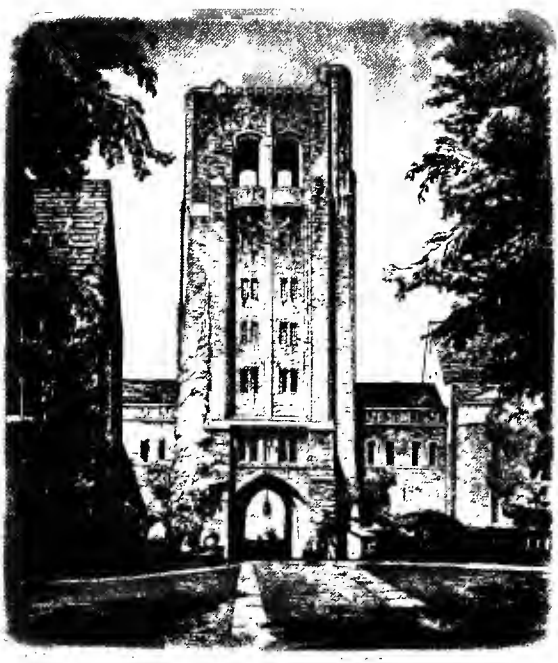

THE

ELEMENTS OF TORTS

BY
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PREFACE.

The treatise which follows has been prepared primarily for the use of students at law and instructors in law schools. The design has been to present succinctly the elements of the law of Torts.

A word in justification of the title may appropriately be added in view of the fact that it has been supposed the same subjects may be treated under the title "Non-Contract Law." But the author in this instance, as in the preparation of his larger treatise upon the law of Torts, has given that subject such consideration as its importance deserves.

An appropriate title is important, inasmuch as it generally marks the author's point of view. An erroneous point of view may, and frequently does, obscure a clear and perfect view of the subject under contemplation.

Non-Contract Law fits very appropriately the idea expresed in some quarters that torts arise independent of contract; but while torts may arise independently of contract relations, they very frequently arise in connection with a contract relation. Indeed the whole law of election of remedies is based upon the proposition that under some circumstances the contract may be waived, and the transaction treated as a tort, or the tort be waived and the transaction treated as a contract. The case of *Rich v. The New York Central & Hudson River Railroad Co.*, 87 N. Y. 382, is a most interesting case upon this subject.

Students of American law should bear in mind the derivation of many of the titles of our law. This word *Tort* is not strictly of English origin: it expresses an idea not exactly

commensurate with the Roman idea of delicts. To the English lawyer it conveys a distinct and definite idea. It is of Norman-French origin, and like the word *Chose* does not find a counterpart anywhere else. So the word *Tort* has become a part of the nomenclature of Anglo-American law, and should not be discarded unless for a better reason than has been suggested.

Liberal use has been made of the text of the author's larger work upon the same subject, but pains have been taken to revise, transpose and arrange the matter in such a manner as to make the law of Torts as easily comprehensible to the student as possible. The citation of authority has not been confined to such cases as are cited in the other work, and great care has been taken in the selection of cases cited.

The author desires to acknowledge the valuable assistance of Mr. Arthur Percival Will, to whom has been intrusted the annotation and who has assisted throughout the work.

THOMAS M. COOLEY.

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THE ELEMENTS OF TORTS.

CHAPTER I.

RIGHTS AND WRONGS AS KNOWN TO THE LAW.

Preliminary.— Judicial tribunals are chiefly concerned with the protection of rights, with giving redress for wrongs committed, and with inflicting punishment on wrong-doers when their acts are found to be criminal. In a primitive state of society, while dealings among the people are simple in their nature, the aid of the courts will seldom be invoked except to give redress for malicious or reckless conduct, and only the facts are likely to be in dispute. But as civilization advances and transactions among the people become more diversified and complex, the judge will often have his attention called to invasions of special rights and privileges of statutory origin, to wrongs charged in the management of improved methods of travel and transportation and of other public conveniences, to frauds ingenious in method and infinite in variety, and to a great many others which are new in the experience of the people, because the conditions from which they spring or which furnish the opportunity for their accomplishment are new. In many of these cases the controversy will relate to the governing principle of law rather than the facts. Thus the progress of the people and the increase in the comforts and conveniences of civilization are multiplying the occasions for legal adjudication upon disputed rights or injuries, and rendering legislation needful to provide remedies under new conditions.

Classification of wrongs.— Wrongs for which individuals may demand legal redress have been classified as, *first*, those which consist in a mere breach of contract, and *second*, those which arise independent of contract.[1] The classification is not strictly accurate, since there are many cases in which on the

[1] See English Common Law Procedure Acts 1852.

same state of facts the injured party may at his option count upon a breach of contract as his grievance, or complain in such form that the breach of contract is not the gist of the action. These cases make clear the lack of utility and convenience of the classification, and that it may be misleading. And it is, perhaps, more correct to say, as to the second class, that it embraces those wrongs which arise out of conduct which, while it may involve the breach of a contract, is accompained by some other unlawful element.[1] Actions for the redress of injuries falling within the first class are called actions on contract, or actions *ex contractu*, but the injuries themselves are not commonly spoken of as wrongs, that term being applied more specifically to such other acts or omissions as may give occasion for a suit at law. The more distinct designation of the second class is by the use of the generic term *torts*, and actions to obtain redress therefor are called actions for torts, or actions *ex delicto*.

A tort, then, is any wrong not consisting in mere breach of contract, for which the law undertakes to give to the injured party some appropriate remedy against the wrong-doer.[2] Where in subsequent pages the word "wrongs" is made use of, it is to be understood as not embracing breaches of contract except as the context may indicate that intent.

An act or omission may be wrong in morals or it may be wrong in law. The terms cannot be used interchangeably; for governments do not undertake to give redress by the standard of morality,— so strict a rule being never agreed upon, and quite incapable of enforcement. Legal standards of right and wrong must be fixed by positive human law, and must be definite and plain to the common understanding.

It is equally true that many things may be wrong in law, though a wrong intent may be wholly wanting. A case in which one has acted under an honest mistake regarding his rights may be of this character, and so may one of negligence, where, though the law will give redress to the person injured, it can plainly be seen that the party chargeable supposed he was in the exercise of due care.[3]

[1] See Rich v. New York, etc. R. Co., 87 N. Y. 382.

[2] See Rich v. New York, etc. R. R. Co., *supra;* Scammon v. Chicago, 25 Ill. 424.

[3] Neither an intention to injure the

Defining rights.— A chief business of government will consist in the defining of rights and the providing of adequate securities for their enjoyment. From this comes civil liberty. The term "natural liberty" is sometimes made use of as implying that freedom from restraint which exists before any government has imposed its limitations, or as the liberty of an individual to do what he pleases subject only to the law of nature.[1] But in no valuable or proper sense can any such liberty exist, for it would be a liberty of perpetual warfare and contention; and the most imperative need of the people would be of a government to bring such liberty under the control of law, and to establish in its stead the civil liberty which the law will protect.[2] The maximum benefit of which government is capable is attained when individual rights are clearly and justly defined by impartial laws, which impose on no one any greater restraint than is essential for securing equivalent rights to all persons, and which furnish for the rights of all an adequate and an equal protection.[3]

There has at times been much discussion whether for one class of controversies, namely, those which arise between employers of labor and their employees, there should not be some special regulations established which would be to a considerable extent a departure from the general principles above stated; whether arbitration should not be prescribed for such controversies and the arbitrators given powers which, to some extent, would contemplate their changing the existing contracts as to wages or some conditions of the service, or to extend the service when it seemed just to do so, though the contracts did not preclude either party terminating it at will. The propositions looking to this end are not as yet very definite, and it will be sufficient to say here that a board of arbitration empowered to deal with legal rights and to pass finally upon them will in fact be a court, and subject to the rules limiting jurisdiction which are applicable to other courts; but if it is to have author-

plaintiff nor an intention to do the act causing the injury is essential. Judd v. Ballard, 66 Vt. 668. And see Vosburg v. Putney, 80 Wis. 523, 14 L. R. A. 227; Mercer v. Corbin, 117 Ind. 450, 3 L. R. A. 221; Cate v. Cate, 44 N. H. 211.

[1] 1 Bl. Com. 125. Compare Bentham, Const. Code, v. 1, c. 3, sec. 5; Austin, Juris. Lec. XII.

[2] See Burlamaqui, Nat. and Pol. Law, vol. 2, pt. 1, c. 8.

[3] See Butchers' Union, etc. Co. v. Crescent City, etc. Co., 111 U. S. 758.

ity to go further and make awards based on a consideration of what the one party or the other ought in conscience to do, though not by law required, the impossibility of making use of the customary methods of compulsion which are available in the case of judgments must leave their enforcement to a consideration by the parties of their interests respectively, and to such force as may be found in an approving public opinion.

Public wrongs.— Wrongs to the state which are punished as crimes, and wrongs to municipal corporations or to political divisions of the state which are of semi-criminal nature and are subject to some kind of penalty, may be individual wrongs also when the personal injury arising therefrom shall be of a pecuniary nature and something different to that which is suffered by the people at large. In these cases, in addition to the punishment for the public wrong, the wrong-doer may be made to compensate the individual.[1]

Wrongs to aggregate bodies.— Where a number of persons are associated in a legal right, and are wronged in respect to it, the wrong will give only individual rights of action if it only deprives each individual associate of a right personal to himself; as where the several members of a voluntary association are prevented from meeting. But where property is owned in common, an injury to the property is an injury to all jointly. The case of a corporation is special; the corporation is an artificial person, and represents, in seeking redress in its own name, all the stockholders. But a mere voluntary association cannot as such sue or be sued; in legal phrase, it is not known to the law.

Civil liberty.— Civil liberty is to be distinguished from political liberty; the former consisting in that condition in which rights are established and protected by means of such limitations and restraints upon the action of individual members of the political society, and upon the law-making power, as are needed to prevent what would be injurious to other individuals

[1] As, for example, where one may recover damages for an assault. Morgan v. Kendall, 124 Ind. 454, 9 L. R. A. 445, and *note;* Goldsmith v. Joy, 61 Vt. 488, 4 L. R. A. 500; Eltringham v. Earhart, 67 Miss. 488. Or where the property lost by gambling may be recovered. Richardson v. Kelly, 85 Ill. 491. A criminal prosecution does not bar a civil action. Austin v. Carswell, 67 Hun, 579; Heller v. Alvarado, 1 Tex. Civ. App. 409; People v. Walsen (Colo.), 28 Pac. Rep. 1119.

or prejudicial to the general welfare;[1] and the latter being found in an effective participation of the people in the making of the laws. The former may exist when the latter is absent, though it is not likely to be so complete.

Rights in every country have historical growth. They do not come into existence by a single exercise of legislative power. With us they have always rested in the main upon what we call the common law, and upon principles which by a liberal use of fiction we assume to have always constituted a part of that law. The Magna Charta of King John was a guaranty of old principles rather than a new grant. But these principles now depend very largely on a species of judicial legislation which from time to time, as new conditions were found to exist, has endeavored to fit and conform the old law to them.

This term "judicial legislation" seems self-contradictory, for judicial action is one thing and legislation another, and under our government they belong to different departments; so that judicial legislation would seem to be usurped authority. But when rightly understood it will appear to be not only proper in itself, but indispensable. In every controversy brought before him the judge must either find an existing rule that governs the case, or he must withhold decision until the legislature can establish one; and the latter course being intolerable and therefore out of the question, the alternative is the acceptance of the principle that the existing law governs all cases, and that the ruling principle for any existing controversy will be found if sought for. The judge in deciding a case is supposed to have found and applied the principle; and though it may never have been recognized before, the case furnishes an illustration of it, and it will be applied in analogous cases thereafter.[2] But as cases are seldom alike in their facts, and as numerous controversies on differing facts are found to be within reach of the same general principle, the principle seems to grow and expand and does actually become more comprehensive under legitimate

[1] See Cummings v. State, 4 Wall. 277; Ex parte Garland, id. 333; In re Jacobs, 98 N. Y. 98. *Cf.* the varying definitions by Blackstone, 1 Com. 125; Kent, 2 Com. 1; Lieber, Civil Lib. & Self-Gov., ch. III, and Austin, Jurisp., Lec. VI and XLVII.

[2] See, as illustrating these remarks, Sheldon v. Sherman, 42 N. Y. 484, 1 Am. Rep. 569.

judicial treatment. A principle newly applied is not supposed to be a new principle, but one that from time immemorial has constituted a part of the common law, and has only not been applied before because no occasion arose for its application. The supposition rests upon an accepted fiction, for the principle is called into existence by the decision itself; but by this course the growth of the law goes on gradually and safely, and rights are more quietly and expeditiously declared, defined and protected than they could be if every new case were to be made a new occasion for the enactment of a formal law. It is only when there seems to be need for a change in what has been a settled rule of the common law, or for enlarging some remedy the common law had given with defined limits, that the aid of legislation is called for; as in the case of statutes giving redress for causing the death of a human being, statutes extending the liability for accidental injuries, and the like.

The common law is generally said to consist in the established usages of the people, by which their respective rights are recognized and limited, and to which they are expected to conform in their dealings.[1] But as shown above, it embraces the principles which are supposed to underlie the usages, and which justify the judicial development of the law.[2] The growth is so steady and harmonious that the habitual obedience of the people is not disturbed as it would be by violent changes. In this is found the chief value of a common law,—it is not strange to the people, it harmonizes with their habits of thought and action, and they obey it without stopping to question whether there ought not to be some other way. We do not need to qualify this statement if we find, as is sometimes actually the fact, that the rule comes to us from the civil law; it may come as legitimately from that source as from the usages of the Saxon barbarians.[3]

No right without a remedy.— Lord Holt said in the great case of *Ashby v. White:*[4] "It is a vain thing to imagine a right

[1] See Cooley's Const. Lim. 22–24.

[2] As to the application of the rules of the common law in this country, see Forepaugh v. Del., L. & W. R. Co., 128 Pa. St. 217, 5 L. R. A. 508; Reno, etc. Works v. Stevenson, 20 Nev. 269, 4 L. R. A. 60.

[3] See, in illustration of this, Coggs v. Bernard, Ld. Raym. 909, 1 Sm. L. Cas. 369; Sheldon v. Sherman, 42 N. Y. 484, 1 Am. Rep. 569.

[4] Lord Raym. Rep. 938, 1 Sm. L. Cas. 473.

without a remedy, for want of right and want of remedy are reciprocal." The thought conveyed here is that that alone is a legal right which is capable of being legally defended, and that is no legal right the enjoyment of which the law permits any one with impunity to hinder or prevent.[1] The maxim is well illustrated by that case. Electors who had been denied the privilege of voting for members of parliament brought suit against the officer who excluded them. It was the first suit of the kind, so there could be no precedent. But a precedent was not important when it was found that the statute gave them the right: having the right the remedy was of course. It would have been otherwise had the officer been made final judge of their qualifications and decided that they did not possess them, for his decision, even if erroneous, must be conclusively deemed correct.

Cases in which the law forbids the doing of an act under a penalty payable to the state, but provides no compensation to a party injured, may seem exceptions to the maxim, but they are not such in fact; the statute forbids the act in the public interest, and fails to give an individual right by neglecting to give individual redress.

Classification of remedies.—Legal remedies are either preventive or compensatory. In a sense, compensatory remedies are preventive also, since they threaten undesirable consequences to those who commit wrongs, and in aggravated cases they may sometimes go so far as to give to the party injured exemplary damages against the wrong-doer. But the underlying thought is that of compensation adequate to the case. In some cases the law allows a mandatory writ to restrain the commission of a threatened wrong; but as such writs, to be effectual, must issue on summary hearing or on none at all, their general use would be dangerous and is therefore carefully restricted.

[1] The maxim is, *Ubi jus ibi remedium.* See Bradlaugh v. Gassett, L. R. 12 Q. B. 271. See, also, Blair v. Ridgley, 41 Mo. 183. For cases applying this maxim, see Hughes' Technology of Law, 213 et seq. This is a volume to which the student may profitably turn whenever there is a question involving the application of a maxim of the law.

[2] Consult Blair v. Ridgley, 41 Mo. 63.

CHAPTER II.

GENERAL CLASSIFICATION OF LEGAL RIGHTS.

Rights in general.— By a legal right is understood something with which the law invests one person, and in respect to which for his benefit another, and perhaps all others, are required by law to do or perform acts, or to forbear or abstain from acts.[1] Every government, whatever its form, is expected to recognize and protect rights which have for their object: 1. Security in person. 2. Security in the acquisition and enjoyment of property. 3. Security in the family relations. Then, under governments not altogether despotic, there will be political rights which are supposed to be given not specially for the benefit of those possessed of them, but for the general advantage of the political society.

Personal rights.— Under this head may be included the right to life, the right to immunity from assaults and injuries to the person, the right to the benefit of reparation, and the right, equally with others similarly circumstanced, to control one's own actions. Political rights may also be classed under the same head.

The right to life is first and highest of all. In early periods a man was sometimes, for some great crime or contempt of authority, put out of the protection of the law, in so far that he might justifiably be killed if he would not surrender peaceably when taken.[2] Though no similar state of outlawry is now recognized,[3] the killing of one who resists lawful arrest and makes use of deadly weapons in doing so, sometimes becomes excusable. Among the early laws of some people the relatives or friends of one who had been unlawfully slain were given the privilege of private vengeance; but any such privilege is now agreed to be barbarous, and as tending to anarchy rather than

[1] Austin, Juris., Lec. XVI. See, also, Lec. VI.

[2] 1 Bl. Com. 178, 319. See Reeves' Hist. Eng. Law, ch. VIII, sec. 4.

[3] See Dale Co. v. Gunter, 46 Ala. 118.

to governmental order. The duty to punish unlawful killing is now left exclusively to the political sovereignty.

The common law made no provision for compensation to parties having an interest in the life of a person when they were deprived of the advantage to be expected therefrom by his life being unlawfully or negligently taken.[1] The private injury was deemed to be swallowed up or drowned in the public injury; but this doctrine has not been fully accepted in this country, the merger of private wrongs in public wrongs not being recognized; and in England it was greatly changed by Lord Campbell's Act,[2] which gave an action for the benefit of the surviving husband or wife, parent or child of the person whose death should be occasioned by the wrongful act, neglect or default of another, and allowed the value of the life to be assessed by way of compensation. In its main features this act has been generally adopted in this country.[3]

Personal immunity.— The right to one's person may be said to be a right to complete immunity; to be let alone. An attempt to commit a battery usually involves an insult, a putting in fear, a sudden call upon the energies for prompt and effectual resistance; and the law for these reasons makes the assault a wrong even though no actual battery takes place. But a mere threat to commit an injury, though sometimes made criminal, as an assault also is, is not an actionable private wrong.[4] The maxim applicable here is that mere words do not constitute an assault.[5] There may, however, be preventive remedies in some cases of threats; such as securities to keep the peace, or injunctions, according to the nature of the threatened injury.

Right to reputation.— The law gives to every person a right to security in his reputation. Every false charge or insinuation which is made in malice and causes damage by its effect upon the standing or reputation of another is actionable. And when action is brought, the burden of proof, after publication is shown, is likely to be thrown upon the defendant by certain

[1] Higgins v. Butcher, 1 Brownl. 205, Yelv. 89. And see Grosso v. Del., L. & W. R. Co., 50 N. J. L. 317.

[2] 9 & 10 Vic., ch. 93.

[3] See *infra*, ch. VIII, Family Relations.

[4] See Heywood v. Tillson, 75 Me. 225.

[5] And it is immaterial how gross and abusive they may be. Willey v. Carpenter, 64 Vt. 212; Tatnall v. Courtney, 6 Houst. 434.

legal presumptions. Thus: *First*, every man is presumed to be of good repute until the contrary is shown; *second*, a derogatory charge or insinuation made against him is presumed to be false; *third*, being false, it is presumed to be maliciously made; *fourth*, if its natural and legitimate effect is to cause damage, then it is presumed to have done so in this instance. But if the case is one in which injury does not necessarily follow the charge, the plaintiff will be required to allege and prove it.[1]

A person may sometimes have a bad reputation which is not deserved, and when that is the case he is entitled to overcome it, and is injured when obstacles are interposed, though they consist merely in a repetition of the charges which have made his reputation what it is. And a person with a bad reputation may be wronged if that is said of him which is untrue; as, for instance, when it is charged that he is a thief, when at the worst he is but a vagabond. But no one is wronged when an undeserved good reputation is destroyed by exposure.[2]

But sometimes on grounds of public policy, when the publication of an offensive truth could be of no benefit to any one, but on the contrary would tend in the direction of immorality, disorder or violence, it may become a public offense even when its truth would be a defense to a private action. In respect to such cases it is not infrequently said that "the greater the truth the greater the libel," because the evil results which the criminal law seeks to prevent are in that case more likely to follow.

Civil rights in general.— These may be summed up as consisting in the right to exemption from any restraint that has in view no beneficial purpose, and the right to participate without unjust discrimination in all the advantages of organized society. If enumeration were to be entered upon, among the first to be named would be religious liberty, which, if complete, would consist in a right freely to worship the Supreme Being in the manner indicated by the individual belief and conscience, and to be exempt from exactions in support of the worship of others. Where a state church exists, the religious liberty is to some extent qualified, and is more properly called religious toleration.

[1] See Broughton v. McGrew, 39 Ind. Rep. 672, 5 L. R. A. 403.

[2] See McPherson v. Daniels, 10 B. & C. 272.

Religious liberty is always subject to regulation by law to prevent its becoming a public offense. It cannot be allowed to embrace those things which the moral sense or sense of decency of the general public condemns, and which therefore cannot be allowed without injury to the public morals. Opinion must be free, religious error the government should not concern itself with; but no body of men have any claim to protection in practices or ceremonies which the community in general look upon as immoral excess or license, and therefore injurious to the public order. The law will deal with them as public protection may seem to require. The exercise of religious liberty must therefore be subject to reasonable regulations. If every man were at liberty to follow what he might assert to be the dictates of his conscience in religious matters, organized society would be at the mercy of fanatics and pretenders.[1]

Equality of civil rights.— All civil rights are supposed to be equal, though in their enjoyment subject to regulations which are not always the same. An infant or a person *non compos mentis* must bring suits by his guardian, and acquire, control, or dispose of property by like agency. The state commonly provides for the education of its people; but discriminations are not regarded as partial or inadmissible which make instruction free to those only who are between certain specified ages. In regulating what is regarded as the free and equal use of the highways, particular restraints may be made applicable to certain classes only, when the reasons which render them important do not embrace others. At the common law the rights of married women were much restricted on grounds in this age deemed untenable; they are greatly enlarged now, though not made exactly the same with those of the husband. Particular discriminations may sometimes operate unjustly though the intent is otherwise. But on the other hand, to recognize precisely the same rights and privileges in all classes would often work not only injustice but inequality; as, for instance, if infants were allowed complete management of their own affairs.[2]

[1] See Reynolds v. United States, 98 U. S. 145; Guiteau's Case, 10 Fed. Rep. 161, 175.

[2] See Crowley v. Christensen, 137 U. S. 86; Louisville, etc. Trust Co. v. L. & N. R. Co., 92 Ky. 233, 14 L. R. A. 579, and *note*.

Political rights. — Participation in the government is a privilege conferred as an act of sovereignty on those whose participation it is supposed will be most beneficial to the state.[1] Discriminations made by law must, therefore, while they continue, be acquiesced in, whatever may be thought of their justice; as where they are made to depend on the possession of property, or on ability to read and write.[2] But those on whom the privilege is conferred have for the time a legal right;[3] a right which for the purposes of defense may be deemed to have a money value, so that an action for the recovery of damages will lie for being deprived of its enjoyment. The same is true of the right to a public office when it has become fixed by legal appointment or election. The privilege of petition and that of the discussion of public affairs are general, and need such protection only as is given by the laws which have in view the preservation of public order.

Family rights. — The husband by the common law is entitled to the society and services of the wife. A duty is incumbent on him to comfort, cherish and support her, but the common law leaves this a duty of imperfect obligation, since it provides no remedy for a failure in its observance.[4] Statutes in some states have given the wife an action against any person who shall be the cause of a loss to her in these particulars by selling or giving to the husband intoxicating drinks.[5] And even at the common law his support of her might by indirection be compelled, since she was supposed to have at her command his credit for the purchase of necessaries when he failed, without cause chargeable to her misconduct, to supply them.[6]

The father, or the mother if the father be not living, is entitled to the custody and services of a child during the period

[1] Minor v. Happersett, 21 Wall. 162; Spragins v. Houghton, 3 Ill. 377, 396; State v. Staten, 6 Cold. 233; Frieszleben v. Shallcross (Del.), 8 L. R. A. 337; Coffin v. Thompson, 97 Mich. 188, 21 L. R. A. 662; State, Lamar v. Dillon, 32 Fla. 545, 22 L. R. A. 124.

[2] See Pearson v. Board of Sup'rs (Va.), 21 S. E. Rep. 483.

[3] See White v. Com'rs of Multnomah Co., 13 Oreg. 317, 57 Am. Rep. 20. And see State ex rel. Allison v. Blake (N. J.), 25 L. R. A. 480.

[4] 2 Kent, 182; Reeve, Dom. Rel. 110. And see *infra*, ch. VIII, Family Relations.

[5] See *infra*, ch. VIII.

[6] See Harrison v. Grady, 13 L. T. (N. S.) 369.

of minority,[1] subject to a controlling authority in the state,[2] to be exercised for the good of the child in the matter of education and for protection against being employed in unsuitable occupations or places, etc., or in tasks for which his age unfits him.[3]

It is the duty of the parent to support his child, but this again is a duty of imperfect obligation, since the child himself is given no remedy for its enforcement. The state provides remedies in its own interest to prevent the child becoming a public charge, and these are commonly not restricted to the period of minority.[4]

It is the duty of the parent to protect his child against the wrongful violence of others, and he may make use of violence for the purpose as he may in defense of his own person. But the law does not undertake to give to the child a remedy against the parent for non-performance of this duty; he will have as against a wrong-doer the same means of redress as would be available to others.[5]

The general authority which the owner of property has to dispose of it by testamentary gift, subject to the legal claims of creditors, and to the dower right of a surviving wife, if there be one, is sometimes limited by statute, on considerations of public policy, for the benefit of those who, if he died intestate, would succeed to interests therein. But such statutes are not enacted in recognition of individual rights.

The right to enter into the family relation is general, but subject to statutory regulation. The legal idea is that every one has a right to marry who obtains the consent of a person of the opposite sex, having a like right, provided both have the capacity and qualifications prescribed by law, and observe all the legal conditions.

[1] The parent may surrender this right by emancipating his child; giving him his time, as it is often called. No formal agreement is requisite. See Johnson v. Terry, 34 Conn. 259; Everett v. Sherfey, 1 Iowa, 356; Bray v. Wheeler, 29 Vt. 514; West Gardiner v. Manchester, 72 Me. 509; Cloud v. Hamilton, 11 Humph. 104, 53 Am. Dec. 778.

[2] Which will regard, first of all, the welfare of the child. Sheers v. Stein, 75 Wis. 44, 5 L. R. A. 781, and *note;* Green v. Campbell, 35 W. Va. 698, 34 Cent. L. J. 216, and *note.*

[3] See People v. Ewer, 141 N. Y. 129.

[4] See State v. Kerby, 110 N. C. 558; State v. Sutcliffe (R. I.), 25 Atl. Rep. 654.

[5] Rogers v. Smith, 17 Ind. 323, 79 Am. Dec. 483.

Other relations, such as that of master and servant,[1] which is one of contract; master and apprentice, which also comes from contract, with the state prescribing or consenting to the terms and sometimes itself a party; guardian and ward, which is usually, but not always, of judicial creation,—are not strictly family relations; that term embracing only those formed in marriage and the others which spring therefrom. An adopted child may, under the statutes of some states, if the forms required by them are observed, take the place of a child by birth in the family, with rights of succession to property on the adopting parents' death.[2] The child born out of matrimony has at the common law no claim whatever upon a parent.[3] But it is provided by statute in some states that the marriage of the parents, and their recognition of the child as their own, shall legitimate him.[4]

The family as such has no legal rights. Parents and children have individual rights as such, but the act which destroys the family or takes away any of its component parts is not in law a family wrong, but only a wrong to individual members of the family. In particular cases we may sometimes think it ought to be otherwise; but it is probably true that in the vast majority of cases the natural impulses and affections have more influence in securing the observance of moral obligations in the family relations than the law could exercise or possess.

[1] See *infra*, ch. XVIII.

[2] While in some states the adopted child has all the rights of a child by birth (see *Re* Newman, 75 Cal. 213, 7 Am. St. Rep. 146; Markover v. Krauss, 132 Ind. 294, 17 L. R. A. 806; Sewall v. Roberts, 115 Mass. 262), in others distinctions are made, especially regarding inheritance (see Keegan v. Geraghty, 101 Ill. 26; Helms v. Elliott, 89 Tenn. 446, 10 L. R. A. 535). If one receives stepchildren into his family, they are, while they remain there, in the position of children in so far that they cannot claim compensation for services nor be required to pay for support. Smith v. Rogers, 24 Kan. 140, 36 Am. Rep. 254.

[3] Simmons v. Bull, 21 Ala. 501, 56 Am. Dec. 257.

[4] See Morgan v. Perry, 51 N. H. 559; Hawbecker v. Hawbecker, 43 Md. 516. Some of the present statutes on this subject are very liberal in their provisions. See Blythe v. Ayres, 96 Cal. 532, 19 L. R. A. 40. And the provisions of the code are liberally construed. *Re* Jessup's Estate, 81 Cal. 408, 6 L. R. A. 594. A child legitimated in one state is legitimate, and may inherit lands, in another. Dayton v. Adkisson, 45 N. J. Eq. 603, 4 L. R. A. 488; Miller v. Miller, 91 N. Y. 320; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505; Stoltz v. Deering, 112 Ill. 234; Scott v. Key, 11 La. Ann. 232. But see Lingen v. Lingen, 45 Ala. 410; Smith v. Derr, 34 Pa. St. 126, 75 Am. Dec. 641.

Taking away rights.— All the rights here enumerated are subject to be taken away by an act of sovereignty accomplished under legal forms. This is sometimes done by way of punishment; and sometimes, in doing justice to others, moral obligations are varied in their demands or methods of performance, if not defeated altogether. An illustration is seen in the effect of a divorce upon the relations of parents to their children. Rights spoken of as statutory may be taken away by statute. One who commits an assault upon another, to a certain extent puts himself out of the protection of the law, for the assaulted party may defend himself with whatever degree of violence may seem necessary.[1] And whoever engages in an illegal act, and thereby exposes himself to injury, may be said to waive his right to redress therefor. A person cannot make his own illegal action the foundation for a legal right: if he invites what comes upon him he must accept it.[2]

[1] Woolsey, Pol. Science, § 18. And see *infra*, ch. VI.

[2] Broom, Legal Maxims, 571.

CHAPTER III.

THE REMEDIES FOR CIVIL INJURIES.

It is a legal presumption that every one subject to the law will obey its requirements and respect the rights of others. The state does not therefore, in general, give to its people preventive remedies in anticipation of positive wrongs of a civil nature: they are given in a few cases only in which the injury resulting from a wrong might be incapable of adequate redress after its commission. Jurisdiction for this purpose is in the courts of equity, but public policy requires that it be carefully restricted to prevent abuse.

Redress by a party's own act.— In a few cases a party is allowed to redress his own wrong without an appeal to the law. Where by the act or wrongful neglect of another a nuisance exists to his prejudice, whether it injures him alone or is one that is a nuisance to the public generally, but in some peculiar manner injurious to him, he may of his own volition proceed to abate or remove it.[1] The blocking or encroaching upon a highway is a public nuisance,[2] and the public authorities should be prompt in abating it; but one who has occasion to make use of the way need not await their action, but may himself lawfully remove that in which the nuisance consists.[3] But if he seeks compensation for the personal wrong he must resort to suit at law.

The right to abate should be so exercised as not to cause a breach of the public peace;[4] and when this is impracticable the law should be appealed to. In general, before there is a resort to force, the party responsible for the nuisance should be notified and requested to remove it; but in strictness this is not necessary when the facts are such that he must be deemed to have knowledge of its existence, and it is not due to mere

[1] Pierce v. Dart, 7 Cow. 609; State v. Moffett, 1 Greene (Iowa), 247.

[2] See State v. Berdetta, 73 Ind. 185, 188.

[3] Lincoln v. Chadbourne, 53 Me. 197; Reed v. Cheney, 111 Ind. 387. See *infra*, ch. XIX, Nuisances.

[4] Baldwin v. Smith, 82 Ill. 162.

neglect under circumstances which furnish grounds of excuse.[1] And in any case of great urgency a failure to give notice may be justifiable.[2] In abating a nuisance destruction of property must not be carried beyond the necessity: for any excess the abator will be liable.[3] A building is not to be destroyed because of its being improperly occupied, the nuisance being in the occupancy and not in the building itself.[4]

Self-defense, or defense of one standing to the party in the relation of husband or wife, parent or child, guardian or ward, master or servant, is also a legal right, but must be carefully restricted to the necessity. Defense of property may also be made under the like restriction.

One from whom personal property is without right taken or detained, or who is deprived of the custody of a person lawfully in his charge, may by his own act have recaption or reprisal,[5] but must exercise the right in strict subordination to the public peace.[6] If the party in possession obtained it by wrongful act of either himself or another, or if a lawful right in himself has by law been terminated, entry upon his premises by the party now entitled for the purpose of enforcing his own right, if not forbidden or restricted, would be justifiable; though if one leave his property upon the land of another without permission, he will be a trespasser if he enters to retake it. If a wrong-doer shall take the property of another and so mix it with his own that separation shall be impracticable, the person whose property is thus commingled may at his option take the whole[7] or abandon his own and sue for its value. But this forfeiture of property by the wrong-doer, which would be in the nature of a penalty, will not be recognized if what is thus commingled is so far of the same general nature that justice can be done by dividing it between the parties according to

[1] Earl of Lonsdale v. Nelson, 2 B. & C. 302.

[2] Penruddock's Case, 5 Rep. 101.

[3] Brightman v. Bristol, 65 Me. 426.

[4] Welch v. Stowell, 2 Doug. (Mich.) 332; Miller v. Burch, 32 Tex. 208, 5 Am. Rep. 242.

[5] Though the property has been temporarily taken out of his sight. State v. Dooley, 121 Mo. 591.

[6] 3 Cooley's Black. 4; Sterling v. Warden, 51 N. H. 217, 12 Am. Rep. 80.

[7] But the rule will not apply unless the intermingling is with improper motive. Claflin v. Cont. Jersey Works, 85 Ga. 27.

their respective proportions.[1] The law does not favor penalties by way of giving redress for civil injuries.

If one shall wrongfully take the property of another, and by expending labor or money upon it shall convert it into something of greater value,[2] the original owner, if he can still distinguish his property, shall be deemed to have acquired a right to it in its improved condition, and this is called a right by accession. But if the taking was by mistake, or otherwise in good faith, or if it is impossible to reclaim the property without inflicting injury out of proportion to its value, as where a board or stone is built into a house, the owner will be left to his action for damages.[3]

If one is wrongfully in possession of the real estate of another, the latter, if he can do so peaceably, may re-enter and exclude the wrong-doer therefrom. The principle applies even when the wrong-doer had lawful possession originally, if the right has terminated.[4]

If the domestic animals of one person stray upon the lands of another, thereby causing him damage, the party injured may restrain and hold them for the purposes of redress. But the animals must be taken while actually trespassing,[5] and redress is obtained by impounding them and retaining them in custody until satisfaction is made. This right, though given by the common law, is now commonly regulated by statute,[6] and enforcement must be made accordingly.[7] Statutory provisions for the fencing of lands by the owners may also affect it, and even under some circumstances take it away altogether.[8] A party entitled to distrain may at his option bring suit for damages instead.

[1] Starke v. Paine, 85 Wis. 633; Reid v. King, 89 Ky. 388; Reiss v. Hanchett, 141 Ill. 419. This is so even though the intermixing was fraudulent. Claflin v. Beaver, 55 Fed. Rep. 576.

[2] As where trees have been converted into shingles, or into railroad ties. See Church v. Lee, 5 Johns. 348; Strubbee v. Trustees, 78 Ky. 481.

[3] See Baker v. Mersch, 29 Neb. 227.

[4] See Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442; Allen v. Keily, 17 R. I. 731, 16 L. R. A. 798.

[5] Buist v. McCombe, 8 Ont. App. 598.

[6] See Bulpit v. Matthews, 145 Ill. 345, 22 L. R. A. 55.

[7] Jones v. Dashner, 89 Mich. 246; Irwin v. Mattox, 138 Pa. St. 466.

[8] See Lee Co. v. Yarbrough, 85 Ala. 590; Lazarus v. Phelps, 152 U. S. 81.

Distress of goods might at the common law be made to compel the payment of rent, and it might extend even to property of third persons in the tenant's possession with the owner's permission, provided they were not there in the way of trade, as articles left with a mechanic for repair would be.[1] But this right of distress is very generally taken away by statute, or greatly restricted to prevent oppression.[2]

Nature of redress by law.— Passing to the cases in which resort must be had to the law for redress, it will be found that though possession of property wrongfully taken may be specifically recovered where this is found to be practicable, the chief remedy given by the law for a wrong is an award of money estimated as an equivalent for the damage suffered.

How one becomes a wrong-doer.— One may become liable in an action as for tort either —

1. By actually doing to the prejudice of another something he has no legal right to do.

2. By doing something he may rightfully do, but wrongfully or negligently doing it by such means, or at such time, or in such manner, that another is injured.

3. By neglecting to do something which he ought to do whereby another suffers an injury.

The active wrong may be done by the party in person or by some other person for whose conduct generally or under the particular circumstances he is responsible. One is always responsible for conduct which he counsels, advises or directs. The husband is civilly responsible for the conduct of his wife; and though they must be joined in a suit, a judgment, if one is recovered, may be collected from him. The master is liable for wrongs negligently committed by those to whom he has intrusted his business, while they are engaged in doing it, and for such frauds and deceits as are committed in the service with his actual or presumed authority. The plaintiff in a suit may be liable for false arrest, and so may all concerned in it, including the magistrate, if the writ was fatally defective.

[1] See Hessel v. Johnson, 129 Pa. St. 173, 5 L. R. A. 851; Brown v. Stackhouse, 155 Pa. St. 582.

[2] Bischoff v. Trenholm, 36 S. C. 75; Howdyshell v. Gary, 21 Ill. App. 288; Dawson v. Watson, 6 Houst. 30.

But any degree of preparation for a tort cannot of itself give a right of action.[1]

Elements of a tort.— To constitute a tort there must be something wrongful with damage as a consequence. But the damage in many cases is implied or presumed, and perhaps would not be susceptible of proof. A libel might illustrate this: One of a peculiarly atrocious nature might damage the party publishing it without harming the intended victim. In many trespasses on land there is no real injury, but damages will be assessed with some regard to the motive in committing the unlawful act. The owner's right has been invaded, and the responsibility to respond therefor in pecuniary damages is what he must rely upon for protection against like wrongs in the future. The maxim *de minimis non curat lex*, which is sometimes applied when one demands that which is insufficient for the mere purposes of vexation, is out of place when the invasion of a substantial right is in question:[2] otherwise the right itself might in some cases be destroyed with impunity, since not only would persons of evil disposition and persons merely careless of the rights of others be likely, in their own action, to disregard it when proof of damage was supposed to be unattainable, but reiterated invasions might in time raise a presumption of an adverse right.[3]

But when that which is done is not in itself wrongful, no tort is made out until actual damage is shown. It is the actual damage that in such cases makes the act done, or the neglect to act, a thing amiss. And the damage must be a proximate sequence; for the law refers the injury to the immediate, and not to the remote, cause.[4] If, therefore, an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which the injury followed as a direct and immediate consequence, the law will refer the damages to the last or proximate cause and decline any attempt to trace it to that which was more remote.

To recapitulate briefly:

1. In the case of any distinct legal wrong which in itself constitutes an invasion of the right of another, the law pre-

[1] See Fanning v. Chace, 17 R. I. 388, 13 L. R. A. 134.

[2] See Andrews' Stephen's Pl. 30.

[3] Rochdale Canal Co. v. King, 14 Q. B. 134.

[4] Broom's Maxims, 165.

sumes that some damage follows as a natural, necessary and proximate result, and the wrong itself fixes a right of action.

2. Where an act or omission complained of is not in itself a distinct wrong, and can only become such to any particular individual through some injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events and as a proximate result of a sufficient cause.

3. If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which are innocent. But if the wrongful act only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote.

The leading case in illustration is *Scott v. Shepherd.*[1] Defendant threw a lighted squib into a crowd of people, one after another of whom, in self-protection, threw it from him until it exploded in the plaintiff's face and blinded him. Here was but a single wrong and the defendant the only wrong-doer. Like to this is the case of the wholesale dealer who carelessly labels a poison with the name of a harmless medicine; it passes through the hands of retail dealers until it reaches one who, relying upon the label, takes it and is injured. Here also is a single wrong and a single wrong-doer.[2] If one negligently starts a fire which spreads from building to building, the injury to the last of these is attributable to the original act and not considered as resulting from the burning of the building nearest it. The wrongful fire was, as a cause, from first to last, a unity.[3] But when a master discharges a servant in violation of his own contract because the servant is slandered by a third person, the consequent injury is to be imputed to the wrongful

[1] 3 Wils. 403, 4 Sm. L. C. 796.

[2] Thomas v. Winchester, 6 N. Y. 397.

[3] This is the weight of authority, though cases in New York and Pennsylvania based on considerations

discharge and not to the slander which remotely instigated or caused it.[1] If an injury results through the intervention of a secondary cause, a question of fact is presented, whether the original wrong-doer should have anticipated it as likely to follow as a consequence of his own action; as where one descends with a balloon upon private grounds and is followed by a crowd of people, to the damage of crops.[2]

4. If damage results directly from concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally, for the injury; as where two persons, though acting separately, so block up a street that one is injured in trying to pass. But when acts or neglects are not concurrent in time, and the party last in fault was chargeable with some duty to the other, which if performed would have prevented the injury, the neglect to perform it will be regarded as the proximate cause and the law will look no farther.[3]

Damnum absque injuria.— Where damage results from pure accident, and without fault on the part of the person to whom it is attributable, no action will lie, for though there is damage there is no concurring wrong. The same is true where, through the lawful and proper exercise of one's own rights, a damage results to another, even though he might have anticipated the result and avoided it. And the absence of a commendable motive is in a legal sense unimportant.[4]

Crimes and torts distinguished.— Acts or omissions are punished as public offenses either because their inherent qualities and necessary tendencies make them prejudicial to organized society, or because it is believed that the evils likely to flow from them will be so serious that the general good will be subserved by forbidding them. The punishments imposed are prescribed on public grounds.[5] It is not to be understood, however, that when conduct is not by the law made a public

which hardly seem to have logical force are the other way. See Ryan v. N. Y. Cent. R. R. Co., 35 N. Y. 210; Penn. R. R. Co. v. Kerr, 62 Pa. St. 353.

[1] Vicars v. Wilcocks, 8 East, 1.

[2] Guille v. Swan, 19 Johns. 381. See Fairbanks v. Kerr, 70 Pa. St. 386.

[3] Bartlett v. Boston Gaslight Co., 117 Mass. 533.

[4] Stevenson v. Newnham, 13 C. B. 285. See Chasemore v. Richards, 7 H. L. Cas. 349; Hughes, Tech. of Law, 34.

[5] 4 Cooley's Black. 5.

offense, the political society is indifferent to it; if it wrongs a single individual the law will in some proper form take notice of it. But if the injurious consequences are limited to one or more persons, it is sufficient in general to provide for them the proper means for individual redress, and leave them to demand it or not at their option. And this means of redress is demandable even in case of public offenses where individuals suffer special and particular injury therefrom, as in the case of a criminal battery, or the keeping of a savage beast with such criminal negligence that he attacks and rends one passing along the street. There is no clear and definite distinction between a public offense and a civil injury, except that which is made by the law itself in the steps to be taken against the party responsible for it. These, in the case of a public offense, are to be taken by the state itself or its proper representative, and in the case of a civil injury are left to the option of the party wronged, who may, if he be so inclined, pardon or overlook the wrong he has suffered. But when the same act or omission constitutes both a private injury and a public offense, the refusal or neglect to demand redress for the one will not preclude a prosecution for the other. The individual cannot pardon the wrong in so far as the law has made provision for dealing with it as a public injury.

In the case of a public offense the most common ingredient is an evil intent, but there are many cases in which gross recklessness or negligence may be the equivalent;[1] as where one injures the person of another while indulging in rough and dangerous sports from which such a consequence might reasonably have been anticipated, or shoots recklessly into a crowd, or drives a horse furiously through a crowded thoroughfare, and in either case inflicts an injury which if intended would be dealt with as a crime.[2] And an evil motive may not be a necessary element in a public offense if the party responsible was at the time acting unlawfully; as, if one while committing a trespass should accidentally kill the person trespassed upon,[3] or one having the custody of a dependent person and chargeable with the duty of protection against dangerous exposure,

[1] Cin., I., St. L. & C. R. Co. v. Cooper, 120 Ind. 469, 6 L. R. A. 241.

[2] Vosburg v. Putney, 80 Wis. 523, 14 L. R. A. 227.

[3] See Flinn v. State, 24 Ind. 286.

should neglect that duty to a degree that death in consequence should have been expected to result, as in fact it did, in either case there would be criminal manslaughter. But the mere failure to observe ordinary care will not in general be punished as a crime even though serious injury results: the negligence must be so gross in its nature as to be equivalent to recklessness.

In England, when on the same state of facts a wrong-doer would be criminally responsible as for a felony, and also liable as for a tort to a person specially injured, the latter is expected to institute prosecution for the crime, and the private remedy is suspended until public justice is satisfied.[1] But that rule does not prevail in this country; either the private suit or the public prosecution may be first instituted, or both may be begun and carried on simultaneously.

In the case of offenses of a particularly atrocious character there may be injuries to individuals for which redress as for a civil wrong will not be given, because they are of the same nature as those suffered by the community at large though greater in degree. Thus a burglary may be such in its circumstances as to beget a feeling of insecurity in a whole neighborhood and subject all the people to the expense of unusual precautions, but only the immediate sufferer from the crime could maintain a personal action. A candidate for a public office might lose his election by an elector being prevented by criminal means from depositing his ballot, but the elector alone would be entitled to maintain a private action; the injury to the candidate would be part only of that suffered by the whole organized society. But it is no objection to private redress in the case of public wrongs that many may be injured by the same criminal act or omission, provided the injury to each is distinct and individual; the test is not the number injured but the special and personal character of the injury. The case of obstruction to a public highway may be an illustration; it is a public offense for which individual actions will not in general lie, but they may nevertheless be maintained by all such as have occasion to make use of the way and are prevented

[1] It would seem from remarks of the court in some late cases that this doctrine is not looked upon with favor. See Midland Ins. Co. v. Smith, L. R. 6 Q. B. D. 561; Ex parte Ball, L. R. 10 Ch. D. 667.

from doing so, or obstructed to an extent that results in direct individual injury.[1]

Contracts and torts.— The rule is general that where contract relations exist the parties assume towards each other no duties whatever but those which the contract imposes, and if there shall be a breach of duty it will consist in a mere breach of contract. But there are exceptional cases. The contract may have been brought about by such falsehood and fraud as would warrant the defrauded party in repudiating it; and in such a case, if the entering into the contract could preclude a suit for the tort of which the deceived party had been made the victim, the wrong-doer would in law gain an advantage from his own misconduct. The answer to his claim that the case is one of contract is that the tort is indeed connected with the contract, but only as it enabled the wrong-doer to bring the party wronged into it. Then in certain relations duties are imposed a breach of which is regarded as a tort, though the relations themselves are formed by contract, and the contract may cover the same ground. Thus the general duties of a common carrier are prescribed by law, and a failure in performance is a tort, though there is in every case of the delivery of property for carriers an express or implied contract covering the terms. The case is similar as between the innkeeper and his guest, as regards the goods the one intrusts to the other for keeping, and between the professional man and his patient or his client, as to whom the relation itself imposes the duty of integrity and fidelity in respect to all dealings which come within it. A failure in these particulars is in itself a distinct wrong, and the right to compensation for the tortious injury is neither dependent upon the existence of a specific contract nor subject to be defeated by proof that such a contract exists. So an agent employed to make a collection, though the matter of employment is one of contract, is guilty of a tortious wrong if he neglects, after collection, to pay over.[2]

In some cases a party may treat that which is purely a tort as having created a contract between himself and the wrong-doer, and he may then waive the tort and pursue his remedy as for a breach of the supposed contract. Thus, if one with-

[1] Henly v. Lyme Regis, 5 Bing. 91, 2 Cl. & F. 331. And, as illustrating these propositions, see *infra*, ch. XX.

[2] See Andrews' Steph. Pl., ch. II.

out authority sell the property of another, the owner, instead of reclaiming the property or suing the wrong-doer in some form of action for the tort, may sue for the purchase-price received, or for the value, as on sale made by himself to the wrong-doer. In either case he makes valid the sale which originally was tortious, waiving the tort in doing so. Of this the wrong-doer cannot complain, since it cannot possibly place him in any worse position than that in which he has placed himself. In any case in which one has come into possession of money belonging to another, and neglects or refuses to pay over, the contract relation may in like manner be assumed and relied upon in seeking redress. There are cases holding that where one's property is wrongfully taken but not converted into money, the tort cannot be waived and *assumpsit* brought for the value; though it would seem that if the wrong-doer has exchanged it for other property, or in any manner converted it to his own use, the ruling should be otherwise; and so other well-considered cases have held. There are naked wrongs, however, in which the fiction of contract could not be indulged, since it would be a manifest absurdity; the case of a battery, for example, and the case of one turning his beasts into the growing crops of another to trample and destroy them, without himself deriving benefit therefrom.

Torts by relation.— The right of action for a tort accrues when the injury is suffered, and belongs to the party then entitled. But there are cases in which one may sue though his right did not accrue until after the wrong was done, as in the case of a wrongful intermeddling with the goods of a trader intermediate an act of bankruptcy and the appointment of an assignee; here the assignee may sue, his title relating back and covering the intermediate period.[1] So one who purchases land on execution subject to a right of redemption may, after his title is perfected, sue for an act of waste committed upon it after the purchase but before the conveyance. The title of the personal representative of a deceased party relates back in the same way for the purposes of redress for legal wrongs suffered by the decedent.[2]

[1] In England, in such a case, trover may be brought. Balme v. Hutton, 9 Bing. 471. But not trespass. Smith v. Milles, 1 T. R. 475.

[2] See Brackett v. Hoitt. 20 N. H. 257.

CHAPTER IV.

LEGAL RESPONSIBILITY FOR TORTS.

The rules of legal responsibility upon contracts differ greatly from those which apply in the case of torts. A contract is not of binding force unless the party entering into it has the legal capacity to contract; he must be of the proper legal age and of sound mind; the law requires this as being needful for the protection of those who presumably are lacking in the ability and capacity fully to protect themselves. And in its nature the contract must not be immoral or otherwise opposed to public policy. If a contract is not of binding force there can be no liability for breaking or repudiating it.

Criminal responsibility also differs greatly from the responsibility for torts. Before reaching the age of seven a child is supposed to be incapable of a criminal intent; between the age of seven and fourteen the case is open to proof of actual capacity and actual malice. Idiots and insane persons have no criminal capacity; and though they may be deprived of their liberty for the protection of themselves and of the public, acts which in the case of competent persons would be crimes are in their cases not punished. Criminal punishments are awarded from a standpoint of public interest, for example and for warning; to punish the incompetent would be to give examples of public brutality.

The question of responsibility for civil injuries is to be considered from a different standpoint. A right has been invaded and injury has resulted from the invasion. The party wronged should in justice be compensated for this injury; and if the party who inflicts the injury is wanting in mental capacity, the reason for compensation is still present, though it cannot go to the extent, as it may in some other cases, of calling for exemplary damages because of the evil intent with which the wrong was done. Strict justice demands adequate compensation, but it calls for nothing more. The injury done is in the nature of a misfortune rather than of a fault; but the conse-

quences fall more justly upon the estate of the incompetent person than upon any third person. And this is equally true where the injury suffered is inflicted by a young child.

The rule of liability in these cases is settled on grounds of general public policy, and among the considerations which have influenced its establishment is this: that the incompetent or immature person, if possessed of means which will enable him to make good the injury inflicted by him, will commonly be so related to others that they will be expected, not merely on grounds of moral obligation but of personal interest, to take the necessary steps for placing and keeping him under proper guardianship or control. In the case of a child under the age of majority, the parental authority is supposed to be ample for the purpose; and in the case of incompetents, the right of control is at first in the members of the immediate family, and when the necessity for the legal appointment of a guardian becomes obvious, they will be expected to take steps to secure the appointment. But another consideration is not without force. The distinction between insanity and the cunning of malice is not always sufficiently clear for ready detection; it is believed that persons sometimes escape criminal punishment for lawless conduct who are abnormal only in the violence of ungovernable passion and depravity, and who calculated upon protection under the false plea of insanity when they gave to their passions a free rein. And on the other hand, juries are urged on and impelled by public excitement and clamor to find in the freaks of delusion the evidences of criminal intent and depravity to convict, and give over to punishment, those who are deserving of their compassion only. The evils attendant upon the trials of such an issue are always serious, and it seems the better rule to exclude them in trials for civil wrongs by limiting the injury to the question of just compensation.

Mental incompetency may, nevertheless, in some cases, not only have an important bearing, but even go to the very foundation of the action itself. This will be the case whenever malice is an element essential to injury, so that in its absence there is in law no wrong. Personal abuse by an insane person may furnish an illustration; there can be no legal malice in one who is incapable of harboring an intent; moreover, the ravings of a madman no one would heed unless for the purposes of re-

straint, so that their object could not be injured by them. But the question of capacity may have importance in other cases if exemplary damages are claimed; these are to be excluded when the impossibility of an evil intent is made apparent.

Torts by infants.— As to infants the rule is commonly said to be that an infant is responsible as any other person would be on the same facts.[1] He is liable for a tort committed by another person through his procurement.[2] The infancy is unimportant except as it may bear upon the question of damages. But there are exceptions. If malice is a necessary ingredient in the wrong, he may or may not be liable, according as his age and capacity may justify imputing malice to him or preclude the idea of his indulging in it. It might be absurd to impute to a child five years of age malice in repeating a slanderous story, and equally absurd to excuse a youth of twenty, who, from evident malice or in mere recklessness, should give it further currency. No precise age can be named as that to which legal responsibility for torts should attach; the infant should be held responsible if he has arrived at an age and a maturity of mind which would render him morally responsible for the consequences of intentional action. But he is never to be held liable for any tort involving an element which in his particular case must be wanting.

The fact of infancy may also be of much importance when want of care is imputed to him as the cause of injury to another. One who has dealings with a child under circumstances calling for special vigilance or care may, in his own action, be justly chargeable with a higher degree of caution and circumspection than when dealing with a person of full age; that may be recklessness in a man which would be ordinary playfulness or pardonable inattention in a child; and it is but reasonable that one whose interests may suffer from the negligence of a child should shape his own conduct with that regard to this general fact which would be expected from a sensible and prudent person.

It is no defense for an infant that the wrongful act was committed on the advice or command of another, even though that other be his parent or guardian.[3] And his infancy does not

[1] Infancy is no defense to an action for seduction. Fry v. Leslie, 87 Va. 269.

[2] Sikes v. Johnson, 16 Mass. 389.

[3] Scott v. Watson, 46 Me. 362, 74 Am. Dec. 457.

excuse him from any duty incumbent on a proprietor of land to so care for it as to prevent its becoming the means of diminishing or destroying such use of the land of adjoining proprietors as they by law are entitled to.

If, however, the wrong imputed to an infant grows out of contract relations, and the real injury consists in the non-performance of a contract into which the party wronged has entered with the infant, the law will not permit the former to enforce the contract indirectly by counting on the infant's neglect to perform it or omission of duty under it as a tort, though on the same state of facts he would be entitled to recover against a person of full age; for if this could be allowed the infant would be deprived to some extent of the shield of protection which, in matters of contract, the law has placed before him. An illustration is seen in the case of property bailed to an infant, and which he is charged with having improperly used; the real grievance is the failure to observe the terms of the contract, and for a breach of this infancy is a defense.[1] It is a defense also when an infant is charged with having effected a sale by deception and fraud, or with having made a purchase by like means.[2] Where the substantial ground of action rests on promises, the plaintiff cannot, by changing the form of action, render a person liable who would not have been liable if sued directly on his promise.[3] But there are cases which hold that if an infant bailee does some distinct tortious act in respect to the property bailed to him — as if he hire a horse for one service and employ him in another, or hire a horse and subject him to a treatment so cruel as to cause his death — he may be held responsible in the one case as for a conversion[4] and in the other as a trespasser.[5] The doctrine seems to be supported by the weight of authority, but is not universally accepted.[6] And the question whether an infant is liable in tort for falsely representing himself to be of full age, whereby he induces another to enter into a contract with him to the other's prejudice, is one upon which the decided cases

[1] Jennings v. Rundall, 8 T. R. 335.

[2] Gilson v. Spear, 38 Vt. 311, 88 Am. Dec. 659.

[3] Green v. Greenbank, 2 March, 485.

[4] Hall v. Corcoran, 107 Mass. 251, 9 Am. Rep. 30.

[5] Fish v. Ferris, 5 Duer, 49.

[6] See Penrose v. Curren, 3 Rawle, 351, 24 Am. Dec. 356.

are greatly at variance. The preponderance of authority seems to be in the negative.[1] But an infant cannot obtain title to property by a fraudulent purchase or on a contract which he disaffirms; if he repudiates the contract he must return the property on demand, and if he refuses, it may be taken from him in replevin, or the value recovered in trover.[2] The rule applies to the case of a purchaser where a worthless check is given in payment.[3]

The doctrine *respondeat superior* rests upon a relation created by contract, and an infant employer cannot be held liable for the negligent torts of his servant.[4] Neither can he be held a trespasser by relation through the acceptance of a tortious act which another, without his knowledge, has assumed to do in his behalf.[5]

It is held that where an infant wrongfully converts money or property of another to his own use, the tort may be waived as it might be if he were of full age.[6]

Drunkenness.— That a tort was committed when in a drunken state is no excuse.[7] It is conceivable, however, that the fact might have influence on the award of damages, either to aggravate or to mitigate them, according to the nature of the case and the circumstances.

Duress.— As a minor cannot excuse his tort by showing the command of his parent or guardian, neither can another person by proving actual compulsion. But the command of an existing military authority which could not be resisted or safely disobeyed is an exception.[8]

Torts by married women.— Where husband and wife jointly commit a tort the action is properly brought against him alone, for the whole may be assumed to be his act.[9] But, in general, a married woman is responsible for her wrongful acts when

[1] Johnson v. Pie, 1 Lev. 169, 1 Sid. 258, 1 Keb. 905; Carpenter v. Carpenter, 45 Ind. 142. And see Nash v. Jewett, 61 Vt. 501, 4 L. R. A. 561.

[2] Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105.

[3] Mathews v. Cowan, 59 Ill. 341.

[4] Robbins v. Mount, 33 How. Pr. 24.

[5] Burnham v. Seaverns, 101 Mass. 360, 100 Am. Dec. 123.

[6] Shaw v. Coffin, 58 Me. 254, 4 Am. Rep. 290; Elwell v. Martin, 32 Vt. 217.

[7] Reed v. Harper, 25 Ia. 87, 95 Am. Dec. 774. As to the responsibility for crime committed by an intoxicated person, see State v. O'Neil, 51 Kan. 537, 24 L. R. A. 555.

[8] McKeel v. Bass, 5 Cold. 151.

[9] McKeown v. Johnson, 1 McCord, 578, 10 Am. Dec. 698.

they work injury to others.[1] Suit therefor, if brought in the life-time of the husband, will be against the two jointly, and the judgment recovered may be enforced against him.[2] If he die before suit brought, or afterwards and before judgment, the right of action survives as against her.[3] It is presumed, however, that if a tort is committed by the wife in the presence of the husband, it is his tort rather than hers and should be redressed in a suit against him alone.[4] But the presumption may be overcome by such evidence as shows that hers was the controlling will, or that at least she was acting freely and not under compulsion in what she did, and where such was the case the two should be joined.[5] If the two are joined the tort should be described as that of the wife alone, or of the two jointly, though, if the action be trover at the common law, the conversion should be averred to be for the use of the husband.[6] Probably in states where by statute the married woman has all the property rights of a *feme sole*, the conversion may be averred to be for her own use.[7]

In suits for the torts of married women where the element of contract is involved, the same reasons which would preclude the indirect redress of an infant's breach of contract by treating it as a tort are present in full force. And there is also the same difficulty here in drawing a definite, clear line of distinction between cases which are clearly in their substance cases of contract, and though a wrong is involved, and cases in which the wrong stands apart from the contract. The cases in which infancy has been relied upon as a defense will furnish analogies for the decision of cases brought against parties under coverture. But the common-law rules of liability are greatly modified by the statutes which confer upon a married woman the full property rights of other persons and empower

[1] Prentiss v. Paisley, 25 Fla. 927, 7 L. R. A. 640.

[2] Wright v. Leonard, 11 C. B. (N. S.) 258.

[3] Capel v. Powell, 17 C. B. (N. S.) 743; Franklin's Appeal, 115 Pa. St. 534; Baker v. Braslin, 16 R. I. 635, 6 L. R. A. 718.

[4] Baker v. Young, 44 Ill. 42, 92 Am. Dec. 149.

[5] Cassin v. Delaney, 38 N. Y. 178; Simmons v. Brown, 5 R. I. 299, 73 Am. Dec. 66.

[6] Kowing v. Manley, 49 N. Y. 192, 10 Am. Rep. 346; Shaw v. Hallihan, 46 Vt. 389, 14 Am. Rep. 628.

[7] See Vanneman v. Powers, 56 N. Y. 39.

her to make contracts in her own name and to her own use. As owner of property she must now respond for nuisances and wrongs of negligence as other persons must; and the reasoning in some of the cases would justify us in saying that the effect of the new statutes must be to leave married women to respond alone for their torts of every nature in which neither direct nor indirect participation by husbands can be shown.[1] But there are other cases which hold that the common-law rules remain unchanged except as her more complete control of her own actions necessarily effects a change.

Association in tortious acts.—Persons associated in business may jointly be liable for torts though not all directly participating in the commission thereof. But the circumstances must be such that the assent of all to the wrongful act is to be implied. The fact that two or more persons are partners in business does not raise a presumption that each of them makes the others his agent for the commission of wrongs upon third persons. A partnership has lawful objects in view; and the implied authority of each to act for all goes no farther than to give sanction to such steps as have in view the accomplishment of those objects; to that extent all are liable. Therefore for a false warranty in a sale, a deception in making a purchase, and the like, where what is done is a partnership transaction, though done by a single partner, without the presence or knowledge of others, or even by an agent acting under partnership authority, all will be responsible; while on the other hand an act of violence committed by a partner, or any wrong not a part of a partnership transaction and not accompanied by circumstances of apparent sanction by the associates to justify its being imputed to all, is to be deemed the wrong only of the party committing it.

Persons associated in riotous conduct may each be liable for the individual acts of all though no express assent to any one of them be shown. A mob is not likely to deliberate and agree in advance just how far the assemblage will go in assaults or destruction of property; the movement is passionate and excited, and every person taking part therein must be understood as assenting to such violent and destructive conduct as is likely

[1] See Mayhew v. Burns, 103 Ind. 328; Troxall v. Silverthorne, N. J. Ch., 1887, 10 Cent. Rep. 189; Farley v. Tillar, 81 Va. 275.

to follow when lawless and passionate bodies of men gather for purposes inconsistent with public order and the regular administration of law. He sanctions by his presence and gives encouragement to what is done; he adds to the violence and passion that for the time are dominant, and is justly held liable not only for the mischief committed by his own hands, but as a participant in the wrong-doing of each of his lawless associates.

Corporations are responsible for the wrongs committed or authorized by them under substantially the same rules which govern the responsibility of natural persons. Corporations indeed are limited in their powers by the corporate grant, and they are never expressly authorized by this to do lawless acts; but, keeping within the apparent scope of the grant, they may by the action of their officers and agents render themselves generally liable for torts when the circumstances are such that a single individual or a partnership would be liable.[1] But if the alleged tort consists in the breach of some duty which from its nature could not be imposed upon or discharged by a corporation, or is connected with a dealing entered into by its officers in its name or on its behalf, but which was forbidden by its charter, it cannot be liable, and the party injured must look to the officers for redress.[2] These are cases standing by themselves; the general rule of liability embraces negligences and omissions of officers and agents in the corporate business, and tortious acts directly authorized by the corporation or which are done in pursuance of a general or special agency, or which are ratified by the corporation afterwards.[3] And in deciding upon corporate liability, officers, agents and servants will be considered as being vested with a liberal discretion, and the corporation held liable for all their acts within the most extensive range of the corporate powers.[4] A corporation may even be held liable for an assault and battery committed by an agent in performing an authorized act wrongfully or with excessive force,[5] or for a libel contained in a report made by its

[1] Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426, 21 L. R. A. 278, and cases cited.

[2] Weckler v. First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95.

[3] Mayor, etc. of Lyme Regis v. Henley, 1 Bing. N. C. 222.

[4] Jeffersonville R. R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103.

[5] Monument Nat. Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322.

board of directors,[1] or for a malicious prosecution[2] instituted in its interest, or for false imprisonment,[3] or for conspiracy,[4] or for frauds when these are committed in the transaction of corporate business or the performance of corporate acts.[5] There is a legal unity between the corporation and its agent, so long as he keeps within the limits of his authority, as much when his acts are wrongful as when they are rightful. If authorized to sell the corporate stock the corporation will be responsible for his excessive sales.[6] In general it may be said the rules of responsibility for his acts are the same as those which apply as against individual employees for the acts of their servants.

Public corporations must respond for the torts of their officers, agents or servants committed in the exercise of corporate authority or which are the result of corporate negligence. Even the state or the United States may be guilty of individual injuries; and though, being a sovereignty, it is not liable to suits except with its own consent, it is always to be presumed it will make provision whereby some court or other tribunal will be empowered to make suitable compensation, or, failing in this, will give it by direct legislative action.[7]

[1] Phila. etc. R. R. Co. v. Quigley, 21 How. 202; Mo. Pac. R. Co. v. Richmond, 73 Tex. 568, 4 L. R. A. 280. In a recent case a town was held not subject to an action for libel in publishing a report of an investigating committee as to the manner in which a contract with the town had been performed. Howland v. Town of Maynard, 159 Mass. 434, 21 L. R. A. 500.

[2] Jordan v. Ala. G. S. R. R. Co., 74 Ala. 85, 49 Am. Rep. 800.

[3] Carter v. Howe Mach. Co., 51 Md. 290, 34 Am. Rep. 311.

[4] Buffalo, etc. Co. v. Standard Oil Co., 106 N. Y. 669.

[5] Ranger v. Gt. West. R. R. Co., 5 H. L. Cas. 71.

[6] New York, etc. R. Co. v. Schuyler, 34 N. Y. 30; Tome v. Parkersburg R. R. Co., 39 Md. 36, 17 Am. Rep. 540.

[7] See Young v. State, 29 Minn. 474; Hans v. Louisiana, 134 U. S. 1; Andrews' Steph. Pl. 28.

CHAPTER V.

WRONGS IN WHICH TWO OR MORE PARTICIPATE.

Some wrongs are in their nature individual. The oral utterance of defamatory words is an illustration.[1] Some others can only be accomplished by the concurring act of two or more. Of these, is conspiring to ruin one in his reputation, originating in combination and carried out by joint action, or at least in pursuance of the joint arrangement and understanding.[2] There must be two or more actors, for one man cannot combine with himself. But the conspiracy is important only as it shows concurrence in the wrong accomplished in pursuance of it, for the injury may be treated as a distinct wrong irrespective of the steps which led to it; and the conspiracy, standing by itself, with nothing done under it, will support no action.[3] The damage, not the conspiracy, is the gist of the action; and if nothing is done in pursuance of the combination, it must be looked upon as a mere unfulfilled intention of several to do mischief.[4] If the mischief is accomplished the conspiracy becomes important, as it enables the party wronged to look beyond those who actually did the injurious act, and to join with them as defendants all who conspired with them to accomplish it. The conspiracy therefore gives a remedy against parties not otherwise connected with the wrong. It may also, as matter of aggravation, be shown to increase the damages.[5]

To make a conspiracy actionable there must be a deprivation of some legal right in consequence. Therefore, a conspiracy to induce one not to give by his will a gratuity to the plaintiff

[1] And if two utter the same slander at the same time they cannot be sued jointly. Webb v. Cecil, 9 B. Mon. 198, 48 Am. Dec. 423.

[2] Hutchins v. Hutchins, 7 Hill, 104, Big. L. C. on Torts, 207; Wildee v. McKee, 111 Pa. St. 335, 56 Am. Rep. 271.

[3] Savile v. Roberts, 1 Ld. Raym. 374; Kimball v. Harmon, 34 Md. 407, 6 Am. Rep. 340; Page v. Parker, 43 N. H. 363, 80 Am. Dec. 172.

[4] Garing v. Fraser, 76 Me. 37; Place v. Minster, 65 N. Y. 89; Boston v. Simmons, 150 Mass. 461, 6 L. R. A. 629.

[5] Kimball v. Harmon, *supra;* Van Horn v. Van Horn, 52 N. J. L. 284, 10 L. R. A. 184.

is not actionable, the plaintiff having no right to the gratuity.[1] And a conspiracy to induce one to violate his contract is held not actionable, the right under the contract being the same as before. If on the trial the conspiracy is not made out, the plaintiff may recover against the party or parties by whose direct act the wrong was accomplished.[2]

In most cases of joint wrongs the participants may be such in different ways and in different degrees; this does not affect their liability or require an apportionment between them of the legal consequences. But the mere approval of a wrong, or the expression of pleasure or satisfaction at its having been accomplished, will not make one a legal participant.[3]

Ratification.— One may adopt or ratify a wrong done by another in his behalf, and thereby become liable as if he had advised or directed it. But the ratification must be with full knowledge of the facts, or with the purpose of the party, without such knowledge, to take the consequences upon himself.[4] It is not sufficient that the party receives and appropriates a benefit from what is done,[5] or takes steps in the defense of the wrong-doer,[6] or to secure in his behalf a compromise;[7] for these are acts that might be done out of friendship where no interest existed. If the wrong-doer was agent or servant to the other, ratification may be established on slighter evidence than in other cases; approval retrospectively being in the nature of an enlargement retrospectively of the previous authority.

Parties to suits and officers.— Where one sues out a writ against another, the writ is a protection to the plaintiff and to the officer acting under it, provided it is valid and there is no departure from its command in executing it. If the writ is void, the plaintiff is liable for what is done in pursuance of its command, and for anything further that he advises or participates in, or ratifies and takes a benefit from.[8] But this is the limit of his responsibility. The officer will be liable for whatever he shall do under a void writ, and for any excess in the

[1] Hutchins v. Hutchins, 7 Hill, 104.

[2] Hutchins v. Hutchins, *supra;* Parker v. Huntington, 2 Gray, 124. See Stanfield v. Jackson, 137 Ind. 592.

[3] Cooper v. Johnson, 81 Mo. 483.

[4] Lewis v. Read, 13 M. & W. 834; Tucker v. Jervis, 75 Me. 184.

[5] Hyde v. Cooper, 26 Vt. 552.

[6] Buttrick v. Lowell, 1 Allen, 172, 79 Am. Dec. 721.

[7] Roe v. Birkenhead, etc. R. Co., 7 Exch. 36, 7 Eng. L. & Eq. 546. See Mech., Agency, § 113.

[8] Root v. Chandler, 10 Wend. 110, 25 Am. Dec. 546.

exercise of his authority under a valid writ, or any departure from the command of such a writ to the injury of the defendant or of any other person. It is a ratification of his wrongful act if the plaintiff takes upon himself the officer's defense when he is sued therefor, as he will if he gives a bond of indemnification.[1]

An attorney who delivers a writ to an officer for service is liable to the extent of the command if the writ is illegal, but no further except as he advises or in some manner connects himself with what is done by the officer under it.[2] He is not liable for malicious prosecution on proof that he knew of his client's malice, unless he also knew there was not a reasonable cause of action.[3] The attorney may be liable when his client is not; as when action is taken by the former which the latter did not advise, consent to or participate in, and which was not justified by any authority he had given.[4]

A sheriff or other executive officer is liable to the plaintiff in a writ for the deputy's misconduct or neglect to the plaintiff's injury, and to the defendant or any third persons for the deputy's misfeasances from which he or they are wrongful sufferers.[5] The deputy is in general equally liable; but, when a mere neglect to perform an official duty is complained of, the sheriff alone is to be sued, since it is upon him alone that the official duty rests.[6]

Extent of joint liability.—*Wrongs intended.*—When the wrong done was intended, the parties are supposed to intend the consequences which follow, and each must assume the responsibility of the misconduct of all.[7] The person wronged may treat all concerned in the injury as one party, and if he proceeds against them jointly he is not bound to point out how much of the whole is attributable to one and how much to an-

[1] Murray v. Lovejoy, 2 Cliff. 191.

[2] Burnap v. Marsh, 13 Ill. 535; Ford v. Williams, 13 N. Y. 577, 67 Am. Dec. 83.

[3] Peck v. Chouteau, 91 Mo. 138, 60 Am. Rep. 236.

[4] Freeman v. Rosher, 13 Q. B. 780; Welsh v. Cochran, 63 N. Y. 181, 20 Am. Rep. 519.

[5] Prosser v. Coots, 50 Mich. 262; Woodgate v. Knatchbull, 2 T. R. 148; Campbell v. Phelps, 17 Mass. 244; Norton v. Nye, 56 Me. 211.

[6] Cameron v. Reynolds, Cowp. 403; Buck v. Ashley, 37 Vt. 475. And see Gibbens v. Pickett, 31 Fla. 147, 19 L. R. A. 177.

[7] McMannus v. Lee, 43 Mo. 206, 97 Am. Dec. 386.

other. Neither is the jury to make any apportionment by their verdict.[1]

But the party injured may, at his option, proceed against any one or more of the parties responsible and enforce his remedy to the full extent, regardless of the participation of the others; for the wrong-doing of one is not diminished by the fact that others assisted or stood by and encouraged him, or interposed to prevent aid and protection. The rule applies to a party who sues out a void writ, to the magistrate who issues, and the officer who serves it; it is of no importance that the participation of one was insignificant as compared to that of another.[2] The responsibility here is quite distinct from that upon contracts; independent contractors cannot be sued jointly, even though what they agree to do has the same general purpose in view, but joint contractors cannot be sued separately; their liability is to be determined by the promise they made, and when they do not sever in that, the plaintiff has no option to compel them to sever when he sues them.

A sheriff or other officer acting by deputy is participant in what is done by the deputy, for in contemplation of law he is always present and directing the action. Several persons may be joint wrong-doers, though in the wrong done they are severally looking after distinct individual interests; as where they obtain writs for their several demands against the same debtor, and the same officer arrests him upon all the writs at the same time. The officer who attached goods, the officer who took them from him on an execution in the attachment suit, and the plaintiff in that suit, have been held jointly liable.

If the party wronged elects to proceed against one or more of the wrong-doers less than all, the beginning of the suit is not a release of the others, but he may sue them afterwards. Neither is the recovery of a judgment a bar to further suits against the others.[3] But the injury being joint, and a recovery against one being for all the damages supposed to have been sustained, the satisfaction of that judgment is a complete bar.[4]

[1] Keegan v. Hayden, 14 R. I. 175.

[2] Farebrother v. Ansley, 1 Camp. 343; Murphy v. Wilson, 44 Mo. 313, 100 Am. Dec. 290.

[3] In England, however, *recovery* of judgment is a bar. Brown v. Wootton, Cro. Jac. 73; King v. Hoare, 13 M. & W. 494. And see Hunt v. Bates, 7 R. I. 217.

[4] Livingston v. Bishop, 1 Johns.

If several suits are brought there may be several judgments in the plaintiff's favor, and possibly in different sums. He may proceed on all until satisfaction of one is obtained. Whether this is larger or smaller than the others is unimportant as bearing on this rule; he may collect the largest if he can, but the collection of the smaller is equally a satisfaction; and so is the acceptance of something in satisfaction without taking out execution.[1] But he is entitled to his costs in all the cases.[2] If the wrong consists in the appropriation of property belonging to the plaintiff, and a part was taken by one and a part by another, it has been held that settlement may be made with one as to the part taken by him without discharging the other; but this must be regarded as an exceptional case.[3] But in any case of conversion of property, whether by one or several, if settlement is made as to a part of it, and the case as to the remainder is expressly left undisposed of, it would doubtless, as to the parties to the arrangement at least, be still open to the customary remedies.[4]

Wrongs not purposely done.— A wrong not intended is commonly a failure to perform some duty which the party has assumed by contract, or which the law has imposed because of official position or of some special relation. In such a case several persons may be blamable, but not all liable to the party wronged. The legal wrong is chargeable only to the party who has by his contract assumed the duty, or upon whom the law imposed it. It is the breach of duty which constitutes the wrong, and that party is the wrong-doer upon whom the unfulfilled duty rested. The seeming exceptions to the rule are of those cases in which, independent of the duty, the facts would constitute a positive wrong. The case of the common carrier of goods will furnish an illustration: his legal undertaking is to carry and deliver safely and within a reasonable time, subject only to such delays and injuries as may result from the act of God or of the public enemy. He may employ many servants in his business; but the owner of goods who

290, 3 Am. Dec. 330; United Society v. Underwood, 11 Bush, 265, 21 Am. Rep. 214; Lord v. Tiffany, 98 N. Y. 412, 50 Am. Rep. 689.

[1] Turner v. Hitchcock, 20 Ia. 310.

[2] Windham v. Wither, Stra. 515; Livingston v. Bishop, *supra*.

[3] Fitzgerald v. Smith, 1 Ind. 310.

[4] McCrillis v. Hawes, 38 Me. 566.

complains of a breach of his obligation as carrier will proceed against the carrier alone, since it is upon him alone and not upon one or all of his servants that the obligation was imposed. If, however, a servant, by some distinct and positive act, shall destroy or injure the goods in transit, he will himself be liable for the damage suffered, though the owner, at his election, may proceed against him alone or against the carrier, or join both. If both are sued it may be necessary to make proof of the special relation, in order to show a connection between the carrier himself and the injury complained of; though if the carrier in person participated with the servant in the act which caused the injury, this showing would be needless. The case of a sheriff and his deputy may furnish another pertinent illustration: the two may be held jointly responsible for any wrongful act of the deputy under a writ committed to him for service; but when what is complained of is the failure to perform some official duty which by law is imposed upon the sheriff, though the deputy is empowered to perform it, it is the sheriff alone who must be called upon to respond, even though, under the circumstances of the particular case, it may be apparent that the deputy was in point of morals more blamable than the principal. This is the general rule of official responsibility when a duty imposed upon an officer has failed in performance; it is the officer himself who must be charged with the wrong, because it was upon him that the duty was imposed. A seeming but not a real exception may exist where the law imposing the duty not only empowers the deputy to perform it, but, under circumstances which it specifies, requires him to do so; for a showing that these circumstances existed, and that the deputy had failed to act, would then make out against him a complete cause of action under the general rule as given above.

