"As damages," says Mr. Serjeant Sayer, in his treatise relative thereto, "are a considerable object in every mixed and in every personal action, a complete and accurate knowledge of the law relative thereto is very useful to all persons engaged in the profession of the law, and particularly to those who are concerned in the management of causes." Such a knowledge, let us add, is by no means so much cultivated amongst our legal practitioners as it ought to be,—an assertion, the truth of which may in part be established by this fact, that, save the work by Mr. Serjeant Sayer just cited, no law-writer in this country has directed his attention exclusively to the subject of damages; nor in any of our standard treatises, or books of practice, has the matter now before us attracted that attention which it manifestly deserves; the very able treatise of Mr. Sedgwick, of the American bar, being the guide with us, as it is in the United States, when difficulty is felt in regard to it.

Under these circumstances, we deem it expedient to inquire, so far as our limits will permit, as to the leading principles upon which damages ought to be awarded, and more especially as to some moot

points which will present themselves to the notice of any one who takes even a cursory survey of recent cases bearing upon the subject before us, adjudicated in our Courts.

The term "damages," we may remark, is used as synonymous with "pecuniary compensation" for a wrong or injury inflicted by one person on another, recoverable by action; the expression, "measure of damages," being employed to indicate the "scale" by reference to which damages are in any given case to be assessed.

Important as it might appear to be, that positive and definite rules should exist for regulating the award of damages, and reasonable as might seem the expectation that such rules could readily and accurately be traced out, we shall find that few intelligible maxims of a precise and practical kind are to be enunciated on this subject, and that, even in actions upon contract, to which we shall on this occasion exclusively direct our attention, a rather wide discretion is allowed to the jury in assessing damages, with the exercise of which, capricious or unsatisfactory as it may be, the Courts at Westminster will not willingly interfere, save indeed to prevent the most obvious injustice, or to set right the most palpable miscarriage.

The first question which demands attention in regard to the mode of assessing damages in an action on contract, is this,—in such a proceeding, can the intention, animus, or motive of the party charged be inquired into? Can it properly be taken into account in estimating the damages? Clearly, this cannot be done: the inquiry suggested would be wholly irrelevant to the issue joined. In such an action, the main questions for determination will obviously be—What was the contract? Was it broken by the defendant? If the terms of the contract in question be ascertained, and its breach be proved, the only other inquiry will be as to the amount of damages to be awarded; and in estimating these damages, the motive or intention of the defendant will be immaterial: If a man expressly covenants, or on good legal consideration promises to do an act, which he would not otherwise be bound to perform, he thus imposes on himself a responsibility from which he cannot be relieved, unless by duly discharging it, or by consent of the contractee; and if
guilty of a breach of his covenant or promise, he is at law compellable to make compensation in damages to the party injured. It is well known, indeed, that the measure of damages in actions of contract differs most materially from that applicable in actions of tort: in the latter class of cases the jury being permitted to take into consideration the animus of the offending party, and to assess the damages upon a general survey of all the circumstances adduced: the verdict being thus sometimes made to operate not merely as compensatory, but to some extent by way of punishment. Occasionally, even in actions of contract, a wide discretionary power is assumed by the jury in inflicting damages: from their hands a defendant who, to breach of promise of marriage, has superadded heartless conduct or insulting behavior, would, as we opine, find but little mercy.

In an action founded upon contract, then, the breach being proved, damages, nominal or substantial, will follow as a matter of course; and where an action is brought for breach of a contract to pay a certain and ascertained sum of money only, the remark of Lord Mansfield, in Robinson vs. Bland, 2 Burr. 1077, seems applicable, that the action under such circumstances, does, from the very nature of the case, become a suit for specific performance. To cases of this kind we need not occupy time or space by further allusion: in regard to them, the rule applicable being, that the amount which would have been received if the contract had been kept, is the measure of damages if it be broken." (Alder vs. Keighley, 15 M. & W. 117.) The rule thus tersely worded, holds true in a vast variety of cases which present themselves in practice; ex. gr., where a covenant for the payment of money, a bond, bill of exchange, or promissory note, is put in suit, or where an action, as often happens, virtually undefended, is brought for the price of goods sold and delivered, for money lent, or for money due on an account stated. In such cases, the contracting parties themselves do in fact define the precise amount of liability to be incurred for breach of contract; and justice is done by giving effect to their stipulations.

