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ARE THREEFOLD DAMAGES UNDER THE ANTI-TRUST ACT PENAL OR COMPENSATORY?

By Lawrence Vold*

I. THE NATURE OF THE ISSUE: CONFLICTING ASSUMPTIONS.

The anti-trust statute denounces violations of its provisions as crimes and subjects violators to heavy criminal penalties. In addition the anti-trust statute also provides that "any person who shall be injured in his business or property" by such violations "shall recover threefold the damages by him sustained".

When courts are called upon to give effect to this threefold damage provision in actual cases that currently arise the ingenuity of counsel for defendants is often brought into play in the effort to paralyze its application in the instance. This is attempted, usually, through some characterization of this provision as penal, and the assertion that by reason of its penal character it runs afoul of various other statutory or constitutional provisions in regard to penalties which preclude its application to the case in hand. Such tactics have been widely resorted to in anti-trust cases where assignment or survival of the cause of action has been involved, and in cases where the application of the statute of limitations to the cause of action has been in question. Analogous problems have arisen under threefold damages provisions in patent and copyright laws. In some recent Nebraska anti-trust litigation similar tactics were

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2 U. S. C. A. title 15, Sec. 15. State anti-trust acts usually have corresponding provisions. See, for instance, Compiled Statutes of Nebraska (1929), Sec. 59-813.

3 See footnote 49 below, with accompanying text.

4 See footnote 52 below, with accompanying text.

5 See footnote 53 below, with accompanying text.
employed in contending that a provision of the state constitution rendered such statutes for double or treble damages invalid.  

It is at once apparent that such arguments depend for their validity upon the preliminary assumption that the statutory threefold damage provision under attack constitutes a penalty. The available legal terminology relating to damages and penalties is very slippery language. In connection with the reported cases in which courts have struggled with problems involving the slippery distinctions between "damages" and "penalties" the following excerpt from the lips of a great jurist in dealing with another matter is therefore highly pertinent:

"When a court applies a principle you may readily recognize it and appreciate its application although not entirely content with the linguistic expression of it in the judicial opinion."

II. THE PROBLEM ILLUSTRATED IN FAMILIAR PARABLE FORM.

1. Nathan's Parable to David.

"1. And the Lord sent Nathan unto David. And he came unto him, and said unto him, There were two men in one city, the one rich, the other poor.

"2. The rich man had exceeding many flocks and herds;

"3. But the poor man had nothing, save one little ewe lamb, which he had bought and nourished up: and it grew up together with him, and with his children; it did eat of his own meat, and drank of his own cup, and lay in his bosom, and was unto him as a daughter.

"4. And there came a traveler unto the rich man, and he spared to take of his own flock and of his own herd, to dress for the wayfaring man that was come unto him; but took the poor man's lamb, and dressed it for the man that was come to him.

"5. And David's anger was greatly kindled against the man; and he said to Nathan: As the Lord liveth, the man that hath done this thing shall surely die;

"6. And he shall restore the lamb fourfold, because he did this thing, and because he had no pity."

(II Samuel, Chapter 12, verses 1-6.)

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7From the address of Charles Evans Hughes before the Association of the Bar of the City of New York, January 16, 1930, in an address upon the organization and methods of the Permanent Court of International Justice.
2. The Punishment and the Restoration Decreed.

So far as it concerns the question of whether threefold damages are in the nature of a penalty or in the nature of compensation, anti-trust cases, in very condensed form, are vividly pictured in the foregoing familiar parable from the Old Testament. The essentials are all there. "The man that hath done this thing shall surely die." That is the punishment. "And he shall restore the lamb fourfold." That is the restoration, the reparation, to the injured party.

3. Fourfold Restoration Was Not Penal but Compensatory for Accumulative Actual Harm Beyond the Range of Legal Damages.

Is the "restore the lamb fourfold" a penalty, or is it compensation to the injured party? The punishment separately pronounced was death. The "fourfold" is in terms of "restore". The two ideas, punishment to the wrongdoer and compensation to the injured party, are quite distinct. This "fourfold" is restoration, which is compensation to the injured party. Punishment for the wrongdoer is independently provided for in the literal language of the parable decree.

Looking at the surrounding facts, too, the correctness of this view is apparent. To the rich wrongdoer, the poor man's lamb was just another lamb, for the conversion of which he might become liable to pay the ordinarily recoverable legal damages, that is, the market value of the property. To the poor man here, however, from whom the lamb was taken, this lamb was a unique chattel. It was the only thing he had. It grew up with him and his children. It ate of his meat. It drank of his cup. It was to him as a daughter. To the rich wrongdoer it might be just another lamb, worth no more than its market value. For the poor man's loss by the rich man's wanton taking, however, the remedy of ordinarily recoverable legal damages, here the market value, is utterly and wholly inadequate. Under the circumstances detailed he has suffered accumulative actual harm intangible and indeterminate, far in excess of the ordinarily recoverable legal damages. As a practical expedient for affording liquidated compensation for this intangible and indeterminate accumulative actual harm under such circumstances the judgment is, according to this parable, that the property
taken shall be restored fourfold. The fourfold measure of damages here invoked thus actually serves as a restoratory device where the facts are such that the single measure of legal damages is utterly inadequate to accomplish full compensation.


With but slight changes in terminology, the foregoing observations on the familiar parable of Nathan and David are often closely applicable to actions for violation of the anti-trust act. Here, often, as there, the defendant is a rich and powerful wrongdoer with an abundance of business establishments. The plaintiff is by comparison a very poor man, who has but his own little business to which he devotes his life and from which he draws his living. Here, as there, the criminal punishment is separately provided, while here reparation for the injury to property or business is awarded threefold. To the rich and powerful defendant with its numerous establishments which destroys the little plaintiff’s only business, the business thus destroyed may be only one more little business. To the little plaintiff, however, the victim of the unlawful destruction of the only business he has from which he draws his living, it is a part of his very life. As with the lamb in the parable, so with the little victim’s business under the anti-trust act. Redress merely in terms of the ordinarily recoverable legal damages is utterly and wholly inadequate to compensate for the intangible and indeterminate accumulative actual harm inflicted. The parable adjudges capital punishment on the wrongdoer. To liquidate compensation for the harm done the parable adjudges “he shall restore the lamb fourfold”. The anti-trust statute provides severe criminal liabilities to punish the wrongdoer. To liquidate compensation for the harm done, the anti-trust statute enacts “Any person who shall be injured in his business or property * * * shall recover threefold the damages by him sustained”. In both cases the punitive measures are set out separately. In both cases the harm to be compensated does not stop at the ordinarily recoverable legal damages. It includes the wider range of intangible and indeterminate accumulative actual harm wantonly inflicted by the rich and powerful wrongdoer upon his poor and defenseless victim. In both cases the
practical device utilized in affording redress where the single measure of damages is utterly inadequate to accomplish full compensation is to liquidate compensation for intangible and indeterminate accumulative harm by quadrupling or trebling the ordinarily recoverable legal damages.

Accordingly, whatever designation is attached to the four-fold restoration in the parable decree, the fact remains that the payment required is liquidated compensation to the injured party for intangible and indeterminate accumulative harm actually inflicted. At the same time such additional compensation, going beyond the ordinarily recoverable legal damages, in the usual types of cases, is to that extent an additional burden upon the wrongdoer which in some degree, perhaps, may act upon him as an additional deterrent from wrongdoing. Only in that very broad sense is it appropriate to call the fourfold restoration in this parable decree a penalty. In that very broad sense of the term penalty, however, every provision requiring the wrongdoer to make compensation for harm perpetrated is a provision for a penalty since it involves a burden upon the wrongdoer to which he would not otherwise be subject, and which therefore may serve in some degree as a deterrent from wrongdoing.

III. The Range of Meaning for the Terms “Damages” and “Penalty”.

Arguments which seek to penalize the enforcement of statutory threefold damage provisions by characterizing them as penalties call for especially attentive scrutiny with regard to the assumptions from which their course of reasoning begins. The term “damages” and the term “penalty” are frequently used in a wide range of uncertain and varying meanings. This is true not only of popular speech and of much of the available legal literature but also of many of the judicial opinions themselves. It therefore seems highly desirable, before setting forth how the threefold damage provision applies to the facts in antitrust cases, first to clear the ground for such analysis by clarifying the range of what is signified by the legal terms “damages” and “penalty” themselves.
1. Legal Damages Ordinarily Fall Far Short of Full Compensation for All Actual Harm Perpetrated.

a. Legal Damages and Actual Harm Are Distinct Concepts.

It is too familiar to require citation of authority that actual harm may be perpetrated for which the law recognizes no legal damage. Thus in circumstances where the basis for liability is negligence, if harm to another results from conduct which is carried on with due care, no liability to make compensation results. There is harm but no legal damage.

Slightly more complicated, but equally well established for ordinary cases, is the common law rule that even in cases where liability attaches to wrongdoing the defendant is not answerable for all the harmful consequences, but is answerable only for such harmful consequences as are proximately caused by his wrongful act.8

Another limitation on liability short of full compensation for all the actual harm perpetrated, is found in the traditionally familiar rules of law relating to the measure of damages. Under these rules relating to the measure of damages, much actual harm is, for various reasons of policy, excluded from consideration as legal damage.9

b. Burdens and Expenses of Litigation Ordinarily Are Not Included in Legal Damages.

Thus it is familiar that under the ordinary common law rules the burdens and expenses of litigation, beyond the technically limited court costs, cannot be included as legal damages, although such burdens and expenses of litigation admittedly.

8A convenient, vivid illustration of how this works out is found in Bank of Commerce v. Goos, 39 Neb. 437, 58 N. W. 84 (1894). In that case defendant bank wrongfully refused to honor the plaintiff's check. By reason of this fact it happened that plaintiff was arrested and for some hours imprisoned, that news of his arrest was prominently displayed in the public press, that his creditors in consequence withdrew credit accommodation up to then extended, thereby requiring him to make large sacrifices of his property in order to meet his obligations. It was stated by the court, however, that as the arrest was not a proximate result of the dishonor of the check, the court not regarding it as a natural and probable result, the wrongdoer was not responsible for that and its further harmful consequences.