But negligence is always unlawful.[1] The moment the deputy of a public officer, or the servant of one who by contract relations or otherwise is charged with a duty to a third person, enters upon the discharge of such duty and conducts himself in such a negligent manner in respect thereto that another is injured, the deputy in the one case, and the servant in the other, is personally responsible therefor, as is also his principal. The

[1] Richardson v. Kimball, 28 Me. 463. See Mech., Agency, § 698.

distinction here is between an injury which might have been avoided by active steps which the law only required of the principal, and an injury directly attachable to the misconduct of the subordinate. Continually we are having illustrations of such liability in the case of railroad employees, especially those employed in the transportation of persons. If the conductor of a railroad train shall forcibly remove a passenger therefrom without justification, he is responsible personally for his misconduct, as is also the railroad company itself. But the undertaking of the railroad company is not merely to carry the passenger,— which is broken by his ejection from the car,— but it is to do so with observance of the highest care to protect against injury to life or limb; and every person in its service is under obligation to the public and to every person transported, to so perform the task devolved upon him by his employment that there shall be no breach of the company's duty as a result of his personal negligence. For a careless injury to a passenger or to any third person directly traceable to him he is responsible as he would have been if there were no superior to respond for it; the difference being that in the one case he alone would be liable for it, while in the other the master whose blamable servant he is may be proceeded against also.[1] The case of a libelous publication in a newspaper is somewhat analogous: the publisher of the paper is under obligation to exclude any such publication, and he, as well as any subordinate who carelessly or otherwise was concerned in making it, may be called to account therefor.[2]

Contribution and indemnity as between wrong-doers.— It is a maxim in the law that no one can make his own misconduct the basis of an action in his own favor. If he suffers because of his own misconduct he must not look to the law for redress. If, therefore, one of several persons who are liable jointly for a wrong is proceeded against separately and compelled to make reparation, the law will give him no assistance in securing contribution from the others.[3] Such is the general

[1] See Purcell v. Richmond & Danville R. Co., 108 N. C. 414, 12 L. R. A. 113; Burnham v. G. T. R. R. Co., 63 Me. 298, 18 Am. Rep. 220.

[2] Dole v. Lyon, 10 Johns. 447, 6 Am. Dec. 346; Street v. Johnson, 80 Wis. 455, 14 L. R. A. 203.

[3] Merryweather v. Nixan, 8 T. R. 186; Coventry v. Barton, 17 Johns. 142, 8 Am. Dec. 376; Churchill v.

rule, and it is founded in sound reasons of public policy,[1] though at first blush it has an appearance of unfairness, since it enables the person injured to select from among those who have wronged him the person who shall make compensation to the relief of the others. But it has a decided tendency to discourage illegal transactions, since it gives every person disposed to engage in them to understand that, however numerous may be his associates, the whole burden of responsibility for the mischief done by all is liable to be cast in the end upon his shoulders exclusively. The rule, moreover, saves to the public treasury the expense, and the courts of justice the labor, of any attempt at an adjustment of equities as between participants in unlawful action.

But there are many cases in which, though two or more are wrong-doers in contemplation of law as between themselves and some third person, yet only one of them was in fault for the injury done; and if another has been compelled to make compensation, his claim to indemnity from the one for whose fault he has made atonement may be perfectly reasonable and just.[2] The case of a master who has been compelled to respond in damages for an injury caused by the negligent or other wrongful act of his servant, to which his privity was purely conventional, is one of these: when he calls upon the servant for indemnity, the reasons for the maxim above referred to have no application whatever, and the master's demand is just and also legal.[3] On the other hand, if the master has directed the servant to perform some act within the apparent scope of his authority, and the servant in good faith has performed it, but has been held liable therefor to some third person, he has, as against the master, a claim to indemnity that no rule of law or of public policy will refuse to recognize.[4] The case of an officer who is called upon to make service of process in a civil case may also be instanced; if the validity of the process, or the legality of any proposed action under it, depends

Holt, 131 Mass. 67, 41 Am. Rep. 191; Texas & P. R. Co. v. Doherty (Tex. App.), 15 S. W. Rep. 44.

[1] See Pierson v. Thompson, 1 Edw. Ch. 212.

[2] Nashua Iron & Steel Co. v. Worcester & N. R. Co., 62 N. H. 159.

[3] Mainwaring v. Brandon, 8 Taunt. 202; Smith v. Foran, 43 Conn. 244, 21 Am. Rep. 647.

[4] Grace v. Mitchell, 31 Wis. 533, 11 Am. Rep. 613.

upon some disputed question of law or of fact, and the plaintiff undertakes to indemnify the officer for any liability he may incur in making the service, it is perfectly reasonable that the law, if appealed to, should compel him to perform his undertaking.[1] The case is plainly distinguishable from one in which indemnity is promised for the publication of a libel, or for a malicious assault or other similar wrong; for the promise in any such case is altogether void.[2]

There are also many cases in which a party who has been compelled to make compensation for a wrong is justly entitled to contribution from others whose relation to it was the same as his own, though he alone was proceeded against. If the wrong was done in the prosecution of some lawful undertaking in which all were concerned, and the act which proved to be wrongful was done in good faith and with the express or implied assent of all, the claim to contribution from his associates would seem to be unanswerable.[3] If, on the other hand, that which was done was known to be illegal, or the circumstances were such as to render ignorance of its illegality inexcusable, the joint interest is not a controlling factor, and the law will not lend its aid to relieve the party to any extent from consequences which his own unjustifiable conduct has brought upon him.[4]

In the application of these rules to the cases of corporations and partnerships, which are aggregations of individuals, it is obvious that if the wrong consisted in the failure to perform a conventional duty imposed upon the aggregate body, whereby that body is made responsible, the members will necessarily share the loss in proportion to their respective interests.[5] But if an individual is made responsible for a tort committed in the service of any joint association, his right to indemnity will be governed by the rules which prevail in the relation of master and servant as given above.[6]

[1] Nelson v. Cook, 17 Ill. 443.

[2] Atkins v. Johnson, 43 Vt. 78, 5 Am. Rep. 260.

[3] Mere negligence in doing a lawful act does not deprive one of the right to contribution from another originally liable. Ankeny v. Moffett, 37 Minn. 109.

[4] See, as illustrating the rule, Johnson v. Torpy, 35 Neb. 604; Vandiver v. Pollak, 97 Ala. 467, 19 L. R. A. 628; Farwell v. Becker, 129 Ill. 291, 6 L. R. A. 400, and cases cited in note to Boston v. Simmons, 6 L. R. A. 631.

[5] See Smith v. Ayrault, 71 Mich. 475, 1 L. R. A. 311.

[6] See Poulton v. London & S. W. R. R. Co., L. R. 2 Q. B. 535.

Injury sustained in wrong-doing.— Where two or more persons are jointly concerned in wrong-doing, and by the negligent or reckless action of one of them another is injured, the latter is without remedy for the injury.[1] The cases may be instanced of persons participating in a riot, or in a smuggling venture, or in illegal sports; an injury which one suffers under such circumstances is as directly traceable to his own breach of the law as to the misconduct of his associate, and any demand made on his part for redress would be based upon a showing of the violation of his own duty to the public. The case of one who is injured in illegal action may be said to be, if possible, still plainer and more just in a case where the action of the other party is wrongful only because of the negligence. An illustration may be seen in the case of a party who, while making use of the public highway, is injured because of its being out of repair; if the use was lawful, he has a remedy for the damage suffered as against the public body or corporation whose duty was neglected in suffering the highway to be out of repair; but if the use was unlawful, as, for example, if he were on his way to attend unlawful Sunday games, or were engaged in ordinary labor, when labor, except works of charity and necessity, are forbidden, redress would be denied him.[2] Of these cases we need say only that a liberal construction of the terms *charity* and *necessity* will always be given, so as to make them cover all meritorious cases.[3] And so in the case of forbidden Sunday travel; the exception in favor of travel to attend religious worship will be construed to cover the cases of professors of the most absurd beliefs, provided that in their practices nothing of an immoral nature is indulged in.[4] The decided cases in which persons injured by the negligence of

[1] Wallace v. Cannon, 38 Ga. 199, 95 Am. Dec. 385.

[2] Connolly v. Boston, 117 Mass. 64, 19 Am. Rep. 396.

[3] The following occupations have been held not to be works of necessity or charity: Keeping a barber-shop open and shaving customers. Com. v. Waldman, 140 Pa. St. 89, 11 L. R. A. 563. But see Ungericht v. State, 119 Ind. 379, 12 Am. St. Rep. 419, where it is held that the question is for the determination of the jury. Issuing, publishing and circulating a newspaper. Handy v. Globe Pub. Co., 41 Minn. 188, 4 L. R. A. 466; Com. v. Matthews, 152 Pa. St. 166, 18 L. R. A. 761.

As to what occupations fall within the terms, see Hennersdorf v. State, 25 Tex. App. 598, 8 Am. St. Rep. 448, and cases cited in *note*.

[4] Feital v. Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720.

common carriers while being transported on Sunday are not entirely harmonious, but they tend now to the doctrine that the courts will give redress for the injury, refusing to inquire into the purpose for which the transportation was being had.[1]

The rules here stated which exempt wrong-doers from liability for negligent injury to their associates do not put those who are themselves engaged in wrong-doing so far out of the protection of the law that they may be purposely assaulted or otherwise injured with impunity. The injury for which the law will deny redress must be one attributable, in part at least, to their own misconduct.[2] One who engages in an unlawful game cannot with impunity be assaulted and beaten by his antagonist;[3] and this has been applied to the case even of a prize-fight, the agreement for the fight being void.[4] And a trespasser is entitled to redress if excessive force is made use of in ejecting him.[5]

[1] Delaware, etc. R. Co. v. Trautwein, 52 N. J. L. 169, 7 L. R. A. 435, 19 Am. St. Rep. 442, citing important cases. And see Van Auken v. C. & W. M. R. Co., 96 Mich. 307, 22 L. R. A. 33; Sutton v. Wauwatosa, 29 Wis. 21, 9 Am. Rep. 534. *Contra*, Stanton v. Metropolitan R. R. Co., 14 Allen, 485.

A brakeman injured by reason of defective appliances, while working in violation of the Sunday law, may recover against the company. Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566, 2 L. R. A. 520.

[2] See Baker v. Portland, 58 Me. 199, 4 Am. Rep. 274. See the opinion of the court in Gross v. Miller (Iowa), 26 L. R. A. 605. In that case two were hunting together on Sunday, and one was injured by the negligent discharge of a revolver by the other. It was held that the injured party, not having contributed to the injury, should recover.

[3] Etchberry v. Leveille, 2 Hilt. 40. And see Welch v. Wesson, 6 Gray, 505.

[4] Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230.

[5] Loomis v. Terry, 17 Wend. 496, 31 Am. Dec. 306; Steinmetz v. Kelly, 72 Ind. 442, 37 Am. Rep. 170. And see Lyon v. Fairbank, 79 Wis. 455, 24 Am. St. Rep. 732.

CHAPTER VI.

WRONGS AFFECTING PERSONAL SECURITY.

Under this head are considered wrongs which affect the physical organization of persons or deprive them of their rightful liberty of movement. These wrongs have no necessary relation to an ownership of property, though in some cases the extent of the injury may be affected by such ownership, and in others the rights in property may be so involved that the same acts may be innocent or injurious when they would take the opposite character were no such rights in question.

Assaults and batteries.— Any attempt with unlawful force to inflict injury upon another, and with the apparent present ability to give effect to the attempt, if not prevented, is an assault.[1] The raising of the hand in anger with apparent purpose to strike and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at a person who is within range;[2] the shaking of a whip in anger in a man's face, and the like, are assaults;[3] and so would be an apparent attempt to do personal violence, even though it could not be given effect, if its object were not aware of that fact; as when an unloaded pistol is pointed in a threatening manner at one who supposes it to be loaded.[4] Every person has a right to live in society without being put in fear of personal harm, and he has an action for the invasion of this right even though not otherwise injured.[5]

A successful assault becomes a battery, which consists in an injury actually done to the person of another in an angry, re-

[1] There must be proof of violence offered so near that harm might ensue if the party was not prevented. People v. Lilley, 43 Mich. 521. See Clark v. Downing, 55 Vt. 259, 45 Am. Rep. 612.

[2] State v. Taylor, 20 Kan. 643.

[3] See Martin v. Shoppee, 3 C. & P. 373; State v. Rawles, 65 N. C. 334; State v. Neely, 74 N. C. 425, 21 Am. Rep. 496; State v. McAfee, 107 N. C. 812, 10 L. R. A. 607.

[4] Beach v. Hancock, 27 N. H. 223; State v. Church, 63 N. C. 15; Chapman v. State, 78 Ala. 463. And see State v. Herron, 12 Mont. 230, 33 Am. St. Rep. 576, and cases cited.

[5] Beach v. Hancock, *supra*.

vengeful, rude or insolent manner.[1] The wrong consists not in an actual touching of the person so much as in the manner and spirit in which it is done, and the question of bodily pain or injury is important only as affecting the extent of the damages. To push gently against another in the endeavor to make one's way through a crowd is no battery, but a rude and insolent push may justify damages proportioned to the rudeness.[2]

It is implied in an assault or battery that it is committed against the assent of the person assaulted; but the existence of assent may not be a complete answer to a suit, as it would be in most other cases when that is complained of as a civil injury which in advance was consented to. An assault and battery is a breach of the peace, and the state in its own interest will punish it; and the assent of the person assaulted will be treated as void and therefore as affording no justification.[3] The preliminaries agreed upon for the fighting of a duel can be no excuse for the attempt to inflict bodily injury in pursuance thereof. The case of batteries in the course of lawful games and plays are seeming exceptions;[4] but in those cases, unless the batteries go beyond what is admissible[5] in such games, the peace of society is not disturbed and the interest of the state not involved.

Deception may sometimes be equivalent to force as an ingredient in an assault; as when an explosive is put in one's hand without knowledge on his part of its nature, or a poisonous drug is given him concealed in his food.[6]

Intent.— Accidental injuries are not in law batteries.[7] But it is not necessary that the precise injury done should have been designed. When a missile is thrown into a crowd in mere recklessness, any one struck by it may have action for his

[1] Coward v. Baddely, 4 H. & N. 378, Bigelow, L. Cas. on Torts, 231.

[2] Cole v. Turner, 7 Mod. 149, Bigelow, L. Cas. on Torts, 231.

[3] Buller, N. P. 16; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Com. v. Collberg, 119 Mass. 350, 20 Am. Rep. 328; Willey v. Carpenter, 64 Vt. 212, 15 L. R. A. 853, and cases cited in *note*.

[4] Fitzgerald v. Cavin, 110 Mass. 153

[5] See Christopherson v. Bare, 11 Q. B. 473, 477; Markley v. Whitman, 95 Mich. 236, 20 L. R. A. 55, 35 Am. St. Rep. 558.

[6] Com. v. Stratton, 114 Mass. 303, 19 Am. Rep. 350; Reg. v. Lock, 12 Cox, C. C. 244; Carr v. State, 135 Ind. 1, 20 L. R. A. 863.

[7] See Weaver v. State (Tex. Cr. App.), 24 S. W. Rep. 648.

injury;[1] and a blow unlawfully aimed at one person will give ground for a right of action to another upon whom it falls.[2]

Self-protection.— An attempt to commit a battery may always be resisted by the person assaulted, but under this restriction: that he must not employ a degree of force not called for in self-defense; he must not inflict serious injury unnecessarily in repelling an attack which threatens him with slight injury, nor take life unless life or limb is in danger, nor even then if by retreating he can safely avoid it.[3] The employment of excessive force will render him liable to the person assaulting him; and in such a case both may have suits, one for the original assault and the other for the excessive force made use of in repelling it.[4] In the defense of female chastity, force may go to the extent of taking the life of the assailant, if a resort to that extreme measure seems to be necessary.[5]

Words do not constitute an assault or justify the employment of force on the pretense of self-protection.[6] But words grossly insulting to females, or spoken in the presence of one's family with the purpose of special aggravation, might so far constitute a breach of the peace as to justify the employment of force for the purpose of putting an immediate stop to so brutal an outrage.

Such force as one may employ in his own defense he may also make use of in defense of any member of his family.[7] But the right does not go so far as to admit of the taking revenge for wrongs suffered. Punishment must be left to the law.[8]

An assault and battery in defense of property may be justi-

[1] Scott v. Shepherd, 2 W. Bl. 892, 4 Sm. L. C. 796. And if one rides a bicycle carelessly and runs against a pedestrian, this is an assault. Mercer v. Corbin, 117 Ind. 450, 3 L. R. A. 221.

[2] James v. Campbell, 5 C. & P. 372. And see People v. Raher, 92 Mich. 165, 31 Am. St. Rep. 575; Talmage v. Smith, 101 Mich. 140.

[3] See Keep v. Quallman, 68 Wis. 451; People v. Pearl, 76 Mich. 207, 4 L. R. A. 709; State v. Dixon, 75 N. C. 275.

[4] Dole v. Erskine, 35 N. H. 503.

[5] People v. Angeles, 61 Cal. 188.

[6] However abusive they may be. Goldsmith v. Joy, 61 Vt. 488, 4 L. R. A. 500; Friederich v. People, 147 Ill. 310.

[7] Patten v. People, 18 Mich. 314; Com. v. Malone, 114 Mass. 295. And an assault upon a man's dwelling, with intent to injure him or any of his family, may be met in the same way as an assault upon himself or any of them. Wilson v. State, 30 Fla. 234, 17 L. R. A. 654.

[8] Cockcroft v. Smith, 11 Mod. 43; State v. Gibson, 10 Ired. 214.

fied, and if possession is actually invaded the intruder may be removed by force, subject to the restriction that no more force must be employed than is needful for the purpose.[1] But force is not to be employed to recover a right which another is in possession of and now disputes, except in such extreme cases as would justify force in preventing crime or arresting offenders.[2]

The setting of spring-guns or similar devices as a defense against trespassers, though not in itself unlawful,[3] might result in serious consequences to the person making use of them if a trespasser were to be seriously injured thereby. The fact that such an injury resulted would be evidence that excessive force was employed.[4] The same may be said of the employment of dogs known to be ferocious, or of any means calculated to inflict serious injuries without warning as a defense against mere trespassers.[5] The question of excessive force would be one of fact.[6]

False imprisonment.— False imprisonment consists in imposing by force or threats an unlawful restraint upon a man's freedom of movement.[7] Submission to an unfounded claim or show of authority may be sufficient to make it out; as where an officer with void process, or none at all, notifies a person that he arrests him, and the person so notified submits and goes with the officer;[8] or where one who makes claim against another stops his egress from a room to compel him to satisfy it.[9] But merely turning one aside from the way he was going does not by itself constitute an imprisonment.[10]

The justification for what would otherwise be false imprisonment is made out in some cases by showing that the parties stood to each other in certain relations; as that of parent to

[1] Abt v. Burgheim, 80 Ill. 92; Harrison v. Harrison, 43 Vt. 417.

[2] Churchill v. Hulbert, 110 Mass. 42, 14 Am. Rep. 578.

[3] State v. Moore, 31 Conn. 479.

[4] Bird v. Holbrook, 4 Bing. 628; Hooker v. Miller, 37 Iowa, 613, 18 Am. Rep. 18.

[5] See *infra*, ch. X.

[6] See Hanson v. European, etc. R. R. Co., 62 Me. 84, 16 Am. Rep. 404; Com. v. Bush, 112 Mass. 280.

[7] Bird v. Jones, 7 Q. B. 742; Fotheringham v. Adams Exp. Co., 36 Fed. Rep. 252, 1 L. R. A. 474.

[8] Brushaber v. Stegemann, 22 Mich. 266. Actual contact is not necessary. Grainger v. Hill, 4 Bing. N. C. 212.

[9] See Hildebrand v. McCrum, 101 Ind. 61; Smith v. State, 7 Humph. 43.

[10] Bird v. Jones, *supra*.

child, guardian to ward, master to apprentice, teacher to pupil, bail in legal proceedings to principal. This last relation is commonly provided for by statute, and a power of arrest given under certain circumstances and on the production of specified papers.[1] In the other cases restraints are admissible within such limits as the parent, guardian, master or teacher, in the exercise of a sound discretion, may decide to be necessary; and in the case of the parent, personal chastisement may accompany the restraint, subject to the limitation that it must be moderate, and dictated by reason, not by passion.[2] For excessive chastisement the parent would be subject to criminal prosecution. A guardian has power to control the movements of his ward, corresponding to that of parent as to his child, but not a corresponding power of chastisement, except, perhaps, where the ward in extreme youth is taken into the guardian's family. For the authority of a master over an apprentice the statute under which the relation is formed must be examined. The restraining authority of teacher over pupil, and the incidental right to inflict chastisement, correspond closely to those of parent over child. Excessive chastisement, or even unreasonable restraint, might render the teacher liable to both criminal prosecution and a suit by the child for the recovery of damages.[3]

The cases are of constant occurrence in which, for some temporary purpose, one places himself under the control of another and must submit to restraint as the other shall deem needful. Persons being transported by common carriers may be instanced. But the control must not go beyond what the circumstances make reasonable.[4]

The charge of false imprisonment, when made against a ministerial officer, is likely to be met by a justification under legal process. Speaking generally, the requisites to legality are that the process must have been issued by a court or officer having authority of law to issue such process, and there must be nothing on its face to apprise the officer that in the particular case the authority was wanting. When the process will bear this test the officer will be protected in serving it.[5]

[1] See Cooley, Const. Lim. 341, *note.*

[2] Johnson v. State, 2 Humph. 283.

[3] Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156, and cases cited in *note.*

[4] See Brown v. Howard, 14 Johns. 119.

[5] See *infra*, 185, 186.

Process may be void:

1. Because it does not emanate from the court or officer purporting to issue it. It may be forged, or it may be filled out and delivered to the officer by some unauthorized person; as when a justice of the peace signed blank warrants and delivered them to a third person to be filled out and issued, when, under the law, no one but himself could issue them.[1]

2. Because it proceeds from a court or magistrate having by law no jurisdiction of the subject-matter, or only a limited jurisdiction, which in the particular case has been exceeded.

3. Because it emanates from an inferior court or officer, whose jurisdiction is never presumed but must be shown, and is not shown on the face of the proceedings: as where a magistrate issues a warrant for committing one to prison in punishment of a crime without reciting therein an accusation, a trial and a conviction.[2]

4. Because it is tested on some day which by statute is *dies non* for such process, or because it fails to comply with some statutory requisite and shows the defect on its face. There may be other defects, to be noted hereafter. Void process can protect no one acting under it.

In some cases arrests may be made without legal process. They are cases in which it is presumable that some serious crime which the arrest would prevent might otherwise be committed, or a criminal might escape punishment for a serious offense already committed. But a warrant of arrest should always, when reasonably practicable, be obtained from a magistrate having jurisdiction to issue it on a showing of cause therefor. This is but a reasonable requirement in protection of individual liberty. One who takes the responsibility of an arrest without such a warrant should be able to show in justification, either —

1. A felony actually committed, and facts which have come to his knowledge which justify him in suspecting the person arrested to be the felon; or

2. A felony being committed and that the arrest was made to prevent it.[3] If one errs in these particulars, it is better that

[1] People v. Smith, 20 Johns. 63; Rafferty v. People, 69 Ill. 111, 72 Ill. 37, 18 Am. Rep. 601.

[2] Clayton v. Scott, 45 Vt. 386.

[3] Ruloff v. People, 45 N. Y. 213; Neal v. Joyner, 89 N. C. 287. And

he be left to take the consequences than that they be visited upon an innocent party who is improperly arrested.[1] The action of a peace officer is regarded with more indulgence than that of a private citizen, and he may be excused for making an arrest on reasonable grounds for believing that a felony has been committed, though in fact the belief proves to be erroneous.[2]

Forcible breaches of the peace in affrays, riots, etc., are placed, as regards arrests without warrant, on the footing of felonies.[3] Notorious cheats and gamblers plying their vocations on the public highways or in other public places, persons making themselves a public danger by disregarding the orders of legal boards of health and in other like ways, may also be arrested without warrant, but only for the purpose of being taken promptly before a court or magistrate for a hearing upon complaint made against them.[4]

Insane persons may be restrained of their liberty to prevent the commission of mischief by them. This may be done as a matter of self-defense by members of their families, and also for the good of the persons arrested and in order that they may be given the treatment appropriate to their condition. In any case in which the insanity is matter of doubt, the party putting any restraint upon the individual liberty takes upon himself the responsibility of justifying it, unless he first procures from a competent court an adjudication that mental competency is wanting. But even this would not justify imprisonment beyond what was deemed needful for the benefit of the party himself, unless his liberty was dangerous to others.[5] In many cases insane persons are perfectly harmless, and should only be restrained for the better treatment of their malady.

Malicious prosecution.— An action as for a tort will lie when there is a concurrence of the following circumstances:

1. A suit or proceeding of judicial nature has been instituted without any probable cause therefor.[6]

see Maliniemi v. Gronlund, 92 Mich. 222, 31 Am. St. Rep. 576.

[1] See Holley v. Mix, 3 Wend. 350, 20 Am. Dec. 702; State v. Holmes, 48 N. H. 377.

[2] Marsh v. Loader, 14 C. B. (N. S.) 535; State v. Underwood, 75 Mo. 230.

[3] Phillips v. Trull, 11 Johns. 486; Hayes v. Mitchell, 80 Ala. 183. But an officer may not arrest for a past breach not committed in his presence. People v. Haley, 48 Mich. 495.

[4] 2 Hawk. P. C. c. 12, § 20; Wiltse v. Holt, 95 Ind. 469.

[5] See Look v. Deen, 108 Mass. 116, 11 Am. Rep. 323; Anderson v. Burrows, 4 C. & P. 210.

[6] It is not a defense that the com-

2. The motive in instituting it was malicious.

3. The prosecution has resulted in the acquittal or discharge of the accused.[1]

Probable cause involves a consideration of what the facts are and what are the reasonable deductions from the facts. It is therefore a mixed question of law and fact.[2] If the facts are not in dispute, or are specially found by a jury, the court will determine whether they make out a case of probable cause.[3] A mere belief that cause exists is not sufficient, for one may believe on suspicion and suspect without cause; there must be such grounds of belief as would influence the mind of a reasonable person.[4] But when one is complaining under circumstances calculated to produce excitement, and especially when he is instituting a prosecution for a wrong suffered by himself, some allowance must be made for want of coolness and impartiality; all that can fairly be required is that he shall act as a reasonable and prudent man would be expected to act under like circumstances.[5] The test of probable cause is to be applied as of the time when the action was taken, not as of any subsequent time when his knowledge may have become more complete and accurate, and his belief perhaps different.[6]

Advice of counsel.— That the party acted upon the advice of counsel is always a material fact in his favor, provided the action was taken after a full and fair disclosure of all the facts,[7]

plaint upon which the warrant was issued failed to state an offense and that the warrant was void on its face. Lueck v. Heisler, 87 Wis. 644, 58 N. W. Rep. 1101.

[1] Vanderbilt v. Mathis, 5 Duer, 304; Stoddard v. Roland, 31 S. C. 342; Vennum v. Huston, 38 Neb. 293, 56 N. W. Rep. 970; Collins v. Campbell (R. I.), 31 Atl. Rep. 332.

[2] Lewton v. Hower (Fla.), 16 S. E. Rep. 616.

[3] Busst v. Gibbons, 6 H. & N. 912; Broad v. Ham, 5 Bing. N. C. 722; Sartwell v. Parker, 141 Mass. 405; Stewart v. Sonneborn, 98 U. S. 187; Fine v. Navarre (Mich.), 62 N. W. Rep. 142.

[4] Mowry v. Whipple, 8 R. I. 360; Shaul v. Brown, 28 Ia. 37, 4 Am. Rep. 151; Driggs v. Burton, 44 Vt. 124; Fagnan v. Knox, 66 N. Y. 525; Faris v. Starke, 3 B. Mon. 4; Shannon v. Jones, 76 Tex. 141; Anderson v. How, 116 N. Y. 336; McClafferty v. Philp, 151 Pa. St. 86.

[5] Cole v. Curtis, 16 Minn. 182; Bourne v. Stout, 62 Ill. 261.

[6] Delegal v. Highley, 3 Bing. N. C. 950; Galloway v. Stewart, 49 Ind. 156, 19 Am. Rep. 677.

[7] Le Clear v. Perkins (Mich.), 26 L. R. A. 627; Barhight v. Tammany, 158 Pa. St. 545; Ravenga v. Mackintosh, 2 B. & C. 693; Lytton v. Baird, 95 Ind. 349; Motes v. Bates, 80 Ala. 382. It is enough if all facts known are disclosed. Johnson v. Miller, 69 Iowa, 562, 58 Am. Rep. 231. But the advice of counsel on a full statement

and the advice acted upon was that of counsel learned in the law and not of a layman or an inferior magistrate.[1]

The want of probable cause will not be presumed: the plaintiff must show it.[2] Nor will the existence of malice prove it, for this might be a result of the wrong complained of.[3] An acquittal and discharge by a magistrate having a power to bind over for trial would be evidence of want of probable cause, but not conclusive.[4] So would be the ignoring by a grand jury of a bill of indictment for the supposed offense.[5] If the party prosecuted was convicted in a lower court but acquitted on appeal, the conviction will be held conclusive of probable cause.[6]

Malice.— The burden of proving that the prosecution was malicious is also upon the plaintiff.[7] It may be inferred from proof of want of probable cause, but the inference is not a necessary one.[8] Malice in the legal sense is made out by showing that the proceeding was instituted from any improper or wrongful motive;[9] as, for example, to compel the surrender of property or papers to which the prosecuting party had no better right than the other.[10]

The end of the proceeding.— The prosecution must have come to an end before suit for maliciously instituting it is brought. And in general this should be by final acquittal.[11] Discontin-

of the facts is no defense to one who did not believe the accused guilty of the offense charged. Johnson v. Miller, 82 Iowa, 693, 47 N. W. Rep. 903.

[1] Beihofer v. Loeffert, 159 Pa. St. 374; Marks v. Hastings, 101 Ala. 165, 13 So. Rep. 297; Womack v. Fudicker, 47 La. Ann. —, 16 So. Rep. 645.

[2] The failure of the prosecution is not enough to show want of probable cause. Boyd v. Cross, 35 Md. 194.

[3] Williams v. Taylor, 6 Bing. 183.

[4] See Rankin v. Crane (Mich.), 61 N. W. Rep. 1007.

[5] See Apgar v. Woolston, 43 N. J. L. 56; Sharpe v. Johnston, 76 Mo. 660; Brady v. Stiltner (W. Va.), 21 S. E. Rep. 729.

[6] Griffs v. Sellars, 4 Dev. & Bat. 176; Severance v. Judkins, 73 Me. 376. Unless based on fraud. Olson v. Neal, 63 Iowa, 214.

[7] Dietz v. Langfitt, 63 Pa. St. 234: Flickinger v. Wagner, 46 Md. 581.

[8] Pullen v. Glidden, 68 Me. 559; Falvey v. Faxon, 143 Mass. 284; Leahey v. March, 155 Pa. St. 458.

[9] Page v. Cushing, 38 Me. 523; Harpham v. Whitney, 77 Ill. 32; Lunsford v. Dietrich, 93 Ala. 565, 9 So. Rep. 308.

[10] See Kimball v. Bates, 50 Me. 308. Or to enforce payment of a debt. Morgan v. Duffy (Tenn.), 30 S. W. Rep. 735. Further, see Andrews' Stephen's Pleading, 127, *note*.

[11] Bacon v. Towne, 4 Cush. 217; Boyd v. Cross, 35 Md. 194. See Davis v. Stuart, 47 La. Ann. —, 16 So. Rep. 871.

uance on a compromise will not be sufficient;[1] but a dismissal, though it be on technical defects, will answer the requirement of the law in this regard.[2]

What is above said has relation to malicious criminal or *quasi*-criminal proceedings. In civil suits the party whose case has no sufficient cause brings it for the most part under a liability for costs which is supposed to operate as a sufficient restraint. But there are some civil proceedings, the institution of which maliciously and without probable cause may support a right of action by reason of the special injury likely to result. One of these is where proceedings are taken to throw a trader into bankruptcy.[3] Another is where suit is begun by arrest of the defendant[4] or by attachment of his property;[5] and still another where the purpose of the proceeding is to have the respondent adjudged insane. If any such proceeding is not only groundless, but malicious, the right to redress would be as clear as in cases in which crime is charged.[6]

Abuse of legal process may support a special action on the case, as where judgment is entered up and execution taken out after the demand sued for has been satisfied;[7] or where the plaintiff purposely continues to prevent a party arrested from procuring bail until he has given assent to some demand the plaintiff had no legal right to make,[8] and the like. In such cases, where the action complained of was clearly illegal, proof of malice is important only as it may tend to increase the re-

[1] McCormick v. Sisson, 7 Cow. 715; Hamilburgh v. Shepard, 119 Mass. 30.

[2] See Clark v. Cleveland, 6 Hill, 344; Apgar v. Woolston, 43 N. J. L. 57.

[3] See Chapman v. Pickersgill, 2 Wils. 145; Whitworth *v.* Hall, 2 B. & Ad. 695; Quartz-Hill Co. v. Eyre, L. R. 11 Q. B. D. 674.

[4] Collins v. Hayte, 50 Ill. 337.

[5] Preston v. Cooper, 1 Dill. 589; Holliday v. Sterling, 62 Mo. 321.

[6] Lockenour v. Sides, 57 Ind. 360, 26 Am. Rep. 58. Whether an action will lie for malicious prosecution of a civil suit when there was no arrest of the person, or seizure of property, is a question on which the authorities are not agreed. That it will not, see Mayer v. Walter, 64 Pa. St. 283, and cases cited; Terry v. Davis, 114 N. C. 31. And this is the English rule. But many late American decisions sustain the proposition that an action may be maintained for the malicious institution, without probable cause, of any civil suit which has terminated in favor of the defendant. See Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; Smith v. Burrus, 106 Mo. 94, 13 L. R. A. 59; Antcliff v. June, 81 Mich. 477, 10 L. R. A. 621, 21 Am. St. Rep. 533.

[7] Barnett v. Reid, 51 Pa. St. 190.

[8] Grainger v. Hill, 4 Bing. N. C. 212; Krug v. Ward, 77 Ill. 603.

covery.[1] But the action may lie where what has been done was illegal only because the process of a court has been made use of for some other than the ostensible purpose, and in order to obtain some advantage that its legitimate use would not have secured; as where by a subpœna, on pretense of desiring his evidence, a party is brought within the jurisdiction of a court whose process would not otherwise reach him, and is there sued;[2] or where process of extradition from one state into another is obtained with no purpose of following it up, but to facilitate the prosecution of a private claim in a jurisdiction not legitimately available.[3] But in any such case the court whose process was improperly made use of would be expected, in furtherance of justice, to set it aside on a showing of the facts.

Officer serving his own process.— The service by an officer of process in a suit to which he is a party to the record or in interest is a nullity[4] and will be set aside on motion, but will not be ground for an action unless it was made by an arrest or accompanied by a seizure of property.

Where a person for any reason is privileged from arrest, the privilege is one of which he may avail himself or not, at his pleasure. If he elects to do so, his remedy is to have an arrest made in disregard of it set aside on motion.[5]

[1] See Stewart v. Cole, 46 Ala. 646.

[2] See Slade v. Joseph, 5 Daly, 187; McNab v. Bennett, 64 Ill. 158.

[3] See State v. Hawes, 4 Am. L. T. Rep. (N. S.) 524; Compton v. Wilder, 40 Ohio St. 130.

[4] See Singletary v. Carter, 1 Bailey, 467; Ford v. Dyer, 26 Miss. 243; Filkins v. O'Sullivan, 79 Ill. 524.

[5] See Smith v. Jones, 76 Me. 138 and cases cited, 49 Am. Rep. 198.

CHAPTER VII.

SLANDER AND LIBEL.

Akin to the wrong of malicious prosecution are the wrongs designated as slander and libel.[1]

Slander and libel are different names for the same wrong accomplished in different ways. Slander is oral defamation published without legal excuse, and libel is defamation published by means of writing, printing, pictures, images, or anything that is the object of the sense of sight.[2]

Defamation is a false publication calculated to bring one into disrepute.

Publication.— There is no legal wrong until the defamatory charge or representation is published; that is, until it is put before one or more third persons.[3] One's reputation cannot presumably be impaired when the false charge is made only to the party himself; for though it may be annoying, aggravating, and possibly injurious to him in its effect upon his mind, and indirectly upon his business, still there is as yet no publication.[4] And delivering a defamatory writing to the party himself is no publication.[5]

It is further necessary that the publication be made by the

[1] A malicious prosecution is a most effective species of defamation, for the defamatory matter is not only published, but is made more formal, and apparently authoritative, by the machinery of the law being made use of for that purpose.

[2] See Townshend, Slander and Libel, § 214, *note;* Newell on Defamation, p. 33. And see Randall v. Evening News Asso., 79 Mich. 266, 7 L. R. A. 309.

[3] It is not sufficient that one printed a libel. Sproul v. Pillsbury, 72 Me. 20.

[4] A communication from husband to wife, not in the presence of any third person, does not constitute a publication in this sense. Sesler v. Montgomery, 78 Cal. 486, 3 L. R. A. 653; Wennhak v. Morgan, L. R. 20 Q. B. D. 635. A slander spoken in a language not understood by the hearer is no publication. See Sullivan v. Sullivan, 48 Ill. App. 435; Kiene v. Ruff, 1 Iowa, 482; Hurtert v. Wienes, 27 id. 134.

[5] Spaits v. Poundstone, 87 Ind. 522, 44 Am. Rep. 773; Warnock v. Mitchell, 43 Fed. Rep. 428. But if a libelous letter is sent by mail to an illiterate person, who is obliged to have it read by a third person, this is a publication. Allen v. Wortham, 11 Ky. L. Rep. 697. Otherwise, if the sender

defamer. A defamatory writing is no libel so long as it remains in the possession of the composer and is seen by no one else; but the publication is in law attributable to him if it falls into the hands of others, for it was he who originated the wrong and was the means of its becoming injurious. And if the party who is falsely accused to his face, or to whom a libelous letter is sent, repeats and makes public the charge, this is his own act and he alone is responsible for it.[1]

Publication implies volition and actual or presumed wrongful intent. Therefore if one, acting in a public or *quasi*-public capacity, or as agent of another, receives a defamatory letter to carry and deliver to a third person, and he does so in good faith and without knowledge of the contents,[2] this is no publication by him, though it would be by the sender when delivery is made. In general, however, all persons in any manner instrumental in making or procuring to be made the defamatory publication are jointly and severally responsible therefor. The question whether the principal assented, either expressly or impliedly, to the publication of an injurious charge by the agent, so as to make him liable as well as the agent, is to be determined by the nature of the agency, the course of the business, etc.[3]

The publisher of a newspaper is responsible for the publication of libelous matter therein, though made without his knowledge, and contrary to regulations prescribed by him for the management of the paper.[4]

Words actionable per se.— Publications are actionable *per se* when an action will lie for making them without proof of actual injury, because their necessary or natural and proximate

did not know that the receiver could not read. State v. Syphrett, 27 S. C. 29, 13 Am. St. Rep. 616.

[1] As where a woman who has received a libelous letter shows it to her husband. Wilcox v. Moon, 64 Vt. 450, 15 L. R. A. 760. A repetition in the presence of a third person, at the request of the plaintiff, of words spoken to the latter, is not a publication. Heller v. Howard, 11 Ill. App. 554. The author of a slander is not responsible for its unauthorized repetition by another. Elmer v. Fessenden, 151 Mass. 359, 5 L. R. A. 724.

[2] As an express agent, or a servant.

[3] The proprietor is presumed to have assented to the reports, advertisements, etc., published by the managing agent. Philadelphia, etc. R. R. Co. v. Quigley, 21 How. 202.

[4] Perrett v. Times (newspaper), 25 La. Ann. 170; Scripps v. Reilly, 35 Mich. 371, 24 Am. Rep. 575, 38 Mich. 10; Haines v. Schultz, 50 N. J. L. 481.

consequence is to cause injury to the person of whom they are spoken, and therefore injury is to be presumed. In other cases, where no such presumption is justifiable, the publications are only actionable on averment and proof that injury which the law can notice actually followed as a natural and proximate consequence.

Spoken words as a cause of action have been classified as follows: "1. Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. 2. Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society. 3. Defamatory words falsely spoken of a person which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. 4. Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. 5. Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage."[1] Of these five classes the first four are of words actionable *per se;* the fifth embraces cases which are actionable only when special damage is averred.[2]

Words imputing an indictable offense.—It is not always *prima facie* actionable to impute to one an act which is subject to indictment and punishment. The law is well settled that "in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment,[3] then the words will be in themselves actionable."[4]

[1] Mr. Justice Clifford, in Pollard v. Lyon, 91 U. S. 225.

[2] In Louisiana the courts are not bound by the distinction of the common law as to words actionable *per se* and not actionable *per se.* See Warner v. Clark, 45 La. Ann. 863, 21 L. R. A. 502; Tarleton v. Lagarde, 46 La. Ann. 1368, 26 L. R. A. 325.

[3] Imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment. Mackin v. United States, 117 U. S. 348. So is any punishment that involves the loss of civil or political privileges. Cooley, Const. Law, 29. And see United States v. Smith, 40 Fed. Rep. 755; Re Butler, 84 Me. 25, 17 L. R. A. 764.

[4] Brooker v. Coffin, 5 Johns. 188, 4 Am. Dec. 337; Filber v. Dautermann, 26 Wis. 518; Davis v. Brown, 27 Ohio

But, whatever the moral turpitude involved, it is not actionable *per se* to charge an act which is not indictable.[1] Therefore, at common law, to charge a female with being a common prostitute is not actionable without averment of special damage.[2] But this rule is changed in many states by statutes making it actionable to impute unchastity to a female.[3]

The charge must be taken in its entirety. If the whole charge, taken together, does not convey to the minds of those who hear it an imputation of criminal conduct, it is no slander. Thus, to say of one: "He is a thief; he has stolen my land," is not slanderous, land not being the subject of larceny.[4] And if the words spoken were not intended to have a slanderous meaning, and were not understood in that sense by the hearers, they are not actionable.[5]

St. 326. And see Thibault v. Sessions, 101 Mich. 279, 59 N. W. Rep. 624. In England the offense imputed need not be indictable. Wood v. Beavan, L. R. 11 Q. B. D. 609. In Massachusetts a similar rule prevails, it being there held that words are actionable which charge an offense which, if proved, may subject the party falsely accused to a punishment which would bring disgrace upon him. Miller v. Parish, 8 Pick. 384. In Vermont it seems that the words are actionable only when the imputed crime involves moral turpitude *and* subjects the party to corporal punishment. Posnett v. Marble, 62 Vt. 481, 11 L. R. A. 162.

[1] Field v. Colson, 93 Ky. 347; Alfele v. Wright, 17 Ohio St. 238, 93 Am. Dec. 615. Words charging merely an intention to commit an offense are not actionable. Fanning v. Chace, 17 R. I. 388, 13 L. R. A. 134; Mitchell v. Sharon, 51 Fed. Rep. 424. But the grade of the crime is immaterial. Young v. Miller, 3 Hill, 21.

[2] Brooker v. Coffin, *supra;* Pollard v. Lyon, *supra;* Underhill v. Welton, 32 Vt. 40. And see Douglas v. Douglas (Idaho), 38 Pac. Rep. 934. In some states this rule has been rejected. See Barnett v. Ward, 36 Ohio St. 107, 38 Am. Rep. 561; Williams v. McManus, 38 La. Ann. 161, 58 Am. Rep. 171; Kelley v. Flaherty, 16 R. I. 234. And in those states where fornication is made punishable by statute it is actionable to charge it. See Mayer v. Schleichter, 29 Wis. 646; Haynes v. Ritchey, 30 Iowa, 76, 6 Am. Rep. 642.

[3] See Colby v. McGee, 48 Ill. App. 294; Freeman v. Sanderson, 123 Ind. 264; Hemmens v. Nelson, 138 N. Y. 517, 20 L. R. A. 440; Hitchcock v. Caruthers, 82 Cal. 523; Barr v. Birkner (Neb.), 62 N. W. Rep. 494.

[4] See Stitzell v. Reynolds, 67 Pa. St. 54, 5 Am. Rep. 396; Morgan v. Halberstadt, 60 Fed. Rep. 592; Trimble v. Foster, 87 Mo. 49, 56 Am. Rep. 440; Ogden v. Riley, 2 Green's L. 186, 25 Am. Dec. 513; Webster v. Sharpe (N. C.), 21 S. E. Rep. 912. If the words impute a crime, the disbelief of the hearers as to the truth of the charge does not affect the case if it is evident that it was the intention to charge a crime. Rea v. Harrington, 58 Vt. 181. And see Pollock v. Hastings, 88 Ind. 248.

[5] See Irlbeck v. Bierle, 84 Iowa, 47; Stroebel v. Whitney, 31 Minn. 384;

The charge of criminal conduct for which punishment has been inflicted, or which has been pardoned, or a prosecution for which has been barred by the statute of limitations, will support an action under corresponding circumstances to those which support one where the charge, if true, would still subject the party to punishment. It is not, therefore, the exposure to the risk of prosecution and punishment that might follow from the charge, but the disgrace of the scandal that constitutes the injury.[1]

Words imputing contagious or infectious diseases.— Perhaps none but venereal diseases are embraced within this rule at the present day;[2] at any rate it is unlikely that the list would be extended to include more than those contagious or infectious diseases which have their origin in disreputable practices. Such words are held actionable because they tend to exclude the party from society. The charge, therefore, must impute the present existence of the disease.[3]

Words damaging as respects office or profession.— A charge against a professional man of general ignorance or incompetency is an illustration of this class.[4] In this class of cases

Ritchie v. Stenius, 73 Mich. 563; Trabue v. Mays, 3 Dana, 138, 28 Am. Dec. 61. It must clearly appear that those who heard the words understood that they were used in a restricted sense. Delaney v. Kaetel, 81 Wis. 353, 51 N. W. Rep. 559; Ellis v. Whitehead, 95 Mich. 105, 54 N. W. Rep. 753. But the fact that certain persons heard only the actionable words, and not that part of the statement which robbed them of their slanderous nature, does not give a ground for action. Kidd v. Ward (Iowa), 59 N. W. Rep. 279.

[1] See Carpenter v. Tarrant, Cas. Temp. Hardw. 339; Rea v. Harrington, *supra;* Stewart v. Howe, 17 Ill. 71. To charge one with having been a convict is actionable *per se.* See Smith v. Stewart, 5 Pa. St. 372. But if words plainly point back to the commission of a crime for which the plaintiff was convicted and then pardoned, proof of the truth of the charge will defeat the action. Baum v. Clause, 5 Hill, 196.

[2] See Watson v. McCarthy, 2 Kelly, 57, 46 Am. Dec. 380; Irons v. Field, 9 R. I. 216; Kaucher v. Blinn, 29 Ohio St. 62, 23 Am. Rep. 727.

[3] Carslake v. Mapledoram, 2 T. R. 473; Bruce v. Soule, 69 Me. 562; Williams v. Holdredge, 22 Barb. 396; Watson v. McCarthy, *supra.*

[4] As to say of a physician that he is "nothing but a butcher," and "I wouldn't have him to a dog; he is no good." Cruikshank v. Gordon, 118 N. Y. 178. See, also, De Pew v. Robinson, 95 Ind. 109; Rice v. Cottrell, 5 R. I. 340; Tarleton v. Lagarde, 26 L. R. A. and cases cited in *note.* To charge a clergyman with incontinence (Gallwey v. Marshall, 9 Exch. 294); or with drunkenness (McMillan v. Birch, 1 Binn. 178; Hayner v. Cowden, 27 Ohio St. 292, 22 Am. Rep. 303); or with misappropriating collections. McLeod v. McLeod, 4 Montreal

the words, to be *prima facie* actionable, must clearly appear to be spoken of the party in respect to his office, profession or employment;[1] and if this does not appear from the words themselves, the declaration must contain the necessary averments to connect them.[2] And it follows that the party must be, at the time, in the exercise of the duties of his office or profession.[3]

Words prejudicial to a party in his business. — A false charge in respect to one person might be injurious, which, if made in respect to another, would afford no presumption of injury. And so, to bring a case within the fourth class mentioned, the imputation must be such as is calculated to affect the party prejudicially in the business in which he is engaged. To say of a day laborer: "He is a bankrupt," is harmless so far as his business is concerned; but the same remark, if applied to a merchant, may be disastrous, because a good financial credit is indispensable to his business.[4]

Nevertheless, the rules which protect persons against slanders in their business are applicable to all kinds and all grades of business.[5] Men will be excused for extravagance of statement in advertising, but in referring to their rivals they must keep within the limits of truth and fairness, and cannot with impunity make unfounded and injurious imputations against rivals to the prejudice of their business.[6]

L. Rep. 343; Franklin v. Browne, 67 Ga. 272. To say that a lawyer is a "blackmailer." To assail the integrity or intelligence of a judge. Robbins v. Treadway, 2 J. J. Marsh. 540, 19 Am. Dec. 152; Spiering v. Andræ, 45 Wis. 330, 30 Am. Rep. 744. To impute incompetency to a teacher. Price v. Conway, 134 Pa. St. 340, 8 L. R. A. 193.

[1] See Lumby v. Allday, 1 Cromp. & J. 301, 1 Tyrw. 217; Morasse v. Brochu, 151 Mass. 567, 8 L. R. A. 524; Mains v. Whiting, 87 Mich. 172; Van Tassel v. Capron, 1 Denio, 250, 43 Am. Dec. 667; Keene v. Tribune Asso., 76 Hun, 488.

[2] Ayre v. Craven, 2 Ad. & E. 7.

[3] See Forward v. Adams, 7 Wend. 204; Bellamy v. Burch, 16 M. & W. 590.

[4] South Hetton Coal Co. v. North-eastern News Asso., 1 Q. B. 133; Lewis v. Hawley, 2 Day, 495, 2 Am. Dec. 121; Nelson v. Borchenius, 52 Ill. 236; Burtch v. Nickerson, 17 Johns. 217, 8 Am. Dec. 390; Noeninger v. Vogt, 88 Mo. 589; Phillips v. Hoefer, 1 Pa. St. 62, 44 Am. Dec. 111; Rathbun v. Emigh, 6 Wend. 407; Young v. Kuhn, 71 Tex. 645. And see Moore v. Francis, 121 N. Y. 199, 8 L. R. A. 214.

[5] See Terry v. Hooper, 1 Lev. 115; Orr v. Skofield, 56 Me. 483.

[6] See Young v. Macrœ, 32 L. J. Q. B. 6, 3 Best & Sm. 264; Boynton v. Remington, 3 Allen, 397; Fitzgerald v. Redfield, 51 Barb. 484; Haney Mfg. Co. v. Perkins, 78 Mich. 1.

Words not actionable per se.— Under this head fall all those cases in which the untruthful statement is not deemed in law to be necessarily of a damaging character, but which is shown to have been damaging in the particular case by reason of special circumstances which are set out in the declaration.[1] While to say of a woman that she is unchaste is generally held not actionable where unchastity is not made a punishable crime, yet if the woman can show that because of the imputation she lost a contemplated marriage, or suffered in any manner a pecuniary loss, she is entitled to legal redress.[2]

Except as the amount of the recovery will depend upon it, it is immaterial whether the injury be great or small; but it must be pecuniary in its nature.[3]

As distinguishing slander and libel it is said that, while the former is oral defamation, the latter is defamation propagated by printing, pictures, or other means open to the sight. And greater liberty is allowed in vocal speech than in writing or printing, for two reasons:

1. Vocal utterance is frequently the expression of momentary passion or excitement, and is not so open to the implication of settled malice. While to oral expressions little importance may be attached, on the other hand, the same words deliberately written or printed, and afterwards placed before the public, usually justify an inference that they are the expression of settled conviction, and they affect the public mind accordingly.

2. The agency of one who inflicts injury by an oral charge is at an end when the utterance has died upon the ear. But a

[1] As where it is said of one, "He is a rogue." Oakley v. Farrington, 1 Johns. Cas. 129. Or where the terms *cheat* and *swindler* are used. Odiorne v. Bacon, 6 Cush. 185. See Canton Surgical & D. Chair Co. v. McLain, 82 Wis. 93; Joannes v. Burt, 88 Mass. 236.

To charge a man with being a drunkard is not actionable, unless it is coupled with some business in which drunkenness is a disqualification. Broughton v. McGrew, 39 Fed. Rep. 672, 5 L. R. A. 406.

[2] See Shepherd v. Wakeman, 1 Sid. 79. As that she was deprived of the hospitality of friends. Williams v. Hill, 19 Wend. 305. And see Moody v. Baker, 5 Cow. 351; Anon., 60 N. Y. 262, 19 Am. Rep. 174.

[3] Mental distress and illness occasioned by the charge are not such special injury as will sustain the action. Terwilliger v. Wands, 17 N. Y. 54, 72 Am. Dec. 420; Donaghue v. Gaffy, 53 Conn. 43.

written or printed charge may pass from hand to hand, and it will be an ever continuous defamation, so long as that by means of which it is communicated remains in existence.

An action for libel may therefore be maintained for words which, if spoken, would not constitute slander.[1]

In libel, as in slander, defamatory publications are classified as publications actionable *per se*, and publications actionable on averment and proof of special damage. The first class embraces not only all cases of publications which would be actionable *per se* if made orally,[2] but also all other cases where the additional gravity imparted to the charge by the manner of publication can fairly be supposed to make it damaging.[3] The general rule is that any false and malicious writing published of another is libelous *per se* when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or hinder virtuous men from associating with him.[4]

Further, any untrue and malicious charge which is published

[1] See Hooley v. Kerry, 4 Taunt. 335; Steele v. Southwick, 9 Johns. 214; Dexter v. Spear, 4 Mason, 115.

[2] As, for example, to publish of a bank teller that he is mentally deranged. Moore v. Francis, 121 N. Y. 199, 8 L. R. A. 214. And see Price v. Conway, 134 Pa. St. 340, 8 L. R. A. 193.

[3] To print of a man that he is an "anarchist" is libelous, though to orally make the same charge might not be actionable unless shown to be damaging. Conway v. Chicago Daily News Co., 139 Ill. 345, 13 L. R. A. 864. And see Williams v. Karnes, 4 Humph. 9; Price v. Whitely, 50 Mo. 439; McMurry v. Martin, 26 Mo. App. 437; J'Anson v. Stuart, 1 T. R. 748, 2 Sm. L. C. (8th Am. ed.) 986.

[4] To print of a man that he is a hypocrite and an oppressor of widows and orphans is actionable *per se* (Jones v. Greeley, 25 Fla. 629); or that he is an ex-convict (Morrissey v. Providence Telegram Co. (R. I.), 32 Atl. Rep. 19). To describe a man in a newspaper article accompanied by the picture of a jackass, as "an egotistical, overestimated, self-conceited jackass," is also libelous. Moley v. Barrager, 77 Wis. 43. And see Kay v. Jansen, 87 Wis. 118. See further, Lindley v. Horton, 27 Conn. 58; Giles v. State, 6 Ga. 276; Smith v. Smith, 73 Mich. 445, 3 L. R. A. 52; Morey v. Morning Journal Asso., 123 N. Y. 207, 9 L. R. A. 621; Allen v. News Co., 81 Wis. 120; Stewart v. Pierce (Iowa), 61 N. W. Rep. 388; Sanderson v. Caldwell, 45 N. Y. 398, 6 Am. Rep. 105; Morgan v. Halberstadt, 60 Fed. Rep. 592; Monson v. Tussauds (1894), 1 Q. B. 671; World Pub. Co. v. Mullen (Neb.), 61 N. W. Rep. 108. But it is not libelous *per se* to call one a crank (Walker v. Tribune Co., 29 Fed. Rep. 827); nor to publish of a merchant that he has made a chattel mortgage (Newbold v. Bradstreet, 57 Md. 38).

in writing or print, is libelous when damage is shown to have resulted as a natural and proximate consequence.

When the words published are actionable *per se*, it is the duty of the court so to instruct the jury.[1]

Truth as a defense.— The truth of the injurious charge is a defense to a civil action,[2] though it is not always a defense to a criminal prosecution.[3] Even in a civil suit it is necessary to plead it specially.[4]

But an honest belief in the truth of the charge is not a legal excuse;[5] though it may be shown to mitigate the damages.[6]

Issues in civil cases are to be determined in accordance with the preponderance of the evidence. Therefore where criminal conduct is imputed, and the defendant relies on the truth as a justification, it is not necessary, as in criminal cases, that the crime should be established beyond a reasonable doubt.[7]

Words alleged to be libelous will receive an innocent construction if they are fairly susceptible of it; but language is

[1] Gottbehuet v. Hubachek, 36 Wis. 515. And see Trimble v. Anderson, 79 Ala. 514; Moore v. Francis, 121 N. Y. 199, 9 L. R. A. 214.

[2] See 3 Cool. Blk. 126; Press Co. v. Stewart, 119 Pa. St. 584; McAllister v. Detroit Free Press Co., 85 Mich. 453. Under the constitution of many states, and the statutes of others, the truth is a complete exoneration if published for justifiable ends. See Castle v. Houston, 19 Kan. 417, 27 Am. Rep. 127; Palmer v. Adams (Ind.), 36 N. E. Rep. 695; Haynes v. Spokane, etc. Pub. Co. (Wash.), 39 Pac. Rep. 969; and constitutional provisions of Florida, Illinois, Nebraska, Nevada and Rhode Island; and the statutes of Delaware, Kentucky, Maine and Massachusetts. The authorities are collected in a note to Warner v. Clark, 21 L. R. A. 502.

[3] See 3 Cool. Blk. 126 and *note;* State v. Bush, 122 Ind. 42. In Colorado the truth may not be shown in a prosecution for a libel "tending to blacken the memory of the dead, or expose the natural defects of the living." Col. Crim. Code, § 1313.

[4] See Switzer v. Laidman, 18 Ont. Rep. 420; Jarnigan v. Fleming, 43 Miss. 710, 5 Am. Rep. 514. The defense must extend to the whole of the charge. Woodruff v. Richardson, 20 Conn. 238; Thompson v. Pioneer Press Co., 37 Minn. 285. Where the charge is general, the justification must set out the facts relied on as a defense with particularity. See Sweeney v. Baker, 13 W. Va. 158, 31 Am. Rep. 757.

[5] Moore v. Francis, *supra;* Henderson v. Fox, 83 Ga. 233. And see Burt v. Advertiser Co., 154 Mass. 238, 13 L. R. A. 97.

[6] Bronson v. Bruce, 59 Mich. 467, 60 Am. Rep. 307.

[7] See Gannon v. Ruffin, 151 Mass. 204; Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 204; Elliott v. Van Buren, 33 Mich. 49, 20 Am. Rep. 668; Riley v. Norton, 65 Iowa, 306; Andrews' Stephen's Pleading, 175, and *note;* Will's Circ. Ev.

to be taken in its most natural sense.[1] When it is uncertain whether or not a defamatory imputation is conveyed, the question is one for the jury.[2]

When the truth is relied upon as a defense, it must be proved substantially as laid.[3] But the common-law rule, that an unsuccessful attempt to justify may be taken into account in aggravation of damages,[4] is abolished in some states.

Malice.— From the foregoing it is manifest that in the definitions of slander and libel the word *malice* is not used in the ordinary sense. In many cases of aggravated injury there is really no malice at all, and no intent to injure. The cases distinguish between malice in law and in fact. The law presumes a wrongful intention where the words are shown to have been uttered without justification. In a legal sense, the words *malice* and *malicious* do not refer to actual ill-will or hate, but mean only that the false and injurious publication has been made without legal excuse.[5]

In some cases, however, the existence of malice is absolutely essential to the action. A question of defamation is not always a question merely of private scandal, but may involve questions of the highest public importance; as, for example, where a man is defamed by an unjust removal from office on

[1] See Peake v. Oldham, 1 Cowp. 275; Morgan v. Halberstadt, 60 Fed. Rep. 592; World Pub. Co. v. Mullen (Neb.), 61 N. W. Rep. 108; Turton v. New York Recorder (N. Y.), 38 N. E. Rep. 1009.

[2] Zier v. Hofflin, 33 Minn. 66, 53 Am. Rep. 9. But where the language is unambiguous, whether it is libel or not is, in a civil action, a question for the court. Morgan v. Halberstadt, *supra;* Pittsburg, etc. R. Co. v. McCurdy, 114 Pa. St. 554.

[3] Sheehey v. Cokley, 43 Iowa, 183, 22 Am. Rep. 236.

[4] Root v. King, 7 Cow. 613; Freeman v. Tinsley, 50 Ill. 497. But see Ward v. Dick, 47 Conn. 300; Henderson v. Fox, 83 Ga. 233. Under the Oregon code, if the plea of truth be not made in good faith, with an expectation of proving it, that fact may be considered in aggravation of damages. Upton v. Hume, 24 Oreg. 420, 21 L. R. A. 493.

[5] See Bromage v. Prosser, 4 B. & C. 47; Barr v. Moore, 87 Pa. St. 385, 30 Am. Rep. 367; Rearick v. Wilcox, 81 Ill. 77; Blumhardt v. Rohr, 70 Md. 328; King v. Patterson, 49 N. J. L. 417; Byam v. Collins, 111 N. Y. 143, 2 L. R. A. 129; Broughton v. McGrew, 39 Fed. Rep. 672, 5 L. R. A. 406. However, actual malice may be shown — as where it appeared that one had repeated a slanderous statement on several occasions — to aggravate damages. Frederickson v. Johnson (Minn.), 62 N. W. Rep. 388. And see Republican Pub. Co. v. Conroy (Colo.), 38 Pac. Rep. 423. Whether or not malice existed in fact is for the jury. Childers v. San Jose, etc. Pub. Co. (Cal.), 38 Pac. Rep. 903.

unfounded charges, or by injurious testimony given in courts of justice. A public man may have his reputation blasted by an impeachment for an offense never in fact committed; yet if the impeachment was instituted in good faith, and on grounds apparently sufficient, those concerned in it only performed a public duty.

Privilege.—It is essential to justice and the cause of good government that, in many cases, there shall be legal immunity for free speaking without regard to the interests of individuals. It is consequently a rule of law that the person whose duty it is to speak shall be privileged to speak freely. The reasons for this protection, however, while in some cases they seem to be conclusive and absolute, operate in others with less force and with less conclusiveness. The cases may therefore be classified as: 1. Cases absolutely privileged, so that no action will lie even though it be averred that the injurious publication was both false and malicious. 2. Cases privileged only to the extent that the circumstances are held to preclude any presumption of malice, but still leave the party responsible if both falsehood and malice are shown.[1]

Cases of absolute privilege.—No action will lie against the witness in judicial proceedings at the suit of the party injured by his false testimony, even though malice be charged.[2] The privilege extends also to parties, jurors, counsel and judges.[3] But the words must be pertinent to the cause or subject of inquiry.[4] A witness, for example, is not privileged in testifying to what is immaterial, and which has not been called out by questions of counsel;[5] and a juror is protected in speaking

[1] See Runge v. Franklin, 72 Tex. 585, 3 L. R. A. 417. The burden of showing malice is on the plaintiff. See Clark v. Molyneux, L. R. 3 Q. B. D. 237; Strode v. Clement (Va.), 19 S. E. Rep. 177.

[2] Henderson v. Broomhead, 4 H. & N. 569; Liles v. Gaster, 42 Ohio St. 631. The protection extends to evidence before a military court of inquiry. Dawkins v. Lord Rokeby, L. R. 8 Q. B. C. 255. And see White v. Nicholls, 3 How. 266.

[3] See Gardemal v. McWilliams, 43 La. Ann. 454; Hollis v. Meux, 69 Cal. 625, 58 Am. Rep. 574.

[4] Nissen v. Cramer, 104 N. C. 574, 6 L. R. A. 780; Blakeslee v. Carroll, 64 Conn. 223, 25 L. R. A. 106. For the case of an irrelevant charge by a party while conducting his own case, see Hastings v. Lusk, 22 Wend. 410. And see Lecroy v. State, 89 Ga. 335.

[5] White v. Carroll, 42 N. Y. 161, 1 Am. Rep. 503; Cooper v. Phipps, 24 Oreg. 357, 22 L. R. A. 836. But see Steineake v. Marx, 10 Mo. App. 580.

freely to his fellows in the jury-room only concerning the proper subject-matter of their deliberations.[1] In determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of the cause.[2] Pleadings and other papers filed by parties in the course of judicial proceedings are privileged;[3] and so are affidavits made for commencing proceedings before magistrates, and the preliminary proceedings and information taken or given for bringing supposed guilty parties to justice.[4] But a pleading must not wander from what is pertinent to libel parties.[5]

The exemption of a legislator from responsibility is even more complete and absolute, and exists, independent of constitutional declaration, as a necessary principle in free government. What is said or written by a legislator, acting as such either at a session of the house or upon one of its committees, may not be questioned elsewhere, except for the purposes of political redress in elections, even though it is not pertinent to the subject before the house for official action.[6] The members of such inferior bodies as city councils, boards of supervisors, etc., have no such independent powers as legislators proper, and are protected only so far as what is said by them is pertinent to any inquiry or investigation pending or proposed before them.[7]

The executive of the nation and the governors of the several

[1] Dunham v. Powers, 42 Vt. 1.

[2] See remarks of Shaw, C. J., in Hoar v. Wood, 3 Met. 193. State v. Wait, 44 Kan. 310; Maulsby v. Reifsnider, 69 Md. 162.

[3] See Henderson v. Broomhead, 4 H. & N. 570; Lea v. White, 4 Sneed, 73, 67 Am. Dec. 599; Hardin v. Cumstock, 2 A. K. Marsh. 480, 12 Am. Dec. 427; Runge v. Franklin, 72 Tex. 585, 3 L. R. A. 417, and *note;* Lanning v. Christy, 30 Ohio St. 115, 27 Am. Rep. 431.

[4] Rainbow v. Benson, 71 Iowa, 301; Eames v. Whittaker, 123 Mass. 342; Hibbard et al. v. Ryan, 46 Ill. App. 313.

[5] In England, however, at the present day, the exemption with regard to proceedings before a judicial tribunal is absolute without regard to pertinency. See Munster v. Lamb, L. R. 11 Q. B. D. 588; Dawkins v. Rokeby, L. R. 7 H. L. 744. For a collection and discussion of the cases concerning privilege in judicial proceedings, see Randall v. Hamilton, 45 La. Ann. 1184, 22 L. R. A. 649, and *note;* Cooper v. Phipps, 24 Oreg. 357, 22 L. R. A. 836, and *note;* Wimbish v. Hamilton (La. Ann.), 16 So. Rep. 856.

[6] See Coffin v. Coffin, 4 Mass. 1, 3 Am. Dec. 189; State v. Burnham, 9 N. H. 34, 31 Am. Dec. 217; Coffin v. Donnelly, L. R. 6 Q. B. D. 307; Belo v. Wren, 63 Tex. 686.

[7] See Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426; Callahan v. Ingram, 122 Mo. 355.

states are exempt from responsibility to individuals for their official utterances.

Cases only conditionally privileged are those in which the publication is on a lawful occasion which fully protects it, unless the occasion has been abused to gratify malice or ill-will. It is a rule applying to petitions, applications and remonstrances of all sorts, addressed by the citizen to any officer or official body, asking what may be lawfully granted, or remonstrating against what may be lawfully withheld by such officer or body, that no action will lie for false statements contained therein, unless it be shown that such statements were not only false but also malicious.[1] It is a necessary part of the right of petition that such papers, presented in good faith, should be protected;[2] and the protection exists while the paper is being circulated as well as after it is presented.[3] Communications made by an officer in the discharge of a public duty are likewise privileged;[4] and so are all communications by members of corporate bodies, churches, and other voluntary societies addressed to the body or any official thereof, and stating facts which, if true, ought to be thus communicated.[5]

[1] See Thorne v. Blanchard, 5 Johns. 508; Whitney v. Allen, 62 Ill. 472; Bodwell v. Osgood, 3 Pick. 379, 15 Am. Dec. 228; Kent v. Bongart, 15 R. I. 72; Ramsey v. Cheek, 109 N. C. 270.

[2] Bradley v. Heath, 12 Pick. 163, 22 Am. Dec. 418; Howard v. Thompson, 21 Wend. 319, 34 Am. Dec. 238. And see Proctor v. Webster, L. R. 16 Q. B. D. 112, the case of a letter to the privy council concerning the removal of an officer.

[3] Venderzee v. McGregor, 12 Wend. 545. It must be addressed to the authority having power to relieve. Fairman v. Ives, 5 B. & Ald. 642. But a paper never meant to be presented as a petition is not protected. State v. Burnham, 9 N. H. 34.

[4] As the report of a committee appointed to investigate town waterworks. Howland v. Flood, 160 Mass. 509. And see Maurice v. Worden, 54 Md. 233, 39 Am. Rep. 384; Perkins v. Mitchell, 31 Barb. 461, 467; Halstead v. Nelson, 36 Hun, 149. See Re State Prison Commission (R. I.), 5 New England Rep. 99, declaring the reports of commissioners appointed by the governor to be privileged.

[5] Kershaw v. Bailey, 1 Exch. 743; O'Donaghue v. McGovern, 23 Wend. 26. And see Blakeslee v. Carroll, 64 Conn. 223. Pertinent statements made at a town meeting are privileged (Kirkpatrick v. Eagle Lodge, 26 Kan. 384, 40 Am. Rep. 316), and communications between church members in the course of church discipline. Jarvis v. Hatheway, 3 Johns. 180, 3 Am. Dec. 473; Landis v. Campbell, 79 Mo. 433, 49 Am. Rep. 239. And see Farnsworth v. Storrs, 5 Cush. 412; Shurtleff v. Stevens, 51 Vt. 501, 31 Am. Rep. 698. But a letter to a member of an association concerning another member, written by one *having no interest* in the as-

Other cases, though of less importance by reason of the public considerations that bear upon them, are still entitled to the same privilege, because a like duty demands the same freedom of speech, though the communication may concern only the person to whom it is addressed and the person to whom it is made.[1] For example, a father may freely discuss with his daughter the character, habits, reputation and abilities of one who has sought her hand in marriage, and he is at liberty to speak not only what he knows, but what he believes and suspects.[2] Confidential communications between one and his professional adviser, whether legal, medical or spiritual, are shielded with the same protection; as likewise between a principal and his agent in any matter connected with the business.[3] In all these cases it is necessary to show not only that the communication was false, but also that it was made with evil intent. The qualified privilege extends to all communications made *bona fide* upon any subject-matter in which the party communicating has an interest or duty, to a person having a corresponding interest or duty.[4] If one makes it his business to furnish information

sociation, is not privileged. Shurtleff v. Parker, 130 Mass. 293. See, also, Nix v. Caldwell, 81 Ky. 293.

[1] See Strode v. Clement, 90 Va. 553.

[2] Todd v. Hawkins, 8 C. & P. 88. But a libelous letter to a woman concerning her suitor cannot be justified on the ground that the writer was her *former* pastor, and that the letter was written at the request of her parents. Joannes v. Bennet, 5 Allen, 169. Nor is a letter of this sort protected which is promoted by friendly feelings merely, and written without the request of the woman to whom it is sent. Byam v. Collins, 111 N. Y. 143, 2 L. R. A. 129.

[3] Knowles v. Peck, 42 Conn. 386, 19 Am. Rep. 542.

[4] An honest and reasonable belief by the party making the communication that the party to whom it is made has such an interest or duty is not sufficient. Hebditch v. McIlwaine (C. A.), 2 Q. B. 54. See Harrison v. Bush, 5 El. & Bl. 344; Bradley v. Cramer, 66 Wis. 297; Pollasky v. Minchener, 81 Mich. 280; Lovell v. Houghton, 116 N. Y. 520, 6 L. R. A. 363; Missouri Pac. R. Co. v. Richmond, 73 Tex. 568, 4 L. R. A. 280, and *note*. This rule is said to embrace cases where the duty is only a moral or social one. But the difficulty is to determine what is a "moral" duty. See Byam v. Collins, *supra;* White v. Nicholls, 3 How. (U. S.) 266, 291; Gassett v. Gilbert, 6 Gray, 94. Statements which go beyond what is necessary for protection, and introduce matters in which the parties have no common interest, are not privileged. Tillinghast v. McLeod, 17 R. I. 208. A letter to an employer concerning the character and conduct of a servant must be written in good faith to give him information necessary for his protection. Over v. Schiffling, 102 Ind. 191. And where A. was

concerning the character, habits, standing and responsibility of tradesmen, in response to inquiries from those who have a special interest in knowing these facts, his business is privileged;[1] but if he sends such information to all who engage his services, without regard to their special interest in any particular case, his business is not privileged and he must justify his reports by the truth.[2] A reply to a newspaper attack, made in self-defense and without malice, is privileged.[3]

The liberty of the press has been carefully preserved by the constitution, which has not, however, undertaken to define it. The freedom of the press implies exemption from censorship, and a right in all persons to publish what they see fit, being responsible for the abuse of the right.[4] The general purpose of this right being to preclude those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public are concerned, it is evident there must be not only freedom of discussion, but exemption afterward from liability for any publication made in good faith, and in the belief in its truth, the making of which, if true, would be justified by the occasion.[5] There is freedom to discuss in good faith the character, the habits and mental and moral qualification of any person presenting himself as a candidate for public office.[6] The same

about to employ a former servant of F., and F. *voluntarily*, and under the conviction that he owed the duty to A., informed him of misconduct of the servant, the words were held privileged. Fresh v. Cutter, 73 Md. 87, 10 L. R. A. 67. No action will lie against a railroad for publishing to its employees, in a monthly list, the names of servants discharged for misconduct or criminal offenses. Hunt v. Great Northern Ry. (1891), 2 Q. B. 189. And see Bacon v. Mich. Cent. R. Co., 66 Mich. 166.

[1] Ormsby v. Douglass, 37 N. Y. 477; Toussell v. Scarlett, 18 Fed. Rep. 214; Howland v. Blake Mfg. Co., 156 Mass. 543.

[2] Sunderlin v. Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322; King v. Patterson, 49 N. J. L. 417 (see the dissenting opinion in this case); Pollasky v. Minchener, 81 Mich. 280; Mitchell v. Bradstreet Co., 116 Mo. 226, 20 L. R. A. 138; Bradstreet Co. v. Gill, 72 Tex. 115, 2 L. R. A. 405.

[3] Chaffin v. Lynch, 83 Va. 106, 84 Va. 884.

[4] Cooley, Const. Lim. 420; Com. v. Blanding, 3 Pick. 304, 15 Am. Dec. 214.

[5] The conductor of a public journal has no special privilege as such. "The public press occupies no better ground than private persons publishing the same libelous matter." Park v. Detroit Free Press Co., 72 Mich. 560, 1 L. R. A. 599; Delaware State F. & M. Ins. Co. v. Croasdale, 6 Houst. 181; Upton v. Hume, 24 Oreg. 420, 21 L. R. A. 493.

[6] Whether presented before the

freedom exists when the character and official conduct of one holding a public office is in question, and in all cases where the matter discussed is one of general public interest.[1]

Judicial trials and hearings may be fully reported in the public press,[2] provided they are not *ex parte* merely,[3] and are not indecent or blasphemous. But such reports must contain no defamatory observations, headings or comments, and must be confined to the actual proceedings.[4]

electors or a board or officer having power of appointment. See Posnett v. Marble, 62 Vt. 481, 11 L. R. A. 162. See Com. v. Clap, 4 Mass. 169; Hart v. Townsend, 67 How. Pr. 88. One, by becoming a candidate for a public office, deliberately places before the public for discussion his conduct and utterances. Nevertheless his character and reputation should be protected from malicious attack. And when harmful language is falsely and maliciously stated as that of the candidate, privilege ceases to be a defense. Belknap v. Ball, 83 Mich. 583, 11 L. R. A. 72. And so if the article falsely accuses the candidate of a crime. Bronson v. Bruce, 59 Mich. 467, 60 Am. Rep. 307. And see Crane v. Waters, 10 Fed. Rep. 619; Wheaton v. Beecher, 66 Mich. 307.

[1] Palmer v. Concord, 48 N. H. 211, 97 Am. Dec. 605. But "if one goes out of his way to asperse the personal character of a public man, and to ascribe to him base and corrupt motives, he must do so at his peril, and must either prove the truth of what he says or answer in damages to the party injured." Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715. Charges of specific acts of misconduct are not the subject of any privilege. Popham v. Pickburn, 7 Hurlst. & N. 891. And see Post Pub. Co. v. Hallam, 59 Fed. Rep. 530; Augusta Evening News v. Radford, 91 Ga. 494, 20 L. R. A. 533; Randall v. Evening News Asso., 79 Mich. 266, 7 L. R. A. 309; Sillars v. Collier, 151 Mass. 50, 6 L. R. A. 680, and *note;* Burt v. Advertiser Co., 154 Mass. 238, 13 L. R. A. 97, and *note;* Neeb v. Hope, 111 Pa. St. 145; Hamilton v. Eno, 81 N. Y. 116; Davis v. Shepstone, 11 App. Cas. 187, and Post Pub. Co. v. Hallam, 59 Fed. Rep. 530, citing many important cases.

[2] The publication of such proceedings to the country at large affords security for the proper administration of justice, in that those who administer justice act under a sense of responsibility to the public. See Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 318.

[3] The reason for this exception is that the publication of *ex parte* proceedings has a tendency "to prejudge those whom the law still presumes to be innocent and to poison the source of justice." See Rex v. Fisher, 2 Camp. 563; Usher v. Severance, 20 Me. 9, 37 Am. Dec. 33. But it would seem from the English cases that where the defendant is discharged there may be publication. Lewis v. Levy, El. B. & El. 537; Usill v. Hales, L. R. 3 C. P. D. 319. "The public have no rights to any information on private suits till they come up for public hearing, or action in open court." Campbell, J., in Park v. Detroit Free Press Co., 72 Mich. 560, 1 L. R. A. 599, a case of the publication of the pleadings in a bastardy proceeding.

[4] Reports may be published from day to day. See Cowley v. Pulsifer,

This privilege of the press extends to all who make use of it to place information before the public.[1]

The press may lawfully warn the public against the conduct and motives of those who are believed to be disloyal or to threaten the peace of the state; and the fair and honest discussion of matters of public interest is always privileged.[2] No privilege is accorded to the publication of news.[3] Publishers of newspapers, however, are not liable in exemplary damages for the appearance in their journals of false items of intelligence without their personal knowledge, where they have been guilty of no negligence in the selection of the agents through whom the publication has been made, and have not been accustomed habitually to make their journals the vehicle of detraction and malice.[4]

Repetition of defamatory publications.— There is no privilege in repeating defamatory publications. It may sometimes operate to mitigate damages that the defendant only repeated what had been told him by another, whose name he gives, or copied in his newspaper a charge originating elsewhere, or published it as an advertisement or communication; but the fact cannot excuse the publication.[5] And it is no defense that

supra. To be privileged, the reports must be fair and made in good faith. Stevens v. Sampson, L. R. 5 Ex. D. 53. One may publish that a judgment has been entered against a party as shown by the record of the court, but comment in a head-line to the effect that such party was embarrassed is not privileged. Hayes v. Press Co., 127 Pa. St. 642, 5 L. R. A. 643.