If, however, the true measure of damages be not thus indicated,
the rules which are to guide us to it are laid down in language somewhat vague and general. Thus, “where a person makes a contract and breaks it, he must pay the whole damage sustained.” “Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.” (See Robinson vs. Harman, 1 Exch. 855, 856.) In order that rules thus expressed may be useful and available to the practitioner, they must be attentively considered by him in connection with each respectively of the leading species of contracts, their operation in each such case when thus considered, being noted down; in order that they may be intelligible to a jury, their practical effect, with regard to the facts before them, must fully be illustrated and explained. We shall here attempt, to a very limited extent only, thus to consider, illustrate, and explain them: and, in the first instance, we will call almost at random, from our voluminous reports, a case or two of a simple kind, which may subserv this end. A. being indebted to B. for the price of goods sold and delivered, gave to this latter party a bill, drawn by himself (A.), to get discounted upon these terms: that B. should, out of the proceeds of the bill, retain to his own use 100l. and the discount, and should pay over the balance to A. Here the measure of damages, in an action by A.'s assignees against B., was held to be the amount of the bill in question, minus the 100l. and the discount. (Alder vs. Keighley, ante.) Again, C., having recovered a judgment for 28l. 3s. 6d. against D., agreed with E. to forbear to sue out execution upon the judgment until a future day; in consideration whereof, E. undertook that he would, on or before that day, erect a substantial dwelling-house, and cause a lease of the same to be granted to C., such lease when granted to be in “satisfaction” of the judgment. In an action by C. against E., for breach of this undertaking, the measure of damages was held to be the value of that (viz., the lease of the house in question) which the defendant had promised to give in consideration of the plaintiff’s forbearance. (Strutt vs. Farlar, 16 M. & W. 249.) In either of the foregoing cases, nothing more was needed than strictly and literally to compensate the plain-
tiff, by assessing his damages at that precise sum which he had lost by the defendant's breach of contract.

Sometimes, however, the object here indicated is not so readily to be accomplished; sometimes the rule for the adjustment of damages is ill-defined. Where the action "sounds in damages" (a phrase by the bye, which Mr Sedgwick, in his Treatise on Damages, 2d ed., p. 205, note, declares himself "not able to understand"), that is, where the recovery of damages, and not of a debt, is sought for, it does not unfrequently happen that a jury finds itself imperatively called upon to award, on evidence conflicting and unsatisfactory, a precise sum, as accurately representing the damage sustained by breach of contract, and, whilst fixing its amount, well known that, after all without the slightest dereliction of duty on their part, but a rough approximation towards justice is thus effected. It not unfrequently happens, also, that the Court itself is puzzled in regard to the true rule for the assessment of damages, to be applied.

What, for instance, it may be asked, in the case of a breach of covenant to repair, is the true measure of damages? Is it, in accordance with the opinion of Lord Holt, the amount which would be required to put the premises in question into repair? Vivian vs. Champion, 2 Lord Raymond, 1125. Is it the loss which the landlord would sustain, if he sold his reversion in the market? as Mr. Baron Martin appears on a recent occasion to have thought. Smith vs. Peat, 9 Exch. 161. The latter criterion, in support whereof direct authority may be cited, would seem to be the most correct and just.

How, again, in an action for breach of an agreement of hiring and service, by a wrongful dismissal of the servant, should the damages be computed? The just measure of damages would here probably be attained by considering these two questions:—1st. What is the usual rate of wages for the particular employment? 2d. What time will probably be lost before a similar engagement can be found? (See per Erle, J., Beckham vs. Drake, 2 H. L. Cas. 606; per Crompton, J., Emmens vs. Elderton, 13 C. B. 508.) Again, in an action for contribution, to reimburse one of several joint contractors, who has paid the entire joint debt, or discharged,
under compulsion, the entire joint liability, what pecuniary amount is the plaintiff entitled to claim, as against any one of his co-contractors? It is curious to find that this question, *prima facie* so simple, and obviously of much practical importance, has but recently been thoroughly sifted and examined. It was resolved by the Court of Queen's Bench, in *Baird vs. Hawes*, 2 E. & B. 287, in a chain of reasoning ingenious and subtle, to which we would refer the reader.