9Elaborate discussion of this aspect may be found in Sedgwick on Damages, 9th ed., vol. 1, Secs. 37 and 38.
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are among the harmful consequences to which the victim was subjected by the defendant's wrongful act. "Litigation should be discouraged" is a caption that summarizes various policies that have been regarded as wise, looking toward the discouragement of frivolous litigation and looking toward keeping the way open for litigants in serious matters to bring their controversies to court without finding such action burdened with insuperable costs and expenses. For systematic discussion see A. L. Goodhart, Costs, in (1929) 38 Yale Law Journal 849. Such matters as loss of time, additional trouble, inconvenience, annoyance, counsel fees and other expenses of litigation, are burdens which, win or lose, the winning ordinary litigant in ordinary cases as a common law matter cannot in this country charge to the loser as costs.\footnote{It is a general rule that taxable costs recovered by the prevailing party are considered full compensation for the expense of conducting the litigation, even if such costs are in fact wholly inadequate. * * * Notwithstanding this general rule it has been held that there are certain exceptions.}

\textit{Dahlstrom Metallic Door Co. v. Evatt Const. Co., 256 Mass. 404, 152 N. E. 715 (1926) at p. 720 (Crosby, J).} Among the numerous decisions holding that such items as a common law matter cannot be included as legal damages, see Lefingwell v. Gilchrist, 40 Ia. 416 (1876) (inconvenience); Mason v. Hawes, 52 Conn. 12 (1884) (expenses of litigation); Jacobson v. Poindexter, 43 Ark. 97 (1883) (loss of time, indirect loss, annoyance, counsel fees); Earl v. Tupper, 45 Vt. 275 (1873) (counsel fees); Titus v. Corkins, 21 Kan. 722 (1879) (feeling of insecurity due to the assault, expenses of litigation); Bull v. Keenan, 100 Iowa 144, 69 N. W. 433 (1896) (loss of time, hotel bills, attorney's fees); Boardman v. Marshalltown Grocery Co., 106 Iowa 445, 75 N. W. 343 (1898) (loss of time, expenses of attending court, attorney's fees, kindred matters); Dahlstrom Metallic Door Co. v. Evatt Construction Co., 256 Mass. 404, 152 N. E. 715 (1926) (ordinary court costs admittedly wholly inadequate to compensate for expense of litigation); Mathes v. Wherry, 45 S. W. (2d) 700, Texas Civil Appeals (1932) (expense of litigation, counsel fees); Brown v. Kidwell, 120 Kan. 350, 244 Pac. 236 (1926) (expenses of litigation); Marshaland v. Hindley, 19 La. App. 266, 140 So. 45 (1932) (trouble and expense of litigation, counsel fees); Shafer Baking Co. v. Greenberg, 51 Ga. App. 324, 180 S. E. 499 (1935) (expenses of litigation, including counsel fees); Moss v. Winston, 223 Ala. 515, 137 So. 303 (1931) (expense of litigation, trouble, loss of time, annoyance, counsel fees); Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932) (expenses of litigation).

Among relatively recent Nebraska cases the same principle has been repeatedly recognized. See Toop v. Palmer, 108 Neb. 850, 189 N. W. 394 (1923); Farmers State Bank v. Aksamit, 112 Neb. 465, 199 N. W. 733 (1924); Smoke v. Pope, 119 Neb. 432, 229 N. W. 330 (1930). An older case to the same effect on this point is Deering v. Miller, 33 Neb. 654 (1892), saying (Maxwell, J., at p. 657):

"It is evident that such damages are not a legitimate charge against the plaintiff in error."
c. Intangible, Indeterminate and Conjectural Harm: Accumulative Harm.

Outside of the items involving burdens of litigation, the actual harm perpetrated by the defendants' wrongful act may involve intangible elements to which no definite measure in pecuniary loss can readily be applied. Such cases usually fall beyond the range of the ordinarily recoverable legal damages on the ground that such harm is too elusive and indeterminate to be adequately measured by the processes available to the law. Again, where the harmful effects of the defendants' wrongful act extend into the future, as in cases of loss of prospective future profits, loss of future earning power, or in cases of continuing disability or suffering for an undeterminable time in the future, it is usually held that recovery must be limited to such damages as can be proved with reasonable certainty. Many matters of policy converge to product such limitations on ordinarily recoverable legal damages short of full compensation for the actual harm perpetrated. Such limitations thus carry into practical effect in ordinary cases the general idea that "litigation should be discouraged".11

In one of these Nebraska cases, opinion by Rose, J., Toop v. Palmer, supra, occurs the following very expressive language:

"There is no statute authorizing a recovery for the expense of litigation under such circumstances and the general rule is to the contrary. An expense of this kind is not an actionable consequence of the fraud pleaded and it is not regarded as compensatory damage under former decisions."

In another of these Nebraska cases, Smoke v. Pope, supra, opinion by Rose, J., appears the following:

"Excessive litigation was caused by defendant's breach of contract but the law does not seem to authorize a recovery for such claim."

11 Among the numerous cases in recent times dealing with these wider matters of actual harm which as a common law matter are held not to be recoverable since lying outside of the range of legal damages, see: A. T. Sterns Lumber Co. v. Howlett, 260 Mass. 45, 157 N. E. 22, 52 A. L. R. 1125 (1927) (damage in indeterminate amount not susceptible of definite measurement); Bank of Commerce v. Goos, 39 Neb. 437 (1894) (imprisonment of drawer resulting from bank's wrongful failure to honor check); Lisenberry v. St. Louis & Springfield Railway Co., 184 Ill. App. 395 (probable but not inevitable future pain and suffering from personal injury); Fitzsimmons v. Chapman, 37 Mich. 139 (1877) (expected enhancement of real estate values from establishment of a new prosperous factory in the town failed to materialize when the factory arranged for turned out to be insolvent); Shurtloff v. Occidental Building and Loan Assn., 105 Neb. 557, 181 N. W. 374 (1921) (loss of prospective rents from delay in completion of building, Day, J.); Mississippi Central Railway Co. v. Hardy, 88 Miss. 732, 41 So. 505 (1906) (personal injury causing loss of prospects of promotion); Watt v. Nevada Central Railway Co., 23 Nev. 154, 44 Pac. 423 (1896) (loss of
The harm thus actually perpetrated but falling outside the range of ordinarily recoverable legal damages for purposes of discussion may conveniently be designated as accumulative harm.12

d. Common Law Modifications of the Measure of Legal Damages.

Even at common law these familiarly applicable restrictive policies regarding the recovery of damages were occasionally, in appropriate cases, modified. It is too familiar to need citation of authority that under the law of libel, published utterances, libelous per se, require no proof of pecuniary or proprietary loss in order to justify a substantial recovery.

The term "accumulative" is used to designate this idea in opinions from courts of the highest authority. "As said by Mr. Justice Ashhurst in the King's Bench, and repeated by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts, 'it has been held, in many instances, that where a statute gives accumulative damages to the party aggrieved, it is not a penal action." Gray, J., in Huntington v. Attrill, 146 U. S. 657, 668, 36 L. Ed. 1123, 1128, 13 S. Ct. 224 (1892).

"The statute only gives damages as compensation to the party aggrieved, although it gives accumulative damages." Peck, J., in Burnett v. Ward, 42 Vt. 80 (1869), at p. 85.

The matter is expressed most cogently in the language of counsel for the plaintiff, as reported in the report of Burnett v. Ward, 42 Vt. 80 (1869) at p. 83, as follows:

"The new law, therefore, was manifestly intended to afford greater encouragement to the sheep breeder, and has simply declared to the owners of sheep that the owner or keeper of a dog or dogs which worry, wound or kill sheep, shall make such sheep owners whole, by way of rendering unto them accumulative damages."
e. Statutory Modification of the Common Law Measure of Damages for Burdens and Expenses of Litigation.

Competent legislation may, of course, change these familiarly applicable common law rules about the measure of damages. Very familiar, now, are such legislative changes, for appropriate cases, making counsel fees and other expenses and burdens of litigation recoverable as in the nature of costs to be collected from the wrongdoer.13

f. Statutory Modification of Common Law Basis For Liability for Harm Inflicted.

Competent legislation, too, may on occasion modify in other respects the common law basis for liability for harm which is ordinarily applicable. Thus, many instances are now at hand where legislation has replaced liability based upon negligence, with liability without fault, as in workmen's compensation acts, or in the familiar instances of statutory absolute liability of railroads for the spread of fire from their engines, and similar liability of railroads for damage to livestock on their right-of-way where it is left unfenced. It may be added parenthetically that while such legislation was still relatively unfamiliar, lawyers were found to argue learnedly that because such legislation required payment for damage inflicted by one upon another without fault on his part, such legislation was unconstitutional for violation of the due process clause.14

It is now well established, however, that the legislature may, on appropriate occasion, shift the basis of liability from fault in the defendant to infliction of damage on the plaintiff. Such legislation, as far as it goes, makes the perpetrator of such conduct in the instance act at his own risk with regard to harmful consequences to others, even though carried on with due care, instead of permitting him to act to that extent at the


14 See cases cited in footnote 33 below.
risk of his victim. In recent decades such legislation for situations of great hazard or great onesidedness of peril or advantage has become increasingly frequent and familiar.15

g. Statutory Modification of Common Law Rules for the Measure of Legal Damages: Liquidated Damages:
   Double or Treble the Legal Damages to Cover Accumulative Actual Harm Where Ordinarily Recoverable Legal Damages Are Utterly Inadequate.

