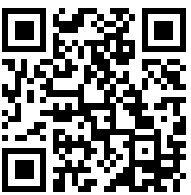

PRINCIPLES

OF THE

LAW OF DAMAGES

BY

HUGH EVANDER WILLIS

AUTHOR OF "PRINCIPLES OF THE LAW OF CONTRACTS."

ST. PAUL
THE KEEFE-DAVIDSON CO.
1910

To

My Brother and Sister

PREFACE.

The general purpose of this new book on the law of Damages is like the purpose of the book on the law of Contracts by the same author, to give a complete treatise on the subject in a small volume. All the fundamental principles of the law of Damages are summarized in rules, or propositions of law. Explanations are given for these propositions of law, with reasons therefor, together with criticisms thereof, whenever in the judgment of the author the rules are the subject of criticism. In order to further elucidate the propositions, copious illustrations are given, showing the application of the same. Under such a plan it is hoped that anyone reading the book will obtain a thorough understanding of the law of Damages.

For the convenience of the reader the propositions of law, explanations and illustrations, are printed in different type. The illustrations used are founded upon the cases selected by Professor Beale and by Professor Mechem for their case books on Damages and upon such other cases as the author has deemed it expedient to incorporate in the volume.

From his experience as a teacher of law, his study of the needs of students, and his consultation with other law teachers, the writer has come to the conviction that the best method of teaching law is by a threefold system of instruction. First, the teacher should propound hypothetical cases, or problems, for whose solution the student should be sent to the law library to pursue independent research and to prepare a brief for later oral argument in the classroom; second, the teacher should place in the hands of the student

for analysis and discussion selected cases bearing upon the most fundamental questions of the subject then being taught; the volumes containing these cases either being loaned to the student by the law school or purchased by the student; third, the teacher should require the student to obtain and study as his own book, in connection with each subject taught, a textbook built along the lines of the present book. Only by the use of this third means can the law student fully round out his legal education, and perfectly systematize, correlate and assimilate the disconnected and heterogeneous principles discovered by reading the selected cases and searching for the law on hypothetical questions.

While the present book on Damages is prepared especially for the use of students, it is believed that such a book will also meet a universal need of the bench, bar and school alike.

H. E. W.

University of Minnesota College of Law.

TABLE OF CONTENTS.

ANALYSIS.

LAW OF DAMAGES.

CHAPTER I.

REMEDIAL LEGAL RIGHTS.

Private remedial legal rights, § § 1-6

I. Preventive, § 1

A. Injunction, § 1
B. Exemplary damages, § § 1, 3, 7

II. Redressive, § 1

A. Restorative, § 1

1. Reformation, § 1
2. Rescission, § 1
3. Specific performance, § 1
4. Ejectment, § 1
5. Replevin, § 1

B. Compensatory, § 1

1. Damages, § § 2-6

a. Legal injury caused by violation of legal right, § § 3-5

(1) What does not amount to legal injury, § 4

(a) Moral wrongs, § 4
(b) Lawful acts, § 4
(c) Act of God and inevitable accident, § 4
(d) De minimis non curat lex, § 4
(e) Volenti non fit injuria, § 4
(f) Loss uncertain, remote, or not proximate result, § 4
(aa) Profits, § 4
(bb) Counsel fees, § 4
(cc) Avoidable consequences, § 4
(g) Act of government, § 4
(h) Benefits conferred by wrongdoer, § 4
(i) No special loss when it is gist of legal right, § 4

(aa) Slander not per se, § 4
(bb) Nuisance, § 4
(cc) Fraud, § 4
(dd) Negligence, § 4

(ee) Lateral support, § 4
(ff) Procuring refusal to contract or breach of contract, § 4
(gg) Slander of title, § 4
(hh) Malicious prosecution not defamatory, § 4

(2) What amounts to legal injury, § 5

(a) Breaches of contract and quasi contract, § 5
(b) Torts with special damage laid and proved when gist of the action, § 5
(c) All other torts whether or not causing special damage, § 5

b. Compensation, § 6

§ 1. A remedial legal right is a right in personam to have, by state authority, the prevention or redress of an injury caused by a violation of an antecedent legal right.

Antecedent legal rights are those rights, such as life, liberty, reputation, family and property and contract, which are recognized by the state and for whose violation the state promises remedial rights. Antecedent rights are called such because they precede any wrongdoing. Remedial rights are called such because their object is the re-establishment of the equilibrium of antecedent rights after it has been disturbed by some one's wrongdoing. Antecedent rights may be in rem, that is, against all the world, as a right to life, liberty, or property, or in personam, that is, against some particular individual, as a right to the performance of a promise; but, except as certain modes of their execution may be in rem, remedial rights are invariably in personam, or against some specified person, who, by his wrongful act, at once also becomes the person of incidence of the remedial right.

In early times most remedies consisted in some form of self-help, but at the present time the state has provided adequate remedies for practically all legal wrongs, and the rights thereto, are, therefore, called legal remedial rights. These rights may be either public or private, both of which, in turn, may be either preventive or redressive, according

as they take effect before or after the commission of a wrong. If the remedial rights are for the purpose of redress, they may be either restorative, to compel the doing of the act whose omission constitutes the wrong or to compel the returning of that which one has gained by his wrong, or they may be compensatory, to substitute something for that of which one has been deprived or to pay him for his injury. Most remedial rights are redressive in nature, compensation being the usual form of redress but the law will sometimes interfere for the prevention of an anticipated violation of an antecedent right.

Remedies for the violations of public rights are preventive, in so far as, by police restraints, education, moral dissuasion, and the example of punishment, the state applies methods which tend to prevent the perpetration of wrongs; compensatory, in so far as the state exacts from the wrongdoer such reparation as is the equivalent of that observance of public rights which is due. But, from the nature of things, compensation is not so much the desire of the state as the vindication of public rights and such a manifestation of public authority as to prevent future violations. Private remedial rights are also classified into those for the purpose of prevention and those for the purpose of redress of violations of private antecedent legal rights. The great preventive remedy for private wrongs is the injunction, a prohibitory writ to restrain the doing of an act, which would infringe a legal right, where the injuries threatened would be irremediable, but the allowance of exemplary damages also indirectly accomplishes the same end. After rights have been violated, the only remedies of the law that are available are necessarily for the purpose of redressing the wrong, either by compelling a restoration of the rights or compensation therefor, both of which remedies are pecuniary in character. In the case of money or other property having a fixed value, such remedies are perfect; but when the remedies of compensation are extended to the violation of the rights of life, liberty, reputation and family, their appropriateness is not so apparent, but thus far the law has not been able to discover any other standard by which to measure the enormity of any legal wrong, and the remedy of money

or its equivalent has to suffice. Restoration is obtained by specific performance of a contract to convey land, or to sell chattels of peculiar but nonmarketable value; by ejectment, to regain the possession of land wrongfully detained; and by replevin, to regain the possession of chattels wrongfully detained; and also, under certain circumstances, by mandamus, to compel the doing of some act; by reformation, to correct, and by cancellation to annul contracts. But these cases of redress are comparatively few and exceptional. Most redress for private wrongs is compensatory, and here we come to the doctrine of damages.

§ 2. Damages are the compensation recoverable at law for the injury caused by the violation of a private, antecedent, legal right.

Preventive remedies are, of course, the most complete remedies, but for most wrongs they are impracticable. Restorative remedies are complete where they can be applied, but it is impossible to restore some legal rights after their violation. Damages are always applicable, but sometimes with much more perfect success than at other times. The two most general elements of the definition are: (1) Legal injury caused by a wrong; (2) compensation recoverable therefor. One element occupies one side of the balance, and the other, the other side. Other terms synonymous with injury are loss and damage. Compensation must be commensurate with the injury. Accordingly, the subject of damages divides itself into two parts: First, whether there is legal injury, that is, when damages are recoverable, a question which lies in the substantive law of antecedent rights and only slightly projects into remedial law; and, second, if damages are recoverable, what the amount of the damages shall be.

§ 3. In order to have a remedial right to damages, there must be a violation by one person of an antecedent legal right of another person.

If there is no violation of an antecedent right there is no remedial right to damages; if there is a violation of an

antecedent legal right, there is a remedial right to damages. Actual damage, without a violation of a legal right, gives no right to damages, but a violation of a legal right, without actual damage, gives a right to damages. There must be a wrong before there can be a remedy for that wrong, but when there is a legal wrong it is the proud boast of the law that it has a remedy therefor, ubi jus, ibi remedium.

§ 4. No legal injury is caused by (a) breaches of moral rights; or (b) by lawful acts; or (c) by act of God or inevitable accident; or (d) by injuries too small for judicial cognizance; or (e) by injuries received by consent; or (f) by injuries that are uncertain, remote, or not the proximate result of a wrongful act—including the loss of profits, consequences which the injured party could prevent or avoid by due and reasonable diligence after notice of the wrong, and counsel fees when such fees are not the subject-matter of a contract or paid by an innocent party called upon to defend a suit founded upon the wrong of another against whom there is a remedy over and who has been notified but fails to defend; or (g) by act of government; or (h) by injuries sustained by a wrongdoer through conferring benefits; or (i) when there is no special damage if special damage is an element of the legal injury, as in slander not per se, nuisance, fraud, negligence, removal of lateral support, procuring refusal or breach of contract, slander of title, malicious prosecution not defamatory.

Since the law recognizes and enforces only certain rights, which by being recognized and enforced have become known as legal rights, no matter what injury or loss one person may sustain by the act of another, if the act does not amount to a violation of a legal right, there is no remedial right to damages. Thus, there is no legal compensation for violations of moral rights. There is no legal compensation provided for injuries occasioned by lawful acts, as the destruction of property because of public necessity, or under the

exercise of the police power, or in the improvement of one's own property, pursuant to the maxim sic utere tuo ut alienum non laedas, or by inevitable accident or act of God, because all legal rights are subject to these limitations. If there is a loss without a legal wrong or injury, it is damnum absque injuria. Sometimes the loss or damage is so insignificant that the law will not remedy it, de minimis non curat lex, and hence there is no legal injury. So, there can be no violation of a private legal right when the owner of the right gives permission for the doing of the act, volenti non fit injuria, a principle which also applies to legal limitation of liability by contract. Again, though one has sustained some damage, if this is so uncertain that it is impossible to say what or how much of it is traceable to any wrong, compensation cannot be recovered therefor, for compensation must always be commensurate with legal injury, and how can there be any right to compensation when it is uncertain whether there is any legal injury, or, if there is, what it is? All that it is ever possible to recover under such circumstances is some nominal sum to vindicate the legal right. Likewise, if the loss is so remote that the human mind cannot trace the operation of any given cause therefor, or if it is not the proximate result of the wrong complained of, no recovery can be had, because it is impossible to show that it is the result of any violation of a legal right. In the same way, nothing is recoverable for losses which the plaintiff, as a prudent man, should prevent, or which he causes after notice not to do so, for they are due, not to any wrong of the defendant, but to his own act or negligence, and the one who causes the loss by his wrong should suffer, or compensate, for it. In a suit for money detained, any damages beyond principal and interest are speculative and uncertain. The expenses of litigation are not the proximate result of a violation of an antecedent legal right unless they are the subject-matter of contract, or caused by having to defend a suit founded upon another's wrong. However, in the common law a system of costs, not including counsel fees, has been established and legal taxed costs are awarded the successful litigant. Profits are ordinarily so uncertain that they cannot be traced to any wrongful act, but this is a general truth rather than a

general principle, and when they are not speculative they are recoverable. If a jury awards a person damages so far beyond or below true compensation for the violation of a legal right as to indicate that its verdict is the result of passion and prejudice, the damages are called excessive, and will be set aside, for they are either not caused by the wrongful act or all the damages caused have not been assessed. Ordinarily no damages are allowed for mental suffering, for there is no legal right not to have such suffering caused by another's act, but, if a person has a cause of action for another's violation of a legal right affecting his person, or which naturally gives rise to grief and distress, as long as there is a right to other damages, if there is, in addition, actual damage sustained by mental suffering because of the same wrong, something is allowed to be assessed for the same, and the amount is left to the sound discretion of the jury. In certain other cases special damage is an element in the legal right, and before one can recover for a wrong he must show special damage, for there is no wrong until then. This is the case in slander not per se, in nuisance, in fraud, in negligence, in violation of lateral support, in procuring refusal to contract or breach of contract, in slander of title, and sometimes in malicious prosecution. A wrongdoer is not entitled to recover for benefits conferred, for there is no violation of his legal rights by another. Lastly, though a person has a right to damages for some violation of a legal right, positive law has established certain rules of procedure which must be followed before damages can be obtained. These are the rules of practice, pleading and evidence, among which are the rules limiting recovery to a single suit for damage incident to a single cause of action, and to the interest of the party suing.

ILLUSTRATIONS.

(1) P and D are co-owners of a vessel which is on the Atlantic on a voyage to Europe, and at P's request D promises to get the vessel insured, but neglects to do so. The vessel is wrecked, and P sues D for damages for the injury he sustains from losing the insurance. Should

nonsuit be granted? Yes. D has violated a moral duty, but no legal duty.[1]

(2) An owner of land makes an excavation thereon, but not near the highway, and takes no precaution against the danger of someone's falling into it. A trespasser, walking across the land, does fall into the hole and is injured. Is the owner liable in damages? No. His act is a lawful act. No legal right of the trespasser has been violated.[2]

(3) A railway is carrying a quantity of tobacco for R, but the road is obstructed by a landslide and before it can be cleared an extraordinary flood comes over the track and injures the tobacco. Is the railway liable to pay for the injury? No. Loss is due to an act of God and this excuses the railway.[3]

(4) In attaching certain hay and grain an officer uses a pitchfork belonging to the debtor, but leaves it where he finds it in no way injured and the debtor receives it. Is the officer liable in trespass? No. De minimis lex non curat.[4]

(5) A boy of seventeen and a half years, out of curiosity, goes upon the premises of a railway company to witness the burning of a train of tank cars filled with petroleum and receives injuries from the explosion of one of the cars. Can he recover damages therefor? No. He assumes the risk of the explosion; volenti non fit injuria.[5]

(6) By reason of D's wrongful act P is not able to plant a crop on certain land. Is P entitled to recover for the loss of profits? No. As the land has not been planted and some crop grown, the loss is too uncertain. Any one of a number of things, like hail, or drought, or disease, or quality of seed, or mismanagement, might have destroyed or affected the crop.[6]

(7) A wife sues D for a slander uttered by him to her husband, charging her with unchastity (not actionable per se), and though she alleges special damage in that she loses the consortium of her husband, the court holds that this loss is not to be considered because not the natural and probable effect of the words, and there is no other special damage. Is she entitled to recover damages?. No. In slander, not ac-

[1] Thorne v. Deas, 4 Johns. (N. Y.) 84.

[2] Hardcastle v. South Yorkshire R. Co., 4 Hurl. & N. 67; Howland v. Vincent, 51 Mass. (10 Metc.) 371.

[3] Memphis & C. R. Co. v. Reeves, 77 U. S. (10 Wall.) 176, 19 Law. Ed. 909.

[4] Paul v. Slason, 22 Vt. 231.

[5] Cleveland, etc., R. Co. v. Ballentine, 28 C. C. A. 572, 84 Fed. 935.

[6] City of Chicago v. Huenerbein, 85 Ill. 594.

tionable per se, as in nuisance, negligence, deceit, etc., there must be special damage or there is no tort, or cause of action. For this reason on the above facts mental suffering cannot be considered as an element in the injury, for there is no legal injury.[7]

(8) D destroys and carries away ten rods of P's fence, in consequence of which certain cattle escape through the breach and destroy P's grass the subsequent year. Is P entitled to recover damages for this injury? No. The measure of damages is the cost of replacing the fence. The crop is a remote loss, which P might easily have avoided by his own act.[8]

(9) P brings an action to recover damages for injury suffered through the careless and negligent manner in which D has constructed the gutters and drains in the streets on which P's property abuts, when by ordinary diligence on his own part in filling the lots and at a moderate expense the damage might have been prevented. Should he recover? No. His contributory negligence causes the injury.[9]

(10) D wrongfully fails to stop a train for P, and the latter, instead of waiting for the next train, or procuring a horse and carriage and driving, walks to the next station, in consequence of which he contracts a sickness and suffers loss of time. Can he recover damages for these injuries? No. They are not the natural and proximate result of the wrong of D. P has no right to inflict injury upon himself to enhance his damages.[10]

(11) A servant is unlawfully discharged before the expiration of his period of service and obtains work elsewhere, but later abandons it. Can he recover the full amount promised him by the first contract? No. The amount he could have earned prior to the expiration of this engagement must be deducted from the amount.[11]

(12) P sues D for damages for losses sustained in logs lost, depreciation in value of logs and expense in looking after them, by D's obstruction of the channel of a river. Does the declared purpose of D to swing a boom across the river impose an additional duty upon P? No. It is sufficient if P exercises ordinary care in the preservation of his logs after the wrong is done.[12]

(13) G contracts with B to keep the Dearborn theatre in Chicago insured for B during the life of a certain mortgage, to the amount of the building's fair insurable value, B to pay the premiums. G neglects to do

[7] Lynch v. Knight, 9 H. L. Cas. 577; Bigelow on Torts.

[8] Loker v. Damon, 34 Mass. (17 Pick.) 284.

[9] Simpson v. Keokuk, 34 Iowa, 568.

[10] Indianapolis, etc., R. Co. v. Birney, 71 Ill. 391.

[11] Sutherland v. Wyer, 67 Me. 64.

[12] Plummer v. Penobscot Lumbering Ass'n, 67 Me. 363.

this, but B is aware of his neglect and procures no insurance. Can B recover from G for loss sustained by the destruction of the building by fire? No. One should use all reasonable efforts to protect his interests and preserve his property even against the wrong or negligence of another.[13]

(14) S, a married woman, sues the town of D for damages for personal injuries caused by a defective highway. Eight weeks after the accident she becomes pregnant and this enhances her injury, but she has no reason to anticipate such a consequence. D requests that she be allowed nothing for any increase of damage through the pregnancy. Should this request be refused? Yes. It is a question of whether she has exercised ordinary diligence, and this the request ignores.[14]

(15) D delivers to P certain paintings to be cleaned and repaired at certain prices. After P has commenced and done a part of the work D asks him not to go on, but in spite of this P finishes the cleaning and repairing. Can P recover for any work done after such countermand? No. He cannot by obstinately persisting in the work impose such a penalty on D. All he can recover is for labor done and materials used up to the time of the countermand and damages for the breach of contract.[15]

(16) P sells D 100,000 bushels of No. 2 barley to be delivered on the twelfth of January following. The next day after the sale D gives notice that he does not consider himself bound by it, but P tenders the warehouse receipts for the barley on the date of delivery, and when they are refused sells the barley upon the market. Can P recover the difference between the contract price and the market price on the date it is to be delivered? Yes. This is not a question of enhancing damages, but of breach, and D cannot create a breach of contract, unless P wishes to treat it as such, until the time for performance arrives.[16]

(17) L engages passage over a railway from London to Scarborough, but through the neglect of the railway arrives at York too late to catch the train that leaves at 6:05, and instead of waiting an hour and a half for the next train engages a special train to carry him from York to Scarborough. He is traveling for amusement. Can he recover the cost of this special train, on the principle that if a party does not perform his contract the other may do it for him at his expense? No. The expenditure must be such as, according to the ordinary habits of society, a person who is delayed on his journey would naturally incur at his own cost, if he had no company to look to.[17]

[13] Brant v. Gallup, 111 Ill., 487.

[14] Salladay v. Dodgeville, 85 Wis. 318, 55 N. W. 696.

[15] Clark v. Marsiglia, 1 Denio (N. Y.) 317.

[16] Kadish v. Young, 108 Ill. 170.

[17] Le Blanche v. London & N. W. R. Co., 1 C. P. Div. 286.

(18) W leases a farm from S, who refuses to give possession. In a suit for breach of contract should S be allowed to prove what W has made in another occupation during the time the lease is to run by way of mitigation of damages? No. The rule contended for by S applies only to the employment of clerks, laborers, or servants for short determinate periods, where the party expects to earn no more than single wages, whereas in other contracts the loss is the loss of the benefits of the contracts, the damages for which may be said to be fixed by the law the moment they are broken.[18]

(19) D leaves his cart, filled with wood, on the edge of the highway before his homestead, one evening, and the next morning it is found upset in the traveled path, a dangerous obstruction in the road, but D suffers it to remain there three days, when P driving along in the night drives upon the cart and wood and is severely and dangerously injured. As D still claims the property in the wood and cart it is his legal duty to so use his own property as not to injure another and he is liable to compensate P for the injuries he thereby sustains, but is P entitled to have the jury consider as an element of his injury the trouble and expenses of prosecuting his action? They should not be allowed in such case as compensatory damages, but they are sometimes incorrectly allowed as exemplary damages.[19]

(20) P sues D in trespass quare clausum for pulling down a mill dam. The court instructs the jury not to allow anything for counsel fees. Is this instruction correct, if the act is wanton and malicious so as to entitle P to exemplary damages? Yes. Damages assessed by way of example may indirectly compensate for money expended in counsel fees, but the amount of these cannot be taken as the measure of punishment, or a necessary element in its infliction. Now that the court allows certain legal costs, if the jury should allow counsel fees in assessing exemplary damages the defendant would be at the mercy of both court and jury.[20]

(21) P sues D in contract to recover damages for the revocation by D of an agreement to submit the controversies between the parties to arbitration. Is he entitled to recover the expenses incurred in preparation for trial before the arbitrators, including counsel fees, so far as the expenses are not available on the present trial? Yes. This is an injury caused by the breach of contract.[21]

(22) D conveys the title to land to P by warranty deed, but after P has been in possession a few years the same is invaded by C, who claims title on the ground that a levy under which D acquired title was

[18] Wolf v. Studebaker, 65 Pa. St. 459.

[19] Linsley v. Bushnell, 15 Conn. 225.

[20] Day v. Woodworth, 54 U. S. (13 How.) 363, 14 Law. Ed. 534.

[21] Pond v. Harris, 113 Mass. 114.

defective. P sues C, and C sues P, in several suits, and in one finally carried up to decide the question C wins, and D pays P the value of the land and the costs and counsel fees in that action. Is he bound to pay the costs and expenses incurred in the other actions by P? Yes. The covenant of warranty amounts to an agreement of indemnity for any expenses which the covenantee, who is evicted, in good faith expends either for the assertion or defense of the title warranted. It is as essential that he should defend all the suits as one.[22]

(23) The town of W pays H the amount of a judgment for injuries sustained by her upon a highway, and then sues M, whose negligence caused the injury. Can W recover the amount of counsel fees paid in the first suit, when M is notified of its pendency and requested to defend, but declines to do so? Yes. When a party is called upon to defend a suit, founded upon a wrong for which he is held responsible in law, without misfeasance on his part but because of the wrongful act of another against whom he has a remedy over, counsel fees are the natural and reasonably necessary consequence of the wrongful act of the other, if he has notified the other to appear and defend the suit.[23]

§ 5. Legal injury results from breaches of the obligations of contracts and quasi contracts, from those torts requiring special damage when special damage is occasioned and from all other torts, regardless of special damage.

Damages are compensation for legal injury. Hence, before there can be any question of compensation, there must be legal injury. Legal injury is the one essential to the right to compensation. If a complainant has sustained no legal injury, he is not entitled to compensation. Legal injury results only from the violation of an antecedent legal right, and what are not such violations has been shown. Hereafter in this book we shall consider what amount to such violations. The only private antecedent legal rights thus far recognized by the law are the rights in rem to personal security (or life), personal liberty, reputation, family and property, and the rights in personam to the performance of legal obligations. Violations of the latter are called breaches of contracts and quasi contracts, and violations of the former are called torts. Generally the nature of a right is such that

[22] Ryerson v. Chapman, 66 Me. 557.

[23] Inhabitants of Westfield v Mayo, 122 Mass. 100.

it is not necessary to have special damage occasioned in order to have a legal injury, but some of the antecedent rights in rem require special damage before there is any violation thereof, and in such cases there is no legal injury without special damage. Damage is said to be the gist of the action. These unusual torts have already been considered in connection with the discussion of what does not amount to legal injury, and mere reference to them in this place will be enough; they are slander not per se, nuisance, fraud, negligence, removal of lateral support, procuring refusal to contract, or breach of contract, slander of title and malicious prosecution not defamatory. Aside from these cases special damage does not have to be shown.

§ 6. Compensation is the pecuniary recompense awarded for the legal injury caused by the violation of a legal right.

On the one hand we have wrongful conduct by one person which has caused another person legal injury. This is the beginning of the law of damages. If there were no legal injuries there would be no law of damages. But these legal injuries are found everywhere. Every day men are failing to live legally correct lives. Every day torts are being committed and solemn obligations undertaken are not performed. Every day rights in rem and in personam are being violated. Every day men whose rights are thus violated lose property, bargain, time, earning capacity, profits, reputation, services and society of spouse or children, are compelled to incur expenses, and suffer physical pain and mental suffering. On the other hand we have the law, standing with the power of compensation in her hands, watching these injuries and ready to obtain for the injured man just compensation for his injuries. But how is the law to determine what the compensation shall be? To deal justly with the men, both the wronged and the wrongdoer, she should be able to estimate both how much the injury is and how much it will take to redress it. She should place the men in the same position as though no wrong had been done, as though the tort had not been committed, or as though the contract had been per-

formed. Through the course of the centuries she has tried one method after another until at last she has adopted, as the best way to measure the damages that shall be given for legal injuries, the measure of value for all pecuniary injuries and the sound discretion of the jury for all nonpecuniary injuries. But for the purpose of determining value and to aid the jury in the exercise of its sound discretion it has been necessary to adopt numerous other subsidiary measures, or rules, of damages. These include, not only those designating the elements of injury sustainable, but the distance to which any injury shall be traced and compensated, to what extent compensation shall be allowed in advance of the occurrence of future consequences expected to continue to flow from a wrong, how different people holding different interests which have been injured shall be compensated, and whether circumstances of aggravation and mitigation shall be considered in the determination of the award. Sometimes it is permitted to parties in advance to determine what shall be the compensation in case any legal injury thereafter occurs, but ordinarily the determination of this question must be left to the courts and juries, whose separate functions must be maintained.

Any and all of the wrongs caused by torts and breaches of contracts and quasi contracts constitute violations of private antecedent legal rights and, therefore, some legal injury is presumed at all events. Not only can no legal right be violated with impunity, but any violation is conclusively presumed to cause some injury, for which the injured person is entitled to redress. What damages shall be recovered is determined by the rules, or measures, of damages, which constitute the real subject-matter of the law of damages. Whether the legal right violated is one of contract, or the right not to have an assault and battery, false imprisonment, malicious prosecution, seduction, trespass, conversion, or other like tort, or the right not to have negligence, deceit, nuisance, or slander not per se, causing damage, the person injured is entitled to recover something. It may be exemplary, or substantial, or only nominal damages, but something he must recover. If there is no substantial injury, but merely a violation of a

legal right, or if the injury is substantial but the evidence is not such that the extent can be ascertained, nominal damages, or a trifling sum in recognition of the right, are always recoverable. If the injury is substantial and proven, substantial damages are recoverable. In both breaches of contracts and torts substantial damages include direct damages for those injuries which result immediately, and consequential damages for those resulting naturally, but not immediately, from the wrongful act. In contracts, consequential damages can include only such injuries as are in the contemplation of the parties at the time of contracting as the probable result of its breach; in torts, only those which arise as the natural and probable result of the wrong. If, in addition to compensation, damages are allowed by way of punishment, or to make the wrongdoer an example to others, they are called exemplary or vindictive. General and special damages are so called as a matter of pleading. General damages are such as are awarded for injuries that necessarily result, because the usual and ordinary consequences; special, such as are awarded for injuries that do not necessarily result, but have occurred in the particular case, and therefore must be specially pleaded to prevent surprise on the other party to the suit on the trial. If the amount of the damages is determined by anticipatory agreement between the parties, they are called liquidated damages. Present damages are awarded for an injury which has already accrued; prospective, for an injury which will accrue in the future from a wrongful act already committed. The rules which decide when these various kinds of damages are recoverable will constitute the topics for our remaining consideration.

CHAPTER II.

EXEMPLARY DAMAGES.

§ 7. The jury may award exemplary damages by way of punishment of the guilty and warning to deter others, in addition to the damages awarded as compensation, in actions of tort and breach of promise of marriage, when there first exists a right to nominal or substantial damages, if the wrongdoer acts with violence, oppression, reckless negligence, malice, or fraud. A principal is liable in exemplary damages for such conduct on the part of his agent only when the principal either authorizes or ratifies the act, or is himself grossly negligent in employing or retaining the agent.

Exemplary damages are "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine." When they are allowed, it is not on any theory of compensation to the injured party, but on the theory that the enormity of the wrongful act is so great that the wrongdoer should be punished, not only criminally for the wrong to the public generally, but civilly for the wrong to the individual especially injured, even after compensatory damages have been awarded. But, in those jurisdictions where exemplary damages are allowed, there are two prerequisites to their allowance. One is that there must first be a right to compensatory damages, for the punishment is inflicted because of the commission of a civil wrong, and

if there is no civil wrong there should be no punishment. Hence, where special damage is of the gist of the action, it must be laid and proved. The other is that the act must be done wantonly, oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. Only malicious injuries are punished by the assessment of more than compensatory damages. For this reason, except in breach of promise of marriage, exemplary damages are not allowed in actions for breach of contract; and, as it is the wrongful personal intention to injure that calls forth the penalty, a principal is not liable in exemplary damages unless he in some way shows such malicious intention, as by authorizing or ratifying the act, or by himself acting with gross negligence. If a servant, then, acts with malicious intent, but the principal can in no way be connected therewith, if exemplary damages are to be recovered at all, the servant alone must be sued for the tort, for if the principal is sued exemplary damages cannot be recovered from him, but, having been sued and judgment recovered, no cause of action for compensatory damages exists against the servant, or agent, and therefore none for exemplary damages. The torts which lend themselves to exemplary damages are assault and battery, false imprisonment, malicious prosecution, defamation, personal injuries, enticement, seduction, criminal conversation, negligence, nuisance, fraud, and sometimes trespasses to chattels or land.

As to whether a corporation shall be punished in exemplary damages for the malicious act of a servant or agent, the decisions are in hopeless confusion. On the one hand the doctrine of principal and agent is invoked, and it is said that the corporation should be liable as principal only when it authorizes, or ratifies, the wrongful act, or is itself grossly negligent, but this rule is complicated by the difficulty of deciding who is the principal and competent to authorize, ratify, and to be held grossly negligent; is it the officers, or the directors, or the stockholders, and if stockholders should an innocent minority be punished? On the other hand it is said that a corporation can never act except through agents or servants, and that the doctrine of respondeat superior should not be invoked, but that in any wrongful

act the corporation should be identified with the servant or agent, acting within the scope of his employment, and if the latter acts in such a way as to render himself liable in exemplary damages the corporation should be held liable. If exemplary damages are to be allowed against a corporation, it seems to the author that the second is the better ground upon which to erect the rule, for a corporation can authorize or ratify the act of one agent only by the act of another, and why should certain agents be arbitrarily selected for this purpose, and why should a corporation be liable in this way for the act of one agent more than that of another agent? The only distinction that can be drawn is between the legal entity, known as the corporation, and its servants. Malice is not predicable of this ideal, intangible entity, but only of its servants, and of one servant as much as of another.

The doctrine of exemplary damages is anomolous, and has no true place in the law. There are two kinds of wrongs; public wrongs and private wrongs, the former violating the rights which inhere in the people as a whole, and the latter, the rights which belong to some individual. The remedy for the violation of a public right is criminal punishment; the remedy for the violation of a private right is redressive, either by way of restoration or compensation. The early idea of private vengeance has been supplanted by the criminal law; there is no longer any place for it in civil law. It is an absurdity to talk about punishing a person for the same act for the public and for the sufferer in the right of the public. We know what torts and crimes are, but what is this maverick of exemplary damages? Further arguments advanced for the position announced above against the allowance of exemplary damages are that their allowance puts a man in jeopardy twice for the same offense, contrary to provisions in state and federal constitutions, for, though the same wrong is inflicted, the fine awarded as punishment in the civil action does not prevent indictment and prosecution in a criminal action, and punishment in a criminal suit is not admissible in mitigation of exemplary damages. The purpose of these provisions is to prevent double prosecutions for the same offense, and when, in addition to the civil

wrong, the same act is split up into two further offenses, a private and a public, that is farther than justice can go; it cannot make two private and one public, or one private and two public wrongs. To do so is to harass the accused with two prosecutions and to subject him to two convictions. No hypothesis, however ingenious, can cloud the mind to the fact that exemplary damages put a man in jeopardy once, and, if he is also punished criminally for the same offense, he is "twice put in jeopardy." Again, in the allowance of exemplary damages, the accused is really punished for a criminal offense without the safeguards of a criminal trial. He is summoned into court to make compensation for a purely private injury, with no issue upon a criminal charge presented; punishment by fine is inflicted without indictment or sworn information; the rules of evidence as to criminal trials are rejected, the doctrine of reasonable doubt is replaced by the rule of preponderance of testimony; the defendant is compelled to testify against himself; and, though in criminal offenses the law fixes a maximum penalty which is imposed by the court, the jury is entirely free to assess exemplary damages, subject only to the power of the court unwillingly to set aside a verdict. The procedure and principles of criminal law are disregarded, the rules of damages are forgotten, and the machinery of justice is used for the avowed purpose of giving the plaintiff that to which he has no shadow of right. He recovers compensation for all direct and consequential injuries resulting from a breach of contract or a tort, for the loss of property, of time, of earning capacity, of profits, of reputation, of services and society, for expenses, for physical pain, for mental suffering, for injuries to result in the future as well as those which have already flowed from the wrong; and then, in addition to all this, after exact justice has been meted out between the contending litigants as far as it is possible to do so, he is allowed to recover exemplary damages, not for any injury he has sustained, but as a punishment to the wrongdoer and an example to others. The doctrine is altogether inconsistent with sound legal principles and should never have found a lodgment in the common law, as it never has in

equity, which is supposed to be in advance of the common-law system.

Upon the general question of the allowance of exemplary damages, the authorities are not in harmony. In some jurisdictions such damages are repudiated and the principle of compensation universally applied in civil actions; sometimes they are confused with substantial damages for mental suffering, but in most jurisdictions they may be recovered in case of aggravated torts. Where exemplary damages are recoverable, all the circumstances tending to show the nature of the motive are admissible in evidence for the purpose of aggravating or mitigating the damages, without being specially pleaded.[24]

ILLUSTRATIONS.

(1) A suit in trespass is brought for false imprisonment under a warrant plainly illegal, whereby P is kept in custody six hours. Twenty pounds would cover the personal injuries, but the jury brings in a verdict for three hundred. Should it be set aside? No. The circumstances sufficiently show malice and the verdict is not excessive.[25]

(2) P, a passenger in D's railway car, sues for damages for an assault made upon him by a brakeman. The brakeman is authorized, in the absence of the conductor, to collect tickets, and through mistake demands P's ticket a second time, and when informed of this mistake by P abuses, insults and threatens P with violence though P is in feeble health. Are exemplary damages recoverable against D, a corporation, though it does not authorize or ratify the tortious act? The majority of the courts answer, yes.[26]

(3) P, while a passenger on D's train, is unlawfully arrested through the direction of its conductor, because P, the train being an excursion train, buys up some of the return tickets from the other passengers, when the tickets are not marked nontransferrable. The conductor by his conduct all the while tries to disgrace and humiliate P. In a suit of trespass on the case against D are exemplary damages recoverable? Not according to the United States and some state courts, which adopt the doctrine of authorization and ratification.[27]

(4) P institutes a civil action to recover damages for malicious prosecution and false imprisonment. It it error to instruct a jury that

[24] 8 Eng. Ruling Cas. 360-382.

[25] Huckle v. Money, 2 Wils. 205.

[26] Goddard v. Grand Trunk R. Co., 57 Me. 202; Craker v. Chicago & N. W. R. Co., 36 Wis. 657.

[27] Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 37 Law. Ed. 97.

if it finds the same were without probable cause it may allow damages by way of punishment in cases like this? Not according to the general holding, but some courts rebel against the general common-law rule permitting recovery.[28]

(5) D, the proprieetor of the Morning Call, is sued by P in libel for charging her with burglary, the article being written by a reporter and inserted in his paper without D's knowledge. It being admitted in the jurisdiction of suit that exemplary damages are recoverable in libel, upon whom is the burden of proof so far as this case is concerned? A plaintiff, whose claim to punitive damages rests upon a wrongful motive of defendant, not inherent in the offense which fixes his legal liability, must present some proof from which such wrongful motive may be legally inferred.[29]

[28] Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119.

[29] Haines v. Schultz, 50 N. J. Law, 481, 14 Atl. 488.

CHAPTER III.

NOMINAL DAMAGES.

§ 8. Nominal damages are recoverable whenever a legal right has been violated, either without any evidence of actual damage or with such evidence but with no basis for ascertaining the amount thereof. Nominal damages are compensatory damages of a trivial amount awarded to establish a legal right.

Whenever a breach of contract or a tort is proven, the plaintiff is entitled to at least nominal damages. In those torts where special damage is essential to a person's cause of action, of course, special damage of some sort must be shown, in order to give any recovery at all, and hence, in such cases nominal damages are recoverable only when the evidence fails to show the extent of the damage, but, otherwise, nominal damages are recoverable for every invasion of a legal right though there is no other damage. It is injuria sine demno. Substantial damages are not recoverable, for there is no actual damage; and, if nominal damages were not allowed, the legal right would soon be a vain thing, for want of right and want of remedy are reciprocal. Were this not the rule, in some cases, by the continued violation of a right of the plaintiff, the defendant could not only diminish the value of it but he could absolutely destroy and extinguish it and create an adverse right. The law will tolerate no further inquiry than whether there has been a violation of a legal right.

ILLUSTRATIONS.

(1) P, having on deposit in D's bank more than the amount of his check, draws a check on the bank for $400, but the clerk to whom it is presented, not knowing of a certain deposit, refuses to pay the check,

but the check is paid the following day. Is P entitled to nominal damages? Yes. This is a breach of an inferred contract, and it makes no difference whether it is proven by direct or circumstantial evidence.[30]

(2) In making a levy of a valid writ of attachment an officer uses a pitchfork belonging to P, the owner of the chattels levied on, but leaves it where he finds it, injures it in no way and P receives it again. Is P entitled to nominal damages? No. There is no violation of any legal right. De minimis non curat lex.[31]

(3) By pouring soap suds, etc., into the same, D pollutes a natural stream flowing through P's land, but P sustains no real damage because the stream is already polluted by other mill owners and dyers. Is P entitled to nominal damages? Yes. This is a direct violation of P's right to have the natural stream flow through his land in its natural state. The maxim de minimis non curat lex does not apply to positive invasions of property.[32]

(4) In an action for deceit in the exchange of real property, belonging to P, for shares of stock belonging to D, the court charges the jury that said jury must find for D unless it appears that the real property is worth more than the shares of stock. Is this error? No. Damage is of the essence of the action of deceit, an essential element to the right of action, and not merely a consequence flowing from it.[33]

(5) H delivers to the Western Union Telegraph Co. a telegraph message in which he orders another party to buy for him twenty thousand bushels of No. 2 wheat for June delivery. Through the negligence of the company this message is never delivered and no wheat is bought. Only on one day, between the day the message is given the company and the date of delivery, is the price of wheat higher than on the former day. Is H entitled to nominal damages? He is if he sues in contract, but not if he sues in tort, for there is a technical breach of contract, but no special damage.[34]

(6) P sues D for damages for injuries caused by an explosion of gas in the house occupied by him from a break in D's main. The evidence shows that P is engaged in business, but not what his business is, nor the value of his time. Is P entitled to nominal damages? Yes. The evidence is not such that the jury can award substantial damages, but the time lost is of some value and nominal damages should be awarded.[35]

[30] Marzetti v. Williams, 1 Barn. & Adol. 415.

[31] Paul v. Slason, 22 Vt. 231.

[32] Wood v. Waud, 3 Exch. 748.

[33] Alden v. Wright, 47 Minn. 225, 49 N. W. 767.

[34] Hibbard v. Western Union Tel. Co., 33 Wis. 558.

[35] Leeds v. Metropolitan Gaslight Co., 90 N. Y. 26.

CHAPTER IV.

DIRECT AND CONSEQUENTIAL DAMAGES.

§ 9. Substantial damages are appropriately recoverable whenever the violation of a legal right causes actual damage. If the act is attended by evil motive or wanton disregard of the right, exemplary damages are recoverable in addition thereto. Substantial damages are compensatory damages awarded one as substitutive redress for the losses caused by another's legal wrong. They include direct damages for injuries resulting naturally and immediately, and consequential damages for injuries resulting naturally but not immediately.

In torts attended by evil motive, or wanton disregard of another's legal rights, something more than actual compensation for the injury is sometimes awarded, in order to punish the wrongdoer, but this subject has been considered in the chapter treating of exemplary damages. Otherwise the ambition of the law is to redress the wrong, so far as money can do so, by placing the plaintiff in the same position as he would have been had the contract been performed, or the tort not been committed.

In order to determine the scope of substantial damages, it will be necessary to discover, so far as possible, both what is excluded and what is included for such redress and what are and what are not elements of injury; and this we now proceed to do, both as regards direct and consequential

injuries. After having treated of these topics, we shall discuss the elements of injury for which compensation can be made and the rules or measures for determining the amount of damages recoverable for such injury.

§ 10. Direct damages are substantial compensatory damages awarded for such immediate, natural and certain injuries, both as necessarily and invariably result (general damages), and as result only in the particular instance (special damages), from the breach of a contract or a tort.

Direct damages are always recoverable for any losses arising immediately from a violation of a legal right either by a tort or by a breach of contract, if properly pleaded. If such losses result as the usual and ordinary consequences of the wrongful act, the damages are recoverable under a general allegation and the injuries do not need to be specially pleaded, but, if not, the same must be specially pleaded, in order to warn the opposite side of what to expect. The questions of proximate cause and whether or not the injuries were within the contemplation of the parties at the time of making the contract do not here arise. Injuries caused by negligence, nuisance, fraud and slander which is not per se, are some instances where direct damages are not recoverable at all unless the injuries are specially pleaded.

ILLUSTRATIONS.

(1) In a case decided in the King's Bench in 1648, an action in case was brought against a common carrier for the value of goods and money delivered to the carrier in a box, but which the carrier failed to deliver because robbed. The plaintiff told the carrier's porter that there was a book and tobacco in the box but did not tell of the money. The plaintiff was allowed to recover the total value of his loss. This was correct. These were direct damages, and it makes no difference whether the action is regarded as one in tort or contract, unless the carrier has made a special contract.[36]

(2) A woman, who is in poor bodily health, or enciente, receives personal injuries in consequence of the negligence of a common carrier of passengers, but the injuries are more serious and lasting because of

[36] Kenrig v. Eggleston, Aleyn, 93.

her bodily condition. Is the carrier responsible for such consequences, though it does not know of her condition? Yes. These are direct damages, but they are special, not general, and the injuries must be specially alleged; for two reasons, they do not necessarily and invariably result, and they are caused by negligence, in order to have which tort special damage must be shown.[37]

(3) Plaintiff while in school is kicked by defendant, who is sitting across the aisle, defendant's toe hitting the shin of plaintiff's leg. Two months before plaintiff had received an injury to the same leg, but just above the knee, by coasting, but this is healing up. After the defendant's kick destruction begins to go on in the bone, and an operation has to be performed, so that the plaintiff will never recover the use of his limb. Does the fact that defendant does not contemplate such a result as likely to follow his act limit plaintiff's recovery? No. These are direct and special damages.[38]

§ 11. Consequential damages are substantial compensatory (and special) damages awarded for such injuries as are certain and, though not necessary and immediate, as result naturally, either because, in contracts broken, they may reasonably be supposed to have been in the contemplation of the parties at the time of making the contract as the probable result of the breach of it, or because, in torts, they are the natural and probable consequence of the wrongful act, whether foreseen by the wrongdoer or not.

Because not the necessary consequence, consequential damage must be specially pleaded, whether the action sounds in contract or tort and whether special damage is an element of the tort or not; but if the damage is specially pleaded consequential damages are recoverable therefor, unless the injury is speculative or remote. The requirement of special pleading is satisfied when from the facts stated in a general allegation the law will infer such other facts. Assuming that the damage has been properly pleaded, we shall first consider the more general rules which decide what are the

[37] Tice v. Munn, 94 N. Y. 621; Mann Boudoir Car Co. v. Dupre (C. C. A.) 54 Fed. 646, but see West Chicago St. R. Co. v. Levy, 182 Ill. 525, 55 N. E. 554.

[38] Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403.

boundaries of legal injury and then the more specific rules which decide what are the various elements of legal injury.

The requirement of certainty is a general rule of law and it applies to damages as to any other branch thereof. Hence, if the injuries, or some of them, are such that either no cause therefor can be found, or the amount thereof can not be determined, no damages are recoverable. They are speculative. They cannot be weighed in the even balances of the law. Of such a character is the deprivation of an opportunity for making money which might prove either beneficial or ruinous. There must be some criteria by which the cause may be traced and by which the amount of injury may be estimated with reasonable certainty, but damages are not speculative simply because they are hard to estimate.

