ly little new law. An alien can commit treason outside the realm if he owes a duty of allegiance. Such a duty may arise even from the illegal issuance of a passport.[32] No conclusion can be drawn from the handling of the trial court's charge to the jury. The House of Lords merely states that the trial judge left the issue of protection to the jury, and quotes no part of the summing-up, which clearly assumed, as completely a matter of law, this essentially factual issue. Since future generations will be unlikely to compare the decision and the record, the court managed to leave unmarred the structure of English justice and still reach its desired result.

Damages—Applicability of OPA Ceiling Prices as Measure of Damages—[Iowa].—The plaintiff sued in a tort action to recover damages for the destruction of a truck in a collision. The defendant contended that the proper measure of damages was the Office of Price Administration ceiling price of the truck, which was $634.55. The trial court instructed the jury that if it found the plaintiff entitled to recover for the loss of the truck, he should be allowed "the fair and reasonable market value of the truck, immediately preceding the accident, less its salvage value, if any, immediately following the accident, not to exceed the amount of $1,200, the amount claimed therefor."[1] The jury returned a verdict for the plaintiff and awarded him $1,200 damages. On appeal to the Supreme Court of Iowa, *held*, the evidence supported the verdict, and the trial court did not err in failing to instruct the jury that the OPA ceiling price was the proper measure of damages. The purpose of the OPA regulations was to govern prices in the sale of goods, and not to put a ceiling upon the recovery of damages in a negligence action. *Ross Produce Co.* v. *Thompson.*[2]

The traditional purpose behind the award of damages in a tort action is to put the plaintiff in the same position, as far as a money award can, that he

[32] Cf. the American case closest to the Joyce case, United States v. Stephan, 50 F. Supp. 448 (Mich., 1943), holding that fraud in obtaining a naturalization certificate was not pleadable in defence of a treason charge, since the naturalization was voidable (by the Government) and not void. Interestingly enough, the Government has voided naturalization on grounds of fraud because the citizen had engaged in disloyal acts not sufficient for a treason charge. United States v. Kuhn, 49 F. Supp. 407 (N.Y., 1943).

[1] Record, at 59. The "fair and reasonable market value" was estimated at $1,300; the salvage value at $100. The difference between the OPA price and the "fair and reasonable market value" was not as great as the figures suggest. The OPA price of $634.55 was the figure at which an individual could sell a truck to another individual or to a dealer. If the plaintiff, who used the truck in his poultry business, had sought to purchase a similar truck from a dealer, under the OPA regulations the dealer would be allowed to add 15 per cent to the above figure. Furthermore, the OPA price included only the chassis, cab, and tires, and did not include the box and any accessories attached to the truck. The "fair and reasonable market value" included all these items. The evidence, however, did not indicate whether the box and accessories were included in the $100 salvage allowance.

[2] 20 N.W. 2d 57 (Iowa, 1945).

would have been in, had the tort not been committed.[3] Where the tortious action has caused the destruction of personal property, the application of this general formula has normally resulted in the award to the plaintiff of the amount of money necessary to purchase a similar commodity in an active and free market at the time of the loss.[4] While the term "market value" is a "definite sounding term for a very imaginary inference,"[5] it has afforded the courts a more or less orderly and accurate standard for estimating the "value" of a particular piece of property at a given time and place.[6] Use of market value assumes that the destroyed goods can be replaced in the market, but difficulties arise when no such replacement is possible. Market value then becomes a more conjectural item, and doubt arises as to whether the price that such goods might command would fully compensate the plaintiff. Frequently, in giving compensation for the destruction of wearing apparel,[7] household goods,[8] and pets,[9] the

[3] 1 Sedgwick, Measure of Damages § 30 (9th ed., 1912); Rest., Torts § 901, Comment (a) (1939). Other policies govern the award of nominal damages, where the objective is merely the adjudication of legal rights, and punitive damages, where deterrence of unconscionable conduct is the end in view. Rest., Torts § 901, Comment (a) (1939). The primary goal of compensation is subject to certain limitations, the most notable of which is the application of the "proximate cause" rule to the remote consequences of the tort. Ibid., at § 917.