   Again, the legislature may modify the limitations on ordinarily recoverable legal damages involved in the familiar common law measure of damages. Thus for particular situations involving great inequality or hardship the legislature may require the wrongdoer to compensate more completely than the ordinarily applicable rules require for the actual harm inflicted upon his victim. One familiar item of such legislation, already adverted to above, is found in statutes which enable the injured plaintiff in certain types of cases involving great inequality, to recover reasonable counsel fees as part of his costs.16 Another familiar item of such legislation is found in statutes which provide for recovery of specific sums as liquidated damages in various instances where the harm inflicted is actual but its amount is too intangible, elusive and indeterminate to be satisfactorily reckoned under the ordinary rules regarding the measure of damages.17 Still another item of such legislation modifying the ordinarily applicable limitations of legal damages is found in occasional statutory provisions for twofold or three-

15 For cases involving this broad question reference may be made to Middaugh v. C. & N. W. Ry. Co., 114 Neb. 438, 208 N. W. 139 (1926) (liability of railway, irrespective of negligence, for damage to livestock on unfenced right-of-way); Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 59 L. Ed. 463 (1885) (same sort of case); C. R. I. & P. R. Co. v. Hambel, 2 Neb. (Unof.) 607, 89 N. W. 643 (1902) (liability of railway for damage inflicted upon the person of passengers, irrespective of negligence, while being transported); Chicago, R. I. & P. R. Co. v. Zernecke, 59 Neb. 689, 82 N. W. 26 (1900), affirmed in 183 U. S. 582 (1901) (liability of railway for damage inflicted upon the person of passengers, irrespective of negligence, while being transported); N. Y. Central R. Co. v. White, 243 U. S. 138, 61 L. Ed. 667 (1917) (Workmen's Compensation Act); St. L. & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. Ed. 611, 17 S. Ct. 243 (1897) (liability of railway for damage from fires communicated from locomotives, irrespective of negligence).

16 See footnote 13 above.

For fact situations where the ordinarily recoverable legal damages are utterly inadequate in that they fall far below full compensation for the accumulative, actual harm inflicted, such twofold or threefold damage legislation provides a reasonable and practicable method for awarding liquidated compensation. In such cases the ordinarily recoverable legal damages afford a definite and measurable base in proportion to which liquidated compensation for the further intangible, indeterminate accumulative harm can be awarded in the instance without caprice or prejudice by the simple process of computation, according to the terms of the statute, twofold, threefold, etc. This is an aspect of the realities which has been much obscured in ordinary, loose, general discussion, through preoccupation with the idea that treble damage provisions are comparable to exemplary damages, which in turn, are loosely thought of as being merely punitive in character, and assessable without limit according to the jury's feeling of ethical indignation in the instance. See for instance: *Haines v. Schultz*, 50 N. J. L. 481, 14 Atl. 488 (1888). It is readily apparent in the light of this analysis of the realities regarding statutory twofold or threefold damage provisions that in this connection much of the ordinary observations on penalties and exemplary damages is utterly beside the point.

The case in the available reports which most effectively discusses this distinctive aspect of the problem in connection with double damages seems to be the case of *Burnett v. Ward*, 42 Vt. 80 (1869). In that case a statute was applied which provided for double damages against owners of dogs killing sheep. Counsel for defendant objected that it was a penalty. The matter is neatly summarized in the argument of counsel for the plaintiff in the following sentences. "The old law afforded very limited encouragement for wool growing, inasmuch as the owner, if compelled to resort to the courts for his remedy against the owner of the dog, would in the end have barely enough left of his verdict to pay his counsel. The new law, therefore, was manifestly intended to afford greater encouragement to the sheep breeder, and has simply declared to the owners of sheep that the owner or keeper of a dog or dogs

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18 See footnote 2 above, and footnotes 19 and 20 below.
which worry, wound or kill sheep, shall make such sheep-owners whole, by way of rendering unto them accumulative damages.”

The court, by Peck, J., in approving this view of the matter expressed itself as follows: “... the remedy is confined to the party injured, and not as a penalty, but as compensation. ... the statute only gives damages as compensation to the party aggrieved, although it gives accumulative damages.”

The same idea is expressed, though in language involving more obscurity, in the following:

“It has been said 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.” (One of the varying definitions of exemplary damages appearing in Bouvier's Law Dictionary—Rawle's Revision, 1897).

While analytical discussion of twofold and threefold damage provisions is too frequently rendered obscure by loose and indiscriminate use of the word “penalty” in such discussion, careful attention to the intangible elements of actual harm, which are present in many situations, greatly clarifies the realities involved. Where the intangible elements of actual harm go far beyond the ordinarily recoverable legal damages, it is readily apparent that redress confined to ordinarily recoverable legal damages is utterly inadequate to afford full compensation. Provisions for threefold damages in such cases pertain exclusively or predominantly to the nature of provisions for liquidated compensation for actual harm inflicted. Such is conspicuously the case in connection with violations of the anti-trust act where destruction of another’s going business is in question, the actual harm inflicted in such cases consisting predominantly in the destruction of established, intangible, advantageous relations with others and loss of prospective future profits rather than in direct injury to the person or destruction of tangible property.

It may be added that the term “actual damage” as used in judicial opinions or in briefs of counsel, is frequently too ambiguous to be dependable with regard to the range of meaning involved. All too frequently the term “actual damages” may be used in some sense that is in substance opposed to fictional or spurious or unreal damages. Without further explanation such

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* Reported at 42 Vt. at p. 83.
* Reported at 42 Vt. at pp. 84-85.
use of the term "actual damages" fails to indicate whether it has reference merely to ordinarily recoverable legal damages, or whether it includes the much wider range of accumulative actual harm which is in fact inflicted upon the victim by the wrongdoer.

2. The Term "Penalty" Has Many Varying Meanings and Largely Overlaps the Term "Damages".

The varying shades of meaning attached to the term "penalty" are very numerous. Even leaving out of the discussion corporal punishments and confining attention to the payment of sums of money, the term "penalty" has been frequently applied in popular and legal usage in from half a dozen to a dozen different gradations of meaning. Among the most familiar of these are the following:

a. Payment By the Wrongdoer To the State, Exacted as Retribution for a Crime Committed. Here the Underlying Idea is Vengeance.

"And if any mischief follow, then thou shalt give life for life,"

"Eye for eye, tooth for tooth, hand for hand, foot for foot, "Burning for burning, wound for wound, stripe for stripe."

—Exodus, Ch. 21, Verses 23-25.

"And if a man cause a blemish in his neighbor; as he hath done, so shall it be done to him.

"Breach for breach, eye for eye, tooth for tooth; as he hath caused a blemish in a man, so shall it be done to him again."

—Leviticus, Ch. 24, Verses 19-20.

Mayor Visits Punishment. Getting Even With Firemen Who Sued The City” (headlines of news item in the Lincoln Morning Journal, February 10, 1939, relating to certain inconveniences, tasks and economies imposed upon firemen by the mayor of an eastern city in retaliation for their action against the city for alleged arrears in pay).

b. Payment By the Wrongdoer To the State in Cases of Crime, Exacted By the Law as a Warning Deterrent To Others.

"In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the state, for a crime or offense against its laws * * *.

"* * * Penal laws, strictly and properly, are those imposing
punishment for an offense committed against the state, and which, by
the English and American constitutions, the executive of the state has
the power to pardon."21

Another leading case in the Supreme Court of the United States
touching upon the range of meaning covered by the term "penalty,
is the case of Brady v. Daly, 175 U. S. 148, 44 Law. Ed. 109, 20 Sup. Ct.
62 (1899). In this case a federal statute was in question which pro-
vided for recovery of damages for infringement of copyright of a play
for public performance in the amount of $100 for the first performance
and $50 for each additional performance and as much more as might
be proved. In the litigation that resulted the contention was made
that these provisions were provisions for a penalty. The court, how-
ever, rejected these contentions and regarded the provisions in the
instance as amounting to provisions for liquidated damages. The
opinion of the court, Peckham, Justice, contains the following:

"Although punishment, in a certain and very limited sense, may be
the result of the statute before us so far as the wrongdoer is concerned,
yet we think it clear such is not its chief purpose, which is the award
of damages to the party who had sustained them, and the minimum
amount appears to us to have been fixed because of the inherent dif-
ficulty of always proving by satisfactory evidence what the amount is
which has been actually sustained."

"The word 'penalty' is also properly used in a narrower sense, to
indicate a sum of money exacted because of a wrong to the state."22

c. Exemplary Damages at Jury’s Discretion.

Payment by the wrongdoer to the individual aggrieved in
an amount to be assessed by the jury, exacted by law in certain
types of aggravated cases for the multiple purposes of making
full compensation to the injured party for actual harm, going
beyond ordinary legal damages, providing for recovery of compen-
sation for costs and expenses involved, and providing a
deterrent example to others, or even containing an element of
retributive vengeance. This is the type of burden usually
indicated by the terms “exemplary” or “punitive” or “vindica-
tive” damages, which indeed, is itself used in varying shades of
meaning.

"A penalty as the word is used in this section is a sum of money
exacted as a punishment for civil wrong as distinguished from compen-
sation for the loss suffered by the injured party."23

"Exemplary Damages. Those allowed as a punishment for torts
committed with fraud, actual malice, or deliberate violence or oppres-
sion.

"In nearly all of the states, in such cases, the jury are not confined
to a strict compensation for the plaintiff’s loss, but may, in assessing

21 Huntington v. Attrlll, 146 U. S. 657, 666-667, 36 L. Ed. 1123, 1127,
13 S. Ct. 224 (1892) (Gray, J.).
22 American Law Institute, Restatement of Conflict of Laws, Sec.
611, comment c.
23 American Law Institute, Restatement of Conflict of Laws, Sec.
611, comment a.
damages, allow an additional sum by way of punishment for the wrong done. This allowance is termed 'smart money' or 'exemplary', 'vindicative' or 'punitive' damages."

