ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF MAINE.[1]

COURT OF APPEALS OF MARYLAND.[2]

SUPREME COURT OF MICHIGAN.[3]

SUPREME COURT OF NEW YORK.[4]

ACTION.

The People as a suitor in the Courts—Who may appear.—The State can be recognized by the courts as a suitor in legal proceedings only through the agents or legal representatives appointed by law, and the appearance of the proper representative can only be attested by the record. In a case before a Justice of the Peace under § 5122 of the Compiled Laws, the intervention of the Supervisor of the township is necessary, or that of the Prosecuting Attorney of the county. The State can only be made plaintiff in error in this Court by the Attorney General: *The People* v. *Navarre*, 22 Mich.

ADVANCEMENT.—See *Evidence.*

What is.—In 1833, a father, by deed of warranty, conveyed to his son certain land of the full value of five hundred dollars, receiving back a writing therein acknowledging the receipt from his father of five hundred dollars as the full share of all his father's estate, and relinquishing all his right, title and interest in and under his father's estate at the latter's decease, which he should otherwise have had. The father, in April, and the son in the following November, died intestate. In a real action, brought by the children and sole heirs of the son, to recover their distributive share of their grandfather's estate, *Held*, that the conveyance was an advancement in full to the son, and that the grandchildren were barred: *Smith* v. *Smith*, 59 Me.

AGREEMENT.

After a settlement between the parties, and the giving of a note by the defendants to the plaintiffs for a sum agreed upon, but during the same interview, the defendants agreed that in case a certain shipment of lumber, made by them, which had not yet arrived, should prove on arrival to contain less than 149,013 feet, at which amount it had been invoiced, the defendants would make good the deficiency. *Held*, that this agreement, being subsequent to, was not merged in, the settlement; and that an action would lie upon it to recover the amount of deficiency in the quantity of lumber shipped: *Smith et al.* v. *Holland*, 61 Barb.

1 From W. W. Virgin, Esq., Reporter; to appear in 59 Maine Reports.
2 From J. S. Stockett, Esq., Reporter; to appear in 35 Maryland Reports.
3 From H. K. Clarke, Esq., Reporter; to appear in 22 Michigan Reports.
4 From Hon. O. L. Barbour, Reporter; to appear in 61 and 62 of his Reports.

Held, also, that the agreement to make good any deficiency in the quantity of lumber was upon a good consideration: *Id.*

How proved.—An oral agreement, connected with a contract in writing, may be proved by parol, if subsequent and independent: *Id.*

AMENDMENT.

Variance.—After judgment, a variance between the complaint and the proof is immaterial. The court may, on appeal, order an amendment, so as to conform the allegations of the complaint to the evidence: *Smith et al.* v. *Holland*, 61 Barb.

ARBITRATION.

Submission—Award—Pleading.—The claim to be investigated by arbitrators need not be stated and annexed to a submission at common law: *Dodge* v. *Hull and others*, 59 Me.

A count in common form upon a submission and award is not vitiated by allegations in the same count setting up a lien claim; but the lien claim being waived, the allegations relating thereto may be rejected as surplusage: *Id.*

The delivery to the parties by the arbitrators of a paper, not as their award but as a detailed statement of their conclusions, does not terminate the powers of the arbitrators; but a formal award subsequently made and published, wherein the same net balance is found, is binding: *Id.*

ATTACHMENT.

Plaintiff's right to.—Although an attachment is an extraordinary remedy not known to the common law, and therefore one which the courts should watch with scrupulous jealousy, yet when a creditor fairly brings himself, by his application, within the spirit and the intent of the statute authorizing the remedy, he is to be protected in the enjoyment of its advantages: *Rowles et al.* v. *Hoare* 61 Barb.

