

U. S. Rep.]

PRENTISS V. SHAW ET AL.

[U. S. Rep.]

On the other hand, a case is suggested, where the injury to the person was severe, a broken limb or grievous wounds, or permanent or partial disability, and yet the party suffering had been guilty of gross abuse, provoking the assault by insulting language or false accusations, or most offensive libels upon the defendant or his family, or had outraged the community in which he lived, by a series of acts or declarations which justly aroused and kept alive the indignation, which at last found vent in the infliction of some personal indignity, accompanied by force and violence, which resulted in the serious manner above stated. What is the rule as to such damages, applied to the aggravations in the one case, and the mitigations in the other?

If we take the case of such an assault, which has been provoked by words or acts at the time of the trespass, and so immediately connected therewith that all authorities would agree in admitting the evidence in mitigation, the precise question then is, for what purpose can it be used, and what damages can it mitigate?

All agree that these facts cannot be a legal justification, and be used in bar of the action. The plaintiff is undoubtedly entitled to a verdict, with damages. It is said these facts may be used to mitigate the damages. But what damages? If the assault was illegal and unjustified, why is not the plaintiff, in such case, entitled to the benefit of the general rule, before stated—that a party guilty of an illegal trespass on another's person or property, must pay all the damages to such person or property, directly and actually resulting from the illegal act? Admit that the defendant was provoked, insulted, irritated, and justly indignant at the acts or language of the plaintiff. If those provocations did not reach the point of a legal justification of the assault, then, so far as the question arises for which party the verdict shall be given, they are immaterial, and out of the case. The assault was wholly legal or wholly illegal. There can be no such thing as apportioning the guilt; making the act half legal and half illegal. It is not one of the class of cases where the suffering party contributed to the injury, and thereby lost his right of action. The contribution, to work that effect, must be co-operation in the doing of the act itself, which is complained of,—i. e., the assault and battery; or whatever the alleged specific act may be.

If then the act is confessedly an illegal one, and unjustified in law, why must not the defendant answer for and pay the actual damages to the person? On what principle of law can he be exonerated?

In the case before us the presiding judge took this view. He made a distinction which has not often been attended to, between a recovery for the actual personal damage and loss of time and other direct injuries, and a recovery for other damages based on injury to the feelings, indignity, insults, and the like, and also on the claim for punitive damages.

Is there not such a distinction in law and common sense? Take the simple case of the meeting of two men in a public street. One addresses the other with opprobrious and insulting language, calling him a thief or a liar. The other, at the moment, naturally excited to almost uncontroll-

able anger, strikes a blow which breaks the arm of his antagonist. The law says the words were no legal justification for the blow. It was therefore a trespass and a wrong. What damages shall be awarded? Can they be more or less, according to the provocation on one side or the natural anger on the other? There is the broken arm, neither more nor less, with the pain and suffering and expense of cure, and the loss of time, all which are open and appreciable, and are the direct and immediate consequences of the legal wrong. If the law holds, as it does, sternly and unwaveringly, that the words are no excuse or justification, why should it "keep the word of promise to the ear but break it to the hope," by allowing a jury to evade the law, whilst in form keeping it by a verdict for nominal damages, which is in effect one in favor of the defendant? Why not say rather that the provocation might be shown in defence of the action, and that if the plaintiff morally deserved to suffer the injury by reason of his language, that should be a legal excuse? It seems to be a legal anomaly to say,—true, it is an undefended, naked trespass and wrong, but no real damages or recompense shall be given. It is giving the benefit of a justification to what the law expressly says is no justification. The restriction of the rule to the provocation given at the time of the assault, does not obviate the objection that it is against a well-settled principle which gives real and substantial redress for every unjustified trespass. Where the trespass or injury is upon personal or real property it would be a novelty to hear a claim for reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had broken his horse's leg, in the case before stated, must not the defendant be held to pay the full value of the horse thus rendered useless? Or in case of trespass on land, can the actual damage be mitigated by showing that it was provoked by unfriendly or unneighborly words? Or in case of a damage at sea, could an intentional and unnecessary collision be mitigated, so far as the actual injury was in question, by proving that the navigator was insulted and irritated by taunting and exciting language from the deck of the injured vessel?

But there is no doubt that the law has sanctioned, by a long series of decisions, the admission of evidence tending to show on one side aggravation, and on the other, mitigation of the damages claimed. Verdicts for heavy damages have been sustained where the actual injury to the person was very slight or merely constructive, and other verdicts for merely nominal damages have been confirmed where the actual injuries were shown to have been serious. In the first class of such cases the plaintiff has not been restricted to proof of the injury to the person, but has been allowed to show the circumstances attending the act, and to have damages for the insult, indignity, injury to his feelings, and for the wanton malice and unprovoked malignity of the deed. And it is now settled, certainly in this state, that he may be allowed, in addition, exemplary damages in the way of punishment or warning to the transgressor and others.

Now this opens a wide field for uncertain or speculative damages for matters not tangible or