In connection with the Contract of Sale, whether of land or personality, various points of more or less publicity invite attention. Contracts for the sale of real estate are, it is well settled, understood as having been made subject to the condition that the vendor has a good title; so that when a person contracts to sell realty, there is an implied understanding, that if (without fraud on his part) the vendor fails to make out a good title, the only damages recoverable will be the expenses necessarily incurred by the vendee in investigating the title; nominal damages only, under the circumstances here supposed, being awarded to him for the loss of his bargain. (Sugd. V. & P., 11th ed., vol. i. p. 424). Every one who purchases land, knows, or is presumed to know, that difficulties may exist as to the making of a title, which were not anticipated at the time of signing the contract; and should the intended purchaser think proper to enter prematurely into possession of his contemplated purchase, and to incur expense in improvements and alterations to it before the title is ascertained, he will do so at his own risk. (See the judgment, *Worthington vs. Warrington*, 8 C. B. 134.) Such is the general rule which determines the measure of damages in an action against the vendor, for breach of a contract of sale of land, there being no fraud, nor (as in *Hopkins vs. Grazebrook*, 6 B. & O. 31; and *Robinson vs. Harman*, 1 Exch. 850) any gross imprudence, or willful misfeasance on his part. And on the other hand where a party has been let into possession of land under a contract of purchase, which he then refuses to complete, and no conveyance is executed, it seems settled, too, that the vendor cannot recover from him the whole amount of the purchase-money, but only the damages, actually sustained by his breach of contract; the mea-
sure of damages, in an action of this nature, being the injury sus-
tained by the plaintiff by reason of the defendant not having per-
formed his contract. (Laird vs. Pin, 7 M. & W. 474.)

In cases such as we have just specified, the mode of determining
the damages recoverable for breach of contract is tolerably clear.
Should special circumstances, however, be introduced into any one
of them; should we, for instance, suppose that the purchaser of
land has himself, relying on the assurance of his vendor that a good
title could be made, to resell it before obtaining the conveyance to
himself, doubt would immediately be felt in regard to the precise
measure of damages to be applied; at all events, the pleader for
whose opinion such a state of facts was submitted would be driven
to a consideration of the doctrine respecting "remoteness of dam-
age," to which we shall presently advert.

Let us next suppose that an action is brought for the non-deliv-
ery of the goods, pursuant to contract; the recognized measure of
damages in this case is the difference (if any) between the contract
price and the market price of the subject matter of the contract at
the time of its breach (Shaw vs. Holland, 15 M. & W. 136; Tem-
pest vs. Kilner, 3 C. B. 249;) when the vendee, should he previously
have resold the goods, ought at once to go into the market and
supply himself with the article in question, in order that he may
thus be enabled to fulfill his sub-contract. Peterson vs. Ayre, 13
C. B. 353. A like measure of damages is applicable also as against
the purchaser of goods, who in consequence of a falling market, re-
fuses to accept them. Philpott vs. Evans, 5 M. & W. 475.
Thus far, under ordinary circumstances, no difficulty presents itself.
Are we, however, to understand that the above rule is inflexible?
Under no conceivable circumstances, for instance, can the vendee
recover as against his vendor the profits which would have accrued
from their resale? This is an important question, by way of an-
swer where to little direct authority can be found in our books. Ac-
cording to the Scotch law, it is clear that, under circumstances such
as supposed, the damages adverted to would be recoverable. For
this proposition the well-known case of Dunlop vs. Higgins, 1 Ho.
L. Cas. 381, is an express authority. It is moreover very no-
ticeable that, whilst moving judgment therein, the late Lord Chancellor Cottenham evidently assumes that the English law is in conformity with the conclusions which he then arrives at in regard to the law of Scotland.