[4] McCormick, Law of Damages § 44 (1935); Rest., Torts §§ 911, 927 (1939). Similarly, where compensation is sought for only a temporary rather than a permanent loss, the laws seeks to determine either the sum which the owner could have obtained by renting the property or the cost of hiring similar property. McCormick, Law of Damages § 44 (1935).

[5] Ibid., at § 165. The writers and courts have generally recognized the relative nature of "market value." The accuracy with which the market price may be determined in the case of stocks and bonds listed on an exchange does not exist when the commodity is not standardized and is not sold in large quantities at a given place. Cf. Bradley v. Hooker, 175 Mass. 142, 55 N.E. 848 (1900). The amount of conjecture involved in the use of the "market value" concept is especially apparent when, as in the principal case, the commodity is a second-hand truck.

[6] The courts have rarely attempted to elaborate upon the meaning of "market value." They have studiously avoided the precise definitions offered by the economists. 1 Bonbright, The Valuation of Property 40–65 (1937). The opinions suggest, however, that in the damage cases the term is generally used in the sense of indemnification rather than realization. Ibid., at 62; 1 Sedgwick, Measure of Damages § 244 (9th ed., 1912). The economists would define the market value as the price at which the plaintiff could sell the goods. Although in many cases there would appear to be no apparent distinction between indemnification and realization, in the case of a retail dealer the money award would be considerably different depending upon which test of market value were used. See note 22, infra. Indemnification and realization would result in different sums in the principal case, if the OPA price were used. Indemnification would allow the plaintiff $634.55 plus 15 per cent; realization would allow $634.55. The courts do not usually speak of "market value" but refer to "fair market value." The adjective covers a multitude of qualifications which the courts attach to the use of market price as a measure of value to the owner. 1 Bonbright, The Valuation of Property 55–56 (1937). The equating of "value" to market price is, of course, inappropriate in cases involving the valuation of property for corporate reorganization or rate-making purposes.

[7] Lake v. Dye, 232 N.Y. 209, 133 N.E. 448 (1921); McMahon v. City of Dubuque, 107 Iowa 62, 77 N.W. 517 (1898).

[8] Barber v. Motor Investment Co., 136 Ore. 361, 298 Pac. 216 (1931); Birmingham Ry. Light & Power Co. v. Hinton, 157 Ala. 630, 47 So. 576 (1908).

[9] Blauvelt v. Cleveland, 198 App. Div. 229, 190 N.Y. Supp. 881 (1921).

courts have stated that the market price of goods was merely evidence, and not a conclusive demonstration, of the amount of money necessary to restore the plaintiff to his former position.[10]

The difficulty in the use of market value is equally apparent where the exchange price of goods has been inflated or depressed as a result of circumstances not usually associated with a more or less competitive economy. Thus, where the seller has cornered the market illegally and caused the price to skyrocket, the market price has been discarded as a proper measure of damages.[11] Where the Eighteenth Amendment had caused the salable value of a brewery to drop from an estimated $50,000 to $15,000, the court refused to apply the latter figure in a suit against an insurer under a fire insurance policy calling for the payment of "actual cash value."[12] Similarly, where liquor purchased before prohibition was stolen after the Eighteenth Amdnement had gone into effect, the court refused to accept the argument of the insurer that, since there was no market, the goods had no value.[13]

This salutary discarding of market price as a measure of loss when it is patently inadequate has, however, forced the courts to employ even more uncertain and arbitrary standards. The original cost of the article, the extent to which it has depreciated, and the use of the article for business or pleasure are "factors" which will be considered in determining what is generally described as the "actual value" to the owner.[14] The difficulties which have accompanied the use of this "actual value" test have caused courts to limit its scope and to be extremely cautious in its application.[15]

[10] The inadequacy of market value as a measure of compensation becomes obvious in the case of the destruction of an unpublished manuscript, Southern Express Co. v. Owens, 146 Ala. 412, 41 So. 752 (1906); or of stereotype plates, Stickney v. Allen, 10 Gray (Mass.) 352 (1858).

[11] Kountz v. Kirkpatrick & Lyons, 72 Pa. 376 (1872). The court refused to apply the usual rule of contract damages, which allows the plaintiff the profit he would have received had the contract been performed. The profit to the plaintiff, a broker, would normally have been the difference between the market price at the time of the breach and the contract price.