Motion to discharge; when it may be made.—The provision in Section 241 of the Code, as amended in 1857, that "in all cases the defendant may move to discharge the attachment, as in the case of other provisional remedies," include all cases, such as want of jurisdiction in the officer who issued the attachment; fraud in obtaining it; defective papers, and various others: *Id.*

An application to discharge or vacate an attachment may now be made in furtherance of justice upon the real merits of the motion, or for irregularity, or for want of jurisdiction in the officer who granted it, or for any other cause; and such motion may be made after judgment entered in the action, even though the defendant has appeared and given the undertaking required by §§ 240, 241: *Id.*

Affidavits upon motion.—In cases where the defendant moves, upon his own affidavit, or affidavits made on his behalf, the plain-

tiff may oppose the motion, as in other cases, by affidavits which either explain or contradict those offered by the moving party: *Id.*

Bills of Exchange.

Acceptance admits genuineness.—The acceptance, whether general or for honor, or *supra protest*, after sight, of a bill of exchange, admits the genuineness of the signature of the drawer, and, consequently, in favor of a *bona fide* holder for value without notice, if the signature turns out to be a forgery, the acceptance will nevertheless be binding and entitle such holder to recover thereon according to its tenor: *The Salt Springs Bank* v. *The Syracuse Savings Institution.* 62 Barb.

Forged bill or check; payment by drawee.—If the drawee of a forged bill has paid it he cannot recover back the money, although the forgery is conclusively established. Having by that act admitted its genuineness he will not be permitted to dispute it afterward, although he can have no recourse against the drawer for reimbursement: *Id.*

Thus, where a forged check upon the plaintiff's bank was received by the defendant in the course of its business in good faith, it having paid the full amount named therein, without notice of the forgery, and the plaintiff, on presentment of such check by the defendant, received and paid it. *Held*, that these facts brought the case within the above rules; and that the plaintiff could not recover back from the defendant the sum paid upon the check: *Id.*

Held, also, that the fact that the forged check had upon its face the forged signature of the plaintiff's teller, which was overlooked at the time of the presentment, together with the facts that the pretended drawer was not even a customer of the bank, and had no account there out of which the check could be paid, demonstrated what would otherwise have been a matter of inference merely, viz., that the plaintiff's agents were guilty of very great negligence: *Id.*

A check on a bank is, in substance, a bill of exchange payable on demand, and is governed by the same rules which are applicable to those securities: *Id.*

The officers of a bank are bound to know whether the pretended drawer of a check is or is not a customer of the bank; and whether his account will justify the payment of the check: *Id.*

Check.—See *Bills of Exchange.*

Constitutional Law.

Trial by Jury.—Justices' Courts.—The amendment of section 53 of the Code, in 1861, by extending the jurisdiction of justices of the peace to actions of replevin, is not void as violating the provision of the constitution which declares that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever" (*Art.* 1, 32), by reason of the circum-

stance that it transfers a class of cases from courts of record, where juries are composed of 12 men, to justices' courts, in which they consist of six, only. MULLIN, P. J., dissenting: *Knight* v. *Campbell.*62 Barb.

That provision in the constitution has no reference to the power of the legislature to alter and increase the jurisdiction of justices' courts, and was not intended to, and did not, operate as a limitation upon such power in that regard: *Id.*

The constitution, in guarantying the right of "trial by jury it has been heretofore used," intended to embrace juries in justices' courts, as they existed, and had been before the constitution was adopted: *Id.*

The word "jury," as used in the constitution, does not mean a jury of twelve men, exclusively. A jury of six men, in a justice's court, is as much a jury, in the eye of the law, as a jury of twelve men, in a court of record, and is the jury which had been "heretofore used" in that tribunal, at the adoption of the constitution: *Id.*

CONTRACT.