The requirements that in a breach of contract the injuries must be shown to have been within the contemplation of the parties at the time of making the contract as the probable result of the breach of it and in torts that the injuries, though they may not arise immediately from the wrongful act, yet must be the natural and probable consequence of it, are the most general rules of substantial damages for actual loss, and in the case of personal torts are about the only rules that have yet been formulated for the guidance of the jury. Without these rules it would be impossible to accomplish the object of the law in allowing damages in ordinary cases. Instead of being confined to actual compensation, instead of being permitted only to redress a wrong and, so far as money can do it, to place the injured party in the same situation as he would have been had no wrong been committed, the jury would be allowed to speculate and roam at will in the field of damages and to render any verdict which might suit their whim or caprice. Such power would work injustice rather than justice, would be contrary to the principles of the common law, and would shock the conscience of equity. While direct injuries are easily found, it is often a difficult matter to determine what injuries flow naturally but not immediately from the wrong and yet are not speculative, remote, or uncertain. In breaches of contracts the reason why consequential damages exclude all injuries which cannot reasonably be supposed to have

been in the contemplation of the parties at the time of making the contract as the probable result of its breach is that remedial rights are intended to redress the violations of antecedent rights which in the case of contracts are just what the parties have created by their agreement, and if the defendant had known of the exceptional and unusual damage likely to result, he would have made a different contract or at all events have used greater exertion; but in torts the wrongdoer is responsible and ought to pay for the natural and probable consequences of his misconduct, but for nothing more, unless his conduct is such that exemplary damages should be awarded, for it is impossible and dangerous to try to trace any wrong to all of its consequences. What are the natural and probable consequences must be left to the jury, if reasonable minds might draw different conclusions. The dividing line between proximate and remote damage is so indistinct, if often not quite invisible, that there is on either side a vast field of doubtful and disputed ground. Among the cases there are established no undisputed landmarks by which the dividing line itself may be precisely traced. All that can be said as to the law is that, if the injuries are not the proximate consequence of the act complained of, if they are not the consequence that follows the act, but a secondary result from the first consequence, either alone or in combination with other circumstances, damages are not recoverable. In contract cases, then, substantial damages provide compensation for all the injurious consequences resulting from the breach of the contract, the only limitations on the rule being that they must be such as may fairly be supposed to have entered into the contemplation of the parties, when they made the contract, as naturally to follow from its violation, and they must be certain, both in their nature and in respect to the cause from which they proceed. In tort cases, substantial damages include compensation for any injurious consequences resulting from the wrongful act, whether foreseen by the wrongdoer or not, provided the operation of the cause is not interrupted by any intervening cause and but for the operation of the cause the consequence would not have ensued,

and provided the injuries are certain both in their nature and cause.

ILLUSTRATIONS.

(1) Plaintiff sues out a writ for the arrest of one S in order to recover a debt, but while the officer is executing the writ defendant and others rescue S from his custody, by reason of which plaintiff loses his debt. The defendant does not know of the debt. Should plaintiff recover damages for the debt in an action against defendant? Yes. "By this means he lost his debt."[39]

(2) G ascends in a balloon in the vicinity of S's garden, and descends into said garden. During the descent G's body is hanging out of the balloon in a perilous position, and he calls for help to a man at work in S's field, in a voice audible to a pursuing crowd. When the balloon finally descends more than two hundred people break into S's garden, beating down his vegetables and flowers. The damage done by G with his balloon is fifteen dollars, by the crowd, ninety dollars. Is G answerable in tort for all the damage? Yes. His act ordinarily and naturally produces the acts of the others, both because his situation invites help and because he excites curiosity.[40]

(3) In an action of tort for assault and battery, there is an allegation that by reason thereof P lost a position as surgeon's mate in the navy, to which he was about to be appointed, and the trial court permits P, over objection, to testify that before the tort complained of he made application for the position. Is the evidence admissible, or is this ruling erroneous? The evidence is not admissible. As the loss of the office is alleged as special damage, the evidence would be admissible if the loss were the proximate result, but it is remote. There must here be intervening events, if not independent causes.[41]

(4) P sues D for damages for the loss of wood, which he has stored upon a levee upon a river for the purpose of reselling to customers. The levee is reached only by a bridge, which P alleges becomes impassable by reason of the negligence of D, so that P is unable to remove his wood and it is lost by a subsequent flood in the river. Is this loss the proximate result of D's negligence? No. The loss results from the flood, and as a matter of law P has no cause of action, although the special damage necessary to constitute a cause of action for negligence is alleged.[42]

(5) E sues for damages for personal injuries received in consequence of a defect in a street in N. In the night time, while it is rain-

[39] Kent v. Kelway, Lane, 70.

[40] Guille v. Swan, 19 Johns. (N. Y.) 381.

[41] Brown v. Cummings, 89 Mass. (7 Allen) 507.

[42] Dubuque Wood & Coal Ass'n v. Dubuque, 30 Iowa, 176.

ing, he drives into a ditch, and is partly dragged over the dashboard of his carriage. In reporting the accident, procuring another carriage and driving home, a number of hours are taken and his clothes become saturated. The next morning he first becomes sensible of pain in his back. What is the proper instruction for the jury? It should hold N responsible for E's diseases if they are the natural and probable result of N's negligence. It would not be proper to instruct the jury that they must be such as might reasonably be supposed to have been in the contemplation of the parties as the probable outgrowth of the accident, for only omniscience could have foreseen them, and this is a tort action.[43]

(6) The Wabash railway sells C a coupon ticket purporting to be good for passage over the Pennsylvania, when it has no authority to sell the same. C is ejected by the Pennsylvania railway and sues it and gets judgment for $7,000 and costs. Is the Pennsylvania railway entitled to recover these sums from the Wabash? No. For the wrongful sale of the ticket said railway has applied a simple remedy, refusal to recognize the same, and if, by its conduct, it has rendered itself liable to C, it is upon its own responsibility and not because of anything the Wabash has done.[44]

(7) P sues D, a carrier, for breach of contract by delay in delivering two pieces of iron, being the pieces of a broken shaft being sent to an engineer as a model. By reason of the delay P's mill is stopped several days and he loses certain profits, and this is laid as special damage, but at the time of making the contract D is not informed of this but only that the article is a broken shaft of a mill. Should the loss of profits be considered by the jury in estimating damages? No. They are not in the contemplation of both parties at the time of making the contract, and under ordinary circumstances such consequences would not occur.[45]

(8) D agrees to sell P a floating-boom derrick and to deliver it before the first of January, but does not deliver it until the first of the next July, in consequence of which P loses large profits. P intends to use the derrick for unloading coal by a new method, and by reason of the breach of contract loses large profits because not able to do so. The ordinary use of a derrick is as a coal store, and if P had intended to use it for this purpose his damages for breach of contract would have been 420 pounds. How much is P entitled to recover? 420 pounds. The measure of damages is the immediate loss which would result from ordinary use, as the special purpose is not made known to D.[46]

[43] Ehrgott v. New York, 96 N. Y. 264.

[44] Pennsylvania R. Co. v. Wabash, etc., R. Co., 157 U. S. 225, 39 Law. Ed. 682.

[45] Hadley v. Baxendale, 9 Exch. 341.

[46] Cory v. Thames, etc., Co., L. R. 3 Q. B. 181.

(9) P, a wholesale boot and shoe manufacturer, contracts with H to supply him 20,000 pairs of shoes at 4 s., the last day for delivery to be the third of February. The last of the goods, 4,595 pairs, P delivers to D, a common carrier, in time to be delivered before the third, and gives it notice of all the above facts except the fact that H agrees to pay 4 s. a pair when the market price is 2 s. 9 d., but D fails to deliver until the fourth. H refuses to take them and P sells them for 2 s. 9 d. a pair. Is P limited in the recovery of damages to the difference in the market value between the third and fourth, or can he recover the difference between what he got on sale and what H promises to give? The difference in the market value between the third and fourth, if any, as this is an exceptional contract, and this consequence of the carrier's breach of its contract ought to have been brought home to it.[47]

(10) In an action for breach of warranty, upon the sale of a cow, that she is free from foot and mouth disease, the court instructs the jury that it may take into consideration the fact that the buyer is a farmer and that therefore the seller must be taken to know that the cow will be placed with other cows and, if she is diseased, and that disease is communicated to other cows, the seller is liable for the entire loss. Is this correct? Yes. This comes within the rule of consequential damages.[48]

(11) P buys from D steam-coal for the purpose, known to D, of again selling it to owners of steamers to be used as steam-coal on such steamers and thereby impliedly warranting that it is reasonably fit for that purpose, and therefore D impliedly makes the same warranty to P. D supplies coal not reasonably fit to be used as steam-coal. P sells it and his subvendees sue him for breach of warranty. P defends, but they recover judgment. In a suit by P against D for breach of warranty of the same coal, is P entitled to recover his costs in the suits he has defended, as well as the difference between what the coal is worth and what it would have been worth as warranted? Yes. According to a reasonable business view of the reasonably probable course of business, the parties may be supposed to have contemplated, at the time when the contract was made, as the inevitable or highly probable result of a breach of it, that there would be a lawsuit between P and his subvendees which it would be reasonable for P to defend, and in which, if it turned out that there was a breach of warranty, P would lose, and that he would thereby necessarily incur costs.[49]

(12) P and D enter into a contract by which P is to have 100 tons of tiles alongside of D's ship before the sixteenth of December, and D is to have his ship ready to load by that date. P has the tiles alongside in trucks but D is not ready to load them by the sixteenth, in con-

[47] Horne v. Midland R. Co., L. R. 7 C. P. 583. See Illinois Cent. R. Co. v. Cobb, 64 Ill. 128.

[48] Smith v. Green, 1 C. P. Div. 92.

[49] Hammond & Co. v. Bussey, 20 Q. B. Div. 79.

sequence of which delay P has to pay a railway company 42 lbs. demurrage for the trucks. Is P entitled to recover the amount of this demurrage from D as direct damages for his breach of contract? Yes. Even as a matter of law this loss is the natural and ordinary consequence, and the rule as to consequential damages is not brought into play.[50]

(13) D buys iron of P. P refuses to furnish it, and D is obliged to get in place of it an inferior quality of iron and thereby loses a contract of sale with X. What is the measure of D's damages? As the iron bought has no market price, his legitimate loss is the difference between the price he is to pay P and the price he is to receive from X. This contingency is within the contemplation of the parties, as they must know that such articles are of limited production.[51]

(14) In an action for breach of warranty that a horse sold is kind, the damage alleged is the breaking of P's wagon and harness in consequence of the unkindness of the horse. The court rules that damages for such injury cannot be recovered. Is this ruling correct? Yes. The warranty relates to the value of the horse. This special damage is not within the contemplation of the parties.[52]

(15) P delivers to D, an express company, for transportation, a package containing plans for a house, and D loses the same. In addition to the reasonable cost of new plans and the reasonable expenses incurred in procuring them, is P entitled in a contract action to recover damages for the delay in the construction of a house occasioned by the loss of the plans? No. As the plans have no market value, the rule of damages is their value to P, but this does not include damages for the delay in the construction of the house. No consequential damages are recoverable, as it does not appear that D has any notice of the contents of the package or need of the plans, so as to bring these losses within the contemplation of both parties.[53]

(16) In a suit on an insurance policy against loss or damage by fire, issued by D to P, is P entitled to recover damages for injury to machinery in a part of the building remote from the fire, and not burned but destroyed by an extra strain on the belt caused by a short circuit produced by the fire, when at the time of making the contract the parties know that the building will contain electrical machinery? Yes. Not on the ground of consequential damages but because this is the subject-matter of the contract. The parties must be presumed to have contemplated such effects as fire might naturally produce under such circumstances, not as the probable result of the breach of the contract but as

[50] Welch, Perrin & Co. v. Anderson & Co., 61 L. J. Q. B. 167.

[51] McHose v. Fulmer, 73 Pa. 365.

[52] Case v. Stevens, 137 Mass. 551.

[53] Mather v. American Exp. Co., 138 Mass. 55.

[54] Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 33 N. E. 690.

a term of the contract, and the effect is the proximate result of the fire, and therefore certain.[54]

(17) P delivers to D, a common carrier, to be transported from Suspension Bridge to Albany, and thence forwarded to Boston, a quantity of wool. Through the failure of D to exercise the diligence required of it by law the wool is detained six days en route, so that after it is unloaded in D's freight depot in Albany, but before removed therefrom, it is submerged and injured by a violent flood in the Hudson, when if it had arrived in Albany as soon as it should it would have been carried forward to Boston before the flood. Is P entitled to recover damages for his loss? No. Not in a contract action, as the event would not be reasonably anticipated; and in a suit in tort it is sometimes held that the measure of his recovery is the diminution in the market value of the goods during the delay, as the negligence of D is the remote, and the flood the proximate, cause of the loss.[55]

(18) P makes a special contract with a common carrier, D, to transport a carload of apples and deliver them to M before a given date, the agreement being made with reference to the mildness of the weather. D negligently fails to deliver them before that date, and the apples are caught by cold weather and frozen. Is P entitled to recover damages for the damage sustained by the freezing of the apples? Yes. This risk is within the contemplation of the parties, and the negligent failure to perform the contract is not the remote but the proximate cause of the loss.[56]

(19) D, a common carrier, sells P and his wife and children tickets to convey them from W to H but takes them on to E, which increases the distance they have to go to get home two or three miles. It is a wet night, but they cannot get in at an inn nor get a conveyance, and have to walk the entire distance, so that they (1) suffer great personal inconvenience, and (2) the wife catches a bad cold and expense for medical attendance is thereby incurred. Is D liable in contract for both? No, but it is liable for the personal inconvenience, if the jury finds that the same has been occasioned as the immediate effect of the breach of contract. The damages are direct, though special. Where a thing contracted for is not obtainable, the damages allowed are the difference between the thing one ought to have and the best substitute that can be got upon the occasion. The other damage perhaps is remote, because not within the contemplation of the parties, but, in tort, recovery would be allowed.[57]

[54] Denny v. New York Cent. R. Co., 79 Mass. (13 Gray) 481. But see Bibb Broom Corn Co. v. Atchison, etc., R. Co., 94 Minn. 269, 102 N. W. 709.

[56] Fox v. Boston & M. R. Co., 148 Mass. 220, 19 N. E. 222.

[57] Hobbs v. London & S. W. R. Co., L. R. 10 Q. B. 111.

(20) P, in advance, hires of D stabling for horses at fair time, but before the horses arrive D rents the same room to another, who turns P's horses out unblanketed, so that they catch cold before P can get another stable. Would a finding of a jury that this is the result of the breach of the contract be unreasonable? No. It is such a probable consequence that it is reasonable to hold that it must have been in the contemplation of the parties.[58]

(21) P buys a ticket, which entitles him to be carried from S to N by D, but D's conductor refuses to receive the ticket, arrests him and delivers him to police officers who keep him in a place of detention over night, so that he not only suffers these indignities but catches cold from the dampness of his cell. In an action of contract is P entitled to recover for the arrest, indignities, mental suffering and sickness? It is generally held that these are elements of damage in only tort actions, as they cannot fairly be supposed to have entered into the contemplation of the parties.[59]

(22) A husband and wife and seven-year old child, a jury finds, are negligently and carelessly directed by a brakeman to leave a car three miles from their destination and without negligence on their part walk three miles home. The wife is pregnant, and as a result of the walk later has a miscarriage and for a time is in imminent danger of dying. Is this injury too remote for damages to be recoverable therefor in an action of tort? No. The injury legitimately flows from the wrongful act as a natural and probable consequence.[60]

(23) S, a pork dealer in Boston, sends by the Western Union Tel. Co. a telegram accepting an offer of another dealer in Buffalo to sell a quantity of pork. This telegram arrives in time to be delivered Saturday evening, but through the negligence of the company's agent is not delivered until after eleven o'clock Monday morning, just after the pork is sold to another purchaser. For this breach of contract what damages are recoverable? The difference in the price which S agrees to pay and the sum which he would have been compelled to pay at the same place to have purchased the like quantity and quality of merchandise, as this injury is the result of the failure to deliver the message with reasonable despatch as agreed.[61]

(24) In an action for damages for breach of contract in erroneously delivering cipher despatches "in addition, two thousand," when it should have read "in addition to thousand," and "70 cents" for "17 cents," it appears that the telegraph company knows of the business in which the sender of the despatch is engaged and from previous dealings ought to have understood the purport of the messages in question and known

[58] McMahon v. Field, 7 Q. B. Div. 591.

[59] Murdock v. Boston & A. R. Co., 133 Mass. 15.

[60] Brown v. Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911.

[61] Squire v. Western Union Tel. Co., 98 Mass. 232.

that they related to a business transaction. Is the company liable for more than nominal damages, or the price of the telegram as direct damages? Yes. Where a message, as written, read in the light of well known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, consequential damages are recoverable as being within the contemplation of the parties.[62]

(25) P delivers to W for transmission a telegraphic despatch, which is in cipher and wholly unintelligible to W's agents, and in consequence of W's negligence in transmitting it P sustains losses upon wool purchased. Is he entitled to recover damages for these losses in a contract action? No. They are neither such as arise according to the usual course of things, nor such as are in the contemplation of the parties when they make the contract as a probable result of a breach of it.[63]

[62] Postal Tel. Cable Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583. Cf., Western Union Tel. Co. v. Hyer Bros., 22 Fla. 637, 1 So. 129, and Western Union Tel. Co. v. Wilson, 32 Fla. 527, 14 So. 1.

[63] Primrose v. Western Union Tel. Co., 154 U. S. 1, 38 Law. Ed. 883.

CHAPTER V.

ELEMENTS OF SUBSTANTIAL INJURY.

§ 12. Legal injuries are classified as those caused by violations of antecedent legal rights without actual damage, those caused by violations of such rights with actual damage, either pecuniary or nonpecuniary, and those caused by malicious violations of such rights, either with or without actual damage.

Before the question of compensation can arise, it is necessary not only to discover some legal injury caused by the violation of an antecedent right in rem or in personam and resulting in a tort or breach of contract or quasi contract, but it is also necessary to discover the nature and extent of the injury; otherwise it would be impossible to determine how much compensation should be awarded in order to re-

dress the injury. In the preceding chapter we considered the question of how far the injurious consequences flowing from legal wrongs can be followed by the law of damages. In this chapter we shall endeavor to separate the various legal wrongs into the elements of which they may be composed. Were there no rules specifying the elements which may be taken into account in any wrong, and no rules determining the method of computing the loss therefrom, the jury's power would be despotic indeed.

Of course it is impossible in every case to enumerate the elements of injury with the same accuracy. The cause of any civil action must be either some violation of an antecedent right in rem, as life, liberty, property, family, or reputation, or some violation of an antecedent right in personam, as breach of contract, or quasi contract; but further than this one cause of action will bear little resemblance to another. An injury to a legal right only may be an element in damage. This subject has been treated under nominal damages. Ordinarily malice is not an element in any injury, but this is not always so, and when it is an element has been discussed under the topic of exemplary damages. So far as substantial damages are concerned the elements of injury may be classified as pecuniary and nonpecuniary, as the losses can or cannot be measured by a pecuniary, or money, standard. Pecuniary losses include such elements as loss of property, loss of use of property, loss of time, loss of earning capacity, loss of profits, expenses, while nonpecuniary losses include such elements as physical pain and mental suffering.

The elements of damage, therefore, vary with the wrong. In a breach of contract for the payment of money, the loss of the unpaid principal, with stipulated, or, after maturity, the legal, rate of interest, are the elements of damage. For the breach of other contracts than to pay money, the injured party suffers to the extent of gains prevented and losses sustained, the gains being such as would accrue to the parties from mutual performance, and the losses being property rights actually taken, labor and expenditures incurred prudently in part performance or preparation for performance, expenditures made on the faith of performance, sums

necessarily paid third parties or caused by third parties because of the breach, labor and expenses incurred to prevent or lessen damage, and, if the nature of the contract is such that damages cannot be measured by a pecuniary standard, the injury to the feelings. In a tort affecting property, if the case does not give rise to exemplary damages, the elements of damage are loss of property, with loss of use of it where the loss is fixed as of a definite date. In a personal tort every phase and particular of the injury may enter into the consideration of the jury in estimating compensation, loss of time, earning capacity, permanent impairment of faculties, mental and physical pain and suffering, disfigurement and expenses. For failure to perform a quasi contractual obligation to pay for benefits, whether conferred by mistake, compulsion, request, fraud, conversion, or misrepresentation uberrimae fidei, the element of damage is the loss of the benefits conferred.

The elements of injury herein enumerated and now to be given separate discussion cannot be classified as immediate, necessary and natural, for in one legal wrong they may be one kind and in another legal wrong they may be another. Consequently, under certain circumstances direct damages may be allowed therefor, and under other circumstances consequential. Sometimes it will be necessary to specially allege the same, and sometimes damages will be allowed under a general allegation. When these injuries are specially pleaded they are not traversible, except when they are the gist of the action. This subject has already been alluded to in connection with direct and consequential damages, and as this book does not purport to be a treatise on pleading, for a complete discussion of the same the reader is referred to special books on pleading.

§ 13. Loss of property is a pecuniary element of legal injury for which substantial compensation is recoverable. Such loss generally results from a tort.

The right of property is the most important of the pecuniary rights of man, and the loss thereof, if not the sole element of injury, is the chief element of injury in almost all legal injuries of a pecuniary character. It includes the right of possession, enjoyment and disposition of both

land and chattels, and the right may consist of one or all of these elements of ownership, and one man may own one, and another man may own another of the elements, but the loss of any one of them is sufficient to constitute a legal injury. The most frequent torts which affect personal property are fraud, nuisance, negligence, conversion, trespass and infringements of patents, trademarks and copyrights. Torts which affect real property are trespass, waste, nuisance, fraud, and the violation of the right of lateral support. Property rights may also be lost in performance of a contract that is subsequently broken by the other party, as well as by breaches of contracts.

ILLUSTRATIONS.

(1) A sells sheep to B, knowing at the time that they are infected with a contagious distemper, but concealing the fact in order to deceive B, and B is deceived thereby. The disease not only affects the sheep B buys but is communicated to other sheep owned by him. Is he entitled to recover compensation for both of these losses? Yes. They are elements of the injury caused by the fraud.[64]

(2) A common carrier accepts goods for transportation from X to Y. In transit they are injured through its negligence. Has the owner a right to compensation therefor? Yes. He has sustained a legal injury, because the carrier has violated his right of property, and the loss of a property right constitutes sufficient special damage.[65]

(3) D builds and operates a factory in such a way as to diffuse gases, vapors and other noxious matters over P's land, injuring his hedges and fruit and rendering his cattle unhealthy, so as to visibly diminish the value thereof. Does P have a cause of action for damages for the nuisance? Yes, for both the injury to the realty and the personalty, as this loss of property is special damage.[66]

(4) W buys from D a horse, which D has lost and which W agrees to run his chances of finding, for the price of $20. W finds the animal in the possession of J, but before he can get it D sells it to J for $60. Has D caused W any legal injury? Yes. By the sale title passes to W, and this subsequent act of D amounts to a conversion of W's property, for the loss of which he is entitled to compensation.[67]

[64] Marsh v. Webber, 13 Minn. 109.

[65] Bibb Broom Corn v. Atchison, etc., R. Co., 94 Minn. 269, 102 N. W. 709.

[66] St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642.

[67] Webber v. Davis, 44 Me. 147.

(5) P sells D a certain ox, but when D goes to take it away by mistake he takes another ox. Is D liable to P in trespass for the loss of the right to possess, enjoy, and dispose of the second animal? Yes.[68]

(6) P is in possession of a lot of land, and D trespasses and cuts a quantity of wood therefrom. Is P entitled to compensation? Yes. The right to the possession of the land gives P a right to the possession of the wood, and for the injury sustained by the destruction of this right he may recover.[69]

(7) D and P are adjoining landowners. D excavates the earth from his land so near to the boundary line that some of the soil on P's land by its natural weight slides into the excavation. Is P entitled to compensation from D? Yes. He has a right not to have the lateral support removed to his damage, and because the lateral support is removed to his loss he is entitled to compensation.[70]

(8) An agent, who receives money for his principal, unreasonably neglects to inform the latter of the fact. Is the principal entitled to recover compensation for the detention of the money? Yes. He is not deprived of the absolute ownership of the money, but he is deprived of the right to use, or enjoy it, and for this loss he is entitled to compensation.[71]

(9) By reason of the flooding of his land with water by D, P is unable to raise any crops thereon for a certain period. Has he sustained any legal injury for which he can recover damages? Yes. He has not lost the possession of his land, nor the right to dispose of it, but if the injury is permanent the latter right is injured, and in any event he has lost the enjoyment of the land for the period it is flooded.[72]

§ 14. The loss of a bargain is a pecuniary element of legal injury for which substantial compensation is recoverable. Such loss generally results from a breach of contract.

For all torts affecting property the chief element of injury is the loss of the rights of property, either partial or total. For failure to pay money as agreed, the chief element of injury is the loss of the use of the money. In most other contracts the chief injury consists in the loss of some bargain which the party has obtained by the contract, and this loss

[68] Hobart v. Hagget, 12 Me. 67.

[69] Chandler v. Walker, 21 N. H. 282.

[70] Thurston v. Hancock, 12 Mass. 220.

[71] Dodge v. Perkins, 26 Mass. (9 Pick. 368.

[72] City of Chicago v. Huenerbein, 85 Ill. 594.

is the most frequent element of injury caused by breaches of contracts. The bargain may relate to the transfer of property, real or personal, but the loss of the bargain is not the loss of a right of property for there can be no loss of property until it is acquired. Loss of bargain may also result from a tort.

ILLUSTRATIONS.

(1) P agrees to sell and D to buy certain goods at a certain price, delivery to be made on a specified date. On that date the contract price exceeds the market price and D refuses to take the goods. Has P sustained a legal injury? Yes, to the extent of the loss of his bargain, and for this he is entitled to compensation.[73]

(2) A agrees to work for B for a certain period at a stipulated salary which B agrees to pay him, but during the term of employment B wrongfully discharges A, and the latter is able to earn elsewhere during the rest of the period only a small part of the sum promised him by B. What legal injury has he sustained? The loss of his bargain, that is, what the contract he has first secured is worth more than other contracts he is able to secure.[74]

§ 15. Loss of time is a pecuniary element of legal injury for which substantial compensation is recoverable upon proper evidence that it results from a legal wrong.

Loss of time is an element of the injury that may be sustained by violations of the rights of many contracts and of liberty and life, and sometimes of property. The torts which may constitute violations of such rights are assault and battery, false imprisonment, malicious prosecution, negligence and seduction. If a man who receives an injury is engaged in mercantile business, the only compensation he can get for the injury to his business is through that which he receives for the loss of time resulting. Damages for this sort of injury are generally consequential and the injury must then be specially pleaded.

[73] Dustan v. McAndrew, 44 N. Y. 72.

[74] Sutherland v. Wyer, 67 Me. 64.

ILLUSTRATIONS.

(1) B is employed by S to sell sewing machines on commission and for about eight months devotes his time to canvassing for the sale of the same and introducing them to the people, but S breaks his contract by failing to supply the machines. Is B entitled to recover for loss of time, or loss of profits? For loss of time, if specially alleged. The profits, in such a case as this, are perhaps to speculative. The value of the time lost should be estimated generally, without reference to the profits which might have been made under the contract.[75]

§ 16. Loss of earning capacity is a pecuniary element of legal injury for which substantial compensation is recoverable. Such loss results from torts causing personal injuries either directly or consequentially, and may include not only the effects up to the time of the trial but future disability as well.

ILLUSTRATIONS.

(1) P has a cause of action against the village of M for injuries received by being thrown from his wagon in one of the streets. P and a partner are in the business of buying and selling teas, P because of his skill attending to the purchasing. Because of the injury P cannot do the purchasing and the business of the firm in consequence falls off. Is P entitled to recover for loss of profits? No. They depend upon too many contingencies. All that he can recover is the loss of his earning capacity during the time of his sickness, as shown by the extent of the business, the part transacted by him, and the compensation usually paid for doing such business. One way of proving the loss of earning capacity in a tort action is by evidence of profits before and after the injury, but only such items are admissible as bear on earning capacity and are susceptible of estimation with reasonable certainty.[76]

(2) P, an employe of another railway, which has the right to use D's yards, is injured by the dome of a boiler blowing off and hitting him, so that his leg has to be amputated. Is testimony admissible to show the probability of his promotion and increase of wages, when the most that is claimed is that when a vacancy takes place a subordinate, who has been faithful and long in the service, has a chance of receiving prefer-

[75] Howe Mach. Co. v. Bryson, 44 Iowa, 159. See Wakeman v. Wheeler & W. Mfg. Co., 101 N. Y. 205, 4 N. E. 264.

[76] Masterton v. Mount Vernon, 58 N. Y. 391; Comstock v. Connecticut R. & Light Co., 77 Conn. 65, 58 Atl. 465; Murdock v. New York & Boston Dispatch Exp. Co., 167 Mass. 549, 46 N. E. 57.

ment? No. He can recover for only what he has in fact been deprived of.[77]

(3) P sues to recover damages for personal injury sustained by being run into by a car of D, and avers that before the accident, being a manufacturer, he is able to earn large sums of money, but by the injury he is rendered unable to labor and conduct his business. Should P be allowed to introduce evidence to show loss of intellectual power and capacity for business? Yes. It is offered, not to show loss of future profits, but to show the extent of the personal injury.[78]

§ 17. Loss of profits is a pecuniary element of legal injury for which substantial compensation is recoverable when such loss is caused by a legal wrong, if there are criteria by which to estimate the same.

Compensation for the loss of profits is not excluded because profits are not an element of injury in any legal wrongs, but when excluded it is because there are no criteria by which to estimate the same with certainty, and when criteria can be found compensation is recoverable for the loss of profits.

Loss of profits is a frequent element in the injury caused by torts violating the right of property, and it is sometimes an element of the injury sustained by a breach of contract. In the latter case, in order to make damages recoverable, it is necessary either that the profits be a part of the subject-matter of the contract or that the defendant have notice that the loss of such profits is a probable consequence of his breach of contract, so as to bring the loss within the contemplation of the parties. Loss of profits from the destruction of an unmatured crop, or the profits that might have been realized had seed germinated, are too uncertain, but where an inferior crop is raised the difference between its value and what it would have been as warranted is sufficiently certain and damages therefor are recoverable. When an established business is interrupted, the usual and ordinary profits are reasonably certain and recoverable. When damages for loss of profits are recoverable at all, it is as conse-

[77] Richmond & Danville R. Co. v. Elliott, 149 U. S. 266, 37 Law. Ed. 728.

[78] Ballou v. Farnum, 93 Mass. (11 Allen) 73.

quential and special damages, except when the subject-matter of a contract sued on.

ILLUSTRATIONS.

(1) Because G does not pay at maturity certain bills drawn on his account by R, R has to have them taken up supra protest by B, who holds as security goods consigned to him by R, so that as a consequence B withholds the usual advances on the goods and R loses the benefits which he might have derived from the use of the money. Is R entitled to recover for this loss? No. At the best the loss is but suppositive; it is not a loss, but a deprivation of an opportunity to speculate.[79]

(2) In an action for the purchase price of a steam engine, D seeks to recoup damages for failure to deliver it on the time agreed, and insists that as an element of his damage he is entitled to recover for what he might have earned by the use of the machine during the time of the delay. Is his claim valid? No. Such a computation would be of the most uncertain character. All that he can recover is the fair value of the use of the engine, in view of all the hazards and chances of the business.[80]

(3) In a suit of trespass for breaking into his store, tearing off his roof, etc., it appears that P has used the store for a jewelry store, and that after the ouster he cannot find a place as valuable for his purposes and his business is greatly injured. Is he entitled to recover for this loss? Yes. This is as much a part of his injury as the loss of the term. The value, or profit, of the business before and after the injury is evidence of the amount of the loss. This is sufficiently certain.[81]

(4) A master of a ship sues the owners for damages for breach of a contract by which they have employed him for a whaling voyage for stipulated wages, and an increasing share in the profits as the cargo may increase. He is wrongfully removed while in the performance of the contract. For what things is he entitled to recover damages? Wages earned, as well as those which he is prevented from earning, and his share of the future profits, or earnings of the vessel. Not only are these profits within the direct contemplation of the parties and capable of proof,—all of these elements of injury are parts of the subject-matter of the foregoing contract and are lost by the loss of the contract.[82]

(5) K leases a portion of a planing mill and a quantity of steam power for a period of nearly five years at a specified rent, but after

[79] Greene v. Goddard, 50 Mass. (9 Metc.) 212.

[80] Griffin v. Colver, 16 N. Y. 489.

[81] Allison v. Chandler, 11 Mich. 542.

[82] Dennis v. Maxfield, 92 Mass. (10 Allen) 138.

about three years the landlord severs the connecting shaft supplying K with power and thus stops his machinery. Is K entitled in case to recover for the loss of the profits he would have made had this act not been done? Yes. The basis for such an estimate is the profits for a reasonable time next preceding the injury.[83]

(6) W is a keeper of general merchandise and agricultural seeds for sale, and M asks him for early strap-leaf red-top turnip seed, buys two pounds of seed as such, and sows it in ground for the purpose of producing turnips for the early New York market, of which fact he informs W at the time of purchase. Turnips are produced, but they turn out to be Russia turnips and only fit for cattle, but the seed of the two kinds is indistinguishable. Is M entitled to recover for the loss of profits? Yes. The correct criterion for the loss is the difference between the market value of the crop raised and the same crop from the seed ordered. The uncertainty of a crop from the weather and season is removed by the yield of the ground under the precise circumstances to which the seed ordered would have been exposed.[84]

(7) P, by contract, undertakes the business of traveling salesman for D on commission, the amount of his commissions depending upon the number and amount of sales he may make. In a suit for damages for breach of contract is P entitled to recover for the loss of profits? No. There are no established data by reference to which the profits are capable of any estimate.[85]

(8) The City of Chicago, by throwing stone and earth into a small stream, cause the water therein to flow back on H's land, so that seven acres cannot be planted during three years. Should H be allowed to prove that if the land had been planted to potatoes the ground would have yielded two hundred bushels to the acre, and sold at an average of seventy cents a bushel? No. As the land has not been planted no one could calculate with any certainty what such a crop would produce, and the only element of damage is the loss of the use of the land overflowed.[86]

(9) P delivers to the Western Union Telegraph Co. a despatch directing H to buy ten thousand barrels of petroleum if he thinks it best to do so, but through the negligence of the company the delivery to H is delayed from 11:30 A. M. to 6 P. M. If the despatch had been delivered promptly H could have bought the petroleum at one dollar seventeen cents per barrel, but at soon as he can buy after receiving the delayed despatch the price has advanced to one dollar thirty-five cents, at which

[83] Chapman v. Kirby, 49 Ill. 211.

[84] Wolcott, Johnson & Co. v. Mount, 36 N. J. Law, 262.

[85] Brigham & Co. v. Carlisle, 78 Ala. 243; Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, 4 N. E. 264.

[86] City of Chicago v. Huenerbein, 85 Ill. 594.

rate he does not purchase. There is nothing to show that if H had purchased at the lower rate he would have sold at the higher. Is P entitled to recover the difference between these two prices as loss of profits? No. P has suffered no loss. As no purchase is made he has merely lost an opportunity to make either a profit or a loss. He can recover only the cost of transmitting the delayed message.[87]

(10) P is a fisherman in the waters of Green Bay and has a pound net set near the mouth of O river. D runs through this with his steam tug. A trial court allows P two hundred dollars for the loss of profits in his business during the time required to restore the net, the profits being based on previous catches, but there is no evidence as to the weather or success of other fishermen, or market price during the time. Is this judgment correct? No. There is no basis for ascertaining such prospective profits.[88]

§ 18. Loss of reputation is an element of injury to be considered by the jury in estimating substantial damages for certain torts.

This sort of injury is one of the most natural results of slander or libel, and where the tort is actionable per se recovery may be had therefor as direct damages. It may also be an element of the injury in malicious prosecution.[89]

ILLUSTRATIONS.

(1) P sues D in tort for maliciously and without probable cause suing out a writ of attachment and levying it on his chattels, alleging as special damage depreciation in the value, etc., and as general damage that his credit and reputation have been impaired and destroyed. Does evidence of the latter constitute proper elements for the consideration of the jury? Yes. Reputation and credit of a man in business are of great value and protected by the law as much as other valuable rights, so that one who destroys them will be required to make good the loss.[90]

§ 19. Loss of services, society and support are pecuniary elements of legal injury for which substantial compensation is recoverable. Such losses are caused by wrongs affecting the domestic relations.

[87] Western Union Tel. Co. v. Hall, 124 U. S. 444, 31 Law. Ed. 479.

[88] Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045.

[89] Lehrer v. Elmore, 100 Ky. 56, 37 S. W. 292; Payne v. Rouss, 46 App. Div. 315, 61 N. Y. Supp. 705.

[90] Lawrence v. Hagerman, 56 Ill. 68.

Loss of services is an element in the loss, not only in the case of an injury to a married woman, but in case of an injury to a minor child. Loss of society and loss of support are elements of injury in many wrongs to the husband or wife.[91]

ILLUSTRATIONS.

(1) P sues D, her father-in-law, for the alienation of her husband's affections. In order to recover for loss of support, must P introduce evidence of the value of such support? Yes. But recovery may be had for loss of society and mental anguish without evidence of value, other than the social standing and character of the parties, for the amount of the damages lies within the sound discretion of the jury.[92]

§ 20. Reasonable expenses are sometimes a pecuniary element of a legal injury for which substantial compensation is recoverable.

Among the expenses recognized by the law as reasonable are expenses incurred in attempting to prevent loss or injury to property; expenses incurred in complying with the terms of a contract, such as labor and expenditures prudently incurred in part performance, or preparation for performance, expenditures made on the faith of performance, sums necessarily paid third parties, or caused by third parties, because of the breach, and labor and expenses incurred to lessen the damage; and expenses incurred in personal injury cases for medical attendance and for the employment of assistance in ordinary duties or business during incapacity. In all of these cases it is at once evident that, if damages were not allowed for expenses, the injured party would not receive full and just compensation for his injury, but this is consequential damage and must be specially alleged. Bona fide expenses in attempting to prevent losses are incurred not to aggravate but to lessen the amount for which the wrongdoer would otherwise be liable. Should the attempt prove successful he would get the benefit, and when it turns

[91] Frick v. St. Louis etc., R. Co., 75 Mo. 542; Citizens' St. R. Co v. Twiname, 121 Ind. 375, 23 N. E. 159; Furnish v. Missouri Pac. R. Co., 102 Mo. 669, 15 S. W. 315.

[92] Rice v. Rice, 104 Mich. 371, 62 N. W. 833.

out otherwise he should make good the loss so long as it is reasonable. Expenses incurred in connection with a contract are governed by the same principles, and the party in default should compensate the other for all the injury he has occasioned.

ILLUSTRATIONS.

(1) D wrongfully takes P's horse and wagon from the person to whom P has temporarily hired it, and P spends time and labor in pursuit of his property. Is P entitled to recover these expenses? Yes, but as they are special damage they must be claimed in the complaint or declaration. They occur because of D's wrongful act and in the use of reasonable means on the part of P.[93]

(2) D negligently places a stake in a public street, and P's horse runs against it and is injured, so that the horse is entirely worthless, but acting in good faith P spends $35 in attempting a cure. Is he entitled to recover this amount in addition to the value of the animal? Yes. D should pay full compensation for the loss he has occasioned P, and the latter is the loser, not only of the value of the horse but also these expenses.[94]

(3) D agrees to furnish an opera house for P on certain dates, and P agrees to furnish the services of a company at that time, the parties to share equally in the gross receipts. D breaks his contract. Is P entitled to recover his expenses incurred in preparation for performance? Yes. He cannot recover profits lost because they are too speculative, but as these expenses may fairly be deemed to have been within the contemplation of the parties when the contract is made they may be recovered as consequential damage specially pleaded.[95]

§ 21. Physical pain and inconvenience amounting to physical discomfort are nonpecuniary elements of legal injury in personal injuries for which substantial compensation is always recoverable.

It is sometimes objected that inquiries into these subjects are too refined for juries, since, where there are no standards adopted as known and recognized measures as lessons from human experience, damages might as well be

[93] Bennett v. Lockwood, 20 Wend. (N. Y.) 223.

[94] Ellis v. Hilton, 78 Mich. 150, 43 N. W. 1048.

[95] Bernstein v. Meech, 130 N. Y. 354, 29 N. E. 255. See, also, United States v. Behan, 110 U. S. 338, 28 Law. Ed. 168.

determined by the casting of dice. But such is not the law. Juries are required to estimate in the best way that they can what is a just recompense for pain endured, to guess not only its intensity but its value in dollars and cents, but this topic will be discussed in the succeeding chapter. The person who has thus had a legal right violated has sustained just as great an injury as though the wrong had invaded one of his rights of property, and he ought not to be denied legal redress simply because of the difficulty of estimating the extent of his injury, or because of the difficulty of applying pecuniary recompense, for it is the fault of the remedy. Pain is rightly an element of damage. In the same way inconvenience, amounting to physical discomfort and not merely annoyance to refined fancy, constitutes another element of injury. As in the case of a blow in the face, there may be no arithmetical rule for the estimate of the damages therefor, but, nevertheless, there is an injury for which the jury should find some compensation. The law implies that pain necessarily follows bodily harm, and therefore in that case proof of the same may be given under a general allegation.

ILLUSTRATIONS.

(1) A passenger is injured by the negligence of a common carrier in failing to transport him safely. Is pain caused thereby an element of the injury to be compensated? Yes. The difficulty of applying a pecuniary balm to suffering is no reason for refusing to permit it to be done.[96]

(2) F sues C, a railway, in an action on the case, for damages for a wrongful expulsion from one of its trains. It is after dark, F is lame, has two heavy bundles, and has to walk over a covered railway bridge spanning a stream on a narrow plank walk laid on the timbers. Are the annoyance, vexation, delay, risk and indignity, elements of the injury? Yes.[97]

(3) A church sues a railway to recover damages for the discomfort occasioned by the establishment of a building for the housing of locomotive engines contiguous to its building used for public worship and Sunday schools. Is this an injury for which damages are recoverable? Yes. This inconvenience and discomfort necessarily tend to destroy the use of the building for the purposes for which erected, and a church

[96] Pennsylvania R. Co. v. Allen, 53 Pa. 276.

[97] Chicago & A. R. Co. v. Flagg, 43 Ill. 364.

congregation has the same right to the comfortable enjoyment of its house as a private person has.[98]

§ 22. Mental suffering is a nonpecuniary element of legal injury for which substantial compensation is recoverable; in contracts if the breach itself sounds in mental suffering, and in torts if there is an injury to the person or an invasion of another right naturally causing grief and distress, provided that where special damage is an element of a tort special damage must first be found.

Damages cannot be recovered for mental suffering alone, for it is not a legal wrong to cause simple mental suffering. No one has an antecedent legal right not to have another cause him mental suffering, nor is mental suffering the subject-matter of contracts. In order to have a right to damages there must be a violation of an antecedent legal right in rem or in personam. Hence, if there is to be compensation for mental suffering, it can only be as a part of the injury caused by the violation of one of these rights. In every breach of contracts there is such a violation of an antecedent right, and, if mental suffering can fairly be presumed to have been in the contemplation of the parties at the time of making the contract as the probable result of its breach, so far as the rules of damages are concerned recovery should be allowed. Ordinarily only pecuniary losses are contemplated, but this is not always so. Where nonpecuniary losses are contemplated, then, shall recovery be permitted? The only voice which raises any objection is that of public policy. This generally forbids the allowance of such damages, except in the case of breach of promise of marriage, which may be said to sound in mental sufferings; but difficulty in estimating damages should never be lic policy, but permit mental suffering to become an element in other injuries resulting from breaches of contracts, especially in telegram cases.

[98] Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 Law. Ed. 739.

In every tort there is also a cause of action because of a violation of an antecedent right and, if mental suffering is occasioned by the wrong, recovery should be allowed so long as the suffering is the natural and probable consequence thereof, unless some rule like public policy likewise steps in here to forbid, but as there is no such rule of public policy it follows that recovery is permitted. Of course in order to have the torts of deceit, negligence, nuisance and slander not per se, etc., there must be special damage, but aside from these torts a mere violation of a legal right, without special damage, is enough to lay the foundation for damages for mental suffering.

The tort feasor should be held responsible in damages for the full amount of all the natural, as well as immediate, injuries occasioned by his wrongful act. There is no question but what he should pay for bodily pain caused, but bodily pain constitutes a very small part of the suffering endured by rational beings; the wrong, often in part and sometimes entirely, acts upon the mental sensibilities. The mind is no less a part of the individual than the body, and the suffering of the mind is often more acute and lasting than that of the body, and will any one say that for such an injury the wrongdoer should not be made to pay some recompense? To hold otherwise would not only outrage the common law but common honesty. In injuries of a physical nature it is impossible to exclude from consideration their effect on the mental organization of the sufferer. The intimate union of the mental and physical, their mutual dependence, and the direct and mysterious sympathy that exists whenever the sound and healthy condition of either is disturbed, renders useless any attempt to separate them for the purpose of assessing damages. The injury to both the physical and the mental is hard to estimate, though it is easier to estimate the damage to a limb, or other part of the physical, than to the feelings; but difficulty in estimating damages should never be regarded as a ground for withholding damages, but rather the difficulties should be solved by leaving them to the sound discretion of a jury.

