sent constitution, to provide for the trial of titles to land in equity in the cases which were triable at law at the time the constitution was adopted:" *Tabor* v. *Cook*, 15 Mich. 322. It seems that this objection might be obviated by giving the parties the right to have the issues tried by a jury, and providing that the verdict of the jury should be as binding and conclusive as it would be at law.

In conclusion it may be said that it is claimed that these statutes are to be construed equitably, and that relief will be denied if the particular circumstances of the case indicate the absence of equity in complainant's demand for the relief sought. This may be best illustrated by a case decided by the Supreme Court of Kansas. A party filed his bill to quiet his title against the holder of a tax-sale certificate, alleging certain defects that invalidated the sale. The court conceded that the defects alleged were sufficient to invalidate the sale, but nevertheless dismissed the bill for the reason that he who seeks equity must first do equity. "Counsel contends," said the court, "that because the action is authorized by and brought under the statute, it is not subject to equitable principles; but this is a mistake." The want of equity, as the court thought, consisted in the fact that the complainant justly owed the tax, and should have offered in his bill to pay the same.

Where a bill to quiet title was based upon a tax title and limitation, but failed to show affirmatively the proceedings, and when possession of the land and payment of the taxes under the title commenced, or how it was continued, merely charging generally possession and payment of taxes for the statutory period, the bill was dismissed as not being sufficiently specific.

HENRY WADE ROGERS.

EXEMPLARY DAMAGES.

THERE is, I believe, a growing conviction among the jurists of the present day, that the law of punitive or exemplary damages has been built upon a wrong foundation, and is alike contrary to principle and evil in its effects. I share deeply in this feeling, and in the hope of effecting something, however little, toward a reform, would willingly add a few words to what was once a much discussed question.

It is the aim of the common law in cases where damages are proper, to give complete redress, so far as this can be estimated in a pecuniary way. Whatever the practical result may be, the law does not confess its inability to give just compensation, nor abandon the theory that the remedy is sufficient. The controversy has been with reference to the proper rule of damages in cases of aggravated torts.

A few of our courts in this country maintain, that the proof of malicious motives forms a basis for special or extraordinary compensation, to cover not only the natural and legal results of the tort, but as near as can be estimated, damages for mental or physical pain, anxiety or distress, or degradation, which actually resulted from the act. But in the rulings of these courts which uphold the system of exemplary or vindictive damages, a radical difference is made between ordinary torts, and cases where there is fraud, wilful negligence, or actual malice on the part of the defendant—the rule not confining the jury to simple compensation, but allowing them to give such further damages "as will mark their sense of the injustice and insult done to the plaintiff, as a punishment upon the defendant, and as a wholesome example to the community." We find these words in substance used again and again by the courts of this country, until their continued repetition, unaccompanied by explanation, tries the ear. The judges seemingly endeavor to evade the responsibility and inconsistency of the doctrine, by parroting the expression of others. The position taken by those who, like Mr. Sedgwick (Sedgwick on Damages 573, note, 6th ed.), and DILLON, J. (*Berry* v. *Fletcher*, 1 Dillon 67), have the vigor to assert an open opinion is, that it is only just to the outraged sense of the community, that the defendant should be assessed such a farther sum, beyond compensation, in proportion to his wealth as will relieve the sting of insult, and deter the defendant from a repetition of the offence. The fact, that the assessment goes to the plaintiff is incidental, and subservient to the necessity of giving an example to the community, and of punishing the defendant.

This, in a few words, is the principle of the doctrine of exemplary damages. To us it seems to have arisen under a mistaken idea, and as a result of unadvised dicta and incompetent reasoning. It is quite well established in this country, though the tendency of some modern decisions is to repudiate it altogether. Some courts

recognise the inconsistency, while they yield to the authority of precedents: *Brown* v. *Swineford*, 44 Wis. 282; *Smithwick* v. *Ward*, 7 Jones, L. R. (N. C.) 64.

