CHAPTER XXV.

DAMAGES.

§ 471. In general.—Damage is a pecuniary allowance made, under rules of law, because of injuries suffered by him in whose favor the allowance is made, through the unlawful act of him against whom it is made.

As a general rule the injury must be the natural and proximate result of the act complained of and not a remote consequence only.[1]

A second general rule is that the damages must be compensatory for the injury received—nothing more and nothing less. This rule excludes an allowance of damages on the theory of punishment of the defendant.[2]

Damages are known in the law as either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really resulted from the injury complained of but are not implied by law.[3] General damages may be

1—Shaw v. Hoffman, 21 Mich., 151; Clark v. Moore, 3 Mich., 55; Heiser v. Loomis, 47 Mich., 16; 10 N. W., 60; Cuddy v. Major, 12 Mich., 368; Wetmore v. Pattison, 45 Mich., 439; 8 N. W., 67; Hitchcock v. Pratt, 51 Mich., 263; 16 N. W., 639; Rajnowski v. Detroit B. C. & A. Ry. Co., 74 Mich., 20; 41 N. W., 849; s. c. 78 Mich., 681; 44 N. W., 335; Doran v. Butler, 74 Mich., 643; 42 N. W., 273; Maywood v. Logan, 78 Mich., 135; 43 N. W., 1053; McKellar v. Monitor Twp., 78 Mich., 485; 44 N. W., 412; Riley v. Littlefield, 84 Mich., 22; 47 N. W., 576; Eddy v. Courtwright, 91 Mich., 264; 51 N. W., 887; Totten v. Burhans, 91 Mich., 495; 51 N. W., 1119; Langworthy v. Green Twp., 95 Mich., 93; 54 N. W., 697; Filer v. Smith, 96 Mich., 347; 55 N. W., 999.

2—Ten Hopen v. Walker, 96 Mich., 236; 55 N. W., 657; Haviland v. Chase, 116 Mich., 214; 74 N. W., 477; Boydan v. Haberstumpf, 129 Mich., 137; 88 N. W., 386; McChesney v. Wilson, 132 Mich., 252; 93 N. W., 627; Stuyvesant v. Wilcox, 92 Mich., 233; 52 N. W., 465.

3—Bateman v. Blake, 81 Mich., 227; 45 N. W., 831.

recovered under a declaration showing the violation of plaintiff's right, and a general allegation that injury resulted. To recover special damages, however, it is essential that there be allegations showing that in the particular case injuries were caused not usually resulting from such conduct as is counted upon, and for which damages are asked.

Special damages cannot be recovered under a declaration containing a general allegation of damages only.[4]

One may be injured under such circumstances as that he can have no allowance of damages—*damnum absque injuria*—in the old phrase. Such is the case where there is injury without any violation of duty;[5] so in case of injury resulting from the enforcement of the police regulations of the state.[6] Again in case of injury resulting to another from that use of one's own lands which is lawful, as by digging a well which injures a neighbor's well.[7]

Nominal damages are given in cases where there has been a technical violation of another's right, but with no substantial injury shown.[8]

§ 472. **Exemplary damages.**—Exemplary damages are allowed because in the particular case the defendant in doing the act complained of, acted wilfully, maliciously or in reckless disregard of the rights of plaintiff. The theory of exemplary damages is not that they are an allowance for something in addition to that which will compensate for the actual injury; they are only compensatory. They are an allowance

4—Chandler v. Allison, 10 Mich., 460; Shaw v. Hoffman, 21 Mich., 151; Allen v. Kinyon, 41 Mich., 281; 1 N. W., 863; Shaddock v. Alpine P. R. Co., 79 Mich., 7; 44 N. W., 158; Kuhn v. Freund, 87 Mich., 545; 49 N. W., 867; Silsby v. Michigan C. Co., 95 Mich., 204; 54 N. W., 761; Beath v. Rapid Ry. Co., 119 Mich., 512; 78 N. W., 537; Smedley v. Soule, 125 Mich., 192; 84 N. W., 63.

5—Post v. Campau, 42 Mich., 90; 3 N. W., 272.