When damages for mental suffering are awarded, it is not as exemplary damages to punish the wrongdoer, for in

the proper case exemplary damages may be awarded in addition, but it is as compensatory damages to indemnify the party injured for the injury he has sustained.

In actions for personal injury damages for mental suffering arising from the injury itself are recoverable as general damages, as the mental suffering is the necessary result; but in many other torts, as in trespass to property, if it is the natural, though not necessary, result, upon being specially pleaded damages are recoverable therefor.

"The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages, and in the metaphysical character of such an injury, considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous condition, the suffering of one under precisely the same circumstances would be no test for the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated, and impossible to disprove, it falls within all the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as mere compensation to plaintiff, is not to be expected." But, while it might be a dangerous and unjust thing to elevate mental suffering into a separate tort and give an independent cause of action for mental suffering alone, yet if damages are allowed for it only as an element in some other legal wrong, as in a breach of contract sounding in mental suffering, or in torts naturally causing grief and distress, the matter is so controlled and safeguarded that there is little danger of injustice or hardship, but rather thereby hardship and injustice are prevented.

ILLUSTRATIONS.

(1) While P is hunting upon his own land, D trespasses upon the same, insists upon joining P's hunting party, shoots at the birds P finds,

and uses intemperate language. Is P entitled to any damages for mental suffering? Yes, though this may also be a case for exemplary damages.[99]

(2) P brings an action to recover damages for an injury sustained in consequence of a defect in a bridge, when statute gives a cause of action to any person who "shall receive an injury to his person." If he receives a bodily injury, is he entitled to recover for mental suffering? Yes. However small the bodily injury may have been, if it is a ground of action and causes mental suffering, that suffering is a part of the injury to be compensated.[100]

(3) P sues D in trespass for the removal of the remains of P's deceased child from a cemetery lot he has paid for. If D acts willfully, or with gross carelessness, is the jury entitled to consider the injury to P's feelings? Yes. The natural injury to the feelings of the plaintiff may be taken into consideration in trespasses to real estate as well as in other torts. Because of the carelessness, or willfulness, the damages are enhanced, not because exemplary damages are allowable, but because the actual injury is made greater. The real injury in such a case is to the peculiar property in a corpse, but it is only recently that courts have dared to admit it.[101]

(4) D wrongfully neglects to replace a furnace belonging to premises leased by P. Is evidence of the condition of P's infant child at the time admissible to show mental suffering endured, although it does not appear that any injury is sustained by the child? Yes.[102]

(5) In an action for words spoken which impute to P, a practising physician and surgeon, want of professional knowledge and skill, if the slanders injure P's character and position, can the jury take into consideration his mental suffering on that account? Yes. This is a necessary and immediate injury.[103]

(6) A telegram is sent to P, informing him of the death of his brother and the time and place at which the burial will occur. If the telegram is seasonably delivered it will enable P to attend the burial, but through the negligence of D's agent it is delayed so that P cannot attend. P sues to recover damages for the nondelivery of the message as D should. Is P entitled to recover as compensation damages for the mental suffering sustained by being deprived of the privilege of attending the funeral? No. If the action is considered as one for breach of contract most courts hold that public policy forbids the allowance of such damages, in order to stop intolerable litigation; if it is con-

[99] Merest v. Harvey, 5 Taunt. 442; 6 Cur. Law 629.

[100] Canning v. Williamstown, 55 Mass. (1 Cush.) 451.

[101] Meagher v. Driscoll, 99 Mass. 281.

[102] Vogel v. McAuliffe, 18 R. I. 791, 31 Atl. 1.

[103] Swift v. Dickerman, 31 Conn. 285.

sidered as a tort action, it is an action for negligence, and there is no special damage to sustain it.[104]

(7) P sues D for the unlawful mutilation and dissection of the body of her deceased husband, the only damage alleged being mental suffering and nervous shock. As the surviving wife has a property right in the body of her deceased husband for purposes of burial and this has been violated by D's wrongful act, a legal right has been violated, the law infers some damage and a cause of action exists. This being true, P is entitled to recover for all the injuries which are the natural and proximate consequence of the wrongful act. That mental suffering is the natural and proximate result of the knowledge of the mutilation of the remains of a deceased husband is too plain to admit of argument.[105]

(8) P alleges that the body of her little child was prepared for burial and delivered to D for shipment to a certain place for burial, and that through D's negligence the corpse is not put off at a transfer point, whereby the funeral arrangements are delayed twenty-four hours, and that thereby she sustains great mental suffering, but no claim is made for actual damage. Is such a complaint demurrable? If it is considered as a suit for breach of contract, no, as it charges a breach which would entitle her to nominal damages; but if it is regarded as a suit for damages for negligence, yes, as there is no special damage. In the latter event, of course, nothing can be recovered for mental suffering, and even in the former event most courts refuse to follow the doctrine of consequential damages to this length.[106]

[104] Western Union Tel. Co. v. Rogers, 68 Miss. 748, 9 So. 823. Contra, Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 8 S. W. 574.

[105] Larson v. Chase, 47 Minn. 307, 50 N. W. 238.

[106] Beaulieu v. Great Northern R. Co., 103 Minn. 47, 114 N. W. 353. Contra, Renihan v. Wright, 125 Ind. 536, 25 N. E. 822.

CHAPTER VI.

FUNCTIONS OF COURT AND JURY.

§ 23. The court decides, as a question of law, whether there is a remedial right to damages of any sort, and, if so, what the limits of injuries are, what elements of injury are and what are not proper to be considered, and, in pecuniary injuries, the rules by which the amount or extent of compensation shall be ascertained. The jury, as a question of fact, finds the elements of injury in any particular case, according to the legal rules of exclusion and inclusion, and determines the amount of the damages,—in pecuniary injuries according to the rule agreed upon by the parties or laid down by the court, and in nonpecuniary injuries and in allowing exemplary damages according to its sound discretion.

Though at one time it was held that the question of damages was wholly a question for the jury, little by little the jury has been shorn of its power in this respect, until today the question of damages is almost altogether a judicial question. The court decides when there is a right to damages and when one kind is recoverable and when another, and defines what is meant by each kind of damages, and explains what elements of injury are subject to compensation, leaving to the jury only the mechanical work of finding the particular items of loss or injury, and assessing the damages for the same. The result is that in suits for breaches of

contracts and torts affecting property, except in rare cases where exemplary damages are allowable, the function of the jury amounts to almost nothing; but in suits for damages for personal injuries of all sorts the jury still retains a great deal of its pristine power. Even in the latter suits the court lays down the rules as to when and what damages are recoverable and what elements of injury are to be considered, but the rules are necessarily so general that the amount of the damages is practically left at large, for the legal injuries cannot be estimated in money. Common sense and sound discretion only can decide how much damages should be recovered for physical pain, or mental suffering, or injury to the feelings. Rules cannot be laid down to govern such matters, except only in a very general way, and where there is no rule of law regulating the assessment of damages, and the amount does not depend on calculation, the judgment of the jury and not the opinion of the court still governs, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or misled by some mistaken view of the merits of the case.[107]

It is sometimes said that the question of proximate cause is for the jury; rather, it should be said that the finding of whether any tort injury is the natural and probable result of a wrong, or any contract injury within the contemplation of the parties at the time of making the contract as a probable result of the breach thereof, are questions of fact for the jury. But, unless the questions are close, so that different minds might not agree, even these facts are found by the court.[108]

ILLUSTRATIONS.

(1) In England in the seventeenth century, in a suit in tort for damages for assault, battery and false imprisonment, a young lady was

[107] Hunt v. J. Y. B. Edw. II 375; Delves v. Wyer, 1 Brownl. & G. 204; Hawkins v. Sciet, Palmer, 314; Townsend v. Hughes, 2 Mod. 150; Cook v. Beal, 1 Ld. Raym. 176; Barker v. Dixie, 2 Strange, 1051.

[108] Sedgwick's Elements of Damages, 59-62; Dubuque Wood & Coal Ass'n v. Dubuque, 30 Iowa, 176; Hammond & Co. v. Bussey, 20 Q. B. Div. 79, 84.

given two thousand pounds by a jury, for being bound two or three hours to compel her to take some medicine, without giving any reason for its verdict, but Lord Holt granted a motion for a new trial for the excessiveness of the damages, saying that the jury has no such "absolute despotic power."[109]

(2) In the early eighteenth century a jury threw up cross or pile (head or tail) to decide whether it should give the plaintiff three hundred pounds or five hundred pounds, but the court granted a new trial.[110]

(3) A little later, in an action for trespass for issuing an illegal warrant by which the house of the plaintiff was entered, his papers examined and he himself carried away and confined six days, there was a verdict for the plaintiff for fifteen hundred pounds, which the court refused to set aside, saying that in an action founded upon a personal tort a new trial ought not to be granted "unless the damages are such as do at the first blush appear to be quite outrageous."[111]

(4) A physician, whose income is six thousand to seven thousand pounds a year, by the negligence of the defendant suffers a personal injury which renders him incapable of ever resuming his profession or regaining the enjoyment of life, and the jury gives him a verdict for seven thousand pounds. The court should grant a new trial on the ground that this is so excessively small that the jury must have left out of consideration some of the circumstances.[112]

(5) R recovers $600 as damages for injuries sustained in consequence of a defect in a bridge of D, which exposes P to the imminent peril of his life and to great bodily and mental suffering. These damages are not so excessive as to justify the interposition of the court.[113]

(6) In an action by P for damages for wrongful refusal by D of admission to its cars, the court instructs the jury that P is entitled to such damages as it may find will under all the circumstances compensate him, leaving the whole question of damages to the jury without definition or any criterion to guide the jury. This is error. The court should instruct the jury in respect to what elements and within what limits damages may be estimated.[114]

[109] Ash v. Lady Ash, Comb. 357.

[110] Mellish v. Arnold, Bunb. 51.

[111] Beardmore v. Lord Halifax, 2 Wils. 244.

[112] Phillips v. London & S. W. R. Co., 5 Q. B. Div. 78.

[113] Worster v. Proprietors of Canal Bridge, 33 Mass. (16 Pick.) 541; Robinson v. Waupaca, 77 Wis. 544, 46 N. W. 809.

[114] Baltimore & O. P. R. Co. v. Carr, 71 Md. 135, 17 Atl. 1052. See Browning v. Wabash Western R. Co., 124 Mo. 55, 27 S. W. 644.

§ 24. The court should set aside a verdict when an injury consists wholly of pecuniary elements, if the damages awarded are not supported by the evidence; and when an injury consists wholly or in part of nonpecuniary elements, if the damages awarded are so great or so small as to indicate that the jury is influenced by passion or prejudice or misled by a mistaken view of the merits of the case.

This is the rule as to excessive damages. Strictly, this term is used to apply only in cases of nonpecuniary injuries and punitive damages, for in the case of pecuniary injuries the ground on which verdicts are set aside, if not according to the rules of damages, is insufficiency of evidence, but there is nothing in the nature of the subject-matter of the two kinds of injuries to justify the distinction.

While the court should be careful not to usurp the functions of the jury so long as the jury is retained in civil cases, it is, nevertheless, its duty to protect parties from improper verdicts. Hence the general rule is that a verdict for pecuniary injuries will not be set aside unless clearly and palpably against the evidence, and if reasonable men, without overstepping the bounds of reason, upon the consideration of all the evidence might find such a verdict, it should stand. In the case of nonpecuniary injuries the court should be particularly cautious in setting aside a verdict, for here the amount of damage is peculiarly for the jury, and the court should only set aside a verdict when the damages so grossly exceed or fall short of what the court would give that the same can be accounted for only upon the theory that they are awarded under the influence of passion (excited feeling), or prejudice (partiality or unfairness), and are so exorbitant or insignificant as to shock the sense of the court. It is more unusual for a court to interfere with the finding of a jury for inadequacy than for excessiveness, but it has the power to do so in either case. It is still more unusual for a court to interfere with an award of exemplary damages, yet even this is within the power of the court.

ILLUSTRATIONS.

(1) C sues W for damages for personal injuries, caused by W's negligence, in causing a collision which throws C from a scaffold, so that he is unconscious for a time and in a hospital for five weeks. The jury finds the negligence and no contributory negligence, but awards C only one dollar damages. Should a new trial be granted? Yes. C is entitled to substantial damages but practically receives none; this is so palpably inadequate that the court should interfere.[115]

(2) P sues W for damages for a libel, in publishing to his own agent the words "Slippery Sam, your name is pants," and the jury in a second trial awards $5,200 damages. Are these damages excessive? Yes. The verdict can only be accounted for on the ground of passion or prejudice.[116]

(3) Through the negligence of L, in not flagging a train in the rear, a collision occurs between two trains and M is thrown from her seat to the floor of the car and receives some external injuries, but it is not shown that she will suffer any future ill effects. In awarding compensatory and punitive damages the jury returns a verdict for $10,000. Is this excessive? Yes.[117]

(4) Through the negligence of L a train runs over R's feet and both have to be amputated. After a fair trial the jury awards $30,000 damages. Is this excessive? No.[118]

[115] Carter v. Wells, Fargo & Co., 64 Fed. 1005.

[116] Peterson v. Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646.

[117] Louisville S. R. Co. v. Minogue, 90 Ky. 369, 14 S. W. 357.

[118] Retan v. Lake Shore & M. S. R. Co., 94 Mich. 146, 53 N. W. 1094.

CHAPTER VII.

AMOUNT OF SUBSTANTIAL DAMAGES FOR INJURY.

§ 25. The amount, or quantum, of substantial damages—direct and consequential—recoverable as compensation for the pecuniary and nonpecuniary elements of legal injury, is estimated, or measured, sometimes by the parties in advance, sometimes by fixed rules of law, sometimes by the jury.

The amount of the recovery, or damages, is limited by the fact that the injury is not complete but is continuing, by the interest of the party injured, and by circumstances of aggravation or mitigation.

In determining, or measuring, damages, it is not enough to decide whether the injuries are direct and consequential, not enough to decide what are the elements of injury. In addition to these things it is necessary to have a method of estimating the compensation for the injury, and there are certain other considerations that must not be passed by, for by them the amount of damages may be limited or modified.

§ 26. The parties may in advance agree upon the substantial compensation to be paid in lieu of ordinary damages for the injuries caused by breach of contract, and if that is their intention such sum is generally recoverable in case of breach, whether it exceeds or falls below the damages otherwise recoverable. Such damages are called liquidated damages. Liquidated damages are recoverable both where a contract is of such a nature that the injury resulting from a breach will be uncertain and difficult or incapable of estimation by any definite standard, and where the contract is such that the amount of the damages for breach is easily established, if the stipulated payment does not differ greatly from the general rule. Where the agreement is in the alternative to do one of two acts at the obligor's election, the alternative chosen is enforcible though a a larger sum is stipulated to be paid in one case than the other.

In actions on penal bonds or statutory undertakings, the amount of recovery is the actual loss within the limits of the penalty.

Ordinarily the courts will enforce contracts just as the parties make them, and if parties agree in advance upon the damages to be paid in case of breach of contract the courts will enforce the agreement. But some agreements the courts will not enforce. They will not enforce an agreement to do anything that is illegal or against public policy. In harmony with this general control which the courts have always exercised over contracts, in their control over damages the courts have laid down the rule that penalties are against public policy and will not be enforced. Consequently, in deciding whether any sum agreed upon by the parties in advance is recoverable or not, practically the only question to be decided is one of interpretation, deciding whether the provision is liquidated damages or a penalty, for if it is a penalty the court at once declares it nugatory, but if liquidated damages, enforcible. In determining this question the intention of the parties is the great criterion, and this is discovered by the ordinary rules of interpretation. But calling a sum liquid-

ated damages, or a penalty, does not make it either, for it would be but changing the name, when it is the fact that is against public policy. Liquidated damages must be intended as compensation for losses arising from a breach of contract or they are not liquidated damages.

Accordingly, if reasonable in amount, a deposit to be forfeited for breach of an entire agreement, or a stipulated sum to be paid on a single breach of a contract calling for continuous acts where it is really a total breach, or for delay in performance of a contract, or for breach of lawful contracts in restraint of trade, or for abandonment of a contract of service, will be upheld as liquidated damages, and in any contract where the damage is incapable of ascertainment or uncertain the damages may be liquidated. But, where a stipulated sum is collateral to the object of the contract and inserted in terrorem to secure performance, or a larger sum is to be paid on the nonpayment of a smaller or failure to do something of less value, or if the stipulated sum is plainly disproportionate to the injury, or if a sum is fixed for the breach of a contract containing several stipulations of widely differing degrees of importance and the damages for the violation of some are of easy ascertainment, or if the sum is stipulated in order to evade the provisions of law, in all of these cases the sum so fixed is a penalty and only the actual damages are recoverable, whether more or less than the penalty.

Owing to the fact that in the early common law interest could not be recovered in an action of debt, there grew up the practice of using a penal bond, stipulating for the payment of a certain sum of money at a certain time, but conditioned upon becoming void upon the payment of a lesser sum or performance of a particular act, so that, if the condition was not complied with, the amount of the bond became the debt and could be recovered, thus allowing parties to get any interest they might agree upon; but so much injustice resulted from this method of procedure that through the influence of equity recovery is now limited to the principal sum due with interest, not to exceed the amount of the bond. Statutory undertakings furnish no exception to the rule, but the mere fact that covenants in a contract are secured by a penalty does not limit the amount of the compensation.

Where there is a case for liquidated damages, interest is allowed on the amount of the same from the time of breach.

ILLUSTRATIONS.

(1) D agrees to act as a comedian in P's theatre for four seasons, in consideration of P's promise to pay a sum equal to about three pounds for each night, and allow one benefit night during the season; and it is agreed that if either party shall neglect or refuse to fulfill the agreement, or any part or stipulation therein, such party shall pay the other £1,000 as liquidated damages. D refuses to act during the second season, and in a suit for breach the jury assesses P's damages at £750. Should the verdict be increased to £1,000? No. The clause is not confined to stipulations which are uncertain in amount, but would apply if P should neglect to make a single payment of three pounds. It is a contradiction in terms to say that a very large sum immediately payable for nonpayment of a very small is not a penalty.[119]

(2) P, a partner of D in the mercantile business, sells out to D, but remains as the latter's business manager, under a contract in which he promises to abstain from the use of intoxicating liquors and if he becomes intoxicated to pay $1,000 as liquidated damages. P violates this promise. Is he bound to pay D $1,000? Yes. This is not a penalty but liquidated damages, as the amount of the injury is uncertain. The fact that there might be a breach with no actual damage does not change the rule, for that is an element in the uncertainty.[120]

(3) B covenants never to practice his profession in G so long as S is in practice there, provided that he shall have the right to do so after five years upon paying S $2,000. B returns to practice in G after five years. Is the stipulated amount recoverable? Yes. It is neither a penalty nor liquidated damages, but an alternative agreement.[121]

(4) A father makes a contract with T by which he agrees that his minor daughter, J, shall work for T in his factory at stipulated wages to be paid her, and that she shall give two weeks' notice of her intention to quit, failing to do which ten dollars is agreed upon as stipulated damages. J leaves, without giving the two weeks' notice, at a time when ten dollars in wages is due her. Does T have a right to keep this in payment of the liquidated damages? Yes. As the contract of employment affords no data by which the actual damages likely to result may be ascertained with certainty and the stipulated sum is reasonable, it is not a penalty but liquidated damages.[122]

[119] Kemble v. Farren, 6 Bing. 141; Goodyear Shoe Mach. Co. v. Selz, Schwab & Co., 157 Ill. 186, 41 N. E. 625.

[120] Keeble v. Keeble, 85 Ala. 552, 5 So. 149.

(5) P sues D for the amount of a final balance for work done on a grandstand on a race course. The work is done under a contract stipulating for the completion of the work at a fixed date, in default of which P agrees to pay one hundred dollars a day for each day in default as liquidated damages. Is D entitled to deduct liquidated damages or only actual damages? The provision as to liquidated damages is valid, as the damages are to be paid for the breach of a single stipulation, are reasonable in amount, and the injury is not readily ascertainable, and the expressed intention of the parties is to make the sum liquidated damages.[123]

(6) D guarantees the performance of a contract by S to furnish stone for the erection of a certain library building, the contract providing that for failure to furnish the stone within such time S shall pay five dollars for every day thereafter the work shall remain incomplete. On the day set for performance S repudiates the entire contract. Is P limited to the liquidated damages agreed upon for delay? No. As the damages for other injuries are not liquidated, ordinary damages may be recovered therefor.[124]

(7) P agrees with the City of W to furnish certain arc lights and have them in operation by a given time, and P deposits with C $10,000 to be treated as liquidated damages in case of failure to furnish the lights. P fails to furnish the lights. Is P entitled to get back the $10,000? No. C is entitled to the same as liquidated damages. The damage to the public is unascertainable.[125]

(8) During the Spanish-American war the Sun rents a yacht from M for an agreed term, agreeing to return the same at the end thereof in as good condition as at the start. For the purpose of the charter the value of the yacht is set at $75,000. The yacht is not returned. Is M entitled to the $75,000 as liquidated damages? Yes.[126]

§ 27. The amount of substantial damages recoverable for all pecuniary injuries resulting from torts and breaches of contracts, if not liquidated, is the value of the said injuries.

Value is determined by the true market value for all

[121] Smith v. Bergengren, 153 Mass. 236, 26 N. E. 690; Burgoon v. Johnson, 194 Pa. 61, 45 Atl. 65.

[122] Tennessee Mfg. Co. v. James, 91 Tenn. 154, 18 S. W. 262.

[123] Monmouth Park Ass'n v. Wallis Iron Works, 55 N. J. Law, 132, 26 Atl. 140.

[124] Murphy v. United States F. & G. Co., 100 App. Div. (N. Y.) 93.

[125] Brooks v. Wichita, 52 C. C. A. 209, 114 Fed. 297; Clydebank Eng. & Shipbuilding Co. v. Yzquierdo Y Castaneda [1905] App. Cas. 6.

[126] Sun Print. & Pub. Ass'n v. Moore, 183 U. S. 642, 46 Law. Ed. 366.

lawful available uses, as drawn from all sources of information, at the time and place of the destruction, taking, demand, or of delivery as the case may be. If there is no market value at this place, then that at the nearest available market governs; if there is no market value anywhere, the value is the actual value to the owner, taking into account the cost, the practicability and expense of replacing the right lost, and such other considerations as affect its value to the owner.

Value is one of the most important subdivisions of substantial damages, as value is the amount which the principal criterion, for determining the damages for all pecuniary injuries, has decided is just compensation therefor, but it has no application to purely personal injuries. The goal of the law is to give actual compensation by graduating the amount of the damages exactly to the extent of the loss actually sustained. Value is the measure of this, but to determine the actual value is often a difficult matter. Where the right lost, or injured, has a market value, that affords an adequate test of value for it shows at once what another like article could be bought for or sold for in the market; but where the right is such that it has no market value, the only way to compensate the owner is by allowing him a sum which is equal to the value of the same to him. The market price is not always the true value, for it may for the time being be a fictitious price. Compensation is the rule, and if the price is unnaturally inflated or depressed, one party would get more than he ought to have and the other would pay more than he ought to give. In the same way, to instruct the jury that the measure of damages for something which has no market value is its market value is merely delusive.

The time and place, according to which value is to be determined, are in general the time and place of the wrongful act. In the case of a breach of contract of sale, this is the time and place of delivery. In the case of condemnation proceedings, it is the value at the time of taking. In the case of injury or destruction of either land or chattels, it is the value at the time of the injury, partial or total. But when property is neither destroyed nor taken by public

authority, but it is taken by a private party wrongfully, it is the value at the time and place of demand, at any time before the running of the statute of limitations and the instituting of the action; except that where, by any wrongful act of another, one has been deprived of property of fluctuating value, like stock, he may recover the highest value obtainable between the time of the taking and the time when the owner by due diligence might replace the property in the market. For example, where a person is holding stock for the chance of making a profit and his broker, in violation of orders, sells the stock, if the chance of profit is converted into a certainty by a subsequent rise, the owner ought to have the benefit of the increase in value, but it is a question whether the rule should be extended to include any other cases than stock. Though all of these rules seem to be different, in reality they are the same; value is assessed as of the time of the injury, but the injury occurs at different times.

The only time and place of assessing the value which gives any special difficulty is where the value, not at the time of the taking, but some future time and place, is allowed. Why should a person ever recover an enhanced value which accrues subsequently to the first act of taking? This question may arise in a variety of ways. The wrongful act of taking may be inadvertent, or intentional, or malicious, and in any one of the cases the injured party may elect to sue in trespass, or conversion, or replevin. Shall the rule be the same, no matter how the injury arises, nor in what manner redress is sought? If the wrongful act is malicious, some courts give the injured party a right to exemplary damages, but that injects a new element of injury and is aside from the question of value, which concerns only compensatory damages. But the rule of value is uniform and applies, whether the action is trespass, conversion, or replevin, and whether the wrongful act is inadvertent, or intentional but not malicious. It is sometimes said that exemplary damages are recoverable where the wrongful act is intentional and that the enhanced value allowed is such. For example, the supreme court of Minnesota[127], among others, gives as a reason why an intentional wrongdoer has

to pay greater compensation than an innocent is that "he is entitled to no consideration, and it is just, as a punishment to him and a warning to others, that the full penalty be visited upon him, although the plaintiff gains thereby." A moment's reflection is enough to show that this reason is not the correct one. Exemplary damages are never allowed unless conduct is malicious; it must be more than intentional. Exemplary damages are never allowed by the court but by the jury; the court only decides when they are not recoverable. Exemplary damages are never awarded as a matter of right but as a matter of discretion. Whenever value measures the damages recoverable, it is on the theory of compensation. No difference in the amount of damages can be predicated on the nature of the action, or the fact of intent on the part of the wrongdoer. For any legal injury he has sustained the party injured is entitled to just compensation and no more. He is entitled to be placed in the same situation, so far as possible by a pecuniary recompense, as though no wrong had been committed. He has a right to be made whole again. To give him any less than this still leaves him an injured party. There is some injury not yet redressed. To give him any more than this, instead of exactly redressing his injury, causes a new injury to the first wrongdoer, who is now the injured party. Hence, no matter what the form of the action, the object is the same, and a different rule of damages should not and does not prevail in suits in trespass, conversion and replevin, except when circumstances of aggravation are relied upon. Unless exemplary damages are sought a person is restricted to compensation for his pecuniary loss. There is no reason or principle why, when the injury is the same, the amount of damages should be different in one form of tort action than in another. The loss is the same; the redress should be the same. To hold otherwise is to permit the form of the action rather than the actual injury to fix the damages. There is as little foundation for a distinction between cases where the injury is intentional and

[127] State v. Shevlin-Carpenter Co., 62 Minn. 99, 64 N. W. 81.

where it is inadvertent. A man is damaged just as much whether the injury is caused by mistake or intentionally, and the same rule of damages should govern both cases. A, innocently, and B, intentionally but not maliciously, trespass upon C's land and cut some of his timber, each cutting exactly the same quantity and grade. So far as C's injury is concerned, what difference does it make that one trespasser acts innocently and the other intentionally? A and B each transports the timber which he has cut from C's land to distant markets, and works it up into lumber, the lumber in A's hands being worth just what the lumber in B's hands is worth. Has B now caused C any greater loss than has A? Manifestly not. Therefore whatever suit C now institutes, the amount of his damages should be the same.

But the main question yet remains, even though the amount of damages should be the same in all of these cases, why should it be the enhanced value of the chattels rather than the value at the time of the taking? At the time of the taking the owner is no more the owner than he is at any time in the future until the title has passed from him, and this cannot be until he enters into a contract to that effect, or he receives a satisfaction of a judgment obtained in a suit for the injury, except where an innocent party changes the identity of chattels, or so increases them in value that the latter is out of all proportion to the original value, or confuses them with other goods of unequal grade. The original owner's title and right to the possession of the property continue. He does not have to consider it converted unless he so desires. Being the owner, he is entitled to the return of the property, and if he cannot get it on demand he is entitled to the value of it at that time and place. The loss of the property at that time is his injury, and if he does not receive the value at that time he does not receive full compensation. It is objected, this may be all right against the wrongdoer, but it is impossible to conceal the fact that the injured party is not only getting pay for the loss of his property but he is also getting the value of the labor and materials which the wrongdoer has added to the property, and in the case of the man who has innocently given this enhanced value it would be the rankest injustice

to make him lose the value of the benefits he has bestowed upon the other party, when the latter takes the property back or is paid its value. The answer to this objection is, when benefits are conferred in this way by an innocent party, give him an independent cause of action to recover the reasonable value of the benefits in a suit in quasi contract. This will satisfactorily adjust all the rights of all the parties, and will not do violence to the rules of damages. After the innocent wrongdoer has enhanced the value of the property taken, he has an equitable interest therein to that extent, and he should be allowed to set this up as a counterclaim whenever he is sued by the true owner. This does not mean that he is entitled to the difference between the value of the property at the time of the taking and the time of suit, or, in other words, that the owner can only recover the value at the time of taking, but that the innocent wrongdoer is only entitled to the value of the benefits which he has bestowed, and which are accepted by the other party, not to exceed that amount. The increased value is the joint result of the original material and the work and materials expended by the laborer, with sometimes an independent cause, like a better market, contributing to enhance the value. The wrongdoer, though innocent, is not entitled to all of this; the ordinary measure of damages in quasi contracts is the true criterion. Whether, when a person innocently trespasses on land and removes some of it, as minerals or trees, he shall be entitled to compensation for all his labor bestowed since the materials were in place, or only after severance and they become chattels, is a troublesome question upon which the cases are in conflict, but it is believed that perhaps the better rule is the one which will allow him to recover only for the benefits bestowed after severance, for the trespasser has added no value to the land, and let him recover only for the added value given to the chattels.

The rule of damages adopted and applied by many of our state courts and by our United States supreme court is unjust and an outrage on the rights of property. By the rule of these tribunals, instead of the owner receiving the profits that are made from the objects of his ownership, the profits are given to the trespasser. This is nothing less than judi-

cial robbery. It is allowing one man to take another's property without paying any compensation. The true rule should compensate the innocent party for the labor and expense he has bestowed upon the chattels to the extent their value is enhanced thereby, but it should give all the other advantages of ownership to the true owner. Thus, if A inadvertently trespasses on B's land and cuts timber, when its value standing is three dollars a thousand and after severance four dollars a thousand, and he then transports it to his sawmill and saws it up into boards at a total expense of five dollars a thousand, but at that time and place the value of the lumber is twenty dollars a thousand, B should be allowed to sue A either for the goods or for damages and recover either the lumber or its present value of twenty dollars, less in either case five dollars a thousand. B should recover fifteen dollars, whereas, according to the cases criticised, he would recover at the most only four dollars a thousand, and A, not B, would put the eleven dollars of profit into his pocket.

The doctrine hereinbefore announced is not a new doctrine, but the old doctrine placed, it is believed, upon a sounder foundation, and if the courts would apply the rule according to this theory there would be less anxiety on their part to reward wrongdoers under the guise of protecting innocence, less effort to discover inadvertence, less endeavor to make richer the rich trespassers who have grown rich by stealing timber from private and state lands, through the instrumentality of men whose business it is to be innocent trespassers.

Last of all, in the determination of value, the owner is entitled to have compensation for its value for all lawful purposes, not alone the present but the future, not alone for the particular purpose to which it may be now put, but for all legitimate purposes for which it is adapted. Only in this way can the full extent of his injury be compensated.

ILLUSTRATIONS.

(1) O sues a common carrier for the nondelivery of goods according to its common-law duty. At the place of delivery there is no market. What is the measure of damages? The value of the goods at the time and place they ought to have been delivered, but as there is no market price at such place, the jury will have to determine the value by taking

into consideration the cost price, expenses of transit, and a reasonable profit which persons in the ordinary course of business would be likely to make.[128]

(2) G, having the entire market at Grand Tower, breaks its contract to sell P & S of that place 15,000 tons of coal a month at three dollars a ton. What damages are P & S entitled to recover? The difference between the agreed price, with expense of transportation, and the price which they would have to pay for the same quantity and quality of coal at the nearest available market.[129]

(3) A boom company, authorized by statute to construct booms and to condemn land for that purpose, appropriates the land of P. The land in question is composed of islands in the Mississippi River, forming a line of shore nearly a mile long, parallel with the west bank of the river and distant from it about one-eighth of a mile, being thus especially fitted to form a boom of extensive dimensions. The land alone is worth $300, but it has an additional value of over $5,000 for boom purposes. What is the market value? What it is worth in the market with reference to the uses to which it is plainly adapted, having regard to the existing wants of the community, or such as may be reasonably expected in the immediate future. This includes here the adaptability of the islands for boom purposes.[130]

(4) K sells to L oil to be delivered at the seller's option any time until Dec. 31st at thirteen and a half cents a gallon. L assigns the contract to F, and then enters into a combination to buy up oil and raises the price in the market at the time K is to deliver to eighteen cents a gallon. K fails to deliver the oil. What is the measure of damages for breach of this contract? The difference between the contract price and the market value at the time and place of delivery, but this means the true market value, not a fictitious and unreal value, which may be determined by the prices before and after the agreed date and other sources of information.[131]

(5) P purchases champagne lying at D's warf for 14s. per dozen, and resells it for 24s. to the captain of a ship about to leave England. D refuses to deliver. Similar wine is not procurpable elsewhere, but D has no knowledge of the sale. P sues D in conversion. What is the measure of damages? The difference between the purchase price and the selling price, or value, as there is no other way of determining the actual value. These are direct, rather than consequential, damages, though they at first look like the latter, and, therefore, though the suit

[128] O'Hanlan v. Great Western R. Co., 6 Best & S. 484.

[129] Grand Tower Co. v. Phillips, 90 U. S. (23 Wall.) 471, 23 Law. Ed. 71.

[130] Boom Co. v. Patterson, 98 U. S. 403, 25 Law. Ed. 206.

[131] Kountz v. Kirkpatrick, 72 Pa. 376.

were in contract, it would not be necessary to prove that the second contract was in the contemplation of the parties; it is not special damage, but special value.[132]

(6) A subbailee converts to his own use, by refusing to give up, stereotype plates belong to P. The plates are made for printing labels and advertisements for P in his special business, and are of trifling value to any one else. What is the proper rule of damages? The fair value of the plates to P, in estimating which the jury may take into consideration the cost of replacing the plates. These are general and direct damages and not special damages.[133]

(7) H sues for damages for loss sustained by the killing of a race horse through the negligence of defendant. The animal is killed on the Isthmus of Panama while being transported to San Francisco, California, but there is no market price for such a horse on the Isthmus. How is the value to be determined? Where there is no market value at the time and place of the injury, proof of value at some other place is admissible to show the value at the time and place of loss, and for this purpose the most natural resort is to the place of destination.[134]

(8) D, a common carrier, which has undertaken to transport the same, through its negligence, loses P's portmanteau and contents, including clothing made to fit P and partly worn, so that it would sell for but little if put on the market as secondhand clothing. What is P entitled to recover? The value of the clothing for the use of P at the point of destination.[135]

(9) P delivers to D, a common carrier, for transportation, an oil painting, the portrait of his father. D loses the portrait. In an action for breach of contract for not delivering the goods, what is P entitled to recover? The actual value to him.[136]

(10) A master of a ship, without right, sells the vessel to D, as it has drifted upon a beach in a damaged condition, and D repairs it. There is no market for the vessel at the place of conversion. What is the measure of damages? The ship's value at that time and place, to be determined by the value at the nearest principal markets, less the probable cost of getting it off, repairing it and a fair salvage, with an allowance for the risk of getting it to market, that is, what buyers at the nearest ports would pay for it on the beach.[137]

(11) P exhibits for money a picture painted by him. The picture

[132] Franc v. Gaudet, L. R. 6 Q. B. 199.

[133] Stickney v. Allen, 76 Mass. (10 Gray) 352.

[134] Harris v. Panama R. Co., 58 N. Y. 660.

[135] Fairfax v. New York Cent. etc., R. Co., 73 N. Y. 167.

[136] Green v. Boston & L. R. Co., 128 Mass. 221.

[137] Glaspy v. Cabot, 135 Mass. 435.

is a scandalous libel on D's sister and a gentleman of fashion. D cuts it to pieces. In trespass what is P entitled to recover as damages? The value of the canvas and paint, as the law cannot consider it to have any value as a picture.[138]

(12) D, as a factor, receives tobacco from P, and agrees not to sell it for less than forty cents a pound, and if he cannot sell it at that price to hold it subject to P's orders. D sells below that price, but within a reasonable time after the sale P demands the tobacco, and at that time it is worth forty cents a pound. Is P entitled to recover forty cents? Yes. P is entitled to the highest market price within a reasonable time after the violation of instructions.[139]

(13) P deposits with D in the aggregate $4,240, directing D to purchase on his account shares of stock, which D does at a cost to himself of $66,300 above the sums advanced by P. Without authority from P, D sells the stock for $67,000 on Nov. 14, 1868. On Nov. 24, 1868, it would have brought $5,500, and in August, 1869, for a short time, it would have brought $18,000, more than D did sell it for. Should P recover $18,000 in a suit in conversion? No. The advance in the market price of the stock from the sale up to a reasonable time to replace it, after notice, affords complete indemnity.[140]

(14) P sues D for damages for failure to deliver a crop of wool sold. Can P recover the highest price between the date of purchase and demand, when the agreement is to deliver within a reasonable time? No. He can recover what at the time of demand and refusal would enable him to purchase other property of like kind and equal value at the same place.[141]

(15) P, a lessee of H, sues D to recover the value of a quantity of hay, wheat and oats seized by D during the term of the tenancy and taken by virtue of an execution against the landlord, H. The court instructs the jury that if P is entitled to recover he is entitled to recover the highest value of the property from the time it is taken to the present time. Is this correct? No. P can recover only the value of the chattels at the time and place of conversion (with interest on the sum from that time to date), or, if the wrongdoer has sold the same, the amount for which sold (with interest), or, if still in the possession of the wrongdoer, the present value.[142]

(16) J sues G for the balance of an account, and G sets up a claim for damages for J's selling some shares of stock of G without his consent for $1.25 on the 29th of November. In December the stock

[138] DuBost v. Beresford, 2 Camp. 511.

[139] Maynard v. Pease, 99 Mass. 555.

[140] Baker v. Drake, 53 N. Y. 211.

[141] Chadwick v. Butler, 28 Mich. 349.

[142] Ingram v. Rankin, 47 Wis. 406, 2 N. W. 755.

rises to $2 per share; in January, $3.10; in February, $5.50. The referee allows G $3.10 a share for the stock, on the ground that by January he has had a reasonable time after notice of the sale by J to replace it by the purchase of new stock, if he had desired to do so. Is this correct? Yes. Unlike the ordinary case of conversion, the real injury sustained here consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, for an unfavorable price.[143]

(17) By mistake D goes beyond his line in mining coal, and mines and carries away some of P's coal. What is the measure of damages for the tort? The value of the coal in place is the rule generally announced, as any other rule would transfer to P the value of D's labor in mining the coal, but P is entitled to recover any damage to the land in mining. Trespass is the proper action. It is a question whether this rule does not favor D too much. Some courts would allow P to recover the value of the coal when it first becomes a chattel. The best rule would allow P to recover the present value less the benefits conferred by D subsequent to severance.[144]

(18) D, who owns land adjoining P's, gets over the line by mistake, cuts timber and makes it into lumber. P sues to recover possession of the lumber. To what redress is he entitled? He is entitled to the lumber itself, or the entire value of it, less, in either case, the amount to which its value has been enhanced by D's labor.[145]

(19) W brings an action of trover to recover damages for the conversion of a quantity of pine saw-logs, cut by C on the land of W by mistake. The value per thousand standing is one dollar and fifty cents; the value on the land after cut, two dollars; the value at the time and place of sale by C, twelve dollars; and the expenses of C in cutting and removing the timber are nine dollars and thirty-seven cents. What is the proper measure of damages? The value of the lumber at the time and place of sale by C, less the sum of money which he has expended in bringing the same to market, not to diminish the sum recoverable to less than the value of the timber on the land. This allows C nothing for the cutting, but does give a quasi contractual obligation in his favor for the value of the benefits he has added to the chattels. It does not permit C to make any profit on what he has done. If C were not innocent no quasi contract would be created by law for him and W would recover the full value at the time and place of sale, or the present value if the purchaser is not an innocent party. The holdings to the contrary,

[143] Galigher v. Jones, 129 U. S. 193, 32 Law. Ed. 658.

[144] Forsyth v. Wells, 41 Pa. 291; McLean County Coal Co. v. Long, 81 Ill. 359; Gaskins v. Davis, 115 N. C. 85, 20 S. E. 188.

[145] Single v. Schneider, 24 Wis. 299; State v. Shevlin-Carpenter Co., 62 Minn. 99, 64 N. W. 81.

including that the United States supreme court, cannot be justified on any ground.[146]

(20) Shares of stock are required by statute to be assessed for taxation at their fair cash value. Is this value the market value of the stock or the net value of the property? The market value of the shares of stock having a market, that is, the price at which they will sell in the market.[147]

(21) P sues D in tort for the conversion of a mahogany framed lounge. An expert as to value says that the lounge is worth $50 to any one who likes antique furniture, but to any one who does not care for antique furniture, $15 or $20. Is the whole of this answer admissible? Yes. The market value is at least the highest price a normal purchaser will pay, and in a case like this the market value will oscillate.[148]

§ 28. Interest at the legal rate is recoverable, whatever the cause of action, if there exists a claim for damages for the loss of a right of pecuniary value, as of a definite time.

Interest (as damages) is the value, or amount of damages, for the loss of the use of money.

The value of an injury, caused by a tort or breach of contract, if it is not paid at the time it occurs, does not measure the full extent of the injury, and consequently interest is sometimes an element in damages. Substantial damages are intended to compensate the injured party for his loss, but the loss may include not only the rights injured or destroyed, but their use from the time of the wrong until payment is made for the value of the rights, so that, unless such party receives interest, he does not receive real compensation. Whenever a debtor is in default for not paying money, delivering property, or rendering services pursuant to his contract, justice requires that he should indemnify the creditor for the wrong, but, though this may sometimes be more, it

[146] Winchester v. Craig, 33 Mich. 205; Tuttle v. White, 46 Mich. 485, 9 N. W. 528. See White v. Yawkey, 108 Ala. 270, 19 So. 360; Beede v. Lamprey, 64 N. H. 510, 15 Atl. 133; Eaton v. Langley, 65 Ark. 448, 47 S. W. 123; Bolles Wooden Ware Co. v. United States, 106 U. S. 432, 27 Law. Ed. 230; United States v. St. Anthony R. Co., 192 U. S. 524, 48 Law. Ed. 548.

[147] National Bank of Commerce v. New Bedford, 155 Mass. 313, 29 N. E. 532.

[148] Bradley v. Hooker, 175 Mass. 142, 55 N. E. 848.

can never be less than the specified amount of money, or the value of the property or services, at the time they should have been paid or rendered, with interest from the time of default until the obligation is discharged. The same principle applies to torts affecting property, for the allowance of value does not compensate the injured party for all his loss up to the time of judgment. Where one is deprived of title to a specific thing, interest is allowed him as a matter of law; otherwise, though the loss is pecuniary, the allowance of interest is discretionary with the jury. But where the party chargeable cannot pay or make tender until the time of payment and amount of damages have been ascertained, his default does not necessarily involve interest for delay. If a demand is necessary to fix the date of the wrong, interest will date from the time of demand. It is not a question of whether there is a liquidated demand, but whether the damages are subject to computation, so that when computed nothing is allowed for the use of the money during the time between the injury and settlement. It is not a question of whether there is a promise, express or implied, to pay interest. Interest as an element of damages is compensation for a part of the injury sustained by a breach of contract or tort. It is the value of the use of money detained, as rent is the value of the use of land, and hire, the value of the use of chattels. Interest is not allowed for the violations of personal rights, for the amount of damages is already in the discretion of the jury, and the jury will assess all the damages to the time of the trial, so that if said body were directed to allow interest, it would really mean a double allowance of interest. In contracts, the time when interest should begin to run is fixed by the date of payment or performance; in torts, it is fixed by the date of the injury, but sometimes the party aggrieved has to do some act to fix the date of the injury. As this interest is allowed only for injury caused by another's wrongful act in detaining money, it follows that, if the delay is not due to his fault, he is not chargeable with interest.

The interest, referred to in this discussion, is that allowed by law as damages. The parties by contract may stipulate for the payment of interest for the use of money,

but this creates a debt, and is in no way connected with the subject of damages. On overdue paper, as interest is here allowed as damages, it would seem that the legal rate of interest, and not the contract rate of interest, should be recoverable, and thus hold most of the cases.