The difficulty of estimating compensation for intangible injuries, was the cause of the rise of this doctrine; the hardship of particular cases was the pretext; and without comprehending the extensive consequences, the judges of our courts have, perhaps unintentionally, allowed their sympathy for mental distress to overpower the principles of the law. There can be no doubt, that there are cases arising, which require extraordinary remedy beyond the mere money loss; and when the early judges allowed the jury discretion to assess beyond the *pecuniary* damage, there being no apparent computation, it was natural to suppose that the excess was imposed as a punishment. The courts in subsequent cases took this view, and in many instances were, no doubt, deceived by the indignation expressed in terms so strongly against the defendant, as to give rise to the idea that the damages were punitive.

In spite of the dicta of the courts and the able views of Mr. Sedgwick (Law Reporter, April and June 1847) and other jurists, I do not think that such damages can be sustained on principle. The arguments of Judge NELSON of New Hampshire (*Fay* v. *Parker*, 53 N. H. 342), and Mr. Greenleaf (2 Gr. on Evidence, 235, note, 13th ed.), are more conclusive; and it must become more and more evident to careful thinkers, that the doctrine is unsound, and if carried to its legitimate results, that it would be very disastrous. It might seem at first sight (and some writers have taken this view: Hilliard on Remedies for Torts 440, note a; Field on Damages 70), that the distinction between exemplary damages, and damages given as special or extraordinary compensation, is one of words merely; and the effect of allowing the former, is the same as that produced upon the theory of compensation, when this is extended to cover injury beyond the pecuniary loss. If this is true, which I believe it is very far from being, the terms "exemplary" and "punitive" damages, are certainly very ill chosen; for it leads the jury, however much restrained in theory, to make the estimate of damages, with a view to punish the defendant rather than compensate the plaintiff: *Hendrickson* v. *Kingsbury*, 21 Iowa 379.

But the distinction is more than one of words. The jury under the one instruction, would be liable to go beyond the ends of

justice. Under the system of exemplary damages, they are instructed to give not only compensation, but are allowed to punish the defendant with a further sum; and it is expressly held, that evidence of his pecuniary ability, is admissible to guide the jury in estimating what sum must be assessed against him to make the punishment effective: *Guengerech* v. *Smith*, 34 Iowa 348; *Buckley* v. *Knapp*, 48 Mo. 152.

Under the principle that damages should never be given beyond compensation, the jury is instructed to estimate the entire injury, taking into consideration the mental anxiety and distress, as well as pecuniary loss, and to give full compensation for all of the injury which defendant's malicious act has caused; and beyond this, not one cent. The result is very different. The jury in the latter case deal with the question as one of remedy, and not of criminal fine.

And it is difficult to see how, under the established system, any reasonable restraint can be on principle imposed on the jury. It is said, that the court may set aside the verdict, if it is unreasonably large; but in such cases it is found, that when the judge comes to consider the verdict, he practically looks to the doctrine of actual compensation, which is supposed to be for the time being discarded. The conclusion is, that if the verdict is allowed to stand, it is because it corresponds to the theory of the advocates of compensation, and that of exemplary damages has been practically disregarded. NELSON, J., in *Fay* v. *Parker*, before cited, shows, that under the latter doctrine there is no inconsistency in compensating the plaintiff four times over.

In the case of *Markham* v. ———, reported in 2 Erskine's Speeches, p. 9, the great barrister Erskine shows, that the words of Lord KENYON have been misinterpreted, and never authorized the incorporation of criminal remedies into civil procedure. It seems to me, that the mingling of the criminal principles with the civil, which the doctrine necessitates, is altogether wrong. And even if it be allowable to fine the defendants in a civil court, there seems no reason why the plaintiff should be the recipient. It is difficult to see why a man should receive a fine, to which he is not entitled in right as compensation. If the plaintiff is entitled to damages as a matter of right, let him receive them in their proper character of indemnity; if he is not so entitled, there is no power in any government which can justly deprive another of his property for

plaintiff's benefit. Judicial procedure ought not to be made a cover for the confiscation of private property.