6—Grand Rapids v. Grand Rapids & I. Ry. Co., 66 Mich., 42; 33 N. W., 15.

7—For cases illustrating this rule further, see, Attorney General v. Evart Booming Co., 34 Mich., 462; Upjohn v. Richland, 46 Mich., 542; 9 N. W., 845; National Copper Co. v. Minnesota M. Co., 57 Mich., 83; 23 N. W., 781; Highway Com'rs v. Ely, 54 Mich., 173; 19 N. W., 940; Gregory v. Bush, 64 Mich., 37; 31 N. W., 90.

8—Haven v. Beidler Mfg. Co., 40 Mich., 286; Ward's C. & P. L. Co. v. Elkins, 34 Mich., 439; Toll v. Wright, 37 Mich., 93; Graham v. Poor, 50 Mich., 153; 15 N. W., 61; Ellis v. Simpkins, 81 Mich., 1; 45 N. W., 646; Wyatt v. Herring, 90 Mich., 581; 51 N. W., 684; Detroit Gas Co. v. Moreton T. & S. Co., 111 Mich., 401; 69 N. W., 659; Sax v. Detroit, G. H. & M. Ry. Co., 129 Mich., 502; 89 N. W., 368.

in addition to such allowance as would be made if the injury were innocently inflicted, and so much in addition, as will compensate for the aggravation of the injury by reason of the malice or recklessness of the defendant.[9]

§ 473. Stipulated damages.—Under certain circumstances parties may, by their contract, fix the amount of damages to be recovered in case of a breach of it. In order that agreements of this sort be upheld, it must appear that the agreement is really one which fairly measures the injury resulting from the breach, and is not a provision in the nature of a penalty for failure to perform. It is not what the parties *intend* which determines whether the stipulation will be enforced or not, but the inquiry is whether the sum fixed is in fact in the nature of a penalty.[10]

The policy of the law is against allowing the parties to a contract to fix the amount of recovery for a breach of it by calling the agreed amount "damages" when in fact it is clearly a penalty or forfeiture for non-performance.[11] The principle of stipulated damages does not forbid reasonable provisions limiting the amount of recovery in certain cases. As in the case of contracts of carriage with express companies, stipulations limiting recovery in case of injury or loss in transportation to $50 unless the value of the goods is declared at the time of the contract, are upheld.[12] So, in case of contracts with telegraph companies, stipulations limiting the amount of recovery for failure to properly transmit, in cases of unre-

9—Scripps v. Reilly, 38 Mich., 10; Watson v. Watson, 53 Mich., 168; 18 N. W., 605; Stilson v. Gibbs, 53 Mich., 280; 18 N. W., 815; Ross v. Leggett, 61 Mich., 445; 28 N. W., 695; Wilson v. Bowen, 64 Mich., 133; 31 N. W., 81; Ford v. Cheever, 105 Mich., 679; 63 N. W., 975; Haviland v. Chase, 116 Mich., 214; 74 N. W., 477; Boydan v. Haberstumpf, 129 Mich., 137; 88 N. W., 386; McChesney v. Wilson, 132 Mich., 252; 93 N. W., 627; Peacock v. Oakes, 85 Mich., 578; 48 N. W., 1082.

10—Jaquith v. Hudson, 5 Mich., 123; First Cong. Ch. v. Walrath, 27 Mich., 232. In the absence of statute, a stipulation for an attorney fee, found in a note or mortgage, to be paid in case proceedings are taken to collect the same, is void: Bullock v. Taylor, 39 Mich., 137; Myer v. Hart, 40 Mich., 517.

11—Davis v. Freeman, 10 Mich., 188; Richmond v. Robinson, 12 Mich., 193; Myer v. Hart, 40 Mich., 517; Daily v. Litchfield, 10 Mich., 29; Richardson v. Woehler, 26 Mich., 90. It is against public policy to allow damages to be stipulated, otherwise than by a trial, unless where the real damages cannot be reasonably well ascertained: Hubbard v. Epworth, 69 Mich., 92; 36 N. W., 801.