Validity.—Violation of Public Policy—A complaint alleged that the plaintiff and defendant entered into an agreement in writing, by which the former agreed that she would do all in her power to aid in a marriage between one R. and the defendant; in consideration whereof the defendant promised that in case she became the wife of R. and outlived him she would pay the plaintiff, for her services in the matter, $2,000 in cash, etc. The complaint further alleged that R. was a widower, possessing great wealth; that the plaintiff performed the agreement on her part, and that, on, etc., R. and the defendant were lawfully married, and lived together happily for many years, until, etc., when R. died, leaving the defendant $50,000. Demand of performance, and refusal by the defendant, were then alleged. *Held,* 1. That the plaintiff was properly non-suited, on the ground that the agreement was a *marriage brokage contract,* and therefore void as being against public policy. 2. That the agreement being void, the claim for advances of money and services performed under it must fall with the agreement itself: *Crawford* v. *Russell,* 62 Barb.

COVENANT—See *Evidence.*

CRIMINAL LAW.

Competency of wife as witness against her husband.—A wife is a competent witness against her husband, or against him and another person jointly, in the trial of an indictment for using an instrument with intent to procure her miscarriage while pregnant with child: *State of Maine* v. *Dyer* 59 Me.

DAMAGES.—See *Trespass.*

DEED.—See *Evidence.*

EJECTMENT.

Election of remedies—Ejectment—Partition.—The action of ejectment for the trial of the legal title and obtaining possession, when wrongfully withheld, whether of a whole or an undivided portion, and a bill in equity for the partition of lands held by tenants in common, and joint tenants, as provided by the statutes of this State, are not elective remedies, applicable generally to the same state of facts, and to be adopted by parties at their option. Purely legal titles are to be tried at law, where a jury is a matter of right, unless there be some impediment to such trial which requires the aid of a court of equity to remove. When the complainant is not in possession, and the case shows an ouster and an adverse possession, and the legal title is not clear and beyond suspicion, the appropriate remedy for the trial of the title, and the obtaining of possession is by the action of ejectment, and not by a bill in equity for a partition: *Hoffman* v. *Beard*, 22 Mich.

ESTOPPEL.

Mortgage on real estate—action—declarations of beneficiary admissible.—If the only surviving beneficiary named in a mortgage of real estate actively aid and assist the mortgagor in selling and conveying by deed of warranty the mortgaged premises to a third person without mentioning her own claim, and such third person, relying upon the joint representations of the mortgagor and such beneficiary, and without suspecting that there was any incumbrance upon the premises, thereupon purchased the same for their full value, she is thereby estopped to set up any claim under the mortgage: *Bigelow, administrator*, v. *Foss*, 59 Me.

Nor can such estoppel be avoided by the fact that the plaintiff of record is prosecuting the suit as the administrator of the estate of the mortgagor, who stood in the relation of trustee of the other beneficiary: *Id.*

The declarations of the real party in interest, though his name does not appear as the party of record, are competent evidence against him: *Id.*

Thus, in the trial of a real action, brought for the sole purpose of enforcing a claim for the life-maintenance of the surviving widow of the mortgagee, in the name of the administrator of the mortgagor, on a mortgage conditioned for the maintenance of the mortgagee and his wife, her acts and declarations tending to show that, at the time of the mortgagor's conveyance of the mortgaged premises by deed of warranty to the defendant's grantor since the death of her husband, she knew the sale was contemplated, and actively aided and assisted in bringing about the sale of the premises at their full value, and urged the mortgagor's grantee to purchase without mentioning her claim, and relying upon the joint representations of the mortgagor and the widow, he did purchase without suspecting there was any

incumbrance upon the premises. *Held*, that the facts constitute a defense, and that they are admissible in evidence: *Id.*

EVIDENCE.

Deed—Breach of Covenant—Variance—Description.—In an action for a breach of covenant contained in a deed for the conveyance of land, alleged in the declaration to be made by the defendant, in which "the said *defendant* did covenant, grant, bargain and agree for *themselves and their heirs*" "that *they were* well seized," etc., a deed executed by the defendant and his wife —it appearing that the land was not the individual property of the wife—is admissible; and this, notwithstanding the covenant of seizin is stated in the plural: *Hovey* v. *Smith*, 22 Mich.