[12] McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N.E. 902 (1928).

[13] Chicago Bonding & Ins. Co. v. Oliner, 139 Md. 408, 115 Atl. 592 (1921); cf. Gonch v. Republic Storage Co., 218 App. Div. 584, 219 N.Y. Supp. 46 (1926).

[14] In determining the value of a ship the original cost, reproduction cost, and depreciation were all to be considered, but no one of them was to be conclusive. Standard Oil Co. of New Jersey v. Southern Pacific Co., 268 U.S. 146 (1925). In cases involving household goods or wearing apparel the original cost and the condition of the goods at the time of the loss are generally admitted as evidence of the "actual value" to the plaintiff. See cases cited in notes 7 and 8 supra. In the case of a loss of a dog the value was determined in part by evidence as to the nature of the work performed by the dog. Blauvelt v. Cleveland, 198 App. Div. 229, 190 N.Y. Supp. 881 (1921).

[15] Although it is said that market value is not a proper measure of the loss resulting from the destruction of wearing apparel or household goods, the courts are careful to caution the jury against awarding damages for "sentimental attachment." 1 Sedgwick, Measure of Damages § 251a (9th ed., 1912). See, for example, Barber v. Motor Investment Co., 136 Ore. 36, 366, 298 Pac. 216, 218 (1931) where the court, after holding that market was not an accurate measure of loss, said: "The owner is entitled to recover the actual value of the property to

In a wartime economy marked by an inadequate supply of civilian goods and the imposition of ceiling prices upon sale price, the inadequacy of "market price" becomes quite obvious and the search for an adequate substitute becomes even more difficult. The determination of the adequacy of market price in the instant case is complicated by the existence of what appear to be two "markets"—one the legal, the other the "black." When these so-called markets are analyzed, it becomes apparent that neither is a satisfactory standard and, indeed, neither is a true market. It is arguable that if the plaintiff were a dealer in second-hand trucks, holding them exclusively for the purpose of resale, the OPA ceiling price would adequately restore him to his prior position. In the principal case, however, the truck was held, not for resale purposes, but for continued business use. The truck represented to the owner an asset which materially contributed to the success of his poultry business.[16] The OPA ceiling price would be an adequate measure of damages only if it appeared that a similar truck could be purchased at that price. Although the evidence in the principal case did not conclusively establish that there was no supply of used trucks at the OPA ceiling price,[17] the court, as well as counsel, apparently recognized that no supply existed at that price. In the few similar cases in which the applicability of the ceiling price has been in issue the courts, with one exception,[18] have ignored the price set by the government. In *General Exchange Ins. Corp.* v. *Tierney*[19] the plaintiff purchased a car for personal use just before the effective date of the OPA ceilings. In a suit to recover under a fire insurance policy the insurer was required to pay the original cost of the car, not the ceiling price.[20] In another case, the plaintiff, a retail dealer, brought an action

him, excluding, of course, any fanciful or sentimental value which he might place upon it." In McAnarney v. Newark Fire Ins. Co., 247 N.Y. 176, 159 N.E. 902 (1928) the court, in holding that the market price of a brewery in 1922 was not an accurate measure of value, stated that the jury should, however, take into consideration the "obsolescence" due to the fact that the product of the plant had been outlawed by the prohibition act.

[16] The plaintiff asserted that he lost $25 a day by being deprived of the use of the truck. Record, at 3. It does not appear whether this represents gross or net loss.

[17] Althogh the Iowa Supreme Court said that the record established that no truck could be obtained at the OPA ceiling price, the only evidence of a lack of supply was the testimony of one dealer that he did not have any second-hand trucks for sale. Record, at 29. The court stated that the truck was "almost irreplaceable."

[18] In a suit against an insurer to recover for the loss of a spare wheel, tire, and tube a Baltimore city court held that the measure of damage was the OPA ceiling price. The court said that it was "against public policy that a price or value arrived at through the operation of a 'black market,' which price in itself is unlawful, should be used as a measure of damages." Dennis Cunningham v. National Guild Ins. Co., People's Court of Baltimore, Maryland, 10019-42.

[19] 152 F. 2d 224 (C.C.A. 5th, 1945).

