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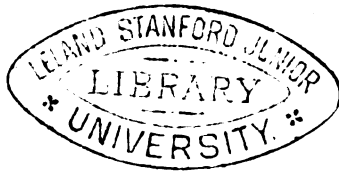
INDEPENDENT OF CONTRACT.

By THOMAS M. COOLEY, LL. D.

SECOND EDITION.

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PREFACE TO THE FIRST EDITION.

In preparing the following pages the purpose has been to set forth with reasonable clearness the general principles under which tangible and intangible rights may be claimed, and their disturbance remedied in the law. The book has been written quite as much for students as for practitioners, and if some portions of it are more elementary than is usual in similar works, this fact will supply the explanation.

THOMAS M. COOLEY.

UNIVERSITY OF MICHIGAN, ANN ARBOR, December, 1873.

PREFACE TO THE SECOND EDITION.

A new edition of this work having been rendered important by the great number of decisions made since it was published upon points of law stated or referred to in it, Mr. ALEXIS C. ANGELL, of the Detroit bar, has been engaged to prepare it, and has done so with great pains and thoroughness. It is believed that every important case which has appeared in the regular series of reports since the date of the original publication will be found referred to in the appropriate place and the point of decision given. The text of the first edition was not found to require material modification, and it has been preserved substantially unchanged.

THOMAS M. COOLEY.

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THE LAW OF TORTS.

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CHAPTER I.

THE GENERAL NATURE OF LEGAL WRONGS.

The purpose in the establishment of judicial tribunals is to prevent the commission of wrongs; to compel redress to those who have suffered from them, and to inflict punishment in proper cases on those guilty of their commission. In order that this may be effected the power of the State is placed at the command of the judges, and a trained body of men is always at hand to assist by their advice, and to guard by the results of their labor and investigations against any departure from correct principles. In a political society where intelligence is steadily increasing, and where public and private morality are commonly believed to gain in strength and vigor in corresponding ratio, it might be supposed that the occasions for judicial interference in the affairs of the citizen would continually grow less and less numerous, in proportion as the people acquire the capacity to understand their rights and duties, and the disposition to respect the rights of others. The contrary, however, is most indubitably the fact. The increase in intelligence, and especially the new inventions and improvements which follow it, have a powerful tendency in the direction of creating new wants and desires, and of establishing people in new occupations, and as these increase, the interests, desires and passions of men must necessarily breed more frequent controversies. Moreover, every recognition by the law of a new right, is likely to raise questions of its adjustment to, and its harmony with, existing rights previously enjoyed

by others ; and in consequence thereof people in the honest assertion of their supposed rights are brought in conflict, and one or the other is found to be chargeable with legal wrong, though no purpose has existed to do otherwise than strictly to obey the law. The effect upon the business of judicial tribunals is very marked and striking.

In a primitive state of society, while occupations are few and the transactions of business and trade are simple, the judge is seldom called upon to give redress, except for lawless and reckless conduct, where only the facts are in dispute. In the more advanced society his attention is invited to invasions of copyrights and patents, to frauds accomplished by new and peculiar methods, to questions in the law of common carriers, which are intimately connected with the new improvements in methods of transportation, and to a variety of wrongs that are new, because the conditions from which they spring, or which give occasion for them, are new. Intellectual and material progress in various ways begets a complexity of business and social relations, and this adds perpetually to the difficulties of legal administration, and multiplies with no little rapidity the occasions for an adjudication upon disputed or doubtful rights. And it renders necessary an infinity of legislation in order to adjust and harmonize the new conditions with what remains of the old.

Classification of Wrongs. It is customary in the law to arrange the wrongs for which individuals may demand legal redress into two classes: the first embracing those which consist in a mere breach of contract, and the second those which arise independent of contract. The classification is not very accurate. Many cases exist where the complaining party may, on the same state of facts, at his option, count upon a breach of contract as his grievance, or complain of a wrong in a manner that puts the contract out of view. Imperfect as it is, however, the classification has been found sufficient for judicial purposes; and where forms of action have been abolished by statute the old distinctions are still kept in view in giving redress. And while thus the common law classified wrongs, it appropriated the generic term to one class of wrongs only. Breaches of contract were mere failures to perform agreements, and the actions for redress in the courts of law were actions on contracts, or actions *ex contractu*. Other acts or omissions giving rise to a suit at law were called specifically wrongs

or *wrds*, and the actions by which redress was to be obtained were called actions for torts or actions *ex delicto*.¹

It is of the cases designated torts that we propose to treat. Where wrongs are mentioned it will be understood that breaches of contract are excluded, except as otherwise indicated.

An act or omission may be wrong in morals, or it may be wrong in law. It is scarcely necessary to say that the two things are not interchangeable. No government has undertaken to give redress whenever an act was found to be wrong, judged by the standard of strict morality; nor is it likely that any government ever will. Of the reasons that would preclude such an attempt, or render it futile if made, it will be sufficient here to mention the following:

Any standard by which the law can undertake to compel the people to regulate their conduct must be one generally and spontaneously accepted, so that their approving judgment shall accom-

¹The English Common Law Procedure Act of 1852 defines a tort as "a wrong independent of contract;" which is perhaps as good a definition as can be given, though even this may require explanation, since in many cases a tort only arises in consequence of the disregard of contract relations. Addison (on Torts, p. 1.) gives no definition, only quoting from BAYLEY, J., in *Rex v. Pagram Commissioners*, 8 B & C. 362, that to constitute a tort two things must concur, actual or legal damage to the plaintiff and a wrongful act committed by the defendant; but this is no more than saying that there must be damage as well as wrong to constitute a tort; and beyond that it might be misleading, since the want of an act—in other words, blamable neglect—is often the very thing in which a tort consists. Mr. Chitty speaks of personal actions in form *ex delicto* as being those "principally for the redress of wrongs unconnected with contract;" which is true enough, though, as we have said, torts, in large classes of cases, only arise in

consequence of a disregard of duty in relations which have been formed by express or implied contract. "We have been unable," says FINCH, J., "to find any accurate and perfect definition of a tort. Between actions plainly *ex contractu* and those as clearly *ex delicto*, there exists what has been termed a border land, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other and become so nearly coincident as to make their practical separation somewhat difficult." . . . After noting cases where the same state of facts admits of an action either in tort or contract, he proceeds: "In such cases the tort is dependent upon, while at the same time independent of the contract; for if the latter imposes a legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract." *Rich v. New York, etc., R. R. Co.*, 87 N. Y. 382. For discussion of torts growing out of contract relations, see p. 90, *infra*.

pany the endeavor to enforce conformity. It must not be one that a majority of the people do not habitually observe, because if the majority of the people are law breakers, it is obvious that only some extraneous power could ever enforce the law. And if a perfect standard were agreed upon, it must have judges and other administrators of the law so perfectly constituted in their mental and moral natures, and so perfectly trained and disciplined, as to be capable at all times of perceiving its application and of applying it, and so entirely in harmony with it as habitually to be disposed to do so. The mere suggestion of these

[*4] *requirements is sufficient to make clear to the mind the impossibility of making moral wrong the test of legal wrong.

It follows that there must of necessity be a legal standard of right and wrong; one that will be generally accepted, and one that the people in general will consent, under penalties, to conform to. Nor is it possible that this standard should be established otherwise than by positive human law; for human law alone could constitute the authoritative expression of assent which would be evidence of agreement upon it. When, therefore, the law of the land undertakes to declare and protect rights, and establishes a standard of conduct for the purpose, the acts or omissions which disturb or impede the enjoyment of such rights may be treated as legal wrongs or torts, but none others can be.

But while it is true that many things wrong in morals may not be wrong in law, it is equally true that some things which constitute wrongs in law may not be wrongs in morals. This remark is made without any purpose to broach a controversy concerning the moral obligation of every citizen to obey all the laws of his country; since taking this for granted, the observation is still accurate. It has already been stated that acts or omissions may constitute wrongs in law where the purpose to disobey the law or to disregard any of its requirements has been wholly wanting. Every case in which parties have acted under an honest mistake regarding their rights may be of this character; and possibly it might be safe to say that in a majority of cases in which persons have been adjudged guilty of legal wrongs, no intent to disobey the law has existed;¹ the wrong is one of accident, mistake, or

¹ If a person unlawfully injures another, he must pay the damages without regard to the intention with which

the act was done. *Amick v. O'Hara*, 6 Blackf. 258; *Bruch v. Carter*, 32 N. J., 554; *Cate v. Cate*, 44 N. H., 211;

negligence, or it is due to some other cause which is consistent with the absence of evil purpose.