"As said by an eminent court with regard to exemplary damages, such a procedure is 'a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine'\textsuperscript{25}.

"Finally, the seeming inconsistency of assessing the exemplary damages as a punishment and awarding the benefit of them to the plaintiff and not to the state may be justified by considerations already mentioned; namely, the advantage of furnishing an incentive for this sort of private prosecution of wrongs which the public prosecutor would ignore, and by the fact that exemplary damages are likely to approximate recompense for the expenses of litigation (over and above tax-able costs) for which the plaintiff otherwise would not be reimbursed."\textsuperscript{26}

"Punitive damages * * * are awarded to the injured party as a reward for his public service in bringing the wrongdoer to account",,\textsuperscript{27}

See subdivisions "d" and "g" below (pp. 132, 134) for other types of redress to which the description of "exemplary damages" is occasionally loosely applied.


In addition to the ordinarily available common law liability for loss sustained through another's wrongdoing, statutes may in various instances provide for payment by the wrongdoer to the aggrieved party of certain additional fixed sums, or of additional amounts proportioned on some specified basis to the loss sustained. The additional sums thus recoverable have often been described as statutory penalties, collectible by the parties aggrieved. Such superadded liability, enforceable in favor of the injured party in a civil action affords a convenient and practical method of securing enforcement of the statutory policy to suppress such wrongdoing. The superadded liability thus furnishes the added incentive to avoid the wrongdoing in question.\textsuperscript{28} It may be accurately described as statutory incentive liability.

\textsuperscript{26} McCormick on Damages (1935), at p. 278.
\textsuperscript{27} Neal v. Newberger Co., 154 Miss. 691, 123 So. 861 (1929) at p. 863 (Anderson, J.).
\textsuperscript{28} "The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every state of the Union provide for the increase of damages where the injury complained of results from the neglect of
Such statutory incentive liability may readily be recognized as lying somewhere in the intermediate range between exemplary damages at the jury's discretion and statutory double or treble damages as liquidated compensation for accumulative actual harm going beyond the ordinarily recoverable legal damages.

duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries."


"Experience teaches that to secure adherence to rates, even when lawfully prescribed, it is essential that deviations from them be discouraged by adequate liabilities and penalties."


"The general rule to be gathered from this extended review of the cases is that common carriers engaged in the public business of transportation may be grouped in a special class to secure the proper discharge of their functions, and to meet their liability for injuries inflicted upon the property of members of the public in their performance, that the seasonable payment of just claims against them for faulty performance of their functions is a part of their duty, and that a reasonable penalty may be imposed on them for failure promptly to consider and pay such claims, in order to discourage delays by them."


"The result will not be changed, however, though the increment to the judgment be classified as penal, if the amount is not immoderate. * * * Repeated judgments of this court bear witness to the truth that such a tax upon default is not put beyond the pale by calling it a penalty. * * * This court upheld the additional exaction though describing it as a penalty. The statute did no more than provide 'a reasonable incentive for the prompt settlement without suit of just demands,' and demands 'of a class admitting of special legislative treatment' * * * There was approval of the statement of the court below that 'the penalty, in case of a recovery in court' would operate 'as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for * * * trouble and expense.'"


"It is the exercise by the state of its police power. It is based upon principles of public policy, and it was intended as an incentive to stockholders of corporations to see to it that the law of the state was obeyed; and if they neglected their duty in that regard, to punish them for such neglect."


See also decisions which without extended discussion have upheld
e. Contract Penalty.

Payment of a specified lump sum by the contract breaker to the individual aggrieved may be provided for by contract between the parties for the double purpose of not only liquidating damages from prospective breach of contract but also of imposing an additional burden upon the promisor in order to deter him from breaking his contract. This is the type of burden commonly indicated by the expression “a contract penalty.” Such a provision seeks by contract to provide additional liability as incentive to performance. A sort of “contractual incentive liability” is sought. It is often a difficult and close matter of construction of contracts to distinguish between clauses for contract penalties and clauses merely providing for liquidated damages.29

f. Contract Liquidation of Damages.

Payment of a lump sum by the contract breaker to the individual aggrieved may also be contracted for as liquidated damages in amount fixed by previous contract as the agreed estimate of the amount of damage where the extent of harm is indeterminate and not readily susceptible of exact measurement in pecuniary terms.30

g. Twofold or Threefold Damages to Liquidate Compensation for Accumulative Harm.

Payment by the wrongdoer to the aggrieved party, may be required by law, in twofold or threefold the ordinarily recoverable legal damages, serving the purposes of providing liquidated compensation for costs, expenses and burdens of litigation and for accumulative indeterminate, intangible, but actual harm beyond the limits of ordinarily recoverable legal damages. Such extended liability for the burdens actually brought about by the

and applied the “statutory waiting time penalty” under the Nebraska Workmen’s Compensation Act.


30 See footnotes 12, 19, and 20 supra.
wrongdoer's misconduct may in such cases also have a deterrent effect on the wrongdoers.\(^{31}\)

In loose discussion, however, in which the distinction between ordinarily recoverable legal damages and accumulative actual harm is ignored, such twofold or threefold damage provisions are sometimes loosely characterized as in the nature of exemplary damages.\(^{32}\)

See also, on this point the alternative definition of exemplary damages from Bouvier's Law Dictionary quoted above at page — of the present paper, in the discussion of threefold damages as compensation for accumulative harm.

h. Absolute Liability.

Requiring the perpetrator of damage to the aggrieved party, to pay compensation for harm actually caused to the extent of legal damages, even though the defendant acted throughout with due care, has at times been described as a penalty. Absolute liability for the legal damages caused is in such cases also a strong incentive to the use of great care, the actor acting at his own risk instead of acting at the risk of his victims. Requiring a party thus to answer for legal damages inflicted upon others by his conduct, even though perpetrated without fault, constitutes a burden imposed upon activity in such cases which has been frequently asserted to penalize lawful activity.\(^{33}\)

i. Liability Based on Fault.

Payment by the wrongdoer to the aggrieved party, of compensation for legal damages caused by willful or negligent conduct has not infrequently been described in terms of punishment. Even the burden of answering for the legal damages of careless conduct is to that extent a deterrent against carelessness, and to that extent can be loosely described in the language

\(^{31}\) See footnotes 12, 19, and 20 above.

\(^{32}\) "There can, of course, be no pretense that section 7 of the Sherman Act provides a penalty. It awards civil damages, which are made exemplary by virtue of being trebled."


of a penalty for carelessness, even though that penalty for carelessness consists merely in making compensation for legal damages caused thereby. It is remarkable how readily the language of punishment is loosely applied to liability to compensate for legal damages, even in the serious writings of judges and high reputed legal authors.34

That, in loose use of language, even parliamentary statutes have sometimes used "punishment" as a term referring to compensation; see Statute, 4 Edw. III, c. 7, relating to survival of causes of action.35

j. Disadvantage or Handicap.

Disadvantage or handicap consequent upon a certain type of event or course of action is not infrequently referred to loosely as a penalty.36

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34 "Any recovery of damages may well be said to be 'in the nature of a penalty' where the defendant is required to pay for his breach of duty."


"An increase reasonably adequate to compensate for these losses will impose sufficient punishment to satisfy the statute."

Muther v. United Shoe Machinery Co., 21 Fed. (2d) 773 (1927) (a patent infringement case) at p. 780 (Brewster, Dist. Judge).

"The recovery of attorneys' fees is a penalty."


"Liability for taxable costs is ordinarily considered sufficient punishment for unfounded claim or meretricious defense."

Boardman v. Marshalltown Grocery Co., 105 Iowa 445, 75 N. W. 343 (1898) at p. 345 (Deemer, C. J.).

"The punishment for waste committed was, by common law and the statute of Marlbridge, only single damages; except in the case of a guardian, who also forfeited his wardship by the provisions of the great charter; but the statute of Gloucester directs that the other four species of tenant shall lose and forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance."


35 "Whereas in times past executors have not had actions for the trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted that the executors in such cases shall have an action against the trespassers to recover damages in like manner as they, whose executors they be, should have had if they were in life."


36 "For the wages of sin is death."

* * *

Epistle to the Romans, chapter 6, verse 23.

"Punishment follows every violation of nature's laws."

(From an old book on physiology.)

"Last year I think I earned a bonus (for sales volume) of some-
3. **Unexamined Assumptions as to the Range of Meaning for These Terms May Vitiate the Argument Built Thereon.**

In the light of the foregoing groupings and illustrations it requires no argument to demonstrate that both the term “damages” and the term “penalty” have various radations of meaning. In its looser and wider meaning the term “penalty” is frequently and readily applied to describe every situation where liability to make compensation for harm is imposed by the law. In other words, in its wider meanings the term “penalty” completely overlaps the term “damages.” Accordingly, where a legal argument is based upon the contention that a certain statutory provision is invalid because it is a “penalty”, the soundness of the argument will depend largely upon what meaning for the word “penalty” is adopted therein. Without more closely defining its terms such an argument can readily become merely an exercise in obscurity, sliding unnoticed from one meaning of the term to another. Again, without more closely defining its terms, such an argument can become an exercise which merely assumes the conclusions sought, simply adopting without explanation that range of meaning for the term which will most readily point toward the desired result.

IV. **Special Facts Characteristic of Violations of Anti-Trust Laws.**

1. **Great Inequality Between Violators and Victims.**

Both the history and the current practical applications of anti-trust legislation are filled with instances where large and powerful combinations or monopolies deliberately seek to destroy smaller and weaker competitors, such destruction being one of the indispensable steps toward establishing monopolistic control of the market to the prejudice of the public. Anti-trust litigation thus regularly presents the spectacle of the little victim who is pitted against the large and powerful combination whose marketing practices are tending toward monopolistic control.37

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37One of the most familiar examples presented in the reports is

"thing like, oh, $150 to $180, something like that. There were penalties if I didn’t make the gross profits, if I didn’t operate my business on a profit business (basis) and so on and so forth."