Compound interest, or interest upon interest, strictly speaking, cannot be recovered, for the law considers simple interest just compensation for the loss of the use of money, but, after interest as a debt of contract becomes due, the parties may stipulate by special agreement that interest may be recovered, and the same thing may be accomplished by the use of interest coupons attached to bonds and other securities.

ILLUSTRATIONS.

(1) R, the inventor and maker of a patented machine for manufacturing umbrella joints, delivers it to A on trial with the privilege of purchasing on specified terms. At the end of the trial period A declines to purchase but fails to return the machine. As damages for detention, is R limited to interest on the value of the property from the time the wrongful detention begins? Yes. The same rule is applicable here as in the case of conversion, and this furnishes just indemnity, but where the thing has a usable value the value of the use may sometimes be recovered.[149]

(2) An agent, who receives money for his principal, unreasonably neglects to inform his employer of the fact. In an action for money had and received and money lent, is the principal entitled to recover interests? Yes, from the time the agent ought to have given the information. This is sometimes put on the ground of an implied promise to pay the same, but the true ground is that it is compensation for injury.[150]

(3) J covenants to pay rent of four bushels of wheat, four fat hens, and one day's service with carriage and horses, but fails to pay the same for four successive years. In an action of covenant is interest recoverable? Yes, from the time each item of rent becomes due, on its value at that time.[151]

(4) F sells D one hundred fifty casks of madder, but fails to deliver the same at the time agreed. In addition to the difference be-

[149] Redmond v. American Mfg. Co., 121 N. Y. 415, 24 N. E. 924.

[150] Dodge v. Perkins, 26 Mass. (9 Pick.) 368.

[151] Van Rensselaer v. Jewett, 2 Comst. (N. Y.) 135.

tween the contract and market prices at that time, is D entitled as a matter of law to interest from such time? Yes. The difference between the contract and market prices measures the extent of D's loss only on the day of performance; interest is necessary to compensate him for his subsequent injury.[152]

(5) M performs work and furnishes materials in the construction of two sections of N's railroad, under an agreement to do the work under the supervision of the engineer of the company. The engineer makes his determination without notice to M and consequently the determination is not final. The contractor requests his employer to make the measurements or cause them to be made, but the latter refuses. Should interest be allowed M? Yes, but only from the time of refusal to cause the final estimate to be made, for in the case of so uncertain a demand as this there is no injury until such time.[153]

(6) B negligently destroys the property of F. Should interest be added to the sum which is found to represent F's loss on the day it takes place? Yes. The delay in payment is not due to F's wrong but B's, for when the claim is presented he denies liability.[154]

(7) Through the negligence of C an explosion of natural gas destroys R's household goods. In an action of trespass for damages for the negligence, is R entitled to interest as a matter of law from the date of the accident? Yes. However, it is sometimes held that for negligent injury it is to be allowed in the discretion of the jury.[155]

(8) W, while in the service of L, sustains severe personal injuries, resulting in the loss of a leg, through the negligence of L. In an action for damages the jury assesses the damages at $7,000, with seven years' interest of $2,940 according to the charge of the court. Is the interest properly allowed? No. In the case of personal injuries, the injuries do not cease when inflicted and they are not susceptible of definite and accurate computation; until judicially ascertained there is no way of knowing what is due, and therefore interest cannot at any preceding time be superadded.[156]

(9) A petition is filed to condemn twenty acres of D's property under the right of eminent domain. Is interest on the value of the property allowable from the time of filing the petition to the trial? No. D has the right to use and possess the same and is not also entitled to interest upon the value. Interest is allowed only from the time of taking.[157]

[152] Dana v. Fiedler, 12 N. Y. 40.

[153] McMahon v. New York & E. R. Co., 20 N. Y. 463.

[154] Fraser v. Bigelow Carpet Co., 141 Mass. 126, 4 N. E. 620.

[155] Richards v. Citizens Natural Gas Co., 130 Pa. 37, 18 Atl. 600.

[156] Louisville & Nashville R. Co. v. Wallace, 91 Tenn. 35, 17 S. W. 882.

[157] South Park Com'rs v. Dunlevy, 91 Ill. 49; Old Colony R. Co. v. Miller, 125 Mass. 1.

(10) The rate of interest specified in a note is ten per cent. The legal rate of interest is six per cent. If the note is not paid when due, what interest is recoverable? The interest named until maturity, and after that the statutory rate. Interest is not given on the principle of implied contract, but as damages for breach of contract after maturity. Statutes and some decisions allow the specified rate to be recovered[158]

(11) In a suit D is summoned as garnishee, and judgment is obtained against him for twenty-five dollars. Is he bound to pay interest? No. He has not promised to pay interest, and, as he was prevented by law from paying the principal, he is not chargeable with interest as damages for nonpayment.[159]

(12) An indorser gives a written promise to pay annual interest on notes drawing the same, if the makers do not. The makers pay the notes, but not compound interest. Is the indorser bound to make up the difference? No. Only simple interest is recoverable on the principal sum. If the holder does not collect interest each year he is presumed to waive interest on interest. But where coupons for interest are attached to a bond or note, being detachable therefrom and having the qualities of commercial paper, interest is recoverable from the date of payment.[160]

§ 29. The amount of the substantial damages for all nonpecuniary injuries resulting from torts and breaches of promise of marriage, as well as the amount of exemplary damages for malicious conduct in connection with such wrongs, is such sum as the jury in its sound discretion may award (subject only to review by the court).

The sound discretion of the jury is the third method of determining the amount of damages. The first method is liquidated damages. The second method is the fixed rule, or measure, of value. We have considered the application of both of these methods. The sound discretion of the jury, as a measure of damages, remains. No one of the three methods extends to the whole realm of substantial damages. Liquidated damages never apply to other injuries than those flowing from breaches of contract, and can only apply to

[158] Eaton v. Boissonnault, 67 Me. 540. Contra, Brannon v. Hursell, 112 Mass. 63.

[159] Bickford v. Rich. 105 Mass. 340.

[160] Henry v. Flagg, 54 Mass. (13 Metc.) 64; Aurora City v. West, 74 U. S. (7 Wall.) 82, 19 Law. Ed. 42.

certain of such injuries. The rule of value applies to all pecuniary injuries flowing from torts and breaches of contracts, except so far as damages for the latter may have been liquidated. The sound discretion of the jury applies to all other injuries, that is, to all nonpecuniary injuries flowing from torts and breaches of promise of marriage, if damages for the latter have not been liquidated. But, even in such cases, the power of the jury is not arbitrary. The court has the power of review, and should also define the limits within which damages may be estimated and enumerate the elements of injury to be taken into consideration.

Further explanations and illustrations of the above rule will be found in this book in the discussion of the functions of court and jury, and in the application of the rules of substantial damages to particular wrongs.

§ 30. When an injury is completed, whether caused by a breach of contract or a tort, it gives rise to but one cause of action, and therein must be assessed damages for losses both past and future; but when the injury is continuous, either because the contract subsists, or is divisible, or the tortious act rather than only its damage continues, it gives rise to successive actions, and in each the damages are assessed only to the time of suit.

Injuries caused by lawful public structures properly constructed and permanent in character and authorized upon condition that compensation be made for special damage are regarded as completed.

Damages for all the injuries caused by any legal wrong must be recovered in a single action once and forever. The demand cannot be split up, so as to subject the debtor or wrongdoer to successive actions. All the damage is then done. The fact that the damage manifests itself only later on does not alter the fact that it is there, and it is the injured party's fault if he does not show all of it so as to recover damages therefor. The matter has become res adjudicata, and the judgment is a bar to other suits. But a new wrong, though just like the first, gives a new cause of action, and

sometimes a single wrongful act will so operate as to give rise to successive torts or breaches of contract, and where this is true successive actions may be maintained, for the principle of res adjudicata obviously does not apply. A continuing tort or breach of contract is in effect nothing but the repetition of the same wrong an indefinite number of times, and separate actions will lie for each repetition, for the damages are limited to compensation for the losses already suffered. These two propositions are simple. Only a single recovery is allowed for a single injury, but separate injuries, and therefore successive actions, may arise from the same wrongful act. Yet there is a class of border line cases where it is hard to decide whether there is a single injury or many injuries. The best statement of the rule to govern such cases is the following: Where a breach of contract is entire, or a tort injury permanent, whether affecting person or property, the compensation will be assessed once for all, though it covers future losses, in which case, if the suit is in contract, damages are called entire damages, and, if in tort, prospective damages; but, if the obligation of a contract is continuing, so that breaches may keep occurring, or if the contract is divisible, and there is a breach of only a part, or if a tort, rather than its effects, continues, as in the continuance of a nuisance, or false imprisonment, or trespass, compensation is recoverable only for the injury which has occurred down to the time of bringing the action, and new actions will have to be brought for future losses as the wrongful act continues. It is not necessary to specially plead prospective losses as such in order to recover therefor.

Where there is a breach on the part of the employer of a contract of employment, a nice question in entire damages arises. Shall the employe be allowed to sue at once and recover for future losses, or be compelled to wait until the expiration of the term of employment? The employer is entitled to have deducted from the amount of the wages that would be due at the end of the period the amount that the servant is able to earn elsewhere during that time, and if suit is allowed to be brought at once, how is this to be determined? The difficulty is more apparent than real. If the

employe chooses he may elect to sue at once for the reasonable value of the services rendered before breach of contract, and if he chooses he may sue at once for breach of contract. It may be more difficult to estimate the damages in one case than the other, but the measure of damages is the same whether suit is instituted at once or after the termination of the period of employment. If he sues at once, in estimating the damages, the jury should consider the wages he would have earned under the contract, the probability of the continuance of life and working ability, as well as the likelihood of his earning money in other work during the time; and, if he does not sue until the period of stipulated service has expired, he is entitled to recover the agreed wages for the whole time, but reduced by the amount he might have earned by engaging in other work during the time. This problem will be met again in connection with the mitigation of damages.

ILLUSTRATIONS.

(1) P sues in a special action of trespass and battery for damages for injuries sustained subsequent to recovery of eleven pounds in an earlier suit for damages for the same wrongful act. After the recovery in the first suit, a part of his skull comes out of P's head by reason of the original battery. Should he recover? No. The former recovery is a bar. It must be presumed that the jury gave damages for all the hurt he suffered, for it existed at the time of the first suit as much as now.[161]

(2) D, before and up to 1868, excavates for coal under P's land and causes a subsidence of the ground, for which injury he makes satisfaction. Subsequently the owner of adjoining land works out his coal, and P sustains further injury from the subsidence of his land, but this would not have occurred if D had not taken out P's coal, or if D had left sufficient support. Is the satisfaction for the past subsidence satisfaction for all succeeding subsidences? No. This is a continuing tort, the wrong consisting in causing the damage; every new subsidence, although proceeding from the same original act or omission, is really a new tort and gives a new cause of action.[162]

(3) A stream of water flows on to a tract of S's land, runs through it a short distance, and then flows back off from it. The C Railway runs its grade across this stream, outside S's land, crossing it both where

[161] Fetter v. Beal, 1 Ld. Raym. 339, 692.

[162] Darley Main Colliery Co. v. Mitchell, 11 App. Cas. 127.

the stream enters and leaves the same. At first C bridges the stream, but later it cuts a channel on the other side of the right of way and fills up the bridges, thus diverting the stream from S's land. S sues and recovers one dollar and costs as damages. Later, can another suit be brought, if the railway continues to divert the water? No. As this is a permanent structure authorized by law, the injury is complete at the time of the first suit and all the damages should have been assessed in that action, and though in that action S does not recover prospective damages because of an erroneous instruction of the court, that does not give him a right to bring a new action. The whole extent of the damage is apparent at the time of the first suit.[163]

(4) D contracts to support P during P's life. After the time for entering upon performance has begun, D refuses to perform. Is P entitled to recover as of a total breach? Yes. The contract does not continue to subsist, if P chooses to treat it as broken, and he is entitled to recover damages for nonperformance in the future as well as the past, according to the mortality tables.[164]

(5) P sues D for damages for a nuisance caused by water flowing from D's eaves against the wall and into the windows and cellar of P's adjoining building. Can P recover prospective damages? No. If the nuisance continues, subsequent damages will have to be sued for in subsequent suits. Where a private structure causes a nuisance damages can be assessed only to the time of beginning the suit, for special damage is of the gist of the action, and the wrongdoer cannot be compelled to pay damages for the future, for he may prefer to change the use of his property so as to make his conduct lawful.[165]

(6) P contracts with D to play character parts in a museum for thirty-six weeks from a fixed date. After eighteen weeks of service D discharges P without excuse. Can P sue at once for breach of contract and recover entire damages? Yes. Under such circumstances the damages are prima facie the stipulated wages, less what the injured party can earn elsewhere by the use of ordinary diligence. After the expiration of the term the rule is the same, except that it is absolute.[166]

§ 31. In contract suits the only person, or persons, who are entitled to sue are entitled to recover all of the damages; but in tort suits each party injured is entitled to recover for the injury to his own rights, and no more, unless he is answerable over to another.

[163] Stodghill v. Chicago, B. & Q. R. Co., 53 Iowa, 341, 5 N. W. 495.

[164] Parker v. Russell, 133 Mass. 74.

[165] Joseph Schlitz Brew. Co. v. Compton, 142 Ill. 511, 32 N. E. 693.

[166] Sutherland v. Wyer, 67 Me. 64.

For a breach of contract there can be only one recovery, which should be the total amount of loss, because the right of action cannot be carved into separate actions. There are no separate interests. The defendant, or defendants, have made but one contract and are liable to be sued by only the parties to that contract, either the original parties, or those stepping in by assignment or adoption. In cases of torts, however, the interests affected may be separate, and separate suits should therefore be permitted. A few explanations will make this clear. For an injury by a third person to a chattel, while in the possession of the bailee, the bailee may sue and recover the value of the interest he has lost, and according to the rule it would seem that he should recover for only that; but according to most authorities he is also permitted to recover the value of the loss to the bailor, that is, for the total loss, holding the excess for the bailor, upon the ground that as to everybody but the true owner the bailee is to be regarded as the owner. But, for the injury to his interests, the bailor also has a right of action, and he may sometimes recover when the bailee cannot, on account of contributory negligence, for the bailor is not responsible for the acts of the bailee. For a conversion by a bailee the bailor can recover the value of the goods at the time of conversion, but the bailee is entitled to have deducted therefrom the value of his interest in the chattel. A mortgagee of personalty recovers against a stranger full compensation for any injury, but against the mortgagor, the amount due if not more than the value of the same. One having the right to the possession of realty for a limited time can recover for any interference with his possession, but not any more than this, either against a stranger or the real owner. Lessors, reversioners, and remaindermen can recover damages only for the injury to their own interests. A mortgagee of realty can recover for any injury to the same to the amount his security is impaired. A joint owner, either of realty or personalty, recovers only his share of the loss, in a suit either against a stranger or a co-owner. In the case of personal injuries to a minor, or to a wife, the parent, or husband, as well as the injured party, are entitled to sue for the injury sustained by each.

ILLUSTRATIONS.

(1) P, a chimney sweeper's boy, finds a jewel, and takes it to D's shop to find out what it is, but D's apprentice, under pretense of weighing it, takes out the stones, gives back the socket, but refuses to give up the stones. In trover, what should P recover? The value of the best jewel that will fit the setting, as he has such a property as will enable him to keep the jewel as against everybody but the rightful owner.[167]

(2) P hires a horse and carriage from F, a liveryman. D's servant drives against and injures the carriage while in P's possession, and F has the carriage repaired at P's expense. Is P entitled to recover for total loss? Yes. This right stands upon his possession, rather than that the bailee is answerable over, but he holds the proceeds in trust for the bailor.[168]

(3) J, an assignee in bankruptcy of C, sues S, a pledgee of C, for the conversion of some brandy, pledged to S by the delivery of dock-warrants under an agreement that S might sell if not repaid his loan on the 29th of January. S sells the brandy on the 28th and delivers the dock-warrants on the 29th. If this is held a conversion, what is the measure of damages? From the value of the brandy should be deducted the amount of S's loan, or his interest in the pledge at the time of conversion.[169]

(4) O agrees to sell a wagon to H, the wagon to become H's upon his paying the agreed price. O, retaining possession, thereafter, sells his interest to D, who knows of the aforesaid bargain. After paying all but $14 H sells his interest to P, who tenders this sum to D and demands the wagon, but D refuses both. In a suit for the conversion should the $14 be deducted from the estimated value of the wagon? Yes. At the time of the conversion D has an interest in the wagon to that amount because he has bought O's lien for unpaid purchase price.[170]

(5) P is the owner of a second mortgage on a plot of land. Subsequently, a boiler and engine are placed on the premises so as to become fixtures, but they are mortgaged as chattels, sold under the chattel mortgage to D, and removed by him. Can P recover from D for the removal of the fixtures? Yes, to the extent his security has been impaired, but to protect himself against suit by the first mortgagee D should pay the money into court.[171]

[167] Armory v. Delamirie, 1 Strange, 505.

[168] Brewster v. Warner, 136 Mass. 57. Claridge v. South Staffordshire Tramway [1892] 1 Q. B. 422, is in conflict.

[169] Johnson v. Stear, 15 C. B. (N. S.) 330.

[170] Fowler v. Gilman, 54 Mass. (13 Metc.) 267.

[171] Jackson v. Turrell, 39 N. J. Law, 329.

§ 32. Evidence of the circumstances of the wrong can be submitted to the jury for the purpose of influencing its estimate of the injury either by way of aggravation or mitigation of damages, whenever damages are not capable of exact pecuniary measusement, but must be left to the discretion of a jury.

The amount of damages recoverable is reduced to the extent of benefits conferred by the act inflicting the injury, or by operation of law, or by a reparation voluntarily accepted.

While evidence in aggravation or mitigation of damages is more frequently and appropriately admissible in cases involving exemplary damages, yet it is also admissible when the jury is called upon to estimate compensatory damages for nonpecuniary injuries. This evidence, in the latter case, is not admitted for the purpose of securing damages either higher or lower than true compensation for the injury, but for the purpose of determinnig just what the injury is. Thus, a man of bad character is entitled to less damages for injuries caused by a slander than a man of unblemished reputation, because if his character is not good his reputation has sustained but little injury. To exclude such evidence is to affirm either that, in the admeasurement of damages in actions of slander, there is no distinction between a most exalted character and the most debased, or, admitting the distinction, that the jury must form its estimate of characfer without evidence, neither of which positions is tenable. Under a general issue of injury to character, evidence of general reputation is admissible, and under an issue of injury to character in some particular respect, evidence of general reputation in the respect in which it is attacked is admissible. So, in actions for criminal conversation (and the like), one of the principal grounds upon which the husband is allowed to recover damages is that he has been deprived, by the wrongful act, of the confidence and affection of the wife. But the wrongdoer inflicts a much more grevious wrong if he invades domestic peace and conjugal felicity than if love and harmony and affectionate intercourse have

previously been lost through the misconduct of the husband.

Compensatory damages are awarded one as actual compensation for losses sustained, so far as the law can measure them by a money standard. The moment the injury occurs the injured party becomes entitled to the compensation, and the wrongdoer cannot reduce the damages by offering to return the property or to do anything else, for when once done the injury stands; it cannot be wiped out, and, though it may be redressed, it is not in the mouth of the wrongdoer to say what that shall be. But, if the very act which causes the injury also causes a benefit, this necessarily must be taken into consideration in determining the amount of the injury sustained, for injury and benefit cannot be separated. The same principle applies if goods taken by a trespasser are taken from the trespasser by the law and restored to the injured party, whether the machinery of the law is set in operation by a third party or by the tort feasor himself. Likewise if, when restored, the owner voluntarily receives the goods wrongfully taken, or the proceeds thereof. Such facts are admissible, not to absolve the tort feasor, but to show that the injured party has sustained less injury and is therefore entitled to less damages.

ILLUSTRATIONS.

(1) M sues D for the seduction of M's daughter. Is the court justified in permitting the introduction of evidence of the pecuniary ability of both parties? Yes. Evidence of the pecuniary ability of the defendant is admissible in estimating exemplary damages, for it will take a larger sum to punish a rich man and awe other rich men by way of example than it would poor men. Evidence of the pecuniary ability of the plaintiff is admissible, not to excite prejudice, but to show the effect of the injury.[172]

(2) In an action for slander, charging P with larceny, D offers in evidence, in mitigation of damages, the general had character of P. Should both evidence of general bad character of P and his character for honesty and integrity be admitted? Yes. Not only are they admissible to show the animus and diminish exemplary damages, but to show that the injury to P's reputation is less because he has little

[172] Grable v. Margrave, 4 Ill. 372;
Storey v. Early, 86 Ill. 461.

reputation. An injured party is entitled only to compensation for the loss he has sustained, and if he has sustained but little loss he is entitled to little compensation.[173]

(3) In an action of tort for seducing P's wife and alienating her affections, should D be permitted to introduce testimony; (1) that P has cruelly treated the wife, and (2) that the wife has complained of his ill treatment prior to the seduction? Testimony as to the second point, but not as to the first, is admissible to show that the injury inflicted is less than if the husband had not lost the love and affection of his wife.[174]

(4) P sues D for damages for an assault and battery by blows on P's head. Should the court instruct the jury to allow damages for the insult and indignity? Yes. They aggravate the tort, increasing the mental suffering.[175]

(5) An affray takes place between plaintiff and one of the defendants in the afternoon, and in the evening of that same day defendant with others goes to P's house and inflicts violence upon him there. Should the defendants be allowed to show what took place in the afternoon, in mitigation of damages? No, only to show the motive for the assault on the issue of exemplary damages, for, otherwise, the result would be the trial of several causes in one.[176]

(6) P sues D in an action of slander for charging her with unchastity. Is D entitled to show the general reputation of P for chastity at the time and place where the words are spoken? Yes. When a person's character is assailed in a particular respect she must be held ready to sustain her general character in that respect, for if her general reputation for chastity is bad she sustains less injury than if untarnished, and this is put in issue, but a general report in regard to some particular crime cannot be received.[177]

(7) D takes from P $300 worth of brandy, under a void attachment in a suit against M, who has sold the brandy to P with intent to defraud his creditors, and while it is still in D's possession he has it attached again under a second valid attachment and sold to pay the debts of the creditors of M. Is this evidence admissible in mitigation of damages? Yes. D is a trespasser and as such liable to pay full damages until the second attachment is levied, but when the goods are taken from his possession by sanction of law and applied to the owner's debt, or other-

[173] Sayre v. Sayre, 25 N. J. Law (1 Dutch) 235.

[174] Palmer v. Crook, 73 Mass. (7 Gray) 418.

[175] Smith v. Holcomb, 99 Mass. 552.

[176] Currier v. Swan, 63 Me. 323.

[177] Duval v. Davey, 32 Ohio St. 604; Mahoney v. Belford, 132 Mass. 393.

wise for his benefit, that may be shown in mitigation of damages, and it makes no difference that the machinery of the law is started by the trespasser himself.[178]

(8) P sues his grandfather in trespass for cutting and carrying away wood and timber from P's land. Can the grandfather show in mitigation of damages that at the time of the trespass P is a minor but that the grandfather has settled with P's mother, who is his guardian, and that she has applied the money to his benefit? Yes. This decreases the amount of injury P sustains.[179]

(9) D takes possession of P's part of a mill, under an attachment, but wrongfully, as the attachment does not cover the mill, but while in possession he and his cotenants tear down the old mill, which is practically worthless, and build a new one in its stead at a cost of two thousand dollars, using as much of the old mill as possible. P sues D in trespass. Are these benefits to be taken in mitigation of damages? Yes. P can recover only nominal damages.[180]

(10) D places an embankment of earth on a lot belonging to P and used as a pasture, the rental value of the part covered for the time covered being forty dollars. P uses the earth in grading other parts of the lot. Can P recover the cost of removing the earth? No. The benefits to the land of placing the earth on it are to be considered, as a method of determining the actual damage.[181]

(11) P, as sheriff, wrongfully levies upon a stock of goods claimed by S as assignee, and while under his control the goods are accidentally destroyed by fire. The goods are insured and S recovers their full value from the insurance companies. Is S, in his suit against P, limited to damages for detention up to the time of the fire? No. P must account for their full value. He has no concern with any contract S may have. S recovers but once for the wrong done him.[182]

(12) P sues D for damages for injuries sustained by falling through a trapdoor in D's storeroom. P is nursed by a brother and sister, who give their services. Is testimony as to the value of the services of nurses admissible? Yes. P is entitled to recover what such services are reasonably worth.[183]

(13) In a suit in tort against a physician for slander in falsely telling P's workmen that their is arsenic in silk furnished by him for

[178] Hopple v. Higbee, 23 N. J. Law (3 Zab.) 342.

[179] Torry v. Black, 58 N. Y. 185.

[180] Jewett v. Whitney, 43 Me. 242.

[181] Mayo v. Springfield, 138 Mass. 70.

[182] Perrott v. Shearer, 17 Mich. 48.

[183] Brosnan v. Sweetser, 127 Ind. 1, 26 N. E. 555.

them to work with, and thereby causing them to leave his employment, P claims to recover for the trouble he has been to in determining whether or not there is arsenic in the silk. He is working for his company on a salary and his company makes no deduction for time lost. Is P entitled to recover from D irrespective of the state of things between him and his company? Yes.[184]

[184] Elmer v. Fessenden, 154 Mass. 427, 28 N. E. 299.

CHAPTER VIII.

PRINCIPAL CONTRACTS AFFECTING PROPERTY.

§ 33. In actions for breaches of contracts the damages are the net value of having the contracts performed, or, if this is incapable of proof, the value of the losses sustained, with the value of such other injuries as are within the contemplation of the parties; unless the damages are liquidated, when the amount recoverable is the stipulated sum.

The mere statement of the above rule shows that in contract actions the damages recoverable are compensatory; exemplary damages are not recoverable, except in the one case of breach of promise of marriage. If there is no actual injury caused by the breach of a contract the recovery is limited to nominal damages, but the mere breach causes such legal injury that some compensation must be awarded for the purpose of vindicating the right. Otherwise, in contract actions, damages are substantial. Direct damages are always recoverable, and consequential are recoverable, when the injuries caused by the breach, though not usual, yet may reasonably be said to have been in the contemplation of the parties at the time of making the contract as the probable result of its breach. The elements of injury occasioned by breaches of contracts are generally the loss of bargain and

the loss of the use of money, but there may result from the breach of some contracts loss of time, loss of profits and expenses, and, in the anomolous wrong of breach of promise of marriage, mental suffering is an element of injury. The damages may be measured by the parties in advance, under certain circumstances, or they may be measured by the rules created by law. Entire damages are sometimes recoverable, as explained in section 30, but the questions of limited interest and aggravation and mitigation do not arise.

Up to this point we have been considering the fundamental rules of damages. During the remaining chapters of this book we shall undertake to apply these rules to the various torts and breaches of contracts that come before the courts for decision. The distinction between contract actions and tort actions is so fundamental that they will be given separate treatment. Wrongs violating the different antecedent rights also naturally fall into separate groups, and so far as possible these natural classifications will be preserved.

§ 34. Substantial damages for the failure to pay an instalment of an annuity are the amount of the instalment with legal interest from the time due.

According to English law interest is allowed only in case of an annuity for the maintenance of the annuitant. If the annuity is personal it is enforced through an action of debt, or of covenant if the promise is in the form of a covenant; if it is a charge on land equity will decree a sale and set aside enough money to produce the annuity.[185]

§ 35. The substantial damages for the breach by the vendor of a contract to convey, or by the vendee of a contract to purchase, real property, are the difference between the contract price and the value of the same at the time of the breach, with legal interest from that time, and the value of any expenditures

[185] Waples v. Waples, 1 Har. (Del.) 399; Brotzman Estate, 133 Pa. 478, 19 Atl. 564; Sutherland on Damages, § 344.

made in reliance on performance and the value of the loss of profits of a resale contemplated by both parties.

This rule is in harmony with the object of all damages in contract actions; to place each party in the same position he would have been in had the contract been performed. If the market value advances the purchaser gets the benefit of it; if it falls the seller gets the benefit of it. The vendee is entitled to have the thing agreed for at the contract price and to sell it for any increased value it may have attained, but the vendor is entitled to have the vendee take it at that price even though it can be resold only for a lower price. Any other rule would not do justice to either party, but this is fair to both. The elements of injury are the loss of bargain, the measure for which is value, which in transactions of this sort is the difference between the contract price and the market value at the time of breach, and, the loss of the use of the money representing the value of the bargain, the measure for which is interest. If the vendee has paid any part of the purchase price, that is also recoverable, with interest during the time the vendor has had the same. The vendee cannot recover the purchase price paid when the failure of performance is due to his own wrong, but only when the vendor is in default, or the contract is voidable. Consequential damages are rarely allowed in actions for breaches of contracts relating to the conveyance or purchase of land. Ordinarily the only injury sustained is the loss of bargain, by either the vendor or the purchaser. If the value falls below the contract price, the vendor can only recover nominal damages for breach by the vendee, while the vendee can recover the difference between the contract price and the market value for breach by the vendor. If the value rises above the contract price, the vendor can recover the difference between the contract price and the market value, in case of breach by the vendee, while the vendee can recover only nominal damages, except any part of the purchase price paid, in case of breach by the vendor. But sometimes other injuries are occasioned, and when they come within the rules of consequential damages in contracts, damages

are recoverable therefor, upon being specially pleaded and proved. Expenses may be incurred by either party in part performance of his obligation, before breach by the other party, or the purchaser may already have negotiated a resale of the property and notified the vendor of this fact. If the vendor merely delays performance and the vendee subsequently accepts a conveyance, the measure of damages is the difference in value between the time when it is made and when it should have been made, and, if meanwhile the vendee is kept out of possession, the rental value of the property during the period of delay.

Yet, simple and just as this rule seems to be, it has not been adopted by all of the courts. According to the English decisions, all that the vendor can recover is nominal damages, and all that the vendee can recover is any part of the purchase price paid and interest thereon. Such a rule does not attempt to place the parties in the same position they would have been in had the contract been carried out, so far as money can accomplish this, but rather it attempts to put them in the same position they would have been in had they never contracted at all. It is contrary to the general theory of damages and it is impossible to see any good reason for it. Sometimes the English decisions are distinguished from the general holding of the American by the fact of the uncertainty of titles in England. Still more inexplicable, if not vicious, is a rule that would permit the vendor, by tender of a deed, to recover the price and keep the land. The vendor should recover the purchase price only when the title has passed, that is, when there is not only a tender but an acceptance of the deed. The rule here adopted has everything to commend it. Some authorities attempt to draw a distinction between cases where the vendor acts in good faith and where his conduct is tainted with fraud, or bad faith, but, while misconduct may render the contract voidable on the ground of fraud or give a cause of action for deceit, it cannot alter the effect of the contract itself, or the rule by which damages should be assessed.

ILLUSTRATIONS.

(1) P, at auction, buys of D a rent of 26 lbs. 1 s. per annum for thirty-two years for 270 lbs, and pays a deposit of 54 lbs. D cannot make out the title. The case arises in England. What is the measure of P's damages? He is not entitled to recover anything for the fancied goodness of the bargain lost, but only the deposit with interest thereon, according to English holdings.[186]

(2) In the state of New York D agrees to convey to P certain land, thinking she and her minor children have the title and can convey the same, but she is unable to do so. Is P entitled to recover the difference between the contract price and the value of the land at the time of breach? Not according to the New York decisions, as in this respect they follow the English.[187]

(3) L sues H to recover damages for not conveying certain tracts of military lands, which H has agreed to convey upon L's discharging certain incumbrances, and this L has done. In assessing the damages, what is the measure of damages? The difference between the contract price and the increased market value at the time of breach. This is the general rule in the United States, and the rule announced by the supreme court of the United States.[188]

(4) H, in writing, contracts to convey to K certain real estate for the price of $2,500, one-third to be paid down and the other two-thirds in equal instalments. K pays down the first instalment, and two years after the other two instalments become due H sues for the amount thereof with interest. Should he recover this sum as the measure of his damages? No. As he did not sue at once after the second instalment became due, but has waited until the third is due, both become dependent obligations, and since because of the two years' delay specific performance will not lie, he cannot now recover the purchase price and keep the land too, but must sue for breach of contract, when the measure of his damages is the difference between the contract price and the market value at the time of breach, with interest, against which K is entitled to offset the amount of his first payment, in the absence of other stipulation.[189]

(5) P purchases certain land from D, pays down $1,000, and promises to pay $9,250 more upon receipt of deed. D cannot give clear title and at that time the property is worth $10,000. Is P entitled to recover $1,000 and interest? Yes, if he sues in quasi contract. He has sustained

[186] Flureau v. Thornhill, 2 W. Bl. 1078; Bain v. Fothergill, L. R. 7 H. L. 158.

[187] Margraf v. Muir, 57 N. Y. 155.

[188] Hopkins v. Lee, 19 U. S. (6 Wheat.) 109, 5 Law. Ed. 218.

[189] Hogan v. Kyle, 7 Wash. 595, 35 Pac. 399; McGuinness v. Whalen, 16 R. I. 558, 18 Atl. 158; Allen v Mohn, 86 Mich. 328, 49 N. W. 52; Warren v. Wheeler, 21 Me. 484.

no further injury, for the land is worth less than the contract price. D has no cause of action for the difference between the contract price and the market value. for P has not broken the contract.[190]

(6) W contracts to sell land to K, and in order to consummate the contract and as a part thereof W agrees to take up a mortgage on the land before its maturity. W takes up the mortgage, but in order to do so has to pay the full amount, at an expense of the intermediate unaccrued interest. Then K refuses to perform. Is this expense an element of injury for which W may recover? Yes. It is within the contemplation of both parties.[191]

(7) A contracts in writing to sell land to B for one thousand dollars. B contracts to resell the same land to C for fifteen hundred dollars. A refuses to perform his contract. In addition to the difference between the value of the land at the time of breach and the contract price, is B entitled to recover the loss of profits which he might have made from this resale? Not unless A is notified of the resale contract at the time of making his contract.[192]

§ 36. The substantial damages for breach of a contract of insurance against any risk other than death, or personal injury, are the value of the property destroyed, not to exceed the amount of the insurance, if the contract is open or if the contract is valued, provided the loss is partial, and the amount of the insurance, if the contract is valued and the loss is total, with legal interest in all cases from the time the amount of the insurance is payable (and sometimes by statute, attorney's fees).

The substantial damages for the breach of a life insurance contract, whether before or after due, are the amount stipulated, together with any dividends or profits that may be due thereon, with legal interest (and by statute in some states, attorney's fees), subject to any set-off or counterclaim in favor of the insurer.

Insurance is a contract, and so far as the matter of damages is concerned is to be governed by the general rules that

[190] Doherty v. Dolan, 65 Me. 87.

[191] Kelley v. West, 36 Minn. 520, 32 N. W. 620; Hurd v. Dunsmore, 63 N. H. 171.

[192] Lynch v. Wright, 94 Fed. 703; Violet v. Rose, 39 Neb. 660, 58 N. W. 216.

apply to breaches of contracts. Direct damages are recoverable, and ordinarily nothing but direct damages are recoverable, because there are no injuries calling for consequential damages, but when there are such injuries consequential damages are recoverable as in other contracts. The insurance contract creates an obligation to pay a sum of money upon the happening of an uncertain event, and when that event happens the money becomes due, as a debt, and if it is not paid a remedial right to damages arises. This includes the amount due with interest from the time due. The person who has this right does not recover the difference between the contract price and value but the amount promised in the contract. All that the law undertakes to do is to place the party injured in the same position as he would have been had the contract been performed. In life insurance the amount due is a stipulated sum, and this is the case in fire and marine insurance when a valued policy is written. The latter sum is sometimes spoken of as liquidated damages, but that is not the appropriate term. Liquidated damages are damages measured in advance by the parties for the injuries caused by a breach of contract; the sum agreed upon in a valued policy, or contract, of insurance, does not relate to the breach but to the performance of the contract. The amount due in open fire insurance in case of total loss is the value of the property destroyed at the time of such destruction, not the difference between the value of the land before and after the fire, and, in case of partial loss, the difference between the property whole and damaged.

Aside from life insurance the subject-matter of insurance contracts is indemnity, and because of public policy can be nothing but indemnity. The person insured has the right to indemnity for all losses resulting as a natural and probable consequence from any risk insured against, but this is a very different thing from consequential damages. Injuries caused by breach of contract do not arise until after breach. Direct damages, or consequential damages, are recoverable only for injuries flowing from the breach. The losses which are the subject-matter of the contract of insurance occur before breach and are caused by some independent force and

not by the party who has to pay damages. They concern antecedent rights; damages, remedial. What losses indemnity is promised for are determined on somewhat the same principles as are consequential damages in tort actions, but there the analogy ceases. This distinction is not always noticed and therefore the confusion in some of the text-books and decisions; but the distinction is fundamental, is liable to make the difference between victory and defeat in a lawsuit, and it should not be forgotten. First, the contract must be interpreted. What the subject-matter of the contract is must be determined. The extent of the insurer's promise must be ascertained. Then, if the insurer refuses or neglects to perform his promise, and only then, does the question of damages arise, and in the determination of this latter question the rules as to direct and consequential damages are those peculiar to contract remedies.

In the case of life insurance, and in case of total loss under a valued policy of any kind, the amount the insurer is to pay is settled by the agreement of the parties, and if the insurer does not pay it when it is due, he is guilty of breach of contract, and that sum with interest thereon from the time due is the measure of damages. But, in other forms of insurance, the amount the insurer has promised to pay is not a definite sum, but indemnity not to exceed a named sum, and consequently, before he is bound to pay any specific sum, it must first be determined, and when that is done, if the insurer does not pay the amount thereof, he is guilty of breach and damages are measured as in the case of life insurance. There may be a breach prior to the time of final performance, but the amount of the recovery pro rata is governed by the rules above set forth.

ILLUSTRATIONS.

(1) J issues a policy insuring V against loss or damage by breakage of plate glass, but it is provided that he shall "not be liable to make good any loss or damage which may happen by or in consequence of fire." During the life of the policy the plate glass is destroyed by an explosion of gas generated from gasoline in a rear room and ignited by a match. Is J liable for the breakage of the glass? Construing the contract according to the general rules, J has promised to indemnify V for just this

sort of a loss, and it is within, not outside, the contract, for he has promised to pay for all losses resulting as a natural and probable consequence of explosion. V, then, has an antecedent right to this indemnity, and if J fails to pay it V is entitled to this amount as compensatory damages for his injuries, plus interest from the time due and the value of other injuries sustained by reason of the breach.[193]

(2) M insures L against loss or damage by fire to a building and machinery which L owns. A fire occurs in one part of the building, causes a short circuit on some wires, and this in turn causes damage in another part of the building. Is M liable for the latter loss? According to the contract M has promised to indemnify L for such a loss as this, as it is the natural and probable consequence of the fire, but the breach of the contract arises only when M refuses to make payment. The damages for the breach of the contract are the amount pfomised, or the value of the property destroyed, with interest from the time M should have made payment.[194]

(3) P sells land, reserving the ownership of the buildings for a certain time, with the right of removal within that time, and then insures the buildings with D for $2,400 against loss by fire. The day before the expiration of the time for removal the buildings are destroyed by fire. D refuses to indemnify. Can P recover the actual cash value of the buildings without regard to the fact of removal? Yes. That is D's promise, and for failure to perform that promise that is the measure of damages. If the value of P's interest is $2,400 he will recover that amount, with interest.[195]

(4) P has his house and furniture insured by D against loss by fire not to exceed the sum of $1,300. The property is worth more than this, and is injured by fire to the amount of $1,300. On refusal of D to settle, what is the measure of P's damages? $1,300. There is no deduction because the property is not totally destroyed, so long as the value of the loss does not exceed the amount of the policy.[196]

(5) D issues to P a fire insurance policy for $800 on his dwelling house, "to make good all loss or damage not to exceed the sum insured." payment to be made after proofs. If D refuses to settle after loss and proofs, what is the measure of damages? Not the sum insured, but the actual value of the loss, for this is an open policy.[197]

[193] Vorse v. Jersey Plate Glass Ins. Co., 119 Iowa, 555, 93 N. W. 569; Ermentrout v. Girard Fire & Marine Ins. Co., 63 Minn. 305, 65 N. W. 635.

[194] Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 33 N. E. 690; Scripture v. Lowell Mut. Fire Ins. Co., 64 Mass. (10 Cush.) 356.

[195] Washington Mills Mfg. Co. v. Weymouth & B. Mut. Fire Ins. Co., 135 Mass. 503.

[196] Underhill v. Agawan Mut. Fire Ins. Co., 60 Mass. (6 Cush.) 440.

[197] Farmers' Ins. Co. v. Butler, 38 Ohio St. 128.

(6) D issues a policy of insurance for the amount of three thousand pounds on P's ship, valued in the policy at seventeen thousand five hundred pounds. There is a total loss. If D is guilty of a breach of contract, what is the measure of damages? The amount of the policy. This is a valued policy.[198]

(7) A life insurance policy, issued by D to P, is payable ninety days after receipt of proofs of loss. P asks for forms to make out proofs of loss, but is informed by D that it refuses to recognize any liability. Is P entitled to interest on the amount due? Yes, on the face of the policy from a day ninety days after the communication of the refusal of payment.[199]

(8) A decree is granted directing an assessment to be ordered by D, a life insurance association, for the payment of a claim of P. Is a judgment held by D against P to be allowed as a set-off against the amount realized from the assessment ordered? Yes.[200]

§ 37. The substantial damages for breach of a contract of lease are the difference between the rent to be paid and the actual rental value of the premises at the time of the breach, for the balance of the term, with legal interest on that sum from the time of breach, together with the value of the loss of time caused thereby and expenditures incurred in part performance or reliance upon the contract and any other pecuniary injuries, if within the contemplation of the parties.

The measure of damages in cases of breaches of leases is practically the same rule that applies in cases of breaches of contracts to convey or purchase. Here, again, there is a difference between the English holding and that of most American cases. The proper way to regard a suit for a breach of a contract of lease is that compensation should be allowed for the injury thus caused. Some courts maintain that there can be no such action, that either the contract is rescinded or kept alive, and that in the latter case the lessor is entitled to recover the amount of rent promised but any one pursuing this path of thought soon finds him-

[198] Irving v. Manning, 1 H. L. Cas. 287.

[199] Unsell v. Hartford L. & A. Ins. Co., 32 Fed. 443; Phoenix Ins. Co. v. Public Parks Amusement Co., 63 Ark. 187, 37 S. W. 959.

[200] Pray v. Life Indemnity & Sec. Co., 104 Iowa, 114, 73 N. W. 485.

self lost in labyrinthine mazes of confusion. Treating the wrongful act of either party as a breach and allowing compensation therefor, the difference between the rent to be paid and the actual rental value ordinarily affords indemnity for all injuries. If the rental value exactly equals the rent promised, neither party sustains any actual injury, and only nominal damages are recoverable; but, if the rental value is below the contract price, the lessor, if the lessee is in default, can recover actual damages, and if the rental value is above the contract price the lessee can recover actual damages, if the lessor is in default. As this sum is determinable at the time of breach, interest is allowed on that sum from the time of breach. Other injuries may also be sustained. The lessee may suffer loss of time in waiting to go into the occupancy of the premises, or either party may incur expenditures in part performance, and if these are within the contemplation of the parties at the time of making the contract as the probable result of a breach, and are specially pleaded, compensation is recoverable therefor. Entire damages are recoverable, as the wrongful act of the defendant is of such a nature as to constitute an entire breach of the contract and the future damage can be ascertained with certainty, though the consequence is continuing. If the premises remain vacant through no fault of the lessor, he can recover the rent reserved for the unexpired portion of the term.

The question of specific performance does not belong to this discussion, and the measure of damages for breaches of covenants will be considered later. Where there is an actual eviction of the tenant by a landlord, other elements of injury may be considered in the estimation of damages. Physical pain, mental suffering, injury to goods, loss of crops, and loss of profits, where it appears with reasonable certainty that they are the result of the lessor's wrongful act, may under such circumstances become elements of injury.

ILLUSTRATIONS.