[1] See Barrows v. Bell, 7 Gray, 301, 66 Am. Dec. 479.

[2] But the mere fact that the readers of a newspaper are interested in a particular matter affords no privilege. Sheckell v. Jackson, 10 Cush. 25. As to matters that come within the rule as to public interest, see Atkinson v. Detroit, etc. Co., 46 Mich. 341.

[3] Barnes v. Campbell, 59 N. H. 128, 47 Am. Rep. 183. And reporters must use the same degree of care as others to prevent mistakes in news furnished by them. See Park v. Detroit Free Press Co., *supra.*

[4] Scripps v. Reilly, 35 Mich. 371, 24 Am. Rep. 575. See, also, Smith v. Ashley, 11 Met. 367. And the seller of a newspaper containing a libel is not liable if he can prove that he did not know of the existence of such libelous article. See Street v. Johnson, 80 Wis. 455, 14 L. R. A. 203. On the subject of this section the statutes of each state must be consulted.

[5] Upton v. Hume, 24 Oreg. 420, 33 Pac. Rep. 810, 21 L. R. A. 493; Wallace v. Rodgers, 156 Pa. St. 395; Democrat Pub. Co. v. Jones, 83 Tex. 302; Edwards v. Kansas City Times Co., 32 Fed. Rep. 813; Barr v. Birkner (Neb.), 62 N. W. Rep. 494; De

the publication professed to give a rumor merely, or that the plaintiff was generally believed to be guilty of what was imputed to him.[1]

Slander of property.— There may be misrepresentation in respect to particular articles of property not connected with one's business, where the injury will concern the property alone. Such misrepresentation is actionable, provided it is malicious and damaging; but malice will not be presumed, and damage must be alleged and proved.[2]

Slander of title.— For maliciously slandering the title to plaintiff's property an action will lie, and here also it is necessary to aver and prove both malice and damage.[3] The action rests upon the general principle that when one injures an-

Crespigney v. Wellesley, 5 Bing. 392. The one who repeats the story is not shielded unless, at the time of the repetition, he gives the plaintiff an action against the original author. Johnson v. St. Louis D. Co., 65 Mo. 539, 27 Am. Rep. 293.

[1] See Knight v. Foster, 39 N. H. 576; Haskins v. Lumsden, 10 Wis. 359; McAllister v. Free Press Co., 76 Mich. 338. And it affords no protection to give with the publication the name of the author. Dole v. Lyon, 10 Johns. 447, 6 Am. Dec. 346. To mitigate damages it may also be shown that a retraction of the charge was published before suit brought. Davis v. Marxhausen (Mich.), 61 N. W. Rep. 504; Taylor v. Hearst (Cal.), 40 Pac. Rep. 392. But a mere offer to retract, made after the beginning of the suit and which does not appear to have been made in good faith, may not be shown in mitigation of damages. Turton v. New York Recorder (N. Y.), 38 N. E. Rep. 1009. And see Constitution Pub. Co. v. Way (Ga.), 21 S. E. Rep. 139. The legislature of Illinois, at its last regular session, passed an act which provides that the plaintiff in a libel suit shall recover only actual damages in cases where the publication complained of was made in good faith, there being reasonable grounds for believing the statements to be true, if, after the falsity or mistake in the publication was brought to the knowledge of the publisher of the paper making it, a correction or retraction was printed in the next two regular issues thereof in as conspicuous a manner and place as was the libel itself. Similar legislation has been proposed in other states and is not unlikely to be adopted.

[2] Dudley v. Briggs, 141 Mass. 582; Gott v. Pulsifer, 122 Mass. 235, 23 Am. Rep. 322. If it is proved that the representations were false and that injury resulted, malice, it has been held, is to be presumed. Swan v. Tappan, 5 Cush. 104.

[3] Malachy v. Soper, 3 Bing. N. C. 371, Bigelow's Lead. Cas. 54. It is necessary to set out the facts which show wherein the plaintiff has sustained damage. Burkett v. Griffith, 90 Cal. 532. And see Flint v. Hutchinson Smoke Burner Co., 110 Mo. 492 16 L. R. A. 243. An action lies for slander of title to either real or personal property. See Steward v. Young, L. R. 5 C. P. 126.

other by any wrongful and malicious conduct he is liable to an action on the special case.[1]

[1] The action generally arises by reason of the breach of a contract of purchase induced by the false representations. See Burkett v. Griffith, 90 Cal. 532. And is founded on malice. Like v. McKinstry, 41 Barb. 186. And see Harriss v. Sneeden, 101 N. C. 273; Burkett v. Griffith, *supra*, 13 L. R. A. 707, and *note*. And evidence of good faith in making the charge will defeat it. See Lovell v. Houghton, 116 N. Y. 520, 6 L. R. A. 363. An action will lie for slander of title to letters patent (Andrew v. Deshler, 45 N. J. L. 167; Snow v. Judson, 38 Barb. 210); and to a trademark (Hatchard v. Mege, L. R. 18 Q. B. D. 771); and to a copyright. Dicks v. Brooks, L. R. 15 Ch. D. 22; Lovell v. Houghton, *supra*.

CHAPTER VIII.

INJURIES TO FAMILY RIGHTS.

Family rights.— It has been said in a former chapter that the common law, while it took notice of rights pertaining to certain relations of life, did not recognize the family, as such, as constituting a legal entity, and as having rights as an association of persons. In modern times legal principles have not been modified to keep pace with social progress, and the common law of family rights is in most particulars not greatly different now from what it was during the formative period of the law, when the husband and father was regarded as the representative of the family, and wife and children were, as to him, rather servants and dependants than equals.

Wrongs to the husband.— While the husband and father was recognized as the head and representative of the family, it was impossible, in some cases, that the ordinary remedies for civil injuries should be allowed as between the various members. For example, for a gross breach of the marriage covenant by the wife the spiritual courts might decree a separation, and the supreme legislative authority might dissolve the marriage relation; but other civil redress the husband could not have.

The spirit of the age rejects, as a reminiscence of barbarism, the right of the husband to inflict personal chastisement upon the wife.[1]

While the wife cannot maintain an action for an assault upon her by the husband, yet such an assault is punishable by the criminal law; and from any forcible restraint put upon the actions of the wife, and which would constitute an imprisonment, she might have relief on *habeas corpus*.[2]

Against third persons the husband might have redress at

[1] The old rule was recognized in State v. Rhodes, 1 Phil. (N. C.) 453, 98 Am. Dec. 78. But see, as supporting the text, Poor v. Poor, 8 N. H. 307, 313; Com. v. McAfee, 108 Mass. 458, 11 Am. Rep. 383.

[2] See Main v. Main, 46 Ill. App. 106.

common law for an injury suffered by him in respect to the property which the wife brought him.

Against one who seduced his wife or enticed her away from him the husband might have a special action on the case. On the question of damages the following subjects might be taken into consideration: 1. Dishonor of the marriage bed. 2. Loss of the wife's affections. 3. Loss of the comfort of the wife's society. 4. Total loss of the wife's services where she absconds from the husband, and probable diminished value of services where she does not. 5. The mortification and sense of shame usually accompanying this flagrant wrong. By the weight of modern authority the basis of the action for alienation of the wife's affections, or for criminal conversation, is the loss of the *consortium*, by which is meant the society, companionship, affection, assistance and fidelity of the wife.[1]

In any case, the extent of the injury must depend in great measure upon the previous relations of husband and wife, which is always a competent subject of inquiry. If these were such as usually exist where the parties have a proper sense of the obligations and responsibilities that belong to marriage, the injury done to the husband by the seduction of his wife is out of all proportion to that which is done him where he has previously, by his own abuse and misconduct, destroyed her affections.[2] The cases differ so widely in their facts, that, as to damages, it must be left to the proper legal tribunal to award in its discretion much or little, according as it is found that much or little has been lost by the complaining party.[3]

[1] Cross v. Grant, 62 N. H. 675, 13 Am. St. Rep. 607; Adams v. Main, 3 Ind. App. 232. In criminal conversation, whether the invasion of the rights of the husband — the defilement — is accomplished by force or by consent of the wife, is immaterial to maintenance of the action. Egbert v. Greenwalt, 44 Mich. 245, 38 Am. Rep. 260; Bedan v. Turney, 99 Cal. 649. But the wife's consent may reduce the damages. Ferguson v. Smethers, 70 Ind. 519, 36 Am. Rep. 186. The question of force is always for the consideration of the jury. Bedan v. Turney, *supra*. Loss of the wife's services may constitute one of the elements of damages, but not necessarily so. Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307.

[2] That the bad character of the husband may mitigate damages he must have been guilty of some wrong to the wife herself. Norton v. Warner, 9 Conn. 172.

[3] See Matheis v. Mazet, 164 Pa. St. 580. Letters of husband and wife to each other may be introduced in evidence to show their relations before the wife's connection with the defendant. Holtz v. Dick, 42 Ohio St.

The action for seducing the wife away from the husband extends to all cases of wrongful interference in the family affairs of others whereby the wife is induced to leave the husband, or to so conduct herself that the comfort of the married life is destroyed.[1] If, however, the parents of the wife interfere on an assumption that the wife is ill-treated to an extent that justifies her in withdrawing from her husband's society and control, they should not be held responsible unless a want of justification is clearly shown.[2] One who merely harbors a wife who left her husband, without his consent, will not be liable to the husband unless she left him without justification.[3]

Wrongs to the wife.— For an injury to the wife, caused either intentionally or negligently, which deprives her of the ability to perform services, or lessens that ability, the husband may maintain an action for the loss of service, and also for any incidental loss or damage, such as moneys expended in care and medical treatment and the like.[4] At common law the fact that the injury resulted in her death could not be taken into

23, 51 Am. Rep. 791; Fratini v. Caslini, 66 Vt. 273. Though previous unhappy relations may mitigate damages they cannot palliate the defendant's conduct. See Hadley v. Heywood, 121 Mass. 236, 239. There is such a thing as a partial alienation of affections; and though the wife had no affection for her husband, the defendant had no right to interfere and cut off the chance of future affection. Dallas v. Sellers, 17 Ind. 479, 79 Am. Dec. 489; Fratini v. Caslini, *supra*.

[1] Though there be no elopement or adultery. Rinehart v. Bills, 82 Mo. 534, 52 Am. Rep. 385. And see Hoard v. Peck, 56 Barb. 202.

[2] Bennett v. Smith, 21 Barb. 439. One who makes true statements to a wife and gives her advice, in consequence of which she afterwards, and of her own independent action, leaves her husband, is not liable unless it appears that he was acting from malevolent motives. Tasker v. Stanley, 153 Mass. 148, 10 L. R. A. 468.

[3] Philp v. Squire, Peake, N. P. 82. And see Johnston v. Allen, 100 N. C. 131.

[4] Matteson v. N. Y. C. R. Co., 35 N. Y. 487; Atlantic, etc. R. Co. v. Hopkins, 94 U. S. 11. And it has lately been decided that the wife's contributory negligence will constitute a defense to such an action. C., B. & Q. R. Co. v. Honey, 63 Fed. Rep. 39, 26 L. R. A. 42; Winner v. Oakland Tp., 158 Pa. St. 405, 410. In Iowa the husband cannot recover if the wife has followed an independent employment. Fleming v. Shenandoah, 67 Iowa, 505, 56 Am. Rep. 354. And see Brooks v. Schwerin, 54 N. Y. 343. Recovery by the husband for an injury to himself is no bar to an action by him for an injury sustained by his wife at the same time. Skoglund v. Minneapolis St. R. Co., 45 Minn. 330, 11 L. R. A. 222, and *note*.

account either as the ground of action or as an aggravation of damages;[1] but this is changed by statute in most of the states.

The word "service," when employed to indicate the ground on which the husband is allowed to maintain an action, implies whatever of aid, assistance, comfort and society the wife would be expected to render to, or bestow upon her husband, under the circumstances and in the condition in which they may be placed, whatever those may be. That services, in the sense of labor or assistance such as a servant might perform or render, were not rendered at all, would be immaterial and irrelevant, except as the fact might, under some circumstances, tend to show a want of conjugal regard and affection, and thereby tend to mitigate the damages.[2]

For an injury suffered by the wife in her person, such as would give a right of action to any person, a suit might be instituted in the joint name of the husband and wife, which would embrace damages for physical and mental suffering;[3] but the damages recovered would belong to the husband alone. In some of the states, however, it is held that the statutes which exclude the husband's common-law interest in the real and personal estate of the wife take from him also the right to compensation for the torts suffered by her.[4]

Where, by statute, the wife is given full dominion and control of her property, an action may be maintained against the

[1] The husband's recovery was limited to the loss suffered intermediate the injury and death. Hyatt v. Adams, 16 Mich. 180.

[2] At the same time, if the wife is accustomed to render services to the husband in his business, he may recover, in an action for an injury which deprives him of her aid, for the value of her services and the loss resulting from her inability to perform them. Citizens' St. R. Co. v. Twiname, 121 Ind. 375, 7 L. R. A. 352.

[3] See Hyatt *v.* Adams, *supra.*

[4] Now in some states the wife may sue alone for injuries. Stevenson v. Morris, 37 Ohio St. 10, 41 Am. Rep. 481; C., B. & Q. R. Co. v. Dunn, 52 Ill. 260, 4 Am. Rep. 606. And in Iowa it has been ruled, under the statute, that the wife must sue alone, and so must the husband, for injury to her. See Honey v. C., B. & Q. R. Co., 59 Fed. Rep. 423. But in other states it is held that a personal tort does not create a right of property, and the married woman's property act has not given her the right to sue for a personal injury; and it is held that, in an action by husband and wife, proof of contributory negligence of the former will defeat the suit. See Pennsylvania R. Co. v. Goodenough (N. J.), 22 L. R. A. 460, and *note.* Also in California the right to recover damages is community property, and the wife cannot sue alone. McFadden v. Santa Anna, etc. R. Co., 87 Cal. 464, 11 L. R. A. 252.

husband for any unlawful interference with the property.[1] But even under these statutes the wife can maintain no action against her husband for a personal injury.[2] Even after divorce the wife cannot sue the husband for a personal tort committed by him upon her while the relation lasted.[3]

At common law the wife had no redress against one who should seduce the husband's affections from her, or in any manner deprive her of his care and society. But now, in many of the states, the wife may maintain an action for the alienation of her husband's affections, and the consequent loss of his society, assistance and support.[4]

Parent and child.— At common law, the action for the injury which one might suffer in the relation of parent was limited to the recovery of damages for being deprived of the child's services, and was based upon the relation of master and servant rather than upon that of parent and child. The decisions have consequently been to the effect that if the child, from want of maturity or other cause, was incapable of rendering service, the parent could suffer no pecuniary injury, and therefore could maintain no action when the child was abducted or injured.[5]

[1] Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578; Larison v. Larison, 9 Ill. App. 27. In New York the wife may sue as if she were single. Code of Civ. Proc., § 450. And see McKendry v. McKendry, 131 Pa. St. 24, 6 L. R. A. 506, and *note*.

[2] Peters v. Peters, 42 Iowa, 182; Schultz v. Schultz, 89 N. Y. 644.

[3] For example, she cannot sue him for assault committed during coverture. Longendyke v. Longendyke, 44 Barb. 366; Abbott v. Abbott, 67 Me. 304, 24 Am. Rep. 27; Main v. Main, 46 Ill. App. 106.

[4] In some states the action is allowed on the ground of the removal by statute of the disabilities of the wife. See Mehroff v. Mehroff, 26 Fed. Rep. 13; Townsdin v. Nutt, 19 Kan. 282; Rice v. Rice (Mich.), 62 N. W. Rep. 833; Warren v. Warren, 89 Mich. 123, 14 L. R. A. 545; Hodgkinson v. Hodgkinson (Neb.), 61 N. W. Rep. 577; Holmes v. Holmes, 133 Ind. 386; Railsback v. Railsback (Ind. App.), 40 N. E. Rep. 276; Clow v. Chapman (Mo.), 26 L. R. A. 412. But other decisions do not base the action on statute. As sustaining the right, see further Fort v. Card, 58 Conn. 1, 6 L. R. A. 829; Bennett v. Bennett, 116 N. Y. 584, 6 L. R. A. 553; Westlake v. Westlake, 34 Ohio St. 621; Seaver v. Adams (N. H.), 19 Atl. Rep. 776. But the following cases deny the right of action: Doe v. Roe, 82 Me. 503, 8 L. R. A. 833; Duffies v. Duffies, 76 Wis. 374, 8 L. R. A. 420. As to the right of a married woman to maintain an action in the nature of *crim. con.* against another woman, see Kroessin v. Keller (Minn.), 62 N. W. Rep. 438.

[5] See Grinnell v. Wells, 7 M. & G. 1033. But in this country there has

Loss of service to the parent[1] may be occasioned by enticing the child away,[2] by forcibly abducting the child,[3] by beating or otherwise purposely injuring the child,[4] by a negligent injury which disables the child from labor,[5] and, in case of a female child, by seduction. In some of these cases there may be two wrongs: one to the parent, in depriving him of the child's services; and one to the child, to his personal injury. But the actions cannot be joined, the right of action in each being distinct.[6]

Whatever induces the child to leave the parent, or, after leaving, to remain away from him, may in law constitute enticement; but to receive and shelter a child from parental abuse may sometimes be a moral duty and justifiable. Therefore, where the defendant is charged with enticing the child away from his parent, his motive is important. It has been held that one who employed a runaway child without knowledge of his misconduct was liable for retaining him in his service after notice that his father objected, but not before.[7]

been a tendency toward "a more liberal and more reasonable doctrine, basing the right of action upon parental relation." And the father is allowed to recover his consequential loss of expense and time in the care, nursing, etc., of the injured child, irrespective of its age. See Netherland-American Steam Nav. Co. v. Hollander, 59 Fed. Rep. 417; Dennis v. Clark, 2 Cush. 347, 48 Am. Dec. 671; Durden v. Barnett, 7 Ala. 169; Clark v. Bayer, 32 Ohio St. 299, 30 Am. Rep. 593; Cuming v. Railway Co., 109 N. Y. 95. But not for the loss of service without proof of such loss. Whitaker v. Warren, 60 N. H. 20, 49 Am. Rep. 302.

[1] A widowed mother may recover for injury to a minor child which lives with her and is supported by her. Horgan v. Pacific Mills, 158 Mass. 402. And a mother who, with her minor child, has been abandoned by the husband, may maintain an action for an injury to the child. Savannah F. & W. R. Co. v. Smith (Ga.), 21 S. E. Rep. 157.

[2] It must be averred that the defendant knew of the relation. Butterfield v. Ashley, 6 Cush. 249.

[3] Magee v. Holland, 27 N. J. 86, 72 Am. Dec. 341; Dobson v. Cothran, 34 S. C. 518.

[4] See Cowden v. Wright, 24 Wend. 429, 35 Am. Dec. 633.

[5] See Horgan v. Pacific Mills, *supra*.

[6] Rogers v. Smith, 17 Ind. 323, 79 Am. Dec. 483. The parent may recover notwithstanding a recovery in an action by the child. Evansich v. G., C. etc. R. Co., 57 Tex. 126, 44 Am. Rep. 586. But the parent cannot recover for the child's suffering; nor can the child, if supported and cared for by the parent, recover for the loss of services, or for expenses incurred by the injury. See Horgan v. Pacific Mills, *supra*.

[7] Everett v. Sherfey, 1 Iowa, 356; Butterfield v. Ashley, 6 Cush. 249. And see Sargent v. Mathewson, 38 N. H. 54.

Upon the question whether the father can sustain an action against one who entices from his service his minor daughter and procures her to be married to a third person without his consent, the cases are not in harmony. In Massachusetts it is held that, if the girl is of the age of legal consent, no such action can be maintained, for the reason that "the law of marriage entirely overrides the general principles of right of the parent to the services of the child."[1] In a case in Kentucky the action was allowed, but the damages were restricted to the time which elapsed previous to the time when the marriage actually took place.[2]

Seduction.— A father suing for the seduction of a daughter actually at the time a member of his household, is entitled to recover in his capacity of actual master for a loss of services consequent upon any diminished ability in the daughter to render services. Evidence that the daughter was not accustomed to render service will not be received. And while this supposed loss will constitute the nominal ground of recovery,[3] a substantial award of damages will be supported, based on the loss of the society of the daughter, the injury to the parental feelings, and the shame and mortification which must follow from such a wrong, which are the real constituents of the cause of action. To this may be added any pecuniary expense which the parent has sustained for care, medical attendance, etc.[4]

If the daughter was not actually a member of the father's household at the time, yet if she were not in the actual service of another, and the father had a right to recall her to his

[1] Hervey v. Moseley, 7 Gray, 479, 66 Am. Dec. 515. And see Holland v. Beard, 59 Miss. 161, 42 Am. Rep. 360.

[2] Jones v. Tevis, 4 Litt. 25, 14 Am. Dec. 98.

[3] See White v. Nellis, 31 N. Y. 405, 88 Am. Dec. 282. Proof of any loss of service, however slight, will be sufficient. Blagge v. Illsley, 127 Mass. 191, 34 Am. Rep. 361. And it has been held that the suit may be maintained though no expense or actual loss of service is proved, it being sufficient that the father is at the time *entitled* to the services of the daughter. See Lawyer v. Fritcher, 130 N. Y. 239, 14 L. R. A. 700. It makes no difference whether the loss of service is accomplished by fraud upon the master or force upon the servant (daughter). Lawyer v. Fritcher, *supra*.

[4] Blanchard v. Illsley, 120 Mass. 487, 26 Am. Rep. 535; Bayles v. Burgard, 48 Ill. App. 371; Terry v. Hutchinson, L. R. 3 Q. B. 599; Scarlett v. Norwood, 115 N. C. 284.

own service, he might maintain the action the same as if she actually had been recalled or had returned.[1]

In England, if the daughter was actually in the service of another, no action could be maintained by the parent, because the conditions which support it did not then exist.[2] In such a case the person in whose employ she was for the time being might maintain the suit, unless he himself were the wrong-doer, in which case it could not be brought at all.[3]

In America, however, the weight of authority seems to sustain the rule that the father may maintain the action, though at the time the daughter was living away from home, if he has retained the right to control her services.[4] And this even though she was in the service of one by whom she was seduced.[5] But not if he has relinquished all right to her services and all control over her.[6] And if the defendant procures the woman to enter his service fraudulently, and for the purpose of withdrawing her from her family and seducing her, the parent may maintain the action against him.[7]

The time when the cause of action is deemed to have accrued may depend upon the form of action, which may be either in trespass or case. If the wrong-doer comes upon the premises of the plaintiff and accomplishes the seduction there, the wrongful act characterizes his entry upon the land, and the seduction is to be regarded as an aggravation of the trespass.[8] Therefore the parent can bring trespass only when the daughter resided with him at the time of the seduction. But if the daughter, after seduction abroad, returns to the home of her parents, where expenses are incurred and loss suffered in con-

[1] See Bolton v. Miller, 6 Ind. 265; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584.

[2] Dean v. Peel, 5 East, 49. See O'Rielly v. Glavey, 32 L. R. Ir. 316 (Ex. D.)

[3] Manvell v. Thomson, 2 C. & P. 303; Bennett v. Alcott, 2 T. R. 166; Gladney v. Murphy, 26 L. R. Ir. 651 (Q. B. D.).

[4] White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Mohry v. Hoffman, 86 Pa. St. 358; Lavery v. Crooke, 52 Wis. 612, 38 Am. Rep. 768.

[5] Simpson v. Grayson, 54 Ark. 404.

[6] See Ogborn v. Francis, 44 N. J. L. 441, 43 Am. Rep. 394; Schmit v. Mitchell (Minn.), 61 N. W. Rep. 140. If the daughter is living in the father's family and rendering service, it is immaterial that she is of full age. Wert v. Strouse, 38 N. J. L. 184; Lamb v. Taylor, 67 Md. 85.

[7] Dain v. Wyckoff, 18 N. Y. 45, 72 Am. Dec. 493.

[8] Hubbell v. Wheeler, 2 Aik. (Vt.) 359; Moran v. Dawes, 4 Cow. 412.

sequence of the seduction, the right of action is deemed to arise from this expense or loss, and the action must be in case for the consequential injury. It is sufficient, therefore, that the actual or supposed relation of master and servant exist either at the time of the seduction or at the time of the resulting damage; the form of the remedy is varied to meet the facts, but the substantial recovery is the same in each case.[1]

It is not essential to the maintenance of the suit that pregnancy or sexual disease should have resulted; it is sufficient if the ability to perform services was in any degree impaired as a direct consequence of the defendant's conduct.[2]

If the father is deceased, the mother may bring the action for the injury.[3]

The damages, as has been intimated, are by no means measured by the loss of service and the incidental care and expenses, but may be given "also 'for all that the plaintiff can feel from the nature of the injury.'"[4] Thus it appears that the substantial ground of recovery is not the ground on which the action is nominally planted. Many courts have expressed their dissatisfaction with the existing rules on the subject and have declared this state of the law to be "at variance with the sentiment and conscience of this age."[5] To remedy the evil the legal fiction has been abolished by statute in some of the states, and it is there not necessary to recovery by the parent that he shall rest his action upon loss of service.[6]

[1] Parker v. Meek, 3 Sneed, 29; Ellington v. Ellington, 47 Miss. 329; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Vanhorn v. Freeman, 6 N. J. L. 322, and *note;* Blagge v. Ilsley, 127 Mass. 191, 34 Am. Rep. 361. But in Bartley v. Richtmeyer, 4 N. Y. 38, 53 Am. Dec. 338, it is held that the relation must have existed at the time of the seduction. And this seems to be the rule in England. Davies v. Williams, 10 Q. B. 725. See, however, Coon v. Moffitt, 3 N. J. L. 583, 4 Am. Dec. 392, opinion of Pennington, J.

[2] Abrahams v. Kidney, 104 Mass. 222, 6 Am. Rep. 220; Blagge v. Ilsley, *supra.* It has been held otherwise in England. Eager v. Grimwood, 1 Ex. 61.

[3] Coon v. Moffitt, *supra;* Furman v. Van Sise, 56 N. Y. 435, 15 Am. Rep. 441.

[4] 2 Greenl. on Ev., § 579, quoted in Phelin v. Kenderdine, 20 Pa. St. 354. See, also, to the same effect, Lipe v. Eisenlerd, 32 N. Y. 229; White v. Murtland, 71 Ill. 250; Lawyer v. Fritcher, 130 N. Y. 239; 14 L. R. A. 700; Russell v. Chambers, 31 Minn. 54; Garretson v. Becker, 52 Ill. App. 255.

[5] See Ellington v. Ellington, 47 Miss. 329, 351.

[6] See Felkner v. Scarlet, 29 Ind. 154; Stoudt v. Shepherd, 73 Mich. 588; Franklin v. McCorkle, 16 Lea, 609, 57

Independent of statute the woman could not sue for her own seduction. In many states, however, the statutes give her the right,[1] and, to affect the damages, she may prove all the consequences of the seduction.[2]

At common law, if the plaintiff was assenting to the seduction, or connived at it, or quietly permitted such improper action on the part of the defendant as led to it, there can be no recovery.[3]

Wrongs to a child.— For an injury suffered by the child in that relation no action will lie at the common law. The only way in which the obligation of the parent to support him can be enforced is by proceedings on behalf of the public. And no action will lie against a third person for depriving a child of his source of support by means of an injury to the parent. As has been heretofore intimated, the common law does not invest a child adopted into the family with the rights of a child by birth. Nevertheless, in the case of an adopted child, the remedies in respect to third persons will be the same, while the relation exists, as they would be in the case of a child by nature.

Action by guardian.— The guardian of the ward's person may, in general, maintain suits for personal injuries to the ward when, under corresponding circumstances, the parent might maintain them. On the ground that he has control over the minor's services, it has been held that he may bring suit for the seduction of his female ward.[4] But in Massachusetts, where he has no such control, the contrary has been held.[5]

Loss of marriage.— In nearly all of the states the only indispensable prerequisite to entering into the marriage relation is that of competent consent. If, after consent once given, one of the parties refuses performance, this, in law, is a mere breach

Am. Rep. 244; Fry v. Leslie, 87 Va. 269.

[1] See McCoy v. Trucks, 121 Ind. 292; Baird v. Boehner, 77 Iowa, 622; Hood v. Sudderth, 111 N. C. 215; Graham v. McReynolds, 90 Tenn. 673. Under such statutes it has been held that she cannot recover if she is equally guilty with the man. Breon v. Henkle, 14 Oreg. 494.

[2] McCoy v. Trucks, *supra*.

[3] Smith v. Mastin, 15 Wend. 270; Vassell v. Cole, 10 Mo. 634, 47 Am. Dec. 136.

[4] Fernsler v. Moyer, 3 W. & S. 416, 39 Am. Dec. 33.

[5] Blanchard v. Ilsley, 120 Mass. 487, 26 Am. Rep. 535.

of contract, except where, by means of the contract of marriage, the man has been enabled to accomplish the woman's seduction. The case then becomes a gross fraud, and may be prosecuted as a tort.

In general, no action will lie against a third person who, by solicitations or otherwise, shall induce one to break off an existing contract of marriage. But where the party is induced to break off the engagement by false and damaging charges not actionable *per se*, there may be such a special injury as will support an action for the defamation. The loss of the marriage in this case is only the damage flowing from the injury. If a contemplated marriage be prevented by the forcible separation of the parties, or by the imprisonment of one of them, the party subjected to the illegal force, though he might have an action in the one case for assault, and in the other for false imprisonment, could not base an action on the loss of marriage. Yet it has been held that where one breaks up an intended marriage by falsely and maliciously representing to the intended husband that the woman is already his own wife, the woman may have an action for the fraud.[1]

The age of consent to marriage is usually below the age of full capacity to act on the child's own behalf, and is merely the age fixed by law, below which a marriage is voidable. In strictness of law, the minor child, when he reaches the age of consent, has not the *right*, but only the *capacity*, to form the relation of marriage. While, previous to the child's legal emancipation, the parent may withhold his consent from a contemplated marriage, and break it up, yet if a child, over the age of consent, succeed in entering into the relation of marriage, the marriage will be sustained on grounds of public policy, and parental rights will be made to yield to it.[2]

Fraudulent marriage.—A very serious wrong may be accomplished by inducing one, through misrepresentation and fraud, to enter into an illegal marriage. In an early case it was decided that where a married man, by falsely assuming to be single, induced a woman to marry him, she might, on discovering the deception, maintain an action against him for the

[1] Shepherd v. Wakeman, 1 Sid. 79.

[2] See Hervey v. Moseley, 7 Gray, 479, 66 Am. Dec. 515; Aldrich v. Bennett, 63 N. H. 415, 56 Am. Rep. 529.

injury.[1] The tort, in such a case, consists in the fraud accomplished to the woman's serious, and perhaps permanent injury. It is not essential that any false affirmations should have been made in words. A proposal of marriage is, in itself, a false affirmation if the party has not lawful authority to enter into the contract. Known impotency on the part of the man, and pregnancy of the woman by another man at the time of the marriage, concealed from the husband, are grounds for annulling the marriage, but not for an action at common law.[2]

Where a marriage is entered into in reliance upon a fraudulent divorce procured from a court not having jurisdiction, with one not aware of the facts, the wrongs committed are precisely the same as if no such divorce had ever been obtained.

Burial rights.— The common law recognized a property in the shroud or other apparel of the dead as belonging to the person who was at the charge of the funeral;[3] but its recognition of legal rights in the family, as an aggregate of persons, in respect to the burial of the dead was very faint and uncertain. In Indiana it is held that the bodies of the dead belong to the surviving relatives in the order of inheritance as other property, and that the courts of the state possess the power to protect the relatives in the exercise of the right of burial.[4] And in a late case in Minnesota a widow was allowed to recover damages for the unlawful mutilation and dissection of the body of her deceased husband.[5]

In Pennsylvania it has been held that the widow's control of the body ceases at burial, and that thereafter the disposition of it belongs to the next of kin.[6] But a recent case in Rhode Island decided that a widow had a right to remove the body when it had been buried by next of kin in a particular cemetery against her wishes.[7]

[1] See Anon., Skinner, 119. In Blossom v. Barrett, 37 N. Y. 434, 97 Am. Dec. 747, this doctrine was applied to the case of one from whom his wife had procured a divorce, leaving him incapacitated to marry again during her life-time.

[2] Donovan v. Donovan, 9 Allen, 140; Franke v. Franke (Cal.), 18 L. R. A. 375, and *note*.

[3] 2 Cooley's Blk. Com. 429; Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759.

[4] Renihaus v. Wright, 125 Ind. 536, 9 L. R. A. 514.

[5] Larson v. Chase, 47 Minn. 307, 14 L. R. A. 85, and *note*.

[6] Wynkoop v. Wynkoop, 42 Pa. St. 293, 82 Am. Dec. 506.

[7] Hackett v. Hackett, 18 R. I. —, 19 L. R. A. 558. See Pierce v. Swan Point Cemetery Proprietors, 10 R. I.

For an injury to the monument an action of trespass might be brought by the owner of the burial lot, or, if there was no private ownership in the lot, then by the party erecting it.[1]

Exemption laws.— One of the most distinct instances of recognitions of the family, as such, for the purposes of legal remedy, is to be found in the constitutional and statutory provisions exempting property of householders from levy and sale on legal process for the satisfaction of debts. The benefit of the homestead is, in many of the states, continued to the family after the owner's death, so long as they, as a family, occupy it.[2]

Master and servant.— Generally the loss which the master suffers in this relation at the hands of others is limited to services, but may extend to expenses incurred in care of the servant, and for medicine and other incidental expenses, when the loss is occasioned by some violence to the servant or injury to his health. The principles which govern the recovery have been sufficiently indicated in speaking of parent and child.[3] The wrongs which the servant himself might suffer at the hands of third persons would be redressed independent of the relation.[4]

Injuries resulting from the use of intoxicating liquors.— In recent years statutes have been passed in many of the states giving to husband, wife, parent, child or guardian, and sometimes to other parties, for injuries done by intoxicated persons, the right to maintain actions against the person or persons who may have sold or given the liquors which caused the intoxication. The recovery may extend to cover injuries to means of support, the expense and trouble of caring for the intoxicated person, and other injuries and losses which are particularly pointed out in the statutes. These provisions are for the benefit and protection of the family, and are therefore

227, 14 Am. Rep. 667, where the right of the widow was denied on the ground of long acquiescence.

[1] Spooner v. Brewster, 3 Bing. 136; Partridge v. First Independent Church, 39 Md. 631.

[2] See Waples on Homestead and Exemption. For a more particular study of this subject the student is referred to the statutes and decisions of his own state.

[3] And see Lawyer v. Fritcher, 130 N. Y. 239, 14 L. R. A. 700; also Chambers v. Baldwin, and *note*, 11 L. R. A. 548; and Rourlier v. Macauley, 91 Ky. 135, 11 L. R. A. 550.

[4] See Fluker v. Ga. R. & Bkg. Co., 81 Ga. 461, 2 L. R. A. 843.

properly referred to here. But the limits of this book will not allow a presentation of all the statutes on the subject, and therefore the statute of Illinois has been selected as a fair sample.

In that state it is provided that —

"Every person who shall, by the sale of intoxicating liquors, with or without a license, cause the intoxication of any other person, shall be liable for, and compelled to pay, a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and two dollars per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in an action of debt before any court having competent jurisdiction.

"Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and any person owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages, sustained, and for exemplary damages; and a married woman shall have the same right to bring suits and to control the same and the amount recovered, as a *feme sole;* and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parent, guardian or next friend, as the court shall direct; and the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this act may be by any appropriate action in any of the courts of this state having competent jurisdiction.

"The giving away of intoxicating liquors, or other shift or device to evade the provisions of this act, shall be held to be an unlawful selling."[1]

These statutes give a right of action unknown to the common law and are to be construed strictly.[2] If the wife brings the action she can recover only for injury in person, property or means of support, and not for anguish of mind, mortification or loss of her husband's society.[3] If a wife bring suit it is necessary to a recovery under this act to establish: the intoxication of the husband; that she has been injured in person or property, or means of support, by reason thereof; and that the intoxication from which the injury resulted was caused, in whole or in part, by the selling or giving intoxicating liquors to her husband by the defendant.[4] Exemplary damages can be recovered only where there has been actual damage and where aggravating circumstances are shown.[5] When exemplary damages are claimed, the defendant may show facts in mitigation; as, for example, that the husband and wife drank liquors together.[6] Proof of injury to means of support may be made out by circumstances.[7] It is no defense that others also sold liquors to the husband; but where several are liable there can

[1] R. S. 1874, §§ 8, 9, 13; Starr & Curt. Anno. Stat., p. 971 et seq. The following states also have statutes on this subject: Arkansas, Connecticut, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, West Virginia and Wisconsin.

[2] And so the last section given is held to apply to those only who are engaged in the liquor traffic, and not to cover the case of one who, in his own house, gives a drink out of courtesy. Cruse v. Aden, 127 Ill. 231, 3 L. R. A. 327.

[3] Flynn v. Fogarty, 106 Ill. 263. The rule is otherwise under the statutes in Michigan. Rudley v. Seider, 99 Mich. 431. It has been held in Iowa that mental suffering may be compensated if it is the result of injury to the person. Ward v. Thompson, 48 Iowa, 588.

[4] McMahon v. Sankey, 133 Ill. 636. And see Fountain v. Draper, 49 Ind. 441.

[5] Roth v. Eppy, 80 Ill. 283; Hanewacker v. Ferman (Ill.), 61 N. W. Rep. 924. In Iowa, if actual damages are given, exemplary damages must be added. Miller v. Hammers (Iowa), 61 N. W. Rep. 1087; Fox v. Underlich, 64 Iowa, 187.

[6] Roth v. Eppy, 80 Ill. 283; Lloyd v. Kelly, 48 Ill. App. 554. But it does not affect the case that the wife on one occasion drank with her husband in their home. Rudley v. Seider, 99 Mich. 431, 58 N. W. Rep. 366. See Bradford v. Boley, 31 Atl. Rep. 751.

[7] Horn v. Smith, 77 Ill. 381. "Means of support" embraces those comforts which are suitable to the complain-

be but one recovery for the injury.[1] All persons who furnished liquor contributing to the intoxication may be joined, or one may be sued.[2] It is immaterial whether the sale was made by the defendant in person or by a servant.[3] The damage sustained must be correctly described in the declaration; if the wife complains only of loss of means of support, evidence should not be received of an injury to her person.[4]

In some of the states a remedy is given by the act where death results.[5] In other states it has been held that an action may be maintained after the death of the intoxicated person, necessarily attributable to the intoxication.[6] Under the Civil Damage Act, in Michigan, it is held to be sufficient if the act was done while the person was intoxicated, in whole or in part, by liquors sold by the defendant; it is not essential there that the act of the intoxicated person which caused the injury should be the natural, reasonable or probable consequence of his intoxication.[7]

By some of the statutes it is essential to the maintenance of the action that the defendant had notice not to sell liquors to the person who was in the habit of drinking to excess.[8] And it is held, under such statutes, that the relationship required in the act must appear from the notice, or that the notice must put its receiver upon inquiry to ascertain the relationship.[9]

Actions for causing death by wrongful act.— At the common law any right of action arising from an act causing the

ant's condition in life. McMahon v. Sankey, 133 Ill. 636; Schneider v. Hosier, 21 Ohio St. 98.

[1] Emory v. Addis, 71 Ill. 273. See Jockers v. Dorgman, 29 Kan. 109. To make the seller liable, the selling must have contributed to the particular act of intoxication. See Bryant v. Tidgewell, 133 Mass. 86.

[2] Fountain v. Draper, 49 Ind. 441; Jones v. Bates, 26 Neb. 693, 4 L. R. A. 495.

[3] See Peterson v. Knoble, 35 Wis. 80; Worley v. Spurgeon, 38 Iowa, 465.

[4] Hackett v. Smelsley, 77 Ill. 109.

[5] See Bedore v. Newton, 54 N. H. 117; Laws of Vermont of 1874, p. 53.

[6] See Mead v. Stratton, 87 N. Y. 493; Hackett v. Smelsley, 77 Ill. 109; Schneider v. Hosier, 21 Ohio St. 98. And see Miller v. Hammers (Iowa), 61 N. W. Rep. 1087.

[7] Brockway v. Patterson, 72 Mich. 122, 1 L. R. A. 708; Eddy v. Courtright, 91 Mich. 264. But see Backus v. Dant, 55 Ind. 181.

[8] See Pub. St. Mass., ch. 100, sec. 25; Rev. Stat. N. H. 1867, p. 210, sec. 22; Ohio Laws of 1875, p. 35; Rhode Island Laws of 1875, p. 24, sec. 34; N. Y. Laws, 1892, ch. 403; Quinlan v. Welch, 141 N. Y. 158.

[9] Sackett v. Ruder, 152 Mass. 397, 9 L. R. A. 391.

death of a human being must be a right not springing from the death itself. The same act which deprives a master of the services of his laborer, or a father of those of his child, may result in the death of the servant or child. In these cases the master or parent suing might recover for the loss of services for the time only intermediate the injury and the death, and for the necessary expenses incurred for medical attendance, care and nursing, and the like, up to that time, but not for mental suffering.[1] And so where death was instantaneous, as well as in very many other cases, no redress at all was possible at common law. The English statute known as Lord Campbell's Act, passed in 1846, was the first attempt to remedy this great defect. By that act the personal representatives of any one whose death should be caused by any wrongful act, neglect or default, were given a right of action against the person who would have been liable for such act, neglect or default, to such injured party, if death had not ensued. The action was declared to be given for the benefit of the wife, husband, parent and child of the deceased person; and the damages were directed to be proportioned among such parties by the jury in their verdict.[2] Most of the legislation in America on the subject is modeled after this act.

The statute gave an action only when the deceased himself, if death had not ensued, might have maintained one. Therefore there could have been no suit under the statute if the party injured had accepted satisfaction for the injury, previous to the death.[3] So, too, if the negligence of the person killed contributed proximately to the fatal injury, no action could be maintained on the statute, because he himself could have brought none had the injury not proved fatal.[4] And generally, if the injury is caused by the negligence of a fellow-

[1] See Hyatt v. Adams, 16 Mich. 180; Green v. Hudson River R. R. Co., 2 Keyes, 294; Sherman v. Johnson, 58 Vt. 40.

[2] St. 9 and 10 Vict., ch. 93, §§ 1 and 2.

[3] Read v. Great East. R. R. Co., L. R. 3 Q. B. 555; Littlewood v. Mayor, etc., 89 N. Y. 24, 42 Am. Rep. 271.

[4] Senior v. Ward, 1 El. & El. 385; Cordell v. New York, etc. Co., 75 N. Y. 330; Parsons v. Mo. Pac. R. Co., 94 Mo. 286. In Massachusetts, however, and in some other states, contributory negligence is no defense. Merrill v. East. R. R. Co., 139 Mass. 252. And see cases cited in note to Usher v. West Jersey R. Co., 4 L. R. A. 263.

servant, no action will lie under the statute against the master.[1] In Massachusetts no action can be maintained if death was instantaneous.[2]

But there is in the United States a class of statutes quite distinct from Lord Campbell's Act, and which give to some designated beneficiary or beneficiaries a right of action that only comes into existence after the death, and which is not the survival, continuation or enlargement of any pre-existing right.[3] In the main, however, the same principles must be applied in an action under these statutes as govern the action under Lord Campbell's Act.

The remedy is local.— In several states it is held that the remedy is purely local, and can be brought in the state only whose statutes give it, and where the killing takes place.[4] This was formerly the rule in New York; but now it is held there that an action will lie for a death in another state, if the statutes of the latter state are substantially like those of New York.[5] And the supreme court of the United States has held that an action will lie in New York upon the New Jersey statute for a death occurring in New Jersey, through the negligence of a New Jersey corporation, at the suit of a New York administrator.[6] And it has lately been held that a widow may maintain an action in New York for the death of her husband in Pennsylvania (the statute of the latter state allowing the widow to bring suit), though in New York the personal representative only has the right of action.[7] But a suit cannot be

[1] Relyea v. K. C., Fort Scott & Gulf R. Co., 112 Mo. 86, 18 L. R. A. 817; Lutz v. Atlantic & Pac. R. Co. (N. M.), 16 L. R. A. 819; Clark v. N. Y., P. & B. R. Co., 160 Mass. 39. In Iowa, however, the statute is construed to allow the action. See Philo v. Ill. Cent. R. Co., 33 Iowa, 47.

[2] See Kennedy v. Standard Sugar Refinery, 125 Mass. 90, 28 Am. Rep. 219. But by the Employers' Liability Act the action may be maintained by the widow or next of kin in such a case. Ramsdell v. N. Y. & N. E. R. Co., 151 Mass. 245.

[3] See Georgia Code of 1873, p. 511, § 2971.

[4] McCarthy v. Chicago, etc. R. Co., 18 Kan. 46, 26 Am. Rep. 742. A foreign administrator cannot sue under the statute. Maysville St. R. Co. v. Marvin, 59 Fed. Rep. 91.

[5] Leonard v. Columbia, etc. Co., 84 N. Y. 48, 38 Am. Rep. 491. See, also, Morris v. Chicago, etc. Co., 65 Iowa, 727, 54 Am. Rep. 39; Burns v. G. R. & I. Co., 113 Ind. 169; Chicago, etc. Co. v. Doyle, 60 Miss. 977; Knight v. West Jersey R. R. Co., 108 Pa. St. 250.

[6] Dennick v. Railroad Co., 103 U. S. 11.

[7] Wooden v. West N. Y. & Pa. R. Co., 126 N. Y. 10, 13 L. R. A. 458.

maintained in Pennsylvania for the killing of the plaintiff's husband in New Jersey, where the statute of New Jersey gives the right of action to the administrator.[1]

The defendant.— By some statutes a remedy is given against railroad companies only; but where there is no restriction as to the parties who shall be liable, the action may be brought against not only natural persons, but corporations, public as well as private.[2]

The plaintiff.— Most commonly the action is given to the executor or administrator of the person killed; and an administrator may be appointed for the purpose of bringing it though there be no estate.[3] In Arkansas there may be three actions prosecuted by the personal representative at the same time — one for the benefit of the estate; one for the benefit of the widow and next of kin; and one for injuries to the party in his life-time under the rule of the common law.[4] In many of the states one or more of the parties to be benefited by the recovery may sue. In California but one action is permitted, and that may be maintained by either the personal representative or the heirs of the deceased.[5] In Mississippi and Wisconsin the widow only may sue for the death of her husband.[6] In Kansas, if there is no personal representative, the action may be brought by the widow, and if no widow, the next of kin of the deceased. And the words, "next of kin," cannot be construed to include the husband where the action is for the death of a wife.[7] In Kentucky, where the action is given to the "widow, heir or personal representative," the word "heir" is construed to mean child.[8] In Georgia, where "a widow, and if no widow,

[1] Usher v. West Jersey R. Co., 126 Pa. St. 206, 4 L. R. A. 261.

[2] Chicago v. Starr, 42 Ill. 174, 89 Am. Dec. 422; Fleming v. Texas Loan Agency (Tex.), 26 L. R. A. 250.

[3] Hartford, etc. R. Co. v. Andrews, 36 Conn. 213.

[4] Davis v. St. Louis, I. M. & S. R. Co., 53 Ark. 117, 7 L. R. A. 283.

[5] Munro v. Pac. Coast D. & R. Co., 84 Cal. 515. And in Illinois there may be but one action. Beard v. Skeldon, 113 Ill. 584.

[6] Natchez Cotton-Mills Co. v. Mullins, 67 Mass. 672; Gores v. Graff, 77 Wis. 174.

[7] West. U. Tel. Co. v. McGill, 57 Fed. Rep. 699, 21 L. R. A. 818. In New Jersey the action is "for the benefit of the widow and next of kin," and the husband has no right of action for the death of a wife. Grosso v. Del. etc. R. Co., 50 N. J. L. 317. But in Illinois a similar statute is construed to give the husband a remedy. C. C. C. & St. L. R. Co. v. Baddeley, 150 Ill. 328.

[8] Jordan's Adm'r v. C., N. O. & T. P. R. Co., 89 Ky. 40.

a child or children may recover," it is held that if the widow sues, and marries pending the suit, she may nevertheless proceed to judgment.[1] If she dies pending the suit the action and the right of action survive to the children, whose damages will be measured by the injury to themselves.[1]

In general, where others than the personal representative sue, no attempt is made to distribute the money among those for whose benefit the action is given.

The beneficiaries.— The cause of action is not given in favor of the estate proper, and creditors, if the estate be otherwise insolvent, can have no share in the recovery. The purpose of these statutes is to make provision for members of the family of the deceased who might naturally have calculated on receiving support or assistance from the deceased had he survived.[3] Where the personal representative brings the suit, the recovery must be a special fund to be paid over by him to the persons for whom the statute intends it.[4] So if there be no person in existence who would be entitled to the moneys recovered, there can be no action.[5]

The wrongful act, neglect or default must have been the proximate cause of death. But it is the proximate cause if it inflicts a fatal injury, though the death that would have resulted is anticipated by an unskilful surgical operation.[6]

As to what constitutes a wrongful act, neglect or default, it may be said that, in general, reference must be had to the principles and considerations which govern in questions of negligence where the results are less serious. And where the

[1] Georgia R. R. Co. v. Garr, 57 Ga. 277, 24 Am. Rep. 492.

[2] David v. Southwestern R. Co., 41 Ga. 223.

[3] A statute allowing recovery for the benefit of "surviving children" has been held to cover posthumous children. Nelson v. G., H. & S. A. R. Co., 78 Tex. 321, 11 L. R. A. 391.

[4] See Whitford v. Panama R. Co., 23 N. Y. 465; Chicago v. Major, 18 Ill. 349; Munro v. Pac. Coast D. & R. Co., 84 Cal. 515; State v. Probate Court, 51 Minn. 241. In some of the states the statutes provide for the manner of distribution. See N. H. Pub. Laws of 1891, ch. 191.

[5] Westcott v. Cent. Vt. R. Co., 61 Vt. 438. In general it is sufficient to set forth the right of the personal representative to recover, without alleging the rights of the distributees. Howard v. Del. & Hudson Canal Co., 40 Fed. Rep. 195, 6 L. R. A. 75. But see Quincy Coal Co. v. Hood, 77 Ill. 68; Walker v. L. S. & M. S. R. Co. (Mich.), 62 N. W. Rep. 1032. In North Carolina, however, and in one or two other states, the action may be maintained in any event. Warner v. West. N. C. R. Co., 94 N. C. 250.

[6] Sauter v. N. Y. C. R. R. Co., 66 N. Y. 50, 23 Am. Rep. 18.

act was one of intentional violence, and the defendant alleges justification or excuse, the question would be the same as in cases of trespass to the person.

The damages. — In England the rule is settled that the action will not be supported to recover merely the nominal damages which are supposed to flow from any technical legal wrong;[1] and the ground for this ruling seems to be that the wrongful act, or default, is not shown to be a tort to the person complaining of it until he shows that personally he has suffered. Where, however, as in some of the states, the statutes fix a minimum of recovery, that sum may be recovered upon the making out of a technical ground of action without any specific showing of loss.[2] Both in this country and in England the damages must be measured by the pecuniary losses; there can be no recovery merely for an injury to the feelings and affections, or a loss of the comfort of the society of a person killed.[3] Exemplary damages are therefore not to be recovered unless the statute expressly or by implication allows them, as in some instances it does.[4]

In estimating actual damages it is essential to depart somewhat from the standards applied in other cases. The right of a parent to recover, under the statutes, for the death of a child killed while yet too young to render services, is unquestionable.[5] So the parent may recover for causing the death of a child who was of full age and not residing with the parent, and upon whom the parent would have no legal claim to any assistance whatever. Here the parent may show his dependent condition and the accustomed donations of the child, to increase the damages.[6] These damages, then, are not to be given

[1] Duckworth v. Johnson, 4 H. & N. 653.

[2] See State v. Me. C. R., 76 Me. 357.

[3] See Morgan v. So. Pac. Co., 95 Cal. 510, 17 L. R. A. 71, and *note;* Gulf, C. & S. F. R. Co. v. Southwick (Tex. Civ. App.), 30 S. W. Rep. 592.

[4] See Galveston, H. & S. A. R. Co. v. Worthy (Tex.), 29 S. W. Rep. 376; Ill. Cent. R. Co. v. Crudup, 63 Miss. 291; Thompson v. Louisville & N. R. Co., 91 Ala. 496, 11 L. R. A. 146. In Kentucky, by statute, punitive damages are allowed when the fatal neglect is wilful. Jordan's Adm'r v. Cin., N. O. & T. P. R. Co., 89 Ky. 40.

[5] Richmond & D. R. Co. v. Johnston, 89 Ga. 560; Austin R.-T. R. Co. v. Cullen (Tex. Civ. App.), 29 S. W. Rep. 256. For a case of excessive damages see Morgan v. So. Pac. R. Co., *supra.*

[6] North Penn. etc. Co. v. Kirk, 90 Pa. St. 15.

as a *solatium*, nor as a satisfaction for the deprivation of a legal right, but they must "be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life."[1]

In some cases the reasonable expectation is fairly measured by the legal right; as, where a widow sues for the death of her husband, the loss of the reasonable support which he is legally bound to furnish her is the measure of her recovery.[2] In Pennsylvania, in an action for the loss of a father, the loss was said to be "what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his life-time, and which would have gone for the benefit of his children, taking into consideration ability and disposition to labor, and his habits of living and expenditure."[3]

In some cases the circumstances set a limit to the probable ability to give assistance; as in the case of a laboring man who has no resources other than his daily earnings. In such a case an award of $5,000 was held excessive.[4] But a verdict will not be disturbed unless the excess is clear.

Many of the statutes fix a maximum of recovery, $5,000 being a common limitation.[5]

[1] Pollock, C. B., in Franklin v. S. E. R. Co., 3 H. & N. 211. And see Howard v. Del. & H. C. Co., 40 Fed. Rep. 195, 6 L. R. A. 75; Mollie Gibson C. M. & M. Co. v. Sharp (Colo.), 38 Pac. Rep. 850; and Austin Rapid-Transit R. Co. v. Cullen (Tex. Civ. App.), 30 S. W. Rep. 578.

[2] Macon, etc. R. R. Co. v. Johnson, 38 Ga. 409.

[3] Sharswood, J., in Penn. R. Co. v. Butler, 57 Pa. St. 335. And see Gulf, C. & S. F. R. Co. v. John (Tex. Civ. App.), 29 S. W. Rep. 558.

[4] See Illinois Cent. R. Co. v. Weldon, 52 Ill. 290. And see O'Donnell v. Me. C. R. Co. (Me.), 25 L. R. A. 658.

[5] In New Hampshire $7,000 is fixed as the limit; in Indiana, Kansas, Ohio, Utah, Virginia, West Virginia, $10,000: in Montana, $20,000.

CHAPTER IX.

WRONGS RESPECTING CIVIL AND POLITICAL RIGHTS.

The term civil rights is not employed here in its most comprehensive sense. But for the sake of convenience such rights as rights in real and personal property, incorporeal rights, etc., are spoken of separately. The use of the term in this comparatively narrow sense has grown out of recent legislation, precluding discrimination against colored people, and it has not commonly been used as embracing certain fundamental rights, because as to these there was no controversy.

In referring to the wrongs which may be suffered in respect to civil rights, particular rights will be mentioned, and the limits, the overstepping of which will constitute a violation of right, either by the state or by individuals, will be indicated. A wrong is not the less a wrong because of being committed by the state through its legislation, and when thus committed some individual actor is generally in position to be held responsible.

State regulation of employments.— Every person *sui juris* has a right to make use of his labor in any lawful employment on his own behalf or to hire it out in the service of others. The state must always be at liberty to determine what are lawful employments, and to make others unlawful by forbidding them. The authority to regulate business embraces every class and variety of occupation, and may be exercised either in respect to the person who may be employed in the business, or as to the methods in which the business may be conducted.

While there must be no exclusions from lawful employments, nevertheless public policy may justify exceptions in some cases; as, for example, where persons are excluded because of some reason peculiar to their cases, such as immaturity or imbecility, which would render the employment hurtful to themselves or dangerous to others.[1] Certain occupations which are peculiarly

[1] The right to forbid the employment of small children in mines is plain. Com. v. Hamilton Mfg. Co., 120 Mass. 383. And the legislature

susceptible to abuse are generally surrounded by special restrictions, and those who propose to enter upon them are usually required to give security for their good behavior.[1] The final test of what is a reasonable regulation must be found in the legislative judgment, unless the constitution has provisions on the subject.[2] The provision of the constitution that no person shall be deprived of life, liberty or property without due process of law is important on this subject, because the right to follow all lawful employments is an important part of civil liberty. Under this provision regulations may not be framed to exclude persons or classes.[3] By it the state is also forbidden to grant monopolies in trade, which are illegal alike in England and in this country. Nevertheless, special privileges or franchises, when granted, may be made exclusive. For while the following of the ordinary and necessary employments of life can be made to depend upon the state's permission or license only to the extent that, if the business is especially liable to abuse, it may be subjected to special regulations, among which may be the requirement of a license, yet, when the state gives permission to do something not otherwise lawful, it may in its discretion make the gift exclusive. This wrongs no one, because, as, for instance, in the grant of a right to set up a lottery, no one had such a liberty before.

Right to form business relations.— Every man must be left at liberty to refuse business relations with any person, whether the refusal rests upon reason or is the result of caprice or malice; and if he is wrongfully deprived of the right to have business relations with any one with whom he can make a contract, he is entitled to redress. Generally the wrong of preventing a person from procuring some employment is the result of some other legal wrong, and constitutes an aggravation of damages rather than a distinct cause of action. For example, the libel of a serving man which prevents his employ-

may interfere to prevent children under fourteen years of age from being exhibited in spectacular performances which, by reason of the lateness of the hour and the nature of the surroundings, are deemed harmful to the well-being of the child. People v. Ewer, 141 N. Y. 129. See opinion of Gray, J., in this case.

[1] As in the case of hackmen, saloon-keepers. etc.

[2] See Danville R. R. Co. v. Com., 73 Pa. St. 29.

[3] See Barbiur v. Connolly, 113 U. S. 27; Yick Wo v. Hopkins, 118 U. S. 356.

ment is itself a cause of action, and the loss of employment is the proof that special damage has flowed from it.[1] Where one is induced by means, not in themselves unlawful, to refuse a person employment, the wrong would be accomplished either by the presentation of reasons or by means of a conspiracy. In the former case, if there were no such false assertions as would support an action, there would be no legal wrong; in the latter, if the conspiracy were made effectual by means of unlawful acts, the wrong would be manifest.

A conspiracy, as the term is here used, is a combination of two or more persons to accomplish, by some concerted action, an unlawful end to the injury of another. It does not become a legal wrong until the unlawful purpose is accomplished, or until some act, distinctly illegal, is done towards its accomplishment.[2] Nor is an object unlawful which can be accomplished by perfectly lawful means.

To induce a person, by inducements not unlawful in themselves, to refuse to contract for service, is not illegal; but to break up a service actually entered upon is an actionable wrong.[3] But it has been held that a mere conspiracy to break a contract for the delivery of property cannot constitute a tort, even though the contract be broken in pursuance of it, for the party to the contract might have broken his promise of his own volition without being liable as for wrong; but the reason for the distinction is not clear, for it would seem that the right to service has no such sacredness over any other right as to justify a more complete protection.

While one has a right to refuse to be employed by another, he has no right whatever to resort to compulsion of any sort to keep others from the employment. A society of men may lawfully unite in agreeing that they will not perform services for those who employ laborers not associated with them; but they become wrong-doers the moment they interfere with the

[1] See Vicars v. Wilcocks, 8 East, 1.

[2] A man's business is property. See the opinion of the court in Barr v. Essex Trades Council (N. J. Eq.), 30 Atl. Rep. 881. A conspiracy to injure a teacher in his profession, followed by damage, is actionable. Wildee v. McKee, 111 Pa. St. 335. And so is a conspiracy to drive a trader out of business by fraudulent and malicious acts, followed by damage. Van Horn v. Van Horn, 52 N. J. L. 284, 10 L. R. A. 184.

[3] See Lumley v. Gye, 2 El. & Bl. 216.

liberty of action of others. And so acts done in pursuance of the conspiracy may be unlawful in themselves if they include deception, threats, intimidation, or any species of duress whatever, whether employed upon the laborer or upon the employers.[1] And if employers combine and use unlawful means to prevent the employment of any special class of laborers, they are violating the liberty, common to all, of employing and being employed.[2]

If a number of employers in the same line of business agree among themselves to suspend or carry on business as the majority shall agree, this is void because in restraint of trade.[3] So is an agreement between laborers by which they undertake that they will not seek work at a shop where disputes connected with the trade have arisen, and that they will not encourage or assist a laborer contrary to certain rules agreed upon, or seek to procure employment for those not associated with them.[4]

Rights to be carried by common carriers.— In the business of common carriers the public have some rights which do not exist in the case of a business of a purely private character. No man becomes a carrier except with his own consent; but when he does so, the principles of the common law under which the business has grown up require that he must carry under impartial regulations, and for all. The scope of his business he must determine for himself, but he must carry certain kinds of property only, or all kinds of property; or, if he be a carrier of persons, he may perhaps limit the business to the carriage of certain classes of passengers only, the dis-

[1] See Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Webber v. Barry, 66 Mich. 127; Carew v. Rutherford, 106 Mass. 1, 8 Am. Rep. 287. And see Longshore Printing & Pub. Co. v. Howell (Oreg.), 38 Pac. Rep. 547; Lake Erie & W. R. Co. v. Bailey, 61 Fed. Rep. 494.

[2] See Worthington v. Waring, 157 Mass. 421, 20 L. R. A. 342. In Pennsylvania there is a statute making it lawful for employees to combine to raise wages, and to persuade, by all lawful means, others from working for a less sum. Since the passage of this statute it has been held that a combination of employers to resist an advance in wages determined upon by employees is not an unlawful conspiracy, since its object is but to resist an artificial price made by a combination which by statute is lawful. Cote v. Murphy, 159 Pa. St. 420, 23 L. R. A. 135.

[3] Hilton v. Eckersley, 6 El. & Bl. 47. And see Queen Ins. Co. v. State, 86 Tex. 250, 22 L. R. A. 483.

[4] See Hornby v. Close, L. R. 2 Q. B. 153.

crimination being based upon distinctions which have some principle to support them. But a certain liberty of action in receiving and rejecting persons could always be justified on grounds of impartiality and reason. The compulsion of impartial carriage is for the public benefit; and the public good does not require, for example, that a person afflicted with a contagious disease should be carried in an ordinary passenger coach.[1] It being impossible for the law to anticipate all the cases which may arise, carriers are allowed to make regulations for the control and management of their business which shall not be unreasonable and which shall not conflict with any which may be lawfully prescribed by competent legislative authority.

A regulation setting aside certain carriages for the exclusive use of women and their escorts, violates the right of no one who is excluded and for whom accommodations are elsewhere provided.[2] A rule setting aside certain carriages within which alone would persons of color be received and carried has been sustained where the accommodations furnished were equal to those supplied for other passengers,[4] but has been held invalid where no such impartial accommodations were provided.[3]

Even in the absence of legislation forbidding it, probably innkeepers and carriers of persons by land or by water would not be warranted in law in discriminating on the ground solely of a difference in race or color or because of any previous condition. The common law required impartiality in their accommodations, and personal discriminations must be unlawful unless the presence of the excluded persons would be dangerous to others, or would be justly offensive to their sense of duty or propriety, or for other reason would interfere with the proper enjoyment by others of the accommodations which the innkeeper or common carrier affords.[5]

[1] See Markham v. Brown, 8 N. H. 523.

[2] Chicago, etc. R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641.

[3] West Cheshire, etc. R. Co. v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744; Chilton v. St. Louis & I. M. R. Co., 114 Mo. 88, 19 L. R. A. 269. See, also, Smith v. Chamberlain, 38 S. C. 529, 19 L. R. A. 710; Louisville, N. O. & T. R. Co. v. State, 2 Inters. Com. Rep. 615, 66 Miss. 662, 5 L. R. A. 132; Anderson v. Louisville & N. R. Co., 62 Fed. Rep. 46.

[4] Chicago, etc. R. Co. v. Williams, *supra*.

[5] Chicago, etc. R. Co. v. Williams, *supra*. A colored man while a pas-

It is within the competency of a state legislature to establish, as a regulation of trade, that every citizen, regardless of race, color, or previous condition, shall receive equal accommodations at the hands of carriers, innkeepers or proprietors of theaters.[1] Congress can exercise no police powers within the states;[2] and, on the other hand, a state regulation of the sort, assuming to cover the transportation of passengers from state to state, is unconstitutional as invading the power of congress over commerce between the states.[3]

Right to control property.— Every man controls his own property as he pleases, subject only to the obligation to perform, in respect to it, the duties he owes to the state and to his fellows, and the state can regulate his dress or his table only so far as may be needful for the protection of morality and decency. For example, laws prohibiting women to appear in public in the customary garb of men are justified as regulations to prevent a practice likely to lead to serious abuses and to be resorted to for the worst purposes.

The right to an education.— It is a part of every person's civil liberty to provide for his own education as he may have the means. The duty of a parent to educate his child is one of imperfect obligation, and the state usually provides schools which all can attend, and, in some cases, makes instruction free to all. But the right to an education at the public expense is not, as against the state, a legal right at all, unless made so by the constitution; and any law assuming the duty of educating citizens of a state may be repealed at the pleasure of the law makers. But any provisions for education which are made by the constitution, the people, as a matter of right, may claim the benefit of, unless legislation is necessary to give them effect.[4]

A provision made for education which denies it to persons of color deprives them of "the equal protection of the law," and is forbidden by the fourteenth amendment to the federal

senger on a railway train is entitled to the same protection against assault and humiliation as a white passenger. Richmond & D. R. Co. v. Jefferson, 89 Ga. 554, 17 L. R. A. 571.

[1] Donnell v. State, 48 Miss. 661, 12 Am. Rep. 375; People v. King, 110 N. Y. 418, 1 L. R. A. 293; Ferguson v. Gies, 82 Mich. 358, 9 L. R. A. 589.

[2] Civil Rights Cases, 109 U. S. 3.

[3] Hall v. Decuir, 95 U. S. 485; Coger v. N. W. Union Packet Co., 37 Iowa, 145.

[4] See Cooley, Const. Lim. 99–102.

constitution; but no right is violated when colored pupils are merely placed in different schools, provided the schools are equal, and the same measure of privilege and justice is given to each.[1]

The refusal of a teacher to instruct those who lawfully come is a violation of an individual right and is probably actionable. A teacher may also violate the right to instruction by inflicting corporal punishment for something not within his jurisdiction,[2] and he is liable for any abuse of the judicial discretion which he must exercise in managing his school.

School committees or trustees are to be governed, in the exercise of their powers as such, by the general principles of constitutional law. The question of the violation of the principle of religious liberty has arisen in connection with regulations allowing the reading of the Bible in the public schools, and such regulations have been sustained.[3] It is also competent for the governing board of the school to exclude the reading of the sacred book of any religious sect therefrom.[4]

Rights in the learned professions.— To practice law or medicine is not a privilege of citizenship, and with regard to either of these professions a state legislature may pass such regulations as may seem to it proper;[5] but a state may not interfere in the choice of a religious teacher, nor with the right of any one to officiate as a religious teacher, so long as the customary police regulations of the state are observed. Such interference would violate the principles of religious liberty. The members of none of the learned professions have any special privileges, the violation of which by individuals would constitute an actionable wrong. If privilege from arrest of an attorney while attending court in the discharge of a professional duty is disregarded, he may apply to the court for his discharge. If a

[1] Lehew v. Brummell, 103 Mo. 546, 11 L. R. A. 828. See Knox v. Independence Board of Education, 45 Kan. 152, 11 L. R. A. 830. Negro children cannot be excluded from the benefits of a school fund set apart by the state constitution. Dawson v. Lee, 83 Ky. 49.

[2] See Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471.

[3] Donahoe v. Richards, 38 Me. 376; Spiller v. Woburn, 12 Allen, 127.

[4] Board of Education v. Minor, 23 Ohio (N. S.), 211, 13 Am. Rep. 233.

[5] See Bradwell v. State, 55 Ill. 535, 16 Wall. 130. For the decisions touching this point arising in various states as to the right of women to practice law, see Re Leach (Ind.), 21 L. R. A. 701, and *note*.

clergyman were disturbed while conducting a religious service by the unnecessary execution of process against him, the officer might possibly be, in a gross case, subject to suit, either by the clergyman or by the religious organization whose worship was disturbed.

Religious liberty.— Individual violations of the principle of religious liberty generally consist in disturbance of religious meetings, or in some other act which would be wrong, independent of any question of the liberty of conscience or worship. Voluntary religious organizations are formed at the will of the associates undisturbed by the state. Incorporated societies can only be formed at the will of the state and under its laws,[1] but when formed they must be left to manage their own affairs in their own way, and the state can interfere only where the property rights of their members, or rights acquired by contract, are disregarded. There is a disregard of right when lawful members are expelled or refused participation in the privileges of the organization in an unusual manner, or for reasons which the rules or usages do not recognize, or when the purpose of the organization is perverted by radical changes without general consent.[2]

Equality of right.— Every person is entitled to have his rights tested by the general laws which govern the rest of the political society. The liberty of a pauper cannot be intrusted to the discretion of an overseer of the poor or other ministerial or administrative officer;[3] the apprenticing of whites and blacks must be under the same general regulation;[4] and the supposed insane must have the same right to a judicial hearing with all others.[5]

Exceptional burdens.— Public burdens must be impartially distributed, and those which touch the individual unequally and unfairly may be properly resisted. On the subject of taxation and requirement of military service, all that can be required is that the laws be impartial and be fairly administered; inequality in their operation being unavoidable.

[1] Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82.

[2] Watson v. Jones, 13 Wall. 679; Pounder v. Ash (Neb.), 63 N. W. Rep. 48; Powers v. Budy (Neb.), 63 N. W. Rep. 476; Kuns v. Robertson (Ill.), 40 N. E. Rep. 343.

[3] Portland v. Bangor, 63 Me. 120, 20 Am. Rep. 681.

[4] Matter of Turner, 1 Abb. (U. S.) 84.

[5] See *ante*, ch. VI.

The right to be exempt from unequal taxation is, as between states, one of the privileges and immunities of citizens of the several states; it is incompetent, therefore, to assess and tax property of a non-resident higher than that of residents. And it is equally incompetent to discriminate between residents by any act of omission or commission which produces inequality. Where taxation is based upon an assessment of property, the functions of the assessors are judicial, and therefore they are not generally liable to a private action by one who has been overtaxed in consequence of their unequal assessment;[1] if it be made to appear that the assessors have been governed by improper motives in making their valuations, the tax will be set aside or reduced to its just proportions by the proper tribunal. The tax-payer may hold the assessors liable only where they have acted without jurisdiction, or, perhaps, where, through neglect of duty, they have deprived a tax-payer of some important privilege.[2]

Searches.— National and state constitutions declare in substance that unreasonable searches and seizures shall be unlawful, and that all persons shall be secure in their persons, houses, papers and effects against them.[3] An unlawful search and seizure is an aggravated trespass, and it is to protect against this wrong that the law makes it a criminal offense for one person wrongfully to open another's letters, and makes the postmaster liable in damages who retains or pries into letters. And there is no reason why correspondence by telegraph should not be surrounded by like securities.[4]

Warrants.— Search-warrants are allowed to discover stolen or smuggled goods, or implements of gaming, and in some other cases for which the statutes provide, and there is no other law-

[1] Weaver v. Devendorf, 3 Denio, 117.

[2] Thames Mfg. Co. v. Lathrop, 7 Conn. 550. See Cooley on Taxation, 553, 554.

[3] See State v. Dupaquier, 46 La. Ann. 557, 26 L. R. A. 162. This right is not violated by the regulation of a pawnbroker's business which compels him to take out a license and to keep a book with a list of all property received in the business, and, when requested, to submit such book and securities to the inspection of certain officers. Shuman v. Fort Wayne, 127 Ind. 109, 11 L. R. A. 378.

[4] However, persons through whose hands telegrams may pass may be compelled to produce them in evidence, and to testify concerning them in courts and before legislative committees. State v. Litchfield, 58 Me. 267.

ful mode for making search upon one's premises. They must be duly issued by a court or officer of competent jurisdiction, and must describe particularly the place to be searched, and the property, if property be sought.[1] The officer, in executing a warrant, may not seize other goods or search other buildings than are described therein;[2] but he is not liable as a trespasser if he seizes property not intended, if it answers the description;[3] nor is he liable for insufficiency of the warrant if he simply obeys its commands.[4]

Invasions of political rights.—If a citizen be deprived of his right to meet and discuss public affairs, either by the action of private individuals or by that of the public authorities, the nature of his remedy must depend upon the means resorted to for the purpose of defeating the right.

The chief political right is that of suffrage. While the numerous ways in which this may be invaded are all wrongs to the political society, only a portion of them can support a private right of action. An individual entitled to suffrage may be deprived of the right in the following ways, where in each case the only redress is by criminal prosecution: 1. Where officers have wrongfully neglected or refused to take the necessary preliminary action to enable an election to be held. 2. Where, by forcible or riotous proceedings, the holding of an election has been prevented. 3. Where illegal votes are received which control the result. 4. Where, by the illegal conduct of the officers or of other persons, the ballots are destroyed, or in some other manner it becomes impossible to determine the result, whereby the election is defeated.

The following are cases where the injury might be more direct and personal: 1. Where the elector, by force or threats, is kept away from the poll. 2. Where the officers, by wrongful decisions concerning his qualifications to vote, deprive him of

[1] Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151; State v. Robinson, 33 Me. 564; Re Horgan's Liquors, 16 R. I. 542.

[2] Jones v. Fletcher, 41 Me. 254. Where a warrant described the premises as occupied by the defendant and situated on the east side of the street named, this was held sufficient, though the building was in the rear of another building and was reached by an alley from the street. State v. Minnehan, 83 Me. 310.

[3] Stone v. Dana, 5 Met. 98.

[4] Bell v. Clapp, 10 Johns. 263, 6 Am. Dec. 339; Humes v. Taber, 1 R. I. 464.

the right.[1] 3. Where officers or others wrongfully invade his right to secrecy. In the first of these cases, if force is employed, there is an aggravated trespass; if it is not employed, still the right of action exists if the terror excited by the threats were such that a reasonable man would be deterred from exercising his right. With regard to the third of these cases, it may be remarked that the purpose of establishing voting by ballot is that the elector may be, in his action, uninfluenced either by fear of giving offense or by the desire to please; his right is therefore invaded when his secrecy is uncovered.[2] But precisely what facts will make out such an invasion must be determined as the cases arise.[3]

Exclusion from office.—As there is no natural right to vote,[4] so there is no such thing as a natural right to hold an office; but when a qualified person chosen for an office is excluded from it, there is a wrong both to the state and to the individual. One who usurps an office, if he has color of office and actually performs the functions without hindrance, will be upheld in those acts which concern the public and third persons;[5] but when he is dispossessed by *quo warranto* or some analogous statutory process, the party entitled is allowed to recover as damages the money value of the office.[6]

Military subordination.— An important exemption is to be free from military control except when it is exercised in strict conformity to law. Where the civil law is not suspended either by the actual presence of warlike preparations, or by declaration of martial law, whatever would be a wrong if done by any other citizen would be a wrong if done by a person in

[1] See *infra*, as to the remedy, ch. XIV.

[2] People v. Pease, 27 N. Y. 45; People v. Cicott, 16 Mich. 283, 97 Am. Dec. 141. And see Jones v. Glidewell, 53 Ark. 161, 7 L. R. A. 831.

[3] This secrecy is not confined to the time of depositing the ballot, but accompanies the voter through the whole preparation of the ballot. An election law, whose purpose is to secure purity of the ballot, will be liberally construed. Detroit v. Rush, 82 Mich. 532, 10 L. R. A. 171.

[4] See Frieszleben v. Shallcross, 9 Houst. 1, 8 L. R. A. 337.

[5] Fylpaa v. Brown Co. (S. D.), 62 N. W. Rep. 962. And see People v. Hecht (Cal.), 38 Pac. Rep. 941; Hale v. Bischoff (Kan.), 36 Pac. Rep. 752.

[6] People v. Miller, 24 Mich. 458, 9 Am. Rep. 131; Nichols v. McLean, 101 N. Y. 526, 54 Am. Rep. 730; Braim v. Tombstone (Ariz.), 33 Pac. Rep. 589; Lightly v. Clouston, 1 Taunt. 112; Parker v. Lett, Ld. Raym. 658.

military service, whether officer or private, and would be punished in the same way.[1]

Seizures of property by military officers for the purposes of government are trespasses.[2] The duty of providing for the necessities of the service falls upon the civil law and provision must be made for payment.[3] No title would pass to property seized without express authorization of law, unless in a case where the civil authority would be too late in providing the means required for the occasion.[4] The right of impressment in emergencies belongs alone to the commander of the army, or of the district or post.[5]

The action of a court-martial is as conclusive as the action of any court exercising its legitimate powers, if it has proceeded within its jurisdiction, but not otherwise. A citizen not in the military service or lawfully summoned into it is not amenable to court-martial.[6]

The right to bear arms for the common defense is guarantied both by state and federal constitutions; but this right does not include the carrying of such weapons as are especially suited for deadly individual encounters, and the State may therefore properly forbid the carrying of such weapons concealed.[7]

[1] Ex parte Milligan, 4 Wall. 2; Luther v. Borden, 7 How. 1.

[2] Mitchell v. Harmony, 13 How. 115; Terrill v. Rankin, 2 Bush, 453, 92 Am. Dec. 500.

[3] Hogue v. Penn, 3 Bush, 663, 96 Am. Dec. 274.

[4] Sellards v. Zomes, 5 Bush, 90.

[5] Lewis v. McGuire, 3 Bush, 202.

[6] Smith v. Shaw, 12 Johns. 257; State v. Stevens, 2 McCord, 32.

[7] Andrews v. State, 3 Heisk. 165, 1 Green Cr. Rep. 466 and *note*, 8 Am. Rep. 8 and *note;* Carroll v. State, 28 Ark. 99, 18 Am. Rep. 538; State v. Workman, 35 W. Va. 367, 14 L. R. A. 600 and *note*.

CHAPTER X.

INVASION OF RIGHTS IN REAL PROPERTY.