Nor is it any objection to the admission of a deed as evidence in such an action, that the description of the premises is not in the same words as laid in the declaration. The identity of the premisesmay be shown by other evidence: *Id.*

Covenant—Deed—Additional consideration proven by parol.—In the trial of an action of covenant broken by the grantee against the grantor of real estate, to recover the amount of an outstanding tax which the former was compelled to pay to prevent a sale of the premises, it is competent for the grantor to prove that prior to and at the time of the conveyance, the grantee verbally agreed to pay the tax: *Dearborn* v. *Morse*, 59 Me.

Declarations of a Grantor.—Although the declarations of a grantor, accompanying the conveyance of real estate to his sons, or accompanying the giving of personal property to them, are competent evidence as *res gestae*, on the question whether such real estate or personal property were advancements, yet such declarations are not admissible to contradict the plain terms and legal intendment of a writing governing the transaction: *Sanford* v. *Sanford et al.* 61 Barb.

The declarations of a father, made subsequent to the execution of deeds of land to two of his sons, and the delivery of money to another son, and when it was not within the power of the father to revoke or alter either of the deeds, or recover back the money, or any part thereof, are mere hearsay, and therefore not admissible as evidence to prove that the land was conveyed, and the money given, as advancements: *Id.*

Of what took place at the time a will was drawn.—In an action wherein the plaintiff, one of the children, and the widow of a decedent are interested on one side, and the devisees and executors are interested on the other side, the attorney by whom the will was drawn may be allowed to testify as to the making of an agreement between the testator and his wife, at the time the will was drawn, in regard to a bequest of $10,000 to the widow being in lieu of a proposed gift of a $5,000 note; and as to what was said by and between the testator and his wife, and to the witness on that subject; and that the will was drawn in conformity with such such agreement: *Id.*

EXECUTORS AND ADMINISTRATORS.

Torts—Executors as such not liable for.—Case will not lie against executors as such for damages caused by their raising the dam on a stream, whereby the plaintiff's mill was flowed, when the dam and the lands on which it is situated had, under the will of their testator, become vested in the executors and others: *Plimpton* v. *Richards*, 59 Me.

EXECUTION.

Personal Property—Officer's Sale of.—A sale on *mesne process* of the personal property of a stranger to the process, conveys no title to the vendee; and the real owner may replevy it from the purchaser after it has come into his possession: *Coombs* v. *Gorden*, 59 Me.

FENCES.

Removal of by Surveyor—Trespass for.—An action of trespass cannot be maintained against a surveyor of highways for removing fences standing within the limits of the location of a highway in his district, when their continuance has been less than forty years next after the location of the highway: *Whittier* v. *McIntyre*, 59 Me.

HUSBAND AND WIFE. *See Criminal Law.*

INSURANCE.

Marine Policy—Construction of—Latent Ambiguity.—Where the property insured in a policy of marine insurance was described as "Sixty-five hundred and fifty dollars on charter, twenty-six hundred and fifty dollars on primage, and also fifteen hundred dollars on property on board ship "Charles S. Pennell," at and from New York to San Francisco," *Held*, That the phrase "at and from New York to San Francisco," is not descriptive of any portion of the property insured, but simply of the voyage during which the risk was to continue: *Melcher* v. *Ocean Insurance Co.*, 59 Me.

And where it appeared that the vessel was sailing under two charters, either of which answered the call in the policy, parol evidence is admissible to prove which of the charters was insured: *Id.*

JUDGMENT.

Motion to set aside.—Where it appeared on a motion to set aside a judgment, that it was for an amount exceeding $2,500; that to that extent it was upon a demand for which the defendant upon a settlement with the plaintiffs, had given them his promissory notes, which were not due when the action was commenced. *Held*, that this presented a question of law for trial. That *prima facie*, this was against the right of the plaintiffs to the judgment to that extent: *Rowles et al.* v. *Hoare*, 61 Barb.