(1) D enters into a written agreement with P to rent the C hotel to P for the term of six years for the rental of $2,000 a year. A few days

before the time set for the commencement of the lease P goes to the town in which the hotel is located and takes with him a young man who is engaged to act as clerk, with the knowledge of D. D breaks his contract. What is the measure of damages? The difference between the rent to be paid and the actual rental value of the premises, plus the value of the loss of time and expenditures incurred.[201]

(2) A lessee repudiates his lease and thereafter the lessor makes every effort to rent the property to other tenants but without success. In a suit for breach, what is the measure of damages? The difference between the rent agreed upon and the actual rental value for the balance of the term, which is nothing. Hence the full rental price is recoverable.[202]

(3) D agrees to make and makes a lease to P for ten years of certain lands on which to plant and cultivate a peach orchard. After P has been in possession two years and planted the peach trees, D evicts him. Is P entitled to recover for the probable profits from the orchard? No. These are too uncertain and speculative.[203]

(4) P leases certain real estate to D for a specified period of five years for an annual rental of $3,000. D abandons the contract and refuses to carry it out; and after giving D notice P puts the lease up at public auction, and himself as the highest bidder bids it in for $1,450 per annum. What is the measure of P's damages? The difference between what he is to receive under the violated contract and what he does receive from the sale, or $1,550 per annum. The amount received at a public or private sale fairly made after due notice is prima facie the true value.[204]

(5) D contracts to lease premises to P knowing that P intends to occupy them as a drug store. P has fixtures made, and also purchases a stock of perishable goods. D breaks his contract, and P has to sell his fixtures and goods at a loss. What is the measure of damages? The difference between the rent reserved and the actual rental value of the premises for the term, and also the value of the loss on the fixtures. The loss on the goods is not an element of injury, for it could not have been anticipated.[205]

[201] Hall v. Horton, 79 Iowa, 352, 44 N. W. 569; Alexander v Bishop, 59 Iowa, 572, 13 N. W. 714; Cleveland, etc., R. Co. v. Mitchell, 84 Ill. App. 206; North Chicago, etc., R. Co. v. Le Grand Co., 95 Ill. App. 435; Kellogg v. Malick, 125 Wis. 239, 103 N. W. 1116. Contra, Gas Light & Coke Co. v. Towse, 35 Ch. Div. 519, 543.

[202] Minneapolis Baseball Co. v. City Bank, 74 Minn. 98, 76 N. W. 1024.

[203] Rhodes v. Baird, 16 Ohio St. 573.

[204] James v. Kibler's Adm'r, 94 Va. 165, 20 S. E. 417; Scheelky v. Koch, 119 N. C. 30, 25 S. E. 713.

[205] Friedland v. Myers, 139 N. Y. 432, 34 N. E. 1055.

(6) P, who is in business, for the purpose of continuing the same business, of which fact D has notice, leases premises from D, who covenants to give possession on a certain date, but is unable to do so on that date, because another tenant is lawfully in possession. P has paid down $41, and has placed in the store some goods which he has to remove at an expense of $14, and has lost trade because unable to find another store. The rental value is also worth $200 more than the price he is to pay for the premises. What is P's measure of damages? The value of the money paid down, the expense of moving, the difference between the agreed rent and the rental value, and the loss of profits, with legal interest.[206]

(7) D leases premises from P, and covenants to surrender them in as good condition at the end of the term as they are in in the beginning, but when he leaves he removes some of the fixtures. What is P's measure of damages? The sum which will put the premises in the condition in which D is bound to leave them, allowing for reasonable use and wear.[207]

§ 38. The substantial damages for breach of a contract to loan money are the difference between the contract rate and the legal rate of interest, provided the contract rate is one allowed by law, unless the contract of loan is made for some special purpose known to both parties, when the value of the loss of time, loss of bargain, or of expenses, is recoverable.

On a contract for the mere payment of money the substantial damages are the unpaid principal with the stipulated interest, up to maturity, and after maturity the legal rate of interest, unless the obligation to pay money relates to some special object, other than the discharge of the debt, known to both parties, when the value of the loss of time, loss of reputation, loss of bargain, or of expenses, is recoverable.

Failure to make a loan or to pay money may embarrass a prospective borrower, or a creditor, and he may suffer losses for which interest is a very inadequate compensa-

[206] Poposkey v. Munkwitz, 68 Wis. 322, 32 N. W. 35; Cohn v. Norton, 57 Conn. 480, 18 Atl. 595.

[207] Watriss v. First Nat. Bk., 130 Mass. 343.

tion, but such losses are remote unless the contract is made with special reference to them. In legal contemplation money is always in the market and procurable at the legal rate of interest, and just as a vendee is limited to the market value of a commodity which is the subject of contract, so the creditor and prospective borrower are limited respectively to principal and interest, and interest. The difference in damage for the breach of a contract for the sale, or purchase, of merchandise, and the breach of one to advance, or repay, money loaned, is indistinguishable. The lending of money is as much of a business as the selling of goods. Generally the amount of damages that can be recovered for breach of a contract to sell goods at a certain time, place and price, is the difference between the contract price and the market value at the time and place of delivery, because this enables the purchaser to make himself whole by going into the market and supplying himself. But, if for any reason he cannot do this, the reason for the rule ceases. Under no circumstances is a person entitled to recover damages from another for injuries which with reasonable exertion and trifling expense he might avoid. The rate of interest is fixed by law; a lender cannot charge more than the rate thus allowed, and generally contracts bear the legal rate of interest. But as the least damages one can recover for a clear violation of a legal right are nominal damages, nominal damages are recoverable though there is no difference between the contract and the legal rates. If the contract rate is less than the legal rate, in case of breach of a contract to loan, there arises a possibility of recovering substantial damages. These, however, must be only the direct damages, the difference between the contract and legal rates if the borrower sues, and the principal and legal interest if the creditor, unless the contract is made for some special purpose, when damages are recoverable for the losses occasioned from the failure to accomplish the special purpose, if they are specially pleaded. If a promise is to pay in property, instead of money, the measure of damages is the market value at the time and place of delivery. Consequential damages are almost invariably excluded in the case of a breach of a contract either to loan or to pay money, not

because in such a case damages are not recoverable for all injuries that may reasonably be supposed to have been within the contemplation of the parties as the probable result of a breach, but because it is ordinarily impossible for the parties to contemplate any other injuries to be caused by a breach than the loss of the use of the money promised, or the loss of the money and the use of it, as the case may be.

Commercial paper comes within the general rules herein announced, and for breach of contract the measure of damages is the face of the note or bill, that is, the sum promised or ordered with the agreed interest up to the time of breach, and legal interest from the time of breach. A bona fide holder of commercial paper is protected against equitable defenses and can recover when the payee might be unable to recover.

The rule above announced, as to the amount of interest recoverable as damages on overdue contracts, is the majority holding. For a further discussion of this question, see section 28.

ILLUSTRATIONS.

(1) D agrees to pay P on a certain date $4,000 in gold with interest. What is the measure of P's damages on failure of D to pay when due? The amount of money agreed to be paid and legal interest from that time. But, if the agreement is to pay or deliver a certain quantity and quality of a commodity, upon failure to perform the promisee is entitled to recover the market value of the article at the time and place of delivery.[208]

(2) P, a saloonkeepr, having a chattel mortgage of $600 on his fixtures, contracts with D to borrow $700, $100 cash and $600 to be paid the first mortgagee, and P executes and delivers to D a chattel mortgage for $700. D fails to pay off the $600 mortgage and it is foreclosed and the property sold. The value of the property is $1,080, and the expense of foreclosure which P has promised to pay in the first mortgage is $50. What is the measure of damages for breach of the second contract by D? $430; the difference between the value of the property and the incumbrance upon it with the expense; but, if the borrower has notice of the refusal to loan in time to procure the money elsewhere, there is no recovery of substantial damages.[209]

[208] Murray v. Gale, 52 Barb. (N. Y.) 427; Mason v. Callender, 2 Minn. 350; Phillips v. Ocmulgee Mills, 55 Ga. 633.

[209] Doushkess v. Burger Brew. Co., 20 App. Div. 375, 47 N. Y. Supp. 312; Lowe v. Turpie, 147 Ind. 652, 44 N. E. 25, 47 N. E. 150.

(3) D promises to loan P $50,000, to be repaid on demand, and then breaks his contract. P desires the money for a corporation, and because he does not get it gives $300,000 worth of stock as a bonus to make another loan. What is P entitled to recover? Nominal damages. There can be no direct substantial damages in the case here set forth, for the lender could compel the repayment of the money forthwith, and there can be no consequential damages, for the loss of the stock is not anything that D had any reason to anticipate at the time he entered into the contract.[210]

(4) D promises to loan P $500 for the term of five years on ten per cent interest, but breaks his contract. As a consequence P loses the purchase of a farm at the price of $550. P claims the farm is worth $2,500. Is he entitled to recover for the loss of this purchase? No. In order to obtain such a recovery P would have to show that he has a binding contract for purchase, that D knows this fact at the time of his promise, and with such knowledge agrees to loan the money to buy the farm, that there is a breach, and that by reason of such breach P loses the trade.[211]

(5) A bank in which D has a standing deposit refuses payment of checks on four different occasions. The checks are dishonored and protested, and in addition D's credit is impaired and he sustains mental anxiety and injury to his feelings. What is the measure of damages in a tort action by D against the bank? As this is an action in tort, injury to the feelings and mental suffering and malice are all elements of injury; but, in any event, D is entitled to damages for his actual money loss, which would include expenses paid because of the protest and the value of the loss of credit.[212]

(6) There is a breach of an agreement to loan money to the owner of land to redeem it from a mortgage. Only nominal damages are recoverable, as the actual loss is too remote.[213]

§ 39. The substantial damages for breach by either the purchaser or seller of a contract to sell personal property are the difference between the contract price and the value of the property to be sold, or, if it has no value, the cost of producing it, at the time and place of delivery, with legal interest from that time, together with the net value of such losses

[210] Kelly v. Fahrney (C. C. A.) 97 Fed. 176.

[211] Equitable Mortg. Co. v. Thorn (Tex. Civ. App.) 26 S. W. 276.

[212] Davis v. Standard Nat. Bank, 50 App. Div. 210, 63 N. Y. Supp. 764.

[213] Thorp v. Bradley, 75 Iowa, 50, 39 N. W. 177.

of bargain, profits and expenses as are within the contemplation of the parties at the time of the contract as the probable result of a breach.

The substantial damages of the seller in an actual sale, and when the promise of payment by the buyer is independent, are the contract price, or, if there is no contract price, the reasonable value of the thing sold, with legal interest from the time of default and the value of any other pecuniary injuries contemplated by both parties.

In an actual sale the title has passed. The buyer is the owner of the thing sold, and the seller is therefore entitled to the exact amount the buyer has promised to pay for it, just as much as though the buyer had borrowed that amount of money from the seller. If the contract is a sale at the time the same is made, the buyer's obligation to pay the full contract price comes into existence at once. If in the beginning the contract is a contract to sell, the buyer's obligation comes into existence as soon as all promissory and casual conditions precedent are performed or happen. So, if the buyer, upon sufficient legal consideration, makes an absolute promise to pay the purchase price on a fixed date, the seller has a right to the same on that date, irrespective of whether the title has yet passed or not, and the buyer must seek independent redress when the time for performance on the part of the seller arrives. But, except where there is an independent promise, when the title has not passed the injury to either party is primarily only the loss of the bargain, and the measure of damages for this is the difference between the contract price and the value of the thing to be sold. If the value exceeds the contract price, the buyer has the advantage of the bargain, but if the contract price exceeds the value, the seller has the advantage of the bargain. Value, as has already been learned, ordinarily conforms to market price, but some articles do not have a market price, and then some other criterion must be found by which to determine the value. For this purpose the price for which it has been resold is one guide, but perhaps the best guide is the cost of producing the article, allowing the person in-

jured to recover the difference between the cost of production and contract price. If the article is bought and sold in the market, the market price shows what it would cost to put the plaintiff in as good a position as he would have been if the contract had been performed. The damages here referred to are direct damages. not consequential.

Suppose that, instead of a contract to purchase chattels, a person promises to pay a certain sum of money for labor to be performed by another and materials to be furnished, it being the purpose of the parties to have the contract ultimately result in the sale of a chattel. What is the measure of damages? Not the stipulated price, less what the laborer might have earned elsewhere in case of breach before full performance, as in the breach of the ordinary contract for services, though this is a contract for labor, for the laborer has added value to materials, which are his own, and which he still has in his possession, and which he may be able to sell to another for more than the first price. Calling it a case where one has hired another to work for him does not change the fact. Not the difference between the contract price and the value of the chattels, for they may be of more value than the contract price and yet the cost of production may be less than the contract price. Some courts have held that the best way to solve this difficulty is to permit the seller, or manufacturer, by tendering the goods in conformity with the contract, to pass the title to the buyer, and then to permit him to recover the contract price, but this is done at the expense of well established principles of law as to the passing of title in sales. The better rule is one which allows the seller to recover the difference between what it will cost him to make and deliver the articles and the contract price, if greater than the cost, plus the difference between the value of the manufactured, or partly manufactured, articles, and the cost of the labor and materials bestowed upon them at the time of the breach, if greater than the cost of the manufactured articles. Under such circumstances, if the value of the articles in the sellers' possession is greater than the cost of making, all that he recovers is the loss of profits; but, if the articles

in his possession have no value, he recovers not only for the profits lost, but for all the expenses for labor and materials which he has incurred because of the contract. If the contract is broken before any materials are bought or labor bestowed, the measure of damages is simply the difference between the cost to make and deliver the articles, and the contract price, if greater than the cost. This rule of damages not only has the advantage of simplicity; it is an application of the general rule and affords just what the law of damages always endeavors to afford, indemnity for legal injury. The chattels are left in the seller's hands at their value, not to exceed the cost of production. But the buyer is compelled to pay the seller for every injury he has sustained. If the seller has sustained no injury, other than the mere breach of contract, he is paid only nominal damages; if he has lost profits, he is paid for them; if he has sustained a loss from materials bought or used and labor bestowed, he is paid for them. But there is no artificial appropriation of the chattels to the contract so as to pass the title, when in reality something is yet needed to pass the title, the consent of the buyer. There is no drawing of a fine distinction as to whether the contract is a sale, under the statute of frauds, or a contract for work, labor and materials, according to the English rule, or New York rule, or Massachusetts rule. So far as the injury to the seller, or laborer, is concerned, his injury is just the same, whether the contract is regarded as a contract to sell chattels or a contract for work, labor and materials, and under the rule here contended for he receives compensation for all his injuries. If the purchaser breaks his contract before all the labor is performed by the seller, the latter has no right to increase the damages the other will be liable to pay by continuing performance. His injuries are measured at that time so far as expenses are concerned, and any profits he may make on these same materials must be deducted by way of substitution from the profits the seller is entitled to recover from the buyer.

When the title to goods sold has passed from the seller to the buyer, but the seller still has the possession of the

goods, in case of breach of contract, the seller is not limited to a suit for the contract price. He may sue for the contract price and keep the goods for the buyer, or he may sell the goods and sue the buyer for the difference between the price thus received and the contract price, or he may elect to keep the goods as his own at their market value, that is, the value which has become fixed by the sales of other property of the same kind, and recover from the buyer the difference between the market value and the contract price. So, when the title has passed, but the seller wrongfully refuses to deliver the goods, the buyer may not only sue for his loss of bargain and consequential injuries, if any, but he may at his election sue the seller in conversion and recover the value of the goods. If he has not paid for the goods, the contract price should be deducted.

In order to make consequential damages recoverable for either party, it must be shown that the losses sustained by the breach of contract are within the contemplation of the parties at the time of making the contract as a probable result of a breach of it. Thus, a man who promises to sell a thing, if informed at the time by the buyer that the buyer has a chance to resell to a third party at a special price, will be liable for the amount which the second contract price exceeds the first, though greater than the difference between the first contract price and the value of the thing, if the loss of the second contract cannot be avoided, and is specially pleaded.

A cause of action accrues only upon default. One party must be guilty of a legal wrong before the other has any remedial right. The contract must be broken. Ordinarily this can occur only when the time for performance by at least one party has arrived, and he fails or refuses to perform but it may take place in advance of performance by an anticipatory breach where a party renounces the obligation of his contract and the other elects to treat it as a breach of contract. When the promises of the parties are concurrent conditions, a tender on the part of one party is necessary to put the other in default, unless a tender is excused. When performance is to take place in instalments, a failure

to pay or discharge one instalment amounts to a breach of the whole contract, if the other party so elects and he may recover entire damages. When credit is given, the time for performance is at the expiration of the term of credit. When a note is given, the date of maturity is the date of performance, and the time when a breach can occur.

The destruction of the goods which are sold, or to be sold, does not affect the question of damages for breach of contract, for loss follows title. If the title has passed, the seller may sue and recover the contract price in any event, and if the goods have been destroyed since the time of the passing of title, it is the loss of the buyer. If the title has not passed, the destruction of the goods adds nothing to the amount which the seller can recover for breach of the contract of purchase.

ILLUSTRATIONS.

(1) P agrees to buy $3,000 worth of lumber of D, agreeing to pay the $3,000 on a fixed date and D agreeing to deliver the lumber at a certain time and place. P pays the $3,000, and subsequently resells the lumber at $1,000 profit, but D refuses to deliver the lumber. P has no other market in which to buy lumber. What is the measure of damages? The money paid, $3,000, and interest, and the difference between the contract price and value, which in the absence of other evidence is taken to be $1,000, as there is no market price. These damages are recovered as direct damages. The profits of the resale are not recovered as profits, which must be within the contemplation of the parties, but as evidence of the value of the lumber.[214]

(2) D promises to knit for P some 12,000 dozen undergarments and deliver them at various times before a certain date. The promise is contained in a letter accepting an offer contained in several orders. At the time P has bargained to sell some of the goods to other parties at a profit above the market price and notifies D of this fact, and subsequently P sells the rest of the goods to other parties. D breaks his contract. What is the measure of damages? On all resales within the contemplation of the parties, the difference between the two contract prices; on all others, the difference between the contract price and market value, or, if none, the value to P.[215]

[214] Trigg v. Clay, 88 Va. 330, 13 S. E. 434.

[215] Jordan v. Patterson, 67 Conn. 473, 35 Atl. 521.

(3) D promises to supply large quantities of lumber to P, to be delivered by vessel, and as each cargo is received the buyer to give acceptances payable in ninety days. After the delivery of one cargo D refuses to deliver any more according to the contract, but offers to supply all the lumber required to complete the bill at a reduction of fifty cents a thousand feet for cash. P stands by his original contract. What is the measure of his damages? Nominal damages. There is a breach of contract but no actual injury, as P could have bought the same goods for the same price and the fifty cents reduction equalizes the interest for ninety days, and no special damages are recoverable for injuries sustained by reason of inability to pay cash as the injuries are not alleged. This is not a case where D could keep on breaking his contract indefinitely.[216]

(4) P sues D to recover for goods sold and delivered, and D sets up a counterclaim for damages for the breach of the contract of sale. The goods are hotel furniture. P contracts to deliver goods of a particular kind especially adapted for this hotel before the 15th of September, but delivers none until the 30th, some more on the 19th of October, some more on the 5th of November, and the balance on the 15th of December. D has customers for these rooms, but cannot rent them because unfurnished. P knows of the purpose for which the furniture is to be used. The rental value is seventy-five cents a day. If these facts are specially pleaded, is D entitled to recover for the rental value of his rooms while unoccupied? Yes. It is a loss contemplated by the parties at the time of making the contract, and it is not one D could have avoided.[217]

(5) P sues D for breach of contract to deliver two thousand shares of capital stock of a certain company. The stock neither has a market value nor an actual value. To what damages is P entitled? Nominal only, as the question of damages is one of indemnity.[218]

(6) P agrees to sell D a soda fountain to be paid for in a sight draft and notes, title to remain in P until the notes are paid. D breaks the contract. Is P entitled to recover the contract price? No. The difference between the market value at the time and place of delivery and the contract price.[219]

(7) P agrees to sell D a manikin for $35, which D agrees to pay, $10 when the manikin is delivered at the express office and the rest in specified monthly payments, on failure to pay any instalment all to become due. After the manikin is delivered at the express office D re-

[216] Bovee's Adm'rs v. Porter, 22 U. S. App. 483.

[217] Berkey & Gay Furniture Co. v. Hascall, 123 Ind. 502, 24 N. E. 336.

[218] Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760.

[219] Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172.

fuses to receive it. Is P entitled to recover the price? Yes. If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so. The delivery fixes the right of P to the price.[220]

(8) D orders P to make an engine, to be paid for when taken out of the shop. P proceeds to make the engine, but before he finishes it D countermands the order. Is P entitled to recover in quantum meruit for his labor? No. The labor was upon his own materials increasing their value and he still owns them. He must sue on the special contract, and his damages will at least be the difference between the cost of producing the engine, and the contract price.[221]

(9) P agrees to sell D 100,000 bushels of No. 2 barley at one dollar twenty cents a bushel, to be delivered at such time in January as P shall elect, and P elects the 12th of January and tenders the receipts for the barley, but D refuses to take them. The next day after the contract is made D notifies P that he will not comply with its terms. Does this notice impose any obligation on P? No. The buyer cannot create a breach of contract in advance of time for performance unless the seller chooses to so treat his act. It is only after breach that the party entitled to damages must do everything he can to mitigate the damages. While the contract subsists the parties can only be required to do what its terms require. Therefore P is entitled to the difference between the contract price and value at the time and place of delivery.[222]

(10) D contracts to purchase 6,000 tons of steel rails from P, to be drilled according to directions to be furnished by D, rolled according to pattern, and to be paid for $58 a ton cash on delivery. P buys the material necessary to make the rails, but D fails to furnish the drilling directions and refuses to go on with the contract unless P will sell on credit. It would have cost P $50 a ton to have manufactured and delivered the rails, giving him a profit of $48,000. He manufactures 4,000 tons of rails from these materials for $54.60 per ton, but only at a profit of $1.60 per ton, or a total profit of $6,400. What is the amount of P's damages? $41,600. The difference between the cost of doing the work and the price to be paid for it, as the materials manufactured are worth more than the cost of production.[223]

(11) D promises to sell and deliver certain marketable goods in certain quantities at specified times to P, but before the day for per-

[220] White v. Solomon, 164 Mass. 516, 42 N. E. 104.

[221] Hosmer v. Wilson, 7 Mich. 294. Contra, Shawhan v. Van Nest, 25 Ohio St. 490.

[222] Kadish v. Young, 108 Ill. 170.

[223] Hinckley v. Pittsburg Bessemer Steel Co., 121 U. S. 264, 30 Law. Ed. 967; Todd v. Gamble, 148 N. Y. 382, 42 N. E. 982; Roehm v. Horst, 178 U. S. 7, 44 Law. Ed. 953; Kingman & Co. v. Western Mfg. Co., 34 C. C. A. 489, 92 Fed. 486.

formance arrives D declares that he will not perform his contract, and P elects to treat it as a breach and brings his action. What is the measure of damages? The difference between the contract price and the market price at the several days specified for performance, not the time of breach, leaving to D the right to show any circumstances which will entitle him to a reduction. P does not need to treat the contract as broken until the time for performance unless he so chooses. D does not have a right to have P make other contracts in order to mitigate the damages on this.[224]

(12) P contracts with D to furnish all the marble required for building the city hall in New York City, estimated to be 88,819', it being understood that it will require five years to complete the building. At the end of a year and a half, when P has delivered and been paid for 14,779', D suspends operations and refuses to receive any more materials. P has made a subcontract with K to furnish this marble for him, and at the time of breach K has on hand 3,308'. What is the measure of damages? For the 3,308' the difference between the contract price and the cost of producing the materials, plus the difference between the cost of producing them and their value at the place of delivery (if less than the cost of production); and for the loss of profits from the rest of the contract, the difference between the cost of producing the marble at the time of breach and place of delivery and the contract price, if greater than the cost. These profits are the immediate fruits of the contract, and therefore cannot possibly be too uncertain. The subcontract with K has nothing to do with the measure of these damages.[225]

(13) P sues D for damages for breach of contract to accept a cargo of maize at an agreed price. The price of maize has been constantly falling. At the time D repudiates the contract the difference between the market value and the contract price is 860 pounds; at the time P accepts the repudiation 1,557 pounds; at the time the cargo arrives and is actually resold 3,807 pounds. What is the rule as to damages? The difference at the time the repudiation is accepted, having regard to the future day of delivery, but P must act reasonably to avoid losses.[226]

[224] Roper v. Johnson, L. R. 8 C. P. 167; Brown v. Muller, L. R. 7 Exch. 319.

[225] Masterton v. Brooklyn, 7 Hill (N. Y.) 62.

[226] Roth & Co. v. Taysen, T. & Co., 73 Law T. (N. S.) 628; Roehm v. Horst, 178 U. S. 1, 44 Law. Ed. 953.

CHAPTER IX.

PRINCIPAL CONTRACTS AFFECTING PERSON.

§ 40. The substantial damages for breach by a principal of a contract of agency are the contract price, if one (less payments received and what the agent might thereby reasonably earn in like employment for another, where the contract is broken before its termination), or, if there is no contract price, the reasonable value of services rendered, and reimbursement for all moneys paid and liabilities incurred within the agent's authority, and the value of such profits lost as are certain and within the contemplation of the parties, together with legal interest.

The substantial damages for breach by an agent of his contract of employment are the value of the increased expense of performance of the contract, and all the advantages gained by the agent, whether in performance or violation of duty, and such loss of profits and expenses incurred as are within the contemplation of the parties, together with legal interest from the time of default.

In a contract of employment of this sort the agent is an employe, and therefore is entitled to compensation, and the loss of this constitutes his principal element of injury in any breach of contract. But the agent is acting for his principal, and if while so acting he incurs any expenses or liabilities on behalf of his principal, there is an obligation resting on the principal, by contract or implication of law, to indemnify the agent, and this may be another element of injury, but it is one caused by performance of the contract, not by breach of it. It is unusual to have any elements of injury for which consequential damages are recoverable, but this sometimes occurs, as will be seen in the illustrations given hereafter. The agent is entitled to nominal damages for breach of his contract of agency if there are no actual losses. The principal is entitled to at least nominal damages for any breach of contract, and also to substantial damages for any actual losses which he may sustain. The principal is entitled to all advantages gained by the agent, whether in performance or violation of his duty, because the relationship between the principal and agent is fiduciary and the agent holds anything which comes into his hands as a trustee for the principal, but these losses should be specially pleaded. Consequential damages may also sometimes be recovered by the principal if specially pleaded, but it is rare that there is any injury calling for such damages. Exemplary damages are not allowed, either for principal or agent, in a contract action.

It seems appropriate to treat of the rules of agency in connection with the rules of damages peculiar to contracts, because the relation of agency is created by contract, but the relation gives rise to as many tort actions as it does contract actions, and even when the action is in contract it is likely to be an action quasi ex contractu, as where an agent sues to recover the reasonable value of his services. A multitude of different actions may be brought because of some breach of duty in connection with agency. The principal may sue the agent for breach of some duty resting upon him as agent, either by law or by contract. In such case, whether the suit is in tort or in contract, the question is, what are the elements of injury, after it is determined that the

agent has violated his contract or committed a tort. The agent, or the principal, may sue a third party, or a third party may sue the agent, or principal, but, then, the measure of damages varies with the contract that is broken, or the tort that is inflicted, and the rules do not differ from those we have considered and shall consider elsewhere as governing those wrongs. An agent is frequently sued for breach of his implied warranty of authority, which is another action in the nature of quasi contract. When the agent sues his principal for damages for injuries incurred in performing the duties intrusted to him, the measure of damages is as announced in the propostion.

When the agent's compensation is not fixed by contract, in determining the reasonable value of services rendered the jury may take into consideration the agent's skill and experience, the nature of the services, the responsibility, the customary price for such services and expert testimony. For serving beyond the stipulated time when the compensation during that time is fixed by contract, the compensation thereafter is the original rate. For additional duties, when working for an agreed price, there is no extra pay. An agent is entitled to recover nothing for an illegal act, or if the losses are caused by his own negligence, or misconduct, or by an anauthorized transaction.

An agent is not liable for interest unless he is guilty of default.

ILLUSTRATIONS.

(1) B contracts to act as agent for M for the sale of reapers and mowers, and by the terms of the contract the compensation which he is to receive for services rendered is ten per cent of the amount actually collected by him on sales made, nothing to be allowed where a purchaser fails to pay more than $65. The right to rescind the authority is reserved, in which case the agent is to be paid in proportion. M terminates B's agency. Is B entitled to recover the reasonable value of the services actually performed? No. He is bound by the contract price, and when he fails to introduce evidence to show to how much he is entitled under the contract only nominal damages are recoverable.[227]

[227] McCormick v. Bush, 47 Tex. 191; 1 A. & E. Enc. 1105-1106.

(2) P contracts to enter the service of D to superintend the mason work of a mill, the amount of his compensation to be left entirely to D's determination after the services are performed. After the services are performed D, in good faith, determines that the services are worth $2.50 per day. The services are reasonably worth $4 per day. Is P entitled to four dollars per day? No. In the absence of fraud, the amount fixed according to the special contract must govern. However, some courts hold that the party in whom is vested the power of determining the amount of compensation must determine upon a reasonable sum, and this should be the construction unless the contract is absolute.[228]

(3) J teaches school for a school district without a contract as to the amount of his compensation. What is the measure of his damages? The reasonable value of the services performed.[229]

(4) A husband, without any special contract, manages his wife's estate. Is he entitled to reasonable compensation for his services within the agency? Yes.[230]

(5) A, in his own name but at the request of B, contracts for B to charter a vessel to M for a certain use. B fails to put the vessel at M's disposal, and without waiting to be sued A pays M as damages a sum in excess of the actual loss caused by the breach of contract. Can A recover this sum from B? No. But he can recover an amount equal to the damage actually sustained by M by the breach of contract, as A is absolutely liable to M. If M had sued A and B had had notice to defend, then the amount of the judgment could be recovered.[231]

(6) A has a contract with P whereby A has the exclusive right to sell within certain territory for a certain commission goods manufactured by P. P sells goods directly to some persons within this territory. Is A entitled to recover the profits which he might have made by making these sales himself? Yes. Prima facie the profits are the difference between what A would have to pay for the goods and what the third persons pay P. So, if P should fail to deliver to A any goods which A had contracted to sell and deliver, A would be entitled to the difference between the price for which P agrees to sell to A and the market value of the goods at the time and place of delivery.[232]

(7) A, a real estate agent, has a written contract with P to sell certain lands at a given price within a time limited, to receive no compensation for advertising, services, etc., except a share of the profits arising from the sale. He renders services for several months and

[228] Butler v. Winona Mill Co., 28 Minn. 205, 9 N. W. 697. See Millar v. Cuddy, 43 Mich. 273, 5 N. W. 316.

[229] Jones v. School Dist. No. 47, 8 Kan. 362.

[230] Patten v. Patten, 75 Ill. 446.

[231] Saveland v. Green, 36 Wis. 612.

[232] Russell v. Horn, 41 Neb. 567, 59 N. W. 901.

spends money in preparing to sell the lands, but then P revokes the contract of employment. Is A entitled to recover anything as compensation? Yes, an amount equal to his share of the profits had the lands been sold.[233]

(8) P, a coal company, enters into a contract with A to have A sell its coal. A breaks the contract. P procures another agent at some cost, and at added expense sells some coal itself. What is P's measure of damages? Primarily these expenses; though, if P cannot make as good a contract with the second agent as the first, the loss of profits may also be an element of injury.[234]

§ 41. The substantial damages of the bailor of a thing for use, or, of the bailee for the care and custody of a thing, or for work and labor on a thing, for breach of a contract to create such bailment are the contract price less what the plaintiff might thereby reasonably earn by other like contracts during the period of the contract, plus any expenses incurred, with the value of profits lost and other pecuniary injuries that are within the contemplation of the parties, with legal interest.

The substantial damages of the bailor in contract for breach of a bailment of any of the above sorts are the difference between the value of the article in its damaged condition, and what it would have sold for undamaged at the time and place of delivery (with the agreed, or reasonable, value of its use where a thing is let for hire), with the value of other pecuniary injuries contemplated and legal interest from the termination of the bailment.

The substantial damages of the bailee in contract for breach of any of such bailments are the agreed compensation, or if none, the reasonable value of his service (with the value of injuries sustained by breach of implied warranty of reasonable fitness where a thing is let for hire), plus expenses incurred in the preservation of the thing bailed, and

[233] Durkee v. Gunn, 41 Kan. 496, 21 Pac. 637.

[234] Cannon Coal Co. v. Taggart, 1 Colo. App. 60, 27 Pac. 238; Rightmire v. Hirner, 188 Pa. 325, 41 Atl. 538.

the value of any other contemplated pecuniary injuries, with legal interest.

A bailee may recover in tort full value for any injury to the thing bailed from the wrong of a third party, holding in trust for the bailor the amount recovered in excess of his own interest; but for any permanent injury to the chattel bailed the bailor may anticipate such action and in his own name recover the value of the injury to his reversionary interest.

Most of the legal wrongs arising out of the bailment relationships are due to some form of negligence and are therefore torts, the actions for redress are ex delicto, and the measure of damages is that applicable to tort actions. The special applications to injuries of this sort of the rules of damages peculiar to tort actions will receive special treatment when we reach the consideration of the tort of negligence. But there are many cases where actions ex contractu are appropriate, both where the duty violated is one created by the common law, and where it is one created by special contract, and these rules will require some consideration. So far as the contract aspect of bailments is concerned, the familiar rule as to direct and consequential damages is the fundamental one which governs all the many cases which arise. This rule, however, is very general, and so far as possible it is desirable to make the rule more specific in specific cases. So far as direct damages are concerned, this is not so difficult, but so far as consequential damages are concerned, not much can be added to the general rule. The injuries caused by breaches of these contracts are all pecuniary, and consequently the measure of damages is always value, but in determining the value of immediate injuries the courts have now established certain further rules, and these are the rules announced in the propositions. In the bailments of mandate and deposit, the bailee is entitled to recover for all expenses incurred; otherwise, what is intended to be a gratuitous bailment would become a charge, but these expenses are not allowed as expenses caused by the breach. There is an antecedent right to these expenses

created by law, and if they are not paid a remedial right to a money equivalent arises immediately. In the other bailments the bailee is entitled to recover for only extraordinary expenses, and, of course, the remedial right is that much narrower. In all mutual benefit bailment contracts there may be a breach of contract either before the bailments begin or during the course of the bailments. In the first case there is only the loss of bargain, unless there are expenses incurred as a consequence of breach, or further profits from another contract lost, in which latter event recovery can be had only when the injuries are within the contemplation of both parties at the time of making the contract as a probable result of its breach and are specially pleaded. If the price is paid in advance, of course the same can be recovered. The measure of substantial damages of the bailee in a bailment of a thing for use, and of the bailor in the bailments for work and care of a thing, for breach of a contract to create a bailment, is like that of the parties named in the proposition, except that they recover the difference between the contract price and the market value of the subject-matter of the contract, and for this reason another proposition is not formulated. In the second case the bailor's injury is generally the loss of property from an injury to the chattel, while the bailee's injury is the loss of compensation for services and expenses incurred for the bailor. Consequential damages are also recoverable if consequential injuries were contemplated. The injuries being pecuniary, legal interest is recoverable from the time payment should have been made. The rule as to limitation of interest does not apply to bailees of chattels. The bailee sues the third party in tort but the ground for his suit is the bailment relation.

ILLUSTRATIONS.

(1) P deposits a quantity of leaf tobacco in D's warehouse subject to P's order. Eight months later it is delivered to P in a damaged condition. What is the measure of P's damages? The difference between what on the day delivered the tobacco would have brought upon the market if it had not been damaged, and what it would have brought in

its damaged condition. The element of injury is the loss of a right of property.[235]

(2) P leaves chattels in the possession of D under the expectation that D will purchase them. D uses them for many years but does not purchase them. Can P recover the value of the use of the chattels during the six years preceding suit? Yes. The law implies an obligation to pay for the use.[236]

(3) D hires of P a horse for a certain journey, but while on the journey the horse becomes lame without any fault on the part of the hirer, so that D is unable to drive it and is compelled to procure other means of getting home at some expense to himself. May D recover damages by way of recoupment against the demand of P for the hire of the horse? Yes.[237]

(4) P hires a horse for a day, and while driving it the animal meets with an accident through a defect in a highway, so that it is ruined and the town is liable to pay for the injuries. Is P entitled to recover from the town the full value of the horse? Yes. The possession is enough to give him this right.[238]

(5) P rents an engine to G. While G is running this engine it is injured in a collision between it and a street car of D, the collision being due to the negligence of both the motorman and the engineer. Is P entitled to recover against D the value of the injury to his reversionary interest in the engine? Yes, and this is so, though G has no right of action at all against D because of his contributory negligence, for G's negligence cannot be imputed to P.[239]

§ 42. The substantial damages for breach by a shipper of a contract to furnish goods for shipment are the contract price less the cost and expense of earning it, (less also the value of any profits that thereby may otherwise be earned during the time of the contract), with legal interest.

The substantial damages for breach by a carrier to receive and carry goods offered for shipment are

[235] Motley v. Southern Finishing & Warehouse Co., 122 N. C. 347, 30 S. E. 3.

[236] Rider v. Union India Rubber Co., 28 N. Y. 379.

[237] Harrington v. Snyder, 3 Barb. (N. Y.) 380; McCalla v. Clark, 55 Ga. 53.

[238] Littlefield v. Biddeford, 29 Me. 310; Armory v. Delamirie, 1 Strange, 505.

[239] New York, etc., R. Co. v. New Jersey, etc., R. Co., 60 N. J. Law, 338, 38 Atl. 828; Mears v. London & S. W. R. Co., 11 C. B. (N. S.) 850.

the difference between the value of the property at the place of shipment and at the destination, less the expense of shipment, with the value of such loss of profits and other pecuniary injuries as are within the contemplation of the parties, and legal interest.

The substantial damages of the carrier for the breach of a contract of carriage of goods are the agreed freight, or, if none, a reasonable freight and demurrage, if the goods are delivered at the point of destination, or pro rata if delivery at the destination is waived.

The substantial damages of the shipper for breach of a contract to deliver goods are the value of the goods at the time and place of delivery, and the value of the loss of any profits and other pecuniary injuries within the contemplation of the parties, and legal interest.

The substantial damages for breach of contract to carry without unreasonable delay are the difference in value of the goods at the time delivered and when they should have been delivered, with the value of any profits lost and other pecuniary injuries that are within the contemplation of the parties, and legal interest (and sometimes the value of the use).

The substantial damages for breach of a contract to carry a passenger are the value of money paid, and the extra expense of other transportation if reasonable, the value of time lost, and such loss of profits as are within the contemplation of the parties, with legal interest.

The rules given above state the measure of damages for breaches of contracts, but they are the rules applied in all contract actions, whether for breach of a duty created by special contract or created by the common law, unless the parties in their special contract liquidate their damages.

The common law, and sometimes statutes, impose many obligations upon public service companies, and a failure to perform these may be sued for as breaches of quasi contractual obligations, as well as in tort, and when the contract action is resorted to the general rules of damages applicable are those peculiar to contract actions. The wrongful act of the carrier generally is a violation of both a right in personam and a right in rem, and the party injured may elect to sue either in tort or in contract. If the rights in rem are violated, the wrongs are the torts of negligence, conversion, assault and battery, wrongful ejection; if the rights in personam, the wrongs are breaches of the obligation of contract or quasi contract. The wrongful acts of shipper and passenger are practically all breaches of contracts. Because of the different rules of damages applicable in the two kinds of actions, the distinction between them is important. In tort actions the rule of proximate cause applies; while in contract actions the rule governing the extent of liability is that the injuries must be within the contemplation of the parties at the time of contract as a probable result of its breach. Ordinarily greater damages may be recovered in a tort action than in a contract action, but sometimes in an action for the breach of a contract the damages are more remote and far reaching than those recoverable in a tort action. As an illustration of how a person injured may proceed, either upon contract or upon tort, take the case of an injury to goods, or a passenger, through the negligence of a carrier. If the injured person proceeds upon the contract, he alleges the negligent acts of the carrier as a breach of contract, but if he proceeds in tort, he makes the negligence of the company the ground of his right to recover, but in order to show his right to recover damages for negligence it will be necessary to show the relationship of bailment, or passenger and carrier. The right in rem is separate from the right in personam, but if there had never been a right in personam there would not be a right in rem. Sometimes it is difficult to determine whether an action set out for negligence is for a breach of contract or in tort, but as it obviously cannot be treated as both it may be well to suggest some test for deciding the difficulty. Though not altogether

satisfactory, the best test of this question is whether the gravamen of the action is the breach of the contract or the negligence.

As to the amount of damages recoverable, where there is a breach of contract by a shipper to furnish goods, it makes some difference whether there is a partial breach, or if total breach whether the goods amount to a full cargo or only a part. In case of failure to supply part of the goods promised, or all the goods if they are only part of a cargo, the carrier must make the trip anyway, and though it is his duty to mitigate the loss by substituting other goods, this may not be possible, and his injury may be greater than if he did not have to make the trip. Where a carrier wrongfully refuses to carry goods, but another carrier can be found for the same price, there is no actual damage and only nominal damages can be recovered. If another carrier can be employed, but only at a higher price, the difference in transportation charges will measure the damages, but at the present time, in the case of common carriers it is hard to conceive of this situation. If the shipper cannot ship at all, his damages are measured by the value of his loss of profits, the difference between the value of the goods at the place of breach and the place of destination, less the cost of transporting the goods to such place, and the loss of any other bargain within the contemplation of both parties as the probable result of breach, except as exemplary damages may be awarded. If during transportation the goods are not destroyed but only injured, the measure of damages is the difference in value between what the goods are worth at the time and place for delivery and what they would have been worth undamaged. It is not necessary that goods have a market value. If they do not have a market value the value to the owner is the criterion, the best evidence of which is the cost of production. Damages for physical pain and mental suffering are not recoverable in contract-actions of this sort. If physical pain and mental suffering are elements of injury, the suit should be in tort.

In general the liability of the carrier is the value of the delivery of the article at the time, place and condition in

which the article should have been delivered. This measures the direct damages, but there may be all sorts of consequential damages. For the latter, except that the injuries giving rise thereto must be specially pleaded, the measure of the damages cannot be made more specific than value.

For injuries to passengers the actions generally sound in tort, but there is no reason why the actions may not be in contract if the person injured so desires, and for wrongs, like deviating from the agreed route, or mode of conveyance, or accommodations, or time of delivery, the suit would necessarily have to be in contract, as the only right violated is the right created by the contract.

ILLUSTRATIONS.

(1) P contracts to carry for D, by vessel on the lakes, ten thousand tons of iron ore from one place to another, during a season, at a certain price. D fails to furnish all of the ore to be carried. What is P's measure of damages? What he would have earned as net profits if the remaining ore had been delivered, less what the vessel might earn in other employment during the remainder of the season.[240]

(2) P offers to a common carrier, D, for transportation, 100,000 bushels of oats, but D wrongfully refuses to transport the same. P has contracted to sell these oats to U for a special price, and notifies D of this fact. What is P's measure of damages? The difference between the value at the time and place offered for transportation and the value at the time and place of delivery, less freight that would be earned, and if the loss of profits from the contract with U cannot be avoided by P, D is also liable for these.[241]

(3) P, a common carrier, carries for D a cargo of corn at a certain rate per quarter. At the port of loading it measures 2,664 quarters and at the port of discharge 2,785. All the corn is delivered at the destination, but some of it is injured in transit. D refuses to pay freight. What is the measure of damages? The contract rate on the amount at the port of loading if all is carried through and delivered.[242]

(4) D contracts to ship by P's vessel 75,000 feet of lumber, but after loading, and before the vessel starts on its trip, D removes the lumber. This lumber does not form all of the cargo, so that P has to

[240] Bangor Furnace Co. v. Magill, 108 Ill. 656; Stone v. Woodruff, 28 Hun (N. Y.) 534.

[241] Cobb, B. & Co. v. I. C. R. R. Co., 38 Iowa, 601.

[242] Gibson v. Sturge, 10 Exch. 621

perform the voyage for other parties. What is P's measure of damages? The stipulated freight, less the freight for other chattels which might be substituted by reasonable diligence.[243]

(5) D ships goods over P's railway, without any stipulation as to the amount of freight to be paid. What is the measure of P's damages? The amount customarily paid for like services, or reasonable compensation.[244]

(6) D contracts to transport lumber from points in Canada to Boston for P, at a certain rate of freight for a period of twelve months. At the time of making the contract P notifies D that he desires to sell the lumber for ties to persons in Boston, and afterwards does sell them. D refuses to transport some of the lumber. What is P's measure of damages? The difference between the market price in Boston and the market price in Canada, less the price stipulated for transportation. Consequential damages are not allowed for the value of the loss of profits from the sales to parties in Boston because these contracts were not made at the time of the contract for transportation, and therefore could not have been contemplated.[245]

(7) A contractor, who is bound to pay as liquidated damages $10 a day for every day he fails to have certain pews in Petersburg after a certain date, ships the pews by rail in time to reach this town by the date set and notifies the railway company of what the result will be if the pews are not delivered then. By mistake the pews are shipped to Parkersburg and delayed eighteen days, so that the contractor has to pay the purchaser $180. Is the contractor entitled to recover damages for this loss? Yes. Both parties contemplated this injury as a natural result of the breach of contract by delay.[246]

(8) D contracts to carry three cargoes of salt from Bay City to Chicago, but takes only one cargo. After D's default P is unable to get vessels to carry the salt and he ships it in small lots by rail to Chicago. Is P entitled to recover the difference between the price agreed on with D and the price paid the railways? No. The excess of value of salt in the Chicago market at the date when it should have arrived beyond what it was worth in Bay City, less expenses of getting it there, is all he can recover. A person cannot recover the extra cost of transportation when a reasonable man would avoid such expense by buying in the market.[247]

(9) P sues D for breach of the obligation implied by law to deliver at the place of consignment a large lot of eggs within a reasonable time

[243] Bailey v. Damon, 69 Mass. (3 Gray) 92.