[20] The car was purchased in May, 1944 for $3,384. The OPA ceiling price of $2,000 on cars of the same make was established in July, 1944. The parties stipulated that if the OPA was not the proper measure of damages the judgment should be for the original price of the car.

Austine v. McWilliams, 163 P. 2d 816 (Wash., 1945) was a suit by the purchaser of a car

for the conversion of industrial alcohol, on which there was a wholesale ceiling but an uncontrolled retail market.[21] Upon a showing that replacement was not possible in the wholesale market, the court set the measure of damages at the prevailing retail price.[22] Common to these cases was the circumstance that at the OPA ceiling there was no available supply;[23] it is this factor and not, as the courts suggest, the limitation of the OPA restrictions to "sales," which makes the ceiling price inapplicable as a measure of damages.[24]

Likewise, the use of an illegal or black-market value affords no accurate measure of value. This so-called market is neither free nor open. Obviously, it will be difficult to obtain testimony to establish the price at which similar goods

under a conditional-sale contract against the seller for conversion. The supreme court sustained a decision for the plaintiff except as to the measure of damages. The car, a 1940 Ford coupe, was purchased in June, 1944, for $975. In October, 1944, the dealer seized the car. The trial court, by deducting $100 for depreciation from the purchase price, set the value of the car at $875. At the time of the conversion the ceiling price at which a private vendor could sell a similar car was $725; a dealer was entitled to ask $906. The appropriateness of the OPA ceiling as a measure of damages was raised by counsel in the trial court and the judge decided that the plaintiff's recovery was not limited by the government regulations. The supreme court of the state agreed that the plaintiff was entitled to a judgment ". . . . for the value of the automobile at the time and place of conversion, that value to be determined by the court upon the evidence in the case without regard to federal regulations governing the ceiling prices on used automobiles." Ibid., at 820–21. The court held, however, that evidence as to original cost was not sufficient to support a judgment for that amount less depreciation. Rather, the court accepted the testimony of a dealer that he would pay $725—the ceiling price at which private vendors could sell—as the proper value of the car! If an OPA ceiling was to be used as a measure of value it would appear that in order to put the plaintiff back in her former position, the OPA ceiling allowed dealers would have been the correct standard.

[21] Zemel v. Commercial Warehouses Inc., 132 N.J. Law 341, 40 A. 2d 642 (1945).

[22] Generally, where the goods lost were held for resale, the "value" is determined by their replacement cost without taking into consideration the profit from reselling. 1 Sedgwick, Measure of Damages § 248a (9th ed., 1912). This rule is in keeping with the judicial aim to indemnify the plaintiff, although, as Bonbright observes, the economists' definition of market value would require the court to hold that market value meant the realization price. Note 6, supra. Where replacement is not possible the retail price would appear to be consistent with the aim of indemnification.

[23] The judicial unwillingness to use the OPA ceilings as a measure of value led one court to hold that a man charged with grand larceny could not successfully plead that the OPA price on the stolen goods brought the crime within the statutory definition of petty larceny. Fugate v. State, 158 P. 2d 177 (Okla. Cr. App., 1945).

[24] The fact that the OPA regulations were written in terms of "sale" should not make them inapplicable as a measure of damages for the destruction of property. The award of damages based upon market price is predicated upon the purchase and sale of similar goods.

The OPA maximum price ceilings have been held inapplicable to judicial sales of liquor in states where liquor is sold only through licensed retailers. Brown v. Texas Liquor Control Board, 54 F. Supp. 350 (Tex., 1944). The OPA ceiling upon the sale of liquor has been enforced in a state where the sale of liquor for beverage purposes is outlawed. Thus, persons selling liquor in Mississippi above the maximum price set by the OPA were convicted of violating the federal Emergency Price Control Act. Barnett v. Bowles, 151 F. 2d 77 (U.S. Emerg. C.A., 1945).

goods are bought and sold.[25] Furthermore, prices on the black market will be influenced more by the risk of illegal activity than by the customary economic forces present in an open market. On the grounds of public policy alone courts might be expected to exclude any evidence of an illegal price.[26] and the courts which have used a market value other than the OPA ceiling have gone to some length to euphemize "black market."[27]