12—Smith v. American Express Co., 108 Mich., 572; 66 N. W., 479.

peated messages, to the amount paid for transmission, are upheld.[13]

§ 474. Double damages.—By statute in certain cases it is provided that double damages may be recovered. C. L., § 11653 makes such a provision in case of wilful or negligent setting of fire by which another is injured in his property.[14] The statute giving damages in case of injury to the domestic animals or person of one by the dog of another, also provides for a double recovery.[15] This statute does not contemplate such result except in case there is some fault in the owner. Injuries inflicted, therefore, by a rabid dog with no fault in the owner are not recoverable under this statute.[16]

The proper practice is to have the jury assess the amount of single damages and to apply, after verdict, to the court to have judgment entered for double the amount of the verdict.[17]

§ 475. Treble damages.—By statute it is also provided that in certain specified cases the plaintiff may recover treble damages. These damages are in their nature punitory and the presumption is against their recovery in cases not clearly within the statute, and which do not involve something like wilful wrong.[18] The statute gives treble damages in case of trespass involving the cutting and despoiling of trees where it is not casual and involuntary.[19] Under this statute the bur-

13—Birkett v. Western Union Tel. Co., 103 Mich., 361; 61 N. W., 645.

14—Boyd v. Rice, 38 Mich., 599. These damages may be doubled by the justice though the doubled damages exceeds the limit of his jurisdiction as fixed by the statute: Rosevelt v. Hanold, 65 Mich., 414; 32 N. W., 443; see also, Talley v. Courter, 93 Mich., 473; 53 N. W., 621.

15—C. L., § 5593. This statute does not supersede common law remedies: Monroe v. Rose, 38 Mich., 348. It is not necessary to aver knowledge in the owner or keeper of the dog that he was accustomed to do mischief: Newton v. Gordon, 72 Mich., 642; 40 N. W., 921; see, Snow v. McCracken, 107 Mich., 49; 64 N. W., 866.

16—Elliott v. Herz, 29 Mich., 202. The constitutionality of this statute was upheld in Fye v. Chapin, 121 Mich., 675; 80 N. W., 797.

17—Swift v. Applebone, 23 Mich., 252. As to who is a "keeper" of a dog within the meaning of the statute, see, Jenkinson v. Coggins, 123 Mich., 7; 81 N. W., 974.

18—Shepard v. Gates, 50 Mich., 495; 15 N. W., 878; Michigan L. etc. Co. v. Deer Lake Co., 60 Mich., 143; 27 N. W., 10; Wallace v. Finch, 24 Mich., 255; Russell v. Myers, 32 Mich., 522; Kilgannon v. Jenkinson, 57 Mich., 325; 23 N. W., 830.

19—C. L., § 11204. Ward v. Rapp, 79 Mich., 469; 44 N. W., 934; Longyear v. Gregory, 110 Mich., 277; 68 N. W., 116. Interest may be included in this amount trebled: Gates v. Com-

den of showing that the trespass was casual and involuntary is on the defendant.[20]

Another statute allows the recovery of treble damages for the forcible and unlawful ejection of one from lands or tenements, or, being out, for the forcible and unlawful keeping of one out of possession of lands or tenements.[21] By still another statute it is provided that a complainant obtaining restitution of any premises under the provisions of Chapter 308 of the Compiled Laws of 1897, shall be entitled to an action of trespass or trespass on the case against the defendant, and may recover treble damages.[22] It is also provided that in case a member of a board of registration shall falsely, maliciously or without credible information take the name of a person registered from the list of registered electors, the party aggrieved shall be entitled to recover treble damages for the injury.[23]

§ 476. Interest as damages.—For any delay in making payment of money, interest is considered a proper compensation.[24] So, for failure to deliver at time agreed, interest on the value of the chattel may be allowed as compensation.[25] Interest will not be allowed for failure to pay at a particular time when the amount is not ascertained.[26] So, in an action of trespass under the statute, interest on the amount of the depreciation in value, by reason of the trespass, may be allowed.[27] In an action in case for negligence, resulting in the total loss of property involved, interest is properly allowed on

stock, 113 Mich., 127; 71 N. W., 515. The damages recoverable under this statute are for injuries to the freehold: Achey v. Hull, 7 Mich., 423.