The attempt has been made to bring the doctrine within the constitutional provision, that "no person shall be subject for the same offence, to be twice put in jeopardy of life or limb;" and though according to the strict rules of interpretation, the objection is not well made, yet the spirit of our institutions would seem to forbid a civil fine for an offence which could be punished criminally (*Austin* v. *Wilson*, 4 Cush. 275). As to its being a matter which public benefit justifies, Lord Commissioner ADAM of Scotland, has said, "a civil court in matters of civil injury is a bad corrector of morals; it has only to do with the rights of the parties:" *Beattie* v. *Bryson*, 1 Murr. R. 317.

If the theory of punishment is to be carried out, consistency would require, that the amount charged to the defendant should be divided into two parts—the one to be awarded to the injured party as compensation, the other to be paid to the state as in cases of criminal fine. And, moreover, there never was the necessity for this doctrine which eminent judges have supposed. There is indeed this much of justice in it, that in particular cases it furnished a means of redressing wrong, when there seemed no other expedient at hand; and which, though contrary to principle, was sufficiently effectual. A good result has been often obtained by it, but a comprehensive application of the theory of compensation, would accomplish every purpose in a much more rational manner: *Meagher* v. *Driscoll*, 99 Mass. 281; *Fillebbrown* v. *Hour*, 124 Id. 580. There is no impracticability in calling upon a jury to estimate the damages with reference to the full injury sustained, taking into consideration not only direct and indirect pecuniary loss, but also the hurt done to the finer instincts of human nature. If an insult is contemplated, the injury is greater on that account. If the act proceeded from *mala mens* or malice, this fact has caused mental anxiety and vexation, perhaps disgrace, which can be accounted for in money.

And, as is undoubtedly the truth, if in many cases any pecuniary compensation is, from the nature of things, essentially inadequate, the courts should not be either deterred thereby from coming as near as possible to complete compensation, or be made the means of inflicting a criminal fine for injury which the defendant has not caused. The maxim "*causa proxima, non remota*

spectatur," should apply here as elsewhere, and the defendant be made liable to the extent that the injury is the result of his wrong, and no further.

There is no doubt extensive authority in this country to sustain the doctrine of exemplary damages, but I question very much whether it is as overwhelming as is generally supposed. Dicta will be found probably in every state which seem to support the principle; but we are apt to be misled by mere words. Mr. Greenleaf criticises with considerable success, the authorities chiefly relied on by Sedgwick, and his reasoning will apply to a great many other and later cases, which he has not touched: 2 Greenleaf on Evidence 235, 13th ed.

There is a large class of decisions supporting the doctrine superficially, which upon analysis, really go no farther than to authorize extraordinary compensation. The courts speak of "damages beyond compensation," but by the latter word, or "actual compensation," as some have called it, they mean to cover simply the pecuniary loss proved at the trial. That something beyond this should in certain cases be given, every one acknowledges; they *call* it "*exemplary* damages," but it is compensation, in spite of the misnomer.

The spirit of these decisions, however ill-chosen the words may be, is undoubtedly not in favor of "punishing" the defendant beyond full indemnity. When the courts speak of giving damages "as compensation to the plaintiff, and an example to the community," it is a ridiculous misuse of words and goes no farther. Compensation is given because the plaintiff is entitled to it, independent of the effect upon the public. That the assessment often does operate as a punishment, and an example, is purely incidental. Yet the courts have followed the letter rather than the spirit of decisions, and have deceived the judges in after cases by their misuse of terms; while the latter conceive themselves more bound by authority, than reason. This, in a word, is the history of exemplary damages in nearly every state where they can be said to be established.

Of the class of cases above spoken of, *Linsley* v. *Bushnell*, 15 Conn. 225, is a fair illustration. In that case, the court elaborates upon the necessity of full and adequate compensation, in distinction from the mere taxable costs. *Malone* v. *Murphy*, 2 Kan. 262, decided in Kansas, is another similar case; and the dictum

is for exemplary damages, as long as they do not conflict with the theory of actual compensation.

A careful review of authorities shows, that of those states commonly considered as adhering to the doctrine, there are several where a vigorous decision in favor of simple compensation would be justifiable in view of precedent, as following the spirit rather than the words of the decisions. This was the condition of things in New Hampshire, before the case of *Fay* v. *Parker* fixed the position of that state beyond question.