[244] Louisville, etc., R. Co. v. Wilson, 119 Ind. 352, 21 N. E. 341.

[245] Harvey v. Connecticut & P. R. Co., 124 Mass. 421.

[246] Illinois, etc., Co. v. Southern Seating & Cabinet Co., 104 Tenn. 568, 58 S. W. 303.

[247] Ward's C. & P. L. Co. v. Elkins, 34 Mich. 439.

as a common carrier. P notifies D that they are intended for the market and asks to have them shipped in quick time. What is the measure of P's damages for D's failure to deliver them within a reasonable time? The difference between the value of the eggs at the time they ought to have been delivered, and the time when they are in fact delivered, as this injury may reasonably be supposed to have been within the contemplation of the parties at the time of the contract as a probable result of breach. Both knew that the market value of eggs is likely to decline at that season of the year.[248]

(10) D, as a common carrier, agrees to transport certain cutlery from New Orleans to Cincinnati. In handling the freight one keg rolls into the Ohio river and the goods are damaged, but D delivers them at the end of the route. What is the measure of damages? The actual value of the goods in Cincinnati, less freight for transportation and the value of the goods in their injured condition. The carrier is entitled to full freight as it has delivered the goods.[249]

(11) P sues D for breach of contract in setting himself, wife and children down at the wrong station, in consequence of which they have to walk and the wife catches cold and medical expense is thereby incurred. Are damages recoverable for the illness and medical expenses? No. They are not within the contemplation of the parties at the time of making the contract as a probable result of breach. But, in tort, recovery could be obtained for these injuries.[250]

(12) Through the negligence of a railway L misses a train, and instead of waiting an hour and a half for the next train engages a special train. He is traveling for amusement. Can L recover the cost of the special train? No. Even if the company had had notice of what he was traveling for, it is not a probable result of breach of contract that L will hire a special train. The expenditure must be such as, according to the habits of society, a person who is delayed on his journey would naturally incur at his own cost if he had no company to look to. If L should hire the special train in order to fulfill an engagement, that meant large profits and both parties should know of this, the decision would be different.[251]

§ 43. The substantial damages for breach of a contract of partnership for a fixed time are the value of the loss of bargain and of profits to the end of the term, expenses incurred bona fide for the ben-

[248] Devereux v. Buckley & Co., 34 Ohio St. 16.

[249] McGregor v. Kilgore, 6 Ohio, 359.

[250] Hobbs v. London & S. W. R. Co., L. R. 10 Q. B. 111; Brown v. Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911.

[251] Le Blanche v. London & N. W. R. Co., 1 C. P. Div. 286.

efit of the firm, and legal interest from the time of breach, less other profits that might be earned because of the release from the partnership.

A breach of a partnership contract is a breach of contract, like the breach of any other contract, and the immediate loss is the loss of the bargain. Accordingly, whatever rights a person has as a partner under the contract, or articles of co-partnership, will control the extent of his recovery. The contract may provide for interest on contributions to the firm, or compensation for services, in which case the interest, or compensation is recoverable up to the time of dissolution; but ordinarily the one principal stipulation in the contract is the agreement to share in profits, and in the absence of express stipulation to the contrary no interest is allowed, as interest, on contributions to the firm, nor is a partner entitled to extra compensation for services, even extra services; everything is supposed to be poured into the partnership for the final purpose of sharing in the profits. The object of commercial partnerships is profits. This is the motive for entering into the relation. The only reason for the creation of the partnership is the expectancy of profits. The most legitimate injury that can follow the wrongful dissolution of a partnership is the loss of profits. If the injured party cannot recover damages for the loss of profits; it is idle to say that any obligation is imposed by the contract of partnership. The loss of profits here, unlike the loss of profits by breach of a contract of carriage, is an immediate loss. Expenses incurred for the partnership are recoverable if bona fide and specially pleaded. They are another immediate, though not necessary, loss because incurred pursuant to contract. Interest is allowed on the sum due the injured party from the time of dissolution. It is hardly possible to think of injuries calling for consequential damages.

It may seem a little strange that recovery for the loss of profits should be so sure, but there is not the element of uncertainty here that there would be if the profits lost were consequential. The uncertainty here does not arise in determining whether there is a loss of profits, but in de-

termining the amount of the loss, but difficulty in determining the amount is no ground for refusing to award them. The jury must estimate the amount of the loss. A partnership that is not limited as to time may be dissolved at any time without legal wrong, and then the other party can recover nothing for the loss of future profits. Before a plaintiff can recover, however, he must show that he has performed all of his own covenants, that is, he must prove a wrongful dissolution.

ILLUSTRATIONS.

(1) P and D enter into a contract of partnership in 1846 for the purpose of carrying on the business of manufacturing gold pens until 1851. In 1848, in P's absence from the city, D publishes notice that the partnership is dissolved and takes possession of the business, and shortly afterwards P also begins business in his own name. What is the measure of P's damages? The prospective profits of the partnership business to the end of the term, on which point evidence of past profits during the continuance of the partnership is admissible. Evidence of subsequent profits made by P since his entering into business is admissible only in mitigation of damages.[252]

(2) D agrees to supply P with the manuscript for a work, the same to be printed by D, and the profits to be equally divided. P incurs some expense in paper and printing, and then D refuses to supply the manuscript. What is the measure of P's damages? The value of the expense incurred and his share of the profits lost as estimated by the jury.[253]

(3) A master of a ship sues the owners for his share of the profits from a whaling voyage, when the contract is dissolved by his removal while in the performance of it. Should he recover these profits? Yes. They are the direct object of the contract.[254]

(4) In 1820 a surviving partner would have had in his hands a surplus if he had paid off all the debts of the firm, but he does not make his distribution to those entitled to it until 1830. Is interest to be allowed, on the amount of the surplus due the other partners, during this period? Yes.[255].

[252] Bagley v. Smith, 10 N. Y. 489.
[253] Gale v. Leckie, 2 Starkie, 107.
[254] Dennis v. Maxfield, 92 Mass. (10 Allen) 138.
[255] Hite's Heirs v. Hite's Ex'rs, 40 Ky. (1 B. Mon.) 177.

§ 44. The substantial damages for breach by a telegraph company of a contract to accept, transmit promptly, or to deliver a despatch, are the price paid for the despatch, and the value of the loss of property, of bargain, of profits, of time, of the use of money, and expenses, caused by the breach, if within the contemplation of the parties at the time of sending the despatch, with legal interest.

A cause of action in contract may not only arise from breach of an actual contract, express or inferred, but also from breach of the common-law duty imposed by law upon telegraph companies as public service companies, and the same rule applies to telephone companies, but the measure of damages is the same in either case. A cause of action in tort may also arise from violation of this common-law duty. The suit is then for damages for negligence. Most actions against telegraph companies probably sound in contract. It is sometimes said that so far as the measure of damages is concerned it makes no difference whether the action is treated as one in contract or as one in tort; but this is not strictly accurate, for in some unusual cases an element of injury may be considered if the suit is in tort when it could not be considered if the suit is in contract, and for breach of contract nominal damages would always be recoverable; while if the suit is for damages for the tort of negligence, special damage must be shown, as it is the gist of the action, and if there is no special damage, not even nominal damages are recoverable.

A person injured by the act of the company may undergo mental suffering. Are damages recoverable therefor, if this suffering is caused by a breach of contract? The plaintiff is entitled to nominal damages, and, unless damages for mental suffering are excluded on the ground of public policy, there is no reason why he should not recover damages for the mental suffering, and thus hold some of the courts. Most courts hold that it is against public policy to allow damages for mental suffering in contract actions against telegraph companies. But what is the rule if the mental suffering is caused by negligence considered as a

tort? Before there can be a tort there must first be a loss of property, or use of money, or some other pecuniary injury (as it would be rare indeed that a telegram would cause physical pain), when if the act also naturally causes mental pain, damages may also be allowed therefor, but damages are never allowed for mental suffering when it is the only element of injury.

In contract actions the distinction between direct and consequential damages is important. Direct damages are recoverable for injuries arising according to the usual course of things, whether or not the parties actually contemplated them; but, in order to recover consequential damages, it is essential that the injuries be such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. That is, the injuries that will probably result must be communicated to the telegraph company by the face of the message, or by the sender. The telegraph operator is the company's agent for the purpose of receiving notice. If a message is sent in cipher no notice can be given the company unless it discloses on its face that it is of business importance, or notice is given the company by the sender, or the company gets the knowledge from some extraneous source. The requirement that all the damage for which recovery is to be allowed must be within the contemplation of the parties is in harmony with the antecedent right for whose violation compensation is being given. It is the mutuality in the contemplation of both parties to the contract of the results that will be likely to flow from its breach that really furnishes that equitable feature of the rule that the damage thus mutually contemplated is in fact the damage for which the law will impose damages. The remedial right is created by law only for the purpose of redressing the antecedent, and to redress injuries which the parties did not contemplate is to create antecedent rights by law instead of by contract. To hold that if one party to a contract shall alone have knowledge that a breach by the other will cause him certain loss, unforeseen, unexpected, uncontemplated and unconsented to by the other, and

that for such breach he may recover damages for this loss, would be neither fair, just, nor equitable, and would reverse the general conception of contracts.

The elements of injury, for which, because within the contemplation of the parties, damages are recoverable, vary with the antecedent right violated, and may be such as the loss of property, or bargain, or profits, or time, or use of money sent by telegraph, or expense. The measure of damages for all of these injuries when the same are specially pleaded is value, which is to be determined according to the rules heretofore announced. It would be too cumbersome to try and gather together in this place all the rules for determining value. For the loss of profits the value is in general the difference between the price the loser would have realized and market value, whether he is selling or buying, but nothing is allowed for a sale not effected, as the loss is too remote. The elements of injury for an error in an order for goods are the expense of transportation both ways and the loss of property by depreciation, if the goods are refused and the damages cannot be mitigated by a sale at the point to which shipped; and if the goods are accepted the loss of profits, which is measured by the difference in the value of the goods at the time and place of shipment and at the place to which they are shipped with transportation expense. The measure of value for the loss of profits caused by delay or failure to deliver an order to an agent to sell or purchase is the difference between the price obtained by reasonable diligence and what would have been obtained. For the loss of a bargain the value is the difference between the contract price and the cost of fulfilling it. Each telegraph company is liable only over its own line unless it makes a special contract to be liable for the entire distance.

Telegraph companies being public service companies, there rests upon them by law the duty to serve all with adequate facilities, for reasonable compensation, without discrimination, and to exercise ordinary diligence in transmitting despatches, and for failure to do so an action ex delicto or ex contractu will lie, though there is no express contract;

but such companies may control their rights and liabilities entirely by contract, or regulations brought to the sender's notice, except to limit their liability for negligence. Authorities do not always agree as to what is a contract to excuse negligence, but they all agree that, if a contract does not excuse negligence, it is to be enforced as the parties have made it. For example, the cases are in conflict as to whether a provision as to exemption from liability unless a message is repeated exempts a company from liability for negligence. Most of the state courts of the United States hold that it does, but the federal courts generally, and some state courts, hold that it does not. It is held by practically all jurisdictions that a contract limiting the time within which claims may be presented to a reasonable time is valid.

ILLUSTRATIONS.

(1) P sends a cipher telegraph message to his agent over D's telegraph line, upon a blank, notifying P that D will not be liable for any loss caused by its negligence beyond the amount paid therefor unless the message is repeated. By mistake the message is delivered to read "Buy," instead of "I have bought," 500,000 pounds of wool. The agent buys 300,000 pounds, at a loss of $20,000, as it is claimed. What is the measure of damages? The price paid. By the contract this is all he is entitled to. Such regulations are generally held invalid as against public policy; but, in any event, here, P is entitled to recover only direct damages. Consequential damages cannot be recovered as the injuries are not within the contemplation of the parties.[256]

(2) P's agent in Atlanta, Ga., sends by D a message to P in Franklin, Ky., to "ship today a carload of mules." Through the negligence of D's agent the message is not delivered until it is clearly too late for him to make shipment that day, and by reason thereof P loses the profits from a falling market. The blank on which the message is sent stipulates that the company will not be liable for delay beyond fifty times the charge for sending, and for nothing but the charge if the message is not repeated. What is P's measure of damages? The price of the telegram (58 cts.) as direct damages and the value of the loss of profits ($125) as consequential damages. It is against public policy to limit liability for negligence thus.[257]

[256] Primrose v. Western Union Tel. Co., 154 U. S. 1, 38 Law. Ed. 883.

[257] Western Union Tel. Co. v. Eubanks, 100 Ky. 591, 38 S. W. 1068.

(3) P delivers to D for transmission a message ordering H to buy oil if he deems it safe. By mistake the message is sent without the name of the addressee, and over six hours are consumed in ascertaining his name. At the time the message would have been delivered but for the mistake oil is selling for $1.17 per barrel, but at the first time H can purchase after the delay it is selling for $1.35 per barrel, at which price H does not think best to buy. What is P's measure of damages? The price of the telegram, as the loss of profits is too remote. The loss is not certain, though contemplated.[258]

(4) P in Florida pays for and delivers to D for transmission a telegraph message, written in cipher, in which P notifies his agent in Liverpool that he will sell certain lumber at a given price. D fails to deliver this message, and P is compelled to sell the lumber in Europe for $630 less than he offers it to his agent. What is P's measure of damages? Even if his offer would make a valid contract, which it does not, he could only recover the price paid for the telegram. The loss of the $630 is such as does not arise in the usual course of things, and therefore must be within the contemplation of the parties at the time of making the contract, and this could not be as the message does not disclose its purpose. It might have related to a criticism on the "Horse Fair" as reasonably as to dollars and cents.[259]

(5) P's agent in charge of a valuable race horse, named Bravo, discovers the horse to be sick with pneumonia and sends to him by D's telegraph a message notifying him that "Bravo is sick. Come and bring M" (a doctor), but through the negligence of D's servant this message is not delivered within four or five hours of the time it should have been, and as a reasonably probable consequence the jury finds that the horse dies therefrom. What is the measure of damages? The value of the horse, the cost of the telegram, and the expense of treating the animal, as the nature of the telegram is such as to make this consequence within the contemplation of the parties. But there must be no contributory negligence.[260]

(6) L desires to have P cash two drafts on men in New York amounting to $3,000. P writes to other parties in New York for information on their standing, and asks for reply by telegram if not all right, otherwise not. Over D's line is sent by telegram, "Parties will accept if bill of lading accompanies," but this is never delivered, but before the telegram would have been received P cashes the drafts at a total loss. What is the measure of damages? Nominal. Substantial damages are not recoverable, for P's loss is too remote to be the result of the telegram. All the telegram could have done would have been to warn P to recover

[258] Western Union Tel. Co. v. Hall, 124 U. S. 444, 31 Law. Ed. 479.

[259] Western Union Tel. Co. v. Wilson, 32 Fla. 527, 14 So. 1.

[260] Hendershot v. Western Union Tel. Co., 106 Iowa, 529, 76 N. W. 828.

the money from L. The loss was not contemplated by the parties at the time of making the contract, as there is nothing in the telegram to give notice.[261]

(7) P sends the following telegram to C over D's telegraph line, "Car cribs six sixty c. a. f. Prompt," which is not a cipher message but an abbreviation known to the trade and to D, and means a carload of clear ribs at six sixty cost and freight. D, by mistake, transmits the message six thirty, and C orders a car. P sends and C accepts, but refuses to pay but six thirty, whereby P loses $75. What is the measure of damages? The cost of the message and the difference between the value at the place of shipment and the place of delivery, or freight both ways as is most feasible. There is no contract and therefore no contract price to be considered.[262]

(8) P's agent to collect a $3,600 note of H telegraphs P through D, "Has stock $1,200. Mortgage on for $1,500," and asks if he shall accept note for $2,400. D sends "Have secured $1,200 mortgage on $1,500," etc. P answers, "If $1,200 mortgage is on $1,500 property accept." The agent settles for $2,500, and thus plaintiff loses $1,100, if collectible. Is D liable for this loss of property? Yes. This despatch gives the agent authority to accept unless the conditions are more favorable to P than a $1,200 mortgage on $1,500 stock, and $1,500 on $1,200 is less favorable, and therefore the loss is caused by D's negligence, as D's negligence gives the agent authority, and it is a result to be reasonably contemplated by the parties.[263]

(9) P is endeavoring to arrest a murderer and the latter's wife is assisting P and promises to telegraph P if her husband should come unexpectedly. She sends a telegram by D, but D's agent is negligent in delivering the message, in that he leaves it on the door knob instead of arousing the family, and P does not receive it until the next morning, too late to apprehend the murderer, although P has a horse in a livery stable ready to drive the twelve miles necessary, and it is reasonably certain that if P had received the message the murderer would have been caught. A reward of $300 is lost. Is P entitled to recover this from D? Not in a contract action, but in a tort action he will be, as this is the natural consequence of the negligence and it does not need to be within the contemplation of the parties.[264]

(10) P's wife on Dec. 13th sends by D a telegram announcing that P's child is dying, and the child dies on the 24th, but, by the negligence of D, P does not receive the telegram in time to be with his child during his last sickness and death. Is P entitled to recover for mental suffer-

[261] First Nat. Bank v. Western Union Tel. Co., 30 Ohio St. 555.

[262] Pepper v. Western Union Tel. Co., 87 Tenn. 554, 11 S. W. 783.

[263] Hasbrouch v. Western Union Tel. Co., 107 Iowa, 160, 77 N. W. 1034.

[264] McPeek v. Western Union Tel. Co., 107 Iowa, 356, 78 N. W. 63.

ing caused thereby? No. In a suit in contract it is against public policy, even if the injury is contemplated; and if the suit is in tort, there is no tort injury to recover for, as negligence causing mental suffering alone is not a tort; nor can such damages be recovered as exemplary damages.[265]

§ 45. In the United States the substantial damages for breach of an obligation to pay for services rendered by an attorney are the contract price, if one, or if none, the reasonable value of the services rendered, with the cost of disbursements and legal interest from the time of default.

The substantial damages for breach by an attorney of a contract to perform professional services with skill and diligence are the value of the loss of property, loss of profits, expenses incurred and any other certain losses, within the contemplation of the parties, with the amount of any money collected and legal interest from the time of default.

In England it is held that the services of a barrister are honorary, but that other practitioners may recover for their services. Generally in this country any one duly admitted to the practice of the law is entitled to compensation for his professional services. The nature and amount of this compensation may be fixed by agreement of attorney and client, but in the absence of agreement the amount is fixed by law. Where there is no special agreement as to the amount of charges for the services of an attorney, the rule of compensation should be the same as that which obtains in every other employment for services without agreement as to price and that is what the services are reasonably worth. It is more difficult to determine what an attorney's services are reasonably worth than some mechanical and physical services, for much depends upon professional skill and learning, but the same principles govern. In determining what is the reasonable value of an attorney's services, allowance must be made for the nature of the business performed, the attorney's standing in his profession, and the usual prices

[265] Connell v. Western Union Tel. Co., 116 Mo. 34, 22 S. W. 345. But see Mentzer v. Western Union Tel. Co., 93 Iowa, 752, 62 N. W. 1.

charged and received for similar services by other men of the same profession in the same vicinity and courts. More than this, where a lawyer is employed without any stipulation as to the price, by a person who has full knowledge of the lawyer's rate of charges, it may fairly be inferred that he agrees to pay that price and thus an actual contract is created. If a contract is prematurely ended by a client, the attorney may either sue in quantum meruit for the reasonable value of his services, or for damages for the breach of contract. In a suit for breach of contract the contract price is the measure of damages, as a client is not entitled to the whole of the services of his attorney, and hence there is no deduction for what the attorney may earn elsewhere.

Suits against an attorney by his client may be either in contract or tort. In the latter case the tort is that of negligence and sometimes exemplary damages are recoverable. These questions will meet us later in our consideration of the tort of negligence. Here we are considering only an attorney's liability in contract. He is not liable for errors or mistakes, if he is fairly capacitated to discharge the duties of his profession and acts with the proper degree of attention and with reasonable care and up to his skill and knowledge. Interest is recoverable on money collected from the date of its reception if the attorney fails to give his client notice, or if he appropriates it; otherwise, from the time of demand.

ILLUSTRATIONS.

(1) **D is employed by the Canadian government to render professional services for it, but the contract is silent as to remuneration. Is he entitled to charge for his work? In Canada and the United States professional men are entitled to charge for their services, and in the absence of stipulation to the contrary, he is presumed to have been employed upon the usual terms.**[266]

(2) **P is employed by D as an attorney to endeavor to secure a pardon for D's son, and D promises to pay an agreed sum in case of success. Thereafter D employs other parties for the same purpose and discharges P. The pardon is granted. What is the measure of P's dam-**

[266] The Queen v. Doutre, 9 App. Cas. 745.

ages? The entire compensation agreed upon. It is impossible to justly measure P's damages by any apportionment of the sum agreed upon.[267]

(3) In a suit for damages for failure to pay for services rendered as an attorney, is the importance of the cause to the client worthy of consideration in determining the value of the services? Yes. The value of the services of an attorney is necessarily to be determined by many considerations besides the mere time visibly employed, and the importance of the cause to the client affords to some extent a measure of the skill, care and responsibility exacted and effort demanded, and should not be disregarded.[268]

(4) P renders services as an attorney for D, and gives to his client an account in which the charges are reasonable. Is he entitled to interest, as well as to the amount of the charges? Yes, from the time the account is rendered, for it should have been paid then.[269]

(5) P renders services for D, as an attorney, without any stipulation as to the price to be received for such services. D refuses to pay P's charges. What is the measure of damages? The reasonable value of the services, to be determined with proper reference to the nature of the business, the professional standing of P, and the usual charges of other members of the same profession in the vicinity for like services.[270]

(6) In consideration of fees promised, D undertakes to conduct a law suit for P to collect a debt, but is so negligent in delaying to sue out execution that the debt is lost. Is D liable in a contract action for the loss sustained by P? Yes. An attorney employed promises to those who employ him that he will faithfully and carefully transact the business entrusted to him.[271]

(7) In 1882 D, as attorney for P, has in his possession certain money, but he claims the entire amount for legal services, and P does not demand it until April, 1887. Suit is brought by P in June, 1887. From what time is P entitled to interest on the balance due? From June, 1887, and not 1882, because of the uncertainty of the demand, and because until June, 1887, at least, D is not in default.[272]

(8) D is employed by P to defend a suit for him, but P does not inform D of the nature of his defense, and if he had done so the defense would not have been a good one. D fails to defend. Can P recover more than nominal damages from D? No.[273]

[267] Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060.

[268] Selover v. Bryant, 54 Minn. 434, 56 N. W. 58.

[269] Mygatt v. Wilcox, 45 N. Y. 306.

[270] Vilas v. Downer, 21 Vt. 419.

[271] Stimpson v. Sprague, 6 Me. 470.

[272] In re Wolf, 51 Hun. 407, 4 N. Y. Supp. 239.

[273] Grayson v. Wilkinson, 13 Miss. (5 Smedes & M.) 268.

(9) D, an attorney at law, induces P to buy certain land from him by presenting him with an abstract of title on which he has certified that he has examined the title and that the abstract is a full and complete abstract of such title. The abstract is false, among other things, in that it represents as a conveyance an instrument that does not purport to convey title. P goes to some expense in breaking the land. What is the measure of damages? The amount of the purchase price plus the expense incurred. D is liable, not only on his promise that the title is as stated, but upon an implied contract that he has exercised reasonable care and diligence in preparing the abstract.[274]

§ 46. The substantial damages for breach by an employer of a contract of employment are the contract price, less payments received and what the servant might with reasonable diligence earn during the remainder of the term if discharged before its termination (or at the election of the servant, or in any event if there is no contract price, the reasonable value of the services rendered), with legal interest.

The substantial damages for breach by a servant of a contract of employment by refusal or failure to perform the duties of the service, or by quitting work, are the difference between the contract price for the balance of the term and the cost of supplying the services, together with the value of the loss of property and any other pecuniary injuries within the contemplation of the parties, with legal interest.

In case of a breach of contract of employment by the employer by a wrongful discharge of the employe, the latter has the option of three remedies. He may treat the contract as rescinded and sue in quantum meruit for the value of services performed. He may sue at once for an entire breach of the contract, when he will recover the contract price, less what he has already received on the contract price as well as what he might reasonably be able to earn during the remainder of the term. He may wait until the expiration of the contract and sue and recover the contract

[274] Thomas v. Schee, 80 Iowa, 237, 45 N. W. 539.

price, less what he might have earned by reasonable diligence during the term of the contract, and under this last option, where wages are payable in instalments, suits may be brought on the several instalments of indemnity as they accrue if the contract is divisible or continuing. This last is not on the theory of constructive service, which is illogical and unjust to the employer, but on the theory of indemnity which accrues by instalments. If but one action were allowed in instalment contracts of this sort, the servant would either have to sue at once, when there is likelihood that the judgment may be unjust either to the plaintiff or defendant, or he will have to wait until the termination of the period of employment, when if the period is longer than the period of the statute of limitations the employe will lose some of his indemnity. For breach by an employer of a contract of employment, the contract price should prima facie be the measure of damages. The employer may show that the damage sustained is less than the price agreed upon, but the employe, who is prevented from performing the service agreed upon, is entitled to full indemnity, and the employer in the wrong should have the burden of reducing the contract price by showing that the plaintiff could have procured work elsewhere. If by the contract the servant is to be paid in profits, the value of the loss of profits should be the measure of damages if it is capable of ascertainment. Continuing in the employment after the termination of a contract for a fixed time and fixed compensation, without any new agreement, is equivalent to a renewal contract for the same period and rate. Where an employer is authorized to fix the amount of compensation, the amount fixed by him is controlling, in the absence of fraud or bad faith. All services rendered by an employe during the period for which he is employed of a nature similar to his regular duties are presumed to be paid for by his salary. If a servant quits before the end of the term for which he is hired, without legal excuse, he forfeits wages due; but if he breaks a contract that is divisible, or an entire contract with just excuse, he may sue for the reasonable value of his services. Where both parties are equally in fault, he may also recover the reasonable value of his services. The foundation for the

recovery in these cases, as also in the case of a suit for the reasonable value of services when the contract is broken by the employer, is quasi contractual. The tort liability of both master and servant will be considered in connection with the tort of negligence. Consequential injuries frequently result to the employer from breach of contract by his employe, and damages are recoverable therefor, according to the usual rules, if they are reasonably within the contemplation of the parties at the time of making the contract as a probable result of breach thereof, and they are specially pleaded.

ILLUSTRATIONS.

(1) P is under contract to work for D for thirty-six weeks, to play old man parts in his museum at $35 per week. D breaks his contract after eighteen weeks by discharging P. P sues at once for breach of contract. What is the measure of damages? The contract price, less what P might earn by reasonable diligence during the balance of the term.[275]

(2) P is employed by D on Feb. 26th for a year for $1,000, payable in monthly instalments. July 15th D discharges P, who sues and recovers for salary up to July 26th. After the end of the year P sues to recover the salary due for the balance of the year. Is he entitled to recover the same, or is the matter res adjudicata? He is entitled to recover the balance of the salary due under the contract to date (less what he might have earned elsewhere by reasonable diligence), with legal interest on the damages from the dates due.[276]

(3) P is employed by D in Feb., 1892, so long as he shall own fifty shares of D's stock, at a salary of fifteen hundred dollars a year, payable in monthly instalments. October, 1893, D discharges P, who sues and recovers damages up to March, 1894. After a few more months P sues to recover further damages up to date. Is he entitled to the same or should the principle res adjudicata be applied? He is entitled to recover the contract price from March, 1894, to date, less what he might have earned with reasonable diligence during the period, with legal interest from the date due, as this is a continuing contract.[277]

(4) P enters into a contract with D, whereby he promises to work for D for three years at a stipulated salary, payable in monthly instal-

[275] Sutherland v. Wyer, 67 Me. 64.

[276] Liddell v. Chidester, 84 Ala. 508, 4 So. 426, and Olmstead v. Bach, 78 Md. 132, 27 Atl. 501.

[277] McMullen v. Dickinson Co., 60 Minn. 156, 62 N. W. 120.

ments. After working a ittle over a year he is discharged. What is the measure of his damages? The contract price, less what by reasonable diligence he has or might have earned up to the time of the suit, and what with reasonable diligence he might earn during the rest of the term of the contract.[278]

(5) P agrees to serve D for an agreed price for a year, but voluntarily leaves the service before the expiration of the time and without the fault of D and against his consent. Is P entitled to recover in quasi contract the reasonable value of the services already rendered? No. The law will not create an obligation of this sort for a wrongdoer. The express contract is a bar. Yet, some courts permit such recovery and allow the defendant a set-off for any injuries caused by the breach of contract.[279]

(6) P sues D for services rendered as keeper of certain property, upon the express request of D. Is the value of the services to be determined by the benefit which D receives? No. This is not a quasi contract, but an inferred contract, and the value of the services is the measure of damages.[280]

(7) P hires D to carry on his sawmill for a year in a workmanlike manner and to make certain repairs, and to receive a share of the lumber sawed for his pay. P discharges D because he does not do the work in a workmanlike manner. Is D entitled to counterclaim the balance due him for his labor and earnings in a suit by P for breach of contract? Yes. This is a quasi contractual obligation and allowance should be made for the value of the benefit conferred by D. It would be unjust to deny D this relief for breach of one part of a contract; and this distinguishes the above case from the ordinary contract of employment.[281]

(8) P sues D for the reasonable value of services as a general farm hand, performed for D by a minor, and D sets up a counterclaim for damages for breach of contract in quitting his employ before the expiration of the term, whereby D loses crops, etc., because of his inability to procure other help. Should damages be allowed under the counterclaim? No. As the contract is not made with special reference to the harvesting of crops, this damage is not within the contemplation of the parties, and therefore is too remote.[282]

(9) P is employed by D for one year, but is discharged after working about eight weeks. Is P entitled to interest on the amount of damages he is entitled to recover for breach of the contract? Yes.[283]

[278] Boland v. Glendale Quarry Co., 127 Mo. 520, 30 S. W. 151.

[279] Stark v. Parker, 19 Mass. (2 Pick.) 267. Contra, Britton v. Turner, 6 N. H. 481.

[280] Stowe v. Buttrick, 125 Mass. 449.

[281] Swift v. Harriman, 30 Vt. 607.

[282] Macy v. Peach, 2 Kan. App. 575, 44 Pac. 687.

[283] Catholic Press Co. v. Ball, 69 Ill. App. 591.

§ 47. The substantial damages for breach of promise of marriage are such an amount as may be awarded in the sound discretion of the jury, subject only to review by the court if excessive. In estimating substantial damages the jury should take into consideration all the recognized elements of injury, both pecuniary and nonpecuniary, but for loss of property to be considered it must be specially alleged. If malice or wantonness is shown, the jury may allow exemplary damages. Evidence in aggravation and mitigation of damages is admissible, if specially pleaded.

While the action for breach of promise of marriage is in form a contract action, in all other respects it resembles a tort action. The wrong is similar to a tort. Exemplary damages are allowed as in tort actions. Mental suffering is an element of injury for which the jury is allowed to assess compensation. The cause of action does not survive, unless there is special pecuniary injury for which consequential damages could have been recovered before death. Interest is not allowed. The elements of injury which it is proper for the jury to consider in arriving at its estimate of the damages are the loss of a permanent home and worldly advantages, the loss of time, the loss of future prospects of marriage, expenses incurred in preparation for marriage, injury to health, loss of virtue and reputation, mental suffering, and mortification and humiliation. In aggravation of damages, evidence is admissible to show seduction, the manner in which the engagement is broken, fraud, bad faith, defendant's reputation for wealth and social position, the length of the engagement, the depth of plaintiff's devotion, plaintiff's lack of independent means; and, in mitigation of damages, evidence is admissible to show family opposition, unchastity, or ill health on the part of the plaintiff. The general elements of injury enumerated above are such as result in the usual course of things, and therefore the damages allowed therefor are direct, and are recoverable under a general allegation. The various elements in aggravation or mitigation must be specially pleaded. It is

possible to conceive of further special injuries, even loss of property, for which allowance of compensation can be made only when within the contemplation of the parties at the time of making the contract as the probable result of breach and when they are specially pleaded. In the case of loss of permanent home, and mental suffering, the injuries may be said to be caused by the breach, but other injuries, like seduction, cannot be said to be caused by the breach, and yet they are a part of the legal injury and should be considered. It is possible to have the parties in advance liquidate the damages recoverable in case of breach, but this is so unusual that it does not call for discussion. Some of the losses are pecuniary, and should be measured by value, but the whole question of damages is here so at large that it is better not to try to lay down any particular rules.

ILLUSTRATIONS.

(1) In a suit by P against D for damages for breach of promise of marriage, it appears that P is not capable of making and carrying out the contract without fraud on the defendant. Is P entitled to substantial damages? No.[284]

(2) A promise of marriage given to P is broken by D, who is a man of wealth and social position, after P has submitted to sexual intercourse with D and become pregnant, through the inducement of his promise to marry her. What elements of injury are proper to be considered? The loss of permanent home and advantageous establishment, injuries to affections, mortification, anguish and seduction, though some courts allow evidence of seduction without consent only to aggravate the mental suffering.[285]

(3) P and D are engaged to be married, but D breaks the engagement by ignoring it. Under a charge by the court that the amount of the damages is discretionary with the jury, provided that their conduct is not marked by prejudice, passion, or corruption, the jury returns a verdict for $45,000 as actual damages, but this is only four and one-half per cent for one year on the estate of the defendant. Is this excessive? No.[286]

[284] Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242.

[285] Daggett v. Wallace, 75 Tex. 352, 13 S. W. 49; Osmun v. Winters, 25 Or. 260, 35 Pac. 250.

[286] Campbell v. Arbuckle, 21 N. Y. St. Rep. 412; Id., 123 N. Y. 662, 26 N. E. 750.

(4) P sues D for damages for breach of promise of marriage. Is the amount of her damages to be measured by the wealth of the defendant? No. But evidence of his reputation for rank and wealth are admissible, not to show D's ability to pay, but to show the injury P has sustained by the loss of the marriage.[287]

(5) In a suit for damages for breach of promise of marriage, in connection with the question of how far the plaintiff is injured in her affections and suffers distress, is it proper for the jury to consider the length of the engagement? Yes.[288]

(6) In preparation for a contemplated marriage with D, P purchases and makes up articles of clothing. D breaks the engagement. Is evidence of this expense proper? Yes. It furnishes an element to be considered in the computation of damages.[289]

(7) In an action for damages for breach of promise of marriage, is evidence of the sickness of the plaintiff directly after intercourse with the defendant admissible as bearing upon the matter of damages? Yes. is evidence that after being informed of defendant's marriage to another plaintiff seeks him out and shoots him admissible in mitigation of damages? No.[290]

(8) P, a young girl, and D enter into a tacit agreement to marry, though no time is set for the ceremony, and at D's expense P goes to a convent to school, when D breaks off the engagement in a manner abrupt, wanton and most humiliating to the young girl. Are exemplary damages allowable? Yes.[291]

[287] Collins v. Mack, 31 Ark. 684; Stratton v. Dole, 45 Neb. 472, 63 N. W. 875.

[288] Coolidge v. Neat, 129 Mass. 146.

[289] Dunlap v. Clark, 25 Ill. App. 573.

[290] Schmidt v. Durnham, 46 Minn. 227, 49 N. W. 126.

[291] McPherson v. Ryan, 59 Mich. 33, 26 N. W. 321.

CHAPTER X.

ACCESSORY CONTRACTS.

§ 48. The substantial damages for breach of a contract of indemnity are the full value of the damage incurred, in a strict contract of indemnity, and the full value of the liability to which the indemnitee has become subject, in a contract to protect against liability (not to exceed the sum named in a bond or note), including reasonable costs and attorney's fees in actions which the indemnitee has had to defend, together with legal interest.

Consequential damages will rarely be recoverable in actions for breaches of contracts of indemnity, not because of any rule against their allowance, but because all the losses will ordinarily be such as flow in the usual course of things and are covered by direct damages. The elements of injury which flow from the breach of a contract of indemnity in the usual course of things are the loss of the money promised for the various items named in the contract and the loss of the use of the money, the former being measured by value and the latter by interest. Where the obligation is that the party indemnified shall not sustain damage by rea-

son of the acts or omissions of another, or by reason of any liability incurred from such acts or omissions, there is no breach of contract until actual damage is sustained and it is not paid, and hence nominal damages are here practically excluded; but, where the obligation is to perform some specific thing, or to save the obligee from a charge or liability, the contract is broken when there is a failure to do the specific act, or when the charge or liability is incurred, that is, as soon as the liability becomes fixed and the obligor fails to perform, though no damage is yet sustained.

The measure of damages for breach by the pledgor or mortgagor of a contract to make a pledge or mortgage, as the case may be, involves no new applications of the principles of damages for breaches of contracts. The remedy of the pledgee and mortgagee after a pledge and mortgage have been executed is not a suit for damages, but foreclosure. For these reasons the subjects of pledges and mortgages will not receive special treatment.

ILLUSTRATIONS.

(1) D promises P that if P will sue C for the amount of certain rent in arrear, obtain judgment and levy on certain property, D will bid the same in for whatever the judgment and costs may be. P obtains judgment for $2,206, and levies on all of the property D has not taken away. What is the measure of P's damages in a suit against D? The amount which would have been received if the contract had been kept. As soon as P performs on his part the promise of D becomes absolute. The parties do not intend indemnity.[292]

(2) A grantee accepts a deed poll containing a covenant that the land conveyed is free from incumbrances, except a certain mortgage of $4,000, which the grantee assumes and from which he agrees to hold the grantor harmless. After the debt has become payable, but before the grantor has paid any of the debt, the grantor sues the grantee upon his contract. What is the measure of damages? The unpaid amount of the debt. While the object of the agreement is in a general way indemnity, it is really an agreement by the grantee to assume the debt as his own, and the grantor may sue as beneficially interested though the promise of payment is to the mortgagee.[293]

[292] Wicker v. Hoppock, 73 U. S. (6 Wall.) 94, 18 Law. Ed. 752.

[293] Locke v. Homer, 131 Mass. 93; Farnsworth v. Boardman, 131 Mass. 115.

(3) A deputy sheriff and his sureties execute to the sheriff a bond conditioned that the sheriff shall not sustain any damage by reason of any act or liability incurred by such deputy. The sheriff is sued and judgment is recovered against him for default in the deputy in not returning an execution, but the judgment is not paid by the sheriff. Can the sheriff maintain an action against the sureties? No. There is as yet no breach of the bond as there is no actual damage.[294]

(4) D agrees with P that, in consideration of the latter's entering into a recognizance as surety for the appearance of C to answer the criminal charge of selling liquor without a license, D will indemnify P for any loss he may sustain. C fails to appear, and P pays the amount of the recognizance and costs. What is the measure of P's damages? The amount of the recognizance and the costs made in taking judgment therein, together with six per cent interest from the date of the payment of the same.[295]

§ 49. The substantial damages for breach of a contract of warranty in sales are the difference between the value of the article and what its value would have been if it had been as warranted at the time and place of delivery (direct), and the value of any injuries to other property, loss of profits, loss of time, expenses incurred, and such sum as the jury may award for physical pain and mental suffering, caused by the breach, if within the contemplation of the parties (consequential), together with legal interest.

The theory of the law here, as almost everywhere else, is to place the injured party, as nearly as money can do so, in the same position as he would have been if the contract had been performed; it is compensation, and the foregoing rule is in harmony with this purpose and theory. The loss of the bargain is the great element of injury, and for this loss direct damages are recoverable. But the fact that the article purchased does not correspond with the warranty may cause many other consequential losses, and if these are within the contemplation of the parties at the time of making the contract as a probable result of breach and are

[294] Gilbert v. Wiman, 1 N. Y. 550.
[295] Keesling v. Frazier, 119 Ind. 185, 21 N. E. 552; Warwick v. Richardson, 10 Mees. & W. 284.

specially pleaded, consequential damages are recoverable therefor. The measure of the direct damages is very definite; it is the value of the loss, which is determined by the difference between two other values. The measure of the consequential damages for pecuniary injuries is also value, but the measure of the consequential damages for the non-pecuniary injuries is only the sound discretion of the jury, subject to the limitation that the damages must not be excessive. If the warrantor knows that his warranty is false, he may be sued in tort, as well as in contract, at the other party's election. In tort the rule as to the recovery of consequential damages is broader, but for direct damages it is just the same. In the case of a warranty of quality, if the article is worthless, the party injured is not limited to the price paid, for he is entitled to the value of the loss of his bargain, and he may therefore recover the value of the article as it would have been as warranted. Evidence of the agreed price is persuasive, but not conclusive, as to what the value would have been. Evidence of what it is actually sold for tends to show the actual value, but that, in turn, is only evidence on the point. In the case of a breach of a warranty of quantity, the warrantee is entitled to a due proportion of the purchase money with interest. In case of a breach of a warranty of title, the warrantee is entitled to the value of the article at the time deprived of its possession, with costs of defending the action and interest. On the sale of a chattel, a warranty is, in legal effect, a promise that the thing sold corresponds with the warranty, in title, quantity, or quality, as to which the warranty relates. If this thing prove defective within the meaning of the warranty, the stipulation can be satisfied only by making it good, which can be done in no other way than by paying the vendee enough money so that with the cash value of the defective article the sum is equal to what the article would have been worth if the defect had not existed. The vendee may return the article and recover the contract price for fraud, or pursuant to a condition in the contract, but the value of the loss is the only way to measure the damages for breach of warranty. If the price paid were allowed to measure one side of the loss, it would negative the purpose

of the warranty. Suppose that, in consideration of the price of one dollar paid by A, B should warrant that a horse is sound, when if the horse were sound it would be worth $100, but because of unsoundness it proves totally worthless. Shall A recover only one dollar? There can be only one answer, whether the value exceeds or falls below the price. The purchaser's measure of damages is the difference between what he gets and what he ought to get.

The warranties may be express or implied, but the rules of damages are the same. The only difference that could arise would be in the elements of injury in the different cases. The rules are those announced in Hadley v. Baxendale, supra. These rules are rules of remedial law, but many courts have confused their meaning and extended their application to antecedent rights. For example, the creation of implied warranties is said to be governed by the principles of this celebrated case. Warranties, in most cases, may extend to only those things contemplated by the parties, but that is a different thing from the rules as to damages. The creation of antecedent rights is one thing; the creation of remedial rights, and in particular the right to damages, is quite another thing. It is only with the latter that the rules of damages have any concern.

ILLUSTRATIONS.

(1) D contracts to furnish P with wheels for agricultural implements and gives a written warranty against defects in material and workmanship. D uses inferior iron, and this makes the wheels defective. In a suit for damages for breach of warranty, what is the measure of damages? The difference between the actual value of the defective wheels delivered, and their value had they been in accordance with the written warranty, (the price agreed to be paid being competent evidence of the latter value), plus compensation for trouble and expense and other injuries incurred in consequence of the wheels not being in conformity to the contract.[296]

(2) D manufactures six carriage springs for P, knowing that P wants to use them for the special purpose of constructing carriages, and

[296] J. I. Case Plow Works v. Niles & Scott Co., 90 Wis. 590, 63 N. W. 1013.

therefore impliedly warranting that they are reasonably fit for that purpose (or expressly warranting that they are of best steel). They turn out to be of poor material and unfit for the purpose intended. P sues D for general damages and for special damages for expenses incurred in taking out these springs from the carriages and fitting in new springs. What is the measure of his damages? The difference between the actual value of the springs and what they would have been worth if as warranted, and the actual cost of replacing the springs, as this loss is within the contemplation of the parties and specially pleaded.[297]

(3) P sues D for damages for breach of warranty by D to construct a freezer that will keep chickens in condition for market, knowing that P intends to place chickens in the freezer. D fails to construct such a freezer and P loses hundreds of pounds of chickens. What is the measure of damages? For the failure to keep the warranty, the difference between the value of the refrigerator as constructed and its value as it would have been if made according to contract; for the special injury of loss of chickens, the value of the chickens less the cost of getting them to market.[298]

(4) P sells D eight bushels of flax seed for $12, for the purpose of enabling D to sow it and raise a crop. D sows the seed, but it is worthless and it does not germinate. As a consequence D loses the seed, the use of his ground, and time and labor. Is he entitled to recover the value of all these elements of injury? Yes.[299]

(5) P sues D for damages for breach of warranty of a furnace sold, and the court instructs the jury that, in case it finds for the plaintiff, "he will be entitled to recover the difference between the purchase price of the furnace and its actual value." Is the instruction correct? No. It should have been the difference between its actual value and its value had it conformed to the warranty. The purchaser is entitled to the profit of his bargain, whether good or bad.[300]

(6) R sells M thirty-seven cases of eggs in Tennessee for fifteen cents a dozen, with a warranty that the eggs are fresh, knowing that M intends to sell them on the market. M sells to B, with like warranty, for fifteen and a half cents a dozen, knowing that B intends to sell them in the Boston market. The eggs are not fresh but mixed, fresh, limed and stale, and B consequently loses seven cents a dozen on them, though he sells them for sixteen cents a dozen. B recovers against M the value of this loss, or $82. Is M entitled to recover the amount of these damages from R as special damages? Yes.[301]

[297] Thoms v. Dingley, 70 Me. 100.