That was an action for the breach of a contract to deliver iron; and a complete contract having been established, and its breach shown, the truth of the following proposition was contended for on behalf of the defendants (the appellants): that in case of failure to deliver goods sold at a stipulated price, and immediately deliverable, the true measure of damage is the difference between the stipulated price of the goods and their market price on or about the day whereon the contract is broken, or at or about the time when the purchaser might have supplied himself. In discussing this general proposition, the late Chancellor thus expresses himself:

"What does the party come into Court for?—to obtain compensation for the other party not having performed his contract." * * *

"The jurors had to ascertain the damage that had arisen from the non-fulfilment of this contract." His lordship then proceeds to illustrate the mode in which this might be done. Suppose, he says, a party who has agreed to purchase a certain quantity of iron on a particular day, has himself entered into a contract with somebody else, conditioned for the supply of that same quantity of iron, to be then delivered, and that he, not being able to obtain the quantity contracted for on that particular day, loses the benefit arising from the sub-contract. Assuming that the market price of iron had risen in the meantime, the plaintiffs ought not only to recover the difference between the contract and the market price, "but also that profit which would have been received if the party had performed his contract." No other rule, proceeds his lordship, is reconcilable with justice, nor with the duty which the jury had to perform—that of deciding the amount of damage which the party had suffered by the breach of his contract. "Most cases of contract vary from each other; and whatever general rules there may be as to awarding damages, they must be modified by the particular cases to which they come to be applied."

His lordship thence concludes that the law of Scotland will do
what a jury is called on to do here, viz., effectuate and sanction the reimbursing of the party who has sustained the loss by the original contract, and that without reference to what the price of the article at the particular time will produce.

The remarks thus made, although incidentally, by a judge so cautious and painstaking as Lord Cottenham, certainly merit our attention; and with their tenor, the decision of the Court of Exchequer in Waters vs. Towers, 8 Exch. 401, to which we shall presently advert, is in close conformity. The truth perhaps is, that the ordinary rule for assessing damages, on a refusal to accept or deliver goods according to contract, may, under special circumstances, require modification. "If," says Mr. Justice Erle, in Beckham vs. Drake, 2 H. L. Cas. 607-8, "goods are not delivered or accepted according to contract, time and trouble as well as expense, may be required, either in getting other similar goods, or finding another purchaser; and the damages ought to indemnify both for such time, trouble, and expense, and for the difference between the market price and the price contracted for."

Another state of circumstances also suggests itself, viz., where the article contracted for does not appear to have any well-ascertained market value. In this case an investigation as to the constituent elements of the cost of its production or supply to the party who has contracted to furnish it, may become necessary, and the difference between such cost and the contract price will in such case be the measure of damages; so that if the cost equals or exceeds the contract price, the damages will be merely nominal.

Upon this part of the subject, the case of Masterton vs. The Mayor, &c. of Brooklyn, 7 Hill. (U. S.) R. 61, well deserves our notice. There the plaintiffs had contracted to procure, manufacture, and deliver all such blocks of marble as might be requisite for the completion of a certain public building about to be erected by them under a contract with the defendants. The marble in question was to be paid for by instalments as the work progressed; and immediately on signing the original agreement, the plaintiffs entered into a sub-contract with other parties, K. & Co., for a regular supply of the said marble. A small portion only of the marble having been
delivered by the plaintiffs, and pain for, according to their contract, by the defendants, these latter parties suspended their building operations, and refused further to perform their contract. Some considerable time after this breach, but as appeared in evidence, before the contract could possibly have been fully performed, the plaintiffs sued the defendants for breach of contract; and having proved their case, a question arose at Nisi Prius, and was subsequently argued before the Supreme Court of the State of New York, as to the nature of the scale by which the damages under the circumstances stated should be computed. The majority of the Court were of opinion that the test to be applied was the difference between the contract price of the marble and that which obtained in the market at the time when the contract was broken. "When," remarks the Chief Justice, "the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance." We may observe that the decision here arrived at has since been recognized in the United States (see Story vs. The New York and Harlem Railroad Company, 2 Selden U. S. R. 85), and may probably be thought to accord in spirit with the decisions in this country. Thus in Hocheester vs. De La Tour, 2 E. & B. 678, it was held that a party to an executory agreement may, before the time for executing it has arrived, break the agreement, either by disabling himself from fulfilling it, or by renouncing the contract;—that an action will lie for such breach before the time has arrived for fulfillment of the agreement; and that the injured party may either sue immediately ex contractu, or wait till the time has come when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. And it was further held that, in either case, the jury, in assessing the damages, would be justified in looking to all that had happened, or was likely
to happen, to increase or mitigate the loss of the plaintiff, down to the day of trial.