Defining Rights. Every government must concern itself with the definition of rights and the providing of adequate security *for their enjoyment. If a government is properly and [*5] justly administered, this will be its chief business; and this in its true sense constitutes civil liberty. The term natural liberty is sometimes made use of by writers on law and on politics in a sense implying that freedom from restraint which exists before any government has imposed its limitations. But in no proper or valuable sense has any such liberty existed or been possible. If it be said that every man, considered as an individual without regard to family or political relations, has a natural liberty to do what he pleases, subject only to the laws of nature,¹ and, as Bentham expresses it, "to make use of everything,"² then, as the liberty of one would only be the same unrestricted liberty which was the right of every other, the liberty would be one of perpetual warfare and contention, as the wants, desires, or appetites came in conflict, and every man would have equal right to take, or hold what his courage, strength, or cunning could secure to

Dexter v. Cole, 6 Wis. 319; Gibbs v. Chase, 10 Mass. 128; Miller v. Baker, 1 Met. 27; Cubit v. O'Dett, 51 Mich. 347; Hazelton v. Week, 49 Wis. 661; Tobin v. Deal, 60 Wis. 87. The intentional throwing, in sport, at another of a piece of mortar without intent to injure, is actionable if damage ensues to a third person. Peterson v. Haffner, 59 Ind. 130. Intention is immaterial to the inquiry whether an act is a nuisance. Bonnell v. Smith, 53 Ia. 281. On the other hand, if the act is not unlawful, the intent with which it is done, does not in general constitute a tort. Estey v. Smith, 45 Mich. 402. *Post*, ch. xxii. A right-ful act negligently done is a tort. Howe v. Young, 16 Ind. 312; Baltimore, etc., R. R. Co. v. Reaney, 43 Md. 117. So if the act, unlawful in itself, is lawful as to the defendant. Knott v. Wagner, 16 Lea,

481. Good faith does not excuse negligence. Lincoln v. Buckmaster, 32 Vt. 652; Tally v. Ayres, 3 Sneed, 677. So if a druggist negligently delivers a harmful drug when a harmless one is asked for. Brown v. Marshall, 47 Mich. 576; Davis v. Guarnieri, 15 N. E. Rep. 350 (Ohio). A trespass is often a mistaken assertion of a right in which the party has utmost confidence. Though a trespasser is misled by a *bona fide* mistake as to his title, or takes every precaution to keep within his own lines, he is liable. Blaen Avon Coal Co. v. McCulloh, 59 Md. 403.

¹ 1 Bl. Com. 125.

² Constitutional Code, V. 1 c. 3 s. 6. Austin justly says that, "Strictly speaking, there are no rights but those which are the creatures of law." Austin, Jurisprudence, Lec. XII.

him, but no available right to more. A natural liberty of this sort is obviously inconsistent with any valuable right whatsoever, and would of itself, as other writers have shown, be sufficient to demonstrate the necessity of government for the imposition of restraints and the establishment of a common arbiter or judge between individuals.¹ And where governments are established, the rights of which the law can take notice, can be those only which come from and are defined by the law itself. A legal right is something which the law secures to its possessor by requiring others to observe it, and to abstain from its violation. Only the law can prevent such interference by others as would deprive it of all the qualities of an individual possession. Individual rights, liberty, and property are born of legal restraints; by means of these every man may be protected within the prescribed limits; when without them, possessions must be obtained and defended by cunning or force. In the domain of speculation or morals a right may be whatever ought to be respected; but in law that only is a right which can be defended before legal tribunals. Protection in rights gives to a man his liberty, but the same protection sets bounds to and constitutes a limitation upon

[*6] *the liberty of every other person, and the maximum of benefit of which government is capable is attained when individual rights are clearly and accurately defined by impartial laws, which impose on no one any greater restraint than is found essential for securing equivalent rights to all others, and which furnish for the rights of all an adequate and an equal protection.'

¹ Burlamaqui, Nat. and Pol. Law. Vol. 2, pt. 1, c. 8.

² Much is said by some writers concerning natural rights and natural liberty, and of the duty of the government, instead of *creating*, to *recognize* those which come from nature. As if nature had indicated any clear line which the human intellect and conscience would infallibly recognize, on either side of which might be placed the acts permitted and the acts prohibited, according as the one or the other was by nature justified or condemned. As if every human act or omission had a moral quality of which the government could take notice, and

by which it might judge the act or omission. Indeed, some have even gone so far as to assume that in a world where the moral law was accepted fully and obeyed implicitly, no law would be necessary, because every individual would at once perceive and do that which was right, and thus put legal compulsion out of the question. But if the most conscientious persons in any state of existence were compelled to support themselves by their industry; if they had occasion to buy and sell, and to find their transactions affected by accident and mistake; if occasionally they encountered questions of defective title, or questions

Public Wrongs. Certain acts or omissions are taken notice of by the law as constituting wrongs to the State. These may consist in something which tends to disturb, embarrass, or subvert the government, or to hinder the administration of the laws, or they may consist in acts or neglects which prejudice individuals, but indirectly and perceptibly affect the public also. These cases will be referred to in a subsequent chapter.¹

The law also permits certain acts to be punished as wrongs to municipal corporations, or to the several political divisions of the State, because they have a tendency to disturb their peace and good order, or to embarrass or obstruct in some manner the local government, though to the people of the State at large they may be matters of indifference. These wrongs will consist mainly in breaches of municipal by-laws, or of local police regulations, and they may or may not be wrongs to individuals. [*7]

The two classes of wrongs just enumerated constitute what are known as public wrongs, and they will be visited with some species of penalty. While the leading purpose in imposing the penalty will be security for the future, incidentally the reformation of the offender may also be had in view. In inferior offenses the idea of compensation is sometimes present, and even in case of offenses of a high grade, pecuniary penalties are often imposed to cover in whole or in part the cost of bringing the wrong-doer to justice. But compensation in the case of public wrongs is usually a subordinate purpose, while in the case of private wrongs it is the substantial purpose of the law.

Wrongs essentially Public sometimes Private Wrongs also. When the act or neglect which constitutes a public wrong is specially and peculiarly injurious to an individual, and obstructs him in the enjoyment of some right which the law has undertaken to assure, the offender may be subject to a double liability; he may be punished by the State, and he may also be compelled

of commercial law, where one of two innocent persons must inevitably suffer; if bankruptcies must occur, the consequences of which must fall upon third persons, whose dealings with the bankrupt had been interwoven with dealings between themselves; in short, if they lived in a world which, except in the moral qualities of the people,

corresponded to the present, they would be likely soon to discover that the rule of morality is very far from being adequate to the adjustment of a large proportion of all the controversies in which conscientious men, in the absence of law, would find themselves involved.

¹ See Chap. III.

to remunerate the individual. These cases we pass for the present, with only the general remark, that the private injury must be of a pecuniary nature; something different from that which is inflicted upon or suffered by the public at large. One man cannot have his private action against a murderer on a showing that the murder was more shocking to him than to others, or touched him peculiarly in his affections. These injuries are general in kind; they are only peculiar in degree.

Wrongs to Aggregate Bodies. A wrong may consist in depriving a number of persons associated together for their own purposes of some legal right. In such a case there is either a joint wrong to all, or there is an individual wrong to each of the associates. The wrong must be severable, and constitute individual wrongs, if it only deprives each associate of a right personal to himself, though exactly like the rights of which his associates are deprived at the same time, and by the same act or neglect. Such would be the case if the several members of a voluntary organization were wrongfully prevented from [*8] meeting. *The right of each is personal to himself, and therefore, though there is a common wrong, there is no joint wrong.¹

On the other hand, an injury to the property owned in common by the associates would be an injury to all, and all should unite in seeking redress.² This might lead to great difficulties when the associates were numerous, and to avoid these, one person is sometimes made the owner of the property, or given legal control over it in trust for the others, and is thus enabled in his fiduciary capacity to protect the rights of all. The importance

¹2 Saunders, 116a, note 2. The question in each case is, whether the particular injury was or was not a joint injury. It may have been exactly alike to each, and it may have been accomplished by one act, and yet be no joint injury; as where one says to two persons, "You have murdered J. S.;" this is a several, not a joint, slander, the reputation of each being assailed. *Smith v. Cooker*, Cro. Car. 513. But the injury may be joint, though it consists in depriving parties of some right, the profit of which would be

several; as where an unauthorized person undertook the business of dipping in the medicinal waters at Tunbridge Wells, thereby rendering less valuable and diminishing the probable gains of all those who were authorized. *Weller v. Baker*, 2 Wilson, 414. Or where a public officer threatens to misappropriate corporate funds, thus increasing the burden of all taxpayers.

²*Austin v. Hall*, 18 Johns. 289; *Merrill v. Berkshire*, 11 Pick. 269.

of this is perceived in the rule of law which requires the parties complainant and respondent in legal proceedings to be named in the pleadings, and which refuses to know voluntary associations, except through the individualism of their members.

The voluntary society cannot, as such, sue or be sued; in legal phrase, it is not known to the law. But the inconveniences which may flow from this rule are, to a large extent, obviated by the permission of the sovereign authority to organize the voluntary society into an artificial person, which is called a corporation, and into which, for legal purposes, the individual identity is merged. This artificial person, like any other, has its name, and is capable of wronging and being wronged, and of suing and being sued. It has its civil rights, and it is a part of the civil right of each corporator that the law is to protect him, and to protect the association in the liberties and privileges which the law permits the corporation to assume and exercise.