The term real property is used here to designate the thing itself; the land and what pertains to it, and the right for the time being to possess and enjoy it. The ownership of land is complete or partial. It is of a present or future estate, or several or joint. In this country most persons own their estate by absolute or fee-simple title, and the chief characteristic of ownership is the right to complete dominion,[1] subject, indeed, to the right in the state to appropriate the property to public use wherever it shall be found needful, and a right to regulate its enjoyment so as to prevent needless or unreasonable interference with the rights of others.[2] It may also be subject to certain easements or servitudes in favor of other parties, some of which are incident to ownership, while others, when they exist, arise from contracts express or implied.

Licenses.— Permission to cross the line of a man's private domain is called a license. Lawful license to enter one's premises may be given, 1, impliedly by the owner; 2, expressly by the owner; 3, by the law.

Implied licenses.— Every man engaged in business impliedly invites the public to enter his premises.[3] One may visit another's place of business from no other motive than curiosity without incurring liability unless he is warned away by placard or otherwise. Nevertheless, the invitation is limited by the purpose. Thus, it would be a trespass if one, instead of visiting a dealer's shop for the purpose of the business carried on there, were to assemble his associates there for some political or other purpose for which the shop had not been thrown open. Every man by implication invites others to come to his

[1] See remarks of Woodward, J., in Pierson v. Armstrong, 1 Iowa, 294.

[2] As to dominion of the state, see United States v. Repentigny, 5 Wall. 211. See, also, on this subject, Hammond's Blackstone, vol. II, p. 40 et seq.

[3] Gowen v. Phila. Exch. Co., 5 W. & S. 141, 40 Am. Dec. 489.

house as they may have proper occasion either of business, of courtesy, for information, etc. Custom must determine in this case what the limit is of the implied invitation.[1] In the case of young children and other persons not fully *sui juris*, an implied license might sometimes arise where it would not in behalf of others.[2] And where one has an easement in the lands of another, he is licensed to enter upon such lands whenever it becomes necessary to repair or protect it.[3]

Express licenses.— Where one gives another authority to enter upon his land to do a certain act or succession of acts, without at the same time granting him any interest in the land itself, this is a license, whether given by parol or in writing. If it is given on condition it is inoperative unless the condition is performed.[4] It is personal as between the parties and cannot be assigned by the licensee,[5] and is revoked by a sale of the land by the licensor.[6] If not acted upon within a reasonable time it is presumptively recalled;[7] if it is acted upon, the licensee assumes the obligation to observe due care, and to negligently do nothing upon the land that shall be injurious.[8] The license is not to be extended by construction,[9] and it is always subject to revocation as to any act contemplated by it but not yet performed.[10] This rule as to the right to revoke is subject to exception in those cases where the license is coupled with an interest; that is, a legal interest conveyed to the licensee in connection with the license, and to the enjoyment of which the license is necessary.[11] For example, if one man sells to another cattle then pasturing on his grounds, the right transferred in the cattle supports the implied license to enter upon the grounds to take them away, and makes it irrevocable. A

[1] Kay v. Pa. R. Co., 65 Pa. St. 269; McKone v. Mich. Cent. R. Co., 51 Mich. 601.

[2] Keffe v. Milwaukee, etc. R. Co., 21 Minn. 207.

[3] Prescott v. Williams, 5 Met. 429. And see The Redemptorist v. Wenig (Md.), 29 Atl. Rep. 667.

[4] Freeman v. Headley, 33 N. J. L. 523; Mumford v. Whitney, 15 Wend. 380, 30 Am. Dec. 60.

[5] Ruggles v. Le Sure, 24 Pick. 187; Carleton v. Redington, 21 N. H. 291.

[6] Drake v. Wells, 11 Allen, 141; Cox v. Leviston, 63 N. H. 283.

[7] Hill v. Lord, 48 Me. 83.

[8] Eaton v. Winnie, 20 Mich. 156, 4 Am. Rep. 377.

[9] Gilmore v. Wilbur, 12 Pick. 120, 22 Am. Dec. 410.

[10] Batchelder v. Hibbard, 58 N. H. 269; Cook v. Stearns, 11 Mass. 533.

[11] Giles v. Simonds, 15 Gray, 441, 77 Am. Dec. 373; Chicago & I. Coal R. Co. v. Hall, 135 Ind. 91, 23 L. R. A. 231.

license cannot be coupled with an interest in lands unless created by deed or by such other instrument as is sufficient to convey such an interest under the Statute of Frauds. Therefore rights of way, sales of growing trees, permission to carry water over, or pipes under, the land of another, are mere licenses, and revocable as such, unless created by deed.

In some cases where a license is revoked it is of very little importance whether the licensee is or is not protected against liability as a trespasser for what has been done under it, because such a liability is insignificant as compared with the loss suffered by the license being withdrawn as to the future. In the case of the withdrawal of a license to erect a mill-dam, where the licensee in acting upon it has contemplated its permanent enjoyment, and has perhaps made large expenditures in reliance upon it, yet he must now not only abandon such enjoyment, but he must also destroy whatever has been erected under the license the continuance of which would require the license for its protection. Nevertheless a licensor may revoke in these cases.[1] A right to flow lands is an interest in the lands which, under the Statute of Frauds, cannot pass without deed.[2]

The question with the courts has been how to relieve the licensee without acting in the teeth of the Statute of Frauds. In many cases parties rely upon the word and honor of others where nothing short of a formal instrument should be accepted, and frequently their confidence is abused by those upon whom they rely, who take advantage of the statute to shield themselves against responsibility for frauds and other wrongs. The law in detestation of such conduct seems to have sought excuse in circumstances to permit the courts to give relief. And it has been held that if the license has been acted upon and considerable expenditures made, it should not be revoked without making compensation to the licensee.[3] Other cases go further and hold that where the licensor has stood by and seen the licensee make large expenditures in reliance upon his license, and which will be wholly or in great part lost to him if the license should be recalled, these facts are sufficient to

[1] Wallis v. Harrison, 4 M. & W. 538; Houston v. Laffee, 46 N. H. 505; Johnson v. Skillman, 29 Minn. 95, 43 Am. Rep. 192.

[2] Cook v. Stearns, 11 Mass. 533, 538; Mumford v. Whitney, 15 Wend. 380.

[3] Rhodes v. Otis, 33 Ala. 578, 73 Am. Dec. 439.

create an *estoppel in pais* which will preclude him from revoking.[1]

The doctrine of estoppel may be properly applied to such cases as the erection of a partition-wall which the parties are to enjoy in common,[2] or the alteration of the route of a watercourse in which both parties are interested.[3] But these are perhaps not so much agreements which give interests in lands as arrangements for the suitable and convenient apportionment of separate rights which are so connected or related that neither party can properly and fully enjoy his own without some common understanding. If parties shall add to or modify the regulations prescribed by law for their conduct in such cases, it will generally be done without any understanding that interests in lands are being given or required. The acquiescence and consent of the parties to such arrangements are in the nature of a contract, which, when fulfilled by one party at his own cost and charge, must be obligatory upon both.[4]

But the doctrine of estoppel cannot safely be applied so as to make a parol license create an easement, or subject lands to a servitude on the ground of expenditures made on the faith of it. Estoppel is applied to prevent fraud, under the rule that "if one is silent when he should speak, justice will compel him to silence when he would speak."[5] It precludes the facts from being shown because they were not shown in season. But there is difficulty in applying it to cases where the action has been had with full knowledge.

Some cases support the doctrine that the permission to flow, if it is acted upon, may be enforced in equity on the same ground on which courts of equity enforce parol contracts for the sale of land after there has been partial performance; that is, to prevent fraud.[6] And where there was no court with full equity powers, it has been held that the licensee should have the necessary protection when he was proceeded against at law.[7]

Assuming the case to stand on the same footing as a parol

[1] See Cumberland V. R. Co. v. McLanahan, 59 Pa. St. 23; Russell v. Hubbard, 59 Ill. 335.

[2] Rawson v. Bell, 46 Ga. 19; Wynn v. Garland, 19 Ark. 23.

[3] Rerick v. Kern, 14 S. & R. 267, 16 Am. Dec. 497.

[4] Pratt v. Lamson, 2 Allen, 275.

[5] See Buckingham v. Smith, 10 Ohio, 288.

[6] Hall v. Chaffee, 13 Vt. 157, *note*.

[7] Rerick v. Kern, *supra;* Lane v. Miller, 27 Ind. 534.

contract for the purchase of lands, the permission to flow must not be treated as a personal privilege merely, but must be considered as pertaining to the mill property so as to pass with it on a sale. And the death of the licensor or licensee, or the sale of the servient tenement, or the decay of the dam, would not revoke it.[1] And the licensee, after moneys expended, would have all the rights of a purchaser in possession under a parol contract, among which would be the right to defend his right of possession in the courts of law until his right was terminated by such steps as would be necessary in the case of the occupation of lands under such parol contracts.

What has been said on this subject is as applicable to a license for any other purpose as for a license for flowing lands.[2]

License by law.— This class of licenses comprehends those cases in which the law, on public grounds, gives permission to enter a man's premises: as where a fire breaks out in a city. The owner of a lot cannot exclude those who would use his premises as a vantage-ground to stay a conflagration; and where it is necessary to destroy buildings to stop the spread of a fire, the sufferer must seek redress at the hands of the state, and accept what the state awards.[3] So where a highway is out of repair or obstructed, a traveler having occasion to make use of it may lawfully pass upon the adjoining premises, carefully avoiding any unnecessary injuries.[4] And statutes which permit lands to be taken for public purposes may provide for preliminary surveys, and in thus providing they license an entry upon the land for the purpose.[5]

A more common instance of a license given by the law is where an officer has process in the service of which it becomes necessary to enter upon private grounds or into private buildings. In general the officer may go wherever a man is in order to make service of process upon him. But the law recognizes every man's house as his castle; that is, that he may close and defend it not only against private persons but against the

[1] Lacy v. Arnett, 33 Pa. St. 169; Thompson v. McElarney, 82 Pa. St. 174; Snowden v. Wilas, 19 Ind. 10, 81 Am. Dec. 370.

[2] See Kamphouse v. Gaffner, 73 Ill. 453.

[3] Stone v. New York, 25 Wend. 157. As to injuries by mobs see Darlington v. Mayor of New York, 31 N. Y. 164, 88 Am. Dec. 248, and *note*.

[4] Bullard v. Harrison, 4 M. & S. 387; Morey v. Fitzgerald, 56 Vt. 487.

[5] Walther v. Warner, 25 Mo. 277.

ministers of the law also. The privilege, however, is in the outer walls only. If the outer door is found open the officer may enter it for any lawful purpose; and, having entered, he may, if need be, break open the inner door to make or complete his service. Even the outer door may be forced open for the purpose of an arrest for treason, felony or breach of the peace or to serve a search-warrant, it appearing that the building entered is the one to be searched.[1] The building must be the man's habitation, though it may be a part of a house only; as where one building was occupied by many persons who had their separate apartments opening into a common hall.[2]

Another case of a license granted by law is that to enter and abate a nuisance.[3]

Abuse of license.— A license given by the owner himself, or by the law, may be lost by abusing it.[4] But it must be borne in mind that if the authority was conferred by the law, an abuse not only terminates it but revokes it; and it is presumed from the misbehavior of the licensee that he entered originally with the intent to do the wrong he has actually committed, and he is held responsible as a trespasser *ab initio*. Thus, if parties enter a public inn and demand entertainment there, the landlord is obliged to receive them, and if they abuse the license by riotous conduct they not only become trespassers, but the trespass dates from their entry.[5] In such cases the law wholly withdraws the authority, because the authority given is one which the owner cannot resist. But where the party himself grants the license which he might at his option have withheld, the licensee is not a trespasser in his entry, but is liable on the special case for exceeding his license, or for any misconduct after entry.[6]

Boundaries.— Where one's land is bounded on a public highway it presumptively extends, not to the outer line, but to the middle of the road, and his supreme dominion embraces the whole, qualified only by the public easement.[7] He may maintain

[1] Semayne's Case, 5 Co. 91, Yelv. 29, Sm. L. C. 213; Hawkins v. Com., 14 B. Mon. 395, 61 Am. Dec. 147.

[2] Swain v. Milzner, 8 Gray, 182, 69 Am. Dec. 244.

[3] See *ante*, pp. 16, 17.

[4] Edleman v. Yeakel, 27 Pa. St. 26; Jewell v. Mahood, 44 N. H. 474.

[5] Six Carpenters' Case, 8 Coke, 146, 1 Sm. L. C. 143.

[6] Cushing v. Adams, 18 Pick. 110.

[7] Lade v. Sheperd, 2 Str. 1004; Cole v. Drew, 44 Vt. 49; Edmison v. Lowy, 3 S. D. 77, 17 L. R. A. 275, and cases cited.

trespass against one whose cattle graze upon the herbage in the highway unless the cattle are permitted by law to roam at large.[1] If the highway officers sell trees standing on the road, and they are cut without necessity, they are liable in trespass.[2] So it is a trespass on the adjoining owner for a person to deposit in the highway anything not in any manner connected with the enjoyment of the easement, or to extend a structure on other lands out over it.[3]

In appropriating lands for a public way it is competent to provide for taking, not an easement merely, but the fee-simple title. It is held in some states that under such an appropriation the complete ownership and dominion passes to the municipal corporation by which the appropriation is made; and it has been held that the corporation may recover from the adjoining proprietor the value of minerals taken by him from beneath the surface.[4] In Michigan, however, it is held that the appropriation of the fee is only for the purposes of the easement, and for the other public purposes for which it is customary and proper to make use of land thus appropriated.[5]

Prima facie the land bounded on a stream of water is bounded by the center of the stream.[6] Where this view prevails, the rights of the public are rights of navigation and of improvement for the purposes of navigation; and where the state interposes no obstacle, the owner may use the land covered by the water, or the water itself, for his own profit. And it has been held that the right to gather ice therefrom is exclusive, and that the owner may maintain an action against one who, by moving a raft in front of his grounds, prevented his gathering an ice crop.[7] He may also carry out the shore by embankment or otherwise; provided he does nothing to terminate or threaten the corresponding rights of other riparian proprietors;[8] and that he does not abridge or obstruct the public

[1] Stackpole v. Healy, 16 Mass. 33, 8 Am. Dec. 121.

[2] Clark v. Dasso, 34 Mich. 86.

[3] Codman v. Evans, 5 Allen, 308.

[4] Des Moines v. Hall, 24 Iowa, 234.

[5] Cumming v. Prang, 24 Mich. 514. And see Bissell v. Collins, 28 Mich. 277, 15 Am. Rep. 217; Robert v. Sadler, 104 N. Y. 229, 58 Am. Rep. 498.

[6] Chandos v. Mack, 77 Wis. 573, 10 L. R. A. 207, and cases cited in *note;* Ross v. Faust, 54 Ind. 471, 23 Am. Rep. 655; Norcross v. Griffiths, 65 Wis. 599; Adams v. Pease, 2 Conn. 481; Houck v. Yates, 82 Ill. 179; Lorman v. Benson, 8 Mich. 18; Ryan v. Brown, 18 Mich. 196.

[7] Lorman v. Benson, *supra.*

[8] See Bickett v. Morris, L. R. 1 H. L. Cas. (Sc. Ap.) 47, 61.

easement, and is governed always by state police regulations. In many states it is held that on streams which are navigable in fact, though not subject to tide-water flow, the line of private ownership is the bank, and not the thread of the river.[1] On small streams, which are highways only for rafting purposes, the title of the bank owner extends to the thread of the stream, but the public may use them for rafting, taking care not needlessly, by checking the water or otherwise, to injure adjacent lands.[2] These rules are rules of presumption merely,[3] and in any grant of lands the words of conveyance may be such as to bound the lands on the exterior lines of highways or on the bank of a stream, or on any other line sufficiently designated.[4]

It was formerly thought that where land was bounded on a fresh-water lake or pond, the boundary line was low-water mark;[5] but the recent cases reject this rule and hold the boundary line to be the center of the lake.[6] On waters where the tide ebbs and flows, the line of high water is the limit of exclusive ownership.[7] In the Atlantic states, however, the matter is governed largely by legislation or by customary law.[8]

Possession of lands.— Land, the ownership of which has passed from the sovereignty, is, in contemplation of law, always in the possession of some one. If possession is rightful it may be by one who has only a temporary interest, as a tenant for years, or it may be by one having a freehold estate. One having actual possession does not lose it by temporary absence for pleasure or business, but the possession will be kept for him by servants, if any remain, or by his domestic animals or his goods. If one occupies part of a known description of

[1] Tomlin v. Dubuque, etc. Railway Co., 32 Ia. 106; Ravenswood v. Flemings, 22 W. Va. 52; Shoemaker v. Hatch, 13 Nev. 261; Minto v. Delaney, 7 Oreg. 337; Lamprey v. State, 52 Minn. 181, 18 L. R. A. 670; Cooley v. Golden, 117 Mo. 33, 21 L. R. A. 300, and cases cited.

[2] Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

[3] Mott v. Mott, 68 N. Y. 246.

[4] Alden v. Murdock, 13 Mass. 256; Allen v. Weber, 80 Wis. 531, 14 L. R. A. 361; Lembeck v. Nye, 47 Ohio St. 336, 8 L. R. A. 578.

[5] Waterman v. Johnson, 13 Pick. 261.

[6] This rule does not apply to the large lakes or inland seas. See Hardin v. Jordan, 140 U. S. 371, and cases cited by Mr. Justice Bradley; Gouverneur v. Nat. Ice Co., 134 N. Y. 355, 18 L. R. A. 695; Stevens v. King, 76 Me. 197.

[7] Martin v. Waddell, 16 Pet. 367.

[8] Gough v. Bell, 22 N. J. 441.

land, but has color of title to the whole and claims the whole, he has constructively possession of the whole, provided no one else is occupying any portion thereof.[1] If there is no *pedis possessio* of any part of the land, the real owner has constructive possession and may sue an intruder for the disturbance of his possession, and will recover if he makes out the title.[2] At the common law, if possession was taken from the owner, he might retake it by force; but as this often led to a breach of the public peace, it was provided by statute that entry on lands and tenements could be made only where entry was given by law, and then only in a "peaceable and easy manner."[3] This statute has been re-enacted in the several American states or recognized as a part of the American common law. If, notwithstanding, one should forcibly seize possession of lands, or if, after having in any manner unlawfully obtained possession, he should forcibly detain the same against the owner, summary statutory remedies are given by means of which the party forcibly expelled or wrongfully excluded by force may regain possession. Title is no defense to a complaint for a forcible entry.[4]

The law will not suffer a forcible entry upon a peaceable possession, even though it be in the assertion of a valid title, against a mere intruder, for the reasons that whoever assumes to make such an entry makes himself judge in his own cause and enforces his own judgment by the employment of force against the peaceable party; and, as the other party must have an equal right to judge in his own cause and to employ force, any wrong, if redressed at all, would be redressed at the cost of a public disturbance, and perhaps of serious bodily injury to the parties. And when forcible possession is taken of land, the law will not inquire into the title until restoration is made. But if one lawfully entitled to possession can make peaceable entry, even while another is in occupation, the entry in contemplation of law restores to him complete possession,[5] and he

[1] Parker v. Wallis, 60 Md. 15, 45 Am. Rep. 703.

[2] Miller v. Miller, 41 Md. 623; Gunsolus v. Lormer, 54 Wis. 630.

[3] 5 Rich. II, c. 7.

[4] Rawson v. Putnam, 128 Mass. 552; Mosseller v. Deaver, 106 N. C. 494, 8 L. R. A. 537, and cases cited in *note*.

[5] Esty v. Baker, 50 Me. 325. And see Smith v. Reeder, 21 Ore. 541, 15 L. R. A. 172.

may resort to such means, without force, as will render further occupation by the other impracticable.[1]

One, if he acts promptly, may expel by force an intruder upon his lands. If he, his family or his servants are upon the land at the time, the necessary force may then be employed. But if the intruder steals in unawares, the rightful possessor may at once proceed to remove him. But he may, instead, maintain trespass, provided he does not, by sleeping on his rights, acquiesce in his dispossession.[2]

It seems, then, that possession is either rightful or wrongful. Presumptively a peaceful possession is always rightful, and the proof of it is sufficient evidence of title to enable one to recover in ejectment against one who is subsequently found in possession, and who shows no right in himself.[3]

An injury to real estate during the continuance of a tenancy may support two actions: one by the tenant, who, in any event, must suffer some legal injury, and one by the reversioner, where the injury is of a nature to affect the reversion. A trespass is an injury to the tenant, but his recovery is limited to the injury suffered by himself.[4] The destruction of buildings is an injury to both. An act to the injury of the reversion is an act of waste, and when committed by the tenant himself or by any third person will support an action on the case by the reversioner.[5]

The entry of the landlord on the rightful possession of the tenant is a trespass.[6] But if the tenant hold over after the expiration of his term, the landlord may make a peaceable entry,[7] and though it has been held in some cases that he may not employ force to expel the tenant,[8] he may, nevertheless, treat as trespassers all other persons who may then be there without authority or who may afterwards make entry.[9]

[1] Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442.

[2] Browne v. Dawson, 12 Ad. & El. 624.

[3] Sherin v. Brackett, 36 Minn. 152; Bagley v. Kennedy, 85 Ga. 703, and cases cited in *note* to Hancock v. McAvoy, 18 L. R. A. 781.

[4] Gilbert v. Kennedy, 22 Mich. 5.

[5] Lane v. Thompson, 43 N. H. 320.

[6] Bryant v. Sparrow, 62 Me. 546; Crowell v. New Orleans, etc. Co., 61 Miss. 631.

[7] Taylor v. Cole, 3 T. R. 292; Taunton v. Costar, 7 T. R. 431.

[8] Hillary v. Gay, 6 C. & P. 284; Dustin v. Cowdry, 23 Vt. 631. Probably the weight of authority is the other way. Allen v. Keily, 17 R. I. 731, 16 L. R. A. 798, and cases cited in *note*.

[9] Jayne v. Price, 5 Taunt. 326;

Tenants in common.— The possession by one tenant in common is in law the possession of both. Therefore, if one makes entry, he is presumed to do so in the right of both and to hold in their right afterward.[1] But one tenant may disseize the other by a forcible expulsion or exclusion, or by the exclusive receipt of the rents and profits accompanied by a denial of all rights in his co-tenant.[2] The ouster must be by some decisive, unequivocal act or conduct.[3] Where there is an actual ouster the disseizee may maintain ejectment, but his right may be barred by continuous adverse possession of his co-tenant for the period prescribed by the statute of limitations.[4] After the ousted tenant recovers he may then maintain trespass for the mesne profits.[5] For a distinct injury by one co-tenant during the joint possession, the other may have the appropriate remedy against him,[6] but he is responsible for a clear abuse only, in the use of the premises.

Injuries to the possession of tenants in common are injuries to all, and all should join in suits for trespass, nuisances, etc.

Trespasses in hunting.— The general acquiescence of owners of lands in the pursuit of game upon them is to be regarded merely as a waiver of a right to complain of a trespass; and whenever one goes upon the land of another with dogs, and the dogs worry the domestic animals of the land-owner, or do him other damage, the trespasser is responsible without evidence of his knowledge of vicious propensities in his dogs, for it is his own trespass, and the mischief done by the dogs is only matter of aggravation.[7]

Trespasses in fishing.— The right to take fish in fresh-water streams belongs to the owners of the soil under them to the exclusion of the public.[8] But to prevent undue encroachments

Daintry v. Brocklehurst, 3 Exch. 207; Hey v. Moorhouse, 6 Bing. N. C. 52.

[1] Roberts v. Morgan, 30 Vt. 319; Dubois v. Campau, 28 Mich. 304.

[2] Brackett v. Norcross, 1 Me. 89; Long v. McDow, 87 Mo. 197.

[3] Morrill v. Morrill, 20 Oreg. 96, 11 L. R. A. 155.

[4] Dubois v. Campau, 28 Mich. 304; Hampton v. Wheeler, 99 N. C. 222.

[5] Goodtitle v. Tombs, 3 Wils. 118; Critchfield v. Humbert, 39 Pa. St. 427, 80 Am. Dec. 533.

[6] Odiorne v. Lyford, 9 N. H. 502; Waller v. Bowling, 108 N. C. 289, 12 L. R. A. 261.

[8] Beckwith v. Shordyke, 4 Burr. 2092; Van Leuven v. Lyke, 1 N. Y. 515, 49 Am. Dec. 346, and cases cited in *note*.

[8] Browne v. Kennedy, 5 H. & J. 195; Cobb v. Davenport, 32 N. J. 369. And see Turner v. Hebron, 61 Conn. 175, 14 L. R. A. 386.

by one riparian proprietor upon the rights of others, the state largely regulates the right by forbidding the taking of fish otherwise than singly in certain waters, by prohibiting their being taken at all at certain seasons, and by requiring a free passage to be kept open for the passage of fish in all streams in which rights of fishery are important.[1] In some states the power of regulation is conferred, either generally or in particular instances, upon the county or township authorities; and in Massachusetts and Maine, towns have been allowed to exercise this power for the common benefit of the people of the towns in their aggregate capacity, and to sell or lease rights of fishery in the waters where, at common law, the rights of the owners of the banks would have been exclusive.[2] Such regulations must respect all other rights of the riparian owner. If he has a mill-dam, for instance, he cannot be compelled to remove it without compensation.[3]

The rule regarding fresh-water streams applies also to small lakes or ponds,[4] but probably does not apply to the larger lakes. Whether a body of water comes within the rule must be determined by the court as the case arises.[5]

In tide-waters the right to take fish belongs to the public and presumptively is common to all.[6] In Massachusetts the towns have been allowed to appropriate the right to take fish within their limits;[7] and private grants may be made by the state itself to individuals, who also may obtain exclusive rights by prescription.[8] But the right of fishery in tide-waters is always subordinate to the public right of regulation and improvement for the benefit of navigation. In all waters navigable in fact, the right of navigation is the paramount right.[9] Those engaged in navigation, however, will be liable for any negligent injuries which their vessels may cause to seines,

[1] See Lawton v. Steele, 119 N. Y. 226, 7 L. R. A. 134, and *note;* Com. v. Manchester, 152 Mass. 230, 9 L. R. A. 236; State v. Lewis, 134 Ind. 250, 20 L. R. A. 52.

[2] Nickerson v. Brackett, 10 Mass. 212; Cottrill v. Myrick, 12 Me. 222.

[3] State v. Glen, 7 Jones L. (N. C.) 321; Woolever v. Stewart, 36 Ohio St. 146.

[4] Cobb v. Davenport, 32 N. J. 369, 33 N. J. 223.

[5] See State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513.

[6] Crosby v. Wadsworth, 6 East, 603.

[7] Coolidge v. Williams, 4 Mass. 140.

[8] Gould v. James, 6 Cow. 369; Paul v. Hazleton, 37 N. J. 106.

[9] Moulton v. Libbey, 37 Me. 472.

oyster beds, etc.[1] When fish are taken in private waters, where the public have been accustomed to take them, and where the owner himself does not make use of the fishery for purposes of profit, and is cognizant of the act of others within it, this cannot be a trespass until in some manner the objection of the owner is manifested.[2]

Trespass by means of inanimate objects.— It is a trespass to cast inanimate objects on the land of another, or to throw water upon it, or to cut trees so that they fall upon it, and this whether the result was intended or not. Thus it is an actionable trespass if, where one is blasting rock, fragments are thrown upon the lands of another; and it is no defense that the party was guilty of no negligence.[3] But if a deposit of stones or other material on one man's land is carried by a violent storm upon the land of another, this is merely an accident.[4]

Waste.— While trespass is an injury to the possession itself, waste is committed or suffered by the person actually or constructively in possession of the land, and may be defined as being an injury done or suffered by the owner of the present estate which tends to destroy or lessen the value of the inheritance.[5] Waste is *voluntary*, when it consists of some positive wrongful act which injures the inheritance; or *permissive*, when it consists in the neglect of some duty from which a like injury follows. There is no absolute rule as to what shall constitute waste under all circumstances, for things that are injurious at some times and in some places, may be beneficial in others. Thus, in England, and in some parts of this country, a tenant would be liable for waste if he cut from the estate more timber than is reasonably necessary for fuel and for the repair of buildings, fences and agricultural implements. But in the newer states, where timber is abundant, it might be beneficial to the inheritance, rather than wasteful, to permit the timber to be removed.

For tenants to do upon leasehold premises that for which

[1] Marshall v. Steam Nav. Co., 3 B. & S. 732.

[2] See Marsh v. Colby, 39 Mich. 626.

[3] Haye v. Cohoes Co., 2 N. Y. 159.

[4] Snook v. Bradford, 14 U. C. Q. B. 255.

[5] This is the true test for determining what is waste. Sherrill v. Connor, 107 N. C. 543.

the premises are leased cannot be waste, provided it is done in the proper manner. But, except where they are leased for a special purpose, and always when the estate comes into existence by operation of law, as in case of dower, the question of waste must be governed largely by previous use,[1] especially as regards buildings. For example, it would be waste to turn a dwelling into a shed or stable, or to make over a shed or a stable into a dwelling.[2] Slight changes may lawfully be made, provided they do not injure the inheritance, but preserve the estate substantially the same.[3] With regard to the land itself, it would be waste to excavate farming lands in search of minerals,[4] or to sell gravel or clay;[5] though if such had been the previous use of the premises it would be different.[6]

To sell manure made on the premises, to be removed from it, is waste in case of agricultural lands, because it is implied in leasing such lands that the manure made is to be used thereon.[7]

Permissive waste.—Unless a tenant has covenanted to make repairs, he can be held to exercise only reasonable diligence for the preservation of the buildings. He is not liable for accidental fires occurring without his fault, unless upon covenants. He is bound to protect the remainder of the estate against negligent waste and decay, and this extends to protection against the acts of trespassers.[8]

For waste actually committed, an action on the case for the recovery of damages is the common remedy; but the interest of the reversioner may be as effectually protected by injunction when the waste is merely begun or threatened. One who has only a lien upon the premises is also entitled to an injunction, but it is not so clear what remedy he would have by action. In New York, where the mortgagee has a mere lien on

[1] See King v. Miller, 99 N. C. 583, and cases cited.

[2] Huntley v. Russell, 13 O. S. 572.

[3] See Winship v. Pitts, 3 Paige, 259.

[4] Unlawful removal of petroleum is waste. Williamson v. Jones, 39 W. Va. 231, 25 L. R. A. 222; and see Childs v. K. C., St. J. & C. B. R. Co., 117 Mo. 414.

[5] University v. Tucker, 31 W. Va. 621.

[6] See Lindley v. Smith, 6 Munf. 134.

[7] Hill v. De Rochemont, 48 N. H. 87; Daniels v. Pond, 21 Pick. 367.

[8] Attersall v. Stevens, 1 Taunt. 183; Cook v. Champlain, etc. Co., 1 Denio, 91.

the land, if the mortgagor, or one in privity with him, commits voluntary waste upon the premises, and the premises in consequence prove insufficient for the satisfaction of the mortgage debt, he may recover the damage done him by the waste of the party committing it, providing the mortgagor is insolvent or not personally liable for the debt.[1] In Massachusetts, where the mortgage vests the legal estate in the mortgagee, and he, after condition broken, may maintain trespass against the mortgagor for acts of waste, though the latter still retains possession, the court goes further and holds that damage is not to be measured by proof of insufficiency of the remaining security.[2] But probably in any of the states if there has been an actual sale in foreclosure of the mortgage, with right of redemption afterward, the purchaser, when his estate is perfected, may recover for any waste committed intermediate the sale and the period when the right to redeem expired; for his right, when perfected, relates back to the time of the sale.[3] And a purchaser at an execution sale would have a like right.[4]

[1] Shepard v. Little, 14 Johns. 210.
[2] Byrom v. Chapin, 113 Mass. 308.
[3] Phœnix v. Clark, 6 N. J. Eq. 447.
[4] Stout v. Keyes, 2 Doug. (Mich.) 184.

CHAPTER XI.

INJURIES BY ANIMALS.

By the common law it was made the duty of every man to keep his cattle within the limits of his own possessions, and when they strayed upon the land of another the owner was liable for the mischief done by them, without regard to the degree of care which he exercised in keeping them within his own bounds. Further, the owner of lands was under no obligation to inclose them as a protection against the beasts of others. This rule is a part of the common law in most of the states, except as legislation has modified or abolished it.[1] In some of the newer states, however, it is said that the rule was never adopted, because unsuited to their condition and circumstances.[2] In other states the common-law rule is held to be not in force because inconsistent with their legislation; and in these states the owner of land must protect his lands against injuries by domestic animals as he may think is for his interest.

In some of the states it is provided that, unless the owner shall cause his lands to be fenced with such a fence as is particularly described, he shall maintain no action for the trespasses of beasts upon them.[3] Such statutes generally apply to exterior fences only. More commonly it is required that the owners of adjoining premises shall keep up respectively one-half the partition fence between them, this being apportioned for the purpose by agreement, by prescription, or by the order of fence viewers. Should one neglect his duty prescribed by

[1] Bileu v. Paisley, 18 Oreg. 47, 4 L. R. A. 840; Barber v. Mensch, 157 Pa. St. 390; Bulpit v. Matthews, 145 Ill. 345, 22 L. R. A. 55; Lord v. Wormwood, 29 Me. 282, 50 Am. Dec. 586. See Tonawanda R. Co. v. Munger, 5 Den. 255, 49 Am. Dec. 239, and *note*, citing cases.

[2] Delaney v. Errickson, 10 Neb. 492; Chase v. Chase, 15 Nev. 259. And see Kerwhacker *v.* Cleveland, C. & C. R. Co., 3 Ohio St. 172, 62 Am. Dec. 246; Savannah, F. & W. R. Co. v. Geiger, 21 Fla. 669, 58 Am. Rep. 697.

[3] See Jones v. Witherspoon, 7 Jones L. 555, 78 Am. Dec. 263; Moore v. White, 45 Mo. 206; Wilhite v. Speakman, 79 Ala. 400; Comerford v. Dupuy, 17 Cal. 308.

these statutes, he must not only suffer in silence the injuries to himself in consequence thereof,[1] but he will also be responsible for injuries received on his land by the domestic animals of his neighbor if they wander there invited by his own neglect.[2]

The owner of beasts which unlawfully enter upon the premises of another and there commit mischief because of some vicious propensity is liable for the injury, even though the particular injury might not of itself support an action.[3]

Any one who by agreement with the owner has for the time being the care and custody of animals, which he suffers to escape and do mischief, is the party responsible for their trespasses. It is not the ownership, but the possession and the duty to care for the animal, on which the liability is based.[4]

An exception to the common-law rule, that every man at his peril must keep his beasts from the lands of others, exists where one is driving his domestic animals along the highway. In such a case he is bound to observe only due care, and if, without negligence on his part, they escape from him and go upon private grounds, he is not responsible provided he removes them within a reasonable time. What is a reasonable time must depend upon all the circumstances.[5]

Injuries by vicious animals.— The difference in the nature of animals makes it necessary to take precautions in one case which are not required in another. Ordinarily a dog will commit no noticeable injury by merely crossing the premises of a neighbor; therefore the common law has never given an action of trespass for the unlicensed entry of dogs upon the premises of other persons than their owners.[6] But every owner of cattle, horses, sheep, swine and other domestic animals, which would naturally commit destruction in private inclosures, is re-

[1] Phelps v. Cousins, 29 Ohio St. 135; Eddy v. Kinney, 60 Vt. 554. As to the sufficiency of fences, see Clarendon Land, etc. Co. v. McClelland Bros., 86 Tex. 179, 22 L. R. A. 105, and cases cited in *note*.

[2] Cate v. Cate, 50 N. H. 144, 9 Am. Rep. 179. And see Wilder v. Stanley, 65 Vt. 145, 20 L. R. A. 479.

[3] Lyke v. Van Leuven, 4 Den. 127, 1 N. Y. 515. And see Ellis v. Loftus Iron Co., L. R. 10 C. P. 10.

[4] Ward v. Brown, 64 Ill. 307, 16 Am. Rep. 561; Kennett v. Durgin, 59 N. H. 560. But in some states either the owner or the agister may be proceeded against. Sheridan v. Bear, 8 Met. 284, 41 Am. Dec. 507; Weymouth v. Gile, 72 Me. 446.

[5] Goodwyn v. Cheveley, 4 H. & N. 631. And see Fallon v. O'Brien, 12 R. I. 518, 34 Am. Rep. 713.

[6] Brown v. Giles, 1 C. & P. 118.

quired by common law to keep them at his peril off the lands of other persons; he must take notice of the natural propensity of cattle to stray and trample down crops, as one who keeps a beast of prey must take notice that he will kill and destroy animals and human beings if he is suffered to escape.[1]

Other mischiefs may be committed by domestic animals which are not the result of the general propensity, but are committed, if at all, by exceptionally vicious individuals of the particular species of animals. The keeper of a domestic animal is not in general responsible for any mischief that may be done by such animal which was of a kind not to be expected from him and which it would not be negligence in the keeper to fail to guard against. But if it be made to appear that any domestic animal is vicious and accustomed to do hurt and that the owner has been notified of the fact, the duty is then imposed upon him to keep the animal secure, and he is responsible for the mischief done by the animal in consequence of the failure to observe this duty. For example, one who has been notified that his dog has been accustomed to worry sheep or other animals, or to attack persons, if he still keeps him,[2] takes upon himself all risks, and becomes from the time of such notice responsible for all injuries of the sort he may thereafter commit.[3] So if one drive a bull along the public highway, knowing of his propensity to attack and gore any person wearing a red garment, and taking no precautions, he will be held responsible if such an attack is made.[4]

The notice must be sufficient to put a reasonable and prudent man on his guard, and to require him to anticipate the injury which has actually occurred. Notice that a horse is unruly is

[1] Van Leuven v. Lyke, 1 N. Y. 515.

[2] Knowledge of a dog's vicious propensities may be inferred from the fact that he was kept constantly confined. Werner v. Chamberlain (Del.), 30 Atl. Rep. 638.

[3] Smith v. Pelah, Stra. 1264; Knowles v. Mulder, 74 Mich. 202, 16 Am. St. Rep. 627. One who keeps a dog that is in the habit of attacking passing teams, and knows of the habit, is liable for injuries resulting from an attack, though the injured party, who knew of the danger, took no pains to avoid it. Jones v. Carey (Del.), 31 Atl. Rep. 976. A dog owned by the defendant's agent, and which is kept with defendant's own dogs, comes within the rule. Harris v. Fisher (N. C.), 20 S. E. Rep. 460; Jacobs-Meyer v. Poggemoeller, 47 Mo. App. 560.

[4] Hudson v. Roberts, 6 Exch. 697. And see Glidden v. Moore, 14 Neb. 84.

no notice that he is likely to kick and bite;[1] but notice that a bull attacks and gores other domestic animals is sufficient warning that he would attack persons in like manner.[2] It is the propensity to commit mischief that constitutes the danger, and so the notice need not be of mischief actually committed.[3] The owner of animals which are likely to commit the particular mischief at that season of the year must anticipate and guard against it without special notice or warning.[4]

The owner of cattle which are accustomed to overleap or throw down fences which are sufficient for cattle in general, is liable for injuries committed by his cattle in that way, even in the case of those whose duty it was to maintain the fence overleaped or thrown down.[5]

The duty to protect against vicious animals is imposed upon the keeper, irrespective of ownership.[6] The law will not suffer a man to defend his premises against mere trespasses by ferocious animals whose assault might be dangerous to life or limb;[7] but a man may defend his house against burglars by the use of a ferocious dog, and even against casual trespasses if the dog is not likely to do serious injury.[8]

The doctrine of contributory negligence applies to the case of injury by animals; a man cannot recover for an injury received from a dangerous animal on the premises of another onto which he has gone heedlessly, knowing that such an animal was there.[9] But a party responsible for keeping vicious animals is liable for an injury inflicted by them on a child, though the child's action was committed imprudently.[10]

[1] See Spray v. Ammerman, 66 Ill. 309.

[2] Earhart v. Youngblood, 27 Pa. St. 331.

[3] Robinson v. Marino, 3 Wash. 434; McCaskill v. Elliott, 5 Strob. L. 196, 53 Am. Dec. 706; Wood v. Vaughan, 28 N. B. 472. Knowledge of a servant is equivalent to knowledge of the master. Brice v. Bauer, 108 N. Y. 428, 2 Am. St. Rep. 454. And see, as to sufficiency of notice, Knowles v. Mulder, and cases cited in *note*, 16 Am. St. Rep. 627.

[4] Meredith v. Reed, 26 Ind. 334.

[5] Hine v. Wooding, 37 Conn. 123.

[6] Marsh v. Jones, 21 Vt. 378, 52 Am. Dec. 67; Twigg v. Ryland, 62 Md. 380, 50 Am. Rep. 226.

[7] Loomis v. Terry, 17 Wend. 496, 31 Am. Dec. 306.

[8] See Sarch v. Blackburn, 4 C. & P. 297.

[9] See Williams v. Moray, 74 Ind. 25, 39 Am. Rep. 76; Marble v. Ross, 124 Mass. 44; Fake v. Addicks, 4 Minn. 37, 22 Am. St. Rep. 716.

[10] Plumley v. Birge, 124 Mass. 57, 26 Am. Rep. 645.

Sometimes a vicious animal may lawfully be killed, though the circumstances would not support an action against the owner;[1] but before one could be justified in killing animals that were property at the common law, it would be necessary to show that protection to more valuable property or to human beings appeared to require it.[2] The liability of owners of dogs for injuries done by them is regulated by statutes in many states.[3]

Where the domestic animals of different owners unite in committing an injury, the wrong is not a joint wrong of the owners; each owner must be sued separately for the damage done by his own beast.[4]

Injuries by wild beasts.—If the keeping of animals *feræ naturæ* is not a wrong in itself, then no wrong can come from it until there is negligence on the part of the keepers. An action has been sustained for an injury by the bite of a monkey, though no negligence was charged in the declaration;[5] but the keeping of wild animals for many purposes has come to be recognized as proper and useful, and the idea of legal wrong in keeping and exhibiting them is never indulged. Therefore it would seem that the liability of the owner or keeper for any injury done by them to the person or property of others must rest on the doctrine of negligence.[6]

A very high degree of care is demanded of those who have them in charge; but if, notwithstanding such care, they are enabled to do mischief, the injury would be considered accidental, and no action could be sustained.

[1] See Putnam v. Payne, 13 Johns. 312.

[2] See Woolf v. Chalker, 31 Conn. 121. It is held that a ferocious dog, or one that has been bitten by a mad dog, may be killed as a nuisance. Putnam v. Payne, *supra;* Nehr v. State, 35 Neb. 638, 17 L. R. A. 771; Brown v. Carpenter, 26 Vt. 638, 62 Am. Dec. 603. Otherwise if the dog is properly confined on the owner's premises. Uhlein v. Cromack, 109 Mass. 273; Perry v. Phipps, 10 Ired. 259. As to the right to kill dogs, see Hubbard v. Preston, 90 Mich. 221, 15 L. R. A. 249.

[3] See Spaight v. McGovern, 16 R. I. 658, 7 L. R. A. 388. In Kentucky, a person bitten by a savage dog may recover punitive, as well as actual, damages, if the owner had knowledge of the dog's dangerous disposition. Koestel v. Cunningham (Ky.), 30 S. W. Rep. 970. And see Galvin v. Parker, 154 Mass. 346.

[4] Adams v. Hall, 2 Vt. 9, 19 Am. Dec. 690. *Contra*, Jack v. Hudnall, 25 Ohio St. 255, 18 Am. Rep. 298.

[5] May v. Burdett, 9 Q. B. (N. S.) 101.

[6] See Earl v. Van Alstine, 8 Barb. 630; Scribner v. Kelley, 38 Barb. 14.

CHAPTER XII.

INJURIES TO INCORPOREAL RIGHTS.

Incorporeal rights are said to exist merely in idea and abstract contemplation, though as regards many of them their effects, in which consists their value, are objects cognizable by the bodily senses. In the classification of property as real or personal, some of these rights are designated incorporeal hereditaments, either because they are or may be inheritable, or because they issue out of, or are annexed to, or exercisable within, corporeal hereditaments. All those rights which at common law may be inherited, such as franchises, pensions, annuities and the right to rents, may have a money value, and are therefore properly considered as property rights; but there may be other rights corresponding to these which are only personal property, since they are neither inheritable nor in any manner connected with the realty. Chief among these is the right which one has to the production of his intellect.

Copyrights and patents.— By copyright and patent laws the governments of civilized countries have made provisions to secure to authors and inventors, for a certain length of time, a monopoly in the publication or reproduction of that which they have produced, invented or designed. The author, inventor or designer becomes entitled to remedies by means of which he may protect himself in his monopoly during the period limited by law, upon complying with certain conditions named in the statute. In the case of a book, writing or design, the applicant must be the author or designer, or the assignee thereof, and must conform to the requirements provided by the law. It is generally required, among other things, that the applicant be a citizen, or at least a resident, of the country.

An inventor applying for a monopoly must make it appear that the invention is new and useful and must comply with all legal formalities.

The violation of a monopoly once properly evidenced by certificate or patent is a legal wrong punishable by penalties or

by damages, or by both; but if it shall turn out that the book, design, etc., was not original, or that the invention was not new, the law will afford no protection. Foreign countries, in consideration of reciprocity, sometimes give a similar monopoly within their own limits.

Inventions not patented.— In considering whether the common law affords the author or inventor any redress in case his rights are disregarded, it may be remarked that the law has made distinctions between the case of inventions and the other cases mentioned. In determining accurately who is entitled to the merit of an invention, there is frequently the greatest difficulty, which is vastly increased if the invention is suffered to come into use before the title is claimed and passed upon by the proper authorities. For this reason the law will not recognize property in an invention after the inventor has suffered it to be published to the world without making, in the manner pointed out by law, a claim on his own behalf to the exclusive property therein.[1] If an inventor voluntarily allows the production of his genius or skill to come into use, it is reasonable to presume that his purpose has been to make a gift of his invention to the world.[2] If, however, he simply delayed applying for letters patent until the discovery has been brought into use by another, he may still secure his monopoly. For of two independent discoverers, only the first is entitled to the protection.[3] But there is no monopoly until the letters are obtained.

Literary and artistic productions.— Writings, pictures, etchings, etc., stand on a different footing. Persons working individually would never produce the same identical book or picture,[4] though they might reach the same identical discovery and apply it in useful machinery. Besides, disputes respecting the authorship of contemporary literary productions can seldom arise, and therefore the recognition of a common-law right in literary productions and works of art can result in very little embarrassment.

Here, however, as in the case of inventions, no monopoly in publication is secured except by compliance with statute. But

[1] Shaw v. Cooper, 7 Pet. 292.
[2] Pennock v. Dialogue, 2 Pet. 1.
[3] Bedford v. Hunt, 1 Mason, 302.
[4] A photograph may be copyrighted. Falk v. Gast L. & E. Co., 48 Fed. Rep. 262. A stage dance may not be. Fuller v. Bemis, 50 Fed. Rep. 926.

the author has no occasion to take out a copyright until publication, and he may, therefore, control his own production and publish it or not, at his option; and others, though they may become familiar with it by some means, are not at liberty to publish it without the author's consent.[1]

When, however, an author or an artist publishes his production, he is supposed to abandon it to the public, and he thereby licenses the public to reproduce copies indefinitely. It must be remembered that the word "publication" is not used here in the broad sense which it bears in the law of libel and slander. A publication, to constitute an abandonment, must be literally one which puts a production before the general public.[2] The writer of a literary, dramatic or musical composition, or work of art, is entitled of right to give it a restricted publication, and to be still protected in his property, provided he gives evidence of a clear intent to make his publication a restricted one only. He may enjoin any attempt to take the first general publication from him, and he may refuse publication altogether. After his death his representatives may exercise and control the right to publish. This common-law right would be protected in any country where the common law prevails, and probably also wherever the civil law prevails.

A copyright may be violated by the republication of the whole or any distinct part thereof *verbatim*, by the publication of an abridgment, or by reproducing the whole or a part with such alterations or disguises as are calculated and designed to give it the character of a new work.[3] What constitutes piracy of a work is frequently a very nice question. It is often said that an abridgment is not piracy of the original copyright; but in a given case the question may turn not so much upon the quantity as upon the value of the selected materials.[4] A new plan, arrangement and illustration of old materials may not only be no piracy, but may entitle the author thereof to

[1] Wheaton v. Peters, 8 Pet. 591.

[2] An author does not abandon his play to the public by allowing it to be publicly acted. Boucicault v. Fox, 5 Blatch. 87. And see Bartlett v. Crittenden, 4 McLean, 300, 5 McLean, 32.

[3] See Belford v. Scribner, 144 U. S. 488. It is an infringement to copy engravings or etchings without tint, title and plate mark. Fischel v. Lueckel, 53 Fed. Rep. 499.

[4] Gray v. Russell, 1 Story, 11.

the copyright as in the case of a scientific work.[1] So may the translation of an original work.[2]

An author may be libeled in respect to his publications, or the books themselves may be libeled by false statements[3] and suggestions regarding their purpose or tendency, their originality or untruthfulness, or by garbled extracts or perversions of language or meaning in criticism; for example, an insinuation, based on unfair deductions or garbled extracts, that the purpose or tendency of the work was to inculcate bad morals, would be libelous.[4] Fair criticism is allowable, but the author is entitled to substantial redress when malice inspires unjust and untruthful comment.[5]

Private letters often have a value for publication, and the question sometimes arises who, as between the writer and the receiver, has the right to control their publication. For more convenient discussion letters may be classified:

1st. As literary productions.

2d. As historical documents.

3d. As evidence of facts important to individuals.

4th. As a means of personal vindication to the writer or receiver.

5th. As a means of inflicting injury to the writer or receiver.

6th. As autographs.

Under the first head will fall such letters as those of Lord Chesterfield to his son, and all others which, from their intrinsic literary merits, it might be deemed desirable to publish under an expectation of profit. The literary properties in such letters and the right to determine their publication is in the writer, unless from the circumstances under which they are transmitted it may be fairly implied that they are given to the party addressed for publication.[6]

It has been said that the writer of a letter may enjoin the publication of it by the receiver; but when one writes and sends a letter, he at least parts with the property in the paper on

[1] Emerson v. Davies, 3 Story, 768. As to dramatic works, see Aronson v. Baker, 43 N. J. 365.

[2] Stowe v. Thomas, 2 Wall. Jr. 547. As to what does and what does not constitute piracy of published law reports, see West Pub. Co. v. L. C. P. Co., 64 Fed. Rep. 360, 25 L. R. A. 441.

[3] See Archibald v. Sweet, 5 C. & P. 219.

[4] See Reade v. Sweetzer, 6 Abb. Pr. (N. S.) 9, *note*.

[5] Cooper v. Greeley, 1 Den. 347.

[6] Pope v. Curl, 2 Atk. 342.

which the letter was written, and there is no implied reservation of the liberty to recall it. If the writer has not retained copies, he cannot obtain them by any legal process.

Letters which have a value as historical documents may also possess a value for publication with a view to profit; but probably the literary property of the writer in them would not prevent the use of them by the receiver, or by others with his permission, as historical evidence. The writer cannot be regarded as having any property in letters which are of value only as evidence of private transactions which may become the subject of a legal controversy. Their production as evidence in court may be compelled by any person upon whose business transactions they may throw light. Whatever property there may be in such letters is in the receiver, who may make such disposition of them as he may see fit.

And so where the value of the letter consists in the means it may afford for the vindication of the writer against any unfounded charge, he has no power to make it available unless he has preserved a copy. The receiver, however, may make use of it for his own vindication; but if he shall publish respecting others what shall prove untrue and defamatory, he may be proceeded against for libel.

Literary property in letters is usually protected by enjoining their publication by the receiver. It has been decided that chancery will not enjoin the publication of private letters unless they possess a literary value;[1] but the more sensible doctrine seems to be that publication of such letters may be enjoined on the ground of violation of confidence and injury to the feelings.[2]

A letter valuable only as a curiosity or as an autograph is the property of the receiver, who may use it as property only at his option. It cannot be taken from him on execution, or demanded from him by an assignee in bankruptcy.[3] At his death such letters would be family papers which his administrator could not of right demand. But in the case of autographs which have been bought for a collection, where no

[1] Wetmore v. Scovel, 3 Edw. Ch. 515.

[2] See Story, Eq. Jur., §§ 946–948; Grigsby v. Breckinridge, 2 Bush, 480, 92 Am. Dec. 509.

[3] See Thompson v. Stanhope, Amb. 737.

matter of personal confidence as between the writer and the owner is involved, they should be regarded as being a part of the owner's general estate and subject to all the incidents of personal property in general.

Wrongs in respect to trade-marks.—Whatever name, designation, label or device has in any manner been appropriated by a person or association of persons engaged in any lawful business, as the particular name or designation of the business or article produced,[1] becomes a trade-mark, in the use of which he or they are entitled to be protected. By adopting and making use of a trade-mark a property right has been acquired therein which is valuable; and besides, another in making use of it practices a fraud not only upon the public, who are thereby deceived into purchasing one article when they suppose they are getting another, but also upon the proprietor of the trade-mark, whose own dealings with the public are likely to be limited in proportion as the public are induced to deal with the fraudulent appropriator.[2] On these grounds the use of a trade-mark by one having no right to it may be enjoined and the damages may be recovered for the violation of the right to its exclusive use.[3]

What may be a trade-mark.— Generally a man may adopt for a trade-mark whatever he chooses. Unquestionably he has a right to the exclusive use of an arbitrary or fanciful name or device first brought into use by him;[4] but mere designation of a quality cannot be appropriated as a trade-mark; nor can any general description by common words of the kind of article, or its natures or qualities.[5] Nor, as a general thing, can a man

[1] The office of a trade-mark is to point out the origin or ownership of the article to which it is affixed. Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537.

[2] McCartney v. Garnhart, 45 Mo. 593, 100 Am. Dec. 397.

[3] High on Inj. 673; Congress, etc. Co. v. High Rock, etc. Co., 45 N. Y. 291, 6 Am. Rep. 82; Seixo v. Provezende, L. R. 1 Ch. App. 191.

[4] Bell v. Locke, 8 Paige, 75; Lawrence, etc. Co. v. Woolen Mills, 129 Mass. 325, 37 Am. Rep. 362.

[5] Raggett v. Findlater, L. R. 17 Eq. Cas. 29; Caswell v. Davis, 58 N. Y. 223, 17 Am. Rep. 233; Burke v. Cassin, 45 Cal. 467, 13 Am. Rep. 204; Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537; as the words "iron bitters," Brown Chemical Co. v. Meyer, 139 U. S. 540; "best six cord," Coats v. Merrick Thread Co., 149 U. S. 562; "microbe killer," Alff v. Radam, 77 Tex. 530, 9 L. R. A. 145. And see Munro v. Tousey, 129 N. Y. 38, 619, 14 L. R. A. 245.

acquire an exclusive right to his own name as a trade-mark as against others of the same name who may see fit to engage in the same business. But one will not be allowed to take advantage of the circumstance of an identity of names to withdraw trade from a rival by practicing a deception upon the public.[1] The name of a place may not be appropriated as a trade-mark as against others who may see fit to engage in the same business at the same place,[2] though it may be as against one who at a different place undertakes to appropriate it.[3]

The trade-mark may be applied to a natural product as well as to a manufacture.[4] The right to it may be sold with the business, but not without.[5] And if it is allowed without objection to come into common use in the trade it will be lost.[6]

What is an infringement.— To constitute an infringement it is sufficient that there is such a substantial similarity that the public would be likely to be deceived;[7] as, for example, the change from "Hostetter's Celebrated Stomach Bitters" to "Holsteter's Celebrated Stomach Bitters."[8] In case a party attempt to mislead, the courts will be slow in applying a rule laid down in one case,[9] that where ordinary attention on the part of customers will enable them to discriminate between trade-marks of different parties the court will not interfere.[10]

[1] Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489; Meriden, etc. Co. v. Parker, 39 Conn. 450, 12 Am. Rep. 401; Holloway v. Holloway, 13 Beav. 209; Brown Chemical Co. v. Meyer, *supra;* Gato v. El Modelo Cigar Mfg. Co., 25 Fla. 886, 6 L. R. A. 823. The rule does not apply "where the defendant, as in the case of a corporation, selects its own name; especially where it appears that such name is selected with an intention to deceive." Rogers Mfg. Co. v. Rogers, 66 Fed. Rep. 56.

[2] Glendon Iron Co. v. Uhler, 75 Pa. St. 467, 15 Am. Rep. 599.

[3] Newman v. Alvord, 51 N. Y. 189, 10 Am. Rep. 588. Names in common use as designating locality cannot be used. Columbia Mill Co. v. Alcorn, 150 U. S. 460. And see Laughman v. Piper, 128 Pa. St. 1, 5 L. R. A. 559.

[4] Dunbar v. Glenn, 42 Wis. 118, 24 Am. Rep. 395.

[5] Banks v. Gibson, 34 Beav. 566. And this though it consist largely of the name, initials or residence of the vendor. Symonds v. Jones, 82 Me. 302, 8 L. R. A. 570.

[6] Ford v. Foster, L. R. 7 Ch. App. 611; Caswell v. Davis, 58 N. Y. 223, 17 Am. Rep. 233.

[7] Columbia Mill Co. v. Alcorn, 150 U. S. 460. Positive proof of fraudulent intent is not required where the proof of infringement is clear. Le Page Co. v. Russia Cement Co., 5 U. S. App. 112, 17 L. R. A. 354.

[8] Popham v. Cole, 66 N. Y. 69, 23 Am. Rep. 22; Hostetter v. Vowinkle, 1 Dill. 329.

[9] Popham v. Cole, *supra.*

[10] Gorham Co. v. White, 14 Wall. 511, 528.

Aliens resident in the country will be given protection in their trade-marks as well as citizens;[1] but the trade-mark that in itself is fraudulent and deceptive cannot be the subject of property and will not be protected. The maxim, "he who comes into equity must come with clean hands," has been often applied to bills to restrain by injunction the counterfeiting of trade-marks. No one has a right to sell his own goods as the goods of another, and equity will interfere in such cases to promote honesty and fair dealing. Where the trade-mark in Spanish, of cigars made in New York, contained a representation that they were made in Havana, a bill to restrain the use of an imitation was dismissed.[2]

The good will of a business is often very valuable property. But what has been said about infringement of rights and trade-marks will apply to all devices by means of which one endeavors to deprive another of the value of the good will of his business by deceiving the public. Here, as in other cases of fraud, the law regards not so much the means as the end of the deception. To steal or to injure the good will of the business by any species of deception is a wrong which will be redressed by remedies appropriate to the circumstances.

A right of common consists in the right to have some definite common enjoyment with the owner in certain real estate. The rights of common possessed by tenants of a manor in many cases furnish suitable illustrations. In England the tendency of legislation has been to diminish the number and extent of these rights. The circumstances attending the settlement of America were not favorable to the establishment of similar rights. The cultivators of land for the most part acquired and owned independent estates. In the New England colonies lands granted in common to those who planted a new town were for a considerable period made use of in common by the inhabitants. The taking of shell fish along the shores of tide water between high and low water mark and the taking of sea weed thrown up by the sea was and is of common right to the

[1] Taylor v. Carpenter, 3 Story, 458; La Croix v. May, 15 Fed. Rep. 236.

[2] Palmer v. Harris, 60 Pa. St. 156, 100 Am. Dec. 557. One engaged in an illegal business is not entitled to protection. Portsmouth, etc. Co. v. Portsmouth, etc. Co. (N. H.), 30 Atl. Rep. 346.

people except where, by colonial ordinance, the riparian proprietorship was extended to low-water mark.[1]

The distinction must be noted, however, between what are proprietary rights in common and the right to participate with the general public in the enjoyment of those rights which pertain to the sovereignty. Such rights as the right to make use of the public highways, commons, parks, the right to fish in public waters, the right to visit and have the customary benefit of public offices, etc., emanate from the sovereignty, and their equal enjoyment by all will be protected by it.[2] Whether or not exclusive privileges may be granted in such rights as are susceptible of being made available for profits, as in the case of fisheries, is exclusively a matter of sovereign discretion.

In the case of any of these public rights, one might be wronged in being excluded therefrom by another, or in being impeded in its enjoyment; but in the absence of legislation it would be difficult to obtain redress against one for a merely excessive appropriation of that which was common to the use of all.[3]

In the absence of statute, perhaps it may be considered a part of the common law of the land that when two persons meet on a public highway they shall turn to the right of the middle of the main traveled path. One injured by reason of the failure of another to observe this rule may recover the damages suffered if he was himself free from fault. But if one injured in this way takes no pains to avoid the collision, his contributory negligence will defeat recovery.[4]

Injuries to rights in easements.— Easements have of late become so numerous that only a few of the more important can be named here. Contracts are sometimes entered into to control the use of a particular lot and the manner in which it shall be built upon; and these establish rights in the nature of easements. They may be enforced in equity at the instance

[1] See Packard v. Ryder, 144 Mass. 440, 59 Am. Rep. 101, and cases cited; Mather v. Chapman, 40 Conn. 382, 15 Am. Rep. 46; Phillips v. Rhodes, 7 Met. 322.

[2] Crandall v. Nevada, 6 Wall. 35.

[3] See Goodman v. Mayor, etc. Saltash, L. R. 7 App. Cas. 633.

[4] Baker v. Portland, 58 Me. 199, 4 Am. Rep. 274. The case of the invasion of one's right to the use of highways by excluding him from it, or by making difficult his means of access will more properly be considered in the chapter entitled Nuisances.

of the owners of the lands for the benefit of which they are to be established.[1] An instance of this is where the proprietor of a town plat in the deeds he gives inserts a provision that a certain business, regarded as offensive, shall not be permitted on the premises;[2] or that the buildings shall be constructed a certain distance from the streets.[3] The relief in equity in such cases is awarded in part because the law can afford none.[4]

The right to pass and repass over the land of another is a more common easement, and may come into existence by grant, by prescription, or as a way of necessity. If the right is created by grant, the way must be defined and located either by the grant itself or by the acts of the parties; and if not located by grant or consent, the grantee may select the route for it.[5] If established by prescription, the user must determine the location.[6] Where one grants a parcel of land so surrounded by other lands owned by himself that access to it, except over such lands, is impracticable, he grants by implication a right of way over his own land to that he has sold. Where lands he has sold so surround a parcel retained by himself that access to the latter can be had only over that he has granted, he reserves the right of way.[7] In either case the way may be located by the owner of the tenement over which it must extend; but if he refuses the request to locate the way, or selects it unfairly, the party entitled to the easement may locate it himself. When the way is once located, it cannot be changed except by mutual consent.[8] There may also be a right of way for any purpose for which one might have occasion to make use of a passage across his neighbor's land for the greater or more convenient use of his own; as for pipes to carry water, gas, etc., or for drains; and this may be acquired by grant or prescription. But such ways do not come into existence as ways of necessity, strictly, though they often arise by implication from grants, the benefits of which cannot be enjoyed without them and must therefore be understood to have con-

[1] Hills v. Miller, 3 Paige, 254.
[2] Barrow v. Richard, 8 Paige, 351.
[3] Hubbell v. Warren, 8 Allen, 173.
[4] Brewer v. Marshall, 19 N. J. Eq. 537.
[5] Hart v. Connor, 25 Conn. 331.
[6] Jones v. Percival, 5 Pick. 485.
[7] The necessity must be positive. Gayetty v. Bethune, 14 Mass. 49, 7 Am. Dec. 188.
[8] Holmes v. Seely, 19 Wend. 507.

templated them.[1] Easements of light and air, and for the support of buildings and drains, frequently come into existence by implication from grants in this way.

The grant of a right of way confers nothing more than the fair enjoyment of the privilege, and must be so construed as not needlessly to restrict the enjoyment of his estate by the owner of the servient tenement.[2]

Any obstruction to an easement or any encroachment upon it, or any disturbance of the soil, or that by means of which the easement is enjoyed, is an actionable wrong, provided damage is caused by it. Only the owner of the land subject to an easement can bring ejectment against the disturber; for the possession of the land is in him, and those acts which would constitute trespass on lands are not trespass in respect to an easement. If, however, the act be one which, if persisted in, may at length ripen into an adverse right, an injury will be presumed; as, for instance, if a fence is erected across a private way, or a water-course is diverted.[3] This, of course, would not apply where an easement is for a special and temporary purpose only, as a right of way to repair a house.[4]

An action for a disturbance of an easement may be maintained by whoever is owner of the dominant tenement at the time of the injury, or by whoever has an interest therein which entitles him to the enjoyment of an easement.[5] The reversioner of a dominant tenement under lease may also sue if his rights are affected by the injury.[6] Suit may be brought against the owner of a servient tenement if injury was done by him or with his permission; and if it consists in an obstruction or encroachment which is continued by his successor in title, the latter may be held responsible if he fails to remove it within a reasonable time after notice.[7] An obstruction or an encroachment would constitute a private nuisance which the owner of the

[1] See Carbeley v. Willis, 7 Allen, 364, 83 Am. Dec. 688.

[2] Atkins v. Bordman, 2 Met. 457; Garland v. Furber, 47 N. H. 301.

[3] See Elliott v. Fitchburg R. Co., 10 Cush. 191, 57 Am. Dec. 85; Nicklin v. Williams, 10 Exch. 259.

[4] Phipps v. Johnson, 99 Mass. 26.

[5] Hastings v. Livermore, 7 Gray, 194.

[6] Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406; Tinsman v. Belvidere R. Co., 25 N. J. 255, 64 Am. Dec. 415.

[7] Woodman v. Tufts, 9 N. H. 88; Dodge v. Stacy, 39 Vt. 558.

easement may abate wherever it is practicable, taking care always not to exceed his right, or cause injury to a third person.[1]

A party wall is a wall on the division line of estates, which each proprietor is at liberty to use as a support to his building. When such a wall stands in part on the land of each, it is presumed to be owned by the two till the contrary is shown.[2] At the common law no person was under obligation to unite with his neighbor in building a party wall, or even to furnish his proportion of the land for it to stand upon; but an erection might be made a party wall by agreement; and if one person allowed another to make use of his wall for the support of a building, and to continue the use for twenty years, the grant of a right to do so was presumed, and the wall became a party wall by prescription. Statutes now permit the proprietor to build into his neighbor's wall for the support of his own building, provided the wall is sufficient for the purpose, on making payment of the just proportion of the cost.[3]

Where a party wall is built by agreement, the strict rule of law requires a deed; but if the agreement was by parol only, no doubt the doctrine of equitable estoppel would apply. If one erects a block of houses or shops and then conveys them separately to purchasers, the walls become party walls for mutual benefit.[4] Each proprietor has an easement in the land of the other for the use, repair and support of the wall; but the extent of his rights may be limited by the contract with respect to the wall, or by the user, or by the statute under which it was built or is owned.[5] Each proprietor may, when he finds it for his own interest to do so, increase its height, sink the foundation deeper, and on his side add to it, but in doing so he insures the other proprietor against damages.[6] If

[1] See Ganley v. Looney, 14 Allen, 40; Amick v. Tharp, 13 Grat. 564, 67 Am. Dec. 787.

[2] Campbell v. Mesier, 4 Johns. Ch. 335, 8 Am. Dec. 570. See Harber v. Evans, 101 Mo. 661, 10 L. R. A. 41.

[3] See Deere v. Weir-Shugart Co. (Ia.), 59 N. W. Rep. 255; Halpine v. Barr (D. C.), 21 Wash. L. Rep. 106.

[4] Matts v. Hawkins, 5 Taunt. 20; Wheeler v. Clark, 58 N. Y. 267.

[5] Brooks v. Curtis, 50 N. Y. 639, 10 Am. Rep. 545.

[6] See Adrae v. Haseltine, 58 Wis. 395, 46 Am. Rep. 635; Hieatt v. Morris, 10 Ohio St. 523, 78 Am. Dec. 280; Brooks v. Curtis, *supra;* Matthews v. Dixey, 149 Mass. 595, 5 L. R. A. 102. In Negus v. Becker, 143 N. Y. 303, 25 L. R. A. 667, it was said that the party building insures the safety of the operation only as to the

the wall becomes ruinous and ceases to answer the purposes of support, or if it is destroyed by fire, the easement is at an end and each proprietor may build as he pleases upon his own land, without any obligation to accommodate the other.[1] Rights in party walls pass with the land to heirs or assignees without being specially mentioned in the conveyance.[2]

strength of the wall to support the addition, or the manner of its construction; that he does not insure against uncontrollable accident or the negligence of third persons.

[1] Partridge v. Gilbert, 15 N. Y. 601, 69 Am. Dec. 632; Antomarchi v. Russell, 63 Ala. 356, 35 Am. Rep. 40; Heartt v. Kruger, 121 N. Y. 386, 9 L. R. A. 135.

[2] See Standish v. Lawrence, 111 Mass. 111.

CHAPTER XIII.

NEGLECTS OF OFFICIAL DUTY.

Offices are trusts.—Public office is a public trust and is conferred for the benefit of the political society.[1] Though the incumbent has a property right in the office, it is from the standpoint of public interest that any failure in duty is to be regarded, and the remedy for such failure must be indicated by the nature of the duty and the purpose intended to be accomplished in imposing it.

Classification.— Official duties are classified as legislative, executive and judicial; but the classification is not exact. There are many officers whose duties cannot be arranged exclusively under either of these heads; and officers who merely execute the commands of superiors are denominated ministerial.

The incumbents of some offices are required to perform duties which specially concern individuals but only indirectly concern the public; for example, a sheriff, though he serves criminal process, preserves order in court, and is conservator of the public peace, serves civil process also. In any particular case the nature of the duty suggests the remedy for neglect. He is amenable to the state for failure to perform a duty to the state, but for the neglect of a duty to an individual, only the person injured may maintain suit. For neglect of an official duty an action can be maintained, as a general thing, against ministerial officers only, for the reason commonly given that it is inconsistent with the nature of the functions of other officers that they should be made to respond in damages for failure in satisfactory performance.

It is inconsistent with the full discretionary authority of the legislature in all matters of legislation that the members should be called to account at the suit of individuals for their acts and neglects. Discretionary power is in its nature independent;

[1] Beebe v. Robinson, 52 Ala. 66; Cottingham v. McKay, 86 N. C. 241.

to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. This applies to legislative bodies proper, and also to such inferior legislative bodies as boards of supervisors, city councils and the like.[1] For the failure of such bodies to perform their duties, the courts can interpose only to set them in motion, not to compel them to reach particular conclusions nor to impose damages upon them for their neglect.[2]

There can, however, be a private action for neglect of the ministerial duties imposed upon legislative bodies, in the performance of which its members severally are required to act, no discretion being allowed. Duties of this kind are sometimes imposed on the members of such subordinate boards as supervisors and county commissioners.

A similar rule applies in the case of executive officers. A governor of a state, in the exercise of the power given him to grant pardons and reprieves, to command the militia, to refuse his assent to laws, to take steps necessary to the proper enforcement of laws, exercises his discretion, and is not responsible to the courts for the manner in which his duties are performed. Further, he could not be made responsible to private parties without subordinating the executive department to the judicial department; and this would be inconsistent with the theory of our institutions, for each department in its own province must be independent.

We find the rule to be the same in case of the judicial department. The judge cannot be sued because of delaying his judgment, or because he fails to bring to his judgment all the care, diligence and prudence that he ought to bring; or because he decides on partial views and without sufficient information.

Every judge may be required to perform duties in which he is not permitted to exercise his discretion. The *habeas corpus* acts, for example, make it imperative that a judge, when an application for the writ is presented which makes out a *prima facie* case of illegal confinement, shall issue a writ forthwith; and the judge is expressly made responsible in damages if he fails to obey the law. A similar liability arises when a justice

[1] Baker v. State, 27 Ind. 485.

[2] Wells v. Atlanta, 43 Ga. 67.

of the peace refuses to issue a summons to one who lawfully demands it, or an execution on a judgment he has rendered;[1] or to enter up a judgment he has determined upon;[2] or to perform any other official act which in its nature is purely ministerial; or when in performing an official duty he is guilty of misconduct to the prejudice of a party, as where he makes a false return to a writ of *certiorari*.[3]

There are, however, many cases of powers not discretionary for the manner of whose performance there can be no responsibility to individuals. The sheriff, for example, is under no responsibility to individuals for any neglect of duty in respect to the execution of a convict, though in such a matter he is allowed no discretion. Plainly it is not only because duties are discretionary that officers are exempt from civil suits in respect to their performance. No man can have any ground for private action until some duty owing to him has been neglected. If the sheriff had received for service an execution against the goods and chattels of his debtor, his duty would still have been ministerial, but it would have been a duty owing to the individual, and for a failure in performance the individual would be entitled to an appropriate redress.

The rule of official responsibility then may be stated thus: If the duty imposed upon an officer is a duty to the public, a failure to perform it or an inadequate or erroneous performance is a public injury, and must be redressed, if at all, in some form of public prosecution;[4] but if, on the contrary, the duty is a duty to an individual, then a neglect to perform it properly is an individual wrong, and may support an individual action for damages.[5] This rule embraces discretionary powers, for these are conferred only where the duties to be performed are public duties, and concern individuals only incidentally. The performance of their duties by members of legislative bodies may benefit individuals, and the failure to perform them may prejudice individuals, but this is only incidental. When, for instance, a private claim is allowed, and its payment ordered by

[1] See Place v. Taylor, 22 Ohio St. 317; Rochester W. L. Co. v. Rochester, 3 N. Y. 463, 53 Am. Dec. 316.

[2] Fairchild v. Keith, 29 Ohio St. 156.

[3] Pangburn v. Ramsay, 11 Johns. 141.

[4] See Moss v. Cummings, 44 Mich. 359.

[5] See Bennett v. Whitney, 94 N. Y. 302; Lampert v. Laclede G. Co., 14 Mo. App. 376.

the state, the claimant is benefited, certainly; but the allowance is made because it is for the public good that all just claims upon the state should be recognized and provided for. But whether such a claim be allowed or rejected, in either case it is presumed that the members of the legislature performed the duty imposed on them and consulted the public interest only.

The judge stands on a similar footing. Courts are created to do justice between suitors, to the end that peace and order may prevail in the political society, and that rights may be protected and preserved. The duty is public and the end to be accomplished is public. If the judge fails to do justice as between individuals, he fails in his duty to the public and may be called to account by the state in such form and before such tribunal as the law may have provided. It is a sufficient, though not the only, reason for judicial exemption from individual suits that the duty neglected is not a duty to the individual.

Immunity from private suits does not depend at all upon the grade of the office, but exclusively upon the nature of the duty. A policeman, for example, is one of the lowest in grade of public officers, and if by reason of his neglect of duty a breach of the peace results and loss accrues to an individual, the latter cannot bring him to account for his neglect. The duty imposed upon the officer was a duty to the state, of which the individual sufferer was only a fractional part, and incapable as such of enforcing obligations which were not individual but general.

If a highway commissioner declines to lay out a road which an individual desires, or discontinues one which it is for his interest to be retained, there is a damage to the individual but no wrong to him. The duty performed or neglected by the officer was a public duty. An individual can never be suffered to sue for any injury which technically is one to the public only. He must show a wrong which he specially suffered, and damage alone does not constitute a wrong.[1] As in case of one who commits a public nuisance to the injury of an individual, so in case of a highway commissioner who improperly opens or discontinues a road to the prejudice of an individual, there is both a public wrong and private damage. But there is this

[1] Waterer v. Freeman, Hob. 266.

difference: the common law imposes upon every one a duty to his neighbor as well as to the public not to make his premises a nuisance, but the duties imposed upon the road officer in laying out or discontinuing roads are only that he shall faithfully serve the public. A failure of the officer to regard sufficiently the interests of individuals in his official action would be a breach of public duty of which the state alone could complain.[1] The officer, however, becomes a trespasser by entering upon lands of an individual for the purpose of laying out a highway without taking the steps required by law.

If an individual suffers from the neglect of a quarantine officer, upon whom is imposed the duty by the public to prevent the spread of contagion, he can have no redress. The duty of the officer was to protect the general public without reference to any particular individual. That the consequence of the public wrong chanced to fall upon him rather than upon another cannot confer upon him a remedy.[2]

Recorder of deeds.— But there are offices in case of which, instead of individuals being benefited by the performance of public duties, the public is to be incidentally benefited by the performance of duties to individuals. For example, the "recorder of deeds" is a public officer, yet in recording individual conveyances and furnishing abstracts or notice from the record to those who request them and tender the legal fees, he performs duties only to individuals, the performance of which the state is not expected to enforce. But the right to private action on breach of the duty follows as of course.[3] The breach is an individual wrong, and resulting damage must be presumed whether it is or is not susceptible of proof.

The recorder commits an actionable wrong by refusing to record a conveyance when it is tendered to him for recording accompanied with the proper fees, or if in undertaking to record the deed he fails to record it accurately. In the latter case it is sometimes a difficult question, upon which the authorities are not agreed, as to who the party is who is wronged by the recorder's mistake. The question would commonly arise

[1] Sage v. Laurain, 19 Mich. 137.

[2] Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499; Forbes v. Escambria County Board of Health, 28 Fla. 26, 13 L. R. A. 549.

[3] See Clark v. Miller, 54 N. Y. 528; Keith v. Howard, 24 Pick. 292.

between the grantee in the deed which has been incorrectly recorded, and some person claiming under a subsequent conveyance by the same grantor, which has been put upon record while the error in the other remained uncorrected. In some cases it has been held that the grantee in the first deed is not to be prejudiced by the recorder's error. It was said in one case that the grantee by filing his deed for record had brought himself strictly within the letter of the statute, and had performed all that the statute in terms made requisite for his protection.[1] A like decision was made under a statute which made the deed "operative as a record" from the time it was delivered by the grantee for the purpose.[2]

Where this is the rule of law, it would seem that the recorder could hardly be responsible in damages to the grantee unless the erroneous record stands in the way of the sale by the latter, or in some such way actual damage should be sustained. But in the case mentioned, the deed, if still in existence, could be recorded over again on payment of the statutory fees; therefore the cost of a new record would probably be the measure of recovery, if, in the meantime, nothing else had occurred to endanger the title by reason of error. The question of remedy would, however, be more serious if the deed were lost or destroyed. The question of remote and proximate cause would then be involved, as the danger to the grantee's title would result from the conjunction of two circumstances: First, the error in the record; and second, the loss of the deed.

But there are also many other cases, which are planted upon the statute, to the effect that every one has a right to rely upon the record actually made as being correct,[3] and that if it is erroneous the peril is upon him whose deed has been incorrectly recorded. In the leading case a mortgage of $3,000 was recorded for one of $300 only. The statute provided that "no mortgage should defeat or prejudice the title of any *bona fide* purchaser, unless the same should have been duly registered." This was construed to mean that "the purchaser was

[1] Merrick v. Wallace, 19 Ill. 486. See, also, Polk v. Cosgrove, 4 Biss. 437. See, however, Ritchie v. Griffiths, 1 Wash. 429, 12 L. R. A. 384.

[2] Mims v. Mims, 35 Ala. 23. And see Chandler v. Scott, 127 Ind. 226, 10 L. R. A. 375.