LANDLORD AND TENANT.

Lease—Emblements—"Away-going" Crops—Presumption.—A lease of a farm to a tenant, granting to him "the privilege to keep

and harvest all the crops (in case the land is sold), which he may have put in, and have either pay for what he may do in preparing to put in other crops, or the privilege of putting them in and harvesting the same," "for the term of one year, with the privilege of three years, if not sooner sold, from and after the first day of April, A. D. 1866," the lease containing an agreement on the part of the tenant to "hire the said premises for the term of one or more years, as above mentioned;" and further, that he would "not put in more than twenty acres of wheat in any one year," will confer upon the tenant the right to harvest a field of wheat, not more than twenty acres, after the expiration of the lease: *Brown* v. *Parsons*, 22 Mich.

It is always a presumption that a lease for one year, with the privilege of several, is to be continued on the same terms, and with the same rights and privileges to the tenant as during the first year, unless some other intention is expressed: *Id.*

NEGLIGENCE.

Not guarding a roll-way with railing.—On the premises of the defendant, within one foot of the sidewalk of a public street, was a descending roll-way leading to the basement of the defendant's block of stores. The entrance to the south store, occupied by the defendant's tenant as a drug store, was up four narrow steps immediately south of the roll-way. In front of the stores north of the roll-way was a continuous platform extending from the north end of the block to the roll-way. The roll-way was unprovided with railing or other safeguard except a buttress on either side thereof rising nine inches above the level of the platform. The plaintiff went upon the north end of the platform in the evening, and while passing along in the exercise of ordinary care for the purpose of entering the drug store on legitimate business, fell into the roll-way and was injured. *Held*, that the place was unsafe, and the defendant liable: *Stratton* v. *Staples*, 59 Me.

RAILROAD.

Action for Personal injuries—Negligence—Reasonable care—Negligence, or the want of Ordinary care, a question of Fact to be determined by the Jury—Erroneous Instruction—Negligence sometimes a Question of law—To entitle the plaintiff, in an action against a railroad company, to recover damages for injuries sustained by him in being caught between two cars of the defendant, while he was attempting to cross a street, it must be shown that such injuries were directly caused by the want of ordinary care and prudence on the part of the defendant, and that they could not have been avoided by the exercise of reasonable care and caution on the part of the plaintiff: *B. and O. R. R. Co.* v. *Fitzpatrick*, 35 Md.

If the plaintiff exercised reasonable care, though he may have been guilty of some negligence or want of caution, he is still entitled to recover for any injury sustained in consequence of the defendant's negligence: *Id.*

In an action against a railroad company, to recover damages for injuries sustained by the paintiff in consequence of the defendant's negligence, the question of negligence or the want of ordinary care is one of fact for the consideration of the jury. The most that the court can do in cases where there is a contrariety of evidence, and the question of care or negligence depends upon the consideration of a variety of circumstances, is to define the degree of care and caution exacted of the parties, and leave to the practical judgment and discretion of the jury the work of comparing the acts and conduct of the parties concerned, with what would be the natural and ordinary course of prudent men under similar circumstances: *Id.*

In an action against a railroad company to recover damages for injuries sustained by the plaintiff in attempting to pass between the cars of the defendant while the train was being made up on the street, a prayer which asked the court to instruct the jury that the plaintiff could not recover, if they believed that the defendant left open spaces between the cars at all the regular crossings of the street, and that the accident did not happen at a regular crossing, was objectionable in that it ignored all the circumstances tending to prove negligence on the part of the defendant, and would have precluded the plaintiff's right of recovery, though his injuries had been occasioned by the grossest negligence of the defendant, provided they were inflicted at a place other than a regular crossing of the street: *Id.*

There are cases where the question of negligence may be properly one of law for the court; but such cases always present some prominent and decisive act, not dependent upon surrounding circumstances for its quality, and in regard to the effect and character of which no room is left for ordinary minds to differ: *Id.*