Civil Liberty. From what has been said we may approach an understanding of what the condition is which constitutes civil *liberty. In making use of this term it is proper to [*9] state that writers of acknowledged authority employ it in very different senses. Thus the leading commentator on American law defines it as "consisting in being protected and governed by laws made or assented to by the representatives of the people, and conducive to the general welfare."¹ This excludes the idea of civil liberty, except where representative institutions prevail; and in

¹ Kent Com. p. 1. In the French Constitution of 1793 there was the following specification of rights:

"1. The object of society is the general welfare. Government is understood to insure to man the free use of his natural and inalienable rights.

"2. These rights are equality, liberty, security, property.

"3. All men are equal by nature and before the law.

"4. Law is the free and solemn proclamation of the general will; it is the same for all, be it protective or penal; it can command only what is just and beneficial to society, and prohibit only what is injurious to the same.

"6. Freedom is the power by which man can do what does not interfere with the rights of another; its basis is nature; its standard is justice; its protection is law; its moral boundary is the maxim, "Do not unto others what you do not wish they should do unto you."

"8. Security rests on the protection given by society to each of its members for the preservation of his person, his rights and his property.

"16. The right of property is that by which every citizen can enjoy his goods and his income, the fruits of his labor and industry, and his right to dispose of them at his pleasure."

this particular it differs radically from the definition of Justice BLACKSTONE.¹ It also makes civil liberty and political liberty synonymous, in this particular agreeing with that of Blackstone. Mr. Austin says that "political or civil liberty is the liberty from legal obligation which is left or granted by a sovereign government to any of its own subjects."² Mr. Lieber says civil liberty "consists in guarantees—and corresponding checks—of those rights which experience has proved to be most exposed to interference, and which man holds dearest and most important."³ Without giving the definition of others, we prefer to distinguish civil from political liberty, defining the former as 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 as are needed to prevent what would be injurious to other individuals or prejudicial to the general welfare; and defining political liberty as consisting in an effectual [*10] *participation of the people in the making of the laws. The former may exist when the latter is absent; but since it would be perpetually liable to be broken in upon and set aside by the arbitrary action of rulers, it is manifest that it could have no secure existence except under a government whose powers were exercised under very effectual constitutional restraints, such as can exist only where the people govern through their representatives. Civil liberty must begin with law; and in order that it may have firm root, it is essential that the law-maker himself shall be under effectual restraints of the law. Without this it could not be very important how just were the purposes of the ruler. A magistrate with despotic powers who goes about administering a rude justice in special cases according as his individual sense of right and wrong inspires him, may possibly be applauded for his wisdom, his justice or his clemency; but his decisions can settle no principles which his subjects can understand and appreciate, and by which they may afterward regulate their actions. Security can only come from fixed rules which the people, as they become familiar with them, will habitually respect and observe; it cannot

¹ 1 Bl. Com. 125.

² Austin, Jurisprudence, Lec. VI. and XLVII.

³ Lieber, Civ. Lib. and Self-Gov., Ch. III. Liberty includes a man's "right to use his faculties in all law-

ful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade and occupation." *In re Jacobs*, 98 N. Y. 98.

come from judgments which are directed by the individual will alone, every one of which must stand by itself on its own reasons, must be submitted to without question, and will be attributed to good motives or bad, to wisdom or caprice, to judgment or passion, according to the views which are held by the people or by individuals concerning the ruler who gives it. But where rights are defined and regulated by durable laws, respect and obedience become habitual, and there is at length a spontaneous conformity of action thereto which deprives the numerous restraints of the law of all seeming hardship that might have been felt originally. The restraints come to be understood and appreciated in their true character as being severally the representatives of rights secured and protected, and the feeling they give is one of security rather than of restiveness and oppression. The restraints and the liberty of the people will progress together, so that the restraints will be most numerous where rights are most fully recognized and most perfectly protected; and if the laws are impartial, even peculiar privileges which fall to the possession of the few will be cheerfully acquiesced in by the many, because they will be granted on a consideration of what is best for the whole political society, so that though the few may *receive [*11] the direct benefit, all others will be supposed to receive incidental benefits sufficient to justify the grant of such privileges.*

Growth of Rights. Some reference to the progressive growth of rights seems required by the subject. Historically, this is always obscure and can only imperfectly be traced. In most countries rights, in their origin, are traditionary rather than statutory. With us, as will be more fully shown hereafter, 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 have always constituted a part of this common law. A common law was unquestionably in existence during the period of the Saxon kings, and it supplied the rule of right and of property under the arbitrary Normans to an extent sufficient to continue to it that attachment of the people which had been cherished before the Conquest. The Great Charter was a guaranty

*1 Bl. Com. 467; *A. & A. on Corp.*, § 13; *Aldridge v. Railroad Co.*, 2 Stew. & Port. 199; *Dunghdrill v. Ala. Life Ins. Co.*, 31 Ala. 91; *Curries' Admr.*

v. Mutual Assurance Society, 4 Hen. & M. 347; *Dartmouth College v. Woodward*, 4 Wheat. 518, 637.

of its principles rather than a new grant. It was a useful code in barbarous and despotic periods, and it has not been any the less so in enlightened periods and under free governments. But in order that it may be continuously useful the progressive changes must be great and numerous, so great and so numerous that it could only be by the most enlarged intendment that the law of to-day could be recognized as the common law of even the time of Lord Coke. In fact, its 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.

In making use of this term, judicial legislation, we encounter prejudices which have for their foundation much apparent reason. The term seems in itself a contradiction; judicial action is one thing, legislation is another, and by the theory and practice of our government we seek to make them stand distinctly apart, and require that their exercise shall be in different hands. Legislation by the judiciary must consequently consist in an invasion of the province of another department of the government, and is properly denominated usurpation. But there is another sense in which judicial legislation may be understood, [*12] *in which it seems to be a necessary condition of any steady improvement in the law, and, therefore, deserving of no censure. A few suggestions by way of indicating what this is will be all we care at this time to make, and these will relate to the method by which the common law of any country is usually developed.

It is impossible to conceive of any condition of organized society, even the most primitive, in which some rights will not be recognized; the right, for instance, of every man to his life, to the implements by the aid of which he secures the means of sustaining life, to the results of the chase, or of his rude agriculture, and to form family relations. But between those possessing such rights there must necessarily be some common arbiter of controversies, and every people will select this common arbiter with some reference to a supposed superior wisdom or superior experience, such as will enable him to draw clear and accurate conclusions where others would hesitate, or perhaps find themselves wholly at fault. It would be the business of such an arbiter to determine the application of the law to the facts of any case brought before him, and he must either find an existing rule

which governs the case, or he must withhold decision until the competent authority can legislate and establish one. The latter course, in many cases, would be equivalent to remanding the parties, as regards the pending controversy, to a condition like that preceding established government; a condition in which violence would be invited, because no peaceful remedy was attainable. It would consequently be wholly inadmissible. The alternative would be 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. This is substantially what is done by the English common law; and with this principle accepted, rights have grown up under judicial regulation, and through judicial definition, much more than under legislation properly so designated. The code of to-day is therefore to be traced rather in the spirit of judicial decisions than in the letter of the statute. The process of growth has been something like the following: Every principle declared by a court in giving judgment is supposed to be a principle more or less general in its application, and which is applied under the facts of the case, because, in the opinion of the court, the facts bring the case within the principle. The case is not the measure of *the principle; it does not limit and confine it within the [*13] exact facts, but it furnishes an illustration of the principle, which, perhaps, might still have been applied, had some of the facts been different. Thus, one by one, important principles become recognized, through adjudications which illustrate them, and which constitute authoritative evidence of what the law is when other cases shall arise. But cases are seldom exactly alike in their facts; they are, on the contrary, infinite in their diversities; and as numerous controversies on differing facts are found to be within the reach of the same general principle, the principle seems to grow and expand, and does actually become more comprehensive, though so steadily and insensibly under legitimate judicial treatment that for the time the expansion passes unobserved. But new and peculiar cases must also arise from time to time, for which the courts must find the governing principle, and these may either be referred to some principle previously declared, or to some one which now, for the first time, there is occasion to apply. But a principle newly applied is not supposed to be a new principle; on the contrary, it is assumed

that from time immemorial it has constituted a part of the common law of the land, and that it has only not been applied before, because no occasion has arisen for its application. This assumption is the very ground work and justification for its being applied at all; because the creation of new rules of law, by whatsoever authority, can be nothing else than legislation; and the principle now announced for the first time must always be so far in harmony with the great body of the law that it may naturally be taken and deemed to be a component part of it, as the decision assumes it to be. Thus a species of judicial legislation, proper and legitimate in itself, because it is absolutely essential to a systematic adjudication of rights, goes on regularly, and without interruption; and up to the present time, in England and America, it has been not only more efficient, but also more useful, in establishing the rules by which private rights are to be determined, and in giving remedies for their violation, than has been the regular and formal enactment of laws. If we consider in detail any one branch of the law, that, for instance, of wrongs by negligence, the examination would render this truth very manifest. Statutes have provided for some new cases; they have changed the common law in some particulars in which, under new [*14] *circumstances, a change which was not within the compass of legitimate judicial action seemed essential; they have given a private remedy in some cases where the common law gives none; as, for instance, where death has resulted from a wrongful act or default; and they have taken away remedies in some cases as, for instance, that which the common law gave against the owner of a house for a fire accidentally originating in it.¹ But even in these cases the statutes have been left for explanation to the rules of the common law; they have given rights which can only be understood in the light of common law principles. In some cases, also, the statutory law has forbidden the doing of certain acts, and the common law, as administered by the courts, has supplemented this action by giving remedies to private parties who are injured by a disregard of the statutory prohibition. In these cases the statute law may be said to lean upon and receive aid from the common law; but in the vast majority of all the

¹ *Tuberville v. Stamp*, 1 Comyn R. 32; S. C. 2 Salk, 647; *Filliter v. Phippard*, 11 Q. B. 347.

cases in which remedies are given for wrongs committed, the judge looks only to the common law, and must administer justice on principles which have grown up irrespective of statutes, and which, no matter how recently announced, are assumed to have existed from time immemorial.