[3] See Satterfield v. Malone, 35 Fed. Rep. 445, 1 L. R. A. 35.

not to be charged with notice of the contents of the mortgage any further than they may be contained in the registry."[1] In many of the states the decisions are to the same effect.[2]

Where the error of the recorder consists in indexing the conveyance incorrectly or not at all, the effect of the error must depend upon the statute and the purpose served by the index. Generally, the purpose of the index is not to protect the interests of those whose conveyances are recorded, but to facilitate the examination of the records by the officer; and where such is the fact, an error in the index, or a failure to index a deed, would not prejudice the title of the grantee;[3] but where it is required that the index shall give information of the contents of the deed, and particularly what land is conveyed by it, the record is not constructive notice of the conveyance of anything which the index does not indicate.[4] If in a state where, by statute, the grantee must see that his deed is correctly recorded, the deed is so recorded that the record fails to describe the land actually conveyed, and the grantor then sells his land a second time to one having no knowledge of the prior conveyance, thereby cutting off the first conveyance, the first grantee must be entitled to recovery against some one for the value of the land. It seems clear that he might treat the second conveyance as one made in his interest, and recover from the grantor the amount received from the second grantee. Such redress might be inadequate, as the vendor, knowing that he had no title, would probably be content to receive, on the second sale, less than the value of the land, and the real owner might sue in tort for the value of that which he has lost.[5] If one, knowing he has already conveyed away certain lands, gives a new deed which defeats the first, this is a gross and palpable fraud, and though, like the selling of property in market overt, it may pass the title, it cannot protect the seller when called upon by the owner to account for the property.[6] The question against the recorder would in this case also be complicated as

[1] Frost v. Beekman, 1 Johns. Ch. 288.

[2] For a collection of the decisions under various statutes, see Ritchie v. Griffiths, 12 L. R. A. 384, and *note*.

[3] Schell v. Stein, 76 Pa. St. 398; Bishop v. Schneider, 46 Nev. 472, 2 Am. Rep. 533.

[4] See Ætna L. Ins. Co. v. Hesser, 77 Ia. 381, 4 L. R. A. 122.

[5] Hanold v. Bacon, 36 Mich. 1.

[6] See Andrews v. Blakeslee, 12 Ia. 577.

a question of proximate and remote cause. For injury resulting from giving an erroneous certificate, the recorder is liable if the giving of the certificate was an official act, otherwise not. It was an official act if the person obtaining it had a right to it and which it was the recorder's duty to give.[1] One is entitled to correct copies from the records and to official statements of what appears thereon, but is not entitled to call upon the recorder for a certificate that a particular title is good or bad: such certificate, if given, would not be official. If a recorder owes to every one who may have occasion to rely upon his records the duty to see that they are correctly made, is it also his duty to every one who may have occasion to rely upon his official certificates to see that they are correct also? There is this difference between the two cases: The records are for general and public inspection, and are required to be kept that all persons may have, by means of them, accurate information concerning the titles; while the giving of a certificate respecting something recorded is a matter between the recorder and the person calling for it, and legally concerns no one else. The recorder contracts with the person who requests and pays for it to give a certificate which shall state the facts; but he enters into no relation of contract or otherwise in respect to it with any other person. He is therefore responsible only to the party procuring his certificate, though another may have acted in reliance upon it and been injured by his error.[2] The recorder may also be responsible for recording papers not entitled to record, as a forged paper; provided the record when made may cause a legal injury, and provided further he is aware that the record is unauthorized.[3] Perhaps the recorder would also be liable if he knowingly put upon record a deed purporting to be acknowledged before the proper officer, when in fact the person purporting to take the acknowledgment was not an officer at all.

Inspectors of provisions.— The requirement of inspection of provisions is important not only to the public as a sanitary regulation, but also to individual purchasers, who, if they are

[1] See Van Schaick v. Sigel, 60 How. Pr. 122.

[2] Houseman v. Girard Bldg. etc. Ass'n, 81 Pa. St. 256.

[3] Ramsey v. Riley, 13 Ohio, 157.

betrayed by reliance upon it, may have their action against the inspector.[1]

Postmasters.— The postmaster-general is charged with duties exclusively public and is not liable for the neglect of duty of any officer or agent of the postoffice.[2] But the local postmaster unquestionably has imposed upon him duties to individuals as well as to the public. In respect to mail matter received at his office for delivery, a duty is fixed upon him in behalf of the several persons to whom each letter, paper or parcel is directed. When the proper person calls for what there is for delivery the postmaster must deliver it, and his refusal to do is a tort.[3] The postmaster is also liable to the person entitled to it for the loss, through his own carelessness, or that of any of his clerks or servants, of any letters or other mail matter which shall have come to his official custody.[4] But the postmaster is not liable for the loss or abstraction of the letter by one of his sworn assistants, whose appointment must be approved and can at any time be terminated by the department.[5] A mail carrier is responsible for the loss of mail matter by his own servant or any unsworn assistant,[6] but not if the loss occurs through the carelessness or dishonesty of a sworn assistant.[7]

The clerk of a court may be liable to the party damnified for neglecting to put a case on the docket when his duty requires it;[8] for failure to enter up a judgment upon the roll;[9] for wrongfully approving of an appeal bond, the penalty in which was less than that required by law;[10] and for any similar misfeasance or nonfeasance.[11] So a highway commissioner is liable who neglects to return as paid a highway tax which has been paid in labor.[12] So is the supervisor who, being required by law to report a claim to the county board for allowance, neglects to do so.[13] A commissioner of customs is liable

[1] Hayes v. Porter, 22 Me. 371.

[2] See Lane v. Cotton, 1 Ld. Raym. 646; Hutchins v. Brackett, 22 N. H. 252, 53 Am. Dec. 248.

[3] Teall v. Felton, 1 N. Y. 537, 12 How. 284.

[4] Bishop v. Williamson, 11 Me. 495; Christy v. Smith, 23 Vt. 663.

[5] Schroyer v. Lynch, 8 Watts, 453.

[6] Sawyer v. Corse, 17 Gratt. 230.

[7] Hutchins v. Brackett, *supra.*

[8] Brown v. Lester, 21 Miss. 392.

[9] Douglass v. Yallop, Burr. 722.

[10] Billings v. Lafferty, 31 Ill. 318.

[11] See Wright v. Wheeler, 8 Ired. 184.

[12] Strickfaden v. Zipprick, 49 Ill. 286.

[13] Clark v. Miller, 54 N. Y. 528.

to an importer for refusing to sign a bill of entry except upon payment of excessive fees.[1] And an election inspector may be liable for refusal to receive a vote for an elector.

A sheriff owes duties to the individuals as well as to the public, and so far as he acts as a peace officer and not in the service of a criminal process, individuals are concerned only that he shall commit no trespass upon them or their property. In the service of a civil process, however, the sheriff is charged with duties only to the party to the proceedings. Thus he is liable to the plaintiff for refusal or neglect to serve process or want of diligence in service;[2] for the escape of a defendant who was lawfully arrested on civil process, either mesne or final;[3] for neglect or refusal to return process;[4] for making a false return;[5] for negligently caring for goods whereby some of them are lost;[6] for neglect to pay over moneys collected,[7] and the like. The rules applicable to the case of a constable are the same.

The same act or neglect may sometimes afford ground for an action on behalf of each party to the writ. If the officer has levied upon property, he owes to each party a duty to keep the property with reasonable care, and there is a breach of duty to each when he fails to do so.[8]

Wrongs to the defendant in the process are committed either by the service upon him of process issued without authority or otherwise void, or by disregard of some privilege the law gives him, or by abuse of the process in service. An important provision of law in the interest of the defendant is that which exempts from levy on execution or attachment certain specified property of which he may be the owner. In some states this exemption is a mere privilege, and will be waived if not claimed; but in others the law absolutely exempts the property, and the officer will be a trespasser if he proceeds in disregard of the provisions of law, which require him to take steps to have the property set apart for the debtor even though the

[1] Barry v. Arnaud, 10 Ad. & El. 646.

[2] Howe v. White, 49 Cal. 658.

[3] Browning v. Rittenhouse, 38 N. J. 279. See Shattuck v. State, 51 Miss. 575.

[4] State v. Schar, 50 Mo. 393.

[5] State v. Finn, 87 Mo. 310. And see State v. Case, 77 Mo. 247.

[6] Burns v. Lane, 138 Mass. 350.

[7] Norton v. Nye, 56 Me. 211; Nash v. Muldoon, 16 Nev. 404.

[8] Abbott v. Kimball, 19 Vt. 551, 47 Am. Dec. 708.

debtor remains passive.[1] A defendant under arrest is, in every case, to be treated with ordinary humanity, and any unnecessary severity could not be justified by the writ. It would be an abuse of process if the officer, having an execution against the property, should himself become purchaser of the goods sold under it,[2] or if he should make sale without giving the notice required by law,[3] or if he sells more than is sufficient to satisfy the demand and costs.[4]

The sheriff lays himself liable if on execution against one person he by mistake seizes the goods of another. Ownership is matter of fact, and the functions of the sheriff in deciding upon the fact who the owner is, are not judicial. No question is referred for solution to the judgment or discretion of the officer himself. A judicial officer must follow his judgment; but the sheriff in levying upon the goods of a named person obeys the exact command, and even if there are others in the neighborhood having the same name as the defendant in the writ, the sheriff must, at his peril, ascertain who the real defendant is, and make service upon him.[5] The sheriff, in seizing property upon his writ, must always recognize, and take in subordination to, mortgages or mechanics' liens or any other liens that may exist against the property. And anything that he may do prejudicial to the existing liens is wrongful.[6]

It is the general rule that the sheriff is responsible for the misfeasance or nonfeasance of his deputies; but where the deputy is employed to do something because of the office which the law does not require the sheriff officially to perform, he is a mere private agent, for whose conduct the sheriff is not responsible. This is the case where a deputy is employed to serve a distress warrant,[7] or to foreclose a chattel mortgage by seizing the property.[8]

[1] On this question reference must be had to the various statutory provisions and the decisions under them. See Smyth on Homestead & Exemptions, ch. XIV; Waples on Homestead & Exemptions, p. 779 et seq.

[2] Gilberson v. Wilber, 2 N. J. 312.

[3] Hayes v. Buzzell, 60 Me. 205; Sheehy v. Graves, 58 Cal. 449.

[4] Stead v. Gascoigne, 8 Taunt. 527.

[5] See Screws v. Watson, 48 Ala. 628; Jarmain v. Hooper, 6 M. & G. 827. See, also, Wonderlich v. Walker (Neb.), 60 N. W. Rep. 103; Thomas v. Markman (Neb.), 62 N. W. Rep. 206.

[6] Hobart v. Frisbie, 5 Conn. 592; Worthington v. Hanna, 23 Mich. 530.

[7] Moulton v. Norton, 5 Barh. 286.

[8] See Dorr v. Mickley, 16 Minn. 20.

The sheriff is not liable to the plaintiff for acts of the deputy which the plaintiff himself or his attorney directed or advised, or in respect to which they gave discretionary authority to the deputy, within which he confined his action;[1] as where, by consent of the plaintiff, the deputy gave credit on an execution sale.[2]

A notary public is liable to the extent of any injury resulting from his failure to discharge faithfully the official duty undertaken on request of a party concerned; as where commercial papers are delivered to him for protest and notice to the indorsers;[3] or where he undertakes to certify to the acknowledgment of a conveyance.[4]

Officers whose duties require them to levy a tax to satisfy a judgment and who refuse or neglect to do so, though commanded to proceed by competent or judicial authority, are liable to the judgment creditor for their failure. "Where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act," he is liable to the extent of the resulting injury.[5]

Want of means to perform a duty.— Where a ministerial officer is charged with a duty which is only performed by an expenditure of public funds, he cannot be in fault unless the funds are provided for the purpose, or unless, by virtue of his office, he may raise the necessary means by levying a tax, or in some other mode. He will be responsible, however, to parties injured by his neglect where the funds are at his command. The superintendent of canal repairs who neglected to perform his duty has been held liable to parties who were prevented from making use of the canal, or delayed in its use in consequence.[6] So commissioners who have charge of cutting and keeping open public drains, while they owe no duty to an in-

[1] Strong v. Bradley, 14 Vt. 55; De Moranda v. Dunkin, 4 T. R. 119.

[2] Gorham v. Gale, 7 Cow. 739.

[3] Bowling v. Arthur, 34 Miss. 41.

[4] Henderson v. Smith, 26 W. Va. 829, 53 Am. Rep. 139. In Louisiana, by statute, the liability of a notary extends to others than those who actually employ him; and it has there been held that if a notary, in executing a will, substitutes language of his own choice instead of observing the legal formalities, he is liable to a legatee to whom loss results thereby. Weintz v. Kramer, 44 La. Ann. 35.

[5] Amy v. Supervisors, 11 Wall. 136.

[6] Adsit v. Brady, 4 Hill, 630, 40 Am. Dec. 305.

dividual in respect of cutting the drains, yet will be liable after the drains are once cut, if they suffer them to become obstructed to the injury of neighboring lands, when they have the means at their command for keeping them open.[1]

Highway officers.— There has been some discussion as to whether an officer who has charge of the duty of making and repairing highways and public bridges owes this duty to individuals using the public way or to the public only. Several states follow an early New York case where it was decided that the action would not lie against the overseer of highways at the suit of the party injured in consequence of a bridge within his jurisdiction being out of repair, and that the duty of repair was a duty to the public, not to individuals.[2] Later New York cases, however, hold commissioners of highways responsible for injuries caused by their neglect to keep the public ways in repair, provided they have the means of doing so. The reason for the adoption of this rule is laid down in a leading case: "Defective bridges are dangerous, and travelers generally have no means of knowing whether they are safe or not. They have to rely upon the fidelity and vigilance of the highway commissioners, who are the only persons whose duty it is to see that the bridges are in repair."[3] Under the statutes in North Carolina a similar liability exists.[4]

De facto officers.— What has been said respecting the disability of officers will apply to those who are such *de facto* only as well as to those who hold the office of right. Indeed, so far as one has actually exercised the functions of a public officer, he would be estopped to deny, for the purpose of escaping liability, that he was properly filling it.[5] And his abandonment of the office would not excuse him from liabilities already incurred.

[1] Child v. Boston, 4 Allen, 41, 81 Am. Dec. 680.

[2] Bartlett v. Crozier, 17 Johns. 449, 8 Am. Dec. 428. See McKenzie v. Chovin, 1 McMul. 222; Lynn v. Adams, 2 Ind. 143; Dunlap v. Knapp, 14 Ohio St. 64; McConnell v. Dewey, 5 Neb. 385.

[3] Hover v. Barkhoof, 44 N. Y. 113, 125.

[4] Hathaway v. Hinton, 1 Jones, 243. See County Com'rs v. Gibson, 36 Md. 229.

[5] See Billingsley v. State, 14 Md. 369; Trescott v. Moan, 50 Me. 347.

CHAPTER XIV.

IMMUNITY OF JUDICIAL OFFICERS.

As a general rule in case of official duties which are public in their nature, though in their discharge especially affecting individuals, the time, manner and extent of the performance of which are left to the wisdom, integrity and judgment of the officer himself, the only liability of the officer is to the criminal law in case he shall wrongfully and maliciously neglect to perform his duties or shall perform them improperly. Duties of this nature are usually spoken of as duties in the exercise of discretionary and judicial powers, and it is deemed a conclusive answer to any private action for an injury resulting from neglect or unfaithful performance to say that, where a matter is trusted to the discretion or judgment of an officer, the very nature of the authority is inconsistent with the responsibility in damages for the manner of its exercise, since to hold the officer to such responsibility would be to confer a discretion and make its exercise a wrong.[1] If it is said that there can be no demonstration as to the real motives of an official, this does not mean that it is impossible for the law to investigate the fact. The state may call to account for misconduct officials of even the highest station, and they cannot put aside the charge by pleading that their duties were discretionary or judicial, and by denying the competency of the state to look into their breasts and make demonstration that their motives were not pure and their purposes not honest. It is not, therefore, a mere difficulty of an inquiry into the facts that precludes civil liability to the party who has been injured by a neglect of judicial duty or an abuse of discretion. The reasons must be sought in the desirability of shielding the judicial officer against harassing litigation at the suit of those who may be displeased with his action, and in the interest of the general public.

[1] See remarks of Lord Ch. J. North in Barnardiston v. Soame, 6 St. Tr. 1063, 1099. See, also, Randall v. Brigham, 7 Wall. 523.

As to the interests of the judge: No other ground can be conceived for holding the judge responsible to the defeated party for his action than one of these: First, that by a wrong judgment where duty required of him a right judgment, he has inflicted injury; or second, that he has done wrong by not making use of his honest judgment, but allowing passion or prejudice to control his actions. Now no man fit for the position and having anything either of property or reputation to put at stake would consent to occupy a judicial position if, at the peril of his fortune, he must justify his judgments to the satisfaction of a jury summoned by a dissatisfied litigant to review them. Nor would the protection be sensibly greater if his liability were to depend upon a showing of bad motives. "Just in proportion to the strength of his conviction of the correctness of his own view of the case is he (the losing party) apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and, from the imperfection of human nature, this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously or corruptly, the protection essential to judicial independence would be entirely swept away."[1]

The following may be assigned as reasons why the public interests could not suffer such a suit to be brought:

1. The necessary result of the liability would be to occupy the judge's time and mind with the defense of his own interests, when he should be giving them up wholly to his public duties, thereby defeating to some extent the very purpose for which his office was created.

2. The effect of putting the judge on his defense as a wrongdoer necessarily is to lower the estimation in which his office is held by the public, and any adjudication against him lessens the weight of his subsequent decisions. The confidence and

[1] Field, J., in Bradley v. Fisher, 13 Wall. 348.

respect of the people for the government will always repose most securely on the judicial authority when it is esteemed, and must always be unstable and unreliable when this is not respected. If a judge were forced upon his defense it "would tend to the scandal and subversion of all justice, and those who are most sincere would not be free from continual calumniations."[1]

3. The civil responsibility of the judge would often be an incentive to dishonest instead of honest judgments, and would invite him to consult public opinion and public prejudice when he ought to be wholly above and uninfluenced by them. As every suit against him would be to some extent an appeal to popular feeling, a judge, caring especially for his own protection rather than for the cause of justice, could not well resist a leaning adverse to the parties against whom the popular passion or prejudice for the time being was running, and he would thus become a persecutor in the cases where he ought to be a protector, and might count with confidence on escaping responsibility in the very cases in which he ought to be punished.

4. Such civil responsibility would constitute a serious obstruction to justice, in that it would render essential a large increase in the judicial force, not only as it would multiply litigation, but as it would open each case to endless controversy. The interest of the public in general rules and in settled order is vastly greater than any results which affect only individuals. Courts are for the general benefit rather than for the individual, and it is more important that their action shall tend to the peace and quiet of society than that at the expense of order, and after many suits, they shall finally punish an officer with damages for his misconduct.

5. But where the judge is really deserving of condemnation, a prosecution at the instance of the state is a much more effectual method of bringing him to account than a private suit. His delinquencies may be perfectly capable of being shown, and yet not be made so apparent by the facts of any particular case that in a trial confined to those facts he would be condemned. It may be necessary to show the official action for years. In a private suit the party would be confined to the facts of his own case; but where an officer is impeached, the

[1] Floyd v. Barker, 12 Coke, 25, quoted in Bradley v. Fisher, 13 Wall. 349.

whole official career may be gone into, one delinquency after another is perhaps shown, and, each tending to characterize the other, the whole will enable the triers to form a just opinion of the official integrity.

When, therefore, the state confers judicial powers upon an individual, it says to him in effect that these duties are confided to his judgment, which he is to exercise fully and freely, without favor and without fear; that the duties, though they concern individuals, concern more especially the welfare of the state, and the peace and happiness of society; that if he shall fail in the faithful discharge of them, he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages.

This rule applies to the highest judge in the state or nation,[1] and also to the lowest officer who sits as a court and tries petty causes;[2] and it applies not in respect to their judgments merely, but to all process awarded by them for carrying their judgments into effect.[3]

The rule extends also to military and naval officers in exercising their authority to order courts-martial for the trial of their inferiors, or in putting their inferiors under arrest preliminary to trial, and no inquiry into their motives in doing so can be suffered in a civil suit.[4] It extends also to grand and petit jurors in the discharge of their duties;[5] to assessors on whom is imposed the duty of valuing property for the purpose of a levy of taxes;[6] to commissioners appointed to appraise damages when property is taken under the right of eminent domain;[7] to officers empowered to lay out, alter and discontinue highways;[8] to highway officers in deciding that a person claiming exemption from a road tax is not in fact exempt,[9] or

[1] Dicas v. Lord Brougham, 6 C. & P. 249; Yates v. Lansing, 5 Johns. 282, 9 Johns. 395, 6 Am. Dec. 290; Bradley v. Fisher, 13 Wall. 335.

[2] Mostyn v. Fabrigas, Cowp. 161, 1 Sm. L. C. 1027; Stewart v. Hawley, 21 Wend. 552; Jordan v. Hanson, 49 N. H. 199, 6 Am. Rep. 508; Atwood v. Atwater (Neb.), 61 N. W. Rep. 574.

[3] Dicas v. Lord Brougham, *supra*.

[4] Sutton v. Johnstone, 1 T. R. 493; Dawkins v. Lord Rokeby, 4 F. & F. 806.

[5] Hunter v. Mathis, 40 Ind. 356; Turpen v. Booth, 56 Cal. 65.

[6] Weaver v. Devendorf, 3 Den. 117. See Cooley on Taxation, 551–557.

[7] Van Steenbergh v. Bigelow, 3 Wend. 42.

[8] Sage v. Laurain, 19 Mich. 137.

[9] Harrington v. Com'rs, etc., 2 McCord, 400.

that one arrested is in default for not having worked out the assessment;[1] to members of the town board in deciding upon the allowance of claims.[2]

In the case of that class of officers who do not hold courts, but exercise what is called *quasi*-judicial power, there are many cases which hold that such officers are liable if they act maliciously to the prejudice of individuals.[3] Thus it is said that the members of a school board may be held responsible for the dismissal of a teacher, if they act maliciously and without cause;[4] and a county clerk for wilfully and maliciously approving an insufficient appeal bond.[5]

Whether the officers having charge of elections and of the preliminary registration and other proceedings should be shielded by the same immunity that protects judicial officers in general is a disputed question. In the leading case of *Ashby v. White*[6] the returning officer who refused to admit a qualified elector to vote was held liable in damages at his suit. And this ruling was followed in Massachusetts, in an early case, in which the court planted their conclusion on the ground of state necessity and the preservation of free institutions.[7] If any officer denies or obstructs the liberty of the ballot, upon which our institutions rest, he takes away a privilege valuable to the possessor and necessary to the country; and whether he does this by mistake or from malice he should bear the consequences.

In other states this doctrine is denied and inspectors of election are put upon the footing of *quasi*-judicial officers and are protected when they act within the limits of good faith,[8] but are made to respond in damages when they maliciously deny the voter's right. In one case the court, after noting that the decisions referred to above rest upon the principle that a party who has been deprived of a right is thereby injured and must have a remedy, said: "In one sense, if he is a legal voter he has

[1] Freeman v. Cornwall, 10 Johns. 470.

[2] Wall v. Trumbull, 16 Mich. 228.

[3] Hoggatt v. Bigley, 6 Humph. 236; McDaniel v. Tebbetts, 60 N. H. 497; Williams v. Weaver, 75 N. Y. 30.

[4] Bennett v. Fulmer, 49 Pa. St. 155.

[5] Billings v. Lafferty, 31 Ill. 318.

[6] Ld. Raym. 938.

[7] Lincoln v. Hapgood, 11 Mass. 350. To the same effect, see Jeffries v. Ankeny, 11 Ohio, 372; Monroe v. Collins, 17 Ohio St. 665; Long v. Long, 57 Ia. 497.

[8] See Isaacs v. McNeil, 44 Fed. Rep. 32, 11 L. R. A. 254.

the right to vote and is injured if deprived of it; but the law has appointed a means whereby his vote is decided, and for the purpose has provided judges to determine that question, and has also provided a most careful guaranty for a proper discharge of their duties by the judges, by the mode of their selection and their oath of office. In all governments power and trust must be reposed somewhere; all that can be done is to define its limits and provide means for its proper exercise. When the act in question is that of a judicial officer, all that the law can secure is that they shall not, with impunity, do wrong wilfully, fraudulently or corruptly. If they do so act they are liable both civilly and criminally, but for an error of judgment they are not liable either civilly or criminally. If the citizen has had a fair and honest exercise of judgment by a judicial officer in his case, it is all the law entitles him to, and although the judgment may be erroneous, and the party injured, it is *damnum absque injuria*, for which no action lies."[1] The principle applies as well to the officers who have charge of the registration of voters, preliminary to an election, as to the judge or inspectors who receive the ballots.

In some states, if the right to vote is questioned, an oath which embraces the several requisites of qualification is tendered to the voter, and if he will take this, and thus give evidence that he answers all the conditions, he must be registered for voting, if registration is required, and his ballot must be received when offered. Whenever the law thus makes a man the final judge of his own right, the election officers have only a ministerial duty to perform, and they are responsible, as in other cases of ministerial duties, for refusal to receive the vote if the oath is taken.[2]

Necessity of jurisdiction.— A judge is not such at all times and for all purposes; if he acts without jurisdiction he is but the individual falsely assuming an authority he does not possess.[3] The officer is judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought

[1] Bevard v. Hoffman, 18 Md. 479, 482. To the same effect are the following decisions: Goetcheus v. Matthewson, 61 N. Y. 420; Fausler v. Parsons, 6 W. Va. 486, 20 Am. Rep. 431.

[2] Spragins v. Houghton, 3 Ill. 377; Gillespie v. Palmer, 20 Wis. 544; People v. Gordon, 5 Cal. 235.

[3] Further, on this question, see cases cited in *note* to Austin v. Vrooman, 128 N. Y. 229, 14 L. R. A. 138.

before him; but he is not judge when he assumes to decide cases of a class which the law withholds from his cognizance, or cases between persons who are not either actually or constructively before him for the purpose. And if, being empowered to enter one judgment or make one order, he enters or makes one wholly different in nature, he is as much out of the protection of the law in respect to the particular act as if he held no office at all.[1]

Jurisdiction in a judge may be defined as the authority of law to act officially in the matter then in hand. Most of the officers who exercise an inferior authority have no jurisdiction at all until certain preliminary action has been taken which is particularly pointed out by statute, and in their case, as well as in the case of the inferior courts, it must appear from their written records that the circumstances existed which authorized them to act.[2] In favor of the action of the superior courts, however, to which vast interests and general powers are confided, it will be intended that they have acted with full jurisdiction, and that they have assumed to do nothing that the law does not sanction.[3]

The jurisdiction of an inferior court must appear by the record itself. A warrant issued by a magistrate for a seizure of goods cannot be upheld unless in its recitals it shows authority in the magistrate to issue it.[4] But where the facts alleged before a magistrate are sufficient to give him jurisdiction and he proceeds upon them, to judgment and execution, his right to exemption from liability cannot be affected by the truth or falsity of these facts, or the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them.[5]

In the case of some officers the jurisdiction cannot depend upon record, but must rest in the knowledge of witnesses, as in the case of an assessor, whose jurisdiction to impose a per-

[1] Case of Marshalsea, 10 Co. 68; Yates v. Lansing, 5 Johns. 282; Palmer v. Carroll, 24 N. H. 314; Craig v. Burnett, 32 Ala. 728.

[2] 1 Saund. 74; Parsons v. Loyd, 3 Wils. 341; Estopinal v. Peyroux, 37 La. Ann. 477.

[3] Clark v. Holmes, 1 Doug. (Mich.) 390; Sears v. Terry, 26 Conn. 273; Shufeldt v. Buckley, 45 Ill. 223; Taylor v. Bruscup, 27 Md. 219.

[4] Newman v. Earl of Hardwicke, 8 Ad. & E. 123; McClure v. Hill, 36 Ark. 268.

[5] Cave v. Mountain, 1 M. & G. 257; Shoemaker v. Nesbit, 2 Rawle, 201; Connelly v. Woods, 31 Kan. 359. See on this subject notes to Crepps v. Durden, 1 Sm. L. C. 911.

sonal tax may depend upon the fact of residence, of which no record exists. But where an officer is to proceed upon evidence in writing, and the statute points out what this evidence shall be, it intends that it shall be found of record in the proper office, and not that important public matters shall be left to uncertain parol testimony.[1]

When inferior courts or judicial officers act without jurisdiction the law can give them no protection whatever. But the rule has been held to be otherwise in the case of judges of the superior courts who exceed their authority.[2] The reason of this distinction in favor of the judge, who, from his higher position and presumed superior ability and learning, ought to be most free from error, is probably found in this: that a limited authority is conferred upon the inferior judicial officer, and he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. Moreover, the presumptions of law are always against the rightfulness of any authority in an inferior court which under the law appears doubtful. When a grant of general jurisdiction is made, however, a presumption accompanies it that it is to be exercised generally until an exception appears which is clearly beyond its intent.

If the magistrate or officer is interested in the result of the suit and has assumed to sit or act in his own case, or in that of one of his near relatives, in whose case he would be disqualified to sit as a juror, the law affords him no protection. His action under such circumstances is a mere nullity,[3] and, in general, if he is complainant or moving party in a prosecution

[1] Cardigan v. Page, 6 N. H. 182; Moser v. White, 29 Mich. 59.

[2] Bradley v. Fisher, 13 Wall. 335; Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80; Grove v. Van Duyn, 44 N. J. L. 654, 43 Am. Rep. 412.

[3] *Nemo debet esse judex in propria sua causa.* See Dimes v. Proprietor, etc. Grand Junction Canal, 3 H. L. Cas. 787, 16 Eng. L. & Eq. 63; Hall v. Thayer, 105 Mass. 219. And see Stockwell v. White Lake, 22 Mich. 341; Bedell v. Bailey, 58 N. H. 62; Matter of Ryers, 72 N. Y. 1. For a discussion of this question and an extensive citation of cases, see Fowler v. Brooks, 64 N. H. 423; Moses v. Julian, 45 N. H. 52, 84 Am. Dec. 114, and *note;* Horton v. Howard, 79 Mich. 642, 19 Am. St. Rep. 198; Hughes' Tech. of Law, 128.

or proceeding, he cannot act in deciding it.[1] But to this rule there are exceptions, of which the following are instances: A justice of the peace may of his own motion call upon a party to answer to a contempt of his authority committed in his presence, and may proceed to hear and dispose of the case. And if a felony or breach of the peace is committed in his presence, he may at once deal with the case without complaint being entered. And where township or other municipal boards are empowered to pass upon all municipal claims, the interest of the members does not preclude their passing upon their own among the rest. But any authority conferred upon such board will be strictly construed, and power to adjudge upon their own claims will not be held included unless it is very clearly conferred.[2] In the case of legislative bodies of all grades their action cannot be held invalid because of the interest of the legislators in the subject-matter in which they have acted. Administrative officers also, such as assessors of taxes, sometimes act from the necessity of the case where their own interests are involved, if the law admits of no other course.

The judicial function can never be delegated by officers of any grade.[3]

Contempts of authority.— The jurisdiction to punish for contempt of authority should be exercised with caution, for the reason that the judge is also the accuser, and when he punishes is dealing with conduct which is contemptuous of his own authority and perhaps insulting to himself. A contempt of authority exists when one is guilty of conduct which directly tends to prevent or impede the performance of public duty by a competent tribunal then in session or about to convene for the purpose.[4] The power to inflict summary punishment is

[1] See Limerick v. Murlatt, 43 Kan. 318. As to when a judge is disqualified by interest, see Ex parte Harris, 26 Fla. 77, 23 Am. St. Rep. 548, and cases in *note*. In many states, by statute, a judge is prohibited from sitting in a cause with which he has been connected as attorney. For a discussion of the decisions under such statutes, and the decisions apart from statutes on the subject, see State ex rel. Ambler v. Hocker (Fla.), 25 L. R. A. 114, and *note*.

[2] See Kennedy v. Gies, 25 Mich. 83.

[3] State v. Noble, 118 Ind. 350, 10 Am. St. Rep. 143. One who assumes to act by delegation can perform only nugatory acts. Andrews v. Marris, 1 Q. B. 3; Van Slyke v. Insurance Co., 39 Wis. 390, 20 Am. Rep. 50; State v. Jefferson, 66 N. C. 309.

[4] See State v. Kaiser, 20 Oreg. 50, 8 L. R. A. 584, and *note*.

inherent in each house of the legislative department,[1] but cannot be delegated to committees.[2] Inferior bodies with inferior legislative powers, such as municipal councils, boards of supervisors, etc., cannot punish for contempts.[3]

The power to punish for contempts is granted as a necessary incident in establishing a tribunal as a court.[4] It is therefore possessed by courts of justices of the peace.[5]

In the punishment for contempt jurisdiction must exist as in all other cases. If the punishment is imposed by a court of general jurisdiction, it will be presumed that it acted within the limits of its authority, and that its judgment is warranted by the law and by the facts.[6] But in the case of a court of special or limited jurisdiction the record must show that the party is convicted of conduct which in the law constituted a contempt of court;[7] and the process issued in the execution of the judgment of the court will be void if it fails to show by its recitals that misconduct is charged which *prima facie* constituted contempt.[8] But if the misconduct charged was such as might be a contempt of court, the court itself must be the conclusive judge whether in fact it was one or not,[9] and the judge will not be liable for an erroneous commitment where he has jurisdiction.[10]

A few instances of contempts are given below;[11] but to specify

[1] Shaftsbury's Case, 1 Mod. 144; Flower's Case, 8 T. R. 314; Gosset v. Howard, 10 Q. B. 411; Anderson v. Dunn, 6 Wheat. 204; State v. Matthews, 37 N. H. 450.

[2] Brown v. Davidson, 59 Ia. 461.

[3] And the power cannot be conferred upon them by the legislature. Whitcomb's Case, 120 Mass. 118, 21 Am. Rep. 502.

[4] United States v. Hudson, 7 Cranch, 32; Ex parte Robinson, 19 Wall. 505; Yates v. Lansing, 9 Johns. 395; People v. Wilson, 64 Ill. 195; Pickett v. Wallace, 57 Cal. 555; State v. Morrill, 16 Ark. 384; Kregel v. Bartling, 23 Neb. 848; State v. District Ct. (Minn.), 62 N. W. Rep. 831. And this power is essentially a judicial one. Langenberg v. Decker, 131 Ind. 471, 16 L. R. A. 108. And a statute conferring on county attorneys the power to punish for contempt witnesses who refuse to testify in certain cases is unconstitutional. Re Sims, 54 Kan. 1, 25 L. R. A. 110.

[5] Rex v. Revel, 1 Stra. 420; Reg. v. Rogers, 7 Mod. 28; Onderdonk v. Ranlett, 3 Hill, 323. And see Ex parte Robertson, 27 Tex. App. 628, where the justice was held to have statutory authority to impose a fine for contempt.

[6] Yates v. People, 6 Johns. 337; Yates v. Lansing, 9 Johns. 395.

[7] Lining v. Bentham, 2 Bay, 1; Batchelder v. Moore, 42 Cal. 412; Ex parte Krieger, 7 Mo. App. 367.

[8] Ex parte Thatcher, 7 Ill. 167.

[9] In re Cooper, 32 Vt. 253.

[10] Morrison v. McDonald, 21 Me. 550.

[11] It is a contempt if strikers inter-

in detail the conduct that might constitute contempt of the court would be to enumerate the ways in which misbehavior might obstruct the courts of justice.[1]

A warrant issued to carry into execution a conviction for contempt by an inferior court should show that opportunity was given the party to be heard in his defense. The right to a hearing is absolute and cannot be denied in a court of any grade.[2] And the punishment must be one warranted by law. Where a justice commits one to prison for refusal to answer a question in a suit before him, the committal is for the purpose of compelling an answer, and if it appears that the suit has been disposed of when the order for commitment was made the order is void.[3] Attorneys, solicitors, etc., for misconduct as such, may be punished by having their names stricken from the rolls;[4] but they do not forfeit their right to their office by misconduct in respect to the court as suitors or citizens merely, and therefore cannot be punished by being deprived of it on conviction for other contempts.[5]

The punishment imposed for contempt of court must be certain. An order of commitment, until discharged by due course of law, would be void for uncertainty.[6]

fere with receivers of a railroad appointed by a court. In re Higgins, 27 Fed. Rep. 443; In re Acker, 66 Fed. Rep. 290. And it is a contempt to attempt to create a belief that jurors in a pending suit could be bribed. Little v. State, 90 Ind. 338. Publications in newspapers commenting upon proceedings in court then pending and undetermined, or false charges or unjust censures against the judge in his relation to the suit, constitute contempt and call for punishment as an abuse of the liberty of the press. See Ex parte Barry, 85 Cal. 603, 20 Am. St. Rep. 248; Myers v. State, 46 Ohio St. 473, 15 Am. St. Rep. 638; State v. Judge, 45 La. Ann. 1250; Cooper v. People, Wyatt, 13 Col. 337, 6 L. R. A. 430; State v. Kaiser, 20 Ore. 50, 8 L. R. A. 584, and *note*. And the publisher of a newspaper is liable to punishment for contempt, though he did not know of the article prior to its publication. People v. Wilson, 64 Ill. 195, 16 Am. Rep. 528. If a court has no jurisdiction to make an order, a failure to comply with such order is not a contempt. Ex parte Gardner (Nev.), 39 Pac. Rep. 570.

[1] The legislature cannot make that punishable as a contempt which, in the nature of things, cannot be a contempt of the authority imposing the punishment. Puterbaugh v. Smith, 131 Ill. 199, 19 Am. St. Rep. 30.

[2] Ex parte Bradley, 7 Wall. 364; Lowe v. State, 9 Ohio St. 337. See State v. District Court (Minn.), 62 N. W. Rep. 831.

[3] Clarke v. May, 2 Gray, 410.

[4] Ex parte Moore, 63 N. C. 397. And see *note* to Burns v. Allen, 2 Am. St. Rep. 853.

[5] Re Wallace, L. R. 1 Pr. C. Cas. 283.

[6] Rex v. James, 5 B. & Ald. 894;

Cases in the nature of contempts, where the purpose of the proceedings is to enforce some civil remedy, such as the payment of costs or of alimony, will come under the same rules in respect to jurisdiction as the cases of criminal contempts above spoken of.[1]

Re Hammel, 9 R. I. 248. And the judgment must be entire and final for the particular contempt. O'Rourke v. Cleveland, 49 N. J. Eq. 577, 31 Am. St. Rep. 719.

[1] See Staples v. Staples, 87 Wis. 592, 24 L. R. A. 433, and *note*, on contempt proceedings to compel payment of alimony.

CHAPTER XV.

WRONGS RESPECTING PERSONAL PROPERTY.

The classification of property as real and personal is governed more by circumstances than by the nature or inherent qualities of things. The designation of real property comes to us from a time when the things held most valuable were the estate held by feudal tenure, the castle upon it, the deer in the park, the family pictures, the family jewels,—anything, in short, which distinctively pertained to the family as such, and gained and imparted importance as it was preserved with and held inseparable from that which gave the family its chief prominence, the landed estate. Such property as temporary interests in lands, beasts for market and traders' wares, was for temporary support or for trade, and pertained rather to the person who for the time owned and controlled them, and who might dispose of it to-morrow or himself pass away, than to the family, which, in legal contemplation, was perpetual. This was called personal property.

In thus classifying certain property as real property the prominent idea was that of permanent interest and ownership. But the representation of this permanence was the land. Other things were real property only because of their association. Where traders and others erected buildings upon land in which they had no freehold, the land was property of the real class, though it might be of little money value, and the building was personal property, being of the less substantial nature, though its money value might be much greater than the value of that upon which it stood. This distinction still exists. The actual or presumed intent of a party attaching a chattel to the realty that it shall constitute a part of the realty, or that it shall remain a chattel, is usually the most important circumstance to be considered in determining the fact.[1] But since those who, in making purchases and accepting liens upon property,

[1] See Ewell on Fixtures, 21; Binkley v. Forkner, 117 Ind. 176, 3 L. R. A. 33; Moyer v. Hoyt, 62 Conn. 542, 19 L. R. A. 611.

rely upon appearances to indicate whether it is real or personal, the law usually acts upon the presumed rather than upon any actual intent. In the case of an erection made by the owner of the freehold which is apparently calculated to increase the permanent value of the estate for use and enjoyment, such as a pump put in the well, or a fence constructed to divide off fields, the law conclusively presumes that the owner intended to make it a part of the realty, and consider it his real estate from the time it was constructed or affixed.[1] The owner by deed, mortgage or lease of the land will convey them as a part of it, and when he dies they pass with the land to his devisee or heir at law.

The manner of annexation is not important.[2] But structures put up in such a way as to indicate no intention that they shall be permanent remain personalty. The ownership of a structure erected by one not the owner of the freehold, if he intended it as a permanent annexation, would pass to the owner of the realty. Therefore the person making the annexation under such circumstances retains his ownership in it as a chattel when no principle of justice or public policy is contravened by doing so. Where a tenant erects a building under a mere license given by the owner of the freehold, and which is subject to be recalled at any time; or, as a general rule, where he makes annexations for a more convenient and profitable enjoyment of his estate for the term, or even by way of ornament, if not inconsistent with the purposes for which the estate is leased, such erections remain the personal property of the tenant.[3] But whatever is attached to the realty by one in possession under a contract of purchase becomes a part of it if made in such manner that if it were so attached by the owner of the freehold it would become a part of it.[4] And if one

[1] See Atchison, T. & S. F. R. Co. v. Morgan, 42 Kan. 23, 4 L. R. A. 284. The intent of the owner may generally be gathered from his declarations, or from the character, relations and purposes of the property. See Seedhouse v. Broward (Fla.), 16 So. Rep. 425.

[2] See Tillman v. De Lacy, 80 Ala. 103. Ice in an ice-house, on premises sold for hotel purposes, has been held to pass with the freehold, in the absence of the expression of an intention by the vendor to the contrary. Hill v. Munday, 89 Ky. 36, 4 L. R. A. 674.

[3] Elwes v. Mawes, 3 East, 38, 2 Sm. L. C. 169; Cooper v. Johnson, 143 Mass. 108.

[4] Crane v. Dwyer, 9 Mich. 350, 80 Am. Dec. 87; Miller v. Waddingham, 91 Cal. 377, 11 L. R. A. 510.

without a license, express or implied, on the part of the owner of the freehold, shall enter and make permanent erections thereon, the law will not allow him to remove what he has thus unlawfully attached.[1] If one having a right to attach a removable fixture to the freehold owned by another, shall so attach it that it cannot be removed without serious injury to the realty, he will not be allowed to remove it.[2] On the other hand, if, without the consent of the owner, one should remove upon and attach to his own realty the structure of another, the qualities of real and personal property will still be preserved, and the separate ownership will remain.[3] It remains to be added that the parties concerned may, by agreement between themselves in due form, give to fixtures the legal character of realty or personalty at their option, and the law will respect and enforce their understandings wherever the rights of third persons will not be prejudiced, or any general policy of the law violated.[4]

Landlord and tenant may also by the lease or other agreement control the whole subject of fixtures as they may see fit.[5] Where a licensee has a right to remove fixtures, he will lose them unless he removes them within a reasonable time under the circumstances after his license has been revoked.[6] Unless the tenancy is for an uncertain period, a tenant must take away his removable fixtures within such time as he may lawfully

[1] Though the entry be in good faith. Honzik v. Delaglise, 65 Wis. 494, 56 Am. Rep. 634. And see Ewell on Fixtures, ch. 2; Kinkead v. United States, 150 U. S. 483.

[2] See Collamore v. Gillis, 149 Mass. 578, 5 L. R. A. 150, a case where the tenant had erected a baker's oven. Friedlander v. Hewitt, 30 Neb. 783, 9 L. R. A. 700.

[3] Cochran v. Flint, 57 N. H. 514.

[4] See Sampson v. Graham, 96 Pa. St. 405; Brown v. Corbin, 121 Ind. 455. One who in good faith purchases land is not affected by an agreement between prior owners, of which he had no notice, that a building should be reserved as personalty. Muir v. Jones, 23 Oreg. 332, 19 L. R. A. 441, and *note*. Where machinery is put in a building to make it available as a factory, an agreement that such machinery shall remain the property of the seller until it is wholly paid for, will not prevent it passing as part of the realty to a subsequent mortgagee without notice. Otherwise in the case of a prior mortgagee who consents to the arrangement. Hawkins v. Hessey (Me.), 30 Atl. Rep. 14. And see cases cited in *note* to Muir v. Jones, 19 L. R. A. 441.

[5] See Docking v. Frazell, 38 Kan. 420; Handforth v. Jackson, 150 Mass. 149.

[6] See Antoni v. Belknap, 102 Mass. 193; Ingalls v. St. Paul, M. & M. R. Co., 39 Minn. 479; Turner v. Kennedy (Minn.), 58 N. W. Rep. 823.

continue in possession.[1] It has been held that one who accepts a renewal of a lease without stipulating to reserve his rights in existing fixtures abandons his right to them as he would on surrendering possession without removing them.[2]

All removable fixtures being personalty are subject to all the rules of law which govern that species of property, even though they still continue attached to the freehold. Still, if the owner is injured in respect to his rights therein, while the annexation continues and while he is still in possession of the lands, the wrong is an injury in respect of his possession of the realty, and trover for the fixture will not lie.[3] But all fixtures become personalty when severed, whether the act of severance is rightful or wrongful.[4]

Betterments.— So to do equity between parties who have erected buildings of a permanent character or made other improvements upon lands which at the time he supposed were his own, but which were recovered by another on a claim of paramount title, laws, known as betterment or occupying claimant laws, have been passed which require the owner, after establishing his title, to pay for the improvements as a condition of being put in possession, and which confirm the occupant in possession if payment is declined.[5] While the right of election remains, the occupant's remedy for wrongs are those of the occupant of the realty.

Sidewalks, curbstones, etc., placed by the owner of urban property in front of his lot are his property. While the sidewalk remains it is a part of the realty; but when any such

[1] Brown v. Reno, etc. Co., 55 Fed. Rep. 229; Bedlow v. N. Y. F. D. D. Co., 112 N. Y. 263, 2 L. R. A. 629; Hedderick v. Smith, 103 Ind. 203; Friedlander v. Hewitt, 30 Neb. 783, 9 L. R. A. 700. And where a tenancy at will can be terminated after reasonable notice, and the tenant has had notice and ample opportunity to remove a building before he is dispossessed, he cannot thereafter remove it. Erickson v. Jones, 37 Minn. 459. The rule of the text extends to the mortgagee of a building erected by a tenant as a trade fixture. Free v. Stuart, 39 Neb. 220.

[2] Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173; Carlin v. Ritter, 68 Md. 478; Watriss v. Nat'l Bank, 124 Mass. 571, 26 Am. Rep. 694. But this has been questioned. Kerr v. Kingsbury, 39 Mich. 150, 33 Am. Rep. 362.

[3] Minshall v. Lloyd, 2 M. & W. 450.

[4] See Wylie v. Grundysen, 51 Minn. 360, 19 L. R. A. 33.

[5] See Moore v. Thorp, 16 R. I. 655, 7 L. R. A. 731; Killmer v. Wuchner, 79 Ia. 722, 8 L. R. A. 289. Such statutes are valid. Leighton v. Young, 10 U. S. App. 298, 18 L. R. A. 266. The right of a party to betterments depends upon his *bona fide* supposition that he had the title in fee. Kendall v. Tracy, 64 Vt. 522.

structure is taken up, the material becomes personalty, and trespass *de bonis* or trover will lie against any who unlawfully appropriate them.[1]

Growing crops are generally the property of the person who rightfully has planted and grown them. A tenant may sell or mortgage crops grown by him while they are growing, and harvest and appropriate them when ripened.[2] But if he should sow or plant crops which, in the ordinary course of nature, will not ripen during his term, he will lose them[3] unless the duration of the lease is uncertain, and it is terminated otherwise than by the voluntary act of the tenant himself, in which case he is entitled to the growing crops as emblements,[4] and may enter upon the land to cultivate them and to harvest them. The landlord, if he refuses to recognize this right and excludes him, is liable on a special case, and if he harvests the crop and appropriates it to his own use he may be sued in trespass or trover for the value.[5] In this respect the rights of one who sows crops on the lands of another under a license, after the license is revoked, are similar to those of the tenant at will.[6] The owner of the land and the person raising a crop "on shares" are tenants in common of the crop until it is harvested and divided.[7] And crops and trees sowed or planted on lands by a stranger to the title and without authority belong to the owner of the soil.[8]

Wild animals.— If one secures and tames wild animals they are his property; so if he does not tame them, as long as he keeps them confined and under his control.[9] The right to cut a tree in which are wild bees is in the owner of the soil, and such property as the bees are susceptible of is in him also. One

[1] See Muzzey v. Davis, 54 Me. 361; Rogers v. Randall, 29 Mich. 41.

[2] Doremus v. Howard, 23 N. J. 390.

[3] Bain v. Clark, 10 Johns. 424.

[4] Bevans v. Briscoe, 4 H. & J. 139; Davis v. Thompson, 13 Me. 209.

[5] Harris v. Frink, 49 N. Y. 24, 10 Am. Rep. 318.

[6] Harris v. Frink, *supra*.

[7] Doty v. Heth, 52 Miss. 530. But whether the parties are co-tenants of the crop or not, notwithstanding the rent is to be paid by a portion of the crop, depends upon the intention of the parties. Dixon v. Niccolls, 39 Ill. 372, 89 Am. Dec. 312.

[8] Simpkins v. Rogers, 15 Ill. 397: Laurendeau v. Fugelli (Wash.), 32 Pac. Rep. 465. Otherwise where the party sowing the crop is in actual adverse possession. Faulcon v. Johnston, 102 N. C. 264, 11 Am. St. Rep. 737.

[9] Amory v. Flyn, 10 Johns. 102, 6 Am. Dec. 316. And see Pierson v. Post, 3 Caines, 175.

who enters upon the land without permission to cut the tree is a trespasser.[1] If bees have been once domesticated, and have then escaped, the loser retains his property therein, and may reclaim them if he pursues them with reasonable promptness.[2]

In England if a hunter starts and captures a beast of the chase on the land of another, the property in him is in the owner of the land;[3] but the courts of this country follow the civil law in holding the property to be in the captor, even where the capture has been effected by means of a trespass on another's land.[4]

How wrongs may be done.— One may be wronged in respect to his ownership of personal estate in the following ways: First, by the direct application of force, injuring or destroying it, or disturbing the owner in his possession, technically known as a trespass; second, by direct injuries, whether through negligence or intent; third, by converting the property to the use of the wrong-doer; fourth, by failure to respond to any obligation of bailment in respect to it; fifth, by neglect to restore possession to the owner where it has been acquired without his consent, or when a possession once rightful has become wrongful by failure to comply with a lawful demand to surrender it to the owner.

A trespass to personal property consists in the unlawful disturbance by force of another's possession. That is not a trespass which consists merely in some wrong done to property by one to whom, for any purpose, the property has been transferred by the owner, and who, at the time of the wrong, was lawfully holding it.[5] But there is a trespass in the case of an injury by force to property, the possession of which was obtained by fraud, and for the very purpose of the wrong.

The possession disturbed by the trespass may be either: First, that of the general owner of the property; or second, that of one having a special property therein as mortgagee, bailee or officer;[6] or third, that of one who shows in himself

[1] Adams v. Burton, 43 Vt. 336.

[2] Goff v. Kilts, 15 Wend. 550. And see Rexroth v. Coon, 15 R. I. 35, 2 Am. St. Rep. 863.

[3] Rigg v. Earl of Lonsdale, 1 H. & N. 923; Blades v. Higgs, 13 C. D. 844; in error, 11 H. L. Cas. 621.

[4] See cases collected in *note* to Wheatley v. Harris, 70 Am. Dec. 260 et seq.

[5] Bradley v. Davis, 14 Me. 44, 30 Am. Dec. 729.

[6] Sewell v. Harrington, 11 Vt. 141, 34 Am. Dec. 675.

no other right than a peaceable possession. This mere possession is sufficient as against one who disturbs it without right in himself;[1] and so one who is simply intrusted with goods for safe-keeping without compensation may maintain trespass against a stranger for taking them away. "Though a mere servant has not such a special property as will enable him to maintain trover, yet a bailee, or trustee, or any other person who is responsible to his principal, may maintain the action, and the lawful possession of the goods is *prima facie* evidence of property."[2] Possession may be either actual or constructive. The right to the possession of chattels draws to it in contemplation of law the possession itself. The bailee or mortgagor of chattels who is left in possession thereof may bring trespass against one who disturbs his possession, and the mortgagee or bailor may also maintain the action if entitled to demand and take possession at any time.[3]

A trespass may be intentional or unintentional. But a mere accident can never be a trespass. That, however, which is done purposely, though by mistake, is not to be deemed accidental. If one goes upon the land of another to take away his own sheep, and by mistake takes some that do not belong to him, this is a trespass.[4] An employment of force, to which the plaintiff assents, is not a trespass upon his rights unless the assent was in itself illegal.[5]

The force that constitutes trespass may be applied either, 1, by the party himself who is responsible for it; 2, by some other person, for whose conduct, as servant or otherwise, he is accountable; or 3, by his domestic animals. The first only of these cases will be considered here.

The force may be express or implied.[6] False or illegal imprisonment is a trespass to the person imprisoned, though it is

[1] Taylor v. Hayes, 63 Vt. 475. See Wilson v. Haley Livestock Co., 153 U. S. 39.

[2] Faulkner v. Brown, 13 Wend. 63. See Matthews v. Smith's Exp. Co., 23 N. Y. Supp. 132.

[3] Staples v. Smith, 48 Me. 470; Overby v. McGee, 15 Ark. 459, 63 Am. Dec. 49. Though the finder of a chattel has a special property in it, if he abuses it he becomes himself a trespasser. Oxley v. Watts, 1 T. R. 12. But one whose possession is wrongful and who is himself a trespasser cannot maintain the action. Murphy v. Sioux C. R. Co., 55 Ia. 473.

[4] Dexter v. Cole, 6 Wis. 319, 70 Am. Dec. 465.

[5] See *ante*, p. 48.

[6] See Jordan v. Wyatt, 4 Gratt. 151.

sometimes effected by force, or by otherwise exciting a person's fears.

The degree of force is immaterial to the right of action. If one's horse is hitched where he had a right to hitch him, it is a trespass if another, without permission, unhitches and removes him to another post.[1]

As regards the directness of the injury which will distinguish a case in trespass from one in which the remedy must be sought on the special case, the following test is laid down: If the unlawful force caused the injury before it was spent, this injury must be deemed direct; but if, after the unlawful force was spent, the injury occurred as a collateral or secondary consequence, it is to be considered indirect. Thus, where one is injured by the throwing of a lighted squib in a crowd, which only reached him after several persons in self-protection had repelled it from themselves, this was a trespass because the plaintiff was injured as a direct consequence of the unlawful act, and before its force was spent.[2] So, "if a man throws a log into the highway, and in that act it hits me, I may maintain trespass because it was a material wrong. But if, as it lies there, I tumble over it and receive an injury, I must bring an action upon the case, because it is only prejudicial in consequence, for which originally I could have no action at all."[3]

An incorporeal hereditament being intangible is not the subject of force, and the disturbance of it is not a trespass. Anything is the subject of trespass in which the law recognizes any property, complete or partial. To kill one's dog or cat, or even a wild beast kept in confinement, is a trespass unless it can be justified.[4]

The remedies for a trespass are: First, an action for the recovery of damages, which will lie in all cases; second, recaption of the goods when the trespasser has taken them into his possession, and they can be retaken without breach of the peace; or third, replevin or recapture of the goods by legal process. A trespass may also generally be treated as a conversion.

Indirect injuries are generally injuries of negligence, and are committed by a failure to observe that care in respect to

[1] Bruch v. Carter, 32 N. J. 554.

[2] Scot v. Shepherd, 3 Wils. 403.

[3] See Reynolds v. Clark, Stra. 634, 636.

[4] Parker v. Mise, 27 Ala. 480, 62 Am. Dec. 776.

the rights of others which is their due. But they may be injuries intended, and differing from trespass only in not being a direct result of the wrongful act. Thus, if one shoots a gun into a crowd and injures some one of the persons there congregated, the act is a trespass. But if he purposely and with evil intent leave a loaded pistol where children will be liable to handle it, he will be liable if an injury occurs, but the action must be on the special case.[1]

Trover.— The injury which is redressed in an action of trover is technically called conversion, and the declaration counts on the real or supposed fact that the plaintiff actually lost his goods and the defendant found and appropriated them. "In form the action is a fiction, in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies and has been brought in many cases where in truth the defendant has got the possession lawfully. Where the defendant takes them wrongfully and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass and admits the possession to have been lawfully gotten."[2] If the plaintiff prefers to recover back the specific property, he brings replevin instead of trover, provided the goods are still in the defendant's possession.

The actions of trespass and trover for personalty appropriated by the defendant differ, first, in that while in trespass there is always an original wrongful taking, or a taking made wrongful *ab initio* by subsequent misconduct, in trover the original taking is supposed or presumed to be lawful; second, that trespass lies for any wrongful force, but the wrongful force is no conversion where it is employed in recognition of the owner's right, and with no purpose to deprive him of his right temporarily or permanently.[4]

The plaintiff.— It is frequently laid down as a general rule that "to sustain trover the plaintiff must show a legal title;"[4]

[1] Dixon v. Bell, 5 M. & S. 198. And see Welch v. Durand, 36 Conn. 182, 4 Am. Rep. 55.

[2] Lord Mansfield in Cooper v. Chitty, Burr. 20.

[3] Wilson v. McLaughlin, 107 Mass. 587.

[4] Dungan v. Mut. Ins. Co., 38 Md. 242, 249; Owens v. Weedman, 82 Ill. 409, 417.

and in some cases the defendant has been allowed to defeat a recovery by merely showing property in a third person without connecting himself with the right of such person.[1] But it has often been decided that possession alone is sufficient to enable one to maintain the action of trover. In the leading case of *Armory v. Delamirie*,[2] the finder of a jewel was held entitled to bring trover against one who, having taken the jewel for examination, refused to restore it. It may be said of such cases that a finder of goods has a special property therein which is good against all the world but the real owner; but the law goes further and declares that the "person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrong-doer, and cannot defend himself by showing that there was a title in some third person, for against a wrong-doer possession is title."[3] The doctrine as thus laid down has been recognized in many cases in this country.[4] The right of which the plaintiff in trover complains that he has been deprived must have been either a right actually in possession, or a right immediately to take possession; it is not enough that it be merely a right in action, or a right to take possession at some future day. If then the plaintiff shows that property in his possession has been taken and converted, he shows *prima facie* his right to maintain the suit; and it is only when he is compelled to show his title in order to make out his right to an immediate possession that it can be important for him to go further.[5] A showing of title is not sufficient where the owner has parted with the right of possession for a time under some contract of lease or bailment. In such a case the owner cannot bring trover if the term has not expired or the bailment been terminated at the time conversion takes place.[6] If one purchases property to be paid for when delivered, and pays in part only, he cannot bring trover

[1] Rotan v. Fletcher, 15 Johns. 206; Clapp v. Glidden, 39 Me. 448.

[2] Stra. 505, 1 Sm. L. C. 679.

[3] Lord Campbell in Jeffries v. Gt. West. R. Co., 5 El. & Bl. 802.

[4] See Duncan v. Spear, 11 Wend. 54; Bartlett v. Hoyt, 29 N. H. 317. And see Wilson v. Hoffman, 93 Mich. 72, 32 Am. St. Rep. 485, and *note*.

[5] Foster v. Chamberlain, 41 Ala. 158.

[6] Gordon v. Harper, 7 T. R. 9.

against a subsequent vendee from his vendor, the part payment giving him no right of possession.[1]

But an apparently rightful possession is conclusive evidence of property as against any one who by force or fraud intercepts it without being able to show any right in himself, unless he is able in some manner to so connect himself with the right of the real owner as to be entitled to defend in such owner's interest. Thus, where the plaintiff's possession was not rightful as against the owner, a surrender of the possession to the owner would be a complete defense to a suit in trover.[2] In some cases it cannot be said that in law a possession has been gained, and a mere showing of wrongful character of the plaintiff's possession would defeat his action;[3] as where a thief sues the officer for the stolen property taken from him in making the arrest.

If one's goods are held without right by another, and a third person converts them to his own use, the owner may maintain trover for such conversion.[4] So the mortgagee of chattels who, under his mortgage, is entitled to possession may sue in trover for a conversion while they remain in the hands of the mortgagor.[5] But a servant cannot bring trover for the conversion of his master's goods, since his possession is the possession of his master.[6]

The property.— Anything which is the subject of property and is of a personal nature is the subject of conversion, even though it have no value except to the owner. Thus trover will lie against the payee for refusal to surrender a paid note,[7] or it will lie by the maker of a note which has never been delivered against the payee, who wrongfully obtains possession and refuses to give it up on demand.[8] So it will lie for shares of stock;[9] or for cutting and carrying away trees.[10] But it will not lie against a magistrate for papers used in evidence against the plaintiff before him and placed on file.[11] One may bring

[1] Owens v. Weedman, 82 Ill. 409.

[2] Ogle v. Atkinson, 5 Taunt. 759; King v. Richards, 6 Whart. 418, 37 Am. Dec. 420.

[3] See Laclouch v. Towle, 3 Esp. 114.

[4] Carter v. Kingman, 103 Mass. 517.

[5] McConeghy v. McCaw, 31 Ala. 417; Grove v. Wise, 39 Mich. 161.

[6] Lehigh Co. v. Field, 8 W. & S. 232.

[7] Stone v. Clough, 41 N. H. 290. *Contra*, Lowremore v. Berry, 19 Ala. 130, 54 Am. Dec. 188.

[8] Neal v. Hanson, 60 Me. 84.

[9] Payne v. Elliot, 54 Cal. 339; Ayres v. French, 41 Conn. 150.

[10] Whidden v. Seelye, 40 Me. 247.

[11] Greene v. Mead, 18 N. H. 505.

trover for a building or other fixture owned by him on the land of another which the owner of the land refuses to permit him to take away, and converts to his own use.[1]

The conversion.— Any distinct act of dominion wrongfully exerted over one's property, in denial of his right, or inconsistent with it, is a conversion. A manual taking of the thing in question by the defendant is not necessary to a conversion;[2] nor need it be shown that he has applied it to his own use. "Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use."[3] It is a conversion if one takes the plaintiff's property for a temporary purpose only, if in disregard of the plaintiff's right. If he hires a horse to go to one place and drive him to another, this is a conversion though he returns him to the owner.[4] "Any asportation of a chattel for the use of a defendant or a third person amounts to a conversion, for the simple reason that it is an act inconsistent with the general rule of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places."[5] While the act must have been intended,[6] it is necessary that the result which actually follows should have been contemplated. Thus an agent has been held liable in trover who, being intrusted with a note to get it discounted, and expressly directed not to let it go without the money, allowed another to take it to obtain the discount, who did so but appropriated the proceeds.[7]

A bailee will not be liable in trover for the loss of property through larceny or negligence; and in any case the act of the bailee, if it shall amount to a conversion, must be inconsistent with the bailment and known by him to be so. Therefore a commission merchant who continues to make sales after his authority has terminated, but without notice to him of the

[1] Dame v. Dame, 38 N. H. 429, 75 Am. Dec. 195.

[2] Brown v. Ela (N. H.), 30 Atl. Rep. 412.

[3] See Liptrot v. Holmes, 1 Kelly, 381, 391.

[4] Rotch v. Hawes, 12 Pick. 136, 22 Am. Dec. 414; Crocker v. Gullifer, 44 Me. 491, 69 Am. Dec. 118. But see *contra*, Doolittle v. Shaw (Ia.), 26 L. R. A. 366. And see cases collected in *note* to this case.

[5] Alderson, B., in Fouldes v. Willoughby, 8 M. & W. 540. And see Burroughes v. Bayne, 5 H. & N. 296.

[6] Simmons v. Lillystone, 8 Exch. 431.

[7] Laverty v. Snethen, 68 N. Y. 522.

fact, is not guilty of conversion, but is liable only for an accounting.[1]

A mortgagor of chattels who is left in possession has such a special property as will enable him to maintain trover against a wrong-doer, and he may sell his right of redemption, recognizing the right of the mortgagee. Such a sale is no conversion of the mortgagee's interest,[2] though a sale and denial of the mortgagee's right would be. Such a sale would be a conversion in the purchaser also who had purchased the whole interest and proceeded in a denial of the mortgagee's rights.[3] The first mortgagee may assign his mortgage and sell his mortgaged property to a third person, subject only to the right of redemption of the mortgagor and those who claim under him.[4] But if he sells out the property in parcels, trover will lie, as this might defeat the right to redeem.[5]

If one buys property of another who has no authority to sell, his taking possession in denial of the owner's right is a conversion.[6] So the one who receives and disposes of property in the usual course of trade, though he does so in good faith, and in the belief that the person from whom he took it was the owner, is liable in trover if in fact the possession of the latter was tortious.[7] But merely receiving property from the wrongful possessor and returning it before notice of his want of title is no conversion.[8] Agency is no protection in wrongs, and one who, acting merely as agent, assists in wrongful taking of goods is liable. So if one hires a horse for another who drives it to death, while the hirer drives another beside it, the two are jointly liable to the owner in trover.[9]

Demand and refusal.—Where the defendant has come into the possession of property lawfully or without fault, as where he finds it, or where the relation of bailor and bailee exists, it is, in general, necessary to make demand of possession of him before suit will lie.[10] In the case of an abuse of the contract of

[1] Jones v. Hodgkins, 61 Me. 480.
[2] White v. Phelps, 12 N. H. 382.
[3] See Millar v. Allen, 10 R. I. 49.
[4] Landon v. Emmons, 97 Mass. 37.
[5] Spaulding v. Barnes, 4 Gray, 330.
[6] Miller v. Thompson, 60 Me. 322.
[7] Hollins v. Fowler, L. R. 7 H. L. Cas. 757.
[8] Hill v. Hayes, 38 Conn. 532.
[9] Banfield v. Whipple, 10 Allen, 27.
[10] Strauss v. Schwab (Ala.), 16 So. Rep. 692; Liptrot v. Holmes, 1 Kelly, 381; Reizenstein v. Marquardt, 75 Ia. 294, 1 L. R. A. 318, and *note*. Demand is unnecessary if the taking was tortious. Hayes v. Mass. Mut.

bailment, as where property hired for one purpose is used for another, the abuse terminates the bailment, and the owner may retake his property without demand, or sue for its value. Where one holds property subject to the owner's right, as where he purchases it of another having no authority to sell, a sale or a mere delivery to another, without right, constitutes a conversion and renders demand unnecessary.[1]

A man acquires rightful possession of chattels which are upon land at the time he recovers it in ejectment, and trover will not lie for their conversion until after demand and refusal to allow the plaintiff to take them away.[2] But if the owner is prevented from removing his property it is equivalent to a demand.[3]

The refusal to surrender possession in response to a demand is not of itself a conversion, but is only evidence of a conversion, and is open to explanation;[4] such as that the property has perished or been lost without the bailee's fault.[5] In any case where, at the time of the demand, the defendant has neither the actual nor constructive possession, his liability is in no manner affected by the demand and refusal. But the demand may be important in that it may put the defendant apparently in the wrong, and throw upon him the burden of showing why he fails to surrender the property.[6]

Conversion by tenant in common.— The culpable loss or destruction, by one tenant in common, of his co-tenant's interest, will render him liable.[7] In England neither a claim to exclusive ownership by one, nor the exclusion of the other from possession, or even a sale of the whole, is equivalent in law to loss or destruction.[8] Some cases in this country adopted this rule,[9] and others have qualified it to the extent of holding that a sale of the property out of the state may be treated as a loss

L. Ins. Co., 125 Ill. 626, 1 L. R. A. 303; Waller v. Bowling, 108 N. C. 289, 12 L. R. A. 261; Bonaparte v. Clagett, 78 Md. 87.

[1] See Sycks v. Hay, 4 T. R. 260; Kimball v. Billings, 55 Me. 147, 92 Am. Dec. 581.

[2] Thoragood v. Robinson, 6 Q. B. 769.

[3] Badger v. Batavia Paper Co., 70 Ill. 302.

[4] Thompson v. Rose, 16 Conn. 71, 41 Am. Dec. 121. And see Reizenstein v. Marquardt, 75 Ia. 294, 1 L. R. A. 318.

[5] Dearbourn v. Union Nat. Bk., 58 Me. 273; Abraham v. Nunn, 42 Ala. 51.

[6] Davis v. Buffum, 51 Me. 160.

[7] White v. Brooks, 43 N. H. 402.

[8] Mayhew v. Herrick, 7 C. B. 229.

[9] See Lewis v. Clark, 59 Vt. 363.

or destruction.[1] In other cases, however, a sale of the whole interest by one tenant in common has been held a conversion;[2] and in others it is held that even a sale is not necessary to make out a conversion, and that the doctrine that one tenant in common cannot maintain trover against his co-tenant without proving a loss, destruction or sale of the article does not apply to such commodities as are readily divisible into portions absolutely alike in quality, such as grain or money.[3]

Bailees.— It is no conversion by a common carrier or other bailee, who has received property from one not entitled to possession, to deliver it in pursuance of the bailment, if this is done before notice of the right of the real owner.[4] A delivery to the party entitled to the possession will be a protection to him, and he may defend in the right of such party before delivery.[5]

The injury.— As trover lies in all cases where one makes an unlawful use of another's personalty, the injury is sometimes very small. If one hires a horse for one journey, and starts with him in an opposite direction on another, but returns the horse before trial, the injury is perhaps merely nominal. But where the conversion is complete, the injury suffered is, of course, the value of what is converted. If one has received property to be returned on demand, and declines to return it, and the property thereafter increases in value, and the owner treats the demand and refusal as a conversion, the injury is measured by the value at that time.[6] He may, however, make a subsequent demand and rely upon the failure to respond to that as his grievance.

[1] Pitt v. Petway, 12 Ired. 69. See Waller v. Bowling, 108 N. C. 289.

[2] See Gilbert v. Dickerson, 7 Wend. 449, 22 Am. Dec. 592, and cases referred to in *note;* Steiner v. Tranum, 98 Ala. 315.

[3] See Fiquet v. Allison, 12 Mich. 328, 86 Am. Dec. 54. For a collection of the cases on the subject of this paragraph, see *note* to Waller v. Bowling, 12 L. R. A. 261.

[4] Nelson v. Iverson, 17 Ala. 216; Burditt v. Hunt, 25 Me. 419.

[5] Sheridan v. New Quay Co., 4 C. B. (N. S.) 619; Young v. East Ala. etc. Co., 80 Ala. 100.

[6] Burk v. Webb, 32 Mich. 173. As to the rule where the value of the property is increased by the action of the wrong-doer himself, see Winchester v. Craig, 33 Mich. 205. And as to the case where the conversion is through innocent mistake, see Wright v. Skinner (Fla.), 16 So. Rep. 335.

Effect of judgment.— It is the present English rule,[1] and the accepted doctrine in this country,[2] that it is not the judgment alone in trover or trespass, but judgment and the satisfaction thereof, that passes title to the defendant. The title by relation vests as of the time when the conversion took place. But this is not effectual for all purposes. If, after the conversion, the plaintiff has sold his interest in the property, the purchaser will not be affected by the suit, and the plaintiff may recover nominal damages only, since by the sale he has disabled himself from passing title to the defendant.[3] The title will not change if the recovery is only for an injury to the property or for a temporary use, and not for the value.

Justification under process.— For the purpose of interfering with one's possession of chattels the ministerial officer is always supposed to be armed with legal process which he can exhibit as his authority. This would not be necessary to his justification in such cases as where a thief is caught *flagrante delicto* with the stolen property in his possession, or where implements of gaming found in actual use, in violation of law, might be seized under proper statutes or municipal by-laws. But these cases are not numerous.

The process that shall protect an officer must be fair on its face; that is, that it shall be a process lawfully issued and such as the officer might lawfully serve. That process may be said to be fair on its face which proceeds from a court, magistrate or body having authority of law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it was issued without authority. When such appears to be the process the officer is protected in making service, and he is not concerned with any illegalities which may exist back of it.[4] The word "process" in this rule will include any writ, warrant, order or other authority which purports to empower a ministerial officer to arrest a person or to seize or enter upon the property

[1] Brinsmead v. Harrison, L. R. 6 C. P. 584.

[2] Lovejoy v. Murray, 3 Wall. 1; United Society v. Underwood, 11 Bush, 265, 21 Am. Rep. 214; Atwater v. Tupper, 45 Conn. 144, 29 Am. Rep. 674.

[3] Brady v. Whitney, 24 Mich. 154. And see Bacon v. Kimmel, 14 Mich. 201.

[4] Parsons v. Loyd, 3 Wils. 341; Savacool v. Boughton, 5 Wend. 170, 21 Am. Dec. 181, and *note*.

of an individual, or to do any act in respect to such person or property which, if not justified, would constitute a trespass.[1]

The writ being lawful, the officer, to protect himself, must proceed upon it according as the law directs. Many directions are given in legal proceedings which do not have substantially in view the interests of parties, and these, when they are not observed, are said to be merely directory, and a failure to comply with them amounts to an illegality only. But provisions which are made for the purpose of protecting individual interests cannot be disregarded with impunity. For example, the officer, if he sells on his process more property than is necessary to satisfy the demand,[2] or if he proceeds to sell before the time when under the statute he is at liberty to do so, becomes a trespasser *ab initio*.[3] For a mere nonfeasance, as where an officer fails to keep safely property taken in execution by him,[4] or to proceed to a sale as in duty bound to do,[5] he does not become a trespasser *ab initio;* and the remedy must be case and not trespass, because there has been no wrongful force.

The protection.— The officer and those called in by him to assist in the service of process apparently valid are protected against liability as trespassers in obeying its commands. But if the officer has taken property under it, and the fact that he acquired a special property in the goods by seizure comes in question, he must show not only an apparently valid writ, but that the writ had lawful authority for its issue. Thus, if the writ was an execution, it must appear that there was a valid judgment; and, if an attachment, that the proper legal showing was made before its issue; for until this appears, the sheriff has only a personal protection and no special property.[6] Mere irregularities in either the writ or what precedes it are not fatal defects.

What process is fair on its face.— The distinction between process issuing from courts of general jurisdiction and that issued by inferior tribunals is unimportant so far as it concerns

[1] A *capias ad respondendum*, or any warrant of arrest, is process. Underwood v. Robinson, 106 Mass. 296. So is an execution. Watkins v. Wallace, 19 Mich. 57; Johnson v. Elkins, 90 Ky. 163, 8 L. R. A. 552.

[2] See Williamson v. Dow, 32 Me. 559.

[3] Wallis v. Truesdell, 6 Pick. 455.

[4] Waterbury v. Lockwood, 4 Day, 257.

[5] Bell v. North, 4 Lit. (Ky.) 133.

[6] Earl v. Camp, 16 Wend. 562.

the personal protection of the officer.[1] But it may be important as bearing upon the form of the process itself; for recitals may be sufficient in one case and not in another. When a court of general jurisdiction assumes authority to act, there is a presumption of law that the authority exists, and the officer need not inquire further; but the inferior court must not only have authority in fact, but upon the face of its records, and of its process enough should appear to show it.[2] The officer who is called upon to execute the orders of any tribunal is bound to take notice of the law and to know that his process is bad, if in fact the law will not uphold it.

In Illinois it is held that where an officer knows that back of process fair on its face are facts which render it void, as where he has notice of an excess or want of jurisdiction in the magistrate or board from which his process emanates, he would render himself liable for acting under it.[3] But in Connecticut the law has been summed up thus: "The executive officer must do his duty, which is to obey all legal writs, and must not arrogate to himself the right of disobeying the paramount commands of those to whose mandate he by law is subjected."[4] In Louisiana[5] and Michigan,[6] also, an identical doctrine has been laid down. The law, therefore, is, according to the weight of authority, that the officer may safely obey process fair on its face, and is not bound to judge of it by facts within his knowledge which may be supposed to invalidate it. And while an officer may safely execute process, though he may know of facts to invalidate it, it seems that he may also safely refuse to do so.[7]

[1] See Savacool v. Boughton, 5 Wend. 170, 21 Am. Dec. 181.

[2] Instances of process not fair on its face: A writ of *habeas corpus* issued by and returnable before an officer not by law having authority over that writ. Cable v. Cooper, 15 Johns. 152. Process issued under an unconstitutional law. Ely v. Thompson, 3 A. K. Marsh. 70. A warrant for the collection of a personal tax where one on real estate only could be levied. Am. Bank v. Mumford, 4 R. I. 478.

[3] Leachman v. Dougherty, 81 Ill. 324. See, also, Grace v. Mitchell, 31 Wis. 533. *Contra*, Webber v. Gay, 24 Wend. 485; Wilmarth v. Burt, 7 Met. 257.

[4] Hosmer, C. J., in Watson v. Watson, 9 Conn. 140.

[5] Brainard v. Head, 15 La. Ann. 489.

[6] Bird v. Perkins, 33 Mich. 28.

[7] Cornell v. Barnes, 7 Hill, 35; Davis v. Wilson, 65 Ill. 525.

Magistrate, when liable.— It is laid down elsewhere that an officer acting within his jurisdiction is irresponsible; but if he acts without authority he is liable, even though his process is perfectly valid on its face, and he has acted with proper motive. As illustration are cited those cases in which a justice of the peace proceeded to punish for an offense not committed within his jurisdiction; the facts on which his jurisdiction depended being known to him.[1]

The party is liable where he participates in the unlawful action of either the magistrate or the ministerial officer. He is in general responsible for setting the court or magistrate in motion in a case where they have no authority to act.[2] There is this exception: If the jurisdiction depends upon the facts, and these are presented to a court having general jurisdiction of that class of cases, and the court decides that it has authority to act and proceeds to do so, this protects not only the officer but the party.[3] If the officer proceeds to execute lawful process in an unlawful manner, the party is not responsible unless he participated in or advised the abuse.[4]

Protection of purchaser under execution.— Where one purchasing property at an execution sale finds the judgment, the levy, the execution and the sale apparently valid, he need look no further.[5] The proceedings upon the execution are void if the court rendering the judgment had no jurisdiction;[6] or if for any other reason the judgment was void;[7] or had been satisfied;[8] or if, being valid, the execution for any reason was void,[9] or was issued when none was allowed by law.[10] The sale would also be void if made privately,[11] or when the property is not within view of the bidders;[12] and a purchaser must take notice of such an illegality. And a purchaser in good faith, that is, one who has paid the purchase-price without notice of defects in the proceedings, will be protected, where the plaint-

[1] See Miller v. Grice, 2 Rich. 27, 44 Am. Dec. 271.

[2] Stetson v. Goldsmith, 30 Ala. 602, 31 Ala. 649.

[3] West v. Smallwood, 3 M. & W. 418; Dusy v. Helm, 59 Cal. 188.

[4] Michels v. Stork, 44 Mich. 2; Corner v. Mackintosh, 48 Md. 374.

[5] Lenox v. Clarke, 52 Mo. 115.

[6] Mulvey v. Carpenter, 78 Ill. 580.

[7] Higgins v. Peltzer, 49 Mo. 152.