Whether cars, which were being placed in procession on Howard street, between the hours of 5 and 9 P. M., with the purpose of being drawn away to their regular place of destination, were *in actual service* within the meaning of an ordinance of the city of Baltimore, and therefore not required to be fastened as cars were required to be by said ordinance, when left standing on the street for a longer period than an hour, could only be determined by observation as matter of fact, and was therefore a question for the jury and not for the court: *Id.*

Common Carrier—Liablity of for Defective Platform.—A railroad corporation is liable to a hackman for an injury received while carrying a passenger to their depot for transportation, by stepping, without fault, into a cavity in their platform, and occasioned solely by the want of ordinary care on the part of the corporation in leaving their platform in an unsafe condition: *Tobin* v. *Portland Railroad Co.*, 59 Me.

And under such circumstances the liability is not changed by the fact that their platform was erected and maintained by them within the limits of the highway: *Id.*

Shipping.

Duties and powers of the Master of a Ship in a Port of necessity—General average—Contribution—Agency.—The master of a ship is the agent of the owners with power to bind them for repairs to the extent of the value of the ship and freight, but not further, unless expressly clothed with larger authority: there is no presumption from the law of agency to justify expenditure beyond that limit: *Stirling, et al.* v. *Nevassa Phosphate Company*, 35 Md.

The owner of the cargo, in a case where expenses had been thrown upon the cargo exclusively, would have the right to call upon the owner of the ship for contribution to the extent of the value of the ship and freight, but not further; the master under such circumstances being considered as acting for the benefit of all parties interested: *Id.*

Whenever exigencies require the master to act for the benefit of other parties, to that extent his authority as agent of the ship-owner is abridged: *Id.*

The master cannot do what a prudent owner, if present, would not do, and the law will not assume that a prudent owner would make repairs beyond the value of his vessel, when repaired: *Id.*

Where vessel, freight and cargo are pledged toward the repairs of a ship by the master, and the entire proceeds of the vessel and freight are insufficient to pay them, it is a fair presumption, in the absence of proof to the contrary, that beyond that limit the master was acting in behalf of the owner of the cargo: *Id.*

Where the cargo alone is jeopardized from causes for which the owner of the vessel is not responsible, he is not personally accountable: *Id.*

Where the master acts for all parties interested, the loss falls upon the owners of the ship and cargo in proportion of their respective interests: *Id.*

Under some circumstances, the master may act as the agent of the owner of the cargo, independent of his agency for the owner of the ship: *Id.*

Slander.

Examination of Witnesses—Proof of uttering Slanderous words—Leading.—On the examination of a witness in an action of slander to prove the uttering of slanderous words, it is not proper to read to the witness the words as laid in the declaration, and then interrogate him concerning them; nor it is within the discretion of the circuit judge to permit such a mode of examination: *Osborn* v. *Forshee*, 22 Mich.

Evidence—Admissions—Privileged.—The testimony given by a witness on the trial of an action, in which he acknowledged the uttering of certain words alleged to be slanderous, cannot be proved as an admission, in an action against him for the alleged slander: *Id.*

Declaration in slander—Colloquium.—No *colloquium* is neces-

sary in a declaration setting forth slanderous words, that they were uttered of and concerning the plaintiff, when the declaration avers that they were uttered of, and to, the plaintiff: *Id.*

STAMP.