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 This definition is quite sufficient for all ordinary purposes; but if considered critically, it is inaccurate in this: That it fails to comprehend those cases which are disposed of under the common law, in respect to which there can be no established usage, because the cases themselves are entirely new. The usage in such a case must come after the decision has established the principle, and it must have followed the decision as a result, instead of preceding it as a cause or reason. With these cases in view, it will be evident that the common law is something more than a body of usages; it is that, indeed, but it also embraces the principles which underlie the usages, or which so harmonize with them that the courts are justified in accepting them as the *basis for judicial action, and as forming with the usages a [*15] consistent body of law. Thus a very considerable proportion of the common law has had its real origin in judicial action, which has accepted many things for law, and rejected many others, and by a sifting process has made the law what we find it now. The growth of the law under this treatment has been so moderate, so steady, and so beneficent as to afford no small justification for the hearty praise that so often has been bestowed upon it. It has been modified and expanded under the decisions, but the changes effected by or through the influence of any particular decision have been such only as it was believed did not disturb the general harmony of the law, and such as could be justified as being rather a new illustration of the law as it was, than an alteration of it. In this steady and almost imperceptible change must be found the chief advantages of a judicial development of the law over a statutory development; the one can work no great or sudden changes; the other can, and frequently does, make such as are not only violent, but premature. A large share of

¹ Cooley, Const. Lim. 22-24, and 85 Vt. 365; Commonwealth v. Churchill, 2 Met. (Ky.) 118.

the value of any law consists in the habitual reception and the spontaneous obedience which the people are expected to give to it, and which they will give when they have become accustomed to and understand its obligations. The people then may be said to be their own policemen; they habitually restrain their actions within the limits of the law, instead of waiting the compulsion of legal process. A violent change must break up, for the time being, this spontaneous observance, and some degree of embarrassment is always to be anticipated before that which is new and strange becomes habitually accepted, and its advantages appreciated, and before that which remains of the old is adjusted to it.

For this reason an imperfect law let alone may be much more conducive to the peace of society and the happiness of the people than a better law often tampered with. But there are always some particulars in which improvement by judicial decisions is impossible, and where legislation alone is adequate to the purpose. An illustration may be given of a case which has already been made use of on another point.

No action would lie at the common law for causing the death of a human being. This was as thoroughly settled by decisions as it was possible for any point to be, and the concurrence of authority was unanimous. When, therefore, it was con- [*16] cluded that public policy demanded the giving a right of action in these cases, a new law was obviously essential. There was no old principle that could adapt itself to such a remedy, for the established principle was distinctly adverse to it. Near a century ago an English judge pointed out the distinction between the cases in which legislative interference was essential and those in which it was not, in the following language: "Where cases are new in their *principle*, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago; if it was not, we ought to blot out of our law books one-fourth part of the cases that are to be found in them."

It must be conceded that this is somewhat indefinite, and that

¹ ASHURST, J., in *Pasley v. Freeman*, 8 T. R. 51, 63.

the field it allows for the exercise of judicial discretion in determining what principles are and what are not recognized in the law, and what cases fall within those that are recognized, is a very broad one. It is often exercised by looking beyond the limits of the common law and culling from the civil law the principles there discovered which may supplement and improve where the common law is discovered to be deficient. An actual adjudication will illustrate this: The owner of logs, by a sudden and very great freshet, had them carried away upon the land of a proprietor below, where they cause considerable injury as they float about. For this injury the owner of the logs is not responsible, because it happened without his fault. The law does not impose on any one the obligation to compensate for accidental injuries. But the logs are now upon the lands of another and cannot be reclaimed without a trespass. The owner of the logs must, therefore, lose them, or he must reclaim them with a further injury to the owner of the land. What is the solution of this difficulty, and how, under such circumstances shall the rights of the parties be adjusted? The civil law affords a solution. By that, if the owner of the logs claimed exemption from responsibility for the injury occasioned by them, he must abandon them to the party they had injured. If he reclaimed them he must *pay for the injury. The option was with him, and [*17] the condition was perfectly reasonable. Now the common law judge finds this principle applicable to a case before him, and he also finds that it may readily be fitted in and accommodated to the common law system; that, in fact, it seems to belong there, and he therefore accepts it.¹ It decides the particular case and it becomes a precedent.

The view which is quite the opposite of this, and of which Mr. Bentham was a conspicuous exponent, denounces the judicial development of the law as usurpation, and demands legislative codification as the legitimate substitute. "Of the whole body of actual law," this writer says, "one pre-eminently remarkable division, derived from a correspondently remarkable source and pervading the whole mass, still remains. It is that by which it is distinguished into two branches, the arrangements of one of which are arrangements that have really been made—made by hands universally acknowledged as duly authorized and

¹ Sheldon v. Sherman, 42 N. Y. 484; S. C. 1 Am. Rep. 569.

competent to the making of such arrangements, viz., the hands of a legislator general, or set of legislators general, or their respective subordinates. This branch of the law may stand distinguished from that which is correspondent and opposite to it, by the name of *real* law, really existing law, legislator made law; under the English government it stands already distinguished by the name of *statute* law, as also by the uncharacteristic, indiscriminative and in so far improper appellation of written law. The arrangements supposed to be made by the other branch, in so far as they are arrangements of a general nature, applying not only to individuals assignable, but to the community at large, or to individuals not individuals assignable, may stand distinguished by the appellations of unreal, not really existing, imaginary, fictitious, spurious, judge-made law; under the English government the division actually distinguished by the unexpressive, uncharacteristic and unappropriate names of *common* and *unwritten* law.

“Of the manner in which this wretched substitute to real and genuine law is formed, take this description: In the course of a suit in which application is made of the rule of action ~~thus~~ [*18] *composed, the judge on each occasion *pretends* to find ready-made, and by competent authority, endowed with the force of law (and at the same time universally known to be so in existence and so in force), a proposition of a general aspect adapted to the purpose of affording sufficient authority and warrant for the particular decision or order, which on that individual occasion he accordingly pronounces and delivers.

“Partly from the consideration of the general proposition so framed, as above, by this or that judge, or set of judges; partly from the consideration of the individual instruments or documents expressive of such individual decision or order, as above; partly from the consideration of such discourses as have been or are supposed to have been uttered, whether by the judges or the advocates on one or both sides, a class of lawyers have, under the names of general treatises, or reports of particular cases, concurred in the composition of an immense chaos, the whole of it *written*, and a vast portion of it printed and published, constituting an ever increasing body of that which forms the matter which passes under the denomination of unwritten law.”¹

¹ Const. Code, Introduction, Ch. 2; Works, Vol. IX., p. 8.

Such were the views of Mr. Bentham. To understand the working of the opposite system of codification, which he favored, it is necessary to suppose the whole body of law reduced to writing and adopted by legislation as a complete substitute for the common or unwritten law as now understood. Such a code could embrace little more than general principles only; it could not anticipate the infinite variety of cases as they arise on their facts; but every actual controversy, as it is presented to the judges for decision, must be compared by him with those general principles; he must find that it is or is not embraced within some one of them, and must hold according to this finding that there is or is not a remedy. If his conclusions are accepted as guides in future cases, books of reports, and at length, commentaries will be found convenient and will naturally be published; if they are not accepted as guides, every judge will construe the code according to the inclination of his own mind; one judge strictly, lest he be chargeable with judge-made law; another liberally, lest he fail in some cases to give the redress *which justice demands, until the statute which [*19] was intended to make all clear seems only to introduce an uncertainty as great as the minds of men are variant. As this state of things would be less endurable than the other, it would follow that the other would be preferred; the code would only become a starting point from which judicial development would necessarily begin, the courts being under the same necessity for finding in the code the governing principles of every case that before compelled them to find it in the common law, and, for the sake of instruction as well as of uniformity, being required to look to the decisions of their predecessors as some evidence of what the general declarations of the code intend, and as some guide in the future applications to new states of facts. Thus, without touching upon the point of the desirableness of a code, it is perceived that its enactment is not to dispense wholly with some of the supposed objections to the common law system, nor can it wholly preclude judge-made law.