[298] Beeman v. Banta, 118 N. Y. 538, 23 N. E. 887.

[299] Shaw v. Smith, 45 Kan. 334, 25 Pac. 886.

[300] Park v. Richardson, 91 Wis. 189; 64 N. W. 859; Cary v. Gruman, 4 Hill (N. Y.) 625.

[301] Reese v. Miles, 99 Tenn. 398, 41 S. W. 1065.

(7) D sells and warrants the title, among other things, to three Baltimore heaters, to which there is a total failure of title. What is the proper measure of damages? The difference between the value of the property as sold and its value had the title been as warranted, or the value of the loss of property purchased. To allow the recovery of the full contract price would be contrary to the general rules of damages, which are calculated to furnish compensation.[302]

(8) D purchases of P a harvester and binder, agreeing to pay therefor $75 and giving his note. Three years later the machines are taken from D by a third party, under a mortgage given prior to that time by P. Is the measure of D's damages the value of the chattels when taken away, or the price paid for the chattels? The value when taken away from him. This gives him compensation. But it has generally been held that the measure of damages for failure of title to slaves is the purchase price and interest, in analogy to the rule in the case of land.[303]

§ 50. The substantial damages for breach of the covenant of warranty or of quiet enjoyment are the purchase price paid, if there is a total eviction, a proportional part of the purchase price according to value, if there is a partial eviction, and the sum paid not to exceed the purchase price, if the purchaser buys in the paramount title, with legal interest, where there is liability for mesne profits, together with the expenses of the eviction suit.

The substantial damages for breach of the covenant of seisin and of the right to convey are the purchase price paid, if there is a total failure of title, and a proportional part of the purchase price according to value, if there is a partial failure of title, and the sum paid not to exceed the purchase price if the purchaser buys in the paramount title; with legal interest and the expenses of the ejectment suit.

The substantial damages for breach of the covenant against incumbrances are the purchase price paid, if there is a total eviction, a proportional part thereof according to value, if there is a partial evic-

[302] Hoffman v. Chamberlain, 40 N. J. Eq. 663, 5 Atl. 150.

[303] Hendrickson v. Back, 74 Minn. 90, 76 N. W. 1019. See Crittenden v. Posey, 38 Tenn. 311.

tion, the difference in value with and without the incumbrance not to exceed the purchase price, if there is a permanent incumbrance, and the cost of removing the incumbrance at reasonable expense, if the incumbrance is removable, with legal interest.

Where the covenantee removes the paramount title or incumbrance against the land, the measure of damages is based upon the true rule, compensation, but in the other cases, the measure of damages is anomolous. The measure should be the value of the bargain lost. In the case either of total eviction or of total failure of title, this would be the difference between the contract price and the value of the property at the time of such eviction or failure of title. But, outside of New England, this is not the rule, but the amount of the damages is fixed by the price paid. Instead of putting the plaintiff in the same position as though the contract were carried out, he is put in the same position as though he had never made a contract. This places the rules as to damages for breaches of covenants out of harmony with the general rules of damages, but the rules are so well settled that there is no changing them at this date, and we must take them as we find them.

The purchase price is controlling, with the exception named, even if other damages are stipulated. The damages are not the same for breach of all of the covenants, but in all cases expenses are allowed for defending the title, whether as defendant or plaintiff, and interest is allowed on the purchase price where the covenantee is liable for mesne profits, and interest is allowed on other moneys expended from the time of the outlay. The covenants of seisin and right to convey relate to the time of the conveyance and mean that the grantor then has title; while the covenants of warranty and quiet enjoyment relate to the future and bind the grantor and his heirs to make the title good; and the covenant against incumbrances relates to subsisting rights in third persons. Before there can be any breach of a covenant of warranty, there must be an actual or constructive eviction, but it is not necessary that it be by

legal process; whenever the grantee is ousted of possession by one having a lawful right to the property paramount to the title of his grantor, the covenants of warranty and quiet enjoyment are broken, and if the paramount title is so asserted that he must yield to it, or go out, the covenantee may purchase, or lease, from the true owner, and this will be considered a sufficient eviction to constitute a breach. An amicable ouster is for the benefit of the grantor, as it saves him the expense of the eviction suit. Before there can be a breach of the covenant against incumbrances, the covenantee must suffer actual injury. In all cases of total eviction the measure of damages is the price paid, with interest. Where the eviction is partial, a proportional part of the price is recoverable for breach of any of the covenants, but the proportion is determined by the relative value and not by the relative quantity of the land lost to the entire tract. If the covenant against incumbrances is broken by a lease, the measure of damages is the rental value to the expiration of the term; if by a life estate, interest on the purchase money, or a proportional part of it, for the probable life, based on the annuity tables; if by an easement, the difference between the value of the land with the easement and without the easement, not to exceed the purchase price.

Where the foregoing covenants occur in a lease, the above rules obtain, but all other covenants of both landlords and tenants are governed by the general rules of damages for breaches of contracts, and have already been considered under leases.

The elements of injury in the various cases are sufficiently set forth in the propositions. Except for costs and expenses, the damages recoverable are direct. Damages for benefits conferred may sometimes be recovered from the holder of the paramount title who accepts the same in an action in quasi contract.

ILLUSTRATIONS.

(1) D sells a lot of land to P, with a covenant of seisin. P resells to C, with the same covenant. C is evicted from a moity of the land, worth three hundred pounds, and recovers this sum from P. In a suit by P against D for breach of covenant, what is the measure of dam-

ages? The contract price with interest and the costs of defending the eviction suit, for the covenant cannot be construed to extend to anything beyond the subject-matter of it.[304]

(2) P buys land from D with a covenant of quiet enjoyment. After the conveyance the title of the United States to the land becomes absolute and paramount by the decision in a suit pending and the lands are thereby restored to the public domain, though P is not actually evicted. P then pre-empts the land. In a suit by P for breach of covenant, setting up the foregoing facts, D demurs to the complaint. The demurrer should be overruled, as constructive eviction is enough to constitute a breach of covenant, and the measure of P's damages would be the purchase price and interest, if P has lost the premises, but, as he purchases them, it is the sum actually paid for the paramount title and expended in defending his title, with interest.[305]

(3) P is the purchaser of land from a remote grantor, who has conveyed with a warranty of title for $6,296, though P pays only $1,000, and P loses by the paramount title of other parties one-fourth of his interest in the land. What is the measure of damages? One-fourth of the purchase price paid for the land by the first vendee, as the covenant runs with the land, and interest, as P is liable for mesne profits, and costs because contemplated. It is the necessary result of the doctrine that the measure of damages is the price and not value, that the price paid by the first vendee is recoverable, but it is not in harmony with the general law of damages.[306]

(4) D buys from P for $600 a lot of land, by a deed of general warranty, purchasing it for the purpose of erecting a lager beer cellar on the west end thereof, of which fact he notifies P. Later he is evicted by paramount title from the west end, by reason whereof the lot is worth to D $200 less than the entire lot would have been worth, but its relative general value is now only $30 less than it would have been. What is the measure of damages? Thirty dollars and interest from the time of eviction. The fact that the land is bought for a particular purpose has no effect on the measure of damages. The implied warranty of reasonable fitness for a particular purpose in sales gives the purchaser an antecedent right and therefore affords no analogy for settling the rules of damages.[307]

(5) D conveys land to A with covenants of warranty and quiet enjoyment for the named price of $500, though the actual price is less, and

[304] Staats v. Executors of Ten Eyck, 3 Caines (N. Y.) 111f; Pitcher v. Livingston, 4 Johns. (N. Y.) 1.

[305] McGary v. Hastings, 39 Cal. 360.

[306] Brooks v. Black, 68 Miss. 161, 8 So. 332.

[307] Phillips v. Reichert, 17 Ind. 120.

A conveys the same land to P. B, having a paramount title, enters and takes possession of the land. Is P entitled to sue D for breach of covenant, and if so what is the measure of his damages? Lawful eviction of some sort is necessary, but it is not necessary that it should be by legal process; whenever the grantee is ousted of the possession by one having the lawful right, the covenants of warranty and quiet possession are broken. The amount of damages is fixed by the price named in the deed, as D is estopped from setting up against a stranger the fact that the price named is not the real price. Not so as between the original parties.[308]

(6) P buys land from D, and D executes a deed, with a covenant against incumbrances. There are several mortgages against the place. P pays $1,165 on them, and $835 remains due. In a suit for breach of covenant, is P entitled to recover $1,165 or $2,000 and interest? $1,165. He ought not to recover the value of an incumbrance on a contingency where he may never be disturbed by it.[309]

(7) P buys land from D by a deed with the usual covenants. The title wholly fails, and the title is decreed by court to be in another from whom P buys the paramount title. What is P's measure of damages for breach of the warranty of seisin? Not the contract price and interest, but the sum paid for the paramount title, not to exceed the price in the first deed. It makes no difference whether the title to a part or the whole of the land fails, when the paramount title is thus bought. This rule is based on the true principle of compensation.[310]

(8) D conveys to P with a covenant against incumbrances the paramount title to lands on which there are junior incumbrances. It would cost the junior incumbrances more than the value of the land to redeem, but P extinguishes the incumbrances. Is P entitled to recover from D the amount paid? No. At least, he can only recover a nominal sum, as the incumbrances have no value.[311]

[308] Greenvault v. Davis, 4 Hill (N. Y.) 643; Howell v. Morris, 127 Ill. 67, 19 N. E. 863.

[309] DeLavergne v. Norris, 7 Johns. (N. Y.) 358.

[310] Richards v. Iowa Homestead Co., 44 Iowa, 304.

[311] Guthrie v. Russell, 46 Iowa, 269.

CHAPTER XI.

TORTS AFFECTING PERSON AND FAMILY.

§ 51. In actions for torts, the damages are such value of pecuniary injuries and such sum awarded in the sound discretion of the jury for nonpecuniary injuries as will place the person injured in the same situation as if no tort had been committed; except that if the act is malicious or wanton the jury in its sound discretion may award a further sum as a punishment to the offender and a warning to others.

While the rules for measuring the damages are different in tort actions than in contract actions, the purpose of all is the same. It is compensation. Damages should always be commensurate with injuries. In both kinds of actions the object of the law is to place the injured party in the same position as though no wrong had been committed. In cases of contracts, this means in the same position as if the contract had been performed, for the injured party has a

right to the performance of the contract. In cases of torts, this means in the same position as though no tort had been committed, for the injured party has a right not to have the wrong committed. As a party is always entitled to at least nominal damages for every breach of contract, so he is entitled to at least nominal damages for every tort violating one of his legal rights, but in the case of negligence, nuisance, fraud, etc., as there is no tort without special damage, nominal damages, in these cases, are practically excluded. Except for breach of promise of marriage, exemplary damages are excluded in contract suits, but in most jurisdictions they are not unusual in tort suits. In contract actions, direct damages are recoverable for the injuries which flow in the usual course of things; in tort actions, for the immediate injuries. Consequential damages are recoverable in contract actions for only those unusual injuries which are within the reasonable contemplation of the parties at the time of making the contract as the probable result of its breach, but in torts such damages include all the injuries which are the natural and probable result of the wrongful act.

Where the amount of the damages rests in the sound discretion of the jury, evidence in aggravation or mitigation of the damages is admissible, either on the issue of malice, or actual injury, and the verdict is subject to be set aside by the court if so great or so small as to indicate that the jury is influenced by passion or prejudice, or misled by a mistaken view of the merits of the case.

The various applications of the general principle will now be considered in connection with the specific torts which arise from violations of the rights of personal security, liberty, reputation, family and property.

§ 52. The substantial damages for assault and battery are such sum as the jury in its sound discretion may award for physical pain and mental suffering, together with the value of loss of time, loss of earning capacity, expenses, and any other pecuniary losses, resulting or to result as a natural and probable consequence of the tort.

Nominal damages are always recoverable for an assault or a battery, as special damage is not an element of the tort. Except where the doctrine of exemplary damages is repudiated, exemplary damages are also recoverable where the assault, or battery, is such as to manifest malice, or a wanton disregard of the rights of others. The immediate injuries here are physical pain and mental suffering, and damages are recoverable therefor under a general allegation, and damages for mental suffering are recoverable, though there is no other actual injury, as the tort is such as naturally to give rise to distress, or mental suffering, and there is a tort, or independent cause of action, in which mental suffering may be an element. Loss of time, loss of earning capacity, and expenses incurred, are consequential in nature, but consequential damages are recoverable, not only for these injuries, but for any other injuries that are certain and the natural and probable consequence of the wrongful act where specially pleaded, and not only present but prospective damages are recoverable. Evidence of special damage, annoyance, malevolence or recklessness, and on the issue of exemplary damages the pecuniary condition of the defendant, is admissible in aggravation of damages, and recent and immediate provocation, before the blood has had time to cool, in mitigation of damages. The usual rule as to excessive damages applies.

ILLUSTRATIONS.

(1) D kicks P on a spot on his leg where he already has a bruise and as a consequence P loses his limb. What damages are recoverable for this injury? Direct, as the injuries flow immediately; but special, as they are not the necessary consequence.[312]

(2) In an action for damages for an assault and battery, which in addition to the immediate injuries of physical pain and mental suffering cause loss of earnings and expenses for medical aid and nursing, are damages recoverable for the latter injuries? Yes. The measure thereof is value, but they should properly be specially pleaded.[313]

[312] Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403.

[313] Howes v. O'Reilly, 126 Pa. 440, 17 Atl. 642; International, etc., R. Co. v. Kentle, 16 Am. & Eng. R. Cas. 337.

(3) In a suit for damages for an assault upon a woman, though there is no battery, are damages recoverable for mental suffering caused? Yes. There is a tort, and if mental suffering is the natural and probable result it is an element of injury for which compensation should be allowed.[314]

(4) A colored woman is excluded from the ladies' railway car, solely on the ground of her color, and directed to take a seat in a car set apart for men. This exclusion is done by a brakeman in a rude manner and in the presence of several persons. The woman declines to go into this car. Is she entitled to recover something for the indignity, vexation and disgrace to which she is subjected, there being a right to some other damages? Yes. A verdict of $200 is not excessive.[315]

(5) D, who with his wife has formerly had certain seats in a dining room at a hotel, finds upon his return that, as he has not reserved the seats, they have been assigned to and are occupied by another guest, P, and without any provocation D seizes a bottle on the table and hits P over the head. Is P entitled to recover exemplary damages in addition to actual damages? Yes. Where exemplary damages are allowed at all they are not confined to cases of actual malice, but they may be recovered where the assault is grevious or wanton, manifesting a willful disregard of the rights of others.[316]

(6) An assault and battery is induced by personal abuse given by the party assaulted. Is this evidence admissible in mitigation of actual damages? No. But it may be considered in mitigation of exemplary damages and it may be introduced to influence the estimate of the actual damage to the feelings.[317]

(7) D's conductor in removing a drunken man from a car jostles another drunken man and throws him upon P, but the conductor's act is lawful and reasonable. Is P entitled to damages? No. P has assumed this risk.[318]

§ 53. The substantial damages for personal injuries caused by negligence are such sum as the jury in its sound discretion may award for physical pain, and, if a cause of action exists, for mental suffering, together with the value of the loss of time, loss of earning capacity, expenses, and any other pecuniary injuries, resulting or to result as a natural and probable consequence of such negligence.

[314] Leach v. Leach, 11 Tex. Civ. App. 699, 33 S. W. 703.

[315] Chicago & N. W. R. Co. v. Williams, 55 Ill. 185.

[316] Borland v. Barrett, 76 Va. 128.

[317] Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468; Prentiss v. Shaw, 56 Me. 427; Smith v. Holcomb, 99 Mass. 552.

[318] Spade v. Lynn, etc., R. Co., 172 Mass. 488, 52 N. E. 747.

Except for one thing, this rule is the same as applies to damages for assaults and batteries. As in the case of actions for assaults and batteries, damages are recoverable for physical pain and mental suffering, under a general allegation, if there is proof thereof, and damages are recoverable for loss of time and loss of earning capacity and expenditures and loss of profits, under a special allegation. The expenditures must be such as are reasonably necessary. Physical pain and mental suffering are not capable of being exactly measured by money. The measure is not what it would cost to hire some one to undergo the pain the plaintiff has endured. All that can be done is to allow the jury to award such compensation as it deems right. Loss of time is capable of exact compensation; it is so much money as the injured man might have reasonably earned in the same time by the pursuit of his ordinary calling. Loss of earning power involves an inquiry into the value of the labor, physical or intellectual, of the injured person before the accident, as judged by his past earnings, or the fair value of his services, his age, state of health, business habits and manner of living, and his ability to earn money after receiving the injury. The jury is not bound to itemize and assess a separate amount for each element of injury but may award a gross sum, but the elements of injury should be detailed to the jury by the court, and the jury should confine its consideration to the same.

The one thing which distinguishes the rule of damages for the tort of negligence from the rule of damages for assault and battery is that special damage is the gist of the action for damages for negligence. Consequently, nominal damages are excluded, and damages for mental suffering and exemplary damages are recoverable only when there is some other element of injury, that is, only when an independent cause of action exists.

Pain and mental suffering are the direct and necessary result of personal injuries, and damages may be recovered therefor under a general allegation. It is also held that loss of procreative power may be shown under an allegation that plaintiff was greviously wounded, and that a miscarriage may

be shown under an allegation that plaintiff was made sick, for the law will infer such facts from those stated, and they are immediate though not necessary. But such injuries as expenses in employing a substitute or for medicines, injuries to a part of the body not mentioned, loss of time, injuries sustained because of special occupation, loss of earnings and business engagements, are consequential in nature and must be specially pleaded.

Personal injuries very frequently arise from the negligence of carriers of passengers in failing to perform the common-law duties resting upon them under their obligation to care for their passengers as far as human care and foresight will go; but so far as the rules of damages are concerned, it is not important to distinguish between the different ways in which personal injuries may arise from negligence.

ILLUSTRATIONS.

(1) P sustains personal injuries through the negligence of D. If P is in delicate health, should the jury be instructed that D is liable only for such consequences as would have resulted if P had been in good bodily health? No. D is responsible for all consequences in the particular case, if proximately caused.[319]

(2) P sustains personal injuries through the negligence of D by being run against by one of its cars. What elements of injury may be considered? Bodily pain, mutilation, loss of time, outlay of money, mental suffering, and loss of earning capacity.[320]

(3) P sustains severe personal injuries, resulting in the loss of a leg, through the negligence of D. Is P entitled to recover interest on the damages assessed by the verdict? No. This sum in gross includes all the compensation requisite to cover pain, suffering and disability to the date of judgment and prospectively beyond, and is a full measure of recovery, and cannot be supplemented by the new element of damage for the detention of this sum from the date of the injury.[321]

(4) P receives an injury, while a passenger on one of D's trains, because of the negligence of the employe of D. What items of injury

[319] Tice v. Munn, 94 N. Y. 621.

[320] Ballou v. Farnum, 93 Mass. (11 Allen) 73; Linsley v. Bushnell, 15 Conn. 225.

[321] Louisville, etc., R. Co. v. Wallace, 91 Tenn. 35, 17 S. W. 882.

should the jury consider? Expense, inconvenience and suffering, and loss of earning power, the first and third measured by value and the second by the discretion of the jury, but the damages for all may be included in one gross sum.[322]

(5) P, a postal clerk earning $1,150 a year, with prospects of a promotion to a salary of $1,300, receives personal injuries of a permanent character from the negligence of D. After pointing out the different circumstances which the jury may take into consideration in estimating the amount of damages from loss of earning capacity, the court says there is no fixed rule for estimating damages of this sort. Is this error? No. While the loss is pecuniary and should be measured by value, it cannot be done with such exactness as to authorize a fixed rule. The loss of promotion is too uncertain to be considered at all.[323]

(6) P sues D for damages for injuries sustained by him through the negligence of D. Is he entitled to recover for expenses incurred in going to various springs in order to restore his health? Yes. They are a part of the injury, and damages may be recovered therefor under a proper pleading, if the expenses are necessary and reasonable (questions of fact for the jury).[324]

(7) P sues D for damages for personal injuries from an explosion of gas, caused by the negligence of D in repairing a gas pipe by which it supplies gas to a house. The trial judge instructs the jury in estimating damages to consider physical injuries, pain and mental suffering, permanent disability and expenses, and also instructs them that if, as a result of the injury, P's expectancy of life has been shortened, they may consider this in estimating damages. Is this instruction error? Yes. The shortening of life can be considered only in determining the extent of other injuries. Life itself cannot be measured in money. Even another person can recover by statute for death only for the pecuniary loss to himself.[325]

(8) P sues D for damages for injuries sustained by D's tying his horse so insecurely that it runs away and into the wagon of P, causing P a concussion of the spinal cord, by reason of which his eyesight and his ability to walk are impaired. P uses ordinary care and judgment in selecting a physician, but the physician does not apply the most approved methods. Is D liable? Yes.[326]

(9) While P is boarding one of D's cars, she is frightened by the negligence of a servant of D, driving another car, who drives his horses

[322] Goodhart v. Penn. R. Co., 177 Pa. 1, 35 Atl. 191.

[323] Richmond, etc., R. Co. v. Allison, 86 Ga. 145, 12 S. E. 352.

[324] Hart v. Railroad Co., 33 S. C 427, 12 S. E. 9.

[325] Richmond Gas Co. v. Baker, 146 Ind. 600, 45 N. E. 1049.

[326] Loeser v. Humphrey, 41 Ohio St. 378.

close to P, and as a consequence she has a miscarriage. Does P have a cause of action? No. There can be no cause of action for injuries sustained by fright occasioned by the negligence of another, but if there is an independent cause of action mental suffering may be considered as an element of injury, and if the injury is such as really to be an injury to the body rather than the mind, it will give a cause of action.[327]

§ 54. The substantial damages for false imprisonment are such sum as the jury in its sound discretion may award for physical pain and mental suffering, together with the value of the loss of time and interruption of business, expenses reasonably incurred, and any other pecuniary injuries, resulting or to result as a natural and probable consequence of the tort.

Nominal damages are always recoverable for a wrong of this sort without special damage, as special damage is not an element of the tort, but if there is special damage, as injury to reputation, illness, insufficient food or attorney's fees, upon being specially pleaded, damages are recoverable therefor. Exemplary damages are recoverable as in other torts. Substantial damages lie within the sound discretion of the jury, and this applies even to pecuniary elements of injury, for while the jury should allow only the value of such injuries, it may bring in a verdict for a gross sum for pecuniary and nonpecuniary injuries. Prospective damages are not recoverable for a continuance of the imprisonment after the commencement of the action, for such detention amounts to a new tort.

ILLUSTRATIONS.

(1) D arrests P on an illegal warrant and takes him to jail and keeps him there until he pays $49 for taxes and costs. Is P entitled to recover from D the amount of money thus paid? Yes. The loss of the money is as much a consequence of the trespass as the loss of time, injury to health, and deprivation of liberty. But interest should not be

[327] Mitchell v. Rochester R. Co., 151 N. Y. 107, 45 N. E. 354; Sloane v. Southern Cal. R. Co., 111 Cal. 668, 44 Pac. 320; Summerfield v. Western Union Tel. Co., 87 Wis. 1, 57 N. W. 973.

allowed on this amount, as it is only one element of injury and the total damages are in the sound discretion of the jury.[328]

(2) P saws into a guy post placed in his boulevard by D. This is a misdemeanor, and no arrest can thereafter be made therefor except on a warrant, but D has P arrested without a warrant and taken to jail and hailed before a magistrate. What is the measure of P's damages for this false imprisonment? Such sum as the jury in its sound discretion may award for pain and suffering and as exemplary damages, as the act of arrest is wanton and without palliation or excuse.[329]

(3) In a suit by P against D for false imprisonment, must P be limited to nominal damages, unless he can show damage beyond mere deprivation of liberty? No. He is entitled to nominal damages in any event, but it is for the jury itself to determine whether it shall reduce its verdict to this sum or allow such substantial damages as its sound discretion may dictate.[330]

(4) P sues D for damages for false imprisonment. May he prove as damage sustained by him the amount of the fee paid by him to counsel in gaining his release from imprisonment? Yes. He can recover only the amount of reasonable charges, but the jury is the judge of this.[331]

§ 55. Substantial damages for malicious prosecution are such sum as the jury in its sound discretion may award for physical pain, mental suffering, deprivation of liberty, and loss of society of family, together with the value of the loss of time, interruption of business, expenses of litigation, injuries to credit and reputation, and loss of property, resulting or to result as a natural and probable consequence of the wrong.

As in all tort actions, damages can of course be recovered in an action for malicious prosecution only for such injuries as are the natural and probable consequence of the wrong. The tort of malicious prosecution may arise either by a criminal prosecution or a civil prosecution, maliciously

[328] Taylor v. Coolidge, 64 Vt. 506, 24 Atl. 656.

[329] Ross v. Leggett, 61 Mich. 445, 28 N. W. 695.

[330] Page v. Mitchell, 13 Mich. 63; Josselyn v. McAllister, 22 Mich. 299; Henderson v. McReynolds, 14 N. Y. Supp. 351.

[331] Parsons v. Harper, 16 Grat. (Va.) 64.

and without probable cause, but the prosecution complained of must have terminated in favor of the one prosecuted before an action for redress can be begun, and in a nondefamatory malicious prosecution suit special damage is necessary, and this must be something other than costs, for these are charged in the first action. If a cause of action for damages for malicious prosecution exists, the damages are in general in the sound discretion of the jury, although some injuries are necessarily measured by value, and exemplary damages may be added to other damages allowed, but the usual right of the court to set aside an excessive verdict for passion, prejudice, or ignorance, exists.

This tort differs from false imprisonment in at least two respects. A defamatory, malicious prosecution imports an injury to reputation and general damages are recoverable therefor; while in false imprisonment only special damages could be recovered, and special damage is never necessary to an action for false imprisonment.

ILLUSTRATIONS.

(1) D's warehouse is set on fire and destroyed, and he has P and his wife prosecuted and imprisoned for burning the building, but they are acquitted. If the prosecution is instituted maliciously and without probable cause, and the keeper lawfully confines P and his wife separately, is this proper for the jury to consider in estimating compensatory damages? Yes.[332]

(2) D institutes a prosecution against P and has him put in jail, without probable cause and from malicious motives, on the criminal charge of committing the offense against nature. What are the elements of injury for which P may recover? Expenses in the prosecution complained of, loss of time, deprivation of liberty, loss of the society of family, injury to fame and personal mortification.[333]

(3) D leases premises to P for one year, with privilege of renewal for two years, but, at the end of one year, while P is using the premises for a boarding house, D maliciously and without probable cause sues out a statutory summary process to evict P. P gives bond and is not evicted, but P incurs expenses in doing this and because of it also loses

[332] Spear v. Hiles, 67 Wis. 350, 30 N. W. 506.

[333] Hamilton v. Smith, 39 Mich. 222; Wilson v. Bowen, 64 Mich. 133, 31 N. W. 81.

boarders. Is P entitled to recover the value of the expenses and loss of boarders? Yes, if specially pleaded and proved. In order to recover for attorney's fees, their value and not the attorney's charge must be proved.[334]

(4) D institutes against P an action for malicious prosecution. The proceedings are published in a newspaper and this fact injures P's reputation. Should he recover damages for this injury? Yes. Such publication is the natural and probable consequence of the institution of the prosecution.[335]

(5) In an action for damages for malicious prosecution, it appears that while under arrest P is made to walk through the snow for a short distance. He had previously had a surgical operation, and either from being made to walk in the snow or other causes he catches cold and the injured parts are affected, but the injury could with more reason be attributed to his own indiscretion and negligence. Should this injury be considered by the jury as an element of injury? No.[336]

(6) By an action for forcible entry and unlawful detainer P is wrongfully ejected from a lease of a mine. In a suit for the malicious prosecution of the above action, what is the measure of damages? The reasonable value of the use of the premises for the time P is kept out of possession, with the value of all permanent damages to his leasehold interest.[337]

(7) In a suit for malicious prosecution, if compensatory damages are allowed for mental suffering, can exemplary damages also be allowed? Yes.[338]

§ 56. The substantial damages for slander and libel are such sum as the jury in its sound discretion may award for injury to reputation, injury to feelings, mental suffering, and the loss of the society of friends and associates, together with the value of the loss of business, of credit, of office, of employment, of advantageous marriage, and any other pecuniary injury, past or future, that is the natural and probable consequence of the defamation.

[334] Slater v. Kimbro, 91 Ga. 217, 18 S. E. 296; Mitchell v. Davies, 51 Minn. 168, 53 N. W. 363.

[335] Minneapolis Threshing Mach. Co. v. Regier, 51 Neb. 402, 70 N. W. 934.

[336] Fletcher v. Chicago, etc. R. Co., 109 Mich. 363, 67 N. W. 330.

[337] Moffatt v. Fisher, 47 Iowa, 473.

[338] Parkhurst v. Masteller, 57 Iowa, 474, 10 N. W. 864.

Defamation is divided into two kinds; that which is actionable per se, and that which is not actionable per se. Of the former there are four kinds: where there is an imputation of the commission of a criminal offense punishable by imprisonment or other corporal penalty; where there is an imputation of having a contagious or infectious disease of a disgraceful kind; where there is a derogatory imputation concerning one in his office, business, or occupation; and where the defamation is a libel. In all these cases there is a cause of action, and a right to at least nominal damages, though there is no special damage. A libel, for instance, is always a libel, and in a suit therefor the question is not whether there is liability but what is the mount of the damages. The same thing is true of slander which imputes a crime, or a loathsome disease, or affects one in his business or profession. But, according to the common law, all other words spoken by one about another amount to the tort of slander and give a cause of action only when they cause special pecuniary injury, or damage. They are said not to be slanderous, or actionable, per se. Special damage is the gist of the action, as in deceit, negligence and nuisance, and must be specially pleaded. Insulting language alone is not a ground for damages.

Malice is said to be an essential to slander or libel. This is malice in law. It is not necessary. It is simply a fiction of law. The use of the term means nothing, is misleading, and we shall disregard it in our further discussion here. Actual or express, malice, is another matter. If the defendant acts with express malice, or with recklessness, or carelessness, and there exists a right to either nominal or substantial damages, the jury in its sound discretion may award exemplary damages.

In estimating the damages the jury should take into consideration the nature of the charge, the manner it is made, the extent of its circulation, social and domestic relations, financial standing and reputation of both parties, and malice. In aggravation of damages, if specially pleaded, evidence of special injury, repetitions of the charges, and other defamations, are admissible. In mitigation of damages may be

shown provocation, retraction, mistake and belief in the truth of the statement. Damages are recoverable for future effects as well as present effects.

ILLUSTRATIONS.

(1) P sues D for damages for the slander of charging her with stealing money. May the jury take into consideration the pecuniary circumstances and standing of the defendant and any effort which he may have made to have the plaintiff indicted? Yes[339]

(2) D publishes in its paper that the upper tendom in R is highly excited over a threatened breach of promise suit against P. This is a libel, as it tends to bring P into ridicule and contempt. The item is sent D by a correspondent in the town of R. Can D set up in mitigation of damages anything which the correspondent might? No. D has no knowledge of these mitigating circumstances when he acts, and therefore is without excuse.[340]

(3) Before twenty to sixty people at an election D charges P with stealing from his employer. Are damages recoverable for mental suffering? Yes. This is an important element of the injury.[341]

(4) D charges P with twice having tried to burn him out of his hotel (in which P lives) in order to get the insurance on her goods. Is evidence of the number and ages of P's children admissible to show that her mental suffering is increased? Yes.[342]

§ 57. The substantial damages for criminal conversation are such sum as the jury in its sound discretion may award for the loss of the wife's affections, society and services, for the degradation, for the injury to the husband's feelings, affections and pride, and for the husband's mental anguish, together with the value of reasonable expenditures, resulting or to result as a natural and probable consequence of the wrong.

Criminal conversation is adultery in the aspect of a tort. In general the measure of damages for injuries caused by this tort may be said to be the value of the wife, but as this

[339] Hintz v. Graupner, 138 Ill. 158, 27 N. E. 935.

[340] Morey v. Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. 161.

[341] Mahoney v. Belford, 132 Mass. 393.

[342] Cahill v. Murphy, 94 Cal. 29, 30 Pac. 195.

cannot be measured by any pecuniary standard, it must be left to the sound discretion of the jury, subject to the power of the court to grant a new trial for passion, partiality, or corruption. The discretion of the jury is unusually large in suits of this sort. As a consequence, verdicts are practically never set aside because they are excessive. The gist of the action is not any pecuniary injury from the loss of services, as is the case in seduction, but the gist of the action is the loss of consortium. Some states now also give a right of action to the wife. All matters in aggravation or mitigation of damages are admissible. Exemplary damages may be allowed, but their allowance is here, as elsewhere, in the discretion of the jury, and therefore it is error for the court to positively instruct the jury to award them. Except for expenditures, the elements of injury are nonpecuniary. Even the loss of the wife's services can hardly be called a pecuniary injury.

ILLUSTRATIONS.

(1) P sues D for damages for criminal conversation. D admits his guilt. In order to recover, is it necessary for P to show that he has suffered pecuniary damage from the loss of his wife's services? No. The injury is primarily to his conjugal rather than to his property rights, and he is entitled to recover for the injury to his feelings, his comfort, his pride, his affections, though he has not lost the services of his wife.[343]

(2) In an action for criminal conversation, what are the elements of injury for which the husband may recover? Mental suffering, humiliation and disgrace, alienation of the wife's affections, loss of the wife's society, and the pecuniary loss of her services (if there is such loss), less the value of the husband's duty to support, clothe and care for the wife. This right is independent of the wife's right to recover damages. Exemplary damages, based on the enormity of the offense, may also be awarded.[344]

(3) In an action for criminal conversation, what evidence is admissible in mitigation and aggravation of damages? Evidence that the relations between husband and wife were unhappy, the profligate char-

[343] Long v. Booe, 106 Ala. 570, 17 So. 716; Johnson v. Disbrow, 47 Mich. 59, 10 N. W. 79; Browning v. Jones, 52 Ill. App. 597.

[344] Prettyman v. Williamson, 1 Pen. (Del.) 224.

acter of the husband, and a divorce, is admissible in mitigation, and evidence that the defendant subsequently tried to influence the husband to allow defendant to continue the improper relations and of his pecuniary ability, in aggravation.[345]

§ 58. The substantial damages of a father in a suit for seduction of his daughter are such sum as the jury in its sound discretion may award as the value of the loss of service and of the time, care and expense of attendance, and for shame, mortification and disgrace, for injury to the good name and character of the family, for mental suffering, for the loss of the comfort of the daughter, and for the anxiety as a parent of other children for the influence of the example on them, resulting or to result as a natural and probable consequence of the wrong.

The gist of the action for damages for the tort of seduction is the loss of service. The loss of service is the gist of the action, whether the suit is by a parent, guardian, or master. Loss of service is also the gist of actions by parents, guardians, masters and husbands for other injuries to children, wards, servants and wives respectively. In order to understand why the loss of service is thus made the basis for recovery in these actions, it will be necessary to understand the historical nature of the various relationships to which reference has been made above. While at the present time all of these relationships are created by contract, in the beginning of the law, back in the primitive conditions of society they were fixed relationships. The relation of parent and child then was, and for that matter this relation still is, in no way dependent upon contract. The relation between guardian and ward was of the same nature, the guardian being simply substituted for the parent. The relation of husband and wife now rests upon agreement, but once it was based on the subordination of the wife. The relation of master and servant was originally only that of master and slave. All of the relations probably antedate the beginning

[345] Cases supra.

of the rights of property, and the fundamental idea in them all is the one peculiar to the ancient institution of the family that the father is its head and that all the other members of the family are his servants. In case of a personal injury to any one of these, servant, wife or child, of course the person injured sustains an injury and has a right of recovery. In such recovery damages are allowed for pain, mental suffering, etc., as explained in connection with the discussion of the rule of damages for personal injuries. But the head of the family also sustains some injury. If the injured person is incapacitated from working, the head of the family, who is entitled to the same, loses the services of the injured person. The early law recognized no independent action for the disgrace, or mental suffering, caused the head of the family as a third party, but it did give him an action for a wrong causing him to lose the services of his servants, and, as all the members of his family were regarded as his servants, he had a cause of action for the loss of the services of any of them. Where the wrong also caused him expense, he could recover for this element of injury. The ancient position of the head of the family no longer endures, but the rule of law still exists for the benefit of any one who is entitled to the services of another.

In the case of seduction, the person seduced formerly had no cause of action for seduction, because of her consent. Accordingly, the only action which could be brought against the wrongdoer was the one for loss of services, brought by the parent, guardian, or master. This was a remarkable situation, and the courts were anxious to change it, and in the process of time they did change it by allowing a father, in a suit for the seduction of his daughter, to recover damages for all the elements of injury he could show that he had sustained; until at last at the present time we find judges allowing a parent to recover damages for the seduction of his daughter independently of the question of whether he has lost any services.

Making the loss of service the gist of the action for seduction is analogous to what is done in the cases of negligence, nuisance, deceit and slander not per se, where special dam-

age is of the gist of the action. In all of these cases, if a cause of action exists, the plaintiff is entitled to show all of his elements of injury and to recover damages therefor.

Damages are allowable for all the elements of injury enumerated in the rule, and in determining the amount of damages to be allowed for these injuries the jury should consider the pecuniary means of the defendant, the social position of the plaintiff, and the methods employed by the defendant to accomplish his purpose. Matters to be considered in aggravation of damages are wantonly charging unchastity, publicity, and any attempt on the part of the defendant to continue the illicit relations. Matters that may be considered in mitigation of damages are unchastity or loose conduct on the part of the woman, the profligate character of the father, indifference of the father, the age of the defendant, and marriage of the defendant with the woman. But gifts given to the daughter, or recovery by the daughter, or a criminal prosecution, should not be considered in mitigation of damages. Exemplary damages may be awarded by the jury if seductive arts or force was used.

ILLUSTRATIONS.

(1) P sues D for the seduction of his minor daughter. The daughter also sues for damages for the same offense, being allowed to do so by statute. For what elemnts of injury may the father recover? For all the injuries to the father, including injuries to mind and estate, and he may also recover exemplary damages. The injury to the father is distinct from the injury to the daughter.[346]

(2) In an action by a father for damages for the seduction of his daughter, what circumstances is it proper for the jury to consider? The pecuniary circumstances of the defendant and the position in society of the plaintiff, an attempt by defendant to produce an abortion, the general reputation of the daughter for chastity, and any other circumstances in aggravation or mitigation of damages.[347]

(3) D seduces the daughter of P. In an action for damages for such seduction, is P entitled to recover the reasonable value of medical attendance and medicine? Yes, if he has incurred a legal liability therefor.[348]

[346] Stevenson v. Belknap, 6 Iowa, 97.

[347] White v. Murtland, 71 Ill. 250.

[348] Comer v. Taylor, 82 Mo. 341.

(4) D seduces the minor daughter of P. In order to recover damages for the seduction, must P prove loss of service? According to the common law this is required, but the tendency of many modern cases (generally decided under statute) is to allow recovery independently of such loss of service.[349]

(5) P sues D for damages for injuries sustained by the loss of service of wife, etc., caused by personal injuries to the wife. The personal injuries are occasioned by the negligence of D. What is P entitled to recover? The value of the labor substituted for the ordinary services of the wife, and the trouble and expense of curing the wife. The rule in case of injuries of this sort is not like that which applies in the case of seduction. The recovery is limited here to pecuniary losses, while in seduction, in addition to such recovery, the plaintiff may recover for all other injuries sustained.[350]

[349] White v. Murtland, 71 Ill. 250; Ellington v. Ellington, 47 Miss. 329; Pelkner v. Scarlet, 29 Ind. 154; Stevenson v. Belknap, 6 Iowa, 97.

[350] Lindsey v. Danville, 46 Vt. 144; Cowden v. Wright, 24 Wend. (N. Y.) 429.

CHAPTER XII.

TORTS AFFECTING PROPERTY.

I. Substantial damages for torts affecting property, § § 59-66

- A. Conversion, § 59
- B. Death, § 60
- C. Detention of property, § § 61-62
  - 1. Chattels, § 61
  - 2. Land, § 62
- D. Escape of dangerous things, § 64
- E. Fraud, § 63
- F. Infringement of patent, trade mark and copyright, § 66
- G. Lateral support, § 66
- H. Mutilation of dead body, § 66
- I. Negligence, § 64
- J. Nuisance, § 65
- K. Procuring refusal or breach of contract, § 66
- L. Slander of title, § 66
- M. Trespass, § 66
  - 1. Permanent injury, § 66
  - 2. Temporary injury, § 66
- N. Violation of water rights, § 66
- O. Waste, § 66

§ 59. The substantial damages for conversion are the true market value of the chattels, for all lawful available present and future uses, as drawn from all sources of information, either at the time and place of taking, or, at the election of the owner, at the time and place of demand, with legal interest from such date, together with the value of other pecuniary injuries resulting or to result as a natural and probable consequence of the conversion.

If the chattels taken are stocks of a fluctuating value, the owner is entitled to the highest market value

within a reasonable length of time after notice of the taking.

If there is no market at the place of taking, the value is determined by the value at the nearest place where there is an available market, less the cost of transportation to such place.

If there is no market value anywhere, the owner is entitled to recover the value of the chattels to him.

If the chattels are taken innocently, the innocent trespasser or innocent purchaser is entitled to counterclaim the value of any benefits conferred by him upon the chattels.

The rules of damages for conversion are important, as well as numerous, but they have already been thoroughly considered in connection with our discussion of the rules of value, and all that is necessary in this place is a summary of the various rules which apply to this particular tort. Nominal damages are always recoverable, and singularly enough exemplary damages are sometimes recoverable. But ordinarily the damages are substantial, which include direct damages, and would include consequential if there could be any. The elements of injury are the loss of property and the loss of the use of its money value from the time of loss. The loss of property is always measured by value, but it is not always easy to estimate the value, for it must sometimes be as of one place and sometimes of another, and sometimes of one time and sometimes of another, and it is for this reason that the various rules are required.

The courts do not agree upon the rules for determining the amount of damages for conversion, but the above rules seem to the author to be the best. For his reasons for thinking so, as well as for further authorities and a discussion of other rules, the reader is referred to section 27.

ILLUSTRATIONS.

(1) P is the lessee of some land, and sues D for the conversion of certain wheat, oats and hay, taken by D during the term of the lease by virtue of a writ of execution against the lessor. What is P's measure

of damages? The value of the chattels at the time and place of taking, with interest on that sum from such date to the time of trial, or, if the chattels are still in the possession of the defendant at the time of trial, at P's election, their present value at the place where the same were taken, in the form they were in when so taken. If D's taking had been willful, P might make a demand and recover the present value of the chattels at the place where they now are. If D has sold the chattels, P may elect to recover in assumpsit the amount for which they are sold.[351]

(2) P transfers to D, as security for money borrowed, certain promissory notes made by R. D makes a wrongful sale of the notes so as to be guilty of conversion. What is P's measure of damages? The actual value, not the face value, of the notes, with interest. The face of the notes with interest is prima facie the measure of damages, but D may show in reduction of damages the insolvency of the maker, or other facts impugning their value. The same rule would measure the damages for the negligence of the pledgee whereby the notes are lost.[352]

(3) D pledges bonds and stock with P as security for a loan evidenced by a note. P sells the security before the maturity of the note. The unauthorized sale amounts to a conversion, and D is entitled to damages therefor. What is the measure of his damages? The highest intermediate value of the securities from the time of the sale to a reasonable time after notice of the same within which to replace the securities. The reason for this rule is that the chattels have a fluctuating value. The pledgor may, at his election, ratify the sale and claim the proceeds, or treat the sale as a conversion and recover the advance in price up to a reasonable time within which to replace the same, or hold the pledgee for his breach of duty and claim the market value of the securities at the maturity of the debt.[353]

(4) P willfully takes a quantity of corn from W, the owner's, possession, and makes it into whisky. D levies on the whisky as the property of W. May P sue D in conversion? No. The whisky is the property of W, as an incident of his ownership of the corn, and it is subject to be levied on by his debtors. But if P had innocently worked this transformation he would have acquired title by accession, and the measure of W, or D's, damages, would be the value of the corn and interest.[354]

[351] Ingram v. Rankin, 47 Wis. 406, 2 N. W. 755; Nesbitt v. St. Paul Lumber Co., 21 Minn. 491.

[352] Griggs v. Day, 136 N. Y. 152, 32 N. E. 612.

[353] Dimock v. U. S. Nat. Bank, 55 N. J. Law, 296, 25 Atl. 926.

[354] Silsbury v. McCoon, 3 N. Y. 379.

§ 60. The substantial damages in the statutory action for death by wrongful act are the value of the pecuniary injuries thereby caused those entitled to the benefit of the statute from loss of service, loss of support, loss of prospective gifts, loss of prospective inheritance, and from medical and funeral expenses.

The determination of the value of these losses is left to the sound discretion of the jury.