It is apparent that neither the black-market price nor the OPA ceiling are adequate tests to determine the compensation to be awarded the plaintiff. Resort to the device of "actual value" also presents certain difficulties which might seem to prevent a more satisfactory result. Courts have frequently stated that original cost less an amount for depreciation is the proper evidence to ascertain "actual value" where there is no market value,[28] yet it seems doubtful whether this is anything more than another way of defining the price set by the OPA. The one factor which makes the OPA price inadequate, i.e., the fact that the truck was irreplaceable at the time of its destruction and would remain so for a period probably extending beyond the termination of the war,[29] should somehow be given weight in determining compensation.[30]

[25] In the principal case the only evidence as to a "market value" other than the OPA price was the following testimony by an auto dealer in a local community:

"A. To a certain extent I am acquainted with the fair and reasonable market value of Chevrolet trucks of the 1940 type. . . . .

"Q. What would you say was the fair and reasonable market value on the 20th day of March, 1944, before the accident?

"A. I would say around in the neighborhood of thirteen hundred dollars, the sale value of the truck at that time. . . . .

"The thirteen hundred dollars which I said the truck was worth before the accident was based upon what they were trying to buy similar trucks for at that time." Record, at 20, 23.

In Fugate v. State, 158 P. 2d 177 (Okla. Cr. App., 1945), the testimony offered to justify a value greater than the OPA price was to the effect that the "fair market value" was considerably higher than the OPA price. The witness, a dealer in the goods, did not suggest that his knowledge was based upon personal experience.

[26] In a suit to recover the "actual cash value" of liquor lawfully acquired but destroyed after prohibition, the plaintiff sought to introduce evidence as to the selling price of the liquor on the bootleg market. The appellate court, in sustaining the lower court's refusal to admit such evidence, stated: "There was but one market and that was the lawful market; the other so-called 'market' is the one resting in crime and is unlawful, and is not to be considered as a basis of recovery. When we speak of value, we imply a transaction in the open, lawful market. It does not embrace the secret price paid by law violators." The court suggested that the proper measure of damages was the price at which the plaintiff would be allowed to sell the goods if he were able to obtain a government permit. Hayward v. Employers' Liability Assurance Corp. of London, 214 Mo. App. 101, 109, 257 S.W. 1083, 1085 (1924).

[27] In the instant case the court said, "Its money value . . . . was not determined by the 'black market,' but by the law of supply and demand. . . . ." Ross Produce Co. v. Thompson, 20 N.W. 57, 61 (Iowa, 1945).

[28] See cases cited in notes 6 and 7, supra.

[29] See note 17, supra.

[30] In an action for conversion of wine, lawfully acquired before prohibition and converted during it, the court held that in determining its value it was proper to consider "the fact

The fact, if it can be established, that the truck cannot be replaced over a prolonged period, with the consequent loss of the truck's contribution to the plaintiff's business, may be considered in two ways. Although there is some authority against giving special damages for deprivation of use when the full value of the property at the time of accident is also awarded,[31] a few of the conversion cases have achieved this result.[32] In the normal case, where the value of the property is not fully capitalized for the special profits that accrue to the plaintiff through its use, no danger of a double award is imminent.[33] If such a special award is made in this case, an uncapitalized value of the truck would be the original cost, less depreciation.[34] However, special damages for lost profits can only be made for the period between the tort and the date of the judgment,[35] and thus the consequent loss to the plaintiff after that time until he can finally get replacement of the truck, is totally ignored. But, if the irreplaceability of the truck is taken into consideration in assessing its value and a special award for loss of use given, the danger of double accounting arises for the period from the accident to the date of the judgment.

The alternative approach to this problem would be to capitalize fully the prospective profits in assessing the value of the truck at the time of the accident and to allot interest upon that figure at the normal rate up to the date of the judgment[36] in lieu of special damages for loss of use.[37] This would circum-

that, under the law, the wine could not legally be replaced." Burleson v. Bundy, 206 App. Div. 644, 198 N.Y. Supp. 904 (1923).

[31] 2 Sedgwick, Measure of Damages § 435a (9th ed., 1912). The legal theory for such a rule is that compensation for the full value of property is compensation for all the incidents of ownership, including the right to profits from its use. Thus, an additional award of damages for loss of use would constitute double payment. Ft. Pitt Gas Co. v. Evansville Contract Co., 123 Fed. 63 (C.C.A. 3d, 1903).