For the judge must either find the code adequate to all controversies, or he must pause in doubtful cases until the legislature can declare the rule. But to lay down the rule retrospectively for existing controversies is not only in a very high degree objectionable and dangerous, but it is also a species of legislative

judicial action, and, particularly when it is done with reference to special cases, is liable to all the objections which have led the people when framing their governments to forbid the legislature exercising judicial power. The judge could not assume that for the government of any particular controversy the law has absolutely no rule whatever; he must hold that it either gives a remedy, or it denies one in every conceivable case.

No Wrong without a Remedy. Judicial development of the law is perceived in two forms: In the recognition of rights, and in giving a remedy for the invasion or deprivation of rights. In the first, usages and precedents will be consulted, and analogies made use of. A right cannot be recognized until the principle is found which supports it. But when the right is found, the remedy must follow, of course. The maxim of law, that wherever there is a right there is a remedy, is a mere truism; for, as Lord HOLT has said, "it is a vain thing to imagine [*20] a right *without a remedy; for want of right and want of remedy are reciprocal."¹

The idea here conveyed is, that that only 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. It is a legal paradox to say that one has a legal right to something, and yet that to deprive him of it is not a legal wrong. When the law thus declines to interfere between the claimant and his disturber, and stands, as it were, neutral between them, it is manifest that, in respect to the matter involved, no claim to legal rights can be advanced. Thus, if the domestic animals of one man invade the unfenced premises of another, and the latter demands compensation from the owner, but finds that the statute denies it to him, the denial itself is conclusive

¹ *Ashby v. White*. *Ld. Raym.* 938; *S. C.* 1 *Smith Lead. Cases*, 105. See *Co. Lit.* 197 *b*; *Herring v. Finch*, *Lev.* 250; 3 *Bl. Com.* 123; *Johnstone v. Sutton*, 1 *T. R.* 493; *Lord Camden*, in *Entrinck v. Carrington*, 19 *How. State Trials*, 1066; *Pasley v. Freeman*, 3 *T. R.* 63; *Hobson v. Todd*, 4 *T. R.* 71; *Millar v. Taylor*, *Burr.* 2344; *Braithwaite v. Skinner*, 5 *M. & W.* 313; *Marzetti v. Williams*, 1 *B. & Ad.* 415;

Hodsoll v. Stallebrass, 11 *A. & E.* 301; *Clifton v. Cooper*, 6 *Q. B.* 463, 474; *Pickering v. James*, *L. R.* 8 *C. P.* 489; *Atkinson v. Waterworks Co.* *L. R.* 6 *Exch.* 404; *Jenkins v. Waldron*, 11 *Johns.* 120; *Pastorius v. Fisher*, 1 *Rawle*, 27; *Snow v. Cowles*, 22 *N. H.* 296; *Woodman v. Tufts*, 9 *N. H.* 88; *Toothaker v. Winslow*, 61 *Me.* 123; *Lorman v. Benson*, 8 *Mich.* 18; *Bass v. Emery*, 74 *Me.* 338.

that the person damnified has no right to demand protection against such invasions.

The method of determining the question of remedy is well illustrated by the leading case of *Ashby v. White* just referred to. The facts were, that certain persons had been denied the right to vote for members of Parliament. They brought suit against the officer who excluded them. No such case had ever been adjudged, and there was no precedent for the suit. But in the opinion of Lord Holt, a precedent was not important. The material question was, Had they a right to vote? This was to be determined by the statute prescribing the qualifications of voters, and by the facts which did or did not bring these parties within the statute. When the facts were found in their favor, the legal conclusion must follow. Having a right, the remedy was of course. It might have been different had the officer been made the judge, whether *the proper qualifications existed; for then his [*21] judgment that the right existed would have been a condition precedent.

To what is here said there are some apparent exceptions. Thus statutes, in many cases, forbid, under penalties payable to the State, the doing of certain acts that might be injurious to individuals, or, under like penalties, require certain acts to be done, the doing of which will be beneficial to individuals. In these cases, if it is manifest from the statute that the penalty is the only injurious consequence that is to be incurred by a violation of the law, it may be said that the individual has a right, and yet that the law affords him no remedy for its infringement. But in a strict legal sense, the statute in such cases is to be regarded as prescribing duties on public grounds only, and the party who suffers from a failure to observe them only chances to be the individual upon whom fall the consequences of a wrong done to the public.

It may be said, also, that in the election case, if the officer had been made final judge of the facts and had decided erroneously, the voter would equally have been wronged, and yet no remedy have been open to him. But in contemplation of law the decision of the tribunal appointed to decide finally upon any question must be conclusively deemed correct. If that tribunal finds that no right exists, then the party is not wronged by a right being

denied him. Order and stability in government require that in all civil proceedings this conclusion shall be absolute.

Classification of Remedies. Legal remedies are either preventive or compensatory. Every remedy is, in a certain sense, preventive, because it threatens certain undesirable consequences to those who violate the rights of others. The person inclined to invade his neighbor's premises has over him the threat of the law that he shall be made to pay all damages, as well as the costs of litigation, if he shall venture to trespass. If he proposes to defame his neighbor, the threat is that he shall pay not actual damages merely, but damages specially assessed in proportion to the aggravation of the case. The principal, however, in all cases, is compensation for an injury done, and exemplary damages are only given in those cases in which the injury, for some reason, is one of special aggravation. In some cases the law permits a mandatory writ to restrain the commission of some threatened wrong; but the general employment of such a writ would lead to abuses which would be intolerable. At the best, preventive remedies are dangerous, because they must to a considerable extent be summary, and be awarded without that full and careful inquiry into the merits which precedes the final judgment. Besides, they must be awarded upon a supposed wrongful intent, and the inquiry into an unexecuted intent is usually among the most unsatisfactory things in legal procedure.

The danger from the employment of preventive remedies is, that though given for the protection of rights and liberties they offer a constant invitation to the usurpation of right and the overthrow of liberties. It is better and safer to assume that no one will violate the law, and to treat him as an offender only after he has done so.

CHAPTER II.

GENERAL CLASSIFICATION OF LEGAL RIGHTS.

What a Right is. In the preceding chapter the term right has been employed in the legal sense exclusively. In that sense it implies something with which the law invests one person, and in respect to which, for his benefit, another, or, perhaps, all others are required by the law to do or perform acts, or to forbear or abstain from acts.¹ Before proceeding further, a classification of rights seems desirable, that we may the better understand the methods which the law has devised for their protection.

Influence of Political Institutions. The general form of political institutions has little to do with the classification of rights, this being in the main the same under all governments. There may be this difference, however, that under some forms of government certain rights will be recognized and provided for, which under other forms will not be given. This is particularly true of those rights which are political; those which are conferred in some countries being few in number, and very imperfectly protected. The general purpose of government is the same under all forms; it exists for the benefit of those who submit and are governed by it, and the benefit is afforded in the establishment and protection of rights. Except for this purpose, no government could for a moment justify its existence.

The rights which every government is expected to recognize and protect may be classed under the following heads: 1. Security in person. 2. Security in the acquisition and enjoyment of property. 3. Security in the family relations. Whether the government be despotic or free, so much will be expected from it; and in a free government there will also be a further class of rights, known as political. The theory of political rights is, that they are not given for their own sake and for the benefit

¹ Austin, Jurisprudence, Lecture XVI; see, also, Lec. VI.

of those who enjoy them, but for the general benefit of the political society. Their chief advantage to the individual consists in this: That they constitute securities to other rights, so that their value is to be found in what they protect. The right of the English peasant to such property as the law recognized as belonging to him was the same under despotic rule as it is to-day; but the political rights which have been acquired by the people have given it guaranties and a security which it did not have before. What then was often violated with impunity is now assured as completely as the experience of the country up to this time has shown to be practicable. On the feeling of security which political rights afford must mainly depend the content and happiness of the people. Were the government itself, instead of protecting rights, to impose unnecessary restrictions for its own purposes, or the purposes of those wielding its authority, or were it to interfere capriciously to deprive individuals or communities of rights which nominally are assured to the people, there would to that extent be a tyranny, whether the form of government were representative or despotic. A representative government only affords certain security against abuse of power, which cannot be had where political rights are not possessed by the people.

Personal Rights. In the classification above made, the first class embraces the rights which pertain to the person. In this are included the right to life, the right to immunity from attacks and injuries, and the right equally with others similarly circumstanced to control one's own action. In all enlightened countries the same class would also include the right to the benefit of such reputation as one's conduct has entitled him to, and the enjoyment of all such civil rights as are conceded by the law. Political rights may also be included under the same head.