In cases such as we have above been alluding to, a question of much difficulty not unfrequently presents itself,—When may damage properly be regarded as "too remote" to be recoverable by action? In other words, what degree of connection between the breach of contract complained of and the damage sustained thereby, ought to exist in order that the party aggrieved may legally be entitled to compensation in respect of the latter? Common sense suggests that some limit should be assigned to the chain of events or circumstances linking together effect and cause; that the maxim, *in jure non remota causa sed proxima spectatur,* must in some sort be observed.

The subject of "remoteness of damage" in an action of contract was much considered by the Court of Exchequer in a recent case, Hadley vs. Baxendale, 9 Exch. 341, where the following rule in regard to it is laid down: that when the parties "have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or 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." Where (as the Court in the case just cited proceed to remark) a contract is made with reference to special circumstances, and such special circumstances are communicated by the plaintiff to the defendant, and are thus known to both the contracting parties, the damages which might reasonably be contemplated as likely to result from a breach of such contract would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if the special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in its contemplation the amount of injury which would arise generally, and, in the great multitude of cases not affected by
any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the event of a breach of contract occurring, by special terms as to the damages to be paid in such case; and of this advantage it would be very unjust to deprive them.

The facts in Hadley vs. Baxendale having been stated in a recent Number of this Magazine, need not just now be recapitulated; with this case, however, should be compared two previously adjudged cases Black vs. Baxendale, 1 Exch. 410, and Waters vs. Towers, 8 Exch. 401. In the former of these cases, the plaintiff had sent certain goods by the defendants, who were carriers, to a country town, intending that they should arrive in time for the market there on a certain day, of which intention, however, the defendants had no notice. In consequence of the non-delivery of the goods by the defendants within reasonable time, expenses were incurred in removing them for sale to another place; and the jury included the amount of such expenses in their verdict. The Court of Exchequer seem to have thought that the jury were wrong in so doing, but, as the amount of their verdict was under 20\$, refused, in accordance with the recognized rule in such cases, to grant a new trial. "If," said Pollock, U. B., "the carriers had had distinct notice that the goods would be required to be delivered at a particular time, perhaps they would have been liable for those expenses for which, without such notice, they would not be liable; but whether any particular class of expenses is reasonable or not, depends upon the usage of trade, and various other circumstances;" remarks which do not seem to conflict with the well considered judgment of the Court of Exchequer in Hadly vs. Baxendale. In Waters vs. Towers, ante, the plaintiffs were held entitled to recover, under a declaration for breach of contract in not fitting up certain mill-gearing in a workman-like manner, and completing the work within a reasonable time, loss of profit which might have been made by the plaintiffs on a sub-contract for the supply of certain articles to be manufactured by them for a third party. And in this case

1 See the Law Magazine for August, 1854, p. 18 (Digest). (This case is also commented upon in an article in 2 Am. Law Reg. 641.)
Mr. Baron Alderson is reported to have made this interlocutory remark, that "the existence of a contract, is evidence of the probable amount of loss sustained. Suppose the plaintiffs had said, 'We should have made such and such a contract if the defendants had performed theirs,' and the jury believed that the plaintiffs would have done so, that would surely have been evidence of the amount of loss occasioned by the defendant's breach of contract." The learned judge, however, would here seem to be laying down a wide, and, as we conceive, a rather dangerous doctrine, at variance, too, with the judgment in Hadley vs. Baxendale, where the fact of notice of the sub-contract having been given to a defendant under the circumstances suggested, or having been in some way brought within his knowledge, is specified as most material in regard to his liability. Various authorities, moreover, might be cited in opposition to the above-mentioned dictum of the learned baron: thus, in an action for breach of warranty of a horse, the loss of a bargain for the resale of the horse cannot be recovered as special damage. Clare vs. Maynard, 6 Ad. & E. 519. And the decision in Hanslip vs. Padwick, 5 Exch. 615, in reference to a contract for the sale of realty, to which the vendor has failed to make a title, is strongly to a like effect.

A review, however, of decided cases, seems to show that the rule has not been uniformly observed, or very clearly settled, as to the right of a party to claim a loss of profits as a part of the damages for breach of a special contract. Perhaps the best practical test which can be suggested for application is that laid down in Fox vs. Harding, 7 Cushing (U. S.) R. 522-3; viz., that if the profits claimed are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfilment, then they would form a just and proper item of damages to be recovered against the delinquent party upon a breach of the agreement. The realization of such profits as are here indicated, may, indeed, be considered as forming part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into; but if the profits in question are such as would have been realized by the party from other indepen-
dent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, there they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit.