20—Hart v. Doyle, 128 Mich., 258; 87 N. W., 219; Gates v. Comstock, 113 Mich., 127; 71 N. W., 515; Michigan L. & I. Co. v. Deer Lake Co., 60 Mich., 143; 27 N. W., 10.

21—C. L., § 11206; Wilson v. McCrillies, 50 Mich., 347; 15 N. W., 504; Mattice v. Brinkman, 74 Mich., 705; 42 N. W., 172.

22—C. L., § 11175. This section is penal in its character and has no retroactive effect: Newkirk v. Tracey, 61 Mich., 180; 27 N. W., 884. That defendant acted in good faith will not defeat treble damages under this statute: Lane v. Ruhl, 103 Mich., 38; 61 N. W., 347; see, also, Crozier v. Allen, 117 Mich., 171; 75 N. W., 300.

23—C. L., § 3561.

24—Clark v. Craig, 29 Mich., 398.

25—Edwards v. Sandborn, 6 Mich., 348.

26—Lake Shore & M. S. Ry. Co. v. People, 46 Mich., 193; 9 N. W., 249. So it may be allowed in an action for money paid without consideration under a land contract where the amount paid would not adequately compensate plaintiff: Davis v. Strobridge, 44 Mich., 157; 6 N. W., 205.

27—Gates v. Comstock, 113 Mich., 127; 71 N. W., 515.

the value of the property lost.[28] So, where the action is for the conversion of chattels, interest may be allowed on the value of the property converted from the time of the conversion.[29]

§ 477. Profits as damages.—As a general rule the loss of profits is not a proper element of damages where the amount of such profits is conjectural or speculative.[30] But where they can be ascertained with reasonable certainty they may be allowed as an element of damages.[31] In order that prospective profits can be recovered the circumstances must be such as to show, that they were fairly within the contemplation of the parties at the time of making the contract, as the probable result of the breach complained of. As where it was known at the time, that the machinery was purchased to enable the purchaser to perform certain contracts then existing.[32]

§ 478. Duty of party asking damages to minimize them.—Plaintiff in case of breach of a service contract by his unlawful discharge before the expiration of his term of service is under obligation to use reasonable diligence to secure other employment.[33]

28—Coan v. Brownstown Twp., 126 Mich., 627; 86 N. W., 130.

29—Rough v. Womer, 76 Mich., 375; 43 N. W., 573; Wright v. Starks, 77 Mich., 221; 43 N. W., 868; Blaisdell v. Scally, 84 Mich., 149; 47 N. W., 585; Spoon v. Chicago & W. M. Ry. Co., 86 Mich., 309; 49 N. W., 35; Woods v. Gaar, Scott & Co., 93 Mich., 143; 53 N. W., 14.

30—Allis v. McLean, 48 Mich., 428; 12 N. W., 640; Petrie v. Lane, 67 Mich., 454; 35 N. W., 70; Davis v. Davis, 84 Mich., 324; 47 N. W., 555; Hutchinson Mfg. Co. v. Pinch, 91 Mich., 156; 51 N. W., 930; Hitchcock v. Knights of Maccabees, 100 Mich., 40; 58 N. W., 640; Taylor v. Cooper, 104 Mich., 72; 62 N. W., 157.

31—Burrell v. New York etc. S. Co., 14 Mich., 34; Allis v. McLean, 48 Mich., 428; 12 N. W., 640; Goodrich v. Hubbard, 51 Mich., 62; 16 N. W., 232; Leonard v. Beaudry, 68 Mich., 312; 36 N. W., 88; S. C. 80 Mich., 163; 45 N. W., 66; Greenwood v. Davis, 106 Mich., 231; 64 N. W., 26; Liggett S. & A. Co. v. Michigan B. Co., 106 Mich., 445; 64 N. W., 466; Fell v. Newberry, 106 Mich., 542; 64 N. W., 499; Barrett v. Grand Rapids V. W., 110 Mich., 6; 67 N. W., 976; Industrial Works v. Mitchell, 114 Mich., 29; 72 N. W., 25.