Right to Life. The first and highest of all these is the right to life. On this all others are based, and it is needless to discuss others if the life is not protected. In barbarous periods a man sometimes, for some great crime or contempt of authority, was put out of the protection of the law, and a term was then applied to him which indicated that he might be treated as a wild beast of prey, and must find his protection in his own strength and cunning. This was the ancient outlawry; and the law under some circumstances

even permitted the life to be taken with impunity.¹ But this was a case of forfeiture of rights, and it implied that the outlaw, by his contempt of the law, had justly put himself beyond the pale of human sympathy. No society is so barbarous as not to recognize the right of its several members to their lives, but the securities which are provided for the protection of the right must, in different countries, be as diverse as are the characters of the people. Among the early laws of some people will be found regulations giving to the relatives or friends of one who had been unlawfully slain the privilege of private vengeance. Two different views may be taken of such regulations: 1. That assuming the protection of life to be the concern of the State, they make the friends of the person slain the agents of the State in inflicting punishment, for the reason that the natural feelings and impulses would be more likely to impel them than others to the performance of the duty. 2. That, regarding the protection of the life of an individual as something which specially concerns him and his immediate relatives and friends, rather than the political society, they make the homicide a ground for the just forfeiture of the life of the slayer to those relatives and friends, but not to others. Where such rules prevail, they are likely not to distinguish between criminal homicides and those which are excusable; and it is manifest that they rest upon very unenlightened notions, and can supply to society only a rude and imperfect protection. Indeed, the tendency is to cruelty, rather than to justice, and anarchy is encouraged by them, rather than governmental order. In a wiser period, the government takes into its own hands the punishment for homicide, and treats it as a wrong to the State. But this is on the assumption that it is found to be blamable. Governments do not assume to punish innocent acts, however serious may be the consequences resulting from them.²

¹ "An outlaw was said *caput gerere lupinum*, by which it was not meant that any one might knock him on the head, as has been falsely imagined, but only in case he would not surrender himself peaceably when taken; for if he made no attempt to fly, his death would be punished as that of any other man, though it seems

that in the counties of Hereford and Gloucester, in the neighborhood of the marches of Wales, outlaws were in all cases considered literally *capita lupina*." Reeves' Hist. of English Law, Ch. VIII., Sec. 4; Bl. Com. 178, 319.

² Austin, Jurisprudence. (4th ed.) 1092; People v. Faulks, 39 Mich. 200.

The Germanic nations were accustomed to compound for the taking of life by a money payment, made in part to the king, and in part to the family of the person slain.¹ This was less barbarous than the method of abandoning the slayer to private vengeance, because it partook of orderly government. But like that, it was suited only to periods of violence, and to people accustomed to protect themselves by strength and valor, instead of looking for redress to the government which should afford it. To demand a money payment for the taking of a life was to give to it no reasonable security whatever; it rather held out inducement to the indulgence of passion by promising immunity at so slight a sacrifice. Wiser laws take notice of the fact that when the passion or depravity is equal to the taking of human life, the government cannot reasonably hope to restrain it, unless the consequences threatened are such as the passionate or depraved would fear the most. In this view, the least that could be threatened would be the loss of whatever renders life valuable, namely, the liberty; the most that could be threatened would be to take the life itself.

But it is manifest that in thus punishing the taking of life, the government gives no protection in the particular case, but instead, is giving indirect protection in other cases. It is impossible to protect life as property is protected, by giving private remedies. Preventive remedies, such as injunction and mandamus, could be of no avail, for they could command no more than the law itself commands. Threats might justify requiring sureties for the peace, but the proceeding to obtain these is criminal rather than civil, and of little avail where the real peril is to the life. And supposing the man actually slain, whether through inadvertence or of purpose, a remedy on his behalf has become impossible, since the very act which would give a cause of action would also terminate the existence of the person entitled to it.

If there are taken into the account the many ways in which one person may have an interest in the life of another—the husband in that of the wife, the wife in that of the husband, the child in that of the parent, and so on—it may seem a little remarkable that the common law, after death had been made the penalty for the felonious taking of human life, should not have

¹ Crabb's Hist. of English Law. 35-37; Reeves' Hist. of English Law, Ch. I.

allowed the damages suffered by others from an unlawful killing to be recovered. The interest which husband and wife possess in each other's life must usually have a pecuniary value which would be estimated for many purposes at a large sum in the dealings with others; as for instance in those relating to insurance; and to the parties themselves, would be invaluable; but when not noticed by the law as a ground for an action, it could only have the incidental and indirect protection which the criminal laws afford; the government thus disregarding the private injury and punishing only the public injury. Here, again, if we speak of a man's estate as that aggregate of possessions which on his decease will pass to his representatives, why should not the money value of his life, when it has been taken away by unlawful act or negligence, be a right of action in the hands of his representatives? It is agreed, however, that the common law made no award of compensation in these cases.¹ If we look for the reasons, we find them variously stated. One that is assigned is the repugnance of the common law to any estimate of the pecuniary value of human life.² If the proposition were that a money estimate should be made of the life for the purpose of determining the proper penalty for a felonious homicide, this repugnance would be perfectly reasonable. It would also be reasonable that the law should refuse to estimate the money value of a life against one who, without fault, had been the instrument or

¹ *Higgins v. Butcher*, 1 Brownl. 205; *Yelv.* 89; *Baker v. Bolton*, 1 Camp. N. P. 493; *Carey v. Berkshire R. R. Co.*, 1 Cush. 475; *Kearney v. Boston & Worcester R. R. Co.*, 9 Cush. 109; *Quin v. Moore*, 15 N. Y. 433; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Eden v. L. & T. R. Co.*, 14 B. Mon. 204; *Conn. Mu. Life Ins. Co. v. N. Y. & N. H. R. R. Co.*, 25 Conn. 265; *Ohio & M. R. R. Co. v. Tindall*, 13 Ind. 366; *Kramer v. San Francisco, etc., R. R. Co.*, 25 Cal. 434; *Sherman v. Johnson*, 58 Vt. 40. In *Sullivan v. Union Pac. R. R. Co.*, 8 Dill. 834, Judge DILLON questions the conclusions in these cases, and is inclined to hold that the father may, at common law, maintain suit for loss of services of his minor son by a wrong-

ful act by which he is instantaneously killed. He cites and places some reliance upon *Ford v. Monroe*, 20 Wend. 210, where a father whose minor child was killed, was allowed to recover for loss of services, not merely up to the death, but for the whole period of minority. See *Pennsylvania R. R. Co. v. Zebe*, 33 Penn. St. 318. An insurance company cannot recover from the slayer for the death of a man by reason of which it has been compelled to pay a policy. *Ins. Co. v. Brame*, 95 U. S., 754.

² *Hyatt v. Adams*, 16 Mich. 180, 191, per CHRISTIANCY, J.: "The life of a freeman cannot be appraised, but that of a slave who might have been sold may." Grotius.

occasion of its loss. But if life were taken by the wrongful act or default of another, whether felonious or not, the sentimental objection to making an estimate of the value in money by way of compensation to the persons wronged, could have little of the ordinary hard reason of the law in its support. It was making a sentimental scruple of more importance than justice itself, and in cases in which the killing was through some degree of negligence, but not negligence of that extreme character which would make plain the road to criminal conviction, it defeated justice entirely. Where the killing was felonious it was also said that the common law would not award compensation, because the private injury was drowned in and swallowed up by the public injury; ¹ a purely arbitrary reason, and one which might with more justice have been applied in the cases of public wrongs where the private injury was less extreme. But the reason, such as it was, fails utterly in this country, where the doctrine of the merger of private wrongs in public wrongs is not recognized. We have, therefore, the rule of the common law left to us, but without even the inadequate reasons by which the common law supported it.

From this statement it will appear that Lord Campbell's act,^{*} 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, was an act which gave new and important rights. It gave to husband, wife, parent and child, in addition to the rights recognized by the common law, a new and important interest in each other's life. It imposed upon all persons the duty to obey all such laws and observe all such precautions as might be needful to prevent their causing the loss of human life by wrongful act, neglect or default; and imposing this for the benefit of the relatives designated, the correlative right was their right, even though the action on breach of duty was to be brought in the name of the personal representative of the person killed. The act, which in its main features, has been generally adopted in this country, has relieved the law from the glaring absurdity of recognizing claims to service, nurture, support, etc., any inter-

¹ See next Chapter.

^{*} 9 and 10 Vic. c. 93.

ference with which might give a right of action, but the destruction of which would give no action whatever.

Personal Immunity. The right to one's person may be said to be a right of complete immunity: to be let alone. The corresponding duty is, not to inflict an injury, and not, within such proximity as might render it successful, to attempt the infliction of an injury. In this particular the duty goes beyond what is required in most cases; for usually an unexecuted purpose or an unsuccessful attempt is not noticed. But the attempt to commit a battery involves many elements of injury not always present in breaches of duty; it involves usually an insult, a putting in fear, a sudden call upon the energies for prompt and effectual resistance. There is very likely a shock to the nerves, and the peace and quiet of the individual is disturbed for a period of greater or less duration. There is consequently abundant reason in support of the rule of law which makes the assault a legal wrong, even though no battery takes place. Indeed, in this case the law goes still further and makes the attempted blow a criminal offense also.