Chattel Mortgage with Sealed Writing on Back—Construction of. Unstamped Instrument—When not Invalid.—In January, 1869, McNeill and Swett gave the plaintiff their note secured by a mortgage of all the stock in trade, in the store occupied by the mortgagors on Point street, in Calais; "also, any and all additions that may, from time to time, be made to said stock by" the mortgagors. In May, 1869, the unsold original stock, together with additions theretofore made and remaining unsold, was removed to another store by the mortgagors, who executed under their hands and seals on the back of the mortgage a writing duly recorded, therein agreeing that the "mortgage, with this indorsement thereon, shall cover the portion of said stock removed, the same as though it had remained in the former store, and that it shall hold and cover any and all additions that have been or may be made to the same, as though the stock had remained and been put into the former store." In trespass by the mortgagee, against an officer for attaching the goods in July, 1869, as the property of the mortgagors, *Held*, that the mortgage, with the indorsement thereon, gave to the plaintiff a title to the stock in the second store at the time of the indorsement: *Brown* v. *Thompson*, 59 Me.

To authorize the court to declare an unstamped recorded indorsement on a chattel mortgage to be "invalid and of no effect," it must affirmatively appear that the omission of the stamp was the result of an attempt to evade the statute: *Id.*

SURETY.

Discharge of.—A procured for his own accommodation the acceptance of B, by giving the latter his promisory note, with the defendant as surety, as collateral security; a month before the acceptance became due, A procured another acceptance of B, which he had discounted, and with the avails thereof and other money paid the former acceptance. *Held*, That the surety was thereby discharged: *Thomas* v. *Stetson*, 29 Me.

It seems, that a renewal of the acceptance in such a case, without the consent of the surety, is such an extension of time of payment as releases the surety: *Id.*

TRESPASS.

Trespass quare clausum—Measure of damages—Certainty—Experts—Pasturage—Cattle—Home or distant market.—A plaintiff in trespass will not be denied the right to recover the actual damages he has suffered because their nature is such that they cannot be accurately measured; and when from the nature of the case adequate damages cannot be measured with certainty

by a fixed rule, all facts and circumstances tending to show such damages as are claimed in the declaration, or their probable amount, should be submitted to the jury, to enable them to form, under proper instructions from the court, such reasonable and probable estimate as in the exercise of good sense and sound judgment they shall think will produce adequate compensation. *Allison* v. *Chandler*, 11 Mich. 542, cited and approved: *Gilbert* v. *Kennedy*, 22 Mich.

Where the plaintiff was deprived of the profitable use of his own pasture for his own stock, by the tortious conduct of the defendant in turning in his cattle with the plaintiff's, and in consequence of the overfeeding of the pasture the plaintiff's cattle suffered, the damages to which the plaintiff will be entitled will not be merely the value of pasturage in the vicinity, but the value of the growth and increase in weight which the cattle might reasonably have been expected to attain but for the overfeeding caused by the trespass; and to show this the testimony of farmers, graziers and drovers, having experience of cattle and that mode of feeding, is competent. It would also be competent to show the market value of the stock in the vicinity but for the overfeeding, and what was the reduced value in the same market in consequence of the overfeeding; and the difference in price, *per* head and *per* pound, in cattle of different weights and conditions. The value in a distant market could only be shown so far as it tended to control the home market; the measure of damages being what the cattle would have been worth but for the injury to the pasture by the trespass, and the reduced amount caused by the injury, to be estimated up to and at the time of bringing the action—unless the cattle had been sold prior to that day—then at the date of the sale: *Id.*

When a party, having been tortiously deprived of his pasturage for his cattle, is obliged to pasture them on his meadow, the measure of damages will be what the value of the use of the meadow land would have been to him *as meadow*, not what he could have obtained for it for pasturage: *Id.*

Damage to the plaintiff's cattle resulting from a loss of feed occasioned by the tortious occupation of plaintiff's pasture by defendant's cattle is not included in the damage to the pasture caused by such occupation; and the condition of the pasture, its value as such for future use, at the time of the commencement of the action, are proper subjects of inquiry in estimating damages which had then been sustained: *Id.*

The rule that a party aggrieved by a trespass will not be allowed to recover damages resulting from his neglect to employ the obvious and ordinary means of preventing or lessening them, is simply one of good faith and fair dealing; it will not prevent his recovering for such damages as he may have actually suffered, and which could not have been by reasonable diligence averted: *Id.*