[8] Jackson v. Morse, 18 Johns. 441; King v. Goodwin, 16 Mass. 63.

[9] Woodcock v. Bennet, 1 Cow. 711, 13 Am. Dec. 568; Brem v. Jamieson, 70 N. C. 566.

[10] Sheetz v. Wynkoop, 74 Pa. St. 198.

[11] Hutchinson v. Cassidy, 46 Mo. 431.

[12] Cresson v. Stout, 17 Johns. 116.

iff in the process, or his attorney, or any one cognizant of the proceedings, who has become a purchaser, would not come within the rule. For example, if the officer sells without giving proper notice of sale, the title of a purchaser in good faith would not thereby be affected;[1] but the plaintiff and his attorney must be supposed to have known of the officer's default, and a sale to either would be set aside on motion.

Locality of wrongs.— A wrong being personal, redress may be sought for it, as a general rule, wherever the wrong-doer may be found, without regard to where the wrong was committed. Local actions, however, must be brought in the country, and within the very county where they arose. The distinction between transitory and local actions is this: if the cause of action is one that might have arisen anywhere, then it is transitory; but if it could only have arisen in one place, then it is local. An action of trespass to the person or other conversion of goods is transitory; for flowing lands, is local, because they could be flooded only where they are. For the most part the actions which are local are those brought for the recovery of real estate, or for injuries thereto, or to easements. In the leading case of *Mostyn v. Fabrigas*,[2] the governor of a British colony was prosecuted in England, and a heavy judgment recovered against him for an assault and imprisonment of the plaintiff without authority of law in the colony. In a later case it was held to be unimportant whether the foreign tort was or was not committed within territory subject to the British crown.[3] But to support an action, the act must have been wrongful or punishable where it took place, and whatever would be a good defense to the action if brought there would be a good defense everywhere.[4]

In England the action for trespass on lands in a foreign country cannot be sustained;[5] and in this country the rule, as adopted by the case of *Livingston v. Jefferson*,[6] is the same. But if by means of the trespass anything is severed from the realty so as to become personal property, and this is afterward

[1] Whittaker v. Sumner, 7 Pick. 551, 19 Am. Dec. 298.

[2] Cowp. 161, 1 Sm. L. C. 1027.

[3] Scott v. Lord Seymour, 1 H. & C. 219.

[4] Phillips v. Eyre, L. R. 4 Q. B. 225, L. R. 6 Q. B. 1; The China, 7 Wall. 53, 64.

[5] Doulson v. Matthews, 4 T. R. 503.

[6] 1 Brock. 203. And see Champion v. Doughty, 18 N. J. 3, 35 Am. Dec. 523.

converted by the trespasser to his own use, suit for the conversion may be brought anywhere.[1]

It has been held in New Hampshire that if by a wrongful act committed in one state real property is injured in another, suit may be brought only in the jurisdiction where the land lies.[2] Another case, however, has held that the action might be brought in the state where the act was committed.

Where a new right of action is given by statute for that for which an action at common law would not lie, some courts hold that the action can be brought only within the state or county whose statute gives the right, and for wrongs there suffered. Others hold that the action can be brought in any state which has substantially similar statutes. And where a further remedy is given for that which is actionable wrong at common law, it can be enforced only by courts of the jurisdiction giving it, and for wrongs there suffered.

[1] McGonigle v. Atchison, 33 Kan. 726; Tyson v. McGuiness, 25 Wis. 656.

[2] Worster v. Winnipiseogee Lake Co., 25 N. H. 525.

CHAPTER XVI.

DECEPTION.

As has been already remarked, the law cannot attempt to enforce the high moral rule requiring every man to do by others what he would have them do by him. But there must be a legal standard capable of being practically applied, by which the existence of actionable wrong can be determined, and this will be found in the maxim which underlies the law of negligence, that every man must so use and enjoy his own as not to impede a corresponding use or enjoyment of their own by others.

Fraud is either actual or constructive. Constructive frauds, or frauds by construction of law, are of two kinds: First, those the indirect effect of which is to deprive some person or persons, not a party to the transaction, of some lawful right, or to hinder or embarrass him or them in the enforcement of such a right; and second, those which consist in accepting benefits under circumstances where, as a general fact, it would be unconscionable to do so, and where, for that reason, the law assumes the existence of fraud or overreaching. An example of the first class is where one makes a voluntary conveyance of so much of his property as is liable for the payment of his debts as to leave insufficient for that purpose. This fraud is redressed in equity or in law by the transfer being treated as void on the principle that whatever fraud creates justice will destroy.[1] The chief illustrations of the second class are to be had in the dealings between persons standing in confidential relations, and they will be considered in the next chapter.

Actual or positive fraud consists in deception practiced in order to induce another to part with property or to surrender some legal right, and which accomplishes the end designed.[2] The deception must relate to facts then existing, or which had previously existed, and which were material to the dealings

[1] See Vreeland v. N. J. Stone Co., 29 N. J. Eq. 188, cases cited.

[2] See Alexander v. Church, 53 Conn. 561.

between the parties in which the deception was employed. To render it actionable it should appear: *First*, that the representations were made as alleged; *second*, that they were made in order to influence the plaintiff's conduct; *third*, that relying upon them the plaintiff did enter into the contract, or otherwise act as was desired; *fourth*, that the representations were untrue; *fifth*, that the plaintiff suffered damage from the action he was induced to take; and *sixth*, that the deception was the proximate cause of the damage.[1]

Burden of proof.— Fraud is never presumed, and the party alleging and relying upon it must prove it.[2] But this rule must be applied with caution, and "amounts to but this: that a contract honest and lawful on its face must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstantial."[3] Fraud may be therefore as properly established by circumstantial evidence as by presenting the more positive and direct testimony of actual purpose to deceive.[4] Indeed, in most cases, circumstantial proof alone can bring the fraud to light. Fraud is peculiarly a wrong of secrecy and circumvention, and is to be traced, not in the open proclamation of the wrong-doer's purpose, but by the indications of covered tracks and studious concealments. The court or jury must be cautious in deducing the fraudulent purpose; but whatever satisfies the mind and conscience that fraud has been practiced is sufficient.[5]

What constitutes deception.— In general, a mere silence, a mere failure to apprise the party with whom one is dealing of the facts important for him to know for the protection of his own interest in the particular transaction, is not fraud.

Caveat emptor is the motto of commercial law, and in sales and other dealings every person is expected to look after his

[1] Tryon v. Whitmarsh, 1 Met. 1, 35 Am. Dec. 339. And see Lorenzen v. Kan. City Inv. Co. (Neb.), 62 N. W. Rep. 231.

[2] Hill v. Reifsnider, 46 Md. 555; United States v. Trans-Missouri, etc. Asso., 58 Fed. Rep. 58, 24 L. R. A. 73; Mayers v. Kaiser, 85 Wis. 382, 21 L. R. A. 623.

[3] Black, C. J., in Kaine v. Weigley, 22 Pa. St. 179.

[4] See Ross v. Miner, 67 Mich. 410; Barndt v. Frederick, 78 Wis. 1, 11 L. R. A. 199; Van Raalte v. Harrington, 101 Mo. 602, 11 L. R. A. 424; Sonnenschein v. Bartels, 41 Neb. 703.

[5] Hopkins v. Sievert, 58 Mo. 201; Kaine v. Weigby, *supra;* Gruber v. Baker, 20 Nev. 453, 9 L. R. A. 302; Gumberg v. Treusch (Mich.), 61 N. W. Rep. 872.

own interest.[1] Therefore, where the sources of information are open to both parties to any dealings, and the one obtains an advantage of the other, without recourse to any trick or artifice or concealment calculated to throw the other off his guard; or to any false presentation of facts, the losing party must bear the consequences of his own want of vigilance or prudence.[2] This is the rule not only as regards the quality or value of that which is the subject of negotiation, but it extends to those facts and circumstances which would be likely to influence the mind of the contracting party if they were known to him when the contract was entered into. So if one who is insolvent buys goods of another, without disclosing his circumstances to his vendor, who is ignorant of them, but makes no inquiries and is not deceived by false misrepresentations or artifices, there is in law no fraud, although the vendor, when he sold, fully believed the vendee to be responsible and entitled to credit.[3]

There may be deception without false assertions made in words. A nod, a wink, a shake of the head, or a smile artfully contrived to induce the other party to believe in a non-existent fact which might influence the negotiations, may have all the effect of false assertions, and be equally deceptive and fraudulent.[4]

One may accomplish a fraud by passing off a note as duly indorsed upon a person who cannot read, when in fact the indorsement was made without recourse;[5] or by encouraging and taking advantage of a delusion known to exist in the mind of the other, although nothing was directly asserted which was calculated to keep it up.[6] Where one sees his own property sold as the property of another, or property sold upon which he has a lien, and in either case fails to disclose the facts, this is fraud to which the doctrine of estoppel is applied.[7]

Silence.— Where silence amounts to an affirmation that a state of things exists which does not, and the party is deceived

[1] See Pasley v. Freeman, 3 T. R. 51, 2 Sm. L. C. 51.

[2] Brown v. Leach, 107 Mass. 364.

[3] Nichols v. Pinner, 18 N. Y. 295.

[4] Walters v. Morgan, 3 De G., F. & J. 718. And see Nairn v. Ewalt, 51 Kan. 355.

[5] Decker v. Hardin, 5 N. J. 579.

[6] Hill v. Gray, 1 Stark. 434; Busch v. Wilcox, 82 Mich. 315, 336.

[7] Gray v. Bartlett, 20 Pick. 186, 32 Am. Dec. 208; Dann v. Cudney, 13 Mich. 239, 87 Am. Dec. 755.

to the same extent that he would have been by positive assertions, the silence itself is fraudulent. Although an insolvent may lawfully buy on credit, even though his insolvency is not known to the seller, yet if, at the time he makes the purchase, he intends to take advantage of his insolvency and not pay for the goods, the concealment of his intention is a fraud, and the title to the goods will not pass.[1]

If one purchases goods and gives in payment a check drawn on a bank where he has no funds, and having no reasonable expectation that it will be paid, the fraud is manifest.[2] So if negotiations are had on the basis of certain facts known to the parties, but before they are concluded a change material to the negotiations takes place to the knowledge of one party, but not to the other, the latter has a right to be informed by the former of this change, and if he is not informed he is deceived and defrauded.[3] So, where one is making a purchase for a specific purpose, which is disclosed to the seller, and the latter knows that what he offers for sale is wholly unfit for that purpose by reason of some hidden defect, it is his duty to make that fact known to the purchaser.[4] Thus, the offer of provisions to consumers is of itself a warranty that they are fit for consumption, and the purchasers are not expected to inquire. And if one has diseased meats, or other unwholesome provisions, knowing the fact, but nevertheless sells them without disclosing their condition, this is of itself a fraud.[5]

This doctrine has been properly applied to the sale of food for domestic animals. In one case food upon which a poisonous fluid had been accidentally spilled was sold and fed by the purchaser to a cow which was poisoned from eating it. Said the court: "The plaintiff bought the hay in small quantities, and the defendant must be considered as knowing generally the kind of use to which it was to be applied. The act of sale under such circumstances was equivalent to an express assurance that the hay was suitable for such use. If he knew that

[1] Load v. Green, 15 M. & W. 216; Donaldson v. Farwell, 93 U. S. 631; Stewart v. Emerson, 52 N. H. 301.

[2] Harner v. Fisher, 58 Pa. St. 453; Mizner v. Kussell, 29 Mich. 229.

[3] Nichols v. Pinner, 18 N. Y. 295.

[4] See Maynard v. Maynard, 49 Vt. 297.

[5] Emerson v. Brigham, 10 Mass. 197, 6 Am. Dec. 109; Van Bracklin v. Fonda, 12 Johns. 468.

the hay had a defect or had met with an accident that rendered it not only unsuitable for that use but dangerous and poisonous, it would plainly be a violation of good faith and an illegal act to sell it to the plaintiff without disclosing its condition. Silence in such a case would be deceit."[1]

For the same reasons it has been held that the selling of animals which the seller knows, but the purchaser does not, have a contagious disease, should be regarded as a fraud.[2] So infecting the grass or other herbage of a field by one in possession as mere licensee, and allowing the owner to turn in his beasts without informing him of the fact, is a gross fraud.[3] And it would seem a fraud more clearly actionable if, by concealment, the health and lives of human beings would be endangered — as if one were to induce another to receive into his family, as a boarder, a person who had been exposed to some contagious disease and should fail to communicate that fact.

A surety is generally expected to apply to his principal for the facts likely to affect his liability, or to inquire them out independently. And, therefore, the party to be secured is not, in general, bound to disclose the facts within his knowledge. There may, however, be cases where there are no suspicious circumstances on the face of the transaction, and in which the ordinary rule which requires every man to protect his interests by his own inquiries has no application, and in such cases the duty of the creditor to speak out would be plain. Thus, if a creditor, knowing that his debtor was in failing circumstances, should obtain from him, for a part of his claim, a mortgage substantially covering all his property, and induce the debtor to obtain the indorsement of a third person for another part, without revealing the fact of the mortgage, this is such a fraud upon the indorser as relieves him from liability.[4] And so if a husband induces his wife to give a mortgage on her property to enable him to purchase goods and continue in business, the mortgagee knowing the purpose, but by a secret arrangement, not disclosed to the wife, a part of the consideration of the

[1] French v. Vining, 102 Mass. 132, 3 Am. Rep. 440.

[2] Jeffrey v. Bigelow, 13 Wend. 518, 28 Am. Dec. 476.

[3] Eaton v. Winnie, 20 Mich. 156.

[4] Lancaster Co. Bank v. Albright, 21 Pa. St. 228. See case for facts.

mortgage is to be old indebtedness of the husband, this secret arrangement is a fraud, and the mortgage to that extent inoperative.[1] And so wherever the creditor has any secret arrangement with his debtor which would increase a surety's liability, or which, if known, would be liable to prevent one assuming the obligation of suretyship, the accepting of the surety's obligation without disclosure is a fraud.[2]

Matters of opinion.— The most positive expression of matters of opinion, as to which the judgment is often governed by whim or caprice, though it be false, is not fraud.[3] Thus one may make exaggerated statements as to the value of a stock of merchandise,[4] or as to the quality or value of lands whose sale he is negotiating,[5] or as to the value of shares in an incorporated company,[6] or as to the profits and prospects of such company,[7] and in either case not liable for fraud. It is also held in some states to be no fraud if the vendor asserts that he paid more for what he is selling than he actually did;[8] in other states, however, the decisions are to the contrary.[9] But where the other party has a right to rely on the expression of opinion without bringing his own judgment to bear, a false assertion will amount to a fraud. Such is the case where one is purchasing goods, the value of which can only be known to experts, and is relying upon the vendor, who is a dealer in such goods, to give him accurate information concerning them.[10] The same rule has been applied where a dealer in patent-rights sold certain territory to one who was ignorant of the facts, by false representations as to its value.[11] It has been held that one buying a saltpetre cave has a right to rely on the assertion of

[1] Smith v. Osborn, 33 Mich. 410.

[2] Booth v. Storrs, 75 Ill. 438.

[3] Pasley v. Freeman, 3 T. R. 51; Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379.

[4] Mosher v. Post, 89 Wis. 602.

[5] Mooney v. Miller, 102 Mass. 217; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Shanks v. Whitney, 66 Vt. 405.

[6] Ellis v. Andrews, 56 N. Y. 83, 15 Am. Rep. 379.

[7] New Brunswick R. Co. v. Conybeare, 9 H. L. Cas. 711.

[8] Holbrook v. Conner, 60 Me. 578, 11 Am. Rep. 212, and cases cited.

[9] Ives v. Carter, 24 Conn. 392; Somers v. Richards, 46 Vt. 170; McFadden v. Robison, 35 Ind. 24; Fairchild v. McMahon, 139 N. Y. 290, 36 Am. St. Rep. 701, and cases cited in *note*.

[10] See Kost v. Bender, 25 Mich. 515; Pike v. Fay, 101 Mass. 134.

[11] Allen v. Hart, 72 Ill. 104. But a representation as to the validity of a patent-right is generally mere matter of opinion. Reeves v. Corning, 51 Fed. Rep. 774.

the vendor as to the quality of saltpetre which a certain quantity of nitrous earth would produce.[1] And the vendee has a right to rely upon the representations of his vendor respecting the quantity of land[2] and the boundaries thereof.[3]

Matters of law.— Misrepresentations as to the legal effect or consequence of a proposed transaction or contract cannot, in general, be looked upon as a cheat. Thus, where an agent, procuring subscriptions to the stock of a corporation, represented that the subscribers would be liable only to a certain percentage when the law made them responsible for the whole amount, the subscriber cannot escape liability upon his subscription on the ground of fraud, for "there was here no error, mistake or misrepresentation of any fact."[4]

Fraudulent promises.— As has been said, deceit, in order to be actionable, must relate to existing or past facts. Therefore, the fact that a promise made in the course of negotiations is never performed is not of itself either fraud or the evidence of a fraud.[5] But in such a case as the purchase of goods with an intention not to pay for them, or where one, by promising to take up an incumbrance on the title of another, secures the title for himself, the promise is false token, a device resorted to for the purpose of accomplishing the fraud.[6] So, if the beneficiary in a will should persuade the maker thereof not to make a codicil, by promising to fulfill the wishes expressed, he may be held to this promise as a fraud if he did not intend to perform it.[7]

Self-protection.—Where ordinary care and prudence are sufficient for self-protection it is the duty of the party to make

[1] Perkins v. Rice, Lit. Sel. Cas. 218. And see Mudsill Min. Co. v. Watrous, 61 Fed. Rep. 163.

[2] Hill v. Brower, 76 N. C. 124; Cullum v. Branch Bk., 4 Ala. 21, 37 Am. Dec. 725. But see Gordon v. Parmelee, 2 Allen, 212; Martin v. Hamlin, 18 Mich. 354, 100 Am. Dec. 181.

[3] Clark v. Baird, 9 N. Y. 183; Roberts v. French, 153 Mass. 60.

[4] Upton v. Tribilcock, 91 U. S. 45, 49.

[5] Fenwick v. Grimes, 5 Cranch, C. C. 439; Murray v. Beckwith, 48 Ill. 391; Warner v. Benjamin, 89 Wis. 290; Dawe v. Morris, 149 Mass. 188, 4 L. R. A. 158.

[6] Wilson v. Eggleston, 27 Mich. 257.

[7] Dowd v. Tucker, 41 Conn. 197. And where the promoter of a corporation, who had knowledge of the unsatisfactory condition of its affairs, by false representations, made with a design to mislead, induced one to take stock, this was held a fraud. French v. Ryan (Mich.), 62 N. W. Rep. 1016.

use of them. Therefore if a party trusts himself in the hands of one whose interest it is to mislead him, where he has the means of knowledge available, he cannot in general obtain redress if he suffers from false representations regarding matters of fact.[1] This rule is frequently applied where fraud is alleged in the sale of property near enough to be inspected, and when the alleged defect is one which ordinary prudence would have disclosed.[2] It is otherwise where the property purchased is at a distance, for then a degree of trust is often unavoidable. In the leading case of *Smith v. Richards*[3] Virginia lands represented as containing a valuable mine had been sold in New York, and it was held that whenever a sale was made of property at a remote distance which the purchaser knows the seller has never seen, but which he buys upon the representation of the seller relying on its truth, such representations in effect must be deemed to amount to a warranty, at least that the seller is bound to make it good. A similar rule is applied where one buys land which at the time was covered with snow, rendering an examination of the soil impracticable.[4]

Representations which disarm vigilance.— A party who claims to have been induced by fraud to sign a contract or other paper, whose contents were misread or misrepresented to him, is frequently denied redress for these reasons: *First*, that it invites perjury and subornation of perjury if persons are allowed to set aside their contracts on parol evidence, having been misled into signing them; *second*, it encourages negligence when relief is given against that which ordinary prudence would have prevented. But there is no inflexible rule to the effect that one cannot be protected against the consequence of his own folly, but every case will have peculiarities of its own by which it may be judged, and each case must be considered on its own facts.

Where one complains that he has been defrauded into signing a contract without reading it, and on the representation respecting its contents of the party whose interests are an-

[1] Short v. Pierce (Utah), 39 Pac. Rep. 474; Slaughter v. Gerson, 13 Wall. 379; Weaver v. Schriver (Md.), 30 Atl. Rep. 189; Brown v. Leach, 107 Mass. 364; Rockafellow v. Baker, 41 Pa. St. 319, 80 Am. Dec. 624.

[2] Long v. Warren, 68 N. Y. 426.

[3] 13 Pet. 26. And see Nolte v. Reichelm, 96 Ill. 425; Caldwell v. Henry, 76 Mo. 254.

[4] Martin v. Jordan, 60 Me. 531.

tagonistic to his own, the question to a large extent is one of negligence, and the one clearly negligent may sometimes be justly refused relief.[1] This is especially so if the instrument was negotiable paper which has passed into the hands of a *bona fide* holder before maturity. In the Iowa case of *Douglas v. Matting*,[2] it was held that if one, "through his own culpable carelessness while dealing with a stranger, allows himself to be deceived into signing a negotiable note which he believes is something entirely different, he can make no defense to it in the hands of a *bona fide* holder." On the other hand, it is held in Michigan and other states that if the party whose signature was procured under such circumstances was guilty of no negligence, the paper is void for all purposes.[3] These cases are all decided with reference to the rule that where one of two innocent parties must suffer from a fraud, and the negligence of one has enabled the fraud to be committed, he who is chargeable with the negligence should bear the loss. Contracts in general are void as to all parties, and even negotiable paper is void as to all but *bona fide* holders, where the signature was obtained by trick or artifice and the party supposes he is signing something different.[4] But negligence is an important consideration even where the question arises as between the parties to a contract, and generally parties cannot obtain relief who have not been ordinarily prudent. But ordinarily prudence is no protection against false assertions and plausible protestations made to disarm vigilance. And where property has been sold which may be conveniently examined, but examination was prevented intentionally by false assertions, the purchaser may hold the seller responsible.[5]

It has been asserted that "every contracting party has an absolute right to rely on the express statements of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements, to

[1] See Beck & Pauli Lith. Co. v. Houppert (Ala.), 16 So. Rep. 522.

[2] 29 Iowa, 498, 4 Am. Rep. 238. To the same effect, Chapman v. Rose, 56 N. Y. 137, 15 Am. Rep. 401.

[3] Gibbs v. Linabury, 22 Mich. 479, 7 Am. Rep. 675; Briggs v. Ewart, 51 Mo. 245, 11 Am. Rep. 445; Taylor v. Atchison, 54 Ill. 196, 5 Am. Rep. 118.

[4] See Foster v. Mackinnon, L. R. 4 C. P. 704; Gibbs v. Linabury, *supra*.

[5] Chamberlain v. Rankin, 49 Vt. 133.

the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.[1] And relief has often been given in cases of very manifest want of vigilance, as where illiterate persons have been deceived into signing contracts which were misread or misrepresented to them by the other contracting party.[2]

Every case involving the question of negligence must be considered on all its facts,[3] and very great apparent negligence may be excused where prudence has been overcome by new, peculiar or very gross frauds.

Representations as to title.— In *Monell v. Colden*[4] it was decided that one who had been induced to make the purchase of land on a false representation by the vendor that if he bought it he would be entitled to obtain from the state certain adjoining lands under water, the vendor knowing that the state had previously conveyed them, may maintain an action for the fraud. And the doctrine of this case has been frequently approved.[5] It has been answered to such an action that one should have no remedy for his own folly in neglecting to inspect the public records, which are notice of what the real title is. But where the vendor had asserted that the title to the lands he was selling had been looked up by him and found to be all right, and the purchaser had said he would take the vendor's word for it, it was held that there was a relation of trust and confidence between the parties, and the seller was bound to exhibit the truth of the case.[6]

Who may rely upon the representations.— No one has a right to accept and rely upon the representations of others but those to influence whose actions they were made. One who makes statements for the express purpose of influencing the action of another is morally accountable to that person only whom he seeks to influence; and one who, having overheard the statements, acts upon them, cannot claim to have been defrauded if they prove false. Fraud implies a wrongful

[1] Mead v. Bunn, 32 N. Y. 275, 280, by Porter, J. See, also, Eaton v. Winnie, 20 Mich. 156, 166; Blacknall v. Rowland (N. C.), 21 S. E. Rep. 296; Kramer v. Williamson, 135 Ind. 655.

[2] Selden v. Myers, 20 How. 506.

[3] See Brady v. Finn, 162 Mass. 260.

[4] 13 Johns. 395, 7 Am. Dec. 390.

[5] See Bristol v. Braidwood, 28 Mich. 191; Bailey v. Smock, 61 Mo. 213; West v. Wright, 98 Ind. 335.

[6] Converse v. Blumrich, 14 Mich. 109, 121.

act or one wrongfully acted upon, and in the case supposed there is no privity whatever. One to whom false representations are made to affect the action of another whose agent he is, and not his own action, is entitled to no remedy.[1] But some representations are made for the express purpose of influencing the mind of the public, and of inducing individuals of the public to act upon them; and whoever does in fact receive, rely and act upon these in the manner intended has a right to regard them as made to him, and to treat them as frauds upon him, if in fact he was deceived to his damage.[2] Courts, both of law and equity, have frequently relieved parties defrauded by misrepresentations contained in the prospectuses issued by projectors of corporate undertakings.[3] And if, after the corporation is formed, the managers make false reports, declare fictitious dividends, or resort to any fraudulent device whatever, whereby they induce individuals to take stock in the corporation, they are liable to the parties thus defrauded in an action for the deceit.[4] So an officer of an insurance company who issued a false prospectus whereby one was induced to take out an insurance in that company is held responsible for the fraud to the person so insuring.[5] And the president of a corporation who pretends to assist the shareholder in selling his shares, and advises a particular sale at a certain price, which is in fact a sale made to a third person for himself, commits a fraud on the shareholder for which an action on the case will lie.[6]

Materiality of representation.— Fraud consists not in mere intention, but "of conduct that operates prejudicially on the rights of others."[7] The fraudulent representations that will avoid a transaction must have, "like poison, entered into it, tainted and destroyed it."[8] The representations must be of an apparently reliable character, holding out inducements to

[1] Wells v. Cook, 16 Ohio St. 67, 88 Am. Dec. 436.

[2] Carvill v. Jacks, 43 Ark. 454. See Genessee, etc. Bank v. Mich. Barge Co., 52 Mich. 164; Eaton, etc. Co. v. Avery, 83 N. Y. 31.

[3] See Clark v. Dickson, 6 C. B. (N. S.) 453; Taylor v. Ashton, 11 M. & W. 401; Peek v. Gurney, L. R. 13 Eq. Cas. 79; Booth ads. Wonderly, 36 N. J. 250; Paddock v. Fletcher, 42 Vt. 389.

[4] Huntingford v. Massey, 1 F. & F. 690; Morgan v. Skiddy, 62 N. Y. 319.

[5] Fisher v. Budlong, 10 R. I. 525.

[6] Pontifex v. Bignold, 3 M. & G. 63.

[7] Williams v. Davis, 69 Pa. St. 21, 28.

[8] Clark v. Everhart, 63 Pa. St. 347, 349.

make the contract calculated to mislead the purchaser and induce him to buy on the faith and confidence of such representations, and, in the absence of the means of information to be derived from his own observation and inspection, and from which he could draw conclusions to guide him in making the contract independent of representations.[1]

To determine whether the representations were material, every case must be examined on its own facts.[2] Thus to misrepresent the crops raised the previous year on a farm which is sold,[3] or the amount of business done at a certain stand,[4] is material, as these facts have a bearing on the question of value.

Deceiving third persons.— While an action cannot in general be maintained for inducing a third person to break his contract with the plaintiff,[5] yet, if this be done by deception, it might be different. If, for example, one were to impersonate a vendee, buy goods, and receive and pay for them as on a sale to himself, the vendee would have an action not only against the vendor, but also against the party who, by deceiving one, had defrauded both. And where the performance of a contract is prevented by deceiving the party about to make it, it is immaterial that the contract was not binding under the Statute of Frauds because not in writing, the defect being one the party had a right to waive.[6]

Knowledge of the wrong-doer.— The rule is laid down that, in order to render false representations fraudulent in law, it must be made to appear that the party making them knew at the time that they were untrue. This rule, however, has many exceptions, and it is certain that courts of equity do not limit their action to it in giving relief when the representations prove to be untrue in fact. But the difference between courts of law and equity in their jurisdiction and in the modes of giving relief must be borne in mind. In a court of law, where the plaintiff counts upon a fraud, he must establish it by evidence, but a court of equity gives relief from unconscionable contracts on the ground of mistake as well as of fraud.

[1] Yeates v. Pyror, 11 Ark. 58.
[2] See Palmer v. Bell, 85 Me. 352.
[3] Martin v. Jordan, 60 Me. 531.
[4] Taylor v. Green, 8 C. & P. 316.
[5] Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340.
[6] Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30.

In the sale of personal property, positive representation of material facts, intended by the seller as an affirmation on which the purchaser may rely, and upon which he does rely,[1] constitute a warranty which the vendor will be held to make good in a suit at law as well as in equity. But such a warranty, although the facts prove to be different from what they were asserted to be, is not necessarily a fraud. Where one takes a warranty for his own protection, he takes it on the understanding merely that, if the facts are otherwise than the promise or warranty asserts, the warrantor will protect him. Therefore on a broken warranty the action is on the contract, and it is not assumed that a tort has been committed. But if the warranty be made with knowledge that facts asserted are untrue, and with intent to deceive by the false statements, it is a fraud. If one sells a horse which he avers is sound, there is upon these facts only a warranty; but if he knows the horse to be unsound, but nevertheless sells it with the like positive assertion that it is sound, this is a false warranty, and the *scienter* makes it a fraud.[2]

The question arises whether this remedy is confined to cases in which the defendant knew, or had reason to believe, he was deceiving by untruths. An examination of the cases shows that one who has been induced, by misrepresentations of material facts, to enter into a contract, may have redress as for a fraud:

First, when the representations were made by the other party, with knowledge of their falsity, and with intent to deceive.[3]

Second, when the party making them had no knowledge and no belief on the subject, and recklessly made them with the like intent.[4]

Third, when the party supposed his representations to be true, but had no reason for any such belief, and nevertheless

[1] See Hawkins v. Pemberton, 51 N. Y. 198, 10 Am. Rep. 595.

[2] Frenzel v. Miller, 37 Ind. 1.

[3] See Pasley v. Freeman, 3 T. R. 51; Griswold v. Sabine, 51 N. H. 167, 12 Am. Rep. 76.

[4] Hammatt v. Emerson, 27 Me. 308, 46 Am. Dec. 598; Cole v. Cassidy, 138 Mass. 437; Bullitt v. Farrar, 42 Minn. 8, 6 L. R. A. 149; McKinnon v. Vollmar, 75 Wis. 82, 6 L. R. A. 121. And see Prewitt v. Trimble, 92 Ky. 176.

made them positively as of known facts, and induced the other to act upon them.[1]

In all of these cases the ground of recovery consists in the impression produced on the mind of one party that certain non-existent facts do exist to the knowledge of the other.

Representations must have been acted on.— Unless the representations are acted on, no action will lie. It is not essential, however, that they should have formed the sole inducement to a contract; it is enough that they form a material inducement.[2] On the other hand, if the party, instead of relying upon the representations, acted upon his own judgment; or if, before the negotiations were completed, he ascertained their falsity; or if, after they were completed, he affirmed the bargain unconditionally with full knowledge of the facts, no action can be maintained.[3] It can certainly be no fraud if the party, instead of believing the representations, believes directly the opposite.[4]

Where a purchaser, electing not to rely upon the representations of the vendor, proceeds to an investigation in person or by agents, there is no deception even though he fails to discover important facts, providing the vendor interposes no obstacle to a full investigation and does nothing to mislead while it is in progress.[5] But even then, perhaps, he might be relieved if the examination was not by experts, and the representation concerned some quality of the thing sold which was susceptible of being accurately determined by experts only.[6] If the representations have brought about a contract, and a new one is substituted for this before their falsity is discovered, the second contract as well as the first is supposed to have been induced by them.[7]

Rescinding contract for fraud.— It is a general rule that the party defrauded in a bargain may, on discovering the fraud, either rescind the contract and demand back what has

[1] See Sims v. Eiland, 57 Miss. 607; Ormrod v. Hurth, 14 M. & W. 651.

[2] Sioux Bkg. Co. v. Kendall (S. D.), 62 N. W. Rep. 377; Roberts v. French, 153 Mass. 60; Converse v. Hood, 149 Mass. 471, 4 L. R. A. 521.

[3] Hagee v. Grossman, 31 Ind. 223; Proctor v. McCoid, 60 Iowa, 153; Pratt v. Philbrook, 41 Me. 132; Whiting v. Hill, 23 Mich. 399. And see Thompson v. Libby, 36 Minn. 281.

[4] Bowman v. Carithers, 40 Ind. 90.

[5] Hall v. Thompson, 1 S. & M. 443.

[6] Perkins v. Rice, Lit. Sel. Cas. 218.

[7] Davis v. Henry, 4 W. Va. 571.

been received under it, or he may affirm the bargain and sue and recover damages for the fraud. But if he elects the former course he must move promptly.[1] Both at law and in equity, long acquiescence, with full knowledge of the fraud, will be deemed a waiver of the right to rescind.[2] And dealing with what has been acquired by a contract in a manner inconsistent with an intention to rescind will be deemed a waiver of the right; as where a party puts upon the market for sale corporation shares which he knows were fraudulently sold to him.[3]

The party electing to rescind must also place the other party as nearly as possible *in statu quo*. Whatever he has received under the contract he must restore;[4] but if he shows what he received was absolutely worthless this rule will not operate.[5] But if the defrauded party has so dealt with the subject-matter of the contract that it has become impossible to put the other *in statu quo*, a suit at law for damages is generally the only remedy.[6]

Affirming the contract.— A fraud may also be waived by an express affirmance of the contract. Where an affirmance is relied upon, it should appear that the party having a right to complain of the fraud had freely, and with full knowledge of his rights, in some form manifested his intention to abide by the contract, and waive any remedy he might have had for the deception.[7] After the contract is rescinded, and the party guilty of the fraud refuses to restore on demand what he has fraudulently obtained, the other, at his option, may treat the detention as a conversion.

Indirect suppression of fraud.— If parties are equally culpable the court will not listen to their complaints. If, in attempting a fraud on a third person, one of two culpable parties obtains an advantage over the other, relief will be refused.[8]

[1] Pearsoll v. Chapin, 44 Pa. St. 9; Wright v. Peet, 36 Mich. 213.

[2] Strong v. Lord, 107 Ill. 25; Michoud v. Girod, 4 How. 503; McCulloch v. Scott, 13 B. Mon. 172, 56 Am. Dec. 561.

[3] Ex parte Briggs, L. R. 1 Eq. Cas. 483.

[4] Babcock v. Case, 61 Pa. St. 427, 100 Am. Dec. 654, and *note;* Thurston v. Blanchard, 22 Pick, 18, 33 Am. Dec. 700.

[5] Babcock v. Case, *supra.*

[6] Downer v. Smith, 32 Vt. 1, 76 Am. Dec. 148; Clarke v. Dickson, El., Bl. & El. 148.

[7] Bradley v. Chase, 22 Me. 511; Negley v. Lindsay, 67 Pa. St. 217, 5 Am. Rep. 427.

[8] Nellis v. Clark, 4 Hill, 424; Roman v. Mali, 42 Md. 513.

But this rule will not be enforced against a party actually or presumably under the influence of the other, and who was induced to engage in the transaction by means of this influence.[1]

Duress is a species of fraud in which compulsion in some form takes the place of deception in accomplishing the injury. It is either of the person or of the goods of the party; and the former is either by imprisonment, by threats, or by an exhibition of force that apparently cannot be resisted.[2]

If one is arrested, though for a just cause, if it be without lawful authority, the arrest constitutes duress, and whatever is obtained by means of it is obtained wrongfully.[3] But it is equally duress if the arrest is by lawful authority, but with the purpose to make use of it to compel the defendant to surrender to the plaintiff something to which the writ does not lawfully entitle him.[4] Threats constitute duress where they cause reasonable apprehension of loss of life, or of some great bodily harm,[5] or of imprisonment.[6] Duress of goods consists in seizing by force or withholding from the party entitled to it the possession of personal property, and extorting something as a condition for its release;[7] or in demanding and taking personal property under color of legal authority which, in fact, is either void or for some other reason does not justify the demand.[8]

Extortion or the exaction of illegal or excessive fees for legal services is also a species of fraud, and the party from whom the exaction is made is entitled to the same remedy as in a case where his property has been taken from him wrongfully.[9]

[1] Barnes v. Brown, 32 Mich. 146; Ford v. Harrington, 16 N. Y. 285.

[2] See Kraemer v. Deustermann, 37 Minn. 469.

[3] Thompson v. Lockwood, 15 Johns. 256.

[4] Breck v. Blanchard, 22 N. H. 323, 51 Am. Dec. 222.

[5] Baker v. Morton, 12 Wall. 150.

[6] Harmon v. Harmon, 61 Me. 227, 14 Am. Rep. 556; Hargraves v. Korcek (Neb.), 62 N. W. Rep. 1086. And see cases cited in *note* to City Nat. Bank v. Kusworm, 26 L. R. A. 48.

[7] Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10.

[8] Adams v. Reeves, 68 N. C. 134, 12 Am. Rep. 627.

[9] See Skeate v. Beale, 11 Ad. & El. 983.

CHAPTER XVII.

WRONGS IN CONFIDENTIAL RELATIONS.

Definition.— By confidential relations are here meant such relations as those which exist between agent and principal, between partner and partner, or which may exist between parent and child, and between husband and wife,[1] and which are formed by convention or acquiescence, in which one party trusts his pecuniary or other interests to the fidelity and integrity of another, by whom, either alone or in conjunction with himself, he expects them to be guarded and protected. In case of the domestic relations there usually exists a trust born of affection and great personal intimacy that may easily grow into or pave the way for undue influence. By undue influence is meant that control which one obtains over another, whereby the other is made to do, in important affairs, what of his own free will he would not do.[2] The manner in which the control is obtained is not important.

Husband and wife.— The law is especially careful in guarding and protecting the confidence which is begotten of the relation of husband and wife. In general, even where by statute a party accused of crime is allowed to testify in his own behalf, neither husband nor wife is permitted to testify against the other, except by mutual consent; it being deemed better that justice should sometimes fail for want of evidence than that the family confidences should be made public, or the spouse be tempted to conceal or prevaricate where the truth might be damaging. If, as between the parties themselves, a sense of what is becoming does not afford protection to this confidence, which should be held sacred, the law undertakes to give no redress.

[1] Wherever "there has been a confidence reposed, which invests the person trusted with an advantage in treating with the person so confiding." Ruger, C. J., in Fisher v. Bishop, 108 N. Y. 25.

[2] Martin v. Teague, 2 Speers, 260. And see Mitchell v. Mitchell, 43 Minn. 73; Herster v. Herster, 122 Pa. St. 239.

While, so far as the wife's property interests are concerned, the common-law presumption that she was largely under the coercion of her husband is no longer indulged, still the existence of some degree of marital influence may always be supposed. This relation is consequently of high importance when fraud or unfair dealing by the husband with the wife's interests is alleged; and "any undue advantage gained by the use of the marital relation is a legal fraud on the wife, which courts of equity will not allow to stand to her prejudice."[1] Where the statutes permit the wife to bring suit at law against the husband, she may seek a remedy in that form when the facts justify it, in which case she makes out her right of action on proofs which would support one against any other person, and the relation is important only as it has furnished the facilities for accomplishing the wrong complained of. Where the husband, by the acquiescence of the wife rather than by her express employment, has become her agent for the management of her property, and has acquired a knowledge of its condition, circumstances and value greater than she is likely to possess, he will be held under strictest obligation not to abuse the confidence reposed.[2]

Parties engaged to marry.— The most serious fraud accomplished in the relation arising from the contract of marriage is that of seduction. If the woman's consent was obtained by means of promises of marriage, which the man did not intend to fulfill, "this was a cheat on the part of the man,"[3] and may properly be considered as an aggravation of the damages recoverable for breach of promise.[4] "The result of an ordinary breach of promise is the loss of the alliance and the mortification and pain consequent on rejection; but in the case of seduction there is added to this the loss of character and social position, and not only a deeper shame and sorrow but a darkened future. All of these spring directly and naturally from the broken obligation."[5]

[1] Witbeck v. Witbeck, 25 Mich. 439, 442. And see Reagan's Adm'r v. Holliman, 34 Tex. 403.

[2] See Farmer v. Farmer, 39 N. J. Eq. 211.

[3] Lord Mansfield in Morton v. Fenn, 3 Doug. 211.

[4] Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95; Kelly v. Riley, 106 Mass. 339, 8 Am. Rep. 336; Bennett v. Beam, 42 Mich. 346, 36 Am. Rep. 442.

[5] Campbell, J., in Sheahan v. Barry, 27 Mich. 217.

Some courts have declared that the woman, having given consent, is *in pari delicto* and is not allowed to complain of seduction.[1] Of this it may be remarked, that while there is consent here, so there is also in other cases of fraud, for it is by obtaining consent that frauds are accomplished.

Both parties are entitled to a fair disclosure of such dealings as are expressly designed to affect their own interests, and any such secret conveyance of one of the parties as would materially diminish the rights in the property which the other had reason to expect he or she would acquire by marriage, is a breach of the confidence of the relation. And where either party to the contract of marriage secretly conveys away his or her property or any considerable portion with intent to defraud the other of such rights therein as, but for the conveyance, would be acquired by marriage, this, if not discovered until after the marriage takes place, will be treated in equity as a fraud upon the other, and such relief will be given as the circumstances of the case will admit of and as may be found suitable.[2] If the intended deceit is discovered before the marriage takes place, the party may withdraw from the engagement or may consummate the marriage, thereby waiving the objection.[3]

Another fraud frequently practiced is where one of the parties makes use of the confidences and affection of the relation to obtain the other's property, employing some plausible but fraudulent pretense for the purpose, and in this relation one party is perhaps as liable to be betrayed by overconfidence as the other. It is a strong if not conclusive badge of fraud, if, after a conveyance of the property has been obtained as a gift or for an inadequate consideration, the donee or grantee refuses to complete the marriage.[4]

Parent and child.—The authority of the parent to require and enforce obedience of the child during minority, coupled with the natural affection, may be expected in a great degree to subordinate the child's will to the parents while the period

[1] Weaver v. Bachert, 2 Pa. St. 80; Burks v. Shain, 2 Bibb, 341.

[2] Smith v. Hines, 10 Fla. 258; England v. Downs, 2 Beav. 522. See Green v. Green, 34 Kan. 740, 55 Am. Rep. 256; Ferebee v. Pritchard, 112 N. C. 83.

[3] St. George v. Wake, 1 Myl. & K. 610; Cheshire v. Payne, 16 B. Mon. 618.

[4] Coulson v. Allison, 2 De G., F. & J. 521; Rockafellow v. Newcomb, 57 Ill. 186.

of minority continues. Further, if the child has an independent estate, and its management is allowed to be taken charge of by the parent, though this is irregular, unless he is legally appointed guardian of the estate, it is likely still further to increase the parental influence.[1] All dealings which take place soon after the child comes of age, while the parental influence is still unimpaired, are looked upon with some degree of jealousy, and if they are gifts, the donee will be required to show that they were spontaneous acts of the child, made with full understanding of what, with respect to the property, were his position and rights.[2] Family arrangements not unfairly brought about, and which from their nature do not suggest undue influence, will not be disturbed.[3]

On the other hand, so long as the parent is in full possession of his mental powers, a gift to his child suggests nothing but the ordinary promptings of affection;[4] but when the child's becomes the guiding mind, and the parent is a dependent, all dealings which are specially to the advantage of the child he may justly be required to support by satisfactory evidence that his own conduct in the transaction was above reproach.[5]

Illegal sexual relations.— If there is a gift or a sale for an inadequate consideration between parties living in illegal sexual relations, or transactions especially beneficial to one party rather than to the other, the party benefited by it will be under the necessity of showing that no advantage was taken and that it was the result of free volition.[6]

Persons of weak intellect.— When one undertakes to deal with a person weak of intellect, though not idiotic and not mentally diseased, he is under more than the usual obligation to abstain from deception. What might not be deception if practiced on a person of average intellect may be fraud in such a case, because it is calculated to accomplish a fraudulent purpose.[7] The law guards jealously the interests of such per-

[1] Sears v. Shafer, 1 Barb. 408, 6 N. Y. 268; Findley v. Patterson, 2 B. Mon. 76.

[2] Turner v. Collins, 7 L. R. Ch. App. 329; Taylor v. Taylor, 8 How. 183; Baldock v. Johnson, 14 Oreg. 542. And see Tate v. Williamson, L. R. 2 Ch. App. 55.

[3] Taylor v. Taylor, *supra*.

[4] Millican v. Millican, 24 Tex. 426; Beanland v. Bradley, 2 Sm. & G. 339.

[5] Highberger v. Stiffler, 21 Md. 338, 83 Am. Dec. 593.

[6] Dean v. Negley, 41 Pa. St. 312, 80 Am. Dec. 620.

[7] Baker v. Monk, 4 De G., J. & S.

sons, and where a gift is made by one "of weak mind, of easy temper, yielding disposition, liable to be imposed upon — if there be the least scintilla of fraud, a court of equity will interpose."[1] The court would be less strict in requiring satisfactory showing if a consideration had been paid, because the presumption of fraud would weaken in proportion as the transaction was found to be equal.[2]

One who takes advantage of a state of intoxication to deal with another, more especially if he himself brought about or encouraged the intoxication, does so with a presumption against his good faith proportioned to the depth of mental obscurity caused by the condition.[3]

The officer of a corporation, as its agent within the scope of the powers conferred upon him, stands in confidential relations to all the stockholders. His duties are: *First*, in his own action to confine his operations within the limits of the corporate authority; *second*, to furnish to the associates truthfully such information as it may belong to his position to give, and to afford them such facilities as are proper for obtaining information by their own investigations; *third*, to take no advantage of his own position to the prejudice of his associates; *fourth*, to give no advantage to one associate over another; *fifth*, to employ his efforts faithfully in defending the common interest.

Wrongs which may result from a disregard of any of these obligations, if they affect the body of the corporators alike, cannot be treated as wrongs to the members severally. If the managing officers exercise powers not within the scope of their charter, they may in a proper case be charged personally with all the consequences. But they "are not liable for mistakes of judgment, even though they may be so gross as to appear to us absurd and ridiculous, provided they are honest, and provided they are fairly within the scope of the powers and discretion confided to the managing body."[4] A wrong committed

388; Ellis v. Mathews, 19 Tex. 390, 17 Am. Dec. 353; Hill v. Nash, 41 Me. 585, 66 Am. Dec. 266, and cases cited in *note*.

[1] Barculo, J., in Sears v. Shafer, 1 Barb. 408, 413. See Harding v. Handy, 11 Wheat. 103, 125.

[2] Brooke v. Berry, 2 Gill, 83.

[3] Peck v. Cary, 27 N. Y. 9, 84 Am. Dec. 220; Mansfield v. Watson, 2 Iowa, 111; Johnson v. Medlicot, 3 P. Wms. 130, *note a*.

[4] Spering's Appeal, 71 Pa. St. 11, 20, 10 Am. Rep. 684; Ellerman v. Chi-

by an officer of a corporation, which affects the stockholders generally through their interests in the corporation, as in the case of the embezzlement of funds by the treasurer, is not a wrong to them as individuals, but to the corporate entity. If the wrong is a corporate wrong, in which all the stockholders are proportionately interested, the corporation should represent all for the purposes of legal remedy.[1] Directors are not the agents and bailees of a stockholder, but the agents and bailees of the body politic whose officers they are.[2] If it should happen that the officers charged with wrong are a governing board of the corporation, and the very parties who should represent its interests in redress of its wrongs, a single shareholder may bring the delinquent or fraudulent officers to account in equity; or may obtain redress from others who have wronged the corporation, but against whom the directors refused to proceed.[3] Such a suit, however, is instituted, not on behalf of the complainant alone, but of all stockholders, and stands as a substitute for a suit by the corporation itself.[4]

Illustrations of acts constituting breaches of duties referred to above:

1. If the managers of a corporation knowingly exceed the corporate powers, this is a species of fraud upon the corporators, for which the latter may have appropriate relief in equity. Probably, also, an individual corporator might obtain relief from his obligation to the company, and permission to withdraw, where powers were exercised, which, when he came in, he had no reason to understand the corporation was to assume.[5]

2. The regular reports required of the managing board, and perhaps of other officers, are supposed to state facts upon which the associates may act in their corporate meetings and also in individual transactions; and the statement of important facts, purposely made untrue, is a fraud when acted upon. The right of a corporator to inspect the books of the corporation at all reasonable times is an individual right, and if de-

cago Junction, etc. Co., 49 N. J. Eq. 217.

[1] Talbot v. Scripps, 31 Mich. 268.

[2] Smith v. Hurd, 12 Met. 371, 46 Am. Dec. 690.

[3] Hodges v. New Eng. Screw Co., 1 R. I. 312, 53 Am. Dec. 624, 3 R. I. 9; Butts v. Wood, 37 N. Y. 317; Dunphy v. Traveller, etc. Asso., 146 Mass. 495.

[4] See Robinson v. Smith, 3 Paige, 222; Dodge v. Woolsey, 18 How. 331.

[5] Ship's Case, 2 De G., J. & S. 544.

nied him he may by *mandamus* obtain it; and if this proceeding be not speedy enough to make the inspection accomplish the intended purpose, the incorporator should also be entitled to redress in a special action on the case against the custodian of the books, or, if the refusal was under corporate orders, against the corporation itself.

3. Under this head the general principle is that, whatever the corporate officer does officially, it is his duty to do with judicial fairness as regards his own interests and those of his associates, and whatever advantage he takes of his own position for his individual benefit to the prejudice of others is a fraud. If the directors of an embarrassed railway company proceed, under proper authority, to sell the road, but do so in a way calculated not to produce its value, and become purchasers themselves, the sale is a fraud upon their trust and may be vacated on that ground.[1] So it is not competent for a director in a railway company to become contractor with the company for constructing the road; and it makes no difference that no actual fraud was intended in the transaction, or that it can be shown that the corporation suffered no loss.[2] The policy of the law will not permit the integrity of the trustee to be put to the trial of transactions where duty to his *cestui que trust* would stand opposed to interest.[3] So payments made by directors to the company in property at more than its value will not be suffered to stand.[4]

Nevertheless, the managing officers may deal with a stockholder in respect to his shares and become purchaser thereof, provided that in their negotiations there is no deception and no concealment of the facts which the seller has a right to know. Nor would the officer be under obligation, in such dealings, to put before the stockholder the facts within his knowledge which might influence the negotiations, any further than would be required of his position by his duty to the stockholders generally, irrespective of the negotiations. A director may buy and sell stock in the market; and it has been held

[1] Jackson v. Ludeling, 21 Wall. 616.

[2] Flint, etc. R. Co. v. Dewey, 14 Mich. 477.

[3] See Palmer v. C. H. Cemetery, 122 N. Y. 429.

[4] Osgood v. King, 42 Iowa, 478. In further illustration see York, etc. R. Co. v. Hudson, 16 Beav. 485; Butts v. Wood, 37 N. Y. 317; Cook v. Sherman, 20 Fed. Rep. 175.

that a director, not being trustee for the sale of the shareholder's stock, may buy of a stockholder his shares without any such obligation to disclose important facts as would rest upon an agent dealing with his principal.[1]

4. Where directors or managing officers perpetrate frauds on associates by allowing advantages to one or more over the rest, the proper remedy is usually found in compelling the favored stockholder to surrender what he has thereby fraudulently gained.[2] An agreement, by which a subscription is to be colorable merely, to induce others to subscribe, is fraudulent and void, and the subscription may be enforced.[3]

It has been decided that if the managers of a bank allow the stockholders to withdraw its funds to the amount of their subscriptions, and to use them without security, such conduct is a fraud upon the creditors of the bank and renders the directors liable in equity for the amount withdrawn.[4] So where the president of a bank makes loans of the bank's funds to irresponsible persons without security, having a private interest of his own to advance thereby, the bank may charge him personally with the loans and recover the amount in a suit at law.[5]

Trustees.— The case of a trustee is the representative illustration of those in which the law demands the utmost good faith, because of confidential relations. However the trustee may be appointed, he is chosen because of the confidence felt and the trust reposed, and the law imposes upon him the obligation of perfect fidelity to the trust, and integrity in its performance, and he must discharge the trust without suffering his own interest in any manner to distract his attention.

It is a fundamental rule that a trustee shall not deal in a trust fund for his own interest. If the *cestui que trust* be a person in law *sui juris*, there is no absolute impediment to dealings between himself and the trustee in respect to the trust property or the trustee's duties; but such cases almost always afford unusual facilities for deception and fraud. It has been held that, to sustain a purchase by trustee from *cestui que trust*, the

[1] Carpenter v. Danforth, 52 Barb. 581; Tippecanoe Co. v. Reynolds, 44 Ind. 509.

[2] See Melvin v. Lamar Ins. Co., 80 Ill. 446.

[3] New Albany, etc. R. R. Co. v. Fields, 10 Ind. 187.

[4] Bank of St. Marys v. St. John, 25 Ala. 566.

[5] First Nat. Bank v. Reed, 36 Mich. 263.

"trustee must have acted in entire good faith. He must show that he made to the *cestui que trust* the fullest disclosure of all he knew in regard to the subject-matter, and that the price he paid was adequate."[1] Presumptions are against such dealings, and if the trustee ventures upon them he takes upon himself the burden of showing that he dealt fairly, and after putting the other party on a footing of equality in respect to the property.[2] Where the trustee himself makes sale of trust property under the authority vested in him as such, if he becomes the purchaser himself, either directly or through a third person, the purchase is, by construction of law, fraudulent; and no showing of good faith, or of payment of the full consideration, can sustain it against the objection of the *cestui que trust*, so long as the property remains in his hands, or in the hands of one who takes it with knowledge or notice of the facts.[3] In such case, when the facts come to the knowledge of the *cestui que trust*, he may either affirm the sale or repudiate it; and if he chooses the latter course, he may call upon the trustee to restore the property, or, if that has become impossible, to account for whatever benefit he has received from the purchase. Long acquiescence in the sale, with full knowledge of the facts, may of itself amount to an affirmance.[4]

If a trustee has occasion to make purchases for the purposes of the trust, he can no more buy of himself than he could sell to himself.[5]

The above rules apply to executors and administrators, creditors, assignees in bankruptcy or insolvency, partners, agents for the sale of property, and all other persons occupying similar relations. Wherever the reason of the rule applies, there the rule is in full force. An agent empowered to sell property for his principal cannot become a purchaser directly,[6] nor by indirection through another.[7] A trustee is liable as for a fraud

[1] Spencer & Newbold's Appeal, 80 Pa. St. 317.

[2] Coles v. Trecothick, 9 Ves. 234; Brown v. Cowell, 116 Mass. 461; Graves v. Waterman, 63 N. Y. 657.

[3] Lowther v. Lowther, 13 Ves. 95; Wade v. Pettibone, 11 Ohio, 57, 37 Am. Dec. 408; McCants v. Bee, 1 McCord's Ch. 383, 16 Am. Dec. 610, and *note*.

[4] Marsh v. Whitmore, 21 Wall. 178; Miles v. Wheeler, 43 Ill. 123.

[5] See Bentley v. Craven, 18 Beav. 75.

[6] Ames v. Pt. Huron, etc. Co., 11 Mich. 139, 83 Am. Dec. 731.

[7] Dwight v. Blackmar, 2 Mich. 330, 57 Am. Dec. 130; Fisher's Appeal, 34 Pa. St. 29.

if he knowingly sells trust property for less than it will bring in the market, even though such a sale is within a minimum fixed by his instructions.[1]

Where the influence of a confidential relation has once existed, it will not be presumed that it passes away immediately on the relation terminating, and dealings within a short time thereafter will be scrutinized closely and may be set aside as fraudulent, especially if no independent advice is taken before entering into them.[2]

Principal and agent.— This subject has been covered partly under the preceding head. The agent owes to his principal the like fidelity which the trustee owes to the *cestui que trust.* But while the supervision of trusts belongs to equity, and wrongs by trustees must generally be redressed in that court, wrongs by agents will be redressed at law, unless in such a case that equity alone can give the relief required.

The principal and agent assume towards each other certain duties of care. The agent must not be negligent in the performance of his trust, and the principal must not negligently lead the agent into danger. Duty is the measure of the required care.

Partners are agents for each other within the scope of the partnership business, and are charged with all the obligations of good faith which rest upon other agents. They are also, in a certain sense, trustees for each other, and will not be suffered to make secret gains at the expense of the copartnership.[3] It is a fraud for one to withhold from the other a full disclosure of all the facts relating to their joint dealings, even when they are proceeding to close up their affairs by arbitration.[4]

Attorney and client.— It has been held that if an attorney, by unwarrantable acts, shall render himself liable to third persons, and shall exact and obtain from his client indemnity therefor, the indemnity will be set aside for presumed undue influence.[5] The client is expected, by law, to lay open to his advisor all that he may know, believe, or suspect, which it can

[1] Price v. Keyes, 62 N. Y. 378; Greenfield Sav. Bank v. Simons, 133 Mass. 415.

[2] Hatch v. Hatch, 9 Ves. 292. And see Ranken v. Patten, 65 Mo. 378.

[3] Getty v. Devlin, 54 N. Y. 403.

[4] Beam v. Macomber, 33 Mich. 127.

[5] See Gray v. Emmons, 7 Mich. 533; Savery v. King, 5 H. L. Cas. 655.

possibly be important for the adviser to know in order to prepare him to render valuable services; and this confidence is protected by the law, which will not permit the adviser to disclose what has been communicated to him, not even as a witness in judicial proceedings, without his employer's consent.[1] It has been said that a member of the legal profession must "consider his lips sealed with a sacred silence;"[2] and if he discloses "the evidence or secrets of the cause," he is liable in an action on the case.[3] The power of courts to deal with such a case summarily when it shall arise does not preclude private action. The courts may also take notice, even without their attention being specially called to it by the parties concerned, of the failure to observe professional faith when it concerns proceedings before them. Thus, if an attorney, while employed by one party, contracts to render assistance to the other for a consideration to be paid him, the courts, when the contract is brought to their attention, will treat it as a nullity.[4] These rules apply to one who assumes to be legal adviser even though not a licensed attorney. What is guarded against is not so much the abuse of an attorney's privilege as the abuse of a confidence which has been bestowed upon him.[5]

Sometimes an attorney having a dealing of bargain and sale with another person is intrusted by the latter with the drawing of a contract between them, and here the draughtsman is bound not simply for good faith, but to make sure that his interest does not mislead his judgment to the prejudice of the other party. In the same way, where an insurance agent draws a contract of indemnity, his principal cannot take advantage of his error or mistake to the prejudice of the insured. The doctrine of estoppel is often applied in those cases where the insurers undertake to claim the advantage of something omitted from the contract but which should have been inserted.[6]

Physicians and clergymen.— The common law did not extend to the confidence which one might bestow upon his phy-

[1] 1 Greenl. Ev., § 237; Denver Tramway Co. v. Owens (Colo.), 36 Pac. Rep. 848.

[2] Tindall, C. J., in Taylor v. Blacklow, 3 Bing. N. C. 235.

[3] Com. Dig., Action upon the Case for a Deceit, 5.

[4] Valentine v. Stewart, 15 Cal. 387.

[5] Sears v. Shafer, 1 Barb. 408, 6 N. Y. 268; Ladd v. Rice, 57 N. H. 374.

[6] Clark v. Union F. Ins. Co., 40 N. H. 333, 77 Am. Dec. 721.

sician or spiritual adviser the same protection which it gives in the case of the legal counselor.[1] In some of the states, however, the legislature has recognized the propriety of such protection not only in the case of religious advisers, but of physicians also.[2]

The law takes notice of the influence likely to be acquired by the physician over his patient, and scrutinizes with jealousy their dealings while the relation continues.[3] As the control of spiritual advisers is likely to be even greater and more controlling, especially in the last illness, they should be able to show that any advantage obtained for themselves, or their church or denomination, was the result of free and voluntary action, and not obtained by practicing in any manner upon fears or hopes, or by taking advantage of spiritual or bodily weakness.[4]

[1] Duchess of Kingston's Case, 20 St. Tr. 573, 2 Sm. L. C. 734.

[2] See as to physicians, Grattan v. Metr. Life Ins. Co., 80 N. Y. 281; Heuston v. Simpson, 115 Ind. 62; Gartside v. Conn. Mut. etc. Co., 76 Mo. 446; Feeney v. L. I. R. Co., 116 N. Y. 375, 5 L. R. A. 544.

[3] See Ashwell v. Lomi, L. R. 2 P. & D. 477, 4 Moak, 700.

[4] Huguenin v. Baseley, 14 Ves. 273; Dent v. Bennett, 4 Myl. & Cr. 269, 277.

CHAPTER XVIII.

THE RELATION OF MASTER AND SERVANT.

There is a class of cases in which the law holds one party responsible for the wrongs done or suffered by another, often with no regard to his personal fault, and in many cases refusing to permit his actual fault to be disproved. These are the cases in which one person occupies toward another the relation of master and servant.

Who is a servant.— The words "master and servant" are not used in the law in their popular signification. In strictness a servant is one who, for a valuable consideration, engages in the service of another and undertakes to observe his directions in some lawful business. The relation is purely one of contract, and the contract may contemplate or stipulate for any services and any conditions of service not absolutely unlawful. But only as between the two parties to it does the contract establish their relation and determine their rights. Whatever obligations the relation might impose on either as respects third persons could not depend on the nature of the stipulations, but must spring from the relation itself. The liability of the master, if any, cannot depend on what the contract of service was, how long it was to continue, what compensation was to be paid for it, or what mutual covenants the parties had for their own protection. His control of the action of the other is the important circumstance, and the particulars of his arrangement are immaterial. So, when one person for the time being places himself in a position of subordination to another in the business of the latter, and by what he may do in that condition of subordination a third person is injured, such third person has a right to regard him as occupying the position of a servant, and is entitled to such remedies against the superior as he would have if the contract of service in fact existed.[1] It is for convenience, rather than because anything

[1] Hill v. Morey, 26 Vt. 178.

depends on an actual contract of service, that he is called a servant when a third person seeks redress. A child, while employed by the parent about his affairs, is to be regarded as a servant. So is a mere volunteer; and the agent in one's business, whether general or special, is in law a servant; and so is the officer of a private corporation. The officer of a public corporation, while discharging his official duties, is not in general to be deemed a servant of the corporation. Neither is any person who is employed in any capacity in the execution of its police regulations. But in the management of its own property the agents of a public corporation are its own servants.

Liability of master to third persons — In general.— The master is not to be held responsible generally for whatever wrongful conduct a servant may be guilty of. *Qui facit per alium, facit per se*, is the maxim applicable to this relation.[1] That which the superior has put the inferior in motion to do must be regarded as done by the superior himself, and his responsibility is the same as if he had done it in person. The maxim is not limited, therefore, to the cases in which the injurious conduct was directed by the master himself, but covers acts of omission as well as of commission, and embraces all cases in which the failure of the servant to observe the rights of others, in the conduct of the master's business, has been injurious.

Intentional acts.— The master is liable for the acts of his servant not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful acts he was directed to do, but the wrongful acts he was suffered to do, that the master must respond.[2] When the conductor in charge of a railway train purposely and wrongfully ejects a passenger from the cars, the railway company must bear the blame and pay the damages. The company, having chosen its servant and intrusted him with discretionary authority and with the means of doing the injury, have through

[1] McClung v. Dearborne, 134 Pa. St. 396, 8 L. R. A. 204.

[2] Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380.

his agency caused it to be done.[1] But the master is liable for intentional acts which constitute legal wrongs, only when that which is done is within the real or apparent scope of the master's business.[2] If the conductor of a train of cars leaves his train to beat a personal enemy, or, from mere wantonness, to inflict any injury, this is the individual trespass of the conductor which he has stepped aside from his employment to commit.[3] In determining whether or not the master shall be held responsible, the motive of the servant in committing the act is important; as, whether he supposes he is furthering the master's interest under discretionary authority, or is indulging his private malice irrespective of the master's interest.[4] But the motive is not conclusive. The test of a master's responsibility is whether that which the servant did was something his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name.[5] "If the servant, wholly for a purpose of his own, disregarding the objects for which he was employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable."[6] But "the master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his

[1] Eastern Counties R. Co. v. Broom, 6 Exch. 314; Seymour v. Greenwood, 7 H. & N. 355; Goddard v. G. T. R. Co., 57 Me. 202, 2 Am. Rep. 39; Passenger R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78.

[2] Lafitte v. New Orleans City & L. R. Co., 43 La. Ann. 34, 12 L. R. A. 337.

[3] Crocker v. New London, etc. R. Co., 24 Conn. 249. In further illustration of the proposition, see Louisville, N. O. & T. R. Co. v. Douglass, 69 Miss. 723, 30 Am. St. Rep. 582; Stephenson v. So. Pac. R. Co., 93 Cal. 558, 15 L. R. A. 475; Davis v. Houghtellin, 33 Neb. 582.

[4] See Birmingham Water-works Co. v. Hubbard, 85 Ala. 179, 4 So. Rep. 607.

[5] See Johnson v. Barber, 10 Ill. 425, 50 Am. Dec. 416; Rounds v. Del. etc. R. Co., 64 N. Y. 129, 21 Am. Rep. 597; Ill. Cent. R. Co. v. Latham (Miss.), 16 So. Rep. 756; Davis v. Houghtelin, 33 Neb. 582, 14 L. R. A. 737. The instructions of the master as to the manner in which an act should be done afford no criterion. Gregory v. Ohio R. R. Co., 37 W. Va. 606.

[6] Hoar, J., in Howe v. Newmarch, 12 Allen, 49. And see Fraser v. Freeman, 43 N. Y. 566, 3 Am. Rep. 740; McManus v. Crickett, 1 East, 106.

duty or authority and inflicts an unjustifiable injury upon another."[1]

Unintentional wrongs.— The wrong for which the master shall respond need not be an intentional wrong. The master is responsible for the servant's negligence or want of skill in the course of his employment which results in an injury to some third person. Every man, whether he manages his business in person or intrusts it to others, is bound to see that due care is observed to avoid injury to any one.[2] The term "business" here embraces everything the servant may do for the master with his express or implied sanction.

Disobedience of orders.— It is immaterial to the master's responsibility that the injury is attributable to the servant's failure to observe directions given him. It is not sufficient for the master to give proper directions: he must also see that they are obeyed.[3] If a railway company has directed that no train shall leave a station until orders to that effect are telegraphed from the managing office, but a conductor, confident of his ability to reach the next station without injury, puts his train in motion, and collision occurs, while the managing officers are chargeable with no moral wrong, yet they must answer for the injuries resulting to others from the disobedience of their servant.[4]

Master's liability to servant — General rule.— In general, when a servant in execution of his master's business receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself. It is said that the servant, knowing that he will be exposed to the incidental risk, must be supposed to have contracted that, as between himself and the master, he would run this risk.[5] "But a more conclusive reason, based

[1] Rounds v. Del. etc. R. Co., *supra;* Chicago, etc. R. Co. v. West, 125 Ill. 320; McClung v. Dearborne, 134 Pa. St. 396, 8 L. R. A. 204; St. Louis, I. M. & S. R. Co. v. Hackett, 58 Ark. 381; Haehl v. Wabash R. Co., 119 Mo. 325.

[2] Quinn v. Power, 87 N. Y. 535, 41 Am. Rep. 392; Hays v. Millar, 77 Pa. St. 238, 18 Am. Rep. 445; International & G. N. R. Co. v. Cooper (Tex. Civ. App.), 30 S. W. Rep. 470.

[3] Phila. etc. R. Co. v. Derby, 14 How. 468; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405.

[4] Phila. etc. R. Co. v. Derby, *supra.* And see Harriman v. Pittsburgh, etc. Co., 45 Ohio St. 11; Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361; Redding v. S. C. R. Co., 3 S. C. 1, 16 Am. Rep. 681.

[5] Alderson, B., in Hutchinson v. Railroad Co., 5 Exch. 343. Risks as-

on public policy, is that the opposite doctrine would be unwise, not only because it would subject employers to unreasonable and often ruinous responsibilities, thereby embarrassing all branches of business, but also because it 'would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct or negligence of others who serve him; and which diligence and caution, while they protect the master, are much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against the master for damages could possibly afford.'"[1] In many employments, as in the case of carriers of persons, the public are compelled to rely upon the caution and diligence of servants as the chief protection against accidents which may prove destructive of life or limb, and it would increase the hazards to others if the servant, instead of relying upon his own vigilance for protection, had a remedy against the master.[2]

Negligence of fellow-servants.—By the weight of authority the general rule extends to cases where the injury results from the negligence of other servants in the same employment.[3] But in some cases it has been held that the rule is not applicable to the case of a servant who at the time of the injury was under the general direction and control of another who was intrusted with duties of a higher grade, and from whose negligence the injury resulted.[4] It must be allowed, however, that the negligence of a servant of one grade is as much one of the risks of a business as the negligence of a servant of any other; and it seems to be in accordance with sound policy that the servant should feel it to his interest not only to be not

sumed are not only those necessarily incident to the business, but those which commonly attend it. Gulf, C. & S. F. R. Co. v. Kizziah, 86 Tex. 81.

[1] Abinger, Ch. B., in Priestly v. Fowler, 3 M. & W. 1. And see Ill. Cent. R. Co. v. Cox, 21 Ill. 20; Lawler v. Androscoggin R. Co., 62 Me. 463, 16 Am. Rep. 492.

[2] For illustrations, see Gibson v. Erie R. Co., 63 N. Y. 449, 20 Am. Rep. 552; Sanborn v. Atchison, etc. R. Co., 35 Kan. 292; Kean v. Det. Copper, etc. Co., 66 Mich. 277; Naylor v. Chicago, etc. R. Co., 53 Wis. 661.

[3] Bartonshill Coal Co. v. Reid, 3 Macq. H. L. 266; Farwell v. Boston, etc. R. Co., 4 Met. 49, 38 Am. Dec. 339; Laning v. N. Y. C. R. Co., 49 N. Y. 521, 10 Am. Rep. 417.

[4] Little Miami R. Co. v. Stevens, 20 Ohio, 415; Pittsburgh, etc. R. Co. v. Devinney, 17 Ohio St. 197.

negligent himself, but also to guard against, as far as practicable, and to report to his employer, if needful, any negligence of others in the same employment.[1]

It is also in accordance with the weight of authority that the general rule applies to the case of a servant injured by the negligence of another, who, though employed in the same general business, had his service in some distinct branch of it; as in the case of a laborer on the track of a railroad injured by the carelessness of an engine driver.[2]

Independent contractors.— In England it has been held that the master is not liable for an injury caused by the negligence of one of his servants to the servant of a subcontractor who is engaged in the performance of a part of the same work.[3] But this rule can apply only where the subcontractor is under the direction and control of his employer, having some particular part of the work to do under a special arrangement, while the others work generally in the employment as directed.[4] In general it is entirely competent for one having any particular work to be performed to enter into an agreement with an independent contractor to take charge of and do the whole work, employing his own assistants, and being responsible only for the completion of the work as agreed. He must not, however,

[1] See Gallagher v. Piper, 16 C. B. (N. S.) 669; Warner v. Erie R. Co., 39 N. Y. 468; Malone v. Hathaway, 64 N. Y. 5, 21 Am. Rep. 573.

[2] See Northern Pac. R. Co. v. Smith, 59 Fed. Rep. 993, 8 C. C. A. 663; Norfolk & W. R. Co. v. Nuckol's Adm'r (Va.), 21 S. E. Rep. 342; Morgan v. Railroad Co., L. R. 1 Q. B. 149; Feltham v. England, L. R. 2 Q. B. 33; Lawler v. Androscoggin R. Co., 62 Me. 463, 16 Am. Rep. 492; Wonder v. B. & O. R. Co., 32 Md. 411, 3 Am. Rep. 143; Baird v. Pettit, 70 Pa. St. 477. But see Nashville, etc. R. Co. v. Carroll, 6 Heisk. 347; Ryan v. Chicago, etc. R. Co., 60 Ill. 171, 14 Am. Rep. 32. It is sufficient that the servant injured, and the one through whose negligence he is injured, are engaged in the same general business, working toward the same general purpose. For valuable opinions, see Holden v. Railroad Co., 129 Mass. 268; Brodeur v. Valley Falls Co., 16 R. I. 448. For an exhaustive citation of authorities on this question, see *note* to Northern Pac. R. Co. v. Smith, 8 C. C. A. 663, and Little Rock & Memphis R. Co. v. Barry, 58 Ark. 198, 25 L. R. A. 386, and *note*.

[3] Wiggett v. Fox, 36 E. L. & Eq. 486, 11 Exch. 832. The liability of the master in these cases has been considerably enlarged in England by the Employers' Liability Act, and in this country by statutes modeled after that act. In many of the states the statutes apply to railroads only. For a collection of the provisions, see 8 C. C. A. 676 et seq.

[4] Chicago v. Joney, 60 Ill. 383, 387.

contract for that the necessary or probable effect of which would be to injure others, and he cannot by any contract relieve himself of duties resting upon him as owner of real estate, not to do, or suffer to be done upon it, that which will constitute a nuisance and therefore an invasion of the rights of others.[1] Observing these rules, he may make contracts under which the contractor becomes for the time being an independent principal, and is in no such sense the servant of his employer as to give to others rights against the employer growing out of the contractor's negligence.[2] Where the contract is for something that may lawfully be done, and is proper in its terms, and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control reserved either as respects the manner of doing the work or the agents employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is neither liable to third persons for the negligence of the contractor as his master, nor is he master of the persons employed by the contractor so as to be responsible to third persons for their negligence.[3]

The term "contractor" is applicable to all persons following a regular independent employment in the course of which they offer their services to the public to accept orders and execute commissions for all who may employ them in a certain line of duty, using their own means for the purpose and being accountable for final performance only. A common carrier is such a contractor, and so is a drayman.[4]

Master's negligence.— To the general rule is the exception that if the injury results from the negligence of the master himself he is responsible.[5] Some important instances of negligent conduct are specified in the following pages.

[1] Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; Hughes v. Railroad Co., 39 Ohio St. 521; Stevenson v. Wallace, 27 Grat. 77; Hawver v. Whalen, 49 Ohio St. 69, 14 L. R. A. 828, and *note*.

[2] Ketcham v. Newman, 141 N. Y. 205, 24 L. R. A. 102; Cincinnati v. Stone, 5 Ohio St. 38; King v. New York, etc. R. Co., 66 N. Y. 181, 23 Am. Rep. 37; Scammon v. Chicago, 25 Ill. 424, 79 Am. Dec. 334. And see rules of liability laid down by Seymour, J., in Lawrence v. Shipman, 39 Conn. 586. See, also, Cuff v. Newark, etc. R. Co., 35 N. J. 17, 10 Am. Rep. 205.

[3] Knowlton v. Hoit (N. H.), 30 Atl. Rep. 346.

[4] De Forrest v. Wright, 2 Mich. 368.

[5] See Anglin v. Texas & Pac. R.

1. The master's negligence may consist in subjecting the servant to the dangers of unsafe buildings or machinery or to other perils on his own premises, which the servant neither knew of, nor had reason to anticipate, or to provide against, when he entered the employment or subsequently.

The owner of real estate is not bound to provide safeguards for wrong-doers, but he is bound to take care that those who come upon his premises by his express or implied invitation be protected against injury resulting from the unsafe condition of the premises, or from other perils the existence of which the invited party had no reason to look for.[1] And whether invited upon his premises by the contract of service, the calls of business, or by direct request, is immaterial. And the master must respond to his servant for failure to exercise ordinary care and prudence to protect him against dangers not within his knowledge and not open to observation.[2]

A master is not responsible in those cases where the risks are apparent, and are voluntarily assumed by a person capable of understanding and appreciating them.[3] No duty can rest upon an employer to guard against every contingency, or to guaranty that accidents shall not result to those in his service.[4] The age, construction and state of repair of buildings and the different methods of conducting business must be taken into account by a servant or any other person doing business with the proprietor. Every manufacturer has a right to choose the machinery to be used in his business, and to control that business in the manner most agreeable to himself, provided he does

Co., 60 Fed. Rep. 553; Mo., K. & T. R. Co. of Texas v. Hamilton (Tex. Civ. App.), 30 S. W. Rep. 679.

[1] See opinion of Orton, C. J., in Bright v. Barnett & Record Co., 88 Wis. 229, 26 L. R. A. 524.

[2] Marshall v. Stewart, 2 Macq. H. L. 20; Coughtry v. Globe Woolen Co., 56 N. Y. 124, 15 Am. Rep. 387; Cielfield v. Browning, 29 N. Y. Supp. 710; Nason v. West, 78 Me. 253; Elledge v. Nat. City & O. R. Co., 100 Cal. 282. Railroads are liable for a failure to keep the road-bed in repair. Chicago, etc. R. Co. v. Swett, 45 Ill. 197, 92 Am. Dec. 206. But even though the master neglected reasonable precaution the servant cannot recover, if before the injury he knew of the danger, either from his own observation or from information derived from others. Truntle v. North Star, etc. Co. (Minn.), 58 N. W. Rep. 832; Mundle v. Hill Mfg. Co., 86 Me. 400.

[3] See Gowen v. Harley, 56 Fed. Rep. 973; Bennett v. Tintic Iron Co., 9 Utah, 291; Larich v. Moies (R. I.), 28 Atl. Rep. 661; Foley v. Pettee Mach. Works, 149 Mass. 294, 4 L. R. A. 51.

[4] Fosburg v. Phillips Fuel Co. (Ia.), 61 N. W. Rep. 400.

not thereby violate the law of the land.[1] But it is negligence not to exercise ordinary care that the building and machinery, such as they are, shall not cause injury, and that the business as conducted shall not inflict damage upon those who themselves are guilty of no neglect of prudence.

2. The master may also be guilty of actionable negligence in exposing persons to perils in his service, which, though open to observation, they, by reason of their youth or inexperience, do not fully understand and appreciate, and in consequence of which they are injured.[2] The case of an infant, while it is no exception to the general rule which exempts the master from responsibility for injuries arising from the hazards of his service,[3] is not subject to the same tests of the master's culpable negligence which are applied in the case of persons of maturity and experience. In the case of a child it is the duty of the employer to take special precautions. "Mere representation in advance that the service generally, or a particular thing connected with it, was dangerous, might give him no adequate notice or understanding of the kind and degree of the danger which would necessarily attend the actual performance of the work."[4] And in general the employer is required to show good

[1] Hayden v. Smithville Mfg. Co., 29 Conn. 548, 558; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506; Ragon v. T., A. A. & N. M. R. Co., 97 Mich. 265; Kehler v. Schwenk, 144 Pa. St. 348, 13 L. R. A. 374. And see Woodley v. Metropolitan R. Co., L. R. 2 Ex. D. 384. The master is not liable if he uses appliances from the use of which an injury could not be reasonably anticipated. Burke v. Witherbee, 98 N. Y. 562; Kitteringham v. Sioux City, etc. Co., 62 Iowa, 285; Hull v. Hall, 78 Me. 114; Simmons v. Chicago, etc. Co., 110 Ill. 340; Lehigh & W. Coal Co. v. Hayes, 128 Pa. St. 294, 5 L. R. A. 441. Negligence cannot be imputed from the use of methods or machinery in general use in the business. Reese v. Hershey, 163 Pa. St. 253. And see Rooney v. Sewall & D. C. Co., 161 Mass. 153.