Threats and Words. A threat to commit an injury is also sometimes made a criminal offense, but it is not actionable private wrong.¹ Many reasons may be assigned for distinguishing between this case and that of an assault, one of them being that the threat only promises a future injury, and usually gives ample opportunity to provide against it, while an assault must be resisted on the instant. But the principal reason, perhaps, is found in the reluctance of the law to give a cause of action for mere words. Words never constitute an assault, is a time honored maxim.² Words may be thoughtlessly spoken; they may be misunderstood; they may have indicated to the person threatened nothing but momentary spleen or anger, though when afterward reported by witnesses they seem to express deliberate malice and purpose to injure.

¹ Threatening not to employ a man who remains a tenant of a certain landlord, gives the latter no right of action against the employer. *Heywood v. Tillson*, 75 Me. 225.

² *Smith v. State*, 39 Miss. 521; *State v. Mooney*, Phill. (N. C.) L. 434. Even though the party at the time has by his side a deadly weapon, which,

however, he makes no attempt to use. *Warren v. State*, 33 Texas, 517; *Cutler v. State*, 59 Ind. 300. To point an unloaded pistol at one, at the same time threatening him, is not a legal injury when neither the pointing nor the making the threat would be an injury. *McKay v. State*, 44 Tex. 43, and see cases 161 n. 1, *post*.

Even when defamation is complained of the law is very careful to require something more than expressions of anger, reproach, or contempt, before it will interfere; justly considering that it is safer to allow too much liberty than to interpose too much restraint. And comparing assaults and threats, another [*30] *important difference is to be noted: In the case of threats, as has been stated, preventive remedies are available; but against an assault there are usually none beyond what the party assaulted has in his own power of physical resistance.

Right to Reputation. The law also gives to every man a right to security in his reputation. Perhaps a more accurate statement would be, that it gives him a right to be protected in acquiring, and then in maintaining, a good reputation. Even this does not state the point with entire accuracy, since one may obtain a good reputation when deserving a bad reputation; and in a reputation to which one is not entitled he has no greater claim to protection than he would have in anything else his claim to which was fictitious.

The subject might be illustrated by supposing the case of one coming into a community as an entire stranger. When he comes he can have there no reputation, either good or bad; but he has a right, by good conduct, to acquire a good repute, and there may be said to be a moral obligation resting upon him to do so, since it is his duty to observe the rules of good conduct, and this will be likely to bring him good repute. If, therefore, evil-minded or thoughtless persons, by inventions or insinuations to his discredit, prevent his acquiring a good repute, they thereby invade his right, and he should have the appropriate redress. Referring now to what has already been said of the reluctance of the law to make mere words a ground of action, and postponing explanations to a future occasion, it will suffice for our present purpose to say that the remedy be interference, provided the following things appear: (1) A false charge or insinuation which (2) is made in malice, and (3) causes damage by its effect on the standing and reputation of the plaintiff. Now it may be that in the case supposed it will be found impracticable to show by evidence of a positive nature that any of the elements of injury exist. *First*, the evidence of falsity may be wanting, because the charge may relate to something in the plaintiff's past history

concerning which information is not attainable. *Second*, it may appear that the defendant, in making the charge, did so on grounds of suspicion which to him were grounds of conviction and consequently he made it without malice. And, *Third*, the plaintiff being still a stranger, it may be said that, as yet he has *acquired no standing or reputation which the [*31] charge could damage. For these reasons it may be argued that grounds of recovery are absent in such a case. But if this were the law, it is plain it could not be a just law, and it would fall far short of doing adequate justice. It would enable a person of suspicious nature to exclude another from the good opinion of the world when his motives and efforts fairly entitled him to general esteem. The difficulty in the case is overcome by a series of legal presumptions. These may be stated as follows: *First*, every man is presumed to be of good repute until the contrary is shown. *Second*, a derogatory charge 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 injury, then it is presumed to have done so in this instance. Thus one fact—that of the publication—and four presumptions of law support the action.¹ The exception to this is of cases where the charge is one which, in contemplation of law, is not necessarily followed by injury, in which case the law will not presume damage, but will leave the plaintiff to allege and prove it. These presumptions may, in some cases, seem somewhat violent, but they are nevertheless reasonable. They must be so unless human nature, conduct and reputation, are presumptively bad, so as to justify a legal assumption that an injurious charge is true rather than false. Perhaps if that were to be assumed it would still be reasonable to throw the burden of proof upon the party making the charge, because, if he asserts facts, he ought to know where his evidences are and be able to produce them; while the proof of a negative, in case of a false charge, is notoriously difficult, and the more absolutely without foundation the charge may be, the more difficult will often be the showing.

In general, however, the law has to deal with the cases of those

¹ In a subsequent chapter it will be quite different from the common shown that the legal definition of meaning. malice in the law of defamation is

who have acquired a reputation of some kind. Of these there may be several classes :

1. Those who deservedly stand in good repute.
2. Those who deservedly stand in bad repute.
3. Those who undeservedly stand in good repute.
4. Those who undeservedly stand in bad repute.

[*32] *Upon the case of the man who is justly in good repute we need not pause. The man who is undeservedly in bad repute is entitled to overcome this, and he is wronged by whomsoever interposes obstacles, though they consist in the mere repetition of charges which have made his reputation what it is. What are left, then, are the cases of men who deserve a bad repute whether as yet they have it or not.

A man whose reputation is deservedly not good, may be wronged as well as any other by having that said of him which is untrue. A worthless vagabond suffers a legal injury if he is called a thief when he is not. A certain individual may be generally despised with abundant reason ; but if he is a kind and indulgent man in his family, he may justly be entitled to maintain an action if he be accused of treating them with cruelty. But if the charge be true he has no legal ground for complaint. The law has never conferred upon any one the right to be protected against the damaging effect of the truth concerning his character. If he has been enabled to put on a good outward appearance by covering himself with the mantle of hypocrisy, it is not illegal for public inquiry and contempt to tear this away. A dishonest man is not wronged when his good repute is destroyed by exposure.

But at this point it may be necessary to make a distinction between the rights of the political community and the rights of the individual. On grounds of public policy a duty may sometimes be imposed to observe silence for the public good when no such duty is imposed for the protection of the individual. The individual is not to be heard to complain if only the truth is spoken of him ; but an offensive truth may be published without occasion, and may then be harmful. If it bring to light facts the publication of which can benefit no one, either by way of admonition or warning, the correction of abuses or the punishment of offenders, the probable tendency of the publication must be in the direction of immorality, disorder or violence. It thus

becomes a public offense; the duty to abstain from that which may injure the public morals or disturb the public peace has been disregarded. And here the very truthfulness of the charge may render it the more injurious to the public order; since a truthful charge which subjects one to ridicule or contempt, or which brings out gross immorality or indecency, if made in mere *wantonness and without justifiable occasion, is more likely [*33] to corrupt public morals and incite the party assailed to acts of violence than it would be if its falsity could be shown. In the latter case the party might rely upon his innocence or upon his civil remedy to vindicate him; in the former he might feel that only in violence had he any redress whatever.

Civil Rights. In defining civil liberty reference has been made to civil rights. An enumeration of these in detail is neither expedient nor practicable. In a free country they embrace the right to do everything not harmful to the public or to other individuals. The boundaries are such as are prescribed by general regulations of peace for the public good. Perhaps the whole body of civil rights may be summed up in two: The right to exemption from any restraint that has in view no beneficial purpose and the right to participate in all the advantages of organized society. These give the proper liberty and insure against unjust discriminations.

Religious Liberty. Among the first of civil rights is that of enjoying religious freedom. If this is complete, as it is supposed to be in this country, it implies two things: 1. The right freely to render adoration and worship to the Supreme Being in the manner indicated by the belief, and according to the dictates of the individual conscience; and 2. The right to be exempt from exactions in support of the worship of others. The first of these may exist where there is only religious toleration; the second enlarges toleration into religious liberty and equality.

But the liberty to worship, like all other liberty, must have bounds prescribed to it as a necessary protection to rights that might be invaded by extravagance or excess in its indulgence. These bounds must be fixed by law; and, as in all other cases of restraining laws, the law on this subject must have regard to the circumstances of the people for whom it is made. One of the most important of these circumstances is the religious belief

which generally prevails among the people. The same laws which give reasonable protection to religious liberty where one belief prevails, might be abhorrent and therefore wholly inadmissible where a different belief is general. To illustrate this, we have only to see what is tolerated or required by the religious creeds of some people. The religion of some savage tribes [*34] *permits human sacrifices; and there were saturnalia among the Greeks and Romans; but in Turkey, to-day, where religious liberty is supposed to exist, such sacrifices and orgies would be abhorrent, and the law would punish them. The religion of the Turk, on the other hand, sanctions polygamy, and this in a Christian country would be forbidden and punished as a high offense. But neither in the one case nor in the other is religious liberty violated when that which is abhorrent to the general public is forbidden. There must necessarily be bounds to religious liberty in every country, varying in each with the religious belief and accepted moral code of the people generally. A single sentence may perhaps be sufficient for the presentation of the general principle. Religious liberty in any country cannot embrace those things which the moral sense or sense of decency of the general public condemns, and which consequently cannot be allowed without injury to the public morals.