Among the states which now stand in this middle position, I think I can with reasonable certainty name California (*Wilson* v. *Middleton*, 2 Cal. 54; *Dorsey* v. *Manlove*, 14 Id. 553; *Selden* v. *Coshman*, 20 Id. 56), in this state the subject is now regulated by statute; Connecticut (*Linsley* v. *Bushnell*, 15 Conn. 225, 267); Indiana (*Millison* v. *Hoch*, 17 Ind. 227, but contra *Shafer* v. *Smith*, 1 Cent. L. J. 271); Iowa (*Hendrickson* v. *Kingsbury*, 21 Iowa 379); Kansas (*Malone* v. *Murphy*, 2 Kan. 262; *Hefley* v. *Baker*, 19 Id. 9; *Titus* v. *Corkins*, 21 Id. 722); Michigan (*Welch* v. *Ware*, 32 Mich. 77; *Daily Post* v. *McArthur*, 16 Id. 447); Maine (*Pike* v. Dilling, 48 Me. 539); and Texas (*Cole* v. *Tucker*, 6 Texas 266).

On the other hand, there are several states where there seems no fair opportunity for doubt, that they are completely committed to the doctrine. Of these are New York, Alabama, Illinois, Kentucky, Maryland, Vermont and Missouri.[1] The position of the Federal Courts is hard to define. Most of the cases usually cited, do not touch the point. The strongest United States dicta are in *Day* v. *Woodworth*, 13 How. 363; and *Berry* v. *Fletcher*, 1 Dillon 67.

There are some states which clearly and satisfactorily limit damages to compensation. It is a relief to find a healthful practical view, among the many vacillating and contradictory decisions. Massachusetts (*Barnard* v. *Poor*, 21 Pick. 378; *Austin* v. *Wilson*, 4 Cush. 273) and Nevada (*Johnson* v. *Wells, Fargo & Co.*, 6 Nev. 224; *Quigley* v. *C. P. Railroad Co.*, 11 Id. 350), have consistently taken this stand; and New Hampshire is now, as we have seen, classed with them.

The preponderance of authorities is, however, in favor of exem-

[1] For full citation of authorities in these states, see Field on Damages, p. 24; *Meidel* v. *Anthis*, 71 Ill. 241; *Miller* v. *Kirby*, 74 Id. 242.

plary damages. It is a great mistake which should be corrected, either by legislative enactment or the law-making power of the courts. For the doctrine is productive of positive evil. "It has demoralized an honorable profession by the prizes held out to the litigious and unscrupulous, and their advocates in court expecting to share in the promised confiscation of another man's property:" (6 Cent. L. J., p. 74). There would be fewer damage suits filling up the dockets of our courts with useless, or else unrightful litigation, if plaintiffs could recover only what they have suffered; and the courts would not be obliged to resort to the thin fiction of "public example," in order to make reparation for the ruin of character and destruction of homes, brought about by slanders and seducers. The reproach upon our law, that it compensates for the loss of the slightest *service*, but not for the severance of the dearest ties, or the ruin of human happiness, would not exist.

In a late Nevada case, *Quigley* v. *Central Pacific Railroad Co.*, 11 Nev. 350, the consideration of the question is thorough and satisfactory; and the words of BEATTY, J., therein reported, accord so closely with my views of what is right upon this subject, that they may be taken as an appropriate conclusion, and apt expression of what it has been the aim of this article to establish: "As to the question whether a jury in awarding vindictive damages, can go beyond a full compensation to the plaintiff for his pecuniary loss, and bodily and mental suffering, and add a further sum by way of punishment to the defendant, for the sake of example, I think the weight of reason and the best considered cases are in favor of restricting the award to compensation to the plaintiff. Of course the amount of compensation to which he will be entitled, will depend, in every case, upon the circumstances of the injury; and in cases of gross and wanton outrage, heavy damages should be allowed, which, while they would go to the plaintiff as a compensation, would operate incidentally as a severe punishment to the defendant. In this sense and in this sense only, in my opinion, is it proper to say that a defendant may be punished in vindictive damages."

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