32—The rule is well stated in Industrial Works v. Mitchell, 114 Mich., 29: "Where notice is brought home to the contracting party that the goods are purchased to be put to a particular use, he is charged with the consequences of a failure to perform." An allowance of profits was made in this case.

33—Harrington v. Gies, 45 Mich., 374; 8 N. W., 87; Owen v. Union Match Co., 48 Mich., 348; 12 N. W., 175; Connor v. Hurley, 112 Mich., 622; 71 N. W., 158; Stearns v. Lake Shore & M. S. Ry. Co., 112 Mich., 652; 71 N. W., 148. It seems that the burden is upon the defendant to show that no effort was made, or what effort

So, in the case of eviction of a tenant; it is obligatory upon him to make a reasonable effort to secure other premises for the carrying on of his business.[34] This general principle is applicable wherever the plaintiff by reasonable effort can materially reduce the injury which otherwise he might suffer.[35] With much more force can it be said that the injured party must not wilfully or carelessly aggravate the injury.[36]

§ 479. Damages recoverable for breach of contract—in general.—They should be such as may be said to fairly arise from the breach, or to have been within the contemplation of the parties when the contract was made, as the probable result of the breach.[37] Where there is partial performance of an unapportionable contract, the party in default may recover the value of anything done or furnished under the contract, from which the other party has derived substantial benefit through its appropriation by him, subject to the reduction of such amount by the amount of damages to which that other is entitled by reason of failure of performance.[38] In case of a breach of a labor contract by refusal to permit performance the injured party may recover for services actually performed, what they were reasonably worth, though in excess of the contract price.[39] Not so, however, when the failure to complete the contract was the failure of the party bringing the action. In such case the recovery can never exceed the contract price.[40]

§ 480. Damages in case of breach of sale contract.—In case of failure of vendee to make payment of the purchase price

was made, by the plaintiff to get other employment: Allen v. Whitlark, 99 Mich., 492; 58 N. W., 470, decided upon the authority of Farrell v. School District, 98 Mich., 43; 56 N. W., 1053.

34—Haines v. Beach, 90 Mich., 563; 51 N. W., 644; see, Talley v. Courter, 93 Mich., 473; 53 N. W., 621.

35—Gilbert v. Kennedy, 22 Mich., 117; Hopkins v. Sanford, 41 Mich., 244; 2 N. W., 39; Endriss v. Belle I. I. Co., 49 Mich., 279; 13 N. W., 590; Wonderly v. Holmes L. Co., 56 Mich., 412; 23 N. W., 79.

36—Dennis v. Huyck, 48 Mich., 620; 12 N. W., 878.

37—Clark v. Moore, 3 Mich., 55; Hopkins v. Sanford, 38 Mich., 611; Howe v. North, 69 Mich., 272; 37 N. W., 213; Goddard v. Westcott, 82 Mich., 180; 46 N. W., 242.

38—Allen v. McKibbin, 5 Mich., 449; Wilson v. Wagar, 26 Mich., 452; Moon v. Harder, 38 Mich., 566; Gage v. Meyers, 59 Mich., 300; 26 N. W., 522; Wickes v. Swift E. L. Co., 70 Mich., 322; 38 N. W., 299; Sheldon v. Leahy, 111 Mich., 29; 69 N. W., 76; Phelps v. Beebe, 71 Mich., 554; 39 N. W., 761; Wells v. Board of Education, 78 Mich., 260; 44 N. W., 267.

39—Hemminger v. Western A. Co., 95 Mich., 355; 54 N. W., 949. One cannot be forced to accept work not conforming to the contract: Martus v. Houck, 39 Mich., 431.