2. Wanton Character of the Violations.

Anti-trust cases where defendants are guilty frequently present living flesh and blood instances where unlawful acts have been intentionally perpetrated by a large-scale powerful organization in direct violation of the anti-trust statute for the purpose of driving the small plaintiff out of business. Destroying another’s business is destroying his means of living. Without here enlarging upon the public and social aspects of the monopolistic problem that is presented when competition is crushed out, it suffices to say for the present discussion as the competitor is crushed out his means of earning a living are destroyed.

Where a competitor is thus ruthlessly crushed out, not by legitimate competitive activity in giving better service to the public, but by forbidden marketing practices, intentionally and specifically directed toward his destruction, the legal justification for the competition fails. The anti-trust law here applies. Victims of such practices have an expressive name for it in the term “commercial murder,” as expressed by a victim in a newspaper interview appearing a number of years ago in a newspaper in Boston, Massachusetts. Even judges in appellate courts have likened such practices to “highway robbery.” See, Elliott, Justice, in Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946 (1909). The same idea is expressed in very poetical form in Shakespeare’s:

“You take my life when you do take the means whereby I live” (the Merchant of Venice, Act. IV, Scene 1, Shylock speaking).

While leaving legitimate competitive activity untouched, the anti-trust act denounces such intentionally perpetrated commercial murder as unlawful. That such deliberate commercial murder was carefully carried into effect by means that were made to look like legitimate competitive activity in no wise changes the reality of the facts. As readily could it be said that deliberately killing a victim by giving him doses of poison is not murder because under certain other circumstances appropriate doses of such poison might be properly administered as medicine for the purpose of curing disease. Even at common law, acts in the forms of ordinary commercial competition

afforded no justification for the destruction wrought where
the sole motive was to destroy another. The familiar doctrine
against spite fences is given appropriate application to cases of
competition.38

Under the anti-trust laws, as under the common law, the
court will look through the forms to the substance to ascertain
what the actual facts are with regard to the acts complained of.
That acts which are done for the purpose of driving another
out of business are given the ordinary forms of legitimate com-
petitive activity does not save them from scrutiny as to their
real character.39

3. The Harm Perpetrated: Intangible Elements: Accumulative
Harm: Danger of Harassment for the Future.

According to the damage section of the anti-trust act any
person “who shall be injured in his business or property” by
violations of the statute “shall recover threefold the damages
by him sustained.” To the extent that conduct violative of the
anti-trust statute succeeds, the injured victim’s business is
destroyed. To the extent that his business is destroyed the
victim’s means of living are destroyed. It is informative to
analyze briefly the elements involved therein.

a. Accumulative Intangible Harm.

It is a matter of common knowledge that the destruction of
a going business does not directly involve either the taking or
the destruction of the victim’s tangible physical property.
Destruction of the victim’s business is destruction of his relation-
ship with others which enables him advantageously to utilize his
tangible assets. It involves the destruction of his business good
will, loss of his financial credit, loss of his current profits in a
going business, destruction of his opportunities for creating
valuable and profitable relations with others in the future. Such
deliberate destruction of his going business can render the
victim’s tangible assets relatively valueless, as only by the use

38 Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946 (1909); Van Horn
v. Van Horn, 52 N. J. Law 284, 20 Atl. 485, 10 L. R. A. 184 (1890);
39 American Can Co. v. Ladoga Canning Co., 44 Fed. (2d) 763
(1930), at p. 767 (Evans, Circ. J.).
in advantageous relations with others can such assets realize a financial return in business enterprise. Idle plant and machinery, instead of helping him to earn his living, drain away the victim's resources through unavoidable overhead taxes and expenses, loss of interest, and depreciation. Much more harmful in the aggregate than the present loss of value on tangible assets, however, is the destruction of the victim's opportunities for the future. A going business stays alive and thrives only through maintenance of continuing advantageous relations with others. Destruction of the victim's business is the destruction of these intangible advantageous relations. Once destroyed, such advantageous relations with others are difficult and expensive to rebuild. Opportunities for the future in the practical affairs of business depend in large measure on the continuing existence of such advantageous relationships. With the destruction of the business the victim's opportunities for the future are thus largely wiped out. Without doors of opportunity for the future, attempts at a new start are foredoomed to tragic failure. Furthermore, when the doors of opportunity for the future are slammed shut, hope withers and dies, while despair crushes the human spirit. Without the beacon of hope to spur human ambition, activity is made futile. Productive effort for the future is destroyed by cutting off the hope and opportunity for its successful exercise.

Most of these items just referred to are intangible. They are elusive. They cannot be adequately measured in terms of pecuniary loss. They are nevertheless the elements that give worth to the tangible assets, and make such tangible assets capable of bargain and exchange resulting in measurement in terms of monetary value. It is familiar law that a business, though intangible, is itself a species of property entitled to legal protection. Even the damage section of the anti-trust statute speaks of injury "in his business or property." In the realm of values, the intangible elements are to the tangible elements like the spirit to the body. Without the living spirit the body would be but a corpse. Though the intangible elements are largely too elusive for measurement in monetary terms, their reality and supreme importance in the world of practical affairs are readily recognizable.

It requires but a slight orientation in the facts of anti-trust
cases to recognize that such cases, involving the deliberate destruction of the victim's business, involve a very large but elusive range of tragic destruction of such intangible elements. These intangible elements are not reducible to the definiteness required for the ordinarily applicable measure of legal damages. Destroying another's business is thus the destroying of the victim's means of living, through destruction of his advantageous relationship with others in his business setting. Even though the victim's tangible assets may remain physically untouched, it is abundantly clear that such misconduct involves a very large range of actual harm to the victim for the full redress of which the ordinary measure of legal damages is wholly inadequate.

b. Danger of Harassment for the Future.

One special aspect of the indeterminate accumulative harm to which a little plaintiff is exposed if he sues for violations of the anti-trust act by the large-scale, monopolistically inclined wrongdoer, is harassment thereafter in all his legitimate business efforts. Harassment can take many forms. Most frequently it will be carried out under the form of legality. It will take the form of denial of dealership, refusal of credits, boycott efforts in various directions, many of which will be difficult to detect and others of which will be difficult to challenge successfully from the standpoint of their legality. Accordingly, one of the serious risks that is involved for plaintiffs in anti-trust cases, is the risk of harassment and exposure to boycott tactics in his business relations thereafter. One of the items of his burdens of litigation, therefore, if he seeks to enforce his legal rights by resort to legal proceedings, is found to be the risk of harassment and boycott tactics to which such litigation exposes his business future. Among illustrations from the reports may be mentioned the following: B. F. Goodrich Co. v. American Lakes Paper Co., 23 Fed. Supp. 682 (1938); U. S. v. International Fur Workers Union, 100 Fed. (2d) 541 (1938); Krigbaum v. Sparbaro, 138 Pac. 364, 23 Cal. App. 427 (1913); Parker Rust Proof Co. v. Ford Motor Co., 23 Fed. (2d) 502 (1928).
matter of fact to prevent the practical operation of memory in such cases.

Accordingly, one of the items of compensation for which the successful plaintiff in anti-trust cases can lay rational claim, is the risk of harassment and boycott tactics against which the threefold damages provide to some extent compensation and boycott insurance.

c. Illustration of Inadequacy of the Measure ofOrdinarily Recoverable Legal Damages in Anti-trust Cases:

Threefold Damage Provision Affords Liquidated Compensation for Accumulated Harm.

Specific illustration of how utterly inadequate is the measure of ordinarily recoverable legal damages to cover full compensation for the entire harm perpetrated in anti-trust cases is readily drawn from the facts appearing of record in a recent case. The measure of legal damages for violations of the anti-trust act had already in an earlier case been announced as follows:

"The measure of damages for the interruption or destruction of a going concern is the loss of profits proved to a reasonable certainty."

Advised of this rule of law through familiarity with the earlier decision counsel for the plaintiff in the trial of the pending case accordingly procured the introduction of evidence of loss of profits in the business only for that interval during the years 1933–1936 during which the violations were going on. Nothing was brought in as to interruption of business by the necessity of attending court, loss of time, inconvenience and expense of litigation. Nothing was brought in as to loss of future profits, prospective profits which would have been in all probability realized for subsequent years had there been no violations with the resulting litigation. Nothing was brought in about loss of goodwill and business connections. Nothing was

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42 Marsh-Burke Co. v. Yost, 98 Neb. 523, 532-533, 153 N. W. 573 (1915). See also footnote 43 infra.

brought in about loss of business reputation in the trade from engaging in litigation against one of the most powerful organizations in that line of trade. Nothing was brought in about the burden of anxiety involved in the situation in which the plaintiff had been put by the defendants’ conduct; given the choice, as it were, of being crushed out quietly or of fighting back and being subjected to possible reprisals or being worn out with contentious litigation for a long time with a very powerful organization, carried through the time-consuming and expensive process of appeal to the highest courts.

These matters, though real, are all more or less elusive and indeterminate. Some of these items also involve an element of conjecture. They are not susceptible of direct measurement in pecuniary terms. Under the already announced legal rule for the measure of damages, confining the inquiry to loss of profits proved to a reasonable certainty, such items are too elusive, too intangible, too indeterminate, too conjectural to be left to the jury. Leaving such matters for the jury to speculate upon might indeed result in very capricious verdicts.

Nonetheless, it cannot be denied that such items have reality, that the reality of such items can make the entire difference between failure and success, between despair and hope, between loss and profit for the indefinite time ahead which we refer to as the future.