To illustrate what has been just said, let us take the case of a special contract, whereby one party to it agrees to make certain machines for the other, who, on his side, agrees to furnish, from time to time, the materials necessary for their construction; let us further suppose a breach of this contract by neglect to furnish materials; then the other party would clearly be entitled to recover the profit which would have accrued to him out of the contract if it had been fulfilled. But if the party suing for damages were to offer to prove in addition to this, that in consequence of the breach of contract by the defendant, he (the plaintiff) had lost other contracts by which he would have realized large profits, the evidence thus proffered would be wholly inadmissible, because such collateral undertakings were not necessarily connected with the principal contract, and could not reasonably be supposed to have been taken into consideration when it was entered into. Such profits would be too uncertain, remote, and speculative in their nature to be recoverable as special damages.

In connection with the foregoing observations, which have been abridged from the American case of Fox vs. Harding may be consulted Stanton vs. Collier, which recently came before our own Court of Queen's Bench, and is reported in 8 E. & B. 274. There the plaintiff (who was a printer) declared for the breach of a contract to re-deliver a printing-machine held as security for money due to him by the defendant, and which was to be re-delivered to the plaintiff upon certain stipulated terms. The damage alleged was, that by reason of the non-delivery of this machine, the plaintiff had lost great gains and profits, which would have resulted to him from its use; that his entire business and trade had been ruined, and that he had thereby become insolvent. Now, although no express decision was given by the Court upon the question whether the damage thus alleged was too remotely connected with the wrong done to be recoverable, it would certainly seem to be so; and it is
clear that the proper compensation, in the absence of special facts, would have been the value of the machine itself.

So, in Theobald vs. The Railway Passengers' Assurance Company, 10 Exch. 15, where the action, in form ex contractu, was brought to recover compensation from the defendants, in respect of an injury sustained by the plaintiff, one of their insured, whilst travelling by railway, the true measure of damages was held to be compensation for the personal injury resulting from the accident, not exceeding, however, the sum which the company would have been liable to pay in the case of death, and irrespective of any loss of time or profits consequential on such injury: for "what the insurance company calculate on indemnifying the party against, is the expense, and pain, and loss immediately connected with the accident, and not remote consequences that may follow, according to the business or profession of the passenger."

The cases latterly cited certainly throw some light upon the doctrine concerning "remoteness of damage," and upon what is meant by saying that, under ordinary circumstances, loss recoverable for breach of contract must be such as would naturally flow from the breach alleged. It cannot, however, be denied that the subject in question is still involved in considerable obscurity, which much time and litigation will be needed to dispel.

Thus far on the present occasion have we spoken touching the measure of damages in actions founded upon contract, not so much with a view to obviating or removing difficulties which may suggest themselves to him who cautiously explores the region through which we have but rapidly been passing, as in the hope that some deductions practically important may thence be drawn. We have shown (and a cloud of additional authorities might have been cited in support of the assertion) that, for an accurate assessment of damages in all, save the simplest, cases, two things are necessary,—first, a careful sifting and balancing of the evidence adduced; secondly, the application to that evidence of rules of law; couched not seldom in language which, if not vague or indefinite, at all events cannot readily be rendered intelligible to non-professionals.

Bearing this in mind, remembering also what has been already
intimated, that the damages in an action *ex contractu* should be assessed *dispassionately*, irrespective of the motive or animus which may have prompted to the breach complained of; we find ourselves impelled to this conclusion, that a jury of twelve *boni et legales homines* does not in very many cases which are now usually submitted to them, present the best medium through which the amount of pecuniary compensation payable to one aggrieved by breach of contract, may be determined; that the ends of justice would more surely be accomplished if in the class of cases adverted to, the judge were substituted for the jury as assessor between the litigating parties. The first section of the Common Law Procedure Act, 1854, does indeed enact that an *issue of fact*, by consent of the parties, subject to the discretion of the Court in banc, or a judge at Chambers, "may be tried and determined, and damages assessed where necessary, in open Court, by any judge who might otherwise have presided at the trial thereof by jury;" and that the verdict of such judge "shall be of the same effect as the verdict of a jury, save that it shall not be questioned upon the ground of being against the weight of evidence." We fear, however, that of these provisions, useful and excellent in tendency though they be, suitors will not be found in practice often to avail themselves; and we think that some further progress in the direction thus indicated may in all likelihood; when the working of recent enactments has been marked and tested, advantageously be made. To the suggestion thus put forth we shall recur in our next number, when we propose to direct attention to some points of difficulty connected with the measure of damages in actions founded upon tort.