[2] Lebbering v. Struthers, 157 Pa. St. 312; Veginan v. Morse, 160 Mass. 143; Davis v. St. L., I. M. & S. R. Co., 53 Ark. 117, 7 L. R. A. 283.

[3] King v. Boston, etc. R. Co., 9 Cush. 112; Fones v. Phillips, 39 Ark. 17; Viets v. Toledo, etc. R. Co., 55 Mich. 120; Crown v. Orr, 140 N. Y. 450; Toledo, St. L. & K. C. R. Co. v. Trimble, 8 Ind. App. 333, 35 N. E. Rep. 716. A servant who is a minor must be held to have assumed the risk if, "in view of his age, intelligence, discretion and judgment, he ought reasonably to have known and understood the dangers to which he was exposed in his employment." Luebke v. Berlin Mach. Works, 88 Wis. 442; Craven v. Smith, 89 Wis. 119.

[4] Grizzle v. Frost, 3 F. & F. 622; Coombs v. New Bedford Cordage Co., 102 Mass. 572, 3 Am. Rep. 506;

faith and reasonable prudence under the special circumstances of the particular case, of which infancy, if it exists, may perhaps be more important than some others.[1]

3. The master may also be negligent in commanding the servant to go into exceptionally dangerous places, or to subject himself to risks which, though he may be aware of the danger, are not such as he had reason to suspect or consider as being within the employment.

One who voluntarily engages in a dangerous employment should not complain because it is dangerous;[2] but he ought not to be made to bear other than incidental risks which he is directed by the master to assume, merely because he did not take upon himself the responsibility of disobedience. The servant might also reasonably assume that the master, whose duty it was not to send him into danger, knew when he gave the command that the dangers were not such or so great as the servant had apprehended.[3] And here it is important to bear in mind the effect which the order of a master would have upon the will of a child of immature years and experience.[4]

4. The master may also be negligent in not exercising ordinary care to provide suitable and safe machinery or appliances, or in making use of those which he knows have become defective, but the defects in which he does not explain to the servant, or in continuing ignorantly to make use of those which are defective, where his ignorance is due to a neglect to use ordinary prudence and diligence to discover defects.[5] The master does not warrant the strength or safety of his machin-

Bartonshill Coal Co. v. McGuire, 3 Macq. H. L. 300; Hinckley v. Horazdowski, 133 Ill. 359, 8 L. R. A. 490; Brazil, etc. Co. v. Gaffney, 119 Ind. 455, 4 L. R. A. 850.

[1] See Chicago, etc. R. Co. v. Bayfield, 37 Mich. 205; Patterson v. Pittsburgh, etc. R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Cleveland Rolling Mill Co. v. Corrigan, 46 Ohio St. 283, 3 L. R. A. 385.

[2] See Williams v. Clough, 3 H. & N. 258; Malone v. Hawley, 46 Cal. 409. But the master should notify the servant of extrinsic and extraordinary risks. Northwestern Fuel Co. v. Danielson, 57 Fed. Rep. 915; Baxter v. Roberts, 44 Cal. 187, 13 Am. Rep. 610. And see Consolidated Coal Co. v. Haenni, 146 Ill. 614.

[3] See Lalor v. Chicago, etc. R. Co., 52 Ill. 401, 4 Am. Rep. 616; Stephens v. Hannibal, etc. Co., 86 Mo. 221.

[4] Houston v. Brush, 66 Vt. 331. And see George H. Hammond Co. v. Johnson, 38 Neb. 244; Kansas C. & P. R. Co. v. Ryan, 52 Kan. 637.

[5] Railroad Co. v. Fort, 17 Wall. 553; Northern P. Coal Co. v. Richmond, 58 Fed. Rep. 756.

ery or appliances,[1] but he is responsible if an injury results to his servant through his failure to exercise such reasonable care and prudence in selecting or ordering what he requires in his business as every prudent man is expected to employ in providing himself with the conveniences of his occupation.[2] He cannot delegate this duty so as to relieve himself from the contingent liability in case of failure in performance.[3]

5. The master's negligence may also consist in employing servants who are wanting in the requisite care, skill or prudence for the business intrusted to them, or in continuing such persons in his employ after their unfitness had become known to him, or when, by the exercise of ordinary care, it would have been known.[4] The obligation to employ suitable servants is precisely the same as that to provide suitable machinery and appliances for the business. And to continue in the employment an incompetent servant after his incompetency is known, or, by the exercise of due care, might have been known, "is as much a breach of duty, and a ground of liability, as the original employment of an incompetent servant."[5]

6. It is also negligence for which the master may be held responsible, if, knowing of any peril which is known to the servant also, he fails to remove it in accordance with assurances made by him to the servant that he will do so. If the servant refrains from abandoning the service in consequence of assur-

[1] Watts v. Hart, 7 Wash. 178; Essex Co. Electric Co. v. Kelly (N. J.), 29 Atl. Rep. 427.

[2] See Readhead v. Midland R. Co., L. R. 2 Q. B. 412; Ladd v. New Bedford R. Co., 119 Mass. 412, 20 Am. Rep. 331; Columbus, etc. R. Co. v. Troesch, 68 Ill. 545, 18 Am. Rep. 578; Keegan v. West R. Co., 8 N. Y. 175, 59 Am. Dec. 476; Noyes v. Smith, 28 Vt. 59; Reilley v. Campbell, 59 Fed. Rep. 990.

[3] Mullin v. California Horse Shoe Co. (Cal.), 38 Pac. Rep. 535.

[4] See Hutchinson v. Railroad Co., 5 Exch. 343; Moss v. Pac. R. Co., 49 Mo. 167, 8 Am. Rep. 126; Elledge v. Nat. City & O. R. Co., 100 Cal. 282; Consolidated Coal Co. v. Haenni, 146 Ill. 614; So. P. Co. v. Burke, 60 Fed. Rep. 704; Norfolk & West R. Co. v. Hoover (Md.), 25 L. R. A. 710. And see *note* to this last case for a citation of many authorities illustrating the propositions of this paragraph.

[5] Gray, J., in Gilman v. East R. Co., 10 Allen, 233. See, also, Laning v. N. Y. C. R. Co., 49 N. Y. 521; Hilts v. Chicago, etc. R. Co., 55 Mich. 437; Ohio & M. R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134; Coppins v. N. Y. C. & H. R. Co., 122 N. Y. 557. The master is, in general, not bound to discharge a servant charged with incompetency without investigation. But there must be no unnecessary delay. Lake Shore & M. S. R. Co. v. Stupak, 123 Ind. 210.

ances that the danger shall be removed, he does not, by continuing in the employment for a time which might be reasonably allowed for the performance of the promise, engage to assume the risks, and the master is not in the exercise of ordinary care, unless or until he makes his assurances good.[1]

7. If a servant is injured by the negligence of a fellow-servant and that of the master combined, he may recover of the master for the injury;[2] for the master is at least one of two joint wrong-doers in such case, and as such is responsible under rules heretofore given.

8. As the servant only undertakes to assume the hazard of his own employment, it must follow that if the master carries on another and wholly distinct business, an injury occasioned by the negligence of a servant in such other business, not being within the contemplation of the employment, will give grounds for an action under the same circumstances which would render liable any stranger who might have been the employer of the negligent servant.

It appears from the above that the master is liable in all cases where the injury has resulted from his own negligence, and not from any of the customary risks of the employment. And when he delegates his authority with respect to the employment of proper servants, the selection of suitable tools, machinery, etc., he is responsible for a want of proper caution on the part of the agent as for his own personal negligence.[3]

But a corporation can manage its affairs only through officers and agents, and the question arises, whose negligence shall be imputed to the corporation as the negligence of the princi-

[1] See Patterson v. Wallace, 1 Macq. H. L. 748; Patterson v. Pittsburgh, etc. R. Co., 76 Pa. St. 389, 18 Am. Rep. 412; Graham v. Newburg Orrel Coal, etc. Co., 38 W. Va. 273. The servant probably would not be able to recover if he continued to work though the danger was so imminent and immediate that a man of ordinary prudence would have abandoned the work. Rothenberger v. Northwestern, etc. Co. (Minn.), 59 N. W. 531.

[2] Grand Trunk R. Co. v. Cummings, 106 U. S. 700; Elmer v. Locke, 135 Mass. 575; Northwestern Fuel Co. v. Danielson, 57 Fed. Rep. 915; Cincinnati, N. O. & T. P. R. Co. v. Clark, 57 Fed. Rep. 125; Norfolk & W. R. Co. v. Nuckol's Adm'r (Va.), 21 S. E. Rep. 342; Lutz v. Atlantic & P. R. Co. (N. M.), 16 L. R. A. 819; Hunn v. Mich. Cent. R. Co., 78 Mich. 513.

[3] Ford v. Fitchburg R. Co., 110 Mass. 240, 14 Am. Rep. 598; Chicago, etc. R. Co. v. Jackson, 55 Ill. 492, 8 Am. Rep. 661; Corcoran v. Holbrook, 59 N. Y. 517, 17 Am. Rep. 369.

pal itself? And upon examination it would seem that the law could go no further than to hold the corporation liable for the acts and neglects of the officer exercising the powers and authority of general superintendent, but that for these it ought to respond to its servants as for its own acts or neglects.[1] "When . . . the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for neglects and omissions of the one charged with the selection of other servants in employing and selecting such servants, and in the general conduct of the business committed to his care."[2]

And if the master places the servant under the orders of another who requires him to perform a dangerous service which he has not undertaken for, whereby he is injured, the wrongful act is properly attributable to the master himself.[3]

Contributory negligence.— The servant cannot recover from the master for an injury claimed to have been occasioned by the latter's negligence if his own negligence contributed with that of the master in producing the injury.[4] And if the servant sues the master for an injury which has resulted from a peril which had come to the knowledge of the plaintiff, and ought to have been known to the master, it may properly be held to be contributory negligence on the plaintiff's part if he failed to report it.[5]

Where the servant claims to recover on the ground of the master's negligence, the burden of proof will be upon him, not only because as a plaintiff he must make out his case, but also because all presumptions will favor the proper performance of duty.[6]

[1] See Mattise v. Consumers' Ice Mfg. Co. (La.), 16 So. Rep. 400.

[2] Malone v. Hathaway, 64 N. Y. 5, 9, 21 Am. Rep. 573.

[3] Mann v. Oriental Print Works, 11 R. I. 152.

[4] West, etc. Co. v. Adams, 55 Ga. 279; Cooper v. Butler, 103 Pa. St. 412. Disobedience of rules provided to insure the safety of employees is such negligence. Ford v. C., R. I. & P. R. Co. (Ia.), 24 L. R. A. 657, and cases cited in *note*. See, also, Fritz v. Mo., K. & T. R. Co. (Tex. Civ. App.), 30 S. W. Rep. 85.

[5] Ladd v. New Bedford, etc. R. Co., 119 Mass. 412, 20 Am. Rep. 331; St. Louis, etc. R. Co. v. Britz, 72 Ill. 256; Jennings v. Tacoma R. & Motor Co., 7 Wash. 275; Breig v. C. & W. M. R. Co., 98 Mich. 222; Richmond & D. R. Co. v. Mitchell, 92 Ga. 77.

[6] See Gilman v. East. R. Co., 10 Allen, 233; Pingree v. Leyland, 135 Mass. 398; Murphy v. St. Louis, etc. Co., 71 Mo. 202.

General summary.— To sum up, the rule that the master is responsible to persons who are injured by the negligence of those in his service is subject to this general exception: that he is not responsible to one person in his employ for an injury occasioned by the negligence of another in the same service, unless generally, or in respect of the particular duty then resting upon the negligent employee, the latter so far occupied the position of his principal as to render the principal chargeable for his negligence as for personal fault.

CHAPTER XIX.

NUISANCES.

Definition.— An actionable nuisance may be defined to be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights.[1] It will be noted that this definition includes any such interference with a public easement, or with any other public right, as especially annoys or injures an individual. In such a case the public nuisance becomes a private nuisance also. Any definition of a nuisance must necessarily be very general, and must embrace a very large proportion of those injuries that are commonly redressed in special actions on the case. An attempt to classify nuisances is, therefore, almost equivalent to an attempt to classify the infinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights; and new and peculiar cases are arising constantly. Only a few of the most important instances will be noticed here, and the principles applicable to them may be applied generally.

Annoyances without fault.— As the definition assumes the existence of wrong, those things which may be annoying and damaging, but for which no one is in fault, are not to be deemed nuisances, though all the ordinary consequences may flow from them. For example, the swamps and marshes that, from their exhalations, prove injurious to the health of those living near them, if they exist only as they were by nature, are not nuisances. But the moment anything is done by the owner, upon or in respect to the lands, which increases the deleterious effects or sensibly renders his lands offensive in a new or different way, he becomes responsible. There is then a nuisance on his own land which exists by his wrong, and it is his duty to abate it.[2]

[1] See Paddock v. Somes, 102 Mo. 226, 10 L. R. A. 254.

[2] See Hartwell v. Armstong, 19 Barb. 166. Also, Adams v. Popham, 76 N. Y. 410.

Nuisances which injure the realty.— Of these some may cause only a technical injury, but if they interfere with the enjoyment in its entirety of any distinct legal right, such interference is sufficient to make them actionable. Thus, if any part of one's building, though it be only a projection above the ground, extends over the neighbor's line, this is a nuisance even though no damage is suffered or even anticipated from it, for it constitutes an intrusion on the owner's freehold in its extension upwards.[1] Here, as in trespass, the insignificance of the injury goes to the extent of the recovery and not to the right of action.

Filthy percolations.— Where one has filthy deposits on his premises he whose dirt it is must keep it that it may not trespass;[2] therefore, if filthy matter from a privy or other place of deposit percolates through the soil of the adjacent premises, or breaks through into the neighbor's cellar, or finds its way into his well, this is a nuisance.[3] The law imposes on one the duty "effectually to exclude the filth from his neighbor's land, and not to do so is of itself negligence." Only sudden and unavoidable accidents which could not have been foreseen by due care would be an excuse in such a case.[4]

Percolating waters.— Every one has a complete right to be secure against the undermining of his buildings or the destruction of his crops, or any other injury to his property rendering it less fit for use or occupation, by the percolation of waters beneath the surface caused by some wrongful act of another. The wrongful act may perhaps be throwing waters from one's roof so near the boundary line that they must escape upon the adjacent premises;[5] or gathering waters in reservoirs not sufficiently protected against such consequence;[6] or damming up

[1] Grove v. Ft. Wayne, 45 Ind. 429, 15 Am. Rep. 262; Wilmarth v. Woodcock, 58 Mich. 482. Branches of trees which overhang land adjoining that on which the trees stand constitute a nuisance. Hickey v. Mich. Cent. R. Co., 96 Mich. 498, 21 L. R. A. 729, and *note.*

[2] Tenant v. Goldwin, 1 Salk. 360, 6 Mod. 311.

[3] Tenant v. Goldwin, *supra;* Marshall v. Cohen, 44 Ga. 489, 9 Am. Rep. 170.

[4] Ball v. Nye, 99 Mass. 582. The injury must be of a substantial character. Upjohn v. Richland, 46 Mich. 542.

[5] Underwood v. Waldron, 33 Mich. 232.

[6] Monson, etc. Co. v. Fuller, 15 Pick. 554; Wilson v. New Bedford, 108 Mass. 261.

the stream below and thus compelling the water to assume a higher level. In the first two of these cases the question may be one of negligence; in the third the only question is one of fact. If the water is so raised that by percolation the land of another is injured, the party raising it is responsible not because he has unreasonably, negligently, intentionally or unexpectedly flowed the land of another for his own benefit, but because he has done it in fact.[1]

Deposits upon land.— For one without license to step upon another's estate is a trespass; for one to do any act off the estate which shall cause anything to be carried or thrown upon it is a nuisance. It is a nuisance if a riparian proprietor shall cast into the stream earth, sand, the refuse of his business, or other things, which by the flowing water are carried and deposited upon the land of a proprietor below. The tort here consists in the act of committing the rubbish to the stream; the deposit upon the land below is only the consequence from which a cause of action in favor of a particular individual arises.[2] Such an occupation of the land is a taking of property as much as would be an actual *pedis possessio* and an exclusion of the owner altogether;[3] and it is immaterial where on the plaintiff's land the deposit is made, whether under water, or in times of flood upon land usually dry; it is enough that the plaintiff's land is to some extent occupied by that which, by the wrongful act of another, is placed there.[4]

Leakage from water pipes.— Where one is lawfully making use of water pipes upon his own premises, or in pursuance of a license or easement on the lands of another, if injuries are caused by the bursting of the pipe or by leakage from other cause, the proprietor of the pipes is responsible if he is guilty of negligence which causes the leakage, or if he fails to observe due care in protecting against it, otherwise not.[5]

[1] Pixley v. Clark, 35 N. Y. 520, 531.

[2] Little Schuylkill, etc. Co. v. Richards, 57 Pa. St. 142, 146. The depositing of waste which can be allowed must be no more than a reasonable use of the stream. Lockwood, etc. Co. v. Lawrence, 77 Me. 297.

[3] Pumpelly v. Green Bay Co., 15 Wall. 166, 177.

[4] Little Schuylkill, etc. Co. v. Richards, *supra;* Robinson v. Black, etc. Co., 50 Cal. 460.

[5] Carstairs v. Taylor, L. R. 6 Exch. 217; Ortmeyer v. Johnson, 45 Ill. 469; Moore v. Goedel, 7 Bosw. 591, 34 N. Y. 527.

Injuries by the bursting of reservoirs.—It is lawful to gather water on one's premises for useful and ornamental purposes, subject to the obligation to construct reservoirs of sufficient strength to retain the water under all contingencies which can reasonably be anticipated, and afterwards to preserve and guard it with due care. Where a reservoir breaks away and causes injury to the lower proprietor, by the decisions in this country the party constructing or maintaining the reservoir is liable, if the injury resulted through any negligence, either in constructing or in subsequent attention.[1] But in the leading English case of *Fletcher v. Rylands*,[2] it was held that the party maintaining a reservoir of water which injures another by breaking away in consequence of original defects, of which he was ignorant, is responsible for the injury, though chargeable with no negligence. In the later case of *Nichols v. Marsland*,[3] a reservoir, in the construction and maintenance of which there was no negligence, was broken away by a rain-fall greater and more violent than any during the memory of witnesses. An action being brought for injuries thereby done, Lord Chief Justice Cockburn held the defendant liable, but in the exchequer chamber the judgment was reversed. "This case," it was said, "differs wholly from *Fletcher v. Rylands*. There the defendant poured the water into the plaintiff's mine. He did not know he was doing so, but he did, as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought it to a place whence another agent let it loose."

The English rule then seems to be as follows: Whoever gathers water into a reservoir where its escape would be injurious to others must, at his peril, make sure that the reservoir is sufficient to retain the water which was gathered into it. But, if thus sufficient in construction, the liability for the subsequent escape of the water becomes a question of negligence. The proprietor is not liable if the water escapes because of the wrongful act of a third party, or from *vis major*, or from any other cause consistent with the observance of due

[1] Pixley v. Clark, 35 N. Y. 520; Wilson v. New Bedford, 108 Mass. 261; Everett v. Hydraulic Co., 23 Cal. 225.

[2] L. R. 1 Exch. 265; affirmed in L. R. 3 H. L. Cas. 330.

[3] L. R. 10 Exch. 255, 14 Moak, 538, 542.

and reasonable care by him. Due care is, of course, a degree of care proportioned to the danger of injury from the escape. The English rule as just explained does not differ greatly from that of this country.

Falling waters and snows.— Every man has a clear legal right to protect his premises against the fall of rain or snow, even though incidental injury may result to his neighbor in consequence. In the case of urban property he may, in erecting buildings and in making improvements, find it needful to do this, even to the extent of preventing altogether the fall of rain or snow upon his grounds; and the limitation upon his right to do so is to be found only in the duty which every proprietor of lands owes to those about him so to use his own as not unreasonably to restrict the enjoyment by others of corresponding rights. But he is not required at all events and under all circumstances to protect his neighbor; and any injury that may result notwithstanding the observance of proper precaution must be deemed incident to the ownership of town property and can give no right of action. If one constructs his buildings so as to cast water therefrom upon the land of his neighbor, he commits an actionable wrong;[1] but if he puts proper eve-troughs or gutters upon his building for leading off the water from his own ground, and keeps them in proper order, and is guilty of no negligence in this regard, an adjoining proprietor can have no legal complaint against him for injuries resulting from extraordinary or accidental circumstances for which no one is in fault; and such injuries must be left to be borne by those on whom they fall.[2]

Drawing off surface water.— The drawing off of surface water may affect adjoining estates, either as it deprives them of the benefits of the ordinary flow in natural water-courses, or as it increases the ordinary flow in such water-courses, or as it casts water through ditches upon adjoining lands or so near to them that the water, percolating through the soil, causes the adjoining land to be wet and unsuited to cultiva-

[1] Baker's Case, 9 Co. 53*b;* Tucker v. Newman, 11 Ad. & El. 40; Shipley v. Fifty Associates, 106 Mass. 194; Gould v. McKenna, 86 Pa. St. 297. But it is not an actionable wrong if water falling from a roof flows on a lot three feet below the grade of the surrounding property. Phillips v. Waterhouse, 69 Ia. 199.

[2] Barry v. Peterson, 48 Mich. 263.

tion, or unproductive. Where the lower proprietor is deprived of the benefit of the natural flow of mere surface water or of some portion thereof, he can have no remedy;[1] and it is equally well settled that one may drain his lands into a natural watercourse, even though a lower proprietor is injured by the increased flow. But this principle should be prudently applied, and the lower proprietor may erect any such protections as may be needful to guard his lands against the additional flow, provided they do not intercept the passage of water which would naturally pass on to his lands.[2] And it has been decided in Massachusetts that one may erect barriers to prevent surface water which has accumulated elsewhere from coming upon his land, even though it is thereby made to flow upon the land of another to his loss.[3] And this doctrine has been approved in several states.[4] Others, following the rule of the civil law, have held that the lower estate is charged with a servitude for the benefit of the upper estate, to permit the surface water to flow off over it as it had been accustomed to do.[5] Probably everywhere an exception would be recognized in favor of the owner of a town lot, who must be at liberty to cut off drainage across it, or his lot would be worthless for many purposes.[6]

Without doubt one may improve his land by filling up low and wet places without incurring liability to the lower proprietor upon whom the flow would be increased,[7] just as the public may lawfully improve streets and public grounds, though the improvement may have the effect to cast the flowing or surface water upon adjoining grounds.[8] But a natural water-

[1] Rawstron v. Taylor, 11 Exch. 369; Curtiss v. Ayrault, 47 N. Y. 73; Boynton v. Gilman, 53 Vt. 17.

[2] See Kauffman v. Griesemer, 26 Pa. St. 407.

[3] Gannon v. Hargadon, 10 Allen, 106. See opinion of Bigelow, C. J., in this case.

[4] See Murphy v. Kelley, 68 Me. 521; Chadeayne v. Robinson, 55 Conn. 345; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Abbott v. Kansas City, etc. Co., 83 Mo. 271; Hanlin v. Chicago, etc. Co., 61 Wis. 515.

[5] Lambert v. Alcorn, 144 Ill. 313, 21 L. R. A. 611; Delahoussaye v. Judice, 13 La. Ann. 587; Ogburn v. Connor, 46 Cal. 346, 13 Am. Rep. 213; Boyd v. Conklin, 54 Mich. 583; Farris v. Dudley, 78 Ala. 124; Gormley v. Sanford, 52 Ill. 158; Gray v. McWilliams, 98 Cal. 157, 21 L. R. A. 593.

[6] See Vanderwiele v. Taylor, 65 N. Y. 341.

[7] Goodale v. Tuttle, 29 N. Y. 459; Hoyt v. Hudson, 27 Wis. 656; Bangor v. Lansil, 51 Me. 521.

[8] Martin v. Riddle, 26 Pa. St. 415; Greeley v. Me. Cent. R. Co., 53 Me. 200. As touching this question of surface water, it is laid down as the rule in Iowa that "persons exercis-

course must not be stopped up and the water turned back upon the lands of another proprietor.[1] To be a water-course, "there must be a stream *usually* flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself in some other stream or body of water."[2]

In an important case it was held that if a ditch made by the defendant for the purpose of draining his land, and which terminated within sixty feet of the line of the plaintiff's, had the effect to increase the quantity of water on the plaintiff's land to his injury, or, without increasing it, threw the water upon the land in a different manner from what the same would naturally have flowed upon it, to his injury, the defendant would be liable for the injury, even though the ditch was constructed by the defendant in the course of the ordinary use and im-

ing the right to improve the condition of their own land must exercise it in a careful and prudent manner, so as to occasion no unnecessary damage or inconvenience to the servient owner." Willitts v. Chicago, B. & K. C. R. Co., 88 Iowa, 28 1, 21 L. R. A. 608.

[1] Emery v. Lowell, 104 Mass. 13, and cases cited; Imler v. Springfield, 55 Mo. 119.

[2] Dixon, C. J., in Hoyt v. Hudson, 27 Wis. 656, 661. And see Ashley v. Wolcott, 11 Cush. 192, 195; Stanchfield v. Newton, 142 Mass. 110; Earl v. De Hart, 12 N. J. Eq. 280. A gorge, in which excessive rains have immemorially found outlet, is a water-course. Palmer v. Waddell, 22 Kan. 352. But a mere depression is not. Kansas City, etc. R. Co. v. Riley, 33 Kan. 374. And the fact that a stream spreads over wide reaches of marsh and swamps, on or below the surface, does not militate against its being a water-course in every essential particular, so long as it can be identified as the same stream. Case v. Hoffman, 84 Wis. 438, 20 L. R. A. 40; Rigney v. Tacoma Light & Water Co. (Wash.), 26 L. R. A. 425. In a late case it was said that "if the conformation of the land is such as to give to the surface water flowing from one tract to the other a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its flow is a water-course, within the meaning of the rule applicable to that subject." Lambert v. Alcorn, 144 Ill. 313, 21 L. R. A. 611. This is advanced ground, and is not within the rule laid down in the decisions generally. For cases which have discussed the subject in relation to swales and depressions, see *note* to Wharton v. Stevens, 84 Iowa, 107, 15 L. R. A. 630. The waters of a stream swollen beyond its ordinary limits by melted snow and rains usual to the season do not constitute surface water, which one may guard against by embankment. Cairo, V. & C. R. Co. v. Brevoort, 62 Fed. Rep. 129, 25 L. R. A. 527, and *note*.

provement of his farm.[1] By this and similar cases[2] the obligation of the owner of the lower estate to receive the water flowing from the upper estate is confined to "waters which flow naturally without the art of man; those which come from springs or from rain flowing directly on the heritage, or even by the natural depressions of the place."[3] And so where the surface waters are collected and cast in a body upon the proprietor below, unless into a natural water-course, the lower proprietor sustains a legal injury and may have his action therefor.[4] Municipal corporations, while they are not bound to construct sewers or drains to protect adjoining owners against the flow of surface water from public ways, yet if they actually construct such as must carry water upon the adjacent lands, they are liable as much as they would be if they had invaded such lands by sending in their servants, or otherwise.[5]

Subterranean waters.— If one, by an excavation on his own land, draws the subterraneous waters from the land of his neighbor, to the prejudice of the latter, no action will lie for the consequent damage.[6] And prescriptive rights cannot be gained in subterraneous waters which will preclude such excavations on adjoining ground as may draw them off.[7] If the well dug by one man ruins the well or spring of his neighbor, by drawing off its water, it is *damnum absque injuria*.[8] Probably, however, if the subterraneous water were a stream flowing in a well known course, the one through whose land it

[1] Livingston v. McDonald, 21 Iowa, 160.

[2] See Pettigrew v. Evansville, 25 Wis. 223; Butler v. Peck 16 Ohio St. 334; Adams v. Walker, 34 Conn. 466; Hicks v. Silliman, 93 Ill. 255; McCormick v. Kan. C. etc. R. Co., 70 Mo. 359.

[3] Kauffman v. Griesemer, 26 Pa. St. 407, 413. And see Paddock v. Somes, 102 Mo. 226, 10 L. R. A. 254.

[4] See Willits v. Chicago, B. & K. C. R. Co., 88 Iowa, 281, 21 L. R. A. 608, and cases cited.

In connection with this subject the note to Gray v. McWilliams, 98 Cal. 157, 21 L. R. A. 593, is valuable.

[5] Alton v. Hope, 68 Ill. 167; Ashley v. Port Huron, 35 Mich. 296, and Rice v. Evansville, 108 Ind. 7; Gilluly v. Madison, 63 Wis. 518; Vale Mills v. Nashua, 63 N. H. 136; Rychlicki v. St. Louis, 98 Mo. 497, 4 L. R. A. 594; Chapman v. Rochester, 1 L. R. A. 296, and cases cited in *note*.

[6] Acton v. Blundell, 12 M. & W. 324.

[7] Chasemore v. Richards, 7 H. L. 349.

[8] Greenleaf v. Francis, 18 Pick. 117; Haldeman v. Bruckhart, 45 Pa. St. 514; Bloodgood v. Ayers, 108 N. Y. 400; Chase v. Silverstone, 62 Me. 175; So. Pac. R. Co. v. Dufour, 95 Cal. 615, 19 L. R. A. 92.

flowed would be protected against its being drawn away from him.[1] But one claiming rights in such a stream would be under the necessity of proving its existence and tracing it.[2]

Nuisances in the use of water-courses.— Certain principles, which apply equally to navigable and non-navigable waters, control the utilization of water in running streams. At the common law one riparian proprietor acquires no superior right over another by first appropriating the waters to his own use.[3] In the mining states, however, where the use of water upon the public domain is allowed to be appropriated to private use, independent of any ownership in the soil, the right of the first appropriator is recognized as the superior right.[4] And in some states by statute a riparian proprietor is allowed to flow the lands of those above him for manufacturing purposes on making compensation. "Where two or more have an equal right to appropriate, and where the actual appropriation by one necessarily excludes all others, the first in time is the first in right."[5]

As between the adjacent proprietors on the opposite sides of the water-course, or between the upper and lower proprietors, no one of them has a right to the water itself, but each of them has a right to the use of the water as it passes by his estate. And where the water-course divides two estates, each proprietor has a right to the use of the whole bulk of the stream, and neither can carry off or divert any part of it without the consent of the other.[6] Every proprietor of land on a water-course

[1] See Dickinson v. Grand Junction Canal Co., 7 Exch. 282; Burroughs v. Satterlee, 67 Ia. 396; Hale v. McLea, 53 Cal. 578. In Lybe's Appeal, 106 Pa. St. 626, it is held that this rule does not apply where the course of the stream cannot be discovered from the surface.

[2] Hanson v. McCue, 42 Cal. 303; Mosier v. Caldwell, 7 Nev. 363. There is a discussion of the rights in subterranean streams in the case of Willis v. Perry (Ia.), 26 L. R. A. 124, where it was held that one might recover damages for being deprived of the use of a well for usual domestic purposes, by the use for city water supply of another well fed by the same subterranean spring. See, further, *note* to So. Pac. R. Co. v. Dufour, 19 L. R. A. 92.

[3] Dumont v. Kellogg, 29 Mich. 420, and cases cited in opinion and in *note*.

[4] Atchison v. Peterson, 20 Wall. 507; Strait v. Brown, 16 Nev. 317. And see Lux v. Haggin, 69 Cal. 255.

[5] Gould v. Boston Duck Co., 13 Gray, 442, 451. And see Lincoln v. Chadbourne, 56 Me. 197.

[6] Blanchard v. Baker, 8 Me. 253; Vandenburgh v. Van Bergen, 13 Johns. 212; Harding v. Water Co., 41 Conn. 87. And see Moulton v. Newburyport Water Co., 137 Mass. 163.

is, as a general thing, entitled to the enjoyment and use of the stream substantially in its natural flow, subject only to such interruption as is necessary and unavoidable in its reasonable and proper use by other proprietors.[1] The use may be for any purpose whatsoever, within the limits of what is reasonable.[2]

Diversion of water.— The upper proprietor is at liberty to divert the water from its natural channel on his own estate at will, provided he returns it again before it leaves his land and allows it to pass as it naturally would, to those entitled to its use below him.[3] To turn any portion of it into a new channel would be an actionable injury.[4] He may not divert the water even for the purposes of repair of machinery; though a mere detention of the water for that purpose would be lawful, if not under the circumstances unreasonable.[5]

A town or city cannot by purchase of an upper proprietor, or even by legislation, acquire the right to appropriate a water-course for municipal purposes without the consent of the proprietors below, or without first appropriating their interests under the eminent domain.[6]

Reasonable use.— In determining the reasonableness of the use, each case must stand upon its own facts. Among other things may be considered the nature and size of the stream, and the business or purposes to which it is made subservient. And it is necessary to take into account not only the general customs of the country, but also any local customs along the stream. Such general rules should be laid down as appear best calculated to secure the entire water of the stream to useful purposes.[7]

[1] When a stream is divided by an island into two distinct channels, the owner of each shore is entitled to so much of the water as naturally flows through the channel running by his land, and no more. Warren v. Westbrook Mfg. Co., 86 Me. 32, 26 L. R. A. 284, and *note*.

[2] See Wright v. Howard, 1 Sim. & Stu. 190; Miller v. Miller, 9 Pa. St. 74; Arnold v. Foot, 12 Wend. 330; Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526.

[3] Tolle v. Correth, 31 Tex. 362; Merritt v. Brinkerhoff, 17 Johns. 306; Porter v. Durham, 74 N. C. 767.

[4] Harding v. Stamford Water Co., 41 Conn. 87; Weiss v. Oregon, etc. Co., 13 Oreg. 496.

[5] Davis v. Getchell, 50 Me. 602.

[6] Wilts, etc. Canal Co. v. Swindon Water-works Co., L. R. 9 Ch. App. 451; Emporia v. Soden, 25 Kan. 588. But a corporation for the improvement of navigation may divert navigable water from a riparian owner. Black River, etc. Co. v. La Crosse, etc. Co., 54 Wis. 659.

[7] Keeney, etc. Mfg. Co. v. Union Mfg. Co., 39 Conn. 576. See further on this point, Davis v. Winslow, 51

Detention of the water.— While it is the general rule that each riparian proprietor is entitled to the steady flow of the stream according to its natural course, yet it is lawful to gather the water into reservoirs, where this is done in good faith,[1] for a useful purpose, and with as little interference with the rights of other proprietors as is reasonably practicable under the circumstances.[2] It is an unreasonable detention of the water to gather it into reservoirs for future use in a dry season, or for the purpose of obtaining a greater supply than the stream affords by its natural flow in ordinary stages.[3] But it is not unreasonable to detain the surplus water not used in a wet season and discharge it in proper quantities for use in a dry season.[4]

Diminution of the water.—While the lower proprietor is entitled to have the stream flow to him in undiminished volume, yet a proprietor may lawfully withdraw from it whatever may be necessary to supply the wants of his family or of his domestic animals, and also for irrigation, manufacturing and other useful purposes, provided what he withdraws does not essentially diminish the volume to the prejudice of those below him.[5]

Flooding lands.— At the common law the owner has no right, by dams or otherwise, to cause the water of a stream passing through his land to set back upon the lands of the proprietor above. Every proprietor may, if necessary, cross his line to keep the channel open.[6] Any act of his which raises the water in the stream above his estate is presumptively damaging, and therefore actionable.[7] It is actionable also because, if persisted in without objection, it might, in the lapse of time,

Me. 264; Holden v. Lake Co., 53 N. H. 552; Pool v. Lewis, 41 Ga. 162, 5 Am. Rep. 526; Dumont v. Kellogg, 29 Mich. 420.

[1] Hoy v. Sterrett, 2 Watts, 327.

[2] Clinton v. Myers, 46 N. Y. 511, 7 Am. Rep. 373; Pitts v. Lancaster Mills, 13 Met. 156; Platt v. Johnson, 15 Johns. 213.

[3] Clinton v. Myers, *supra;* Timm v. Bear, 29 Wis. 254. And see Thunder Bay, etc. Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184.

[4] Oregon Iron Co. v. Trullenger, 3 Oreg. 1.

[5] Chasemore v. Richards, 2 H. & N. 168; Gillett v. Johnson, 30 Conn. 180; Bliss v. Kennedy, 43 Ill. 68. Water for locomotives may not be taken if the flow is sensibly diminished. Garwood v. New York, etc. R. Co., 83 N. Y. 400; Pennsylvania R. Co. v. Miller, 112 Pa. St. 34.

[6] Prescott v. Williams, 5 Met. 429.

[7] Pixley v. Clark, 35 N. Y. 520; Munroe v. Gates, 48 Me. 463; Plinzy v. Augusta, 47 Ga. 260; Amoskeag Mfg. Co. v. Goodale, 46 N. H. 531; Mississippi Cent. R. Co. v. Caruth, 51 Miss. 77.

establish permanent rights by prescription.[1] Any showing of actual damage is therefore unnecessary to the maintenance of the action.[2] But in aid of manufactures, as has been said, parties are allowed by statute, in some states, to flow the lands of others for the purpose of obtaining power, on making compensation.[3]

All the foregoing principles are as much applicable to municipal corporations in their dealings with water-courses as to individuals.[4]

Fouling the water of streams.— It has been said that whether the use of a stream to carry off the waste from a manufactory is reasonable or not is a question of fact for the jury, depending upon the circumstances of the particular case.[5] In *Wood v. Waud* the ground of complaint was that the defendant fouled the water of a stream, to the prejudice of lower riparian proprietors, by pouring into it soap-suds, etc. It was answered that the plaintiffs received no actual damage because the stream was already so polluted by similar acts of mill-owners that the wrongful act complained of made no practical difference. But it was held that the plaintiffs had received damage in point of law.[6] "Every owner of land through which a stream of water flows is entitled to the use and enjoyment of the water and to have the same flow in its natural and accustomed course, without obstruction, diversion or pollution. The right extends to the *quality* as well as to the quantity of the water."[7] But to the general principle thus declared there may be exceptions.

[1] Mississippi Cent. R. Co. v. Mason, 51 Miss. 234.

[2] See ch. III, p. 20.

[3] See Cooley, Const. Lim. 666.

[4] Haynes v. Burlington, 38 Vt. 350; Sprague v. Worcester, 13 Gray, 193; Helena v. Thompson, 29 Ark. 569.

[5] Such as the size and character of the stream, the extent of the pollution, the benefit to the manufacturer, and the injury to others. Hayes v. Waldron, 44 N. H. 580.

[6] 3 Exch. 748.

[7] Robb v. Carnegie Bros. & Co., 145 Pa. St. 324, 14 L. R. A. 329; Drake v. Lady Ensley, etc. Co. (Ala.), 24 L. R. A. 64; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335, 342. See, also, Richmond Mfg. Co. v. Atlantic Delaine Co., 10 R. I. 106; Silver Spring, etc. Co. v. Wansknok Co., 13 R. I. 611. See Columbus & Hocking, etc. Co. v. Tucker, 48 Ohio St. 41, 12 L. R. A. 577; Barton v. Union Cattle Co., 28 Neb. 350, 7 L. R. A. 457. A municipal corporation is liable for the pollution of a stream by sewerage and filthy matter flowing through drains which it has constructed, from which injury results to a land-owner, through whose premises the stream flows. Chapman v. Rochester, 110 N. Y. 273, 1 L. R. A. 296.

A very large proportion of the value of all the streams in the country would be sunk and lost if mills might not be erected upon them because some taint to the water was inevitable to it from their use. It would therefore seem that there may be some change in the natural condition of the water without legal wrong, and the question of how much and what shall constitute legal wrong must be a question of what under the circumstances is a reasonable use. "An extent of deposit which might be of no account in some streams might seriously affect the usefulness of others. So, too, a kind of deposit which would affect one stream seriously would be of little importance in another. There is no doubt one must be allowed to use a stream in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below."[1]

Negligent fires.—Fire may be employed lawfully for all the purposes of life for which it is useful, and also for amusement upon one's premises, subject only to the condition of due care. But due care is a degree of care corresponding to the danger, and requires circumspection, not only as to time and place of starting it, but in protecting against its spread afterwards. "The time may be suitable and the manner prudent, and yet if one be guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done."[2] The burden is upon the plaintiff to show that the injury is to be imputed to the negligence or misconduct of the defendant or his servants, and this part of the case is made out by showing that the fire was kindled when and where it would be likely to spread as it did, or pass beyond control, or that it was left without proper care afterwards.[3] A case of spontaneous combustion may be one of negligent fire if ignition was reasonably to be looked for.[4] It is immaterial whether the fire spreads by

[1] Redfield, C. J., in Snow v. Parsons, 28 Vt. 459, 462. See to the same effect, Hayes v. Waldron, 44 N. H. 580, 585; Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592. See further, Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126; Gladfelter v. Walker, 40 Md. 1.

[2] Hewey v. Nourse, 54 Me. 256. And see Louisville, etc. R. Co. v. Nitsche, 176 Ind. 229, 9 L. R. A. 750; Brown v. Brooks, 85 Wis. 290, 21 L. R. A. 255, and *note*.

[3] Higgins v. Dewey, 107 Mass. 494, 9 Am. Rep. 63. And see Read v. Penn. R. Co., 44 N. J. L. 280.

[4] Vaughan v. Menlove, 3 Bing. N. C. 468.

running along the ground or by sparks or brands being carried through the air by the wind.[1]

The setting of fires under certain circumstances is sometimes prohibited by statute because of the great danger of injurious consequences. Whoever sets a fire thus prohibited must take all the consequences.[2]

Fires communicated by machinery.— Where the use of steam machinery is lawful, the principles already mentioned apply. If fires are kindled by sparks or otherwise in the use of it, no action lies unless negligence appears.[3] But it is negligence if those employing such machinery fail to make use of approved appliances for arresting sparks, or if the machinery, by reason of being unsuitable or out of order, is likely to scatter fire.[4] The fact that fire has been communicated by railroad engines to the premises of individuals is sufficient to make out a *prima facie* case of negligence.[5] Still, as the business itself is lawful, all that can be required is that it be managed with a care proportionate to its risks.[6] In some states statutes exist which either render railroad companies responsible for all injuries by fire originating with their engines,[7] or which expressly impose upon them the burden of showing that the fire originated without negligence on their part.[8]

It is held to be negligent in a railroad company to leave grass and other combustibles lying along the track where they

[1] Higgins v. Dewey, *supra.*

[2] Burton v. McClellan, 3 Ill. 434.

[3] Borroughs v. Housatonic, etc. R. Co., 15 Conn. 124; Hoyt v. Jeffers, 30 Mich. 181; Mobile, etc. R. Co. v. Gray, 62 Miss. 383.

[4] Ill. Cent. R. Co. v. McClelland, 42 Ill. 355; Toledo, etc. R. Co. v. Corn, 71 Ill. 493. After it is shown that fire originated from sparks from a locomotive, the burden of proof of establishing that the appliances in use at the time were of the best pattern is upon the company. White v. C., M. & St. P. R. Co., 1 S. Dak. 326, 9 L. R. A. 825.

[5] Miller v. St. Louis, etc. R. Co., 90 Mo. 389; Spaulding v. Chicago, etc. R. Co., 30 Wis. 110.

[6] Mich. Cent. R. Co. v. Coleman, 28 Mich. 440; Frankford, etc. Co. v. Phila. etc. R. Co., 54 Pa. St. 345; Marvin v. C., M. & St. P. Ry. Co., 79 Wis. 140, 11 L. R. A. 506, and *note.* In the case of fire used for manufacturing purposes, the manufacturer is not liable for damages caused by its escape unless negligence on his part is shown. Day v. Akeley Lumber Co., 54 Minn. 522, 23 L. R. A. 512.

[7] Such statutes are held constitutional. Matthews v. St. Louis, etc. R. Co., 121 Mo. 298, 25 L. R. A. 161, and *note.*

[8] See Perley v. East. R. Co., 98 Mass. 414; Stearns v. Atl. etc. R. Co., 46 Me. 95; Rowell v. Railroad, 57 N. H. 132; G. T. R. Co. v. Richardson, 91 U. S. 454.

are peculiarly liable to take fire by falling sparks or coals.[1] The rules of contributory negligence apply here as in other cases; but the fact that the neighboring land-owner leaves grass and other combustibles on his premises near the road does not render him chargeable with contributory negligence, the obligation of care to prevent fires resting not upon him but upon the company.[2]

Injuries by fire-arms and explosives.— When one makes use of loaded weapons, he is responsible only as he might be for any negligent handling of dangerous machinery; that is to say, for a care proportionate to the danger of injury from it.[3] The firing of guns for sport or exercise is not unlawful if a suitable place is chosen for the purpose; but in the streets of a city, or in any place where many persons are congregated, it might be negligence in itself.[4] An injury by a young child with a loaded gun placed in its hands negligently by another is the wrong of the person putting it in his hands.[5]

If one deliver to a carrier explosive articles for transportation without disclosing what they are, he will be responsible to parties injured if an explosion take place.[6] So if he put articles in the trade for a certain use in which they would be dangerous,[7] or sell poisonous drugs wrongly labeled, or labeled as being innocent.[8]

Removing lateral support.— The right to lateral support by adjoining land exists independent of contract; and to remove it,

[1] Flynn v. San Francisco, etc. R. Co., 40 Cal. 14; Ohio, etc. R. Co. v. Clutter, 82 Ill. 123; Jones v. Mich. Cent. R. Co., 59 Mich. 165.

[2] Flynn v. San Francisco, etc. R. Co., *supra;* Jacksonville, etc. Co. v. Peninsular Land, etc. Co., 27 Fla. 157, 17 L. R. A. 33. Failure to try to put out a fire after hearing of it will not prevent recovery for damage done before. Stebbins v. Cent. Vt. R. Co., 54 Vt. 464.

[3] Underwood v. Hewson, Stra. 596; Chataigne v. Bergeron, 10 La. Ann. 699. A higher degree of care and vigilance is required in dealing with a dangerous agency than in the ordinary affairs of life or business. Every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. Koelsch v. Phila. Co., 152 Pa. St. 355, 18 L. R. A. 759. The note to this case mentions various things held to be dangerous agencies.

[4] See Conklin v. Thompson, 29 Barb. 218; Welch v. Durand, 36 Conn. 182; Spier v. Brooklyn, 139 N. Y. 6, 21 L. R. A. 641.

[5] Dixon v. Bell, 5 M. & S. 198.

[6] Williams v. East India Co., 3 East, 192; Carter v. Towne, 98 Mass. 567.

[7] Wellington v. Downer, etc. Co., 104 Mass. 64.

[8] Loop v. Litchfield, 42 N. Y. 351; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298.

or to do anything which endangers it, is to commit a nuisance.[1] Whoever, in the course of improvements on his own land, may have occasion to make excavations which endanger the land of his neighbor, must supply walls or other sufficient substitute for the support that he removes; but his obligation is limited to the support of the land in its natural condition, and in removing collateral support from land weighted with buildings or other burdens, he is responsible for such consequences only as would have followed if the land had not been thus weighted.[2] The case, however, is one in which the obligation of care for the protection of the neighbor's interest is imposed; and before proceeding to remove collateral support he should give reasonable notice of his intention, that the owner of the dominant tenement may have the opportunity to provide against any threatened danger.[3] He will also be responsible for all the consequences of negligence in making the excavations.[4]

In England the right to collateral support for land weighted with buildings is held to be in the nature of an easement, and may be acquired by prescription.[5] In this country the tendency of the decisions is to repudiate the English doctrine.[6]

Subjacent support.— Where one man owns the surface of a freehold and another owns the subsurface, this is a condition of things which must have had its origin in grants emanating from a common source, and therefore contracts or covenants fixing the respective rights and obligations of the parties are

[1] Thurston v. Hancock, 12 Mass. 220; Baltimore, etc. R. Co. v. Reaney, 42 Md. 117; Guest v. Reynolds, 68 Ill. 478; Wier's Appeal, 81* Pa. St. 203.

[2] Partridge v. Scott, 3 M. & W. 220; Backhouse v. Bonomi, 9 H. L. Cas. 503; Quincy v. Jones, 76 Ill. 231; Moellering v. Evans, 121 Ind. 195, 6 L. R. A. 449. It has been held in a recent case that the value of the building may be recovered if the sliding of the ground is not caused by the weight of the building. Parke v. Seattle, 5 Wash. 1, 20 L. R. A. 68.

[3] Wyeley Canal Co. v. Bradley, 7 East, 368; Brown v. Werner, 40 Md. 15. Failure to give such notice is evidence of want of care. Schultz v. Byers, 24 Vroom, 442, 13 L. R. A. 569, and *note*.

[4] Elliott v. N. E. R. Co., 10 H. L. Cas. 333; Boothby v. Androscoggin, etc. R. Co., 51 Me. 318; Myer v. Hobbs, 57 Ala. 175. As to responsibility of owner for injuries caused by a contractor in this way, see Larson v. Met. R. Co., 110 Mo. 234, 16 L. R. A. 330; Ketcham v. Newman, 141 N. Y. 205, 24 L. R. A. 102.

[5] Washb. on Easements (3d ed.), 547.

[6] See Sullivan v. Zeiner, 98 Cal. 346, 20 L. R. A. 730, and cases cited in *note*.

likely to exist, and these must govern so far as they extend.[1] In the absence of any such contract or covenants the owner of the surface is entitled to support not only for the land itself, but for the buildings erected upon it.[2] The liability of the subsurface owner does not depend upon negligence, but if he removes the natural support he must substitute that which is sufficient to protect the surface; and a custom to work mines without providing such support is unreasonable and void.[3]

Nuisances causing personal discomfort.— A slight degree of inconvenience may be sufficient to render actionable a discomfort wantonly caused from malice or wickedness; but where one complains that something done or suffered by the defendant causes him personal discomfort, the controversy generally extends to considerations of what is a reasonable use of the property of the parties respectively, and what discomforts and inconveniences one can reasonably be required to submit to and endure for the convenience or benefit of his neighbor.

In the case of *St. Helens' Smelting Co. v. Tipping*,[4] it was said by the court that whether anything which discomposes or injuriously affects the senses or the nerves may or may not be denominated a nuisance must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, if they are actually necessary for trade and commerce and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. But the submission that is required from persons living in society, to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circumstances the immediate result of which is sensible injury to the value of the property.[5] Every business

[1] See Smith v. Darby, L. R. 7 Q. B. 716, 3 Moak, 281; Aspden v. Seddon, L. R. 10 Ch. App. 394.

[2] Hext v. Gill, L. R. 7 Ch. App. 699, 3 Moak, 574; Smith v. Thackerah, L. R. 1 C. P. 564.

[3] Humphries v. Brogden, 12 Q. B. 739; Jones v. Wagner, 66 Pa. St. 429, 5 Am. Rep. 385; Horner v. Watson, 79 Pa. St. 242, 21 Am. Rep. 55.

[4] 11 H. L. Cas. 642. And see Huckenstein's Appeal, 70 Pa. St. 102, 10 Am. Rep. 669; Gilbert v. Showerman, 23 Mich. 448; Whitney v. Bartholomew, 21 Conn. 213.

[5] Bohan v. Port Jervis, etc. Co.,

should be carried on in a suitable and convenient place; and by *convenient* is meant, not a place which is convenient for the party himself, looking at his interest merely, but a place suitable and convenient when the interests of others are considered.[1]

In considering what is reasonable under all the circumstances, the unlimited and undisturbed enjoyment which one is entitled to have of his own property must be qualified to this extent: that trifling inconveniences resulting from the useful employment of his neighbor's property must be submitted to when that which is done by the other in point of locality is not unsuitable, and in point of management not unreasonable.[2]

In those cases in which the questions of nuisance or no nuisance are raised in a court of equity, the conclusion of the court to grant or deny relief in the particular cases is not always a guide to a court of law when it comes to pass upon similar facts. A court of equity will decline to grant so severe a remedy as injunction if the case is not clearly and conclusively made out, and will send the plaintiff to a court of law for damages.[3]

Offensive noises.— A dog which disturbs the rest of a community at night by loud and continuous barking, about or in the neighborhood of their residences, may be a nuisance.[4] So the noises of billiard rooms or places which are frequented by persons for drinking and carousing, and disorderly houses of all sorts, while they constitute public nuisances, they also, from their noises and for other reasons, would be nuisances to the neighborhood.[5] And so may the keeping of a noisy livery-

122 N. Y. 18, 9 L. R. A. 711, and cases cited in *note*.

[1] Williams, J., in Bamford v. Turnley, 3 Best & S. 65, 75. See remarks of Holt, J., in Powell v. Bentley, etc. Co., 34 W. Va. 804, 12 L. R. A. 53; Fogarty v. Junction City, etc. Co., 50 Kan. 478, 18 L. R. A. 756; Kinnaird v. Standard Oil Co., 89 Ky. 468, 7 L. R. A. 451.

[2] Gaunt v. Fynney, L. R. 8 Ch. App. 8, 4 Moak, 718; Trulock v. Merte, 72 Iowa, 510. And see opinion of the court in Robb v. Carnegie Bros. & Co., 145 Pa. 324, 14 L. R. A. 329.

[3] Huckenstine's Appeal, 70 Pa. St. 102, 10 Am. Rep. 669; Campbell v. Seaman, 63 N. Y. 568.

[4] Brill v. Flagler, 23 Wend. 354.

[5] See Tanner v. Albion, 5 Hill, 121; People v. Sergeant, 8 Cow. 139; Marsan v. French, 61 Tex. 173. The playing of a piano in a saloon, accompanied by dancing, is a nuisance. Feeney v. Bartoldo (N. J. Eq.), 30 Atl. Rep. 1101.

stable,[1] or any business in which the noises are great and incessant or frequent.[2]

Jar of machinery.— Where manufacturing operations are carried on with heavy machinery in the part of a city mainly occupied by residences, the jar of machinery may constitute a serious nuisance, injurious not to comfort merely but to health.[3]

Nuisance of dust, smoke, etc.— This may be caused in many kinds of business. If the smoke or dust, or both, that arises from one man's premises and passes over and upon those of another, causes perceptible injury to the property, or so pollutes the air as sensibly to impair the enjoyment thereof, it is a nuisance.[4] But the inconvenience must be something more than mere fancy, mere delicacy or fastidiousness. It must materially interfere with the ordinary comfort physically of human existence.[5]

Offensive odors may proceed from a business carried on in an inconvenient place or managed improperly, or from something merely permitted on one's premises from which offensive odors arise. Where they proceed from lawful and proper business, the question of suitableness and reasonableness in point of place and management is almost necessarily presented.[6]

[1] Broder v. Saillard, 2 Ch. Div. 692, 17 Moak, 693; Dargan v. Waddill, 9 Ired. 244. But a livery-stable is not a nuisance *per se*. St. Louis v. Russell, 116 Mo. 248, 20 L. R. A. 721.

[2] McKeon v. See, 51 N. Y. 300; Rhodes v. Dunbar, 57 Pa. St. 274. Each case must be decided on its own facts. See Ballentine v. Webb, 84 Mich. 38, 13 L. R. A. 221. The noise complained of must be such as materially to interfere with and impair the ordinary comfort of existence of people of ordinary sensibility. Powell v. Bentley, etc. Co., 34 W. Va. 804, 12 L. R. A. 53, and *note*. The noises produced by the unloading of coal by machinery into a coal shed situated in a thickly populated residence portion of a town may be a nuisance. Wylie v. Elwood, 134 Ill. 281, 9 L. R. A. 726.

[3] Robinson v. Baugh, 31 Mich. 290; McKeon v. See, 51 N. Y. 300, 10 Am. Rep. 659; Quinn v. Lowell, 140 Mass. 106; Cooper v. Randall, 53 Ill. 24.

[4] Ross v. Butler, 19 N. J. Eq. 294; Rhodes v. Dunbar, 57 Pa. St. 274. And see Norcross v. Thoms, 51 Me. 503; Hyatt v. Myers, 71 N. C. 271; Louisville Coffin Co. v. Warren, 78 Ky. 400; Wylie v. Elwood, 134 Ill. 281, 9 L. R. A. 726.

[5] See Walter v. Selfe, 4 De G. & S. 315, 4 Eng. L. & Eq. 15; Columbus Gas Co. v. Freeland, 12 Ohio St. 392.

[6] "A reasonable use of property can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of existence of those who dwell in the neighborhood." Bohan v. Port Jervis, etc. Co., 122 N. Y. 18, 9 L. R. A. 711, and *note*.

If a business be necessary or useful, it is always presumable that it may be carried on without being a nuisance. But "however ancient, useful or necessary the business may be, if it is so managed as to occasion serious annoyance, injury or inconvenience, the injured party has a remedy."[1] The business of tanning leather is often found to be a nuisance,[2] in part because of offensive smells proceeding from it, and in part from the fouling of streams on which the business is usually carried on. A livery-stable, or a brewery, may or may not be offensive according as it is managed.[3]

Dead animals left unburied are likely to be a nuisance;[4] and a privy may be one if offensive odors arise from it which destroy the comfortable occupation of a neighboring tenement.[5]

Mental disquietude.— In *Owen v. Henman*,[6] where the plaintiff alleged no damage to his property, health, reputation or person, it was held that no action would lie for being disturbed in the hearing of a clergyman and the other exercises of a place of public worship. And this case was approved in a suit brought to restrain a street railway company from running its cars on Sunday, the complainants alleging that they were "deprived of their right of enjoying the Sabbath as a day of rest and religious exercise, free of all disturbance from merely unnecessary and unauthorized worldly employment." The true rule in judging of injuries from alleged nuisances was declared to be "such as naturally and necessarily result to all alike who come within their influence. Not to one on account of peculiar sentiments, feeling or tastes, if it would have no effect on another, or all others, without these peculiar sentiments or tastes. Not to a sectarian, if it would not be to one

[1] Norcross v. Thomas, 51 Me. 503; People v. Detroit White Lead Works, 82 Mich. 471, 9 L. R. A. 722; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 9 L. R. A. 737.

[2] Moore v. Webb, 1 C. B. (N. S.) 673; Francis v. Schoellkopf, 53 N. Y. 152.

[3] Kirkman v. Handy, 11 Humph. 406. The same may be said of a brewery (Jones v. Williams, 11 M. & W. 176), a distillery (Smiths v. McConathy, 11 Mo. 517), and of a slaughter-house. Ballentine v. Webb, 84 Mich. 38, 13 L. R. A. 221.

[4] Ellis v. Kansas C. etc. R. Co., 63 Mo. 131.

[5] Barnes v. Hathorn, 54 Me. 124; Wahle v. Reinbach, 76 Ill. 322. For other illustrations, see Com. v. Perry, 139 Mass. 198; Shively v. Cedar Rapids, etc. R. Co., 74 Iowa 169.

[6] 1 Watts & S. 548.

belonging to no church. It must be something about the effects of which all agree."[1]

If mental disquietude could give a right of action, the question of locality would be of little importance, and one might be specially inconvenienced by a nuisance at a distance as well as by one near him.

As any public evil or disorder, which by statute is declared to be a nuisance, must be held and be deemed to be one, there may be many other statutory nuisances which cannot afford grounds for a private action, for the reason that the only annoyance they could cause to individuals would be such as might be caused by any breach of public order or of good morals.[2]

Inviting one into dangerous places.— One is under no obligation to keep his premises in safe condition for the visits of trespassers; but when he invites others to come upon his premises for any purpose, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.[3] Thus, a railroad company is liable to one who is injured while attempting to cross its track, if invited to cross by a signal indicating that it was safe to do so;[4] and to people who, coming to the station to welcome an arrival, are injured by the giving way of the platform;[5] and to a hack-man doing business with it, who is injured by stepping without fault into a cavity negligently left by it in its platform.[6]

But one is not invited into danger when his entrance upon dangerous premises is simply not opposed or prevented. Thus the owner of a vessel is not liable to a servant employed on it, who, in wandering about the vessel from curiosity, falls through

[1] Thompson, J., in Sparhawk v. Union Pass. R. Co., 54 Pa. St. 401, 427.

[2] City or town councils can punish as nuisances only what are declared such at the common law or by statute. Yates v. Milwaukee, 10 Wall. 497; Everett v. Council Bluffs, 46 Iowa, 66.

[3] See Southcote v. Stanley, 1 H. & N. 247, 38 Eng. L. & Eq. 295; Francis v. Cockrell, L. R. 5 Q. B. 184; Elliott v. Pray, 10 Allen, 378; Harriman v. Pittsburgh, etc. R. Co., 45 Ohio St. 11. Further, see opinion of court in Bright v. Barnett, etc. Co., 88 Wis. 299, 26 L. R. A. 524.

[4] Sweeny v. Old Colony R. Co., 10 Allen, 368.

[5] Gillis v. Pa. R. Co., 59 Pa. St. 129; Hamilton v. Texas, etc. R. Co., 64 Tex. 251.

[6] Tobin v. Portland, etc. R. Co., 59 Me. 183. If the appearance of premises points out a certain space as the mode of approach, that space must be kept safe. Learoyd v. Godfrey, 138 Mass. 315.

a scuttle.[1] And one who publicly exposes a machine on market-day is not responsible for injuries to boys who meddle with it without permission.[2] The liability in any such case must spring from negligence; and therefore if the injury arises from some danger not known to the owner, and not open to observation, he is not responsible, because he is not in fault.[3]

The duty in all such cases must, in general, pertain to occupancy, not to ownership;[4] but sometimes it is assumed by others. Thus if a landlord, by his covenants with tenants, assumes the obligation of repairs, he is responsible for any injuries consequent upon his failure to make them, not to the tenants merely, but to third persons lawfully coming upon the premises.[5]

Nuisances which threaten calamity.— Many things are nuisances because they threaten calamity to the persons or property of others, and thereby cause injury, though the calamity feared may never befall. In such cases the party injured or endangered need not wait for the calamity to happen, but may bring suit at once and take proceedings for abating the nuisance. The blasting of rocks sufficiently near the dwellings of others to endanger them is a nuisance of this sort;[6] and so is powder or any other dangerous explosive stored and imperfectly guarded in the vicinity of residences;[7] and a building so negligently constructed, or so greatly decayed, that it is likely to fall upon an adjoining tenement, or on persons lawfully making use of easements near it.[8]

[1] Severy v. Nickerson, 120 Mass. 306. See for cases where the same principle is applied, Pierce v. Whitcomb, 48 Vt. 127, 21 Am. Rep. 120.

For other illustrations of the text, see Hargreaves v. Deacon, 25 Mich. 1; Klix v. Nieman, 68 Wis. 271; Schmidt v. Kansas City, etc. Co., 90 Mo. 284.

The owner is not liable, however frequently his premises are used by them for their own convenience, unless he leads them to believe a way is intended to be created there for travelers. Evansville, etc. R. Co. v. Griffin, 100 Ind. 221.

[2] Mangan v. Atterton, L. R. 1 Exch. 239.

[3] See Malone v. Hathaway, 64 N. Y. 5, 21 Am. Rep. 573.

[4] Rich v. Basterfield, 4 M., G. & S. 783.

[5] Campbell v. Sugar Co., 62 Me. 552; Burdick v. Cheadle, 26 Ohio St. 393, 20 Am. Rep. 767.

[6] Scott v. Bay, 3 Md. 431; Colton v. Onderdonk, 69 Cal. 155.

[7] Myers v. Malcolm, 6 Hill, 292; Emory v. Hazard Powder Co., 22 S. C. 476.

[8] Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530.

Diseased beasts.—Domestic animals which have an infectious or contagious disease become a nuisance when the care and management of them by the owner is such as to expose the domestic animals of others to the infection or contagion,[1] or when they are sold to be put with others, to one who is not informed of their condition.[2] The question of liability is one of negligence and of the want of good faith.[3]

Responsibility for nuisances.—A party is responsible for a nuisance on the ground, either, first, that he purposely or negligently created it; or second, that he continues it. Distinct parties may be equally liable, one perhaps for the positive wrong of creating, and the other for the negative wrong of failing to abate.

In general that party only is responsible for the continuance of a nuisance who has possession and control where it is, and upon whom, therefore, the obligation to remove seems properly to rest. As between landlord and tenant, then, the party presumptively responsible is the tenant.[4] But there are many cases in which the party out of possession is, either in part or exclusively, the party in fault. Thus, if the owner of lands, through which a water-course runs, erects a dam across it which sets the water back upon the proprietor above, and then leases the land with the nuisance upon it, he gives with the lease implied permission for the lessee to keep up the dam, and he thus becomes a participant with the lessee in the wrong while the dam is maintained as it was when he gave the tenant possession.[5] It has been held to be otherwise, however, where the landlord requires the lessee to covenant to keep the premises in repair, and the injury is one which, though attributable to the condition of the premises when the landlord delivered possession, might have been avoided by care on the part of the tenant.[6] In order to render a landlord liable in a case of this sort, there must be some evidence that he author-

[1] Mills v. N. Y. etc. R. Co., 2 Rob. 326; affirmed, 41 N Y. 619, *note*.

[2] Mullett v. Mason, L. R. 1 C. P. 559.

[3] See Kemmish v. Ball, 30 Fed. Rep. 759; Bradford v. Floyd, 80 Mo. 207; Hawks v. Locke, 139 Mass. 205.

[4] Todd v. Flight, 9 C. B. (N. S.) 377; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295.

[5] Roswell v. Prior, 12 Mod. 635, 2 Salk. 460; Helwig v. Jordan, 53 Ind. 21, 21 Am. Rep. 189. And see Grady v. Wolsner, 46 Ala. 381.

[6] Leonard v. Storer, 115 Mass. 86, 15 Am. Rep. 76.

ized the continuance of the nuisance. That he assumed the obligation to repair the premises might be a circumstance to show that he authorized this continuance. But the mere letting of a house with a chimney in it, which the owner has constructed, does not render him responsible for a nuisance caused to the occupant of an adjoining tenement by the smoke issuing from the chimney from fires built by his tenant.[1]

The fact that the party erecting a nuisance remains responsible for its continuance does not excuse the actual possessor. The continuance, and every use of that which is in its direction a nuisance, is a new nuisance.[2] And persons may be liable for the continuance of a nuisance who have created it on the land of another, even though they have no right to enter to abate it.[3]

A party who comes into possession of lands as grantee or lessee with a nuisance already existing upon it is not in general liable for the continuance of the nuisance until his attention has been called to it, and he has been requested to abate it.[4] But if one has already been notified to remove the nuisance, and the party giving notice then sells to another, his alienee may sue without giving notice himself.[5] And notice is not necessary in any case where the alienee is chargeable with some personal duty or obligation cast upon him by law; or where the nuisance is immediately dangerous to life or health.[6]

A mere agent or servant is not liable for the continuance of a nuisance on the land of his master or employer,[7] unless he is guilty of some distinct wrongful act, or of personal negligence from which injury flows.[8]

The complainant.— The party who at the time suffers the inconvenience of a nuisance is entitled to complain of it, and it is immaterial whether it was or was not a nuisance to him in its origin. It is of no importance to the right of action that

[1] Rich v. Basterfield, 4 M., G. & S. 783.

[2] Nichols v. Boston, 98 Mass. 39; Clancey v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391; Pillsbury v. Moore, 44 Me. 154.

[3] Thompson v. Gibson, 7 M. & W. 456. And see Gray v. Boston, etc. Co., 114 Mass. 149, 19 Am. Rep. 324.

[4] See Johnson v. Lewis, 13 Conn. 307; Eastman v. Amoskeag Co., 44 N. H. 143; Conhocton Stone Rd. v. Buffalo, etc. R. Co., 51 N. Y. 573, 10 Am. Rep. 646.

[5] Caldwell v. Gale, 11 Mich. 77.

[6] Jones v. Williams, 11 M. & W. 177; Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603.

[7] Brown Paper Co. v. Dean, 123 Mass. 267.

[8] Carleton v. Redington, 21 N. H. 291; Brown v. Lent, 20 Vt. 529.

the plaintiff has come into the neighborhood since the nuisance was created. If a grantor could have complained when he conveyed, the grantee may complain afterwards. But it is doubtful if a court of equity would relieve by injunction one who should purchase an estate in the neighborhood of a nuisance for the express purpose of litigation. Undoubtedly such a party would have a right to a remedy in damages.[1]

No lapse of time can confer the right to maintain a nuisance as against the state;[2] but where a nuisance is purely private, and concerns only the one person or the few who are injured, its maintenance for the period of prescription without interruption will bar any subsequent suit.[3] Whether the right to maintain a public nuisance, as against those to whom it works especial and peculiar injury, can be gained by a lapse of time, may possibly be open to some question. Without discussing the matter here, it is sufficient to say that the better doctrine seems to be that the acquisition of rights by prescription can have nothing to do with the case of public nuisances, either when the state or when individuals complain of them.[4]

Private injury from public nuisance.— When the complaint is that the plaintiff has been injured in respect to his right to enjoy in common with all others some public easement or privilege, it becomes necessary for him to show both that the public easement or privilege exists, and that he has been hindered or obstructed in the common right to enjoy it.[5]

[1] Edwards v. Allouez Min. Co., 38 Mich. 46.

[2] United States v. Hoar, 2 Mason, 311; State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737; State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513; Driggs v. Phillips, 103 N. Y. 77; Inhabitants of Charlotte v. Pembroke Iron Works, 82 Me. 391, 8 L. R. A. 828. And see a discussion of the subject and numerous illustrations cited in note to this last case.

[3] Elliotson v. Feeltham, 2 Bing. N. C. 134; Crosby v. Bessey, 49 Me. 539.

[4] See Meiners v. Fred'k Miller Brewing Co., 78 Wis. 364, 10 L. R. A. 586; Weld v. Hornby, 7 East, 195; Knox v. Chaloner, 42 Me. 150; Kellogg v. Thompson, 66 N. Y. 88; Woodruff v. North Bloomfield, etc. Co., 18 Fed. Rep. 753, 788. It is held in New Salem v. Eagle Mills Co., 138 Mass. 8, that while a private nuisance may be prescribed for, though it is a public nuisance as well, yet a public nuisance from which special injury is suffered may not be.

[5] It is necessary to show both, because the public wrong must be redressed at the suit of the state, and the fact that a public wrong is suffered creates no presumption of individual injury. Brown v. Perkins, 12 Gray, 89; Gerrish v. Brown, 51 Me. 256. See *ante*, ch. III, p. 16.

But it being found that a public easement exists, if it then appears that what is complained of has been authorized by the state, no action can be maintained on the assumption that what is thus allowed is a public nuisance.[1] The state having in some form provided for and created a certain easement may at its will abandon it or change it to some other easement, or restrict or enlarge the use of it, and generally do with the creature of its authority what it pleases. A common highway may thus be qualified by the laying of a railway track upon it;[2] or a navigable stream may be bridged or dammed.[3]

But while the state may restrict its own right, it cannot restrict or take away rights which are purely individual, even though they are intimately associated with the public right.[4] No regulation of the right of navigation can lawfully take from the riparian proprietor his water front, and the right to make use of it for the purposes of navigation;[5] nor can any special privilege which is conferred to make use of public waters empower the beneficiaries to flood the lands of individuals.[6]

Objects in the highway which do not prevent passage, but render it dangerous from a tendency to frighten horses, are nuisances.[7] But when the object is something employed to facilitate traffic or travel on the highway, the question whether it is a nuisance cannot be determined on the single consideration of its tendency to frighten horses of even ordinary gentleness.

Street railways, and elevated roads using steam power, are

[1] Danville, etc. R. Co. v. Com., 73 Pa. St. 29. And see Everett v. Marquette, 53 Mich. 450.

[2] Danville, etc. R. Co., *supra;* Randle v. Pac. R. Co., 65 Mo. 325; Chicago, etc. Co. v. Loeb, 118 Ill. 203.

[3] Arimond v. Green Bay, etc. Co., 31 Wis. 316; Lee v. Pembroke Iron Co., 57 Me. 481.

[4] See Aldworth v. Lynn, 153 Mass. 53, 10 L. R. A. 210, and cases cited in *note.* The statutory authority which will justify an injury to private property and afford immunity for acts which would otherwise be a nuisance must be express, or must be a clear and unquestionable implication from powers expressly conferred. Bohan v. Port Jervis, etc. Co., 122 N. Y. 18, 9 L. R. A. 711; Morton v. New York, 140 N. Y. 207, 23 L. R. A. 241.

[5] Ryan v. Brown, 18 Mich. 196.

[6] Trenton Water Power Co. v. Raff, 36 N. J. 335; Muskegon Booming Co. v. Evart Booming Co., 34 Mich. 462; Brown v. Dean, 123 Mass. 254.

[7] See Ayer v. Norwich, 39 Conn. 376, 12 Am. Rep. 396; Brownell v. Troy, etc. R. Co., 55 Vt. 218; Wabash, etc. R. Co. v. Farver, 111 Ind. 195; Agnew v. Corunna, 55 Mich. 428.

not nuisances, but if injury occurs from their use the question presented is whether, under all the circumstances, there is fault imputable to some one, and, if so, who should be held accountable for it.[1]

What is a special injury.— In general, to entitle an individual to an action, it is sufficient that he suffer some peculiar injury differing from that suffered by the community at large.[2] The public nuisance of an offensive mill-dam is a special and peculiar injury to the man whose residence is near it and the comfort of whose home is destroyed thereby. To entitle him to redress, plaintiff need only show how he has been injured by the nuisance, and distinguish his injury from that suffered by the public at large.[3] If one's premises are situated upon public navigable water, whatever obstruction in the stream tends specially to interfere with his access to the water is an actionable injury.[4] And it is a special injury to the plaintiff, if, having occasion to pass along a navigable stream, he finds a barge moored across it which prevents his boat passing.[5]

Continuity of the wrong.— A nuisance continued is a fresh nuisance every day it is suffered to remain unabated; and new suits for the damage caused by its continuance may be brought from day to day.[6]

[1] Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522, and *note*. Water-tanks erected in a street under the authority of the municipality, to facilitate the work of the owner in sprinkling the street, are not nuisances *per se*. Savage v. Salem, 23 Oreg. 381, 24 L. R. A. 787.

[2] See Haggart v. Stehlin, 137 Ind. 43, 22 L. R. A. 577; Venard v. Cross, 8 Kan. 248; Green v. Nunnemacher, 36 Wis. 50; McDonald v. Newark, 42 N. J. Eq. 136. The difference must be in kind, not merely in degree. East St. Louis v. O'Flynn, 119 Ill. 200. But unless he has sustained some special or particular damage apart from the common injury, he is not entitled to maintain an action. Long v. Minneapolis (Minn.), 63 N. W. Rep. 174.

[3] See Stetson v. Faxon, 19 Pick. 147; Platt v. Chicago, etc. R. Co., 74 Iowa, 127; Schulte v. N. P. T. Co., 50 Cal. 592; Patterson v. Det. etc. R. Co., 56 Mich. 172.

[4] Dobson v. Blackmore, 9 Q. B. 991; Larson v. Furlong, 63 Wis. 323; Wood v. Esson, 9 Can. S. C. Rep. 239.

[5] Rose v. Miles, 4 M. & S. 101. Or a boom. Dudley v. Kennedy, 63 Me. 465; Gifford v. McArthur, 55 Mich. 535. And though certain coal-sheds on a railway company's right of way may be a public nuisance, a private individual may maintain an action for the damages sustained by him through coal dust falling upon food, clothing and furniture in his house. Wylie v. Elwood, 134 Ill. 281, 9 L. R. A. 726.

[6] Shadwell v. Hutchinson, 4 C. & P. 333; Queen v. Waterhouse, L. R. 7 Q. B. 545; Reid v. Atlanta, 73 Ga.

Nuisances by municipal corporations.— More often than otherwise the wrongs for which municipal corporations may be responsible are in the nature of nuisances.

Municipal corporations are to be considered: first, as parts of the governmental machinery of the state, legislating for their corporators, and planning and providing for the customary local conveniences for their people; second, as corporate bodies executing their plans through proper agencies, and discharging such duties as they have imposed upon themselves or as the state has imposed on them; and third, as artificial persons owning and managing property. In this last capacity they are chargeable with all the duties and obligations of other owners of property, and must respond for creating or suffering nuisances under the same rules which govern the responsibility of natural persons.[1]

The powers of municipal corporations being conferred for public purposes, to be exercised within prescribed limits at discretion for the public good, they are not liable in damages to individuals for taking or neglecting to take strictly governmental action. One shows no ground of action whatever when he complains that he has suffered damage because the city he resides in has made insufficient provision for protection against fire,[2] or because provision is not made for lighting the streets,[3] or because the drains which it orders and constructs are insufficient to carry off the surface water.[4] And a municipal corporation is not responsible for the failure of its officers to discharge properly and effectually their official duties; for in respect to these, the officers are not properly the servants or agents of the corporation, but act upon their own official responsibility, except as they may be specially directed by the corporate authority.[5] And it is responsible for the destruction of property by a mob only when expressly made so by statute.[6]

523; Mahon v. N. Y. C. R. Co., 24 N. Y. 658; Colrick v. Swinburne, 105 N. Y. 503; Valparaiso v. Moffitt (Ind. App.), 39 N. E. Rep. 909.

[1] See Clark v. Peckham, 9 R. I. 455; Rowland v. Kalamazoo Supt's, 49 Mich. 553; Moulton v. Scarborough, 71 Me. 267.

[2] Davis v. Montgomery, 51 Ala. 139, 23 Am. Rep. 545.

[3] Freeport v. Isbell, 83 Ill. 440.

[4] See Roberts v. Chicgao, 26 Ill. 249.

[5] Barney v. Lowell, 98 Mass. 570; Hayes v. Oshkosh, 33 Wis. 314, 14 Am. Rep. 76; Wakefield v. Newport, 60 N. H. 374; Robinson v. Rohr, 73 Wis. 436, 2 L. R. A. 366; O'Rourk v. Sioux Falls, 4 S. D. 47, 19 L. R. A. 789.

[6] West. College v. Cleveland, 12

But municipal corporations are responsible for due care in the execution of any work ordered by them,[1] and if the work is one for the special benefit of its own people, it must not negligently be allowed to get out of repair to the injury of individuals.[2]

Public ways being for the use of all the people of the state, the duty which municipal corporations owe to keep in repair the public ways within their limits is a duty to the state. And therefore, except as the liability is expressly imposed by statute, a municipal corporation is not liable to an individual for neglect to keep a highway in repair whereby he suffers injury.[3]

Statutes rendering towns liable for defects in highways are generally held to include defects in sidewalks also.[4]

In this country, when a town is incorporated and is given control over the streets and walks within its corporate limits, and is empowered to provide the means to make and repair them, the corporation not only assumes this duty, but by implication agrees to perform it for the benefit and protection of all who may have occasion to make use of these public easements, and for any failure in the discharge of this duty the corporation is responsible to the party injured.[5] This rule applies to injuries sustained in consequence of defects in sidewalks.[6] Imposing and making the duty of making and keeping

Ohio St. 375. For a discussion of the question in various phases, and references to the statutes of various states, and decisions thereunder, see Gianfortone v. New Orleans, 61 Fed. Rep. 64, 24 L. R. A. 592, and *note*.