Without going into attempts to evaluate the more elusive and indeterminate of the items mentioned, two elements, prospective future profits, and the burden and expense of litigation may be segregated for particular emphasis. No lawyer or judge will deny the very definite reality of the burden and expense involved where an injured party must resort to litigation to secure his legal rights. Equally familiar and readily recognizable though not as readily susceptible of accurate measurement is the loss of prospective profits. On the evidence in the record in the case, above referred to, the jury found a loss of profits for the interval of 1933–1936, covering roughly

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4 Connecticut Importing Co. v. Frankfort Distilleries, 101 Fed. (2d) 79, at p. 81 (limiting proof of recoverable damages to “only those sustained by the plaintiff from the time the cause of action accrued up to the time the suit was brought”).

4 See footnote 42, supra.
two years and a half, amounting to $25,000, or about $10,000 per year. According to the jury's verdict, the plaintiff was actually out of pocket $10,000 for each of those years involved by reason of defendants' unlawful conduct. Had there been no unlawful conduct plaintiff would have realized $10,000 per year more for that interval. So far goes the verdict of the jury that heard the evidence. Had there been no unlawful conduct, who knows for how many years further into the future such advantageous opportunities would have continued? Conjectural, to be sure, such prospects for the future always are. They are subject to eventualities and contingencies. For all that, however, just such prospects are what keeps the business world moving. Destroy such prospects, and collapse follows.

Even only a five year duration of such prospects without startling change in the business outlook would in this case have netted the plaintiff another $50,000. Extended beyond a bare five year period it might have been very much more. For a person who was in the plaintiff's position, an established dealer owning a favorably located and well equipped place of business, a person in middle life with many years' experience in the business in question, a person who had survived the depression from 1929 to 1936, an expectancy of another five years without serious change in his business position does not seem an extravagant conjecture. In fact, an expectancy of from ten to twenty years would seem more probable. The vitality of such business expectancies depend but little, if at all, on long time contracts. They depend rather on the continuity of business opportunities in the free and open market. Conjectural in some degree of course these future profits are, however, and hence such prospective profits are not "proved to a reasonable certainty" within the common law rule as to the measure of damages. Under such circumstances, which, after all, are but typical of anti-trust violations wherever found, it is not difficult to see what is the function actually served by the threefold damage provision in the anti-trust act. It affords liquidated compensation for such intangible, indeterminate, accumulative harm to the injured party going beyond the ordinarily recoverable legal damages, in cases where the large-scale powerful monopolistic combination through violations of the anti-trust act attempts to drive its small competitors out of business.
V. Special Policy Regarding Extent of Liability for Violation of Anti-Trust Laws.


The anti-trust statute, in addition to its provisions for criminal penalties also specifically provides for a civil cause of action for damages in favor of the injured party. Unlike the civil legal redress to aggrieved parties in ordinary cases, moreover, the anti-trust statute by two special provisions in its damages section specifically encourages the victims of such practices to defend themselves by resorting to litigation. One of these is the provision for awarding to the winning plaintiff not only the technical court costs, but also reasonable attorneys' fees, thereby throwing on the wrongdoer in such cases, a larger portion of the actual burdens of litigation involved in securing legal redress. The other is the provision for award to the plaintiff of threefold the legal damages sustained in his business or property. This in actuality provides for a considerable range of compensation for the loss of prospective profits and other accumulative actual harm inflicted through destruction or impairment of valuable intangible relations already adverted to, whose superlative importance in a going business cannot be gainsaid but which are too elusive to be reckoned in the ordinarily available measure of legal damages. In other words, the threefold damage provision, even if completely disregarding any possible deterrent aspect which it may have, is a limited but practical device embodied in the anti-trust act which affords to injured plaintiffs to that extent liquidated compensation for actual harm inflicted. The statutory threefold damage provision in encouraging injured victims to seek legal redress is thus readily seen to embody a twofold aspect. In the first place, it casts upon the wrongdoer responsibility for a considerable range of accumulative intangible but actual harm inflicted upon his victim, which under ordinary policies of the common law in other types of cases would not be recognized as subjects for legal redress. In the second place, it liquidates the compensation for such accumulative actual harm in proportion to the legal damages to business or property proved in the case.

*See footnotes 1 and 2 supra, with accompanying text.
* *See footnote 2 supra, and accompanying text.
special policies embodied in the anti-trust act which shift to the large-scale monopolistically tending wrongdoer to a larger extent than is customary for ordinary cases under the traditional measure of recoverable legal damages both the burdens of litigation and the burdens of intangible harms inflicted by destruction of the little victim’s going business.

It detracts nothing from the reality of the foregoing analysis of the provisions of the anti-trust act that the liability for threefold the ordinary legal damages may be thought of as affording also an incidental deterrent additional to the criminal penalties imposed by the statute upon violators. If the threefold damage provision actually has any deterrent effect it to that extent, at the same time, serves both as incentive liability to defendants and as liquidated compensation for accumulative actual but intangible harm to plaintiffs who prove ordinarily recoverable legal damages in their business or property.

2. Reasons for Specially Enlarging the Range of Liability for Wrongdoers in Anti-Trust Cases.

While this aspect of the anti-trust law is seldom discussed at length in the court opinions, the reasons which justify these special policies are not far to seek. The great inequality between violators and victims in these cases, the serious and preponderant character of the intangible elements of harm inflicted when the wrongful conduct is directed at destruction of a going business, the deliberate character of the wrongdoing under the delusive appearances of legitimate competition, and the general public interest in protection of the public against the consequences of destruction of legitimate competition and the substitution therefor of monopolistic practices—all these considerations point to the desirability of these special policies for making the anti-trust statute practically effective.

The large-scale, monopolistically inclined wrongdoer is engaged in the process of crushing out his little victim, pursuant to the unlawful practices seeking to establish monopolistic control of the market to the prejudice of the public. The anti-trust statute provides for the injured party the remedy of threefold the legal damages suffered in business or property. It also provides for his attorney’s fees. By these provisions the anti-trust act directly encourages injured victims of such monopolistic
practices to assert their claims for legal redress. To that extent it shifts the burdens caused by such unlawful monopolistic practices from the little victim to the large-scale monopolistically inclined wrongdoer. This is quite different in this respect from the policy of the common law embodied in the ordinary doctrines of proximate cause and measure of legal damages under which litigation is discouraged through the rules of law which leave the litigant in any event to bear a considerable part of the loss and burdens actually resulting from the wrongdoing that is called in question.

The extreme disparity between the parties in their relative economic strength is such in these cases that were not the burdens thrown upon guilty defendants in these cases to a greater extent than is provided through the ordinarily recoverable legal damages, such large-scale, guilty defendants could readily wear down the plaintiffs by sheer delay and expensive litigation carried through, in course of time, to the highest courts in the country. Pursuing such practices, the large-scale, guilty defendants could, under the ordinary rules for legal damages, reduce every court victory for the little plaintiff to a Pyrrhic victory which would cost him more in costs, expenses, delay, inconvenience and interruption of regular work than the amount of the recovery itself. Meanwhile the overwhelmingly important accumulative intangible actual harm in the destruction of the little victim's business and loss of his future profits and prospects would remain totally unrecompensed were redress to be had only to the extent of ordinarily recoverable legal damages. Under such circumstances, therefore, the private action for damages would be practically nugatory. The special provisions embodied in the statute for threefold damages and attorney's fees, therefore, are indispensable to making the private action effective as an instrument for enforcement of the general policy of the anti-trust act.

VI. THE MEANING OF THREEFOLD DAMAGES AS JUDICIALLY INTERPRETED UNDER THE ANTI-TRUST ACT.

1. The Courts Interpret It As Remedial Rather Than Penal.

While the exact phraseology employed in the judicial opinions is often inapt because of lack of complete analysis of the

K. L. J.—4
concepts involved, the threefold damage provision in the antitrust act is not regarded by the courts as a penalty in the strict sense. The courts treat it as partaking of the nature of burdens imposed upon the wrongdoing defendant, provisions for which in their various gradations have frequently been upheld as remedial rather than penal provisions. Because of the importance of ascertaining as a matter of definite inquiry, instead of starting in the instance from mere unexamined assumptions as to what is in this regard the proper interpretation of the threefold damage provision in the statute, it seems desirable to set out in some detail how the federal statute has actually been interpreted in this regard.


Any discussion of the problem of what constitutes a penalty, as the term is analyzed in the federal courts, inevitably gets back to the leading case, Huntington v. Attrill, 146 U. S. 657, 36 Law. Ed. 1123, 13 Sup. Ct. 224 (1892). A state statute subjected stockholders individually to liability for corporate debts where their corporations failed to submit certain reports as required, and making officers of such corporation who submitted false reports also individually liable for the corporate debts. Attrill was a stockholder and officer. As officer he made false reports. Huntington had a large claim against the corporation which he thereupon sought to enforce against Attrill individually, the corporation being insolvent. He recovered judgment against Attrill in New York. In seeking to enforce this judgment against Attrill thereafter in the courts of Maryland, he encountered the contention that as the judgment was for a penalty it was not enforceable outside of the state under whose laws it was imposed. On appeal from the Maryland court the Supreme Court of the United States held that the statutory provision in question was not a penalty in that sense. In the course of this opinion appears a rather extended discussion of the various senses in which the term "penalty" is used, the most significant portions of which have been referred to above.47

It is to be noted that these excerpts from opinions from the

47 See footnote 21, supra, with accompanying text.
highest authority deal with two quite distinct aspects of the inquiry which appear in close connection. One of these aspects involves the question of who collects the exacted payment, the state or the injured party. The other aspect involves the question whether the payment collected is exacted of the defendant merely by way of example to others, punitive or exemplary, or whether it is exacted as compensation for harm actually inflicted. In this connection, enhanced damages, double damages, etc., are here designated as "accumulative damages" which are awarded in order to provide liquidated compensation for actual harm inflicted beyond the range of ordinarily recoverable legal damages. While the term "accumulative damages" is relatively uncommon in familiar, legal speech, its presence in the opinion in *Huntington v. Attrill*, supra, is in this connection worth repetition here.