[32] Preble v. Hanna, 117 Ore. 306, 244 Pac. 75 (1926); Universal Credit Co. v. Wyatt, 56 S.W. 2d 487 (Tex. Civ. App., 1933).

[33] The market value of such chattels as a truck under normal conditions is not based upon capitalization of its use value to consumers but rather on production costs and sellers' competition. Thus, special damages for loss of use will not involve double accounting. Assessment of land values is one place, however, where such capitalization is consistently used.

[34] The following is an illustration of a means by which damages might be computed by this method. A truck costing originally $1,200 and depreciating at the rate of $100 per year for two years prior to the accident would have an uncapitalized value of $1,000 at the time of the accident. Assuming that the truck would contribute $600 per year to the plaintiff's business, and that six months elapsed between the accident and the date of the judgment, the plaintiff would be entitled to a special award of $300 for loss of use, in addition to the depreciated value of the truck at the time of the accident, or $1,000, making a total of $1,300.

[35] When a judgment is awarded to the plaintiff, he is no longer deprived of at least the money equivalent of his destroyed goods.

[36] Subject to many local qualifications and statutory provisions interest is generally allowable on all judgments, dating from the time the cause of action arises to the date of the judgment. For a summary of these local rules, see 96 A.L.R. 227 (1935).

[37] Using the same assumptions as in note 34, supra, the following is an illustration of how the "value" of the truck may be determined on the basis of its use. Because this use value will

vent the problem of double accounting, but in so doing numerous elements of a speculative character are introduced. In addition to determining the truck's contribution to the plaintiff's business—a problem which is also involved in the award of special damages—the rate at which these profits are to be capitalized must be determined. This rate will not only depend upon the length of the period of deprivation, but also upon the comparable rates in other types of business enterprise. It may be argued that such a determination is aleady achieved by the operation of the "black market"—and with much greater accuracy than by a jury. Even conceding this, the difficulty that has faced courts in eliciting testimony as to the price set by the "black market" is enough to cast serious doubt upon the practicality of this approach.

The confusion that exists not only in the court's treatment of the instant case but also in many of the normal damage cases, is a result of the inadequacy of the traditional legal concepts and their lack of adaptability to a complex economic structure—and particularly to a war-time economy. The Iowa court, recognizing the inadequacy of the OPA price, has allowed a speculative guess by a witness to control the compensation awarded, in the attempt to do approximate justice. The result achieved in terms of the amount of compensation may not be shocking but there remains a judicial duty to develop a workable formula to deal with such problems.

It is submitted that, if it can be shown that the truck was not replaceable at the ceiling price, compensation would be adequately determined by awarding the plaintiff its value capitalized on the basis of its use. If care is used in accounting for the various factors involved, a satisfactory result would be achieved.

Domestic Relations—Constitutionality of "Anti-Heart-Balm" Statute—Liability to Children for Inducing Parent To Avoid Duty of Support—[Federal].— The Daily family, husband, wife and four minor children, were residents of Pennsylvania. The defendant and her husband were neighbors of the Dailys. The defendant induced Mr. Daily to leave his family and move with her to Chicago. Two suits were filed in the federal district court in Chicago—the first by Mrs. Daily, setting forth a declaration based on alienation of affections and

depend upon the length of time that the truck cannot be replaced, it will be assumed that two years will elapse from the time of the accident until a new supply of trucks will be on the market. During the two-year period during which the plaintiff will be deprived of the truck, its contribution to his business would have been $1,200. At the end of that period the truck would have had a market value, which can be estimated roughly on the basis of its original cost less four years' depreciation, of approximately $800. Thus, for the two-year period the truck will represent a total principal and income of $2,000. Assuming that other business investments during that period would have produced a 10 per cent profit, we find that $1,666 invested at that rate for two years would produce a total principal and income of $2,000. Thus, $1,666 is the approximate "use value" of the truck. The difference of $366 in this method of computation and that in note 34, supra, is due to the fact that in the prior method the deprivation of use subsequent to the date of the judgment was not accounted for.