We have inserted the foregoing article from the London Law Magazine, both as an evidence of the increasing attention which is paid in England to American decisions and text writers, and as in itself a clear and able discussion of a difficult question. With the conclusions of the writer, we agree in the main. But we cannot let pass without some expression of dissent, the proposition that damages in actions *ex contractu* ought to be assessed in all cases, "irrespective of the motive or animus which may have prompted to
the breach.” We cannot admit that such is or should be the law. On the contrary, we are convinced that good sense and natural justice indicate, and demand, where it can be fairly applied, a distinction between the failure to comply with an agreement arising from causes beyond the control of the party, or attributable only to ordinary negligence, unskillfulness and the like, and the violation of a contract, through malice, fraud, or that gross negligence which in its recklessness of the rights of others, is viewed by the law as next to fraud, dolo proxi ma. We do not now desire to argue in favor of the application of vindictive or punitory damages in this connection, though we think it quite susceptible of justification. It is with reference to compensatory damages alone, that we would insist upon the validity and importance of the distinction which we have stated.

We are willing for the present, to assent to the doctrine that the object of a civil action is merely the enforcement of compensation for an injury suffered. What then? Compensation ought to extend to every species of hurt or damage which is inflicted by the wrongful act of another, so far as it is capable of pecuniary estimation. Nothing less than this will square with the principles of abstract justice. The injured party has, according to strict theory, the right to demand to be replaced exactly in the situation which he would have occupied had not the wrong occurred. So far we proceed on the supposition that the party injuring has no rights to be considered, and that practical and abstract justice are co-extensive. But this obviously is not always the case. Where one of the parties to a contract fails to comply with its terms, through accident or even negligence, where not culpable, it would not be equitable to visit upon him the extreme rigor of the law. He may justly claim not to be liable for more than the natural or necessary consequences of his conduct. We may even consider it implied in every contract, that in case of the inability of either party to comply with its stipulation, without fault, he is not to be held liable for any consequences therefrom which could not reasonably have been foreseen at the time the contract was formed,—that is to say, for any but its natural and probable
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consequences. If this were not the case, no man would enter into any agreement. In cases of this nature, consequently, the party affected is entitled only to partial and limited redress, and must by reason of the reciprocal rights of the other party, be content to bear himself, some of the consequences of a comparatively blameless act or omission.

We may consider, therefore, that in an action for breach of contract, two elements enter into the consideration of the measure of damages; (1) the right of the plaintiff to complete compensation, (2) the claim of the defendant to have this abstract right restricted within limits, to be ascertained in accordance with the nature of the original contract.

Now, when we come to consider the case of a malicious, fraudulent, or reckless violation of an agreement, we readily perceive that the second of the elements we have specified, ceases to have a just application. The defendant has forfeited any claim to insist upon a limitation of the abstract rights of the plaintiff, or upon a recourse to any implied term in the contract, which he has thus chosen to abrogate and ignore. He has voluntarily placed himself in the position of a mere tort-feasor. Hence, we have nothing to consider but the single element of compensation to the injured party. Now in few, if any, cases, can damages, measured according to the natural and probable consequences of a breach of contract, afford anything like complete pecuniary compensation. The loss of contingent profits, of time, of expected bargains, injuries flowing from the consequent violation of agreements which the party has entered into on the faith of the completion of the contract, from the disarrangement of his plans, and many other such substantive injuries, while they would not have been foreseen, and cannot be brought within the general definition, are not the less real and hurtful to him, or susceptible of estimation in money. He cannot be replaced in his former position, and abstract justice be satisfied, unless he obtain redress as to these also. The necessary consequence is, that under the circumstances, the plaintiff must be entitled to recover for some, if not all injuries of the nature we have referred to, as well as for
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those which are directly and necessarily consequent upon the wrong complained of.