"As said by Mr. Justice Ashurst in the King's Bench, and repeated by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts, 'it has been held, in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action.'"

It may be noted, too, that this very expression, "accumulative damages" is the term employed to express the court's idea of the realities in the case of the double damages statute which was discussed in the opinion of Peck, J., in *Burnett v. Ward*, 42 Vt. 80 (1869), which is set out at greater length elsewhere in this paper.\(^{48}\)

These leading cases have authoritatively analyzed in considerable detail the elements involved in "penalties" and "damages". They have recognized how the two terms in considerable range overlap. They have recognized that actual harm inflicted may be far beyond the ordinarily recoverable legal damages. These leading cases have been frequently referred to in connection with the litigation directly upon the anti-trust statute.


There are numerous adjudications in which the question of whether the threefold damage provision in the federal anti-trust
statute was to be regarded as a penalty has been discussed with reference to the problem of assignment or survival of causes of action under the statute. Without attempting here to discuss in detail the merits of that question, it suffices to say that by the large preponderance of authority such causes of action have been held to survive and to be assignable.⁴⁹

While in these groups of cases touching assignment and survival of causes of action for threefold damages under the anti-trust act, the question of whether that provision constitutes a penalty is frequently referred to, the analysis of the concept of what constitutes a penalty is itself most frequently either entirely overlooked or is left in very great obscurity. It is broadly recognized in these cases, however, that the provision for threefold damages is not penal in the stricter sense, but the gradations of the concept itself are seldom set out at length.

The case of Haskell v. Perkins,⁵⁰ supra, among these cases, seems to be the one whose language from this standpoint is most hostile of all to the “threefold” provision. That case loosely calls the threefold damage provision a penalty. Examination of the opinion of the court in that case, however, discloses that the conclusion reached rests upon an unexamined assumption that cannot be maintained. The opinion of District Judge Runyon at page 222 overlooks the elementary fact that legal

⁴⁹ Holding such causes of action assignable, see, Hicks v. Bekins Moving & Storage Co., 87 Fed. (2d) 583 (1937) (includes statement that it is not a penalty); United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574 (1916) (includes statement that it is not a penalty, but likened to exemplary damages); Kunihiro v. Lyons Bros. Co., 12 Fed. (2d) 894 (1928); Imperial Film Exchange v. General Film Co., 244 Fed. 985 (1915). Corresponding decisions that the cause of action survives: Glenn Coal Co. v. Dickinson Fuel Co., 72 Fed. (2d) 585 (1934); Imperial Film Exchange v. General Film Co., 244 Fed. 985 (1915); Moore v. Backus, 78 Fed. (2d) 571, 101 A. L. R. 379 (1935); Sullivan v. Associated Billposters and Distributors, 6 Fed. (2d) 1000 (1926) (calls it remedial rather than penal).

As may be expected, in view of the deep-seated ambiguities inherent in the loose use of the term “damages” and the term “penalty,” a few decisions to the contrary may also be found which have denied survival or assignability in these situations, on the assumption without adequate analysis that the provision was one for a penalty. See Bonvillain v. American Sugar Refining Co., 250 Fed. 641 (1918) (calls it analogous to common law action for deceit, which did not survive); Caillouet v. American Sugar Refining Co., 250 Fed. 639 (1917) (calls it analogous to fraud and deceit); and Haskell v. Perkins, 28 Fed. (2d) 222 (1928).

⁵⁰ 28 Fed. (2d) 222 (1928).
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damages awarded by the jury do not fully compensate for the entire harm that is suffered. Judge Runyon there says:

"But if, on the other hand, the damages as awarded by the jury constitute in their entirety everything that is compensatory, then the trebling of the damages and the attorneys' fee would appear to lie entirely outside the scope of compensation."

Consequently the reasoning utterly ignores the element of liquidating compensation for accumulative actual harm in the intangible elements involved when a going business is destroyed in violation of the anti-trust act. The opinion thus merely blindly assumes that the threefold damage provision is merely punitive.

It appears, further, from the quotations in this opinion from the debates in congress, that Senator Hoar in charge of the bill for the anti-trust act in the Senate before its enactment referred to the threefold damage provision as a penalty. In considering that argument, however, one should not forget the cautionary rule that "statements in debate are of doubtful aid to the construction of the statute." (From opinion of Simons, J., in Goodyear Tire & Rubber Co. v. Federal Trade Commission, 101 Fed. (2) 620, at p. 623.)

Again, moreover, this debating reference to the threefold damage provision as a penalty was made without defining the range of meaning for the word "penalty" which was used in the instance. That the senator was using the term "penalty" in the very broad and comprehensive sense of burdens for good cause imposed upon defendants, and was not using it in its strict sense, is from the context abundantly plain, however. He specifically included in his broad description of "penalty" not only the threefold damage provision but also the provision for attorneys' fees, a matter which has often been held to be in the nature of costs, and not a penalty.51 The context readily shows, moreover, that the senator was not minutely analyzing a legal concept, but was addressing his remark to the policy of keeping the remedies under the federal statute within the jurisdiction of the federal courts. He was not in that connection called upon to use terms with more precision or to define the various senses in which the word "penalty" is loosely used.

The case of Haskell v. Perkins, supra, thus in its use of the

51 See footnote No. 13, supra.
terms not only fails to distinguish between ordinarily recoverable legal damages and the broader range of accumulative actual harm, but also fails to distinguish between the widest and most indefinite meanings and the narrower and more restricted meanings of the term "penalty." Under the circumstances, its choice of terminology with which to characterize the threefold damage provision in the anti-trust act is worthy of but slight if any weight.

4. Interpretations of Threefold Damages in Anti-Trust Cases in Application of the Statute of Limitations.

Another range of inquiry, regarding the nature of the threefold damage provision in the federal anti-trust statute concerns the running of the statute of limitations. Statutes of limitations, as every lawyer knows, are various. Their provisions are somewhat numerous and from one jurisdiction to another the differentiations that are made are somewhat divergent. As in the Nebraska statute of limitations, so in many others, a relatively short period of limitation is provided for actions for the recovery of penalties, while a relatively longer period is provided for actions of various other sorts. The threefold damage provision in the federal statute has many times been dealt with from the standpoint of whether in this regard it was to be classified as a penalty or whether it fell within some period of the statute of limitations blocked out on other grounds. Since statutes of limitations in different jurisdictions vary somewhat, the exact points of demarcation in the various cases do not always exactly correspond. However, the cases quite generally hold that for purposes of the statute of limitations, other clauses of the statute are controlling rather than the clause fixing the period of limitation for penalties.\footnote{See H. J. Jaeger Research Laboratories, Inc. v. Radio Corporation of America, 90 Fed. (2d) 826 (1937) (classified as falling under the six year clause); City of Atlanta v. Chattanooga Foundry and Pipe Works, 101 Fed. 900 (not a penalty in strict sense, but classified as falling within the clause for injuries to real and personal property); City of Atlanta v. Chattanooga Foundry and Pipe Works, 127 Fed. 23 (1903) (classified as statute liability); Chattanooga Foundry and Pipe Works v. City of Atlanta, 203 U. S. 339, 59 Law. Ed. 241 (1906) (not a penalty in the strict sense, but classified as falling within the general clause); Foster and Kleiser Co. v. Special Site Sign Co., 85 Fed. (2d) 742 (1936) (classified as a statutory liability); Baugh Machine and Tool Co. v.
The most outspoken characterization of the nature of the action which appears in this group of cases is that of Clark, D. J., in City of Atlanta v. Chattanooga Foundry & Pipe Co., 101 Fed. 900, at p. 906, as follows:

"It would be unusual to discover that a statute inflicted punishment for infringement of its provisions by a fine and imprisonment, or either, and again in the form of a pecuniary penalty for the same act. A sound rule of interpretation would be that when a statute inflicts punishment by way of fine and imprisonment at the suit of the state for a public wrong affecting the whole community, and also confers a remedy on a party for private injuries resulting from breaches of the statute, the latter will not be regarded as a penalty unless the statute so declares.* * * These and other characteristic points of difference between penal and remedial actions support the conclusions arrived at that these actions are remedial and compensatory only."

5. Analogous Interpretations of Threefold Damages


In addition to the cases just referred to, which were under the anti-trust act itself, the statutory provisions for treble damages in connection with infringement of patents have on various occasions received a treatment very similar. Here again, the word "penalty" is frequently in discussion used very loosely.53 Especially significant expressions from the leading cases in the patent field are the following:

"In the nature of a penalty is a somewhat nebulous phrase, and might as appropriately be applied to damages in an action on the case, based upon ordinary negligence or an ordinary breach of duty to the plaintiff. * * *

"Any recovery of damages may well be said to be 'in the nature of a penalty,' when the defendant is required to pay for his breach of duty."

Standard Oil Co. v. Roxana Petroleum Corporation, 9 Fed. (2) 453 (1925) (Fitzhenry, District Judge).

Aluminum Company of America, 79 Fed. (2d) 217, 227 (1935) (classified as falling under the six year clause); Sheldon Electric Co. v. Victor Talking Machine Co., 277 Fed. 433 (1922) ("neither a penalty or a forfeiture, but merely treble damages allowed by the law for the redress of a private injury"); Harvey v. Booth Fisheries Co., 228 Fed. 752 (1915) ("the right of recovery under Sec. 7 * * * is private and remedial"). For a special problem of this sort under the provisions of the statute of limitations of Kentucky, see Northern Kentucky Telephone and Telegraph Co., 73 Fed. (2d) 333, 97 A. L. R. 133 (1934).

"Whatever the defendant is obliged to pay beyond the profits which he unlawfully received is in a sense punishment as to him, but it is also remedial as to the plaintiff. The punitive element, however, must be regarded as incidental to the remedy. The underlying purpose of the statute is to provide adequate compensation for the injury sustained by infringement of patent rights, where the strict rules of law would not afford it. In the field of patent litigation it is difficult to measure with mathematical accuracy a plaintiff's damages, and a statement that all over legal damages is punitive rather than remedial may, as an abstract proposition, be true, but it would rarely be so as a statement of experience."