[1] Detroit v. Carey, 9 Mich. 165; Suffolk v. Parker, 79 Va. 660; Hardy v. Brooklyn, 90 N. Y. 435.

[2] See Gilman v. Laconia, 55 N. H. 130, 20 Am. Rep. 175; Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Vanderslice v. Philadelphia, 103 Pa. St. 102.

[3] Russell v. Men of Devon, 2 T. R. 667; Perry v. John, 79 Pa. St. 412; Frazer v. Lewiston, 76 Me. 531; Peters v. Fergus Falls, 35 Minn. 549; Bates v. Rutland, 62 Vt. 178, 9 L. R. A. 363; Templeton v. Linn County, 22 Oreg. 313, 15 L. R. A. 730. For cases decided under statutes expressly imposing the liability upon towns, see Philbrick v. Pittston, 63 Me. 477; Ayer v. Norwich, 39 Conn. 376, 12 Am. Rep. 396; Agnew v. Corunna, 55 Mich. 428; Houfe v. Fulton, 29 Wis. 296, 9 Am. Rep. 568.

[4] Bacon v. Boston, 3 Cush. 174; Coombs v. Purrington, 42 Me. 332; Loan v. Boston, 106 Mass. 450; Providence v. Clapp, 17 How. 161.

[5] Burns v. Bradford, 137 Pa. St. 361, 11 L. R. A. 726; Manchester v. Ericsson, 105 U. S. 347; Nelson v. Canisteo, 100 N. Y. 89; Gibson v. Huntington, 38 W. Va. 177, 22 L. R. A. 561, and *note*. See *contra*, Detroit v. Blackeby, 21 Mich. 84; Young v. Charleston, 20 S. C. 116.

[6] Quincy v. Barker, 81 Ill. 300; Davenport v. Ruckman, 37 N. Y. 568; Dotton v. Albion, 50 Mich. 129.

the sidewalks in repair upon the adjoining owners does not relieve the city itself from responsibility to perform the duty imposed upon it by law; and if the duty fails in performance, the city and the individuals in default may be united in a suit for the injury caused by the nuisance.[1]

Obstructions consequent on the repair of streets create no liability if there is no negligence.[2]

Individual liability for defects in streets.— If an individual, whether the adjoining owner or not, and whether the fee in the public way is in himself or in the public, does any act which renders the use of the street hazardous or less secure than it was left by the proper public authorities, he commits a nuisance and is liable to any person who, while exercising due care, is injured in consequence.[3] If, however, he has the consent of the proper public authorities, and what he does is consistent with the customary use of the way for private purposes, and he observes a degree of care proportioned to the danger, he cannot be held responsible for accidental injuries, inasmuch as in such case he has failed in the observance of no duty. The question in all such cases is one of due and proper care.[4]

[1] Davenport v. Ruckman, *supra*. See Rochester v. Campbell, 123 N. Y. 405, 10 L. R. A. 393. See Fife v. Oshkosh, 89 Wis. 540.

[2] Kimball v. Bath, 38 Me. 219.

[3] Durant v. Palmer, 29 N. J. 544; Calder v. Smalley, 66 Iowa, 219; Pfau v. Reynolds, 53 Ill. 212; Cohen v. New York, 113 N. Y. 532, 4 L. R. A. 406.

[4] Ottumwa v. Parks, 43 Iowa, 119; Portland v. Richardson, 54 Me. 46.

CHAPTER XX.

WRONGS FROM NON-PERFORMANCE OF CONVENTIONAL AND STATUTORY DUTIES.

There are certain cases in which, by virtue of some conventional relation between parties, a specific obligation is imposed upon one to observe some special course of conduct as regards the person or the property of the other. The most numerous of these are cases of bailment.

Bailment is a delivery of goods in trust upon an agreement, express or implied, that the trust shall be duly exercised, and the goods returned or delivered over when the purpose of the bailment is accomplished. Bailments have been classified as: 1. Those in which the trust is for the benefit of the bailor; 2. Those in which the trust is for the benefit of the bailee; 3. Those in which the trust is for the benefit of both parties.[1]

The classification is important here, because the degree of care and vigilance required of the bailee is justly held to be in some degree dependent upon the circumstance that the benefit is to accrue to one rather than the other, or to both instead of one only.

Bailments of the first class are usually mere matters of friendly accommodation; as where one, at his neighbor's request, receives some article of value to be cared for during the latter's absence from his home or place of business. Here the trust is one of safe keeping only, but the law implies a promise commensurate with the trust.[2] If the trust is not performed the bailee is guilty of some breach of duty, unless he has some legal excuse for the failure. It would be a good legal excuse if the goods are injured, lost or destroyed without the bailee's fault. A loss or injury occurring by inevitable accident would be without the bailee's fault; and those accidents are usually spoken of as inevitable which have occurred notwithstanding the exer-

[1] Story on Bailments, § 3.

[2] See Isham v. Post, 141 N. Y. 100, 23 L. R. A. 90. Note in this case the application of the rule to the case of funds held in trust. See brief of respondent.

cise of such care as might reasonably have been expected under the circumstances.[1]

The bailee who accepts a trust for the benefit of the bailor is not discharged from the obligation to perform unless he has done all that can reasonably be required of him in respect to it. But he has not done all that can reasonably be required of him if he has been guilty of negligence, for negligence implies fault; and to be in fault in discharging a legal duty to another is to place one's self under legal obligation to make good the consequent loss.

What is negligence.— The question of legal liability is therefore one of negligence, and its consideration demands first a determination of what negligence is. The term is relative, and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose. That degree may vary in different cases according to the danger involved in the want of vigilance. And negligence, in a legal sense, is but the failure to observe for the protection of the interests of another person that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury.[2] The classification of negligence as gross, ordinary, and slight, means no more than that, under the special circumstances, great care and caution were required, or only ordinary care, or only slight care. If the care demanded was not exercised, the case is one of negligence, and a legal liability is made out when the failure is shown.[3]

Degrees of negligence.— It has been said that where the bailment is for the mutual benefit of both parties, that degree of care is required which every person of common prudence, and capable of governing a family, ordinarily takes of his own concerns, and this is designated ordinary diligence. But if the bailment is for the benefit of the bailee, it is proper to require

[1] The subject of accident is discussed in Holmes v. Mather, L. R. 10 Exch. 261, 14 Moak, 548, and *note*. See, as supporting the propositions of this paragraph, Bradley v. Cunningham, 61 Conn. 485, 15 L. R. A. 679; Bunnell v. Stern, 122 N. Y. 539, 10 L. R. A. 481, and *note*.

[2] For definitions of negligence, see Philadelphia, etc. R. Co. v. Stinger, 78 Pa. St. 219; Blyth v. Birmingham Water-works, 11 Exch. 781; Heaven v. Pender, L. R. 11 Q. B. D. 503.

[3] Hinton v. Dibbin, 2 Q. B. 646; Steamboat New World v. King, 16 How. 469.

of him the highest vigilance, or such as a very cautious and vigilant man would take with his own possessions. While if it were for the benefit of the bailor exclusively, the bailee is chargeable with only such slight care as a man of common sense, however inattentive, would give to his own affairs.[1] As has been already said, these degrees of extreme care, ordinary care, and slight care, are subject to be affected by the nature of the thing in respect to which the trust is created, its value, its liability to injury, etc.[2]

Liability as gratuitous bailee only arises when the trust has once been assumed: the promise to accept such a trust is void for want of consideration; and probably after he has accepted, the bailee may surrender it without performance if he restore the property uninjured, and without having put the bailor to any inconvenience or damage.[3] But any dealing with the subject of the bailment in a manner not warranted by the understanding is in law wrongful.[4]

The question whether the proper degree of care has been observed is one of fact, not of law.[5]

Bailments for the benefit of the bailee.— Where the bailment is for the exclusive benefit of the bailee, more than the ordinary care and vigilance is required on his part. Where a horse is loaned by the owner without hire to a friend for a particular journey, the party accommodated will be responsible if, in consequence of slight neglect on his part, the horse is lost or injured.[6]

Bailments for mutual benefit.— The most common bailments are those from which each party expects or is supposed to receive some advantage. Some of these cases are complicated by the consideration that the bailee receives the property in the course of a certain occupation to which the law attaches exceptional duties, imposing upon those who follow it extraordinary liabilities. But others involve consideration only of the particular transaction; as where a thing is delivered to a

[1] See Jones on Bailments, 4–10.

[2] Coggs v. Bernard, 2 Ld. Raym. 909; Foster v. Essex Bank, 17 Mass. 479.

[3] Thorne v. Deas, 4 Johns. 84.

[4] See Colyar v. Taylor, 1 Cold. 372; Stewart v. Frazier, 5 Ala. 114.

[5] Chase v. Mayberry, 3 Harr. 266; Storer v. Gowen, 18 Me. 174. And, as illustrations, see Wylie v. Northampton Bank, 119 U. S. 361; Flint, etc. R. Co. v. Weir, 37 Mich. 111.

[6] Howard v. Babcock, 21 Ill. 259; Watkins v. Roberts, 28 Ind. 167.

mechanic in order that something may be done by him upon or in respect to it, in the line of his employment, and for a compensation. The bailment being for the benefit of both parties, the bailee is charged with the obligation of ordinary care only.[1] So where goods are pledged in security for a debt; and where grain is deposited in a mill or warehouse to be returned on demand. In the latter case, the fact that the grain is commonly stored with other grain of like kind and quality does not vary the rules of legal responsibility. The bailor is entitled to receive from the aggregate an amount of grain of like kind and quality equal to the deposit, and the bailee must deliver it on demand, or he must show an excuse which does not involve a want of ordinary care on his part. If, however by the custom of the business, the warehouseman is expected to buy and sell and to store what he buys with that which he receives on deposit, making his sales from the aggregate, the deposit of grain is not a bailment but is a sale of the grain, on an undertaking to pay for it on demand in grain of like kind and quality; and all risks are upon the warehouseman.[2]

Every bailee is bound in his use of the property to keep within the terms of the bailment. It is not material that a departure from the terms is not injurious to the interests of the bailor. Contracts being matters of agreement, even a more beneficial contract cannot be substituted for another without mutual assent.[3]

Innkeepers.— The employment of an innkeeper is one to which special obligations are attached. An innkeeper is one who holds himself out to the public as ready to accommodate all comers with the conveniences usually supplied to travelers on their journeys.[4] One who only furnishes occasional entertainment is not an innkeeper;[5] neither is a boarding-house keeper, or one who lets lodgings and furnishes their occupants

[1] See Kelton v. Taylor, 11 Lea, 264; Gleason v. Beers, 59 Vt. 581; Kincheloe v. Priest, 89 Mo. 240; Seevers v. Gabel (Ia.), 27 L. R. A. 733.

[2] Nelson v. Brown, 44 Iowa, 455; Jones v. Kemp, 49 Mich. 9.

[3] One who hires a horse to go to a certain place has no right to go with him beyond that point. Farkas v. Powell, 86 Ga. 800, 12 L. R. A. 397. See Homer v. Thwing, 3 Pick. 492; Mullen v. Ensley, 8 Humph. 428.

[4] Thompson v. Lacy, 3 B. & Ald. 283. And see Pinkerton v. Woodward, 33 Cal. 557.

[5] State v. Mathews, 2 Dev. & Bat. 424; Carter v. Hobbs, 12 Mich. 52.

with meals.[1] An innkeeper is bound, as a matter of law, to furnish the entertainment called for. He may demand his hire in advance, but if it be paid or tendered, he must receive the traveler at any hour of the day or night.[2] He would be excused, however, if the inn were full, or if the traveler were infected with a contagious disease; or if he came in a disorderly manner. A disorderly guest may be removed with force if necessary. But a traveler turned away without cause, either before or after being received, may sustain an action therefor.[3]

As bailee of the personal effects which the guest[4] brings with him to the inn, it is generally held that, where the guest himself is not in fault, the innkeeper is responsible as an insurer except only as against losses by the act of God or of the public enemy.[5] Under this rule the innkeeper is liable not only for all losses attributable to his own negligence or misconduct, or those of his servants, but also for such as may result from accidental fires, and the thefts or other misconduct or negligence of third persons.[6] This is a very high degree of responsibility, and the rule is disapproved in several states, which hold that the loss of the goods of the guest only makes out a *prima facie* case of liability against the innkeeper, and that he may exonerate himself by showing that the loss was in no manner occasioned by a want of proper care and attention on his part.[7]

Innkeepers do not necessarily come into actual possession of the thing bailed, but usually have constructive possession only. Thus, it has been held that the grain in a traveler's sleigh when brought within the inclosure was constructively within

[1] Shoecraft v. Bailey, 25 Iowa, 553; Walling v. Potter, 35 Conn. 183.

[2] Rex v. Ivens, 7 C. & P. 213. And see Atwater v. Sawyer, 76 Me. 539.

[3] McCarthy v. Niskern, 22 Minn. 90; Whiting v. Mills, 7 U. C. Q. B. 450.

[4] A guest is defined as one away from home receiving accommodations at an inn as a traveler. Pullman Palace Car Co. v. Love, 28 Neb. 239, 6 L. R. A. 809. And see Fay v. Pac. Imp. Co., 93 Cal. 253, 16 L. R. A. 188.

[5] Mason v. Thompson, 9 Pick. 280; Norcross v. Norcross, 53 Me. 163; Sibley v. Aldrich, 33 N. H. 553. As to boarders the innkeeper does not assume any such extraordinary liabilities. See as to the distinction, Chamberlain v. Masterson, 26 Ala. 371; Hancock v. Rand, 94 N. Y. 1.

[6] See Shultz v. Wall, 154 Pa. St. 262, 8 L. R. A. 97; Fay v. Pac. Imp. Co., 93 Cal. 253, 16 L. R. A. 188.

[7] See Metcalf v. Hess, 14 Ill. 129; Merritt v. Claghorn, 23 Vt. 177; Cutler v. Bonney, 30 Mich. 259.

the innkeeper's possession.[1] At the common law an innkeeper cannot relieve himself in any degree from his responsibility by any notice posted about the inn;[2] but by statute, in England and in many of the states, he is permitted to restrict his liability within certain limits, which the statute defines, by the posting of notices in his rooms. These statutes will constitute no protection unless they are strictly complied with.[3]

If the loss or injury to the goods occurs through the fraud or intermeddling of the guest, or through his failure to use the ordinary care that a prudent man might be reasonably expected to have taken under the circumstances, the innkeeper is excused.[4] If an innkeeper's servants take charge of the luggage of a departing guest to deliver it to a railway company or other carrier, the responsibility of the innkeeper continues until actual delivery.[5] And probably, if the guest goes away without at the time taking his baggage with him, the innkeeper's liability as such will continue until it is removed, if this be within reasonable time.[6] An innkeeper has a lien for reasonable charges on the goods brought with him by his guest.[7] There is no such lien, however, as to those who are merely boarders and not guests in the proper sense.[8]

Common carriers.— The liability of a common carrier closely resembles that of an innkeeper. A common carrier is one who regularly undertakes for hire, either on land or on water, to carry goods, or goods and passengers, between different places, for such as may offer.[9]

[1] Clute v. Wiggins, 14 Johns. 175.

[2] Bodwell v. Bragg, 29 Iowa, 232; Maltby v. Chapman, 25 Md. 310.

[3] Porter v. Gilkey, 57 Mo. 235; Chamberlain v. West, 37 Minn. 54, 33 N. W. Rep. 114.

[4] Cashill v. Wright, 6 El. & Bl. 891; Read v. Amidon, 41 Vt. 15; Kelsey v. Berry, 42 Ill. 469.

[5] Richards v. London, etc. R. R. Co., 7 C. B. 839. And the innkeeper is liable for the safe keeping of goods of an incoming guest from the moment they are received by a porter of the hotel at the depot. Coskery v. Nagle, 33 Ga. 696, 6 L. R. A. 483.

[6] Adams v. Clem, 41 Ga. 65, 5 Am. Rep. 524. But he is not liable as innkeeper if the luggage is left for the guest's convenience. Miller v. Peeples, 60 Miss. 819.

[7] Pollock v. Landis, 36 Iowa, 651. And in some cases it is held that this is so even though the goods were intrusted to the guest by another. Manning v. Hollenbeck, 27 Wis. 202. *Contra*, Domestic, etc. Co. v. Watters, 50 Ga. 573. The cases are collected in the note to Singer Mfg. Co. v. Miller, 21 L. R. A. 229.

[8] Singer Mfg. Co. v. Miller, 21 L. R. A. 229, and *note*.

[9] Mershon v. Hobensack, 22 N. J. 372. U. S. Exp. Co. v. Backman, 28

While a carrier may profess to limit his employment to some one species of goods, yet, within the limits of his accustomed business, he must receive and carry for all who offer, without partiality or discrimination.[1] But he cannot enforce upon the party proposing to employ him any terms to which the latter refuses assent.[2] The obligation which is imposed upon him by the common law is: that he shall deliver at its destination the property received by him, without damage while in his hands, unless prevented by the act of God or of the public enemy.[3] And he must deliver, or be ready to deliver, within a reasonable time. But custom has much to do with the time, place and manner of delivery.[4]

The transportation of live-stock by a railroad company imposes risks of a different character, demanding more labor and special arrangements for the protection of the stock, and does not come within the reasons which, at the common law, imposed upon common carriers the duty of care and custody of other property and made them insurers. The owner generally accompanies them, having entire charge, care and management, and to that extent takes upon himself the risk of loss and injury, the company being responsible for the furnishing of proper cars and motive power, and for the proper making up and running of the trains.[5]

The liability of a common carrier as such does not attach in respect to goods in his hands waiting the orders of the owner for shipment.[6] The time when the liability ceases depends upon circumstances. If the carrier is to transport the goods for a

Ohio St. 144. See Staub v. Kendrick, 121 Ind. 226, 6 L. R. A. 619, *note*. Street railway companies are carriers. Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 20 L. R. A. 316.

[1] Keeney v. G. T. R. Co., 47 N. Y. 525; Chicago, etc. R. Co. v. People, 67 Ill. 11, 16 Am. Rep. 599; Louisville, etc. R. Co. v. Wilson, 132 Ind. 517, 18 L. R. A. 105, and *note*.

[2] N. E. Exp. Co. v. Me. Cent. R. Co., 57 Me. 188; Audenried v. Phila. etc. R. Co., 68 Pa. St. 370.

[3] Coggs v. Bernard, 2 Ld. Raym. 909; Powell v. Mills, 30 Miss. 231; Fillebrown v. G. T. R. Co., 55 Me. 462. For definitions of the phrase "act of God," see Gordon v. Buchanan, 5 Yerg. 71; Michaels v. N. Y. Cent. R. Co., 30 N. Y. 564; Beard v. Ill. Cent. R. Co., 79 Iowa, 518, 7 L. R. A. 280.

[4] See Loveland v. Burke, 120 Mass. 139, 21 Am. Rep. 507, and cases cited.

[5] Mich. South. R. v. McDonough, 21 Mich. 165; Squire v. N. Y. Cent. R. Co., 98 Mass. 239; Duntley v. Boston, etc. R. Co. (N. H.), 9 L. R. A. 449, and cases in *note*.

[6] Mich. etc. R. Co. v. Shurtz, 7 Mich. 515: Little Rock, etc. R. Co. v. Hunter, 42 Ark. 200.

portion only of the whole distance, and then deliver them to another, his liability as carrier ceases when the goods arrive at the point of intersection, and he then becomes a forwarder only.[1] But if his route covers the whole distance, his liability as carrier only ceases when the goods are actually delivered, unless by the custom of the business the consigneee is expected to receive them at the carrier's warehouse; in which case his liability changes from that of carrier to that of warehouseman when the goods are received at the warehouse and the consignee has had reasonable time and opportunity to remove them.[2]

Prima facie the consignee is entitled to demand and receive of the carrier at the place of destination, and to sue for any breach of the carrier's contract, but the presumption is not conclusive. One may have a special interest in the goods which entitles him to demand and receive possession;[3] or he may, as vendor to one who has become insolvent, be entitled to exercise his right of stoppage *in transitu*,[4] or some other right which the carrier cannot resist.

Carriers of persons.— While, for the safe transportation of property, the carrier is responsible as insurer, with the exceptions already stated, in the case of passengers he undertakes only that he will carry them without negligence or fault. As, in the carriage of persons, the slightest failure in watchfulness may be destructive of life or limb, the carrier's undertaking and liability as to his passengers goes to this extent: that as far as human foresight and care can reasonably go, he will transport them safely.[5] He is not liable if injuries happen from sheer

[1] Gray v. Jackson, 51 N. H. 9; Pendergast v. Adams Exp. Co., 101 Mass. 120; Hadd v. U. S. Exp. Co., 52 Vt. 335.

[2] Morris, etc. R. Co. v. Ayres, 29 N. J. 393; Moses v. Boston, etc. R. Co., 32 N. H. 523; Nat. Line, etc. Co. v. Smart, 107 Pa. St. 492. A reasonable time is "such time as will enable one living in the vicinity of the place of delivery, in the ordinary course of business, and in the usual hours of business, to inspect and remove the goods." L. L. & G. R. Co. v. Maris, 16 Kan. 333. Consult for a full discussion of the points involved, East Tenn., V. & G. R. Co. v. Kelly, 91 Tenn. 699, 17 L. R. A. 691, and *note*.

[3] So. Exp. Co. v. Caperton, 44 Ala. 101.

[4] Newsom v. Thornton, 6 East, 17; Reynolds v. Railroad, 43 N. H. 580; Dougherty v. Miss. etc. R. Co., 97 Mo. 647.

[5] Dodge v. Boston, etc. Co., 148 Mass. 207, 2 L. R. A. 83, *note*. He is not an insurer of the lives or safety of his passengers. Palmer v. Pa. Co., 111 N. Y. 458, 2 L. R. A. 252.

accident or misfortune, where there is no negligence or fault, and where no want of caution, foresight or judgment would prevent the injury; but he is liable for the smallest negligence in himself or his servants.[1] And where steam is the motive power, this liability is applied with great strictness.[2] But the luggage which it is customary to allow a passenger to take with him without charge beyond what is paid for his own conveyance, is taken under the like obligation which attends the carriage of ordinary freight.[3]

The responsibility of the carrier begins when the passenger presents himself for transportation, and this he may be said to do when he approaches the place of reception for the purpose.[4] Therefore if the carrier is negligent in respect to the platforms and other approaches provided for the use of passengers, and, in consequence of their being in an unsafe condition, the person coming to be carried is injured, he may have his action therefor.[5] The carrier of persons, as well as the carrier of goods, must carry impartially, and he must have a valid excuse for refusing to receive one who offers.[6] It will be a sufficient excuse that the person refuses to pay his fare in advance when demanded, or that, for some reason, such as that he is intoxicated, he is unfit to be received as a passenger with others.[7] But the color of a person is no justification for re-

[1] Derwort v. Loomer, 21 Conn. 245; White v. Fitchburg R. Co., 136 Mass. 321; Citizens' St. R. Co. v. Twiname, 111 Ind. 587.

[2] Caldwell v. N. J. Steamboat Co., 47 N. Y. 282; Baltimore & Ohio R. Co. v. Miller, 29 Md. 252.

[3] Hannibal R. Co. v. Swift, 12 Wall. 262; Merrill v. Grinnell, 30 N. Y. 594. As to what a passenger may take as baggage, see Noble v. Milliken, 74 Me. 225, 77 Me. 359; Ill. Cent. etc. R. Co. v. Handy, 63 Miss. 609; Staub v. Kendrick, 121 Ind. 226, 6 L. R. A. 619.

[4] For a discussion of the question who are passengers, see Dewire v. Boston, etc. R. Co., 148 Mass. 443, 2 L. R. A. 166, and *note;* McVeety v. St. Paul, etc. R. Co., 45 Minn. 268, 11 L. R. A. 174. While it is not easy to lay down a rule defining what in all cases would constitute one a passenger on the train of a carrier, it is held to be essential that the person should be rightfully on the carrier's train, or should be thereon with the knowledge or consent of the carrier, or his agent in charge of the train. Woolsey v. C., B. & Q. R. Co., 39 Neb. 798, 25 L. R. A. 79.

[5] Poncher v. N. Y. Cent. R. Co., 49 N. Y. 263; Ala. etc. R. Co. v. Arnold, 80 Ala. 600; Chicago, etc. R. Co. v. Wilson, 63 Ill. 167; Snow v. Fitchburg R. Co., 136 Mass. 552; Del., L. & W. R. Co. v. Trautwein, 52 N. J. L. 169, 7 L. R. A. 435.

[6] Lake Erie, etc. R. Co. v. Acres, 108 Ind. 548; Nevin v. Pullman, etc. Co., 106 Ill. 222.

[7] See Elmore v. Sands, 54 N. Y. 512; Bennett v. Dutton, 10 N. H. 481.

fusing to carry him as others are carried.[1] The carrier is also under obligations to use the utmost care and diligence in providing safe, suitable and sufficient vehicles for the conveyance of his passengers;[2] to carry the passenger therein to the end of his route;[3] to protect him against assaults and other ill treatment by those employed by or under the carrier's control while on the way;[4] to exercise the utmost vigilance and care in maintaining order, and guarding the passengers against violence, from whatever source arising, which might reasonably be anticipated or naturally be expected to occur in view of all the circumstances and of the number and character of the persons on board;[5] and when the journey is completed, to afford the passenger reasonable opportunity to leave the car with safety.[6]

Carriers are permitted to adopt rules for the regulation of their business, and, so far as these are not opposed to law or unreasonable in themselves, the passenger must observe them; and if a passenger refuses to comply with any reasonable rule, he may be removed from the vehicle.[7] But the carrier must see that in the removal no more force is employed than the necessity of the case demands.

Telegraph companies.— The legislation which permits telegraph companies to appropriate an easement in highways or on private lands for the construction of their lines, recognizes them as public agencies, and requires them to accommodate the public impartially, and to transmit messages in the order in which they are received.[8] Therefore to some extent in their

[1] See *ante*, pp. 102 *et seq.*; 268.

[2] Taylor v. G. T. R. Co., 48 N. H. 304; Grand Rapids, etc. R. Co. v. Huntley, 38 Mich. 537.

[3] Hamilton v. Third Avenue R. Co., 53 N. Y. 25; Porter v. Steamboat New England, 17 Mo. 290.

[4] Hanson v. European, etc. R. Co., 62 Me. 84; Bryant v. Rich, 106 Mass. 180; Louisville, etc. R. Co. v. Kelly, 92 Ind. 371; Ill. Cent. R. Co. v. Minor, 69 Miss. 710, 16 L. R. A. 627, and *note*.

[5] Flint v. Norwich, etc. R. Co., 34 Conn. 554. See, also, Britton v. Atlanta, etc. R. Co., 88 N. C. 536.

[6] Taber v. Del. etc. R. Co., 71 N. Y. 489; Hickman v. Miss. etc. R. Co., 91 Mo. 433.

[7] McGowen v. Morgan's L. & T. R. & S. Co., 41 La. Ann. 732, 5 L. R. A. 817, and *note;* Vinton v. Middlesex, etc. R. Co., 11 Allen, 304; Atchison, etc. Co. v. Weber, 33 Kan. 543. It is not an unreasonable rule that the passenger should procure a ticket and show it whenever called upon. See Elmore v. Sands, 54 N. Y. 512; Jerome v. Smith, 48 Vt. 230, 21 Am. Rep. 125.

[8] They must not discriminate in their rates, so as to give one patron the preference over another. West. U. Tel. Co. v. Call Pub. Co. (Neb.), 27 L. R. A. 622.

functions and in their responsibilities they resemble common carriers, and are sometimes so designated.[1] But the resemblance does not go far; they receive nothing to carry and are not exposed to the risks of theft, robbery, fire and flood which render the undertaking of the common carrier so onerous. They are responsible in sending, receiving and delivering messages on the grounds only that through their negligence errors or unnecessary delays have occurred or that they have failed to transmit and deliver messages impartially. If a message is not sent and delivered within a reasonable time under the circumstances, or if errors occur in the transmission which are attributable to their negligence, they are responsible for all consequent damages;[2] but they are not insurers, and, if errors occur without their fault, they are not responsible.[3] And any reasonable rule that they may make for the regulation of their business, when assented to expressly or by implication by those dealing with them, will be binding as a contract. For example, a rule is reasonable and valid that the company sending the message will not be responsible for errors occurring on connecting lines.[4] And if rules which are reasonable in themselves are printed conspicuously on the blanks of the company, they will be deemed assented to by those who make use of the blanks.[5]

[1] West. U. Tel. Co. v. Call Pub. Co. (Neb.), 27 L. R. A. 622. In this respect telephone companies stand upon the same footing with telegraph companies. Cent. Union Co. v. Bradbury, 106 Ind. 1; Chesapeake, etc. Co. v. Balt. etc. Co., 66 Md. 399.

[2] West. U. Tel. Co. v. Short, 53 Ark. 434, 9 L. R. A. 744; West. U. Tel. Co. v. Carew, 15 Mich. 525; Grinnell v. West. U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485. It is held in some states that mental suffering is a ground for the recovery of damages. Reese v. West. U. Tel. Co., 123 Ind. 294, 7 L. R. A. 583; Young v. West. U. Tel. Co. 107 N. C. 370, 9 L. R. A. 669. But generally the decisions support the contrary rule. Francis v. West. U. Tel. Co. (Minn.), 25 L. R. A. 406, and cases cited; Connell v. West. U. Tel. Co., 116 Nev. 34, 20 L. R. A. 172.

[3] Sweetland v. Ill. etc. Tel. Co., 27 Iowa, 433, 1 Am. Rep. 285; Breese v. U. S. Tel. Co., 48 N. Y. 132, 8 Am. Rep. 526.

[4] West. U. Tel. Co. v. Carew, 15 Mich. 525; West. U. Tel. Co. v. Munford, 87 Tenn. 190, 2 L. R. A. 601. But a telegraph company cannot stipulate to restrict its liability for negligence either as to mistakes in transmission or delay. Brown v. Postal Tel. Cable Co., 111 N. C. 187, 17 L. R. A. 648, and cases cited in *note*. It can, however, stipulate that a claim for damages shall be presented within a specified time. West. U. Tel. Co. v. Daugherty, 54 Ark. 21, 11 L. R. A. 10. But see Francis v. West. U. Tel. Co. (Minn.), 25 L. R. A. 406.

[5] Young v. West. U. Tel. Co., 65 N. Y. 163; Clement v. West. U. Tel. Co., 137 Mass. 463; Keiley v. West. U. Tel. Co., 109 N. Y. 231.

Skilled workmen.— Every man who offers his services to another and is employed assumes the duty to exercise in the employment such skill as he possesses with reasonable care and diligence; and, in an employment where peculiar skill is requisite, one who offers his services holds himself out to the public as possessing the degree of skill commonly possessed by others in the same employment. But, whether he be skilled or unskilled, the workman undertakes merely for good faith and integrity, and not that his task shall be performed without fault or error; he is liable to his employer for negligence, bad faith or dishonesty, but not for losses consequent upon mere errors of judgment.[1]

Professional services.— The implied promise of the professional man when his services are engaged is not different in the case of the physician and surgeon from what it is in the case of the attorney, solicitor and proctor, and one general rule may be given which will apply to all.

It has been declared in England that, in order to maintain an action against one's legal adviser, it is necessary "that the professional adviser should be guilty of some misconduct, some fraudulent proceeding, or should be chargeable with gross negligence or gross ignorance."[2] But in this country it has been laid down in one case that the professional man must bring to the practice of his profession a degree of skill and diligence such as those "thoroughly educated in the profession ordinarily employ."[3] So severe a rule, however, is not applicable in the newer portions of the country. The practitioner must possess at least the average degree of learning and skill in his profession in that part of the country in which his services are offered to the public; and if he exercises that learning and skill with reasonable care and fidelity, he discharges his legal duty.[4]

[1] Page v. Wells, 37 Mich. 415.

[2] Purves v. Landell, 12 C. & F. 91, 102.

[3] McCandless v. McWha, 22 Pa. St. 261.

[4] Leighton v. Sargent, 27 N. H. 460; Landon v. Humphrey, 9 Conn. 209; Patten v. Wiggin, 51 Me. 594; Hathorn v. Richmond, 48 Vt. 557; Foulks v. Falls, 91 Ind. 315; Small v. Howard, 128 Mass. 131; Vanhooser v. Berghoff, 90 Mo. 487. It has been said in a recent case: "An attorney who undertakes the management of business committed to his charge thereby impliedly represents that he possesses the skill, and that he will exhibit the diligence, ordinarily possessed and employed by well-informed members of his profession in the conduct of business such as he has undertaken." He is not liable

Voluntary services.— Where friends and acquaintances are accustomed to give and do give to each other voluntary services without expectation of reward, the law will not imply an undertaking for skill, even when the services are such as professional men alone are usually expected to render. And where there is no undertaking for skill, the want of it can create no liability.[1] The "street opinion" of an attorney, given in answer to a casual inquiry by one to whom he holds no professional relation, cannot, however erroneous, render him liable.[2] But when one holds himself out to the public as having professional skill, and offers his services to those who accept them on that supposition, he is responsible for the want of the skill he pretends to have, even when his services are rendered gratuitously.[3]

Statutory duties.— Duties may be imposed by statute upon individuals or corporations for the purpose of giving to the general public some new protection which the common law did not provide, or in order to give to individuals liable to injury a remedy where none existed before, or more complete remedy than before existed. Often all these purposes are had in view, though none of them may be expressly declared. When the latter is the case, the question of civil liability to parties who may be damnified by the neglect can only be determined on a careful consideration of the statute and of the end it was manifestly intended to accomplish. Certain rules will be given for the construction of such statutes which will afford some aid in determining the real intent. They are not,

for a mistake in reference to a matter in which members of the profession, possessed of reasonable skill and knowledge, may differ as to the law, until it has been settled by the courts. See Citizens' Loan, etc. Asso. v. Friedley, 123 Ind. 143, 7 L. R. A. 669. And as to physicians: There is no implied contract that the physician will cure his patient; he does not insure the success of his treatment. But he "is bound to bestow such reasonable, ordinary care, skill and diligence as physicians and surgeons in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases." Lawson v. Conaway, 37 W. Va. 159, 18 L. R. A. 627. To the same effect, see State, Janney v. Housekeeper, 70 Ind. 162, 2 L. R. A. 587; Nelson v. Harrington, 72 Wis. 591, 1 L. R. A. 719. And the physician is to be judged by the practices of his own school, not by those of another. Force v. Gregory, 63 Conn. 167, 22 L. R. A. 343.

[1] Beardslee v. Richardson, 11 Wend. 25.

[2] Fish v. Kelly, 17 C. B. (N. S.) 194.

[3] McNevins v. Lowe, 40 Ill. 209; Hord v. Grimes, 13 B. Mon. 188.

however, very certain or conclusive guides, and the exceptions to them are numerous.[1]

1. Where a remedy existed at the common law and a new remedy is given by statute, and there are no negative words in the statute indicating that the new remedy is to be exclusive, the presumption is that it is meant to be cumulative, and the party injured may pursue, at his option, either the common-law remedy or the remedy given by the statute. For example, statutory authority to forfeit stock in corporations for non-payment of calls lawfully made upon the subscriptions thereto does not take away the remedy by suit upon the promise to pay contained in the subscription.[2]

2. But the common-law remedy may be excluded by implication as well as by express negative words; and where that which constitutes the actionable wrong is permitted on public grounds, but on condition that compensation be made, and the statute provides an adequate remedy whereby the party injured may obtain redress, the inference that this was intended to be the sole remedy must generally be conclusive.[3]

3. Where the statute imposes a new duty where none existed before and gives a specific remedy for its violation, the presumption is that this remedy was meant to be exclusive, and the party complaining of a breach is confined to it.[4] Upon this ground it is held that when the right to exact tolls has been conferred upon a corporation, and a summary remedy given for their collection, the corporation must find in this summary remedy its sole redress when attempt is made to evade payment.[5] And if performance of duty is enjoined under penalty,

[1] Farmers' Turnpike Road v. Coventry, 10 Johns. 389; Tremain v. Richardson, 68 N. Y. 617; Cumberland, etc. Corp'n v. Hitchings, 59 Me. 206; Jarrett v. Apple, 31 Kan. 693.

[2] Goshen Turnpike Co. v. Hurtin, 9 Johns. 217; Carson v. Mining Co., 5 Mich. 288; Gt. Northern R. Co. v. Kennedy, 4 Exch. 417.

[3] So held in many cases where land or other property has been taken for public use under the eminent domain. See Fuller v. Edings, 11 Rich. 239; McCormack v. Terre Haute, etc. R. Co., 9 Ind. 283; Soulard v. St. Louis, 36 Mo. 546; Stowell v. Flagg, 11 Mass. 364; Henniker v. Contoocook Valley R. Co., 29 N. H. 146.

[4] Almy v. Harris, 5 Johns. 175; Smith v. Drew, 5 Mass. 514; Commissioners v. Bank, 32 Ohio St. 194.

[5] Kidder v. Boom Co., 24 Pa. St. 193; Turnpike Co. v. Van Dusen, 10 Vt. 197; Russell v. Turnpike Co., 13 Bush, 307. If the statute provides a

the recovery of this penalty is, in general, the sole remedy, even when it is not made payable to the party injured.[1] But if a plain duty is imposed for the benefit of individuals, and the penalty is obviously inadequate to compel performance, the implication will be strong that the penalty was meant to be cumulative to such remedy as the common law gives when a duty owing to an individual is neglected.[2] And if the duty imposed is obviously meant to be a duty to the public and also to the individual, and the penalty is made payable to the state or to an informer, an individual injured may maintain an action on the case for a breach of the duty owing to him.[3]

Statutes for fencing railroads.— When a statute imposes a duty as a regulation of police, without, in terms, pointing out what shall be the rights on the one side and the liabilities on the other, if the duty is neglected it must usually be decided, in considering the remedy, whether the duty is imposed on public grounds exclusively, and if not, what persons or classes of persons are within its intended protection. Statutes for fencing railroads are of this kind.

At the common law railroad companies, as owners of the land over which their tracks run, are under no obligation to fence them in order to protect their tracks against cattle straying upon them.[4] If owners of cattle fail in the duty to prevent their straying, they would not only be without remedy for any injury their cattle might receive while trespassing on the track, but they might even be liable if cars or engines were injured by the cattle being encountered, provided the owners were negligent in suffering them to stray there.[5]

means for the collection of taxes, no other can be implied. See Cooley on Taxation, § 13.

[1] Almy v. Harris, 5 Johns. 175; and see Flynn v. Canton Co., 40 Md. 312; Moore v. Gadsden, 93 N. Y. 12.

[2] Salem Turnpike Co. v. Hayes, 5 Cush. 458.

[3] See Pauley v. Steam Gauge & Lantern Co., 131 N. Y. 90, 15 L. R. A. 194.

[4] Manchester, etc. R. v. Wallis, 14 C. B. 213, 25 Eng. L. & Eq. 373; Nor. Pa. R. Co. v. Rehman, 49 Pa. St. 101; Price v. N. J. R. Co., 31 N. J. 29; St. Louis, I. M. & S. R. Co. v. Ferguson, 57 Ark. 16, 18 L. R. A. 110.

[5] Railroad Co. v. Skinner, 19 Pa. St. 298; Williams v. New Albany, etc. R. Co., 5 Ind. 111. If, however, the cattle are recklessly or wilfully run over, the company may be responsible. See Holden v. Rutland, etc. R. Co., 30 Vt. 297; Darling v. Boston, etc. R. Co., 121 Mass. 118.

It is now very generally required by statute that railroad companies shall fence their tracks.[1] One purpose of such statutes is to protect the lives and limbs of the traveling public, who are constantly endangered when cattle are not effectually excluded from the tracks; but another purpose is to protect the cattle themselves, and this is commonly done by making railroad companies responsible for the cattle injured or killed by their engines, or otherwise, upon the unfenced tracks.

Where a liability for injury to cattle is imposed in general terms, it is held, in some states, that if cattle stray upon the adjoining lands and thence pass upon the track through insufficient fences and are injured, the owners, being themselves in fault for suffering them to stray, have no remedy. But in other states the courts hold that it was intended that all persons should have the benefit of the statutory protection.[2]

Some other cases of neglect of statutory duty for which individuals injured have been allowed to recover in actions on the case for negligence are: Neglect of railway companies to ring bells or sound the whistle on approaching a highway crossing, or to put up a sign to warn travelers;[3] moving trains at unlawful speed;[4] neglecting to keep a bridge in repair,[5] and neglecting to fence or otherwise protect dangerous machinery.[6] And,

[1] It is said that in some states the common-law rule was never in force, and in such jurisdictions, if cattle stray upon the unfenced track of a railroad company and are injured, the company is liable if it failed to exercise ordinary care. Moses v. So. Pac. R. Co., 18 Oreg. 385, 8 L. R. A. 135. For a collection of the decisions under statutes of various states, see *note* to this case; also *note* to Gallagher v. N. Y. & N. E. R. Co., 5 L. R. A. 737. It has been said that the jury might find, in a particular case, that, independent of statute, the duty of a company to its passengers might require it to fence its track in order to avoid danger from obstruction. Donnegan v. Erhardt, 119 N. Y. 468, 7 L. R. A. 527.

[2] Indianapolis, etc. R. Co. v. McKinney, 24 Ind. 283; Isbell v. N. Y. etc. R. Co., 27 Conn. 393; Curry v. Chicago, etc. R. Co., 43 Wis. 665; Tracy v. Troy, etc. R. Co., 38 N. Y. 433; Cairo, etc. R. Co. v. Murray, 82 Ill. 76.

[3] Richardson v. N. Y. etc. R. Co., 45 N. Y. 846; Dimick v. Chicago, etc. R. Co., 80 Ill. 338; Norton v. East. R. Co., 113 Mass. 366; Correll v. Burlington, etc. R. Co., 38 Iowa, 120; Chicago, etc. R. Co. v. Boggs, 101 Ind. 522; Becke v. Mo. P. R. Co., 102 Mo. 544, 9 L. R. A. 157; Ill. Cent. R. Co. v. Slater, 129 Ill. 91, 6 L. R. A. 418.

[4] Houston, etc. R. Co. v. Terry, 42 Tex. 451; Keim v. Union, etc. Co., 90 Mo. 314.

[5] Titcomb v. Fitchburg R. Co., 12 Allen, 254.

[6] Coe v. Platt, 6 Exch. 752; Fawcett

as a general rule, when the duty imposed by statute is manifestly intended for the benefit and protection of individuals, and an individual is injured by a breach of the duty, the common law will supply a remedy if the statute gives none.[1]

v. York, etc. R. Co., 16 Q. B. 610; Reynolds v. Hindman, 32 Iowa, 146.

[1] Com'rs v. Duckett, 20 Md. 468; Pauley v. Steam Gauge & Lantern Co., 131 N. Y. 90, 15 L. R. A. 194.

CHAPTER XXI.

REDRESS FOR NEGLIGENCE.

As in every relation of life, and in every position in which one may possibly be placed, some duty is imposed for the benefit of others, it is important to consider the general principles which must govern when in any of these cases complaint is made that one has been injured by the neglect of another to observe due care.

1. Existence of the duty.— In establishing negligence it is requisite, first, to show the existence of the duty which it is supposed has not been performed. A duty may be general, and owing to everybody, or it may be particular, and owing to a single person only, by reason of his peculiar position.[1] A duty owing to everybody can never become the foundation of an action until some individual is placed in a position which gives him particular occasion to insist upon its performance. The general duty of a railway company to run its trains with care becomes a particular duty to no one until he is in position to have a right to complain of the neglect.[2] In every instance the complaining party must point out how the duty arose which is supposed to have been neglected. And one cannot complain of an injury to which his own negligence has contributed, for this very reason: when it appears that but for his own fault the injury could not have occurred, it also appears that the duty to protect him did not rest upon others, for no one is under obligation to protect another against the consequences of his own misconduct or neglect.

2. Failure to observe the duty.— The duty being pointed out, the failure to observe it must be shown. This is an affirmative fact, the presumption always being, until the con-

[1] See Elliott v. Hall, L. R. 15 Q. B. D. 315.

[2] For example, a tramp injured while walking on the track cannot recover. Ill. Cent. R. Co. v. Hall, 72 Ill. 222; Bresnahan v. Mich. Cent. R. Co., 49 Mich. 410.

trary appears, that every man has performed his duty.[1] But the quantity of evidence necessary to make out a *prima facie* case of negligence is very slight in some cases, while in others a more strict showing is required. Often the injury itself affords sufficient *prima facie* evidence of negligence.[2] Thus, if the buildings of individuals are destroyed by fire originating in the sparks from a locomotive, the fire itself is held to be evidence of negligence, which requires to be overcome by showing that the railway company provides suitable precaution against such an occurrence.[3] And an injury to a passenger being carried by a railroad company charges the company with presumptive negligence. When properly managed, railway carriage of persons is supposed to be at least as safe as any other kind of travel, and when crime or negligence or inevitable accidents do not intervene, the risk of injury is so small as to awaken little concern. When, therefore, an injury occurs, it seems perfectly logical to assume that the cause must be found in a failure at some point to observe the caution the business requires. Presumptions accept the ordinary and probable as true until it is shown not to be true. Thus, we presume a man innocent of a crime, and that a man and woman living together as husband and wife, and recognizing each other and being recognized by the community as such, are lawfully married, and these presumptions are made because in the great majority of cases the fact accords with the presumption. It is equally reasonable, when an injury to a railway passenger is shown, the cause of which is not at once apparent, to assume that it is chargeable to some want of care in the company or in some of its agents or servants. "*Prima facie*, where a passenger being carried on a train is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the *onus* of disproving it."[4] This is the rule where the injury is caused by a defect in the road, cars or machinery, or by want of diligence or care in those employed, or by any

[1] See Clements v. La. etc. Co., 44 La. Ann. 692, 16 L. R. A. 43.

[2] See Tredwell v. Whittier, 80 Cal. 574, 5 L. R. A. 498.

[3] Piggott v. East Counties R. Co., 3 C. B. 229. And see cases on p. 245, *ante, note.*

[4] See Laing v. Colder, 8 Pa. St. 479; Terre Haute & I. R. Co. v. Clem, 123 Ind. 15, 7 L. R. A. 588; Louisville, N. A. & C. R. Co. v. Snider, 117 Ind. 435, 3 L. R. A. 434; Mitchell v. So. Pac. R. Co., 87 Cal. 62, 11 L. R. A. 130.

other thing which the company can and ought to control as a part of its duty to carry the passenger safely.[1] But this is not conclusive, and the carrier may rebut the presumption and relieve himself from responsibility by showing that the injuries arose from an accident which the utmost skill, foresight and diligence could not prevent.[2] And as against the proprietors of stage-coaches, a like presumption is raised by the injury, but it may be overcome by showing a cause consistent with due care.[3]

In the case of an injury by a railway train to one who is not a passenger, the rules of presumption seem to be quite different. Common observation does not teach that in the great majority of cases, where one is run over at a railway crossing, the managers of the train are in fault. Thoughtlessness, preoccupation, intoxication, a reckless pushing forward to cross in advance of the train,—any of these would be as likely to lead to such an injury as carelessness in the management of the train, and it would be unreasonable to call upon the railway company to disprove negligence when, to the common mind, there could be no presumption that negligence existed.[4]

But if the statutes required a warning to be sounded as the train approached, and if the injury could be traced to neglect of this precaution, the *prima facie* case would be made out.[5] While the fact of neglect does not conclusively determine that the injury is attributable to it,[6] yet, as the party approaching the crossing has reason to expect that the statute will be complied with, he is not put to that degree of vigilance and watch-

[1] Thomas v. Phila. & R. R. Co., 148 Pa. St. 180, 15 L. R. A. 416; Doyle v. Chicago, St. P. & K. C. R. Co., 77 Iowa, 607, 4 L. R. A. 420.

[2] Carpue v. London, etc. R. Co., 5 Q. B. 747; Meier v. Pa. R. Co., 64 Pa. St. 225; Louisville, etc. R. Co. v. Jones, 108 Ind. 551. For a collection of the cases on the subject under discussion, see note to Barnowski v. Helson, 15 L. R. A. 33.

[3] Christie v. Griggs, 2 Camp. 79; Lawrence v. Green, 70 Cal. 417.

[4] Skelton v. London, etc. R. Co., L. R. 2 C. P. 631. And there is no presumption of negligence from striking an animal upon a crossing. McKissock v. St. Louis, etc. R. Co., 73 Mo. 456.

[5] The violation of a duty specified by law is negligence. Clements v. La. Electric, etc. Co., 44 La. Ann. 692, 16 L. R. A. 43.

[6] Failure to ring a bell or sound a whistle does not alone make out a case of liability. Quincy, etc. R. Co. v. Wellhoener, 72 Ill. 60; Zimmerman v. Hannibal, etc. R. Co., 71 Mo. 476.

fulness that otherwise would be required of him, and he goes into evidence with less necessity for full and satisfactory explanation of his own movements than would otherwise be demanded.

The rule applied to carriers of passengers is a general rule which may be applied wherever the circumstances impose upon one party alone the obligation of special care. For example, while the householder on a prominent street of a city was engaged in repairing his roof, a slate fell from the roof and injured a person passing along the street below. It was the duty of the householder to take such precautions as would reasonably guard against such an injury, and the passer-by had a right to assume that no work being done over the walk was to subject him to danger.[1]

Thus, though the *onus* of showing negligence is on the party complaining of it, there are some cases in which it is made out by showing the injury and connecting the defendant with it.

Is negligence a question of law.— It is important to know whether the question of negligence is one which, under any circumstances, can be disposed of as a question of law, and if so what those circumstances are.

Questions of law the judge can conclusively pass upon; questions of fact are solved by the jury. If negligence is a question of law, the judge may say that there is or there is not negligence, under a given state of facts, and the jury must accept this conclusion as they must his ruling on any other question of law. It is manifestly impossible that in the infinite variety of human transactions the law can say that, as to certain of them, the party charged with a duty was negligent and as to all others he was not negligent. It is very seldom that one case is in its facts exactly like another which has preceded it, and the decision upon the fault of one can consequently throw little light upon the next. Rules of law must be

[1] Byrne v. Boadle, 2 H. & C. 722. So where snow is thrown from a roof. Corrigan v. Union Sugar Refinery Co., 98 Mass. 577; Jewell v. G. T. R. Co., 55 N. H. 84. And where a chisel drops from a platform on which workmen are engaged and injures a person on the sidewalk. Dixon v. Pluns, 98 Cal. 384, 20 L. R. A. 698. Where a wooden sign falls of its own weight, the presumption is that there was negligence in respect to its fastenings. St. Louis, I. M. & S. R. Co. v. Hopkins, 54 Ark. 209, 12 L. R. A. 189.

certain so as to constitute guides, but the rule of one case can never constitute a guide for the next if the facts and conclusions flowing from them are of such an intermediate character and quality that the question whether the one runs parallel to the other is one upon which different minds and different judges would be likely to disagree. There are some cases as to which there should be no real doubt in the minds of fair men. But in a very large proportion of the cases in which negligence is counted upon, the facts are of that ambiguous quality, or the proper conclusions so doubtful, that different minds would be unable to agree concerning the existence of fault or the responsibility for it. If the judge in such a case were to pass upon negligence as a question of law, he must in doing so be endeavoring to enforce a rule of a variable nature, which must take its final coloring from the experience, training and temperament of the judge himself. And it must be a very clear case indeed which would justify the court in taking upon itself this responsibility.

Without further discussion the rule may be stated thus: If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly.

Many cases would be very clear if they were not complicated with questions of contributory negligence. Such are the cases of the disregard of a law expressly devised to prevent the like injuries. An instance is that of the failure of a railway train to come to a stop before crossing another road, as is required by statute in some states, whereby another train is run into. Here the negligence is plain, but it might happen that some parties injured by it would by their own negligence be precluded from any redress. And in the great majority of cases the question of negligence on any given state of facts must be one of fact.[1] And in no case where the facts are in dispute, can the judge

[1] Railway Co. v. Stout, 17 Wall. 657; Hawks v. Northampton, 121 Mass. 10. What is care in one case may be negligence in another. Jacksonville, T. & K. W. R. Co. v. Peninsular Land, etc. Co., 27 Fla. 157, 17 L. R. A. 33. Negligence is the absence of care, according to the circumstances. O'Toole v. Pittsburgh & L. E. R. Co., 158 Pa. St. 99, 22 L. R. A. 606.

take the case from the jury and decide against negligence as matter of law, unless there is a want of evidence fairly tending to establish the negligence which is counted on.[1]

The principles here stated are as applicable when negligence is relied upon to defeat an action as when the plaintiff seeks to recover upon it.[2]

Contributory negligence.— If the injury complained of is brought about by the concurring negligence of the party injured and of the party of whose conduct he complains, a case arises for the application of the principle that no man shall base a right of recovery upon his own fault. Between two wrong-doers the law will leave the consequences to rest where they have chanced to fall.[3] Therefore, although the injury complained of was caused by the negligence of the defendant, yet if legal fault contributing to the injury is imputable to the plaintiff himself he will not be heard to complain.[4]

Burden of proof.— Where negligence is the ground of an action, the plaintiff, in order to trace the fault for his injury to the defendant, must show the circumstances under which it occurred. If from these circumstances it appears that the fault was mutual, he has, by showing them, disproved his right to recover.[5] Many cases hold that there is a legal presumption against negligence upon which he may rely,[6] thus casting upon the defendant the burden of showing contributory negligence.[7] Other cases, however, hold that negligence in one party presupposes the duty of care imposed upon him for the protection

[1] Barber v. Essex, 27 Vt. 62.

[2] McMahon v. North Cent. R. Co., 39 Md. 438; Orange, etc. R. Co. v. Ward, 47 N. J. L. 560; Teipel *v.* Hilsendegen, 44 Mich. 461. It is negligence not to look out on the track when approaching a railroad crossing to cross it. Cent. R. Co. v. Feller, 84 Pa. St. 226.

[3] Gibbon v. Paynton, 4 Burr. 2298; Clay v. Willan, 1 H. Bl. 298; Rathburn v. Payne, 19 Wend. 399. The doctrine of contributory negligence applies to statutory actions. See opinion of Ryan, C. J., in Curry v. Chicago, etc. R. Co., 43 Wis. 665, and Little v. Brockton, 123 Mass. 511.

[4] See Butcher v. West Va. & P. R. Co., 37 W. Va. 180, 18 L. R. A. 519.

[5] See Railroad Co. v. Gladmon, 15 Wall. 401; McQuilken v. Cent. Pac. R. Co., 50 Cal. 7.

[6] Weiss v. Pa. R. Co., 79 Pa. St. 387; Baltimore, etc. R. Co. v. McKenzie, 81 Va. 71; Thorpe v. Miss. etc. R. Co., 89 Mo. 650. See Lyman v. Boston & M. R. Co., 66 N. H. —, 11 L. R. A. 364.

[7] Railroad Co. v. Gladmon, 15 Wall. 401; Wheeler v. Westport, 30 Wis. 392; Cleveland, etc. R. Co. v. Rowan, 66 Pa. St. 393; Louisville & N. R. Co. v. Hall, 87 Ala. 708, 4 L. R. A. 710.

of the other, and that the plaintiff does not show the existence of this duty until he has first shown his own relative position. In this view the absence of contributory negligence becomes a part of the plaintiff's case, and it should appear, *prima facie* at least, before the defendant can be called upon to answer the negligence imputed to himself.[1]

Negligence and recklessness co-operating.— Where the conduct of the defendant is wanton and wilful, or where it indicates that degree of indifference to the rights of others which may justly be characterized as recklessness, the doctrine of contributory neligence has no place whatever, and the defendant is responsible for the injury he inflicts irrespective of the fault which placed the plaintiff in the way of such injury.[2] If the defendant discovered the negligence of the plaintiff in time by the use of ordinary care to prevent the injury, and did not make use of such care for the purpose, he is justly chargeable with reckless injury, and cannot rely upon the negligence of the plaintiff as a protection.[3] Or it may be said that in such case negligence of the plaintiff only put him in the position of danger and was therefore only the remote cause of the injury, while the subsequently intervening negligence of the defendant was the proximate cause.[4]

The general rule.— The English rule, and the one generally adopted in this country, is that if the plaintiff or party injured, by the exercise of ordinary care under the circumstances might have avoided the consequences of the defendant's negligence but did not, the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof.[5]

[1] Wendell v. N. Y. etc. R. Co., 91 N. Y. 420; Bovee v. Danville, 53 Vt. 183; Hawes v. Burlington, etc. R. Co., 64 Iowa, 315; Owens v. Richmond, etc. R. Co., 88 N. C. 502.

[2] Hartfield v. Roper, 21 Wend. 615; Mulherrin v. Del. etc. R. Co., 81 Pa. St. 366; Tanner v. Louisville, etc. R. Co., 60 Ala. 621; Florida So. R. Co. v. Hirst, 30 Fla. 1, 16 L. R. A. 631. And see Freeman v. Duluth, S. S. & Atl. R. Co., 74 Mich. 86, 3 L. R. A. 594.

[3] Brown v. Hannibal, etc. R. Co., 50 Mo. 461; State v. Manchester, etc. R. Co., 52 N. H. 528; Cooper v. Cent. R. Co., 44 Iowa, 134; Clark v. Wilmington & W. R. Co., 109 N. C. 430, 14 L. R. A. 749; Smith v. Norfolk & So. R. Co., 114 N. C. 728, 25 L. R. A. 287.

[4] See Balt. & Ohio R. Co. v. State, 33 Md. 542; and Burham v. St. Louis, etc. R. Co., 56 Mo. 338.

[5] Tuff v. Warman, 5 C. B. (N. S.) 573; Railroad Co. v. Jones, 95 U. S. 439; Jackson v. Com'rs, etc., 76 N. C. 282; Memphis, etc. R. Co. v. Thomas,

In Illinois, though the early cases followed the English rule, a later case announced the doctrine "that in proportion to the negligence of the defendant should be measured the degree of care required of the plaintiff, that is to say, the more gross the negligence manifested by the defendant the less degree of care will be required of the plaintiff to entitle him to recover."[1] And further, that "the degrees of negligence must be measured and considered, and whenever it shall appear that the plaintiff's negligence is comparatively slight and that of the defendant gross, he shall not be deprived of his action." This doctrine, known as the doctrine of comparative negligence, has however been "greatly modified, if not wholly repudiated," by the recent decisions in that state. The rule there is, that before a plaintiff can recover on the ground of mere negligence, he "must show that the negligence of which he complains was caused by the negligence of the defendant, and that he himself was in the exercise of ordinary care."[2]

The negligence that will defeat a recovery must be such as proximately contributed to the injury; the remote cause will no more be noticed as a ground of defense than as a ground of recovery.[3] Where the injury is inflicted upon the plaintiff upon his own premises, it is not contributory negligence that he had not guarded his premises as perfectly against such injuries as prudence might dictate. Thus, it is not contributory negligence that one allows his cattle to pasture by an unfenced railway track, on land belonging to or controlled by himself, provided it is the fault of the railway company that the track is not fenced.[4] The law will not impute negligence to an effort to preserve human life, if, from the appearances, the party

51 Miss. 637; Monongahela v. Fischer, 111 Pa. St. 9; Carter v. Chambers, 79 Ala. 223. In a recent case in New Jersey this subject was under discussion, and the rule, as stated in the text, was affirmed. The opinion contains a valuable statement of the law. See State v. Lauer, 55 N. J. L. 205, 20 L. R. A. 61. See, also, Evans v. Adams Exp. Co., 122 Ind. 362, 7 L. R. A. 678, and *note*.

[1] Breese, J., Galena, etc. R. Co. v. Jacobs, 20 Ill. 478, 496.

[2] Bailey, J., in North Chicago St. R. Co. v. Eldridge, 151 Ill. 542.

[3] Factors' & T. Ins. Co. v. Werlein, 42 La. Ann. 1046, 11 L. R. A. 361; Smithwick v. Hall & U. Co., 59 Conn. 261, 12 L. R. A. 279; Lepnick v. Gaddis (Miss.), 26 L. R. A. 686; State, Menger v. Lauer, 55 N. J. L. 205, 20 L. R. A. 61; Smith v. Norfolk & So. R. Co., 114 N. C. 728, 25 L. R. A. 287.

[4] Blaine v. Ches. & O. R. Co., 9 W. Va. 252.

had reason to believe he might succeed in the attempt though not without danger of failure and injury to himself.[1] But where a party, in the exercise of his own right, is in the enjoyment of that which is common to others also, or which may in any way narrow, impede or restrict the enjoyment of rights by others, his duty to observe a vigilance proportionate to the danger of interference is manifest. Thus, one about to cross a railway track by the public highway, where the liability to collision is great, cannot recover for an injury if he drives upon the track without looking for approaching trains, even though the railway company has neglected to sound the alarm which the statute requires of it at such places.[2]

Negligence of infants.— It was held in New York that, where a child two years of age was run over while at play in the public street, he could not recover, because it was negligent for him to be thus exposed to injury. It was held to be the duty of parents or others having charge of him to judge for him, and if they neglected this duty, their negligence was to be imputed to him.[3] The English rule is similar,[4] and the New York case has been followed in several states.[5] Generally in this country, however, the contrary rule is adopted. In one case it was said "that although a child or idiot or lunatic may, to some extent, have escaped into the highway through the fault or negligence of his keeper and so be improperly there, yet if he is hurt by the negligence of the defendant, he is not precluded from his redress."[6] But the fact that a party who

[1] Eckert v. Long Island, etc. R. Co., 43 N. Y. 502. And in sudden emergencies persons are not held to the same degree of caution as in other cases. Union P. R. Co. v. McDonald, 152 U. S. 262. But this principle is said to be inapplicable where one is put in such an emergency by his own negligence. Haetsch v. Chicago & N. W. R. Co., 87 Wis. 304.

[2] Railroad Co. v. Houston, 95 U. S. 697; Wheelwright v. Boston, etc. Co., 135 Mass. 225; Tolman v. Syracuse, etc. Co., 98 N. Y. 198; Rupard v. Chesapeake, etc. R. Co., 88 Ky. 280, 7 L. R. A. 316; Freeman v. Duluth, S. S. & A. R. Co., 74 Mich. 86, 3 L. R. A. 594.

[3] Hartfield v. Roper, 21 Wend. 615.

[4] Waite v. N. E. R. Co., El. Bl. & El. 719; Singleton v. East. Counties R. Co., 7 C. B. (N. S.) 287.

[5] Lynch v. Smith, 104 Mass. 52, 6 Am. Rep. 188; Leslie v. Lewiston, 62 Me. 468; Jeffersonville R. Co. v. Bowen, 40 Ind. 545; Meeks v. So. Pac. R. Co., 52 Cal. 602; Casey v. Smith, 152 Mass. 294; Fitzgerald v. St. Paul, M. & M. R. Co., 29 Minn. 336, 43 Am. Rep. 212.

[6] Redfield, C. J., in Robinson v. Cone, 22 Vt. 213, 224. See, also, Kay v. Pennsylvania R. Co., 65 Pa. St. 269, 3 Am. Rep. 628; Daley v. Norwich, etc. R. Co., 26 Conn. 591. And see further for valuable discussions of

is not *sui juris* is found in a place of danger does not establish a case of negligence against his proper custodian. Very young children are properly allowed some liberties. Moreover, a child in a dangerous position may have reached it by escape from his proper custodian, who was at the time in the exercise of proper care. In such a case no question of concurring negligence arises, and whether suit is brought by the parent for the injury to his rights as such, or by the child, there is nothing which, under the doctrine of any of the courts, should preclude recovery.[1]

But the extreme youth of a child is always an important circumstance in its bearing on the question of negligence in the party by whose act or negligence he is injured.[2] One is required to exercise in his own conduct, where it may possibly result in injury, a degree of care commensurate with the apparent immaturity or imbecility that exposes that other to peril.[3] Thus, one driving rapidly along the highway where he sees boys engaged in sport must take notice of their immaturity and govern his action accordingly.[4]

That the injured party, subsequent to the injury, was guilty of negligence which aggravated it, does not bar a recovery; the negligence must have concurred in producing the injury.[5]

Negligence of third parties.—In general, the negligence of third parties concurring with that of defendant to produce an injury is no defense.[6] In some cases, however, where the person injured was for the time being with and under the direction of the third party whose negligence concurred in produc-

this subject, where the English rule was repudiated, Newman v. Phillipsburgh, etc. R. Co., 52 N. J. L. 446, 8 L. R. A. 842; Chicago City R. Co. v. Wilcox, 138 Ill. 370, 21 L. R. A. 76; Winter v. Kansas C. R. Co., 99 Mo. 509, 6 L. R. A. 536. The note to Chicago City R. Co. v. Wilcox, in 21 L. R. A. 76, contains a summary of the decisions on the question.

[1] Railroad Co. v. Stout, 17 Wall. 657; Mulligan v. Curtis, 100 Mass. 512; Mangam v. Brooklyn R. Co., 38 N. Y. 455; Gavin v. Chicago, 97 Ill. 66; Farris v. Cass Ave. etc. Co., 80 Mo. 325.

[2] See Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361.

[3] Cleveland Rolling Mill Co. v. Corrigan, 46 Ohio St. 283, 3 L. R. A. 385.

[4] Railroad Co. v. Gladmon, 15 Wall. 401; Lynch v. Smith, 104 Mass. 52, 6 Am. Rep. 188; Kerr v. Forgue, 54 Ill. 482, 5 Am. Rep. 146.

[5] Loeser v. Humphrey, 41 Ohio St. 378; Page v. Sumpter, 53 Wis. 652; Hathorn v. Richmond, 48 Vt. 557; City of Goshen v. England, 119 Ind. 368, 5 L. R. A. 253.

[6] North Pa. R. Co. v. Mahoney, 57 Pa. St. 187; Wabash, etc. R. Co. v. Shacklet, 105 Ill. 364.

ing the injury, this negligence has been held to be a bar to any recovery. In *Thorogood v. Bryan*,[1] where the plaintiff, in alighting from a public omnibus, was knocked down and injured by an omnibus belonging to the defendant, the jury was instructed that if the negligence of the vehicle he was riding in contributed to the injury he could not recover, for he must be considered a party in the negligence. This case has been frequently followed in this country,[2] but in several states its doctrine is repudiated.[3] In New Jersey it is held that the negligence of the driver of a street-car in which the plaintiff was riding was not to be imputed to the plaintiff as a bar to any action for the injurious negligence of a third party.[4]

Contracts against liability for negligence.—While it has been held that common carriers may agree for a limitation of their common-law liability, yet public policy forbids that they should be allowed to make contracts which assume to exempt them not only from liability for the inevitable risks attendant upon their business, but for risks from the negligence of themselves and servants. In numerous cases it has been held that they could not by any stipulation relieve themselves from responsibility for injuries resulting from a want of ordinary care.[5] Therefore, any general stipulation inserted in a carrier's bill of lading or receipt, by which the consignor is made to take upon himself the risks of conveyance, or any special risks like those of fire, will be read with an implied exception of injuries from

[1] 8 C. B. 115.

[2] Otis v. Janesville, 47 Wis. 422; Crescent v. Anderson, 114 Pa. St. 643; Joliet v. Seward, 86 Ill. 402; Lake Shore, etc. R. Co. v. Miller, 25 Mich. 274.

[3] Robinson v. N. Y. Cent. R. Co., 69 N. Y. 11, 23 Am. Rep. 1.

[4] Bennett v. N. J. R. Co., 36 N. J. 225. And see Little v. Hackett, 116 U. S. 366; Transfer Co. v. Kelly, 36 Ohio St. 86. Recently Thorogood v. Bryan has been overruled in England, in as far as it applies to public conveyances. See The Beduina, L. R. 12 Pub. Div. 58. And in this country the doctrine has been frequently up for consideration within a few years, and the reasoning of Thorogood v. Bryan is now almost universally condemned. See Nisbet v. Garner, 75 Iowa, 314, 1 L. R. A. 152; Dean v. Pa. R. Co., 129 Pa. St. 514, 6 L. R. A. 143; Becke v. Mo. Pac. R. Co., 102 Mo. 544, 9 L. R. A. 157; Union P. R. Co. v. Lapsley, 4 U. S. App. 542, 16 L. R. A. 800.

[5] Colton v. Cleveland, etc. R. Co., 67 Pa. St. 211; Ga. R. Co. v. Gann, 68 Ga. 350; Cream City, etc. Co. v. Chicago, etc. R. Co., 63 Wis. 93; Smith v. N. C. A. Co., 64 N. C. 235; Mo. Pac. R. Co. v. Ivey, 71 Tex. 409, 1 L. R. A. 500; Durgin v. Am. Exp. Co. (N. H.), 9 L. R. A. 453.

the want of ordinary care on the part of the carrier himself or his servants.[1] Carriers of passengers, it is also held, cannot relieve themselves from the obligation to observe ordinary care by any contract whatsoever, even in the case of "drovers' passes,"[2] or in case where free passage is given as mere matter of courtesy or favor.[3] In several states, however, it is held to be entirely competent to contract against liability for any negligence but the personal negligence of the carrier himself; which, in the case of corporations, would embrace any negligence of their servants, and of all but the managing board.[4] The authorities are in a very unsettled condition.[5]

Restrictions of liability by telegraph companies.— It is customary for telegraph companies to send messages subject to a condition that they shall not be responsible for errors or delays, unless the message is repeated at the sender's cost, and such conditions have frequently been supported as reasonable.[6] But the condition, to be available, must be brought to the knowledge of the party interested in the message, sender or receiver,[7] and, in the absence of a provision requiring the message to be

[1] Condict v. G. T. R. Co., 54 N. Y. 500; McFadden v. Miss. P. R. Co., 92 Mo. 343. It has been held that a carrier may, by a just and reasonable stipulation and in consideration of reduced freight charges, limit his liability to a certain agreed valuation. Richmond & D. R. Co. v. Payne, 86 Va. 481, 6 L. R. A. 849; Louisville & N. R. Co. v. Gilbert, 88 Tenn. 430, 7 L. R. A. 162. And see Ballou v. Earle, 17 R. I. 441, 14 L. R. A. 433.

[2] N. Y. Cent. R. Co. v. Lockwood, 84 U. S. 357; Carroll v. Miss. P. R. Co., 88 Mo. 239; Ohio, etc. R. Co. v. Selby, 47 Ind. 471; Meuer v. Chicago, M. & St. P. R. Co. (S. Dak.), 25 L. R. A. 81.

[3] Pa. R. Co. v. Butler, 57 Pa. St. 335; Ill. Cent. R. Co. v. Read, 37 Ill. 484.

[4] Wilson v. N. Y. etc. R. Co., 97 N. Y. 87; Kinney v. Cent. R. Co., 32 N. J. 407, 34 N. J. 513. See Rogers v. Kennebec, etc. Co., 86 Me. 261, 25 L. R. A. 491.

[5] See N. Y. Cent. R. Co. v. Lockwood, *supra;* also cases cited in note to Muldoon v. Seattle City R. Co., 7 Wash. 528, 22 L. R. A. 794.

[6] Grinnell v. West. U. Tel. Co., 113 Mass. 299, 18 Am. Rep. 485; West. U. Tel. Co. v. Edsall, 63 Tex. 668; West. U. Tel. Co. v. Stevenson, 128 Pa. St. 442, 5 L. R. A. 515; Primrose v. West. U. Tel. Co., 154 U. S. 1; Birkett v. West. U. Tel. Co. (Mich.), 61 N. W. Rep. 645. Such a stipulation has, however, been frequently held void as to mistakes caused by negligence. See Brown v. Postal Tel. Co., 111 N. C. 187, 17 L. R. A. 648; Wertz v. West. U. Tel. Co., 7 Utah, 446, 13 L. R. A. 510; Pepper v. West. U. Tel. Co., 87 Tenn. 554, 4 L. R. A. 660; West. U. Tel. Co. v. Short, 53 Ark. 434, 9 L. R. A. 744.

[7] N. Y. etc. Tel. Co. v. Dryburg, 35 Pa. St. 298.

repeated, it would be void as an attempt by the company to relieve itself of the consequences of its own fault.[1]

Though the reasons which forbid such contracts have special force in the business of carriers and telegraph companies, they apply universally and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct.

[1] True v. Int. Tel. Co., 60 Me. 9. There may, however be a stipulation requiring a claim to be presented within a certain time. West. U. Tel. Co. v. Daugherty, 54 Ark. 21, 11 L. R. A. 102. But a limitation of liability cannot be extended beyond the words creating the limitation. West. U. Tel. Co. v. Yopst, 108 Ind. 248, 3 L. R. A. 224. A stipulation against liability for delays in unrepeated messages will not relieve a company from liability where it receives for transmission an important message, when it knows that its wires are down, and does not inform the sender of its inability to send the message, or give him an opportunity to send it over another line. Pac. Post. Tel. Co. v. Fleischner, 66 Fed. Rep. 899.

CHAPTER XXII.

EVIL MOTIVE.

It is clear from what has been said in the preceding pages that when the question at issue is whether one person has suffered legal wrong at the hands of another, the good or bad motive which influenced the action complained of is generally of no importance whatever. "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."[1] Whatever one has a right to do, another can have no right to complain of.[2]

It has been shown that when a government official assumes an authority which the law does not warrant him in exercising, he is personally responsible, whatever may have been his motive.[3] But if the circumstances were such that no individual can be held responsible, as may be the case where the injury was done in time of war, in the exercise of orders from a superior authority which the agent was powerless to resist, the wrong may be the same, but the remedy is by an appeal to the justice of the government, or to such court of claims or auditing board as the government may empower to hear and allow claims against itself.[4]

And, as has been seen, an exercise of legislative authority can afford no ground for legal complaint.[5] The rule is universal that legislation shall not be assailed in the courts upon an allegation of malice, bad faith or corruption in passing it.[6] The machinery of one department of the government may not

[1] Parke, B., in Stevenson v. Newnham, 13 C. B. 285, 297.

[2] This question is discussed, in connection with the citation of a number of cases, in Chambers v. Baldwin, 91 Ky. 121, 11 L. R. A. 545, and *note*.

[3] This point is fully discussed in Ex parte Milligan, 4 Wall. 3. And see Johnson v. Jones, 44 Ill. 142; Wilson v. Franklin, 63 N. C. 259.

[4] Durand v. Hollins, 4 Blatch. 451; Ford v. Surget, 46 Miss. 130.

[5] In illustration, see Charles River Bridge v. Warren Bridge, 11 Pet. 420.

[6] See Doyle v. Ins. Co., 95 U. S. 535; Sunbury, etc. R. Co. v. Cooper, 33 Pa. St. 278.

be employed by individuals to assail another department.[1] But legislatures exceed the limits of their lawful authority when they order a trespass upon the property or persons of individuals, or when they provide for taking individual property for the public use without making compensation.

The general rule.— Bad motive by itself, then, is no tort. While malicious motives make a bad act worse, they cannot make that wrong which in its own essence is lawful.[2] The charge in legal proceedings that one has wrongfully and unlawfully done the act complained of, amounts to nothing unless a cause of action is otherwise alleged.[3] In *Mahan v. Brown*,[4] the plaintiff declared against the defendant for wantonly and maliciously erecting on his own premises a high fence near to and in front of the plaintiff's window, without benefit or advantage to himself, and for the sole purpose of annoying the plaintiff, thereby obstructing the air and light from entering her windows, and rendering her home uninhabitable. It was held that whether the motives of the defendant were good or bad, the action would not lie, no legal right of the plaintiff being infringed.[5]

So it has been held that no action would lie for maliciously adopting a trade-mark to the prejudice of a plaintiff who has no exclusive right to appropriate it;[6] or for throwing open one's land to the public so that they may pass over it, thereby avoiding a toll-gate.[7] Illustrations might be multiplied indefinitely. On the other hand, the most correct motive, or even an inability to indulge a motive, will not protect one who invades the right of another. The legal wrong is in the injury done and not in motive.[8]

Exceptions.— We have seen that malice is said to be an ingredient in the wrongs of slander and libel. If the damaging impntation is false the law supplies the malice, and will neither

[1] See State v. Kolsem, 130 Ind. 434, 14 L. R. A. 566.

[2] Jenkins v. Fowler, 24 Pa. St. 308, 310.

[3] Gerard v. Lewis, L. R. 2 C. P. 305.

[4] 13 Wend. 261.

[5] This is the American doctrine. See Abendroth v. Manhattan R. Co., 122 N. Y. 1, 11 L. R. A. 634, and *note*.

[6] Glendon Iron Co. v. Uhler, 75 Pa. St. 467.

[7] Auburn, etc. P. R. Co. v. Douglass, 9 N. Y. 444.

[8] The motive by which a party was controlled in the conversion of property is of no avail as a defense. Balt. & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 21 L. R. A. 117. And see Moran v. Smell, 5 W. Va. 26.

require it to be proved nor give immunity because it is disproved. That malice is an element of wrong in a case in which the proof of it is unimportant must be purely a legal fiction. Thus, in most cases the exception to the general rule is only apparent.

The cases in the law of slander and libel in which the actual existence of malice is essential to constitute an actionable wrong are those in which the law gives a privilege to speak or otherwise publish what at the time the party believes, provided it is done in good faith.[1] In such cases the law itself defines the limit. The privilege is to speak in good faith but not otherwise, and the party who maliciously publishes what proves to be untrue does not avail himself of the privilege, and therefore cannot claim its protection. Precisely the same may be said of the cases of malicious prosecution. Every man is at liberty to make use of the machinery of the law in the assertion of any legal demand which he has probable cause to believe exists in his favor against another, and also in the prosecution of any criminal charge against another which he has probable cause to believe is well founded. This is his lawful privilege, and he is protected in its exercise notwithstanding the demand or the criminal charge proves on investigation to be unfounded. But he is not privileged to seize the property of another upon legal process for a demand which he has no reasonable ground for asserting, or to defame another by a criminal prosecution on a charge which he has no reason to believe is well founded. Good faith in these cases is the limit of the privilege.[2]

Necessity for caution.— But it cannot be said that bad motive is unimportant when one is exercising undoubted legal rights. All rights must be exercised with due regard to the rights of others, and action becomes unlawful when it becomes negligent. It may be that if one shall assert his rights with no other object than annoyance, he should be put to the observance of a higher degree of care than if what he was doing had in view a beneficial purpose. It would seem that there must certainly be some difference between a man who proposes

[1] For illustrations see *ante*, p. 68 *et seq.*

[2] See Tabert v. Cooley, 46 Minn. 366, 13 L. R. A. 463.

to keep within the limits of legal rights, and also to cause no annoyance, and the man who proposes to cause what annoyance he finds possible without exceeding those limits.

Generally motive becomes important only when the damages for a wrong are to be estimated. It then comes in as an element of mitigation or aggravation and is of the highest importance. While an unintended blow, though negligent, is excused, a blow meant for an affront, though no heavier, is justly punished with heavy damages.

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