40—Allen v. McKibben, 5 Mich., 449; Wilson v. Wagar, 26 Mich., 452.

the vendor is entitled to recover such price with the interest from the time when it should have been paid.[41] The measure of damages in an action by the vendor where the vendee refuses to take or pay for goods and the vendor elects to retain the goods, is the difference between the contract price and the market price at the time and place of delivery under the contract.[42]

The measure of damages in case there is a failure to deliver as agreed and the contract price has not been paid, is the difference between the value of the property at the time and place of delivery and the contract price.[43] In case the purchase price has been paid, the purchaser may recover the money paid, or he may have the full market value of the property at the time and place of delivery.[44] In case of breach of warranty of quality or failure to deliver goods of the description contracted for the measure of damages, in case the goods are taken by the purchaser, is the difference in value of the goods, had they been as contracted for, and their actual value as furnished.[45]

§ 481. Damages in actions for tort.—For a discussion of the subject of damages in trover see, *post,* §§ 646, 647. For the rules in actions of replevin, see, *post,* Chap. xxxix. In actions for trespass to real property, see, *post,* § 620; in case of defective fences, *post,* § 627-9. In trespass for carrying away chattels the plaintiff may recover the value of that taken at the time taken,[46] with interest, [47] or the value of the use during

41—Cook v. Stevenson, 30 Mich., 242; Kelly v. Waters, 31 Mich., 404.

42—Brownlee v. Bolton, 44 Mich., 218; 6 N. W., 657; Williams v. Robb, 104 Mich., 242; 62 N. W., 352.

43—Haskell v. Hunter, 23 Mich., 305; Chadwick v. Butler, 28 Mich., 349; McKercher v. Curtis, 35 Mich., 478; Peters v. Cooper, 95 Mich., 191; 54 N. W., 694; Maxted v. Fowler, 94 Mich., 107; 53 N. W., 921; Leo Austrian & Co. v. Springer, 94 Mich., 344; 54 N. W., 50. This general rule is not applicable in case the article is not kept in the market or is prepared for a special purpose: Den Bleyker v. Gaston, 97 Mich., 354; 56 N. W., 763.

44—See, West Mich. F. Co. v. Diamond G. Co., 127 Mich., 651; 87 N. W., 92.

45—Burdick on Sales, p. 213; Jackson Sleigh Co. v. Holmes, 129 Mich., 370; 88 N. W., 895. In case of the sale of fruit trees to be of a particular variety, and a breach by furnishing trees of a different variety, the measure of damages is the value that would have been added to the land if they had been of the variety contracted for, beyond its value with the trees of the variety furnished: Heilman v. Pruyn, 122 Mich., 301; 81 N. W., 97; Long v. Pruyn, 128 Mich., 57; 87 N. W., 88.

46—Kent County A. S. v. Ide, 128 Mich., 423; 87 N. W., 369.

47—Rathbun v. Rathbun, 14 Mich., 382.

the time the plaintiff was deprived of it,[48] or if it is not returned, he may recover its value and reasonable damages for its detention.[49] It would not be permitted that damages for the detention together with interest on the value should be recovered.

In actions to recover for personal injuries the plaintiff is entitled to recover compensation for all the injury received; for the consequences already experienced, and such as are reasonably certain to follow, including physical and mental suffering, anxiety, suspense, fright and for expenses of nursing and medical attention, for disfigurement or deformity, loss of time and of capacity to follow one's occupation or engage in any business or employment.[50] The plaintiff can only recover for injuries chargeable to the act complained of and not for suffering, the result of conditions for which the defendant is not responsible.[51] Fright unaccompanied by immediate physical injury will not afford ground for an allowance of damages.[52]

48—Hart v. Blake, 31 Mich., 278.

49—Haviland v. Parker, 11 Mich., 103.

50—Sherwood v. Chicago & W. M. Ry. Co., 82 Mich., 374; 46 N. W., 773; Kinney v. Folkerts, 84 Mich., 616; 48 N. W., 283; Ostrander v. Lansing, 115 Mich., 224; 73 N. W., 110; Lucas v. Michigan Central Ry. Co., 98 Mich., 1; 56 N. W., 1039; Beath v. Rapid Ry. Co., 119 Mich., 512; 78 N. W., 537; Goucher v. Jamieson, 124 Mich., 21; 82 N. W., 663.

51—Schwingschlegl v. Monroe, 113 Mich., 683; 72 N. W., 7.

52—Nelson v. Crawford, 122 Mich., 466; 81 N. W., 335.