*Beacon Folding Machine Co. v. Rotary Machine Co.*, 17 Fed. (2d) 934 (1927) at p. 935 (Brewster, J).

Similar conclusions have been frequently expressed in connection with analogous provisions in the copyright laws, holding such provisions to be in their nature compensatory and remedial rather than penal. See, *A. Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 108, 109, 39 Sup. Ct. 194, 63 Law. Ed. 499, 503. Quoting from a prior case, Mr. Justice Van Devanter states:

"'The idea of the punishment of the wrongdoer is not so much suggested by the language used in the statute as is a desire to provide for the recovery by the proprietor of full compensation from the wrongdoer for the damages such proprietor has sustained from the wrongful act of the latter. In the face of the difficulty of determining the amount of such damages in all cases, the statute provides a minimum sum for a recovery in any case, leaving it open for a larger recovery upon proof of greater damage in those cases where such proof can be made. The statute does not speak of punishment or penalties, but refers entirely to damages suffered by the wrongful act. * * *'

"'Although punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned, yet we think it clear such is not its chief purpose, which is the award of damages to the party who had sustained them, and the minimum amount appears to us to have been fixed because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained.'"

See also *Douglas v. Cunningham*, 294 U. S. 207, 79 Law. Ed. 862, 55 Sup. Ct. 365 (1935), opinion by Judge Roberts:

"The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits. In this respect the old law was unsatisfactory. In many cases plaintiffs, though proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. The ineffectiveness of the remedy encouraged wilful and deliberate infringement. * * *"

"In other words, the employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion."
6. The Threefold Damage Provision in the Anti-Trust Act Is Dependent Upon Proof of Legal Damages to Business or Property.

That the threefold damage provision in the anti-trust act, instead of being penal, rather provides liquidated compensation for accumulative, actual harm going beyond the ordinarily recoverable legal damages, is readily observable from another angle. It is provided in the damage section of the anti-trust act that the party who is "injured in his business or property" by the defendant's violation of the anti-trust act, may recover threefold damages. The legal damage against which the statute thus in the first instance provides redress is the damage in "business or property." Other harm, aside from such legal damage, is not independently recognized. Under the provisions of the anti-trust act definite proof of ordinarily recoverable legal damages to the business of the property is thus required as a starting base, the guaranty of genuineness of the harm claimed. In this respect the statutory situation under the anti-trust act somewhat closely resembles the position familiar in the older cases on recovery for injury through emotional distress, which required, as a starting point, proof of bodily impact, to assure the genuineness of the claims asserted. If the legal damages to business or property for which the statute provides redress is made out, the threefold damage provision is operative to afford the injured plaintiff more complete compensation for the wider range of accumulative intangible harm, which is reckoned by the threefold provision with reference to the amount of proved legal damage to the business or property. As more at length elsewhere expounded in this paper (Subdivision IV, pp. —), the wrongdoing involved in driving another out of business in violation of the anti-trust act commonly involves little or no direct physical damage to person or tangible property. The harm sustained consists predominantly in intangible elements. It is apparent, therefore, that for full compensation for such harm the ordinary measure of legal damages is utterly inadequate. Giving the injured party

54 See footnote 2, supra.
redress under the threefold provision thus provides for substantial compensation for such intangible harm while the amount recovered therefor is reckoned in proportion to the legal damages actually proven. The provision for threefold the legal damages in business or property thus while providing more complete compensation, at the same time avoids the danger of complete indefiniteness with regard to the bounds of recovery in such cases, which would otherwise be encountered if redress beyond the ordinarily recoverable legal damages should be awarded.

While this aspect of the matter is nowhere discussed at length in the judicial materials, the distinctions involved in it have been repeatedly and clearly recognized. Among the most conveniently available materials are the following:

"Such an action as this under the Sherman Act can only be brought when a person is 'injured in his business or property,' Sec. 7. The action is to recover threefold the damages by him sustained, i. e., sustained by and in the said 'business' or 'property.' Such an action as this might well be called sui generis."

*Imperial Film Exch. v. General Film Co.*, 244 Fed. 985 (1915) at p. 987 (Hough, District Judge).

"The provisions above quoted are clearly remedial. They give a cause of action to any 'person' 'injured in his business or property' by reason of anything forbidden or declared to be unlawful by the act, and they declare that 'a person' 'so injured shall recover threefold' 'the damages by him sustained.'"

*Sullivan v. Associated Billposters and Distributors*, 6 Fed. (2) 1000 (1925) (Rogers, Circuit Judge).

"It may be that it (i. e., the term 'property') has a broader meaning than was intimated below, and that some wrongs are within it besides physical damage to tangible property. But there is a sufficiently clear distinction between injuries to property and 'injured in his business or property,' the latter being the language of the act of congress."


"It should be stated at the outset that 'Section 7 of the Anti-Trust Act gives a right of action to one who has been 'injured in his business or property.' Again, 'Recovery cannot be had unless it is shown, that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture.'"


On the other hand, if no legal damages "'in his business or property'" are proved in cases under the anti-trust statute, mere
outside intangible harm that may have been involved, even though serious and substantial, is insufficient to ground an action.\footnote{See: Rossman v. Pullman Co., 15 Fed. Supp. 325 (1936) (no proof of damage to a property interest); Ebeling v. Foster & Kleiser Co., 12 Fed. Supp. 459 (1935); Krigbaum v. Sparbaro, 23 Calif. App. 427, 136 Pac. 364 (1913) (loss of prospective profitable contract, but no damage “in his business or property”); Clabaugh v. Southern Wholesale Grocers' Ass'n., 181 Fed. 706 (1910); Central Coal and Coke Co. v. Hartman, 111 Fed. 96 (1901) (legal damages claimed being too conjectural to support verdict, threefold damages has nothing to operate upon); Gerll v. Silk Assn. of America, 36 Fed. (2d) 959 (1929) (loss of corporate office and salary held not to entitle a party who had no independent business or property to recover threefold damages); Paine Lumber Co. v. Neal, 244 U. S. 459, 61 Law. Ed. 1256, 37 Sup. Ct. 718 (1917) (under the Clayton Act) (majority of court, by Holmes, J., finds special damages not proved); Paterson Parchment Paper Co. v. Story Parchment Co., 37 Fed. (2d) 537 (1930) (mere loss of profits on prospective future contracts in a field where plaintiff was without any record of past experience to serve as a standard held too conjectural to be recognized).}

7. The Threefold Damage Provision Affords Liquidated Compensation for Accumulative Actual Harm Going Beyond Ordinarily Recoverable Legal Damages Rather Than Being a Provision for Exemplary Damages at Jury's Discretion.

It is clear, under this array of judicial experience under the federal anti-trust acts, that the threefold damage provision is not a penalty, using the term “penalty” in its stricter senses. It is not a penalty in the sense of Huntington v. Attrill,\footnote{See footnote 47, supra, with accompanying text.} a payment by the wrongdoer to the state as punishment for a crime committed, either for vengeance or for a deterrent example to others. It is not a penalty in the sense of ordinary exemplary damages, for it is not a payment by the wrongdoer to the individual aggrieved, assessed by the jury in amount reflecting the jury’s moral indignation, as a deterrent example to others. It is not even a penalty in the milder sense of a statutory incentive liability, unless merely incidentally so, for the realities in its application in anti-trust cases include so predominantly large a range of accumulative actual harm as in ordinary cases far to exceed the ordinarily recoverable legal damages.

In other words, closely analyzed, the threefold damage provision is remedial to the plaintiff, compensatory in its nature in
liquidating compensation for accumulative intangible harm incurred outside of and beyond the ordinarily recoverable legal damages to the business or property. It is a penalty upon the defendant only in the loose sense of penalty as signifying a burden encountered by the defendant as a consequence of his wrongdoing. In that broad sense of penalty this provision of course is a burden to the defendant in requiring him to make compensation for damage wrongfully caused, comparable to the burden that is imposed by every provision which imposes legal liability to make compensation to the injured party. The threefold damage provision is a provision for liquidated compensation for accumulative harm, largely intangible in its nature, which is so conspicuous a part of the loss suffered when a going business is destroyed in violation of the anti-trust act.

It is very significant, that in the numerous foregoing applications which have been set out whenever any differences between the merely punitive and the compensatory attributes of the remedy have become in any wise material in the instance, the compensatory and reparatory aspect of the threefold damage provision in the anti-trust act has been by the courts insistently emphasized as characteristic and controlling, while the resulting burden to the defendant from such liability is treated as incidental.

It is thus very clear that the threefold damage provision as used in the federal anti-trust act is not a provision for a penalty, using that term in the strict sense of a payment exacted and collected by the state as a punishment by way of example to deter other evildoers. The available decisions have not had to distinguish this provision sharply from exemplary damages at the jury's discretion, or from statutory incentive liability, no legal obstacle to the validity of such liabilities being encountered in most jurisdictions. In numerous incidental applications heretofore set out, however, where such inquiry was collaterally involved, as in connection with assignment and survival of causes of action, and the running of the statute of limitations, etc., the courts have clearly indicated that they were cognizant of the compensatory and remedial elements in the threefold damage provision, albeit usually without analyzing those elements in elaborate detail.

There is no reason to suppose that any state legislature, in
enacting this identical section of the anti-trust statute to make this section applicable to intrastate business falling under the local anti-trust act as well as to interstate business falling under the federal statutes, intended to use this language in any other sense than that which was and is attached to the very same words of the very same section of the federal anti-trust act. As already shown, the threefold damage provision is here compensatory in its nature, in liquidating compensation for accumulative intangible harm going beyond the ordinarily recoverable legal damages to the business or property.