At the common law a personal injury was liable to cause two civil wrongs; one, an injury to the person himself, the other, an injury to the husband, father, guardian, or master. The common-law rule was that both causes of action died with the death of the person injured; but the first cause of action has been enlarged by the growth of the doctrine of assignability, and the second has been enlarged for the benefit of the family of the deceased by giving them a new statutory action for the loss occasioned by the death. This last action is the one we are now considering. The only elements of injury that are here considered are pecuniary, or a better word would be material, and these injuries must of course be sustained by the beneficiaries. Nothing is allowed for the physical, mental, or other suffering of the deceased, for the action for death is independent of the action which the injured person himself would have had had he survived. Nothing is allowed for the mental suffering of the plaintiff, nor for his loss of the society, or companionship, of the deceased. Exemplary damages are not recoverable. Most jurisdictions do not permit the recovery of nominal damages unless there is pecuniary, or material, loss. The damages recoverable are substantial damages, and they are allowed only for pecuniary elements of injury, and they must be specially pleaded in order to be recoverable, except in those jurisdictions where nominal damages are allowed at all events. One of the elements of injury for which compensation is recoverable is the loss of future services. In case these are the services of the wife, they should be measured by their reasonable value during the probable continuance of her life, less the cost of support. In the case of the

loss of the services of a child, the rule is the same, except that the time is limited to minority. Loss of future support and care may be another element of injury. If the suit is by the wife, or a child, or for their benefit, the amount recoverable is the amount the husband, or father, would probably have earned for their benefit during the rest of his life. Another element of injury is the loss of prospective gifts. The value of this loss is estimated by what it is reasonably probable that the plaintiff would have received, in addition to what he does receive, if the deceased had lived. The loss of prospective inheritance is another possible element of injury. The value of this is what it is reasonably probable the deceased would have accumulated in the future and the plaintiff would have inherited. Medical and funeral expenses are also generally allowed as an element of injury. Interest is not recoverable. The total amount recoverable is generally limited to not exceed a certain sum, varying from $5,000 to $20,000. The pecuniary condition of the plaintiff should not be considered by the jury, although in New York and Wisconsin the jury seems to be allowed to take this into consideration. The expectation of life of the deceased, as well as of the beneficiaries, is determined by the standard life tables. Property received by descent is not to be deducted from what the parties entitled to sue would probably have received in addition if the deceased had lived.

The cause of action for death is anomalous. It is purely statutory. There was no cause of action at the common law. No satisfactory reason can be discovered for the common-law rule. Many poor reasons can be found therefor, all as barbarous as unsatisfactory. It is enough to say that the common law allowed no recovery. The English statute, abrogating the common law, and creating a new action is Lord Campbell's act. Other statutes creating this cause of action are modeled on Lord Campbell's act. These statutes create a new property right in those named therein in the life destroyed, and the violation of this by the wrongful act causing death gives them their cause of action. The measure of damages for the destruction of an annuity by causing the death of the donor thereof is the value of the annuity according to the standard mortality tables.

ILLUSTRATIONS.

(1) One, Ann Dwyer, is struck by D's cars, and as a result she dies about thirty days thereafter. P, her administrator, sues D for damages for personal injuries. On rulings permitting it the jury brings in a verdict for $700 damages for the injury to the estate and $2,300 for pain and suffering of said Ann Dwyer. Should the damages for the pain and suffering be allowed? No. This is an action, not for injuries to the deceased, but for the benefit of the surviving spouse and next of kin, and they are entitled to compensation only for pecuniary injuries. Damages should not be allowed for the pain and suffering, either of the deceased or of the beneficiaries.[355]

(2) P sues D to recover damages for the death of her female child of two years of age, caused by D's negligence. There is no evidence of damage, other than the above. The jury brings in a verdict for $20,000, under a charge from the court to the effect that such verdict is not limited to the actual pecuniary injury sustained by P. Is the verdict excessive? Yes. The main element of damage here is the probable value of the services of the deceased child until she attains her majority, considering the cost of support and maintenance during that time. Sorrow and mental suffering are not elements. Only pecuniary injuries to the beneficiary are elements.[356]

(3) P sues to recover damages for the death of his testator from a disaster on D's railway. The case is tried and a verdict rendered for P for $30,000. The deceased left no widow, but three children, all of maturity, two sons self-supporting and a daughter married. He owed none of them the present duty of support. At his death he was in partnership with his sons and son-in-law. At his death his expectancy of life was sixteen and seven-tenths years, and he had no other sources of income than his investments and his business. All of his investments come in bulk to his children. Are the damages excessive? Yes. The statute gives a cause of action only for the pecuniary injury to the widow and next of kin. Nothing is allowed for the severance of the contract relationship of partnership. As the children are mature, the loss of support is practically nothing. The loss of the prospective inheritance is the main basis of plaintiff's claim. The children have received the permanent investments, and can therefore recover only what the deceased would probaly have accumulated from his business and they would probably have inherited, which could not have amounted to over $15,000.[357]

[355] Dwyer v. Chicago, St. P. M. & O. R. Co., 84 Iowa, 479, 51 N. W. 244.

[356] Morgan v. Southern Pac. Co., 95 Cal. 510, 30 Pac. 603. But see Matthews v. Warner, 29 Grat. (Va.) 570.

[357] Demarest v. Little, 47 N. J. Law, 28.

(4) P et al. sue D to recover damages for the death of their father through the negligence of D in leaving a truck upon the platform where it is run into by an incoming train. The wife survives the husband's death only two years, and plaintiffs were not at the time of the accident dependent upon him for support. Their only loss is the money he might have accumulated during his expectancy of life. He was sixty-eight years of age, and his expectancy of life nine and a half years. He was earning $1,500 a year as an employe of a bank, and $500 as a conveyancer and notary. The court correctly instructs the jury as to the measure of damages, and the jury brings in a verdict for $4,000. Is this excessive? Yes. It is evident that the jury did not consider the liability of the deceased to illness, his incapacity for further exertions because of age, and the likelihood of his retiring from active work.[358]

(5) P et al. sue D to recover damages for injuries resulting to them as sons and daughters through the death of their mother because of the negligence of D. The children are all of age. During the mother's life the children have received many gifts in the way of support, but all of the aid they have received has come from the income their mother received from property of the value of $18,500. Is evidence admissible to show that by her will the mother left all of her property to her daughters? Yes. In such case those taking under the will have sustained no loss of support or prospective gifts, for the mother would have had no greater amount to give them and might have given them less.[359]

(6) P sues D under the statute for damages for wrongfully causing the death of her husband. Deceased was earning wages at the rate of $75 a month. He carried $2,000 of life insurance in favor of P, but had no other property. The insurance has been paid to P. Is D entitled to have this $2,000 insurance deducted from the amount the jury finds to be the value of P's loss? No. P is restricted to her actual pecuniary loss from losing the life, but the only deductions for insurance that can be allowed are future premiums which deceased would have had to pay had be lived, i. e., the benefit from accelerated payment.[360]

(7) P, as administrator of his wife's estate, sues to recover damages sustained by her death by the negligence of D. In estimating the pecuniary injuries, should the jury consider the loss the children sustain in reference to their mother's nurture, instruction, and moral, physical and intellectual training? Yes. Deprivation of these may result in pecuniary injuries.[361]

[358] Denver, etc., R. Co. v. Spencer, 27 Colo. 313, 61 Pac. 606; Wiest v. Electric Trac. Co., 200 Pa. 148, 49 Atl. 891.

[359] San Antonio, etc., Co. v. Long, 87 Tex. 148, 27 S. W. 113; Hutchins v. St. Paul, M. & M. R. Co., 44 Minn. 5, 46 N. W. 79.

[360] Grand Trunk R. Co. v. Jennings, 13 App. Cas. 800.

[361] Tilley v. Hudson River R. Co., 29 N. Y. 252.

§ 61. In an action of replevin, or other action for the recovery of specific chattels, the prevailing party is entitled to judgment for the chattels themselves, or in lieu thereof their value, together in either case with damages for their detention, either in the form of rent or interest, with the value of other pecuniary injuries, resulting or to result as a natural and probable consequence of the detention.

If the chattels have been taken from the prevailing party inadvertently by an unintentional wrongdoer, the latter is entitled to recover the reasonable value of benefits added thereto by his labor and expense, not to exceed the increased value of the chattels.

So far as the measure of damages is concerned, the principles of law applicable to suits in replevin are, or should be, identical with those which are applicable to suits in conversion, and they do not need further discussion here. There should be no distinction in the law, as to the measure of redress an injured party should receive for the same injury, because of the action he may select. All the courts apply the rule above announced in suits of replevin. Some, however, attempt to make a distinction in case of suits in conversion. In ancient English law replevin was a remedy introduced for the benefit of the owner of chattels which had been distrained, but in modern times it is a remedy for the recovery of chattels unlawfully in the possession of another, and often is a mere means of trying title. When the chattels themselves are returned, the owner ordinarily recovers only the value of their use during their detention, but, if the chattels are not returned, he recovers their value at the time of demand with the value of their use, or in some jurisdictions interest on the value instead of rent. If the chattels are injured or if expenses are incurred because of the wrong, damages may be recovered therefor if specially pleaded. Claim and delivery is the more common name of the modern action.

ILLUSTRATIONS.

(1) D inadvertently trespasses upon P's land and cuts 3,500 cross ties, and P sues to recover the possession of the same. The timber from which the ties were cut was worth, standing, two cents per tie, and at the time of suit twelve and a half cents per tie. A trial court gives judgment for P for $70, instead of possession. Is this judgment erroneous? Yes. It is incorrect for two reasons. The judgment should have been for possession, or if the delivery could not be had, damages. But, in the latter event, the rule of damages announced by the court is wrong. P is entitled to the value of the ties at the time of suit, less the labor and materials in transforming them, not to exceed the difference between the value of the ties at the time of suit and the value of the timber standing. The chattels are still the property of P. The increased value is the joint result of the original materials and the work and materials expended by the laborer. The wrongdoer, though innocent, should not profit by his wrongful act; he should be satisfied if he receives the value of his labor and materials. This rule should be the same, so far as chattels are concerned, whether the suit is in replevin, conversion, or trespass.[362]

(2) P, claiming to be the owner thereof, replevies a stack of wheat and threshes 225 bushels of wheat out of it. D is the owner of the wheat, but P acts in good faith in obtaining the writ. On the date the wheat is taken from D it is worth sixty-five cents; before the trial it advances until it is worth at its highest value one dollar, and P sells it for ninety cents. Threshing and hauling the grain are worth twenty cents. What is the measure of damages? The market value of the grain at the time of trial, i. e., delivery under bond, less the cost of threshing and marketing it.[363]

§ 62. In an action to recover the possession of land, the prevailing party is entitled to a judgment for the land itself, together with the annual rental value of the land and legal interest thereon during the period of eviction, and the value of any waste.

If the losing party is an occupant under a belief of title, he has a counterclaim for damages for the value of benefits conferred on the owner by expenses and improvements of the land.

[362] Eaton v. Langley, 65 Ark. 448, 47 S. W. 123; Winchester v. Craig, 33 Mich. 205. (Most cases incorrectly make the time for estimating the value in conversion just after severance, if the defendant is an innocent trespasser.)

[363] Clement v. Duffy, 54 Iowa, 632, 7 N. W. 85.

Under the original action of ejectment actual damages were awarded at the common law, but when the proceedings became fictitious, and the parties only nominal, the claimant was allowed to recover only nominal damages in the ejectment suit. Then there arose to recover the actual damages the action for mesne profits, an action which grew up out of the action of trespass on the case. In modern times, by adjudication and statute, the earlier practice has been restored and the plaintiff in ejectment may also proceed for mesne profits. Whether the damages for the detention of the land are allowed in a separate suit, or in the ejectment suit, the measure of damages is the same. In addition to these damages special damages may be recovered for waste and dilapidation. Exemplary damages are allowed as in other cases for malice. The rule permitting the occupant to recover for benefits conferred upon the owner when he takes his property back is of modern origin, and is a quasi contract growing out of the practice of courts of equity. Occupying claimant statutes have enlarged even this quasi contractual obligation.

ILLUSTRATIONS.

(1) P sues in ejectment for the recovery of a term, assigned to P by the lessee of D. The buildings on the place are destroyed, and D, acting in good faith, ejects P and builds larger and more expensive buildings. What is P's measure of damages? The same as it would have been if D had wrongfully withheld possession of the demised premises for the same length of time in substantially the same condition as they were in before the destruction of the buildings, with legal interest yearly, deducting from the gross rents and profits a fair compensation for the time and labor of D in caring for the premises and collecting the rents.[364]

(2) P sues D in ejectment for the possession of land, which defendant claims to hold adversely under a tax title. The title of D is worthless, and he has not been in possession of the land, which is unenclosed, unimproved, prairie land. Is P entitled, in addition to judgment for possession, to a judgment for damages for use and occupation? No. But D is entitled to recover for taxes paid.[365]

[364] Hodgkins v. Price, 141 Mass. 162, 5 N. E. 502; New Orleans v. Gaines, 82 U. S. (15 Wall.) 624, 21 Law. Ed. 215; Woodhull v. Rosenthal, 61 N. Y. 382.

[365] Griffey v. Kennard, 24 Neb. 174, 38 N. W. 791.

§ 63. The substantial damages for fraud, or deceit, are the value of the difference between the real state of the property and what it is represented to be, together with the value of any other injuries resulting as a natural and probable consequence of the fraud, such as loss of other property, loss of time and expenditures, and legal interest in the sound discretion of the jury.

Actual damage is the gist of the action of fraud. Actual damage is not an element of the rights of life, liberty and property, but it is an element of the right of one person to have another tell the truth. A person is not guilty of a legal wrong in lying, unless he thereby causes another actual damage. Nominal damages are therefore eliminated in this connection, except where actual damage is shown but there is a failure of proof. Exemplary damages are not often recoverable for torts of this sort, but where there is malice, or a relation of trust, exemplary damages may be assessed. In order to have a cause of action for fraud, there must be a false representation in regard to a material fact, made knowingly, or in such a way that the law construes it as made with knowledge, by one person to another, with intent that the same should be relied and acted upon, and it must be relied and acted upon by the other to his damage. Fraud differs from a warranty in that in order to amount to fraud the representation must be made with knowledge of its falsity. Interest may be allowed in the discretion of the jury. If the fraud induces a contract, the party defrauded may always at his election rescind the contract and recover the price paid.

A great many courts do not follow the rule above announced but rather the rule that the direct substantial damages for fraud are the difference between the value of the thing purchased and the price paid. Such a rule is contrary to the full, true purpose of the law of damages, and the author does not think that the objection of its advocates to the rule herein adopted is well taken. The ground of objection is uncertainty, but the damage is no more uncer-

tain here than in the case of a breach of warranty, and the ordinary rule in regard to certainty should apply.

ILLUSTRATIONS.

(1) P sues D for damages for deceit. What are the essential elements necessary to constitute this tort and give a cause of action? A false representation, in regard to a material fact, made by D with knowledge of its falsity and with intent that it should be acted upon by P, and that P reasonably believes it to be true and acts upon it to his damage. Fraud without damage, or damage without fraud, gives no cause of action. There must be knowledge of its falsity by the one making a representation in order to have it amount to the tort of deceit.[366]

(2) D sells P three horses for $400, which is paid. D falsely represents that the horses are sound, knowing that they are all afflicted with glanders. P reasonably relies upon this representation. The horses are all worthless and are killed by the public authorities. P also incurs an expense of $100 in surgical treatment of the horses and burns a $200 barn in which the animals have been kept, burning it because of the contagious character of the disease. The jury awards $650 damages. Is this excessive? No. All of these injuries flow from the fraud.[367]

(3) P sues D for damages for fraud in the sale of land. D has never seen the land, and offers evidence to show that the representations made by him to P are the same statements made to him by the former owner from whom he bought and which he believed. Should this evidence be admitted? Yes. In order to amount to fraud, the party making a false representation must know that the same is false, and the evidence offered is material on this point.[368]

(4) P sues D in tort for deceit in making false and fraudulent representations to P, touching the business and profits of a firm of which D was a member, and thereby inducing P to buy D's interest in the stock and good will of the firm. What is the measure of damages for the loss of property sustained because of the fraud? The difference between the actual value of the property at the time of the purchase and its value if it had been as represented.[369]

[366] Pasley v. Freeman, 3 Term, 51.

[367] Merquire v. O'Donnell, 103 Cal. 50, 36 Pac. 1033.

[368] Merwin v. Arbuckle, 81 Ill. 501; Rutherford v. Williams, 42 Mo. 18.

[369] Morse v. Hutchins, 102 Mass. 439. But see Smith v. Bolles, 132 U. S. 125, 33 Law. Ed. 279; Stickney v. Jordan, 47 Minn. 262, 49 N. W. 980.

§ 64. The substantial damages for injuries to property caused by negligence are the value of the property if totally destroyed, or the difference between the value of the property as it is and as it would have been but for the negligence, if partially destroyed or depreciated in value, with legal interest in the discretion of the jury from the date of the injury, together with the value of all other injuries, resulting or to result as the natural and probable consequence of the negligence.

In negligence we have another tort where actual damage is necessary in order to have the wrong. Negligence is not really a tort, but only an element of a tort. Aside from this distinction, the rules applicable to the tort of negligence do not differ from those which generally apply in torts for the estimation of the damages for pecuniary injuries. The heads of injury may be innumerable, and for this reason it is impossible to state them in a rule, but illustrations of some representative elements of injury will be found below. Liability ex delicto does not arise from omissions alone, though damage is sustained; it can arise only for the consequences of acts or omissions after the doing of acts. The liability of a public service company for refusal to receive goods cannot be treated as growing out of negligence. Liability for damage caused by negligence not only arises in ordinary relationships, but also and more frequently where there is some special relation, such as that between the various bailors and bailees, the many employers and employes, and because of the conduct of public officers. In these special cases liability is generally largely, governed by contracts, and, except to excuse willful and wanton negligence, all liability may be contracted away by the parties. Liability for damage caused by negligence exists when one person, seeing or knowing, or who ought to see or know, that an act or omission of his in failing to exercise ordinary care towards another in some particular place or juncture will be apt to do him harm, nevertheless is guilty of such act or omission in failing to exercise ordinary care to the damage of the other party. Liability for the escape of dangerous things,

the common carriers' liability at common law for the safety of goods, and the like, are not examples of liability for damage caused by negligence; rather they are absolute liabilities imposed by public policy. In such extraordinary cases damage alone is sufficient to create a liability. Yet this liability is closely connected with the subject of negligence, and by virtue of the growth of the power of private contract is gradually becoming assimilated by the subject of negligence.

Nominal damages are not recoverable for negligence, except when there is a right to substantial damages, and failure of proof by which to estimate the same. Exemplary damages are allowable in the discretion of the jury for reckless negligence. Substantial damages are allowed for consequential injuries when the latter are specially pleaded.

ILLUSTRATIONS.

(1) D negligently places a stake in a public highway, and thus injures P's horse so that it becomes worthless. P spends $35 in trying to cure the horse, in good faith and in reasonable belief that the horse can be cured. What is the measure of damages? The value of the horse and the value of reasonable expense, never to exceed the value of the horse.[370]

(2) Property belonging to P is destroyed through the negligence of the servants of D, a railway company, in allowing sparks to escape from an engine. What is the measure of damages, in the absence of any malice? The value of the property destroyed, with interest on that sum for its detention from the date of the destruction. P is entitled to just compensation in money for the property destroyed. He is entitled to an amount that will restore him to the same property status that he occupied at the time of the destruction.[371]

(3) P employs D to institute proceedings against some of his apprentices for alleged misconduct, but D specifically proceeds on a section of the statute relating to servants and not to apprentices, as a result of which the warrants issued against the apprentices are set aside, and the apprentices recover damages from P for false imprisonment. Should P recover from D the amount of the damages paid the apprentices, and cost of suit? Yes. The conduct of D amounts to negligence as an attorney of P, and D is liable for the injuries resulting to P.[372]

[370] Ellis v. Hilton, 78 Mich. 150, 43 N. W. 1048.

[371] Jacksonville, etc., R. Co. v. Peninsular, etc., Co., 27 Fla. 1, 9 So. 661.

[372] Hart v. Frame, 6 Clark & F. 193.

(4) P delivers $1,500 in money to D, and D gratuitously promises to carry the same to a certain place for P. Instead of doing as he has promised, D takes the money to certain fair grounds and publicly counts it out to E, who promises D to take D's place in carrying the money. The money is stolen from E. This conduct amounts to gross negligence on the part of D towards P. What is the measure of the damages? The value of the money, at least.[373]

(5) P rents an engine and cars to N for a certain time. While in the possesion of N, through the negligence of N and D, a collision occurs between the engine and a street car belonging to D, and P's chattels are injured permanently. May P sue D, and, if so, what is his measure of damages? P may sue D, and the measure of his damages is the value of the injury to his reversionary interest in the chattels. Such recovery can be had against either D or N, as each owes a duty to P not to cause him damage through negligence, E as a bailee, and D as man to man.[374]

§ **65.** The substantial damages for a nuisance of a permanent character affecting property are the depreciation in the market value of the property and the value of other pecuniary injuries, as well as such sum as the jury may award for nonpecuniary injuries, with legal interest at the sound discretion of the jury.

The substantial damages for a nuisance of a temporary character affecting property are the decrease in the rental or usable value of the property, together with any expense incurred in abating the nuisance and restoring the property to its former condition, and the value of the loss of profits, as well as such sum as the jury may award for nonpecuniary injuries, together with legal interest in the sound discretion of the jury.

If a nuisance is permanent, all damages, past and prospective, are recoverable; if a nuisance is temporary, damages are recoverable only down to the date of the action.

[373] Colyar v. Taylor, 41 Tenn. (1 Cold.) 372.

[374] New York L. E. & W. R. Co. v. New Jersey Elec. R. Co., 60 N. J. Law, 338, 38 Atl. 828.

Nuisances are of two kinds, public and private. A public nuisance may become a private by inflicting special damage upon some particular individual. In order to give a civil action for damages for a nuisance, whether the nuisance is a public or a private nuisance, the plaintiff must have suffered some actual, specific damage thereby. Actual or special damage is the gist of the action for damages for a nuisance. Consequently, in such actions nominal damages are recoverable only when, because of failure in proof, the injured person does not recover the substantial damages to which he would otherwise be entitled for actual damage. Nuisance must be distinguished from a physical invasion or interference with another's property, though this invasion or interference is caused by an act which is also a nuisance. In every case of a positive infringement of a right of property, actual damage is not necessary to give rise to a cause of action, but nominal damages at least are always recoverable, whereas, for a nuisance, actual damage is an essential and must be specially pleaded.

What amounts to special damage? A person cannot bring an action for every slight detriment caused his property. He must submit himself to the consequences of city life, if he is living in a city. The common-law doctrine in regard to surface waters imposes certain burdens upon the owners of servient estates. Rights may be gained by prescription, or contract. But, in general, an occupation which causes a visible injury to the property of another in the neighborhood is a nuisance, and such injury is sufficient damage. Whether a business is carried on in a reasonable manner, that is, in a convenient place, is a question to be answered from the standpoint of the neighbor and not from that of the man conducting the business.

Where a nuisance is of a permanent character, and those established by authority of the government are presumed to be such, all the damages, those for injuries which have already accrued and those to accrue, should be assessed; but, if the nuisance is such that the person conducting it would rather discontinue it than pay damages, damages should be assessed only down to the time of the action.

Where a nuisance causes personal injuries, in addition to injuries to property, many elements of injury may enter into the case, and, in addition to loss of rental value and expenses, there may occur such injuries as physical discomfort, injury to health, and loss of time.

Exemplary damages are allowable for malice in the discretion of the jury.

ILLUSTRATIONS.

(1) D is the owner and operator of a creamery. A tile drain carries refuse from this creamery to plaintiff's land and discharges the same thereon, creating a filthy mudhole, which plaintiff has to fence to keep his stock away from, and creating such a smell that the rental value of his premises is decreased. D has acquired an easement to conduct the waste through P's land but not to create a nuisance, prior to P's purchase of the premises. Is there special damage which will give P a cause of action for damages for this nuisance? Yes.[375]

(2) P, the owner of a lot, has his means of ingress and egress thereto cut off by the D railway company, which blockades with cars the entrance to the only street that P can use. What is P's measure of damages for his special injury? The difference between the rental value of the premises free from the effects of the nuisance and subject to them.[376]

(3) D locates a manufacturing establishment for manufacturing coke from coal in the vicinity of P's farm. The factory deposits on the farm various sterilizing substances, causing a diminution in the quantity and value of the crops. Should the benefits realized by P by the establishment of the manufacturing concern in his vicinity be considered in adjusting the amount allowed as damages for the above elements of injury? Yes.[377]

(4) A railway company, D, authorized to construct a line of railway, injures a public road, peculiarly affecting P, a mill owner, and also by blasting throws rocks into a stream and thus injures P's mill. What should P recover? For injuries, the cause of which is permanent in nature and the recovery of damages for which will confer a license on D to continue the cause, prospective as well as past damages may be recovered in a single action; but for the injuries, the cause of which

[375] Van Fossen v. Clark, 113 Iowa, 86, 84 N. W. 989.

[376] Jackson v. Keil, 13 Colo. 378, 22 Pac. 504.

[377] Robb v. Carnegie Bros. & Co., 145 Pa. 324, 22 Atl. 649.

is not permanent in character but such that D would remove rather than pay prospective damages, prospective damages cannot be recovered.[378]

§ 66. The substantial damages for a trespass causing a permanent injury to land are the diminution in the market value of the land, and the value of any other pecuniary injuries, and such sum as the jury may award for nonpecuniary injuries, resulting or to result as a natural and probable consequence, with legal interest, in the sound discretion of the jury.

The substantial damages for a trespass causing a temporary injury to land are the diminution in the rental value of the land during the time of the injury and the value of any other pecuniary injuries, and such sum as the jury may award for nonpecuniary injuries, resulting as a natural and probable consequence of the trespass, with legal interest, in the sound discretion of the jury.

If the cost of repairing a permanent injury by restoring the property to its former condition is less then the diminution in market value, then the cost of repairing, plus the cost of the use of the land meanwhile, is the measure of damages.

The term trespass is one of the broadest we have yet considered. In its broadest significance it includes, not only an unlawful entry upon land and an unlawful taking or interfering with the possession of goods, but many injuries to the person. Injuries to the person we have already considered in other connections. So far as trespasses to goods are concerned, the reader is referred to the rules for the tort of conversion, for the differences in the rules of damages between actions in trespass and actions in conversion are not sufficient to justify separate treatment. Injuries to land may be temporary or permanent, and permanent injuries may arise either from the destruction of some part thereof,

[378] Watts v. Norfolk, etc., Co., 39 W. Va. 196, 19 S. E. 521.

or from the taking away of some part thereof. In the latter case the land is changed into a chattel, and the rule of damages for trespass to chattels would allow the owner any enhanced value, less compensation for any benefits conferred by an innocent trespasser, but it is believed that this recovery can hardly be classified with trespasses upon land. The propositions fully state the rules as to the measure of damages for injuries to land by unlawful entry.

For the wrong of trespass upon land all the different kinds of damages are allowable in the proper case. Nominal damages at least are always recoverable, for there is a legal wrong. whether or not the trespass causes actual damage. Substantial damages are recoverable for all actual injuries; direct, for immediate injuries; consequential, for natural and probable but not immediate injuries; general, for necessary injuries; special, for such injuries as result naturally but not necessarily, as for example, personal injuries, or loss of other property. In addition, for injuries which are permanent, prospective damages are recoverable, and, if the injuries are caused maliciously, exemplary damages are allowable in the sound discretion of the jury. Double and treble damages are also sometimes allowed by statute.

There are various other wrongs in the nature of trespasses which constitute separate torts today, but so far as the rules of damages are concerned do not call for separate discussion. In three of them, violations of the rights to lateral and subjacent support, procuring refusal to contract, or procuring breach of contract and slander of title, actual damage is of the gist of the action; in such others as infringements of patents, trade marks and copyrights, mutilation of dead body, and violation of water rights, actual damage is not an essential.

Damage done to the inheritance by the lessee, or mortgagor, is known as waste. The same act committed by a stranger would be in the nature of a trespass. The measure of damages for waste committed by the owner of a particular estate is the diminution in the value of the estate in reversion or remainder.

ILLUSTRATIONS.

(1) P is the widow of S and as such entitled to the possession of a dwelling house. D wrongfully orders her to vacate the house, takes possession of all the rooms in the house but P's bedroom, and makes the house so cold and otherwise uncomfortable that P is forced to vacate. For what elements of injury is P entitled to recover in a suit of trespass? Loss of property, injury to health, physical pain and mental suffering, and also for D's maliciousness.[379]

(2) P is the owner of a certain section of land. D wrongfully occupies the same for three successive years, raising hay and crops thereon. Is P entitled to the market value of the crops and hay at the time of demand and suit? Yes. The crops produced by the trespassing acts are the property of the owner of the soil, and the latter is entitled to their value if deprived thereof.[380]

(3) P is the owner of a city lot. D raises the grade of an alley running in the rear of this lot, but in doing so not only deposits dirt upon the alley itself but extends the embankment onto P's lot. What is the measure of damages? The difference between the value of the property immediately before the trespass and after it is complete, unless the cost of restoring the property to its former condition is less, when that is the measure of damages. These are direct damages.[381]

(4) D, in the work of laying out a road, commits a trespass upon P's land and tears down a fence. As a natural and probable consequence of detroying the fence P loses several hogs and other property. Is P entitled to recover for the loss of the hogs and other property, as well as for the injury to the fence? Yes. These are consequential and special damages.[382]

(5) By contract P sells D the right to construct and use a tramway on P's land to remove timber for five years. D continues to use the tramway after the expiration of five years. What is P's measure of damages? The rental value of the land occupied and the decrease in the rental value of the other land affected by the tramway. This company being a private company, it could not condemn land and have the damages assessed as for a permanent injury.[383]

[379] Stevens v. Stevens, 96 Ga. 374, 23 S. E. 312.

[380] Negley v. Cowell, 91 Iowa, 256, 59 N. W. 48.

[381] Tegeler v. Kansas City, 95 Mo. App. 162, 68 S. W. 953.

[382] Welch v. Piercy, 29 N. C. 365.

[383] Leigh v. Garysburg Mfg. Co., 123 N. C. 167, 43 S. E. 632.

CHAPTER XIII.

QUASI CONTRACTS AND EMINENT DOMAIN.

§ 67. The substantial damages for breach of a quasi contractual obligation, equitable in nature, are the value of the net benefit received by the one under obligation.

The substantial damages for breach of a quasi contractual obligation of statute, or of custom, or of record, are the value of the loss sustained by the one in whose favor the obligation is created.

In this chapter we shall consider the measure of damages in suits in quasi contracts and in condemnation proceedings. The first bear some similarity to suits for breaches of contracts, and the second to suits for torts, but there is no contract in the first, nor tort in the second. Hence, they cannot be considered in connection with the rules applicable to breaches of contracts and to torts. They must receive separate treatment. They are both treated in the same chapter, not because of any especial similarity, but more for the sake of convenience.

There are two radically different kinds of obligations classified as quasi contractual. The first rests upon the doctrine that whenever a benefit has been received by one per-

son which in equity and good conscience belongs to another person, the law will imply an obligation on the former to refund the same to the latter. This occurs in a great variety of cases of fraud, compulsion and mistake, where there is no actual contract or tort on which suit may be brought, and yet where justice requires that recovery should be allowed. A person has had benefits conferred upon him by another, and it is not right that the person receiving the benefits should keep the same and return no compensation to the other party, when he receives the benefits under the above circumstances. The one conferring the benefit, and sustaining the loss, however, should recover only that to which in conscience and equity he is entitled, which can be no more than what remains after deducting all just allowances which the party benefited has a right to retain from the money or chattels received. The second kind of obligations are positive obligations of the law whereby a person is bound to do particular acts other than to pay for benefits received. Damages here must necessarily be measured by the value of the injuries caused by breach of the obligations.

Only the general rule, or measure, of damages for breach of an obligation of quasi contract, or ex lege, is stated in this chapter. The question of damages in suits in quasi contracts has been constantly arising throughout this book, both in connection with breaches of contracts and torts, and wherever it seemed appropriate the rule as to the recovery in quasi contracts has been stated. For the specific applications of the general rule, therefore, the reader is referred to the specific topics treated elsewhere.

ILLUSTRATIONS.

(1) An insurance company pays a loss on a policy of fire insurance. Afterwards the company discovers that the proofs of the loss are fraudulent, and it sues to recover the entire amount paid. If the insured is honestly entitled to anything, the company should recover only the difference between that amount and the entire amount paid.[384]

[384] Western Assur. Co. v. Towle, 65 Wis. 247, 26 N. W. 104.

(2) A works for B as watchman, being employed by B's agent. A thinks he is working for three dollars for twenty-four hours, and B thinks A is working for one dollar and a half. What should A recover? Reasonable compensation. It would not be right to allow him to recover the three dollars, nor the one dollar and a half, but he is entitled to something. The law disregards the understanding of both parties and determines the amount which A ought to receive.[385]

(3) A collects money for B, as his agent, and retains forty pounds for his services. Then B sues for money had and received. May A show that this is a reasonable allowance without pleading it as a set-off? Yes. In a suit of this sort a party can recover only that to which he is in conscience entitled.[386]

(4) A is a pilot, licensed to pilot vessels into the port of New York. A statute of New York provides that any pilot bringing his vessel in from sea shall be entitled to pilot her out to sea when she leaves. B employs A to pilot his vessel into New York, but goes to sea again without a pilot. Is A entitled to recover damages for the loss sustained? Yes. An obligation to employ and pay him is created by statute.[387]

(5) A owns a ship and is carrying in the same a cargo of wheat for B. On the voyage, in order to save the ship and cargo, it is necessary to sacrifice some of the ship's tackle, etc. May A recover (in quasi contract) his proportion of the amount of the loss from B? Yes. This is on the principle of general average. The ship and cargo are considered as embarked in a common peril except as to ordinary losses.[388]

§ 68. The substantial damages for taking land under the right of eminent domain are the total value of the land to the present owner at the time of taking, with legal interest from that date.

If land is taken for a temporary use, such damages are the value of the use.

If only a part of an entire tract is taken, such damages are the difference between the value of the entire tract before the taking and the value of what is left after the taking, allowing both for injuries and for special benefits giving intrinsic value to the remainder of the tract, which is parcel of that taken.

[385] Turner v. Webster, 24 Kan. 38.

[386] Dale v. Sollet, 4 Burr. 2133.

[387] The Francisco Garguillo, 14 Fed. 495; Milford v. Commonwealth, 144 Mass. 64, 10 N. E. 516.

[388] Birkley v. Presgrave, 1 East, 220.

The federal constitution provides, so far as the federal government is concerned, that private property shall not be taken for public use without just compensation. State constitutions and statutes have generally treated the subject-matter in the same way so far as the state governments are concerned. Many state constitutions follow the language of the federal in safeguarding the taking of private property for public use. Others provide that "private property shall not be taken, destroyed, or damaged for public use without just compensation therefore first paid or secured." Still other variations will be found, but in general the provisions may be divided into two classes, those which require compensation for "taking," and those which require compensation for "damaging, injuring, or destroying" private property for public use. The word taking includes destruction, restriction, or interruption of the common and necessary use and enjoyment of property. There must be an actual invasion of property. Taking does not include injuries resulting from the acts of the government not directly encroaching upon private property. Damaging, injuring, or destroying are words which include all the injuries arising from the exercise of the right of eminent domain which cause a diminution in the value of private property, and may be consequential. So far as the measure of damages is concerned, the rule is the same, in such case, as in the case of a partial taking of property, the difference in the value of the property immediately before the taking and after the taking, or injury. It simply introduces new elements of injury for compensation.

Value means the value for all lawful available uses to the present owner, not to the one condemning the land, at the time of the taking of the same. The value is determined by the general selling price of similar lands in the immediate vicinity. The title taken may be that of the owner in fee, or that of a lessee, but whatever the nature of the title taken, each owner takes in proportion to his interest. The value includes not only the value of the land, but the value of the land with any minerals, improvements, crops, trees, etc., thereon. Easements, franchises, earth removed, commons,

riparian rights, wild lands and chattels, all come within the purview of the provisions in regard to compensation.

In determining the injuries to be compensated when only a part of a tract is taken, the difficult question is what is meant by a single, or entire, tract. It does not necessarily need to have no roads dividing it, but it must be used as a unit; one part must be necessary to the enjoyment of the others. Having determined that there is such a single tract, only part of which is taken, how shall the damages be measured? Evidently the owner is entitled to the market value of the part taken. But he is also entitled to consequential damages for the injuries to the rest of the land in the single tract. To estimate these injuries, both the benefits conferred and the injuries occasioned must be taken into consideration, and allowance made simply for the difference in value between losses and advantages. In no other way could the actual legal injury be ascertained. In determining the debits, there should be considered cuts and culverts made on the land, the size and shape of the parts left remaining, the difficulty of access, the obstruction of view, interference with privacy, and the cost of fencing and crossings where the company is not obliged to put these things up. In determining the credits, general benefits received with the country at large cannot be considered, but only special benefits which enhance the value of this particular tract, though not necessarily this tract alone. To sum up, where a part of a single tract is taken the owner is entitled to the difference between the value of the entire tract before the taking and the value of what is left after the taking. The time when the value is estimated is as a general rule the time of the taking, but the courts do not always agree as to when the taking occurs.

As a general rule there is no right of entry on lands taken under condemnation proceedings until there is a prepayment or tender of the amount of the damages in money; nothing else will suffice. This inhibition does not apply to the state. It is sufficient when the state itself takes property, if provision is made by which the owner whose property is taken can obtain compensation and an impartial tribunal is provided for assessing the same.

Public lands may be granted for public use without compensation, even though they may be held by a corporation, but private lands held for a public use cannot be so granted. Where one railway crosses another, compensation must be made for the land taken and for the expense of bridges and extra fences thereby necessitated, but nothing should be allowed for the loss of future business, or delay, or operating expenses.

ILLUSTRATIONS.

(1) A statute of the state of M requires railways to permit others to contruct, maintain and operate elevators on the land of such companies, without making any provision for just compensation. Is the statute valid? No. These lands must be taken for public use in the same manner as the lands of any private owner through the right of eminent domain.[389]

(2) The state of N grants to D the right to build a bridge across a certain river, upon state property, but without requiring D to pay the state anything for the property on which to build the bridge. Is this act valid? Yes. These are public lands and the constitutional inhibition applies only to taking private property.[390]

(3) An act of congress provides for condemning certain land belonging to private individuals to be used for the purpose of increasing the water supply of Washington, and designating a proper tribunal for ascertaining the compensation and making provision for the payment of the compensation when ascertained. The act also provides for the taking of possession before the compensation has been ascertained, and possession is so taken. Is the act unconstitutional and are the employes trespassers? No. Where the taking is by a sovereign power itself, it is not necessary to the validity of the law that provision be made for payment of compensation before the actual taking of the property. It is sufficient if provision is made by law by which the party whose property is taken may obtain compensation and a tribunal is provided for ascertaining the same.[391]

(4) A statute of the state of N provides for the condemnation of land for the construction of a sewer and provides for the payment of compensation to the owner of the land by the issuance, by the commissioners appointed to make the award, of certificates payable within not to exceed two years. Does the statute provide a constitutional method

[389] State v. Chicago, etc., R. Co., 36 Minn. 402, 31 N. W. 365.

[390] Pennsylvania R. Co. v. New York, etc., Co., 23 N. J. Eq. 157.

[391] Great Falls Mfg. Co. v. Garland, 25 Fed. 521; Matter of the Application of Church, 92 N. Y. 1.

of securing compensation to the landowner? No. There is no power in the legislature to provide for the payment of the award in anything but money, nor to postpone the right of the landowner to receive the same after the award becomes a finality. This position is not antagonized by the allowance of special benefits.[392]

(5) A railway takes proceedings to condemn land for a right of way, but previously enters and constructs its road on the land without the active opposition of the owner. Thereafter the value is greatly increased. As of what time should the damages be assessed? The time of the taking, that is, the taking by the condemnation proceedings, not by the physical appropriation. The courts differ on this point.[393]

(6) A railway seeks to appropriate a strip of land one hundred feet wide across G's land. Taking this land will necessitate G's building new fences. The construction of the road will also obstruct the drainage of the land. Are these proper elements of damage and what is the measure of damages? Damages should be allowed for the deprivation in value of the remainder of the land because of the necessity of fencing and the obstruction of the drainage. The value of the land taken should be determined by the selling price of similar lands in the vicinity. Evidence is admissible even of the selling price of a particular tract of land of similar character in the same vicinity.[394]

(7) A railway company institutes proceedings to condemn a leasehold interest for ninety-nine years in certain lots in the city of M owned by K. In determining the value of the leasehold interest, including buildings and machinery, is evidence that there is a manufacturing business established and in operation on the premises proper to be taken into account? Yes. K is entitled to the fair value of his property for any use to which it is adapted and for which it is available and may be sold, and this evidence is therefore admissible. So a landowner, whose land is taken for a public use is entitled to recover for the enhanced value given to his land by improvements placed thereon by a trespasser, though the trespasser is the one who subsequently condemns the same.[395]

(8) A railway institutes proceedings to condemn a piece of eight and a half acres of land lying between two lines of railway running across C's farm, one north and south and the other east and west. C has never owned the fee to the land formerly taken by the railway run-

[392] Butler v. R. R. Sewer Com'rs, 39 N. J. Law, 665.

[393] Chicago, M. & St. P. R. Co. v. Randolph Town-Site Co., 103 Mo. 451, 15 S. W. 437; Hampton, etc., Co. v. Springfield, etc., W. R. Co., 124 Mass. 118.

[394] Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 738.

[395] King v. Minneapolis U. R. Co., 32 Minn. 224, 20 N. W. 135; Village of St. Johnsville v. Smith, 184 N. Y. 341, 77 N. E. 617.

ning north and south, nor has he had a private right of way across the same. Is C entitled to damages for the injury to his entire farm resulting from the taking of the eight and a half acres? No. Damages should be awarded for the land taken and for the resulting injury to the remainder of the same tract, but in order to be regarded as a part of the same tract the land must constitute one entire body of land, and tracts physically separated by intervening land owned by another, or worked as separate and independent farms having no necessary relation to each other, cannot be regarded as such.[396]

(9) A railway condemns H's land for a road. The railroad is constructed through H's farm along a road which follows a governmental subdivision. It leaves H's house and buildings on the south side of the road, and his plow and pasture land on the north side. In determining the damages, should the injury to the whole farm be considered? Yes. The separate tracts of land as fixed by the governmental survey are used together as one farm.[397]

(10) A railroad institutes proceedings for the condemnation of a right of way across certain lots in the city of C belonging to S. If the parts of the lots not taken are enhanced in value by reason of the public improvement, should these benefits be considered in estimating the damage thereto? Yes. This property is specially benefited. If the property is worth as much after the improvements as before, there is no damage to the same. General benefits, that is, those shared by the community at large and not merely by others in the same vicinity, are excluded.[398]

(11) The city of B grades a street by digging, and as a consequence a portion of R's land adjoining falls into the street. The city does the work under a statute providing for payment of damages to the owner of land taken for the street. The constitution of the state provides that private property shall not be taken for public use without just compensation. Can R recover damages for the injuries sustained by the above falling in of his land? No. This is not a taking. Had the constitution required payment of just compensation when private property was damaged, damages might be recovered therefor. Then R could recover damages for any injuries he might sustain which he did not suffer in common with the public generally.[399]

[396] Cameron v. Chicago, M. & St. P. R. Co., 42 Minn. 75, 43 N. W. 785; Sharp v. United States, 191 U. S. 341, 48 Law. Ed. 211. See Dickerman v. Duluth, 88 Minn. 288, 92 N. W. 1119.

[397] Ham v. Wisconsin, I. & N. R. Co., 61 Iowa, 716, 17 N. W. 157.

[398] Metropolitan West S. El. R. Co. v. Stickney, 150 Ill. 362, 37 N. E. 1098; Peoria, B. & C. Traction Co. v. Vance, 225 Ill. 270, 80 N. E. 134.

[399] Radcliff's Ex'rs v. Brooklyn, 4 N. Y. 195; Beale v. Boston, 166 Mass. 53, 43 N. E. 1029; Chicago v. Taylor, 125 U. S. 161, 31 Law. Ed. 638.

TABLE OF CASES.

[References are to pages.]

[References are to pages.]

[References are to pages.]

[References are to pages.]

[References are to pages.]

[References are to pages.]

[References are to pages.]

INDEX.

[References are to pages.]

A.

[References are to pages.]

[References are to pages.]

[References are to pages.]

[References are to pages.]

D.

[References are to pages.]

[References are to pages.]

[References are to pages.]

[References are to pages.]

[References are to pages.]

F.

G.

I.

[References are to pages.]

J.

[References are to pages.]

L.

[References are to pages.]

[References are to pages.]

N.

[References are to pages.]

[References are to pages.]

[References are to pages.]

Q.

R.

[References are to pages.]

S.

[References are to pages.]

[References are to pages.]

T.

[References are to pages.]

[References are to pages.]