This view of the question furnishes a complete refutation of the fallacy so often put forward, that as the party injured suffers to the same extent, whether the motives of the other were good or bad, so the claim to compensation must be the same in either case. The answer is, that where the motives of the latter were innocent, he can justly demand and does obtain a limitation of the compensation to be made; but, in the opposite case, no such controlling element exists, and full compensation ought to be exacted.

The arbitrary distinction, indeed, between actions in contract and in tort, in this respect, which is a consequence of this fallacy, is without any foundation in reason or analogy. Evidence in mitigation or aggravation of damages, is admitted without objection in the one, why not in the other? The only difference between the two is, that in tort, it may perhaps be assumed, in the first instance, that as there was no previous relation between the parties, the wrong was a deliberate and intentional one. But this, if true, would only have the effect of throwing the burden of proof of intention, in the case of contract, on the plaintiff; and, if it were proved, then the culpability of the defendant would be so much the greater, since he has superadded to a tortious act a breach of good faith. The non-fulfilment of an engagement, indeed, is neither more nor less than an injury to a right; and an attack on person or property is nothing else. For illustration's sake, suppose a banker, maliciously desiring to injure a depositor, refuses payment of a draft, having ample funds to meet it, and knowing that his act will produce bankruptcy, and for that very purpose. What difference is there, either in morality or in law, between such an act, and actual theft of so much money for the same purpose? Why then should there be a difference in the damages recovered?

The view which we have taken, moreover, is that which is most in accordance with our instincts of justice, and with the policy of the law. One of the highest objects of any system of jurisprudence, is the rigid enforcement of good faith and fair dealing.
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In no country, much less in a commercial country, ought a man to be permitted to profit by the violation of a contract; yet the adoption of an unvarying rule, which restricts compensation to the natural consequences of the wrong, permits a man who finds that he can make a better bargain as to his time, his money, his property, than one which he has already entered into, to violate the latter with comparative impunity. Fraud, malice, caprice, are thus placed on the same footing with honest error, or blameless misfortune.

These conclusions are not speculative, nor the result of logical abstraction, but are embodied in every system of Jurisprudence, and in every civilized country, unless the Common Law form an exception. The Roman Law, and the countries in Europe and America which are governed by its principles, adopt precisely the distinctions which we have contended for. We cannot affirm, indeed, that so far they have received entire sanction in our own law, which is quite unsettled on the subject, but we cannot doubt, from the tendency of the authorities on analogous questions, that it will not be long before they shall. Some cases have already recognized their propriety, and time, we hope, will add to their number.—Eds. Am. Law Reg.

1 See Dig. XIX, tit. 1, fr. 43, § 1, 45; id. tit. 2, fr. 19; Muhlenbruck, Doctr. Pand. v, ii, § 368, etc.; Lindley's Introduct. to Jurispr., § 167; Merlin, Repository, tit. Dommages—Interests, No. V.; Code Civil, art.1147, etc.; Motives sur le Code Civil, vol. 5, pp. 29, 115, 218; Code Louisiana, arts. 1928, 2523. Pothier, in his treatise on Obligations, (1 Poth. Obl., by Evans, 166,) after stating the general rule, that a debtor is only liable for the damages which might have been contemplated at the time of the contract, proceeds thus: "The principles which we have hitherto established, do not prevail where it is the fraud of my debtor that gives me a claim for damages and interest; in this case, the debtor is liable indiscriminately for all the damages and interests which I have suffered in consequence of his fraud; not only for those which I have suffered in respect of the thing which is the object of the contract, propter rem ipsam, but for all damages in respect to any other property, without regarding whether the debtor could be presumed to have intentionally subjected himself to them or not; for a person who commits a fraud obliges himself, velit nolit, to the reparation of all the injury which it may occasion." See, also, Domat, by Cushing, vol. I. p. 776. In the Athenian Jurisprudence, similar principles obtained. Bocck Publ. Econ. Athens, by Lewis, 2d ed. 371; Smith Dict. Ant., sub. verb. Bocck: Adda.

2 Flourcous vs. Thorhill, 2 Wm. Blackst. 1078; Bitner vs. Brough, 11 Penn. St. 139; McDowell vs. Oyer, 21 id. 426.