The acceptance of this as a general rule cannot preclude any government in its discretion tolerating that which its people would condemn, where for any reason of policy it should think proper to establish regulations to that effect. But the general principle that any class of people in a country can rightfully do that which is offensive to the public morals cannot be accepted. Opinion must be free; religious error the government should not concern itself with; but when the minority of any people feel impelled to indulge in practices or to observe ceremonies that the general community look upon as immoral excess or license, and therefore destructive to public morals, they have no claim to protection in so doing. The State cannot be bound to sanction immorality or crime, even though there be persons in a community with minds so perverted or depraved or ill-informed as to believe it to be countenanced or commanded of heaven. And the standard of immorality and crime must be the general sense of the people embodied in the law. There can be no other.¹

¹ Cooley, Const. Lim. 471, *et seq.*; Woolsey's Political Science, § 52.

When religious liberty is defined, there may still be rules for regulating its enjoyment. We say, in general, that every man is at liberty to worship God according to the dictates of his own conscience. But one man's conscience may perhaps impel him to gather a crowd for worship in the streets of a populous city *or to invade the house of worship of people of an- [*35] other belief and interrupt their exercises by substituting his own, or, Cassandra-like, to give solemn warnings in legislative halls or courts of justice. These the law must deal with as the excesses of liberty, because they encroach upon the just liberty of others or disturb the public order. Concede to every man the liberty to follow what he may assert to be the dictates of his own conscience, and there must soon be no organized society and no rational liberty of any sort. The reason is obvious: Society and liberty, as has been already shown, depend for their existence on regulations and restraints.

Equality of Civil Rights. In a free country all civil rights must be equal, except as the circumstances of individuals or classes create distinctions which it is necessary or proper for the law to recognize. We may illustrate with the right to maintain suits. Every one must possess it, and one is out of the protection of the law who is deprived of it. But there are classes whom it may not be proper to permit to manage their suits in their own way. The infant or the *non compos* for instance, who must appear by guardian. But this manifestly is only a regulation of a right; not a denial or even an abridgement of one. The State must deny to no man right and justice, but it may properly regulate the forms and proceedings through which he must obtain them. So the right to acquire an education is an important civil right; but though the State provides for this, it usually establishes schools for those who are within certain ages, and not for any others. In this case the persons within the prescribed ages have a right in the schools under proper regulations; others have a right to make their own voluntary arrangements. The people are impartially arranged into classes, and that is all that can be required. The public highways are for the common use of all, but discriminating regulations are often essential, and it may be deemed politic to prohibit certain classes being abroad in the streets at hours or under circumstances when they or the public

would be peculiarly liable to outrage or injury in consequence. The reasonableness of such regulations is the concern of legislation, and they may be legal, even when on the score of policy or justice there seems to be abundant ground to question the propriety of the distinctions. The common law did not allow the married woman to make contracts on her own behalf.

[*36] The general conviction now is that the *reasons were insufficient; but while they were accepted and acted upon, the most that one could say would be that this class of persons ought to have the right, but did not. However unfairly any particular discrimination might operate, it will readily be admitted that to give exactly the same rights to all classes under all circumstances would work injustice rather than equality. The case of the infant is perhaps the best illustration here; to give him the same control and management of his property which the law allows to others would only be taking from him a rule of protection which he needs, but which is not needed by others. The infant is undoubtedly entitled to equal consideration in the law with all others; but equality of civil rights, in a general sense, can only mean equality under impartial regulations; and these regulations cannot be reasonable or just unless in some cases they recognize or establish important distinctions.

The right to acquire, own and enjoy property may be said to be of universal recognition in government. And this includes the right to select and follow any lawful employment, with a view to the acquisition of property, subject only to reasonable and impartial regulations. The infant has this right of acquisition equally with the adult, and the insane equally with all others. There may be restrictions on control and management of property for the general good, or for the good of the owner, but these guard the right; they are not properly an abridgement of it. Instances of this are found in the requirement of the statute of frauds, that certain contracts and sales shall not be made unless by writing duly signed; the purpose here is not to preclude any proper contracts or sales, but to establish such precautions as will prevent the setting up of contracts and sales which were never made, and establishing them on mistaken or false testimony.

Political Rights. The privilege of participation in the government is conferred as an act of sovereignty on those whose par-

icipation is supposed to be most beneficial to the State. Being a privilege, no one is supposed to be injured when it is not conferred upon him. The rules of admission will be established by the State on a consideration of the general good.¹ The privilege is not conferred on the very young, and it is some- [*37] times withheld from the ignorant. It is also sometimes made to depend on the possession of property. A defense of such a discrimination is made by some on the ground that one of the chief objects of government is to render it possible to own and enjoy property, and if suffrage were universal, this purpose might be defeated by the government passing into the hands of those who, having no property of their own, may be disposed to despoil others. It may also be said that those ought to control the government whose contributions support it, and that these are the property owners.

Still, again, it may be said that the owner of property is *prima facie* better qualified to take part in the government than he who has nothing, because *prima facie* he has exhibited more prudence, thrift and judgment than the other. These theories do not concern us now. When the political privilege is conferred as an act of sovereign power, it becomes for the time being a legal right; a right which others must not disturb, which is capable of being defended, and which may even, for the purposes of legal defense, be considered as having a money value to the possessor. The deprivation thereof may consequently be compensated by a recovery of damages. But a like act of sovereignty to that which confers a political right may take it away. There cannot be, either in the elective franchise or in a public office any vested right as against the sovereignty, except so far as, in forming the constitution of government, it has been agreed that there should be.

Some political privileges are the right of every person, whether an elector or not. Such is the privilege of meeting and discussing public affairs with others. Such, also, are the privileges of petition and remonstrance. Every person under the jurisdiction of the laws has the right to petition for or remonstrate against a change therein, and also to address any official person or body upon any subject which concerns him as an individual, or the public of

¹ *Minor v. Happersett*, 21 Wall. 162; *State v. Staten*, 6 Cold. 233; *Spencer v. Spragins v. Houghton*, 3 Ill. 377, 396; *B'd. of Registration*, 1 McArthur, 169.

which he is a member, and over which such official person or board is vested with authority. Precautions are taken to guard this right by constitutional provisions, but they cannot be very effectual, because they are easily evaded. The caucus often in advance decides that the petition or remonstrance shall have no influence, and its reception then becomes an idle ceremony.

[*38] *Family Rights. The following may be mentioned as rights in the family relation :

1. The right of the husband to the society and services of the wife. It is often, and very justly, spoken of as a reproach to the common law, that it recognized in the wife no corresponding right to the society and services of her husband. Theoretically, the duty was imposed upon him to comfort and cherish, but the duty was one of imperfect obligation, because no remedy whatever was provided for failure to observe it.¹

Some few of the States have provided a remedy for this defect in a single class of cases; that is to say, cases in which the loss to the wife is occasioned by selling or giving to the husband intoxicating drinks. In these cases she is permitted to bring suit against the party who, by furnishing the means of intoxication, has been the cause of the loss, and she is allowed to recover substantial damages, where substantial loss has been suffered.

2. The right of the wife to a reasonable support, to be furnished by her husband.² This, also, at the common law

¹ 2 Kent, 182; Reeve Dom. Rel. 110. The subject will be discussed in a subsequent chapter.

² Where husband and wife are living together and he makes her an allowance sufficient for her clothes and has forbidden her to pledge his credit, he is not liable as for necessaries to a tradesman who has sold her clothing without any notice of the prohibition by the husband, the tradesman having had no reason from prior dealing to suppose that the wife had authority to pledge the husband's credit. *Debenham v. Mellon*, L. R. 5 Q. B. D. 394; L. R. 6 App. Cas. 24; see *Compton v. Bates*, 10 Ill. App. 78. When a wife leaves the husband's house because of his cruelty or neg-

lect, or with his express or implied consent, the husband is liable to anyone furnishing her with necessaries. *Billings v. Pitcher*, 7 B. Mon. 458; *Mahew v. Thayer*, 8 Gray, 172; *Emmett v. Norton*, 8 C. & P. 505; *Dixon v. Hurrell*, 8 C. & P. 717; *Rawley v. Vandyke*, 3 Esp. 251; *Hodges v. Hodges*, 1 Esp. 441; *Burton v. Shannon*, 14 Gray, 433; *Cartwright v. Bate*, 1 Allen, 514; *Hultz v. Gibbs*, 66 Penn. St. 360; *Biddle v. Frazier*, 3 Houst. 258; *Allen v. Aldrich*, 9 Foster, (N. H.) 63; *Pidgin v. Cram*, 8 N. H. 350; *Trotter v. Trotter*, 77 Ill. 510; *Lockwood v. Thomas*, 12 Johns. 248; *Tebbetts v. Hapgood*, 84 N. H. 420; *Walker v. Simpson*, 7 Watts & S. 83; *Parke v. Kleeber*, 37 Penn. 251; *Sno-*

was a *right of imperfect obligation, not only because the [*39] remedies for compelling its observance by the husband were inadequate, but because not protected in any way against abridgement or defeat at the hands of other parties.

3. The right of the parent to the custody and services of his child,¹ which is qualified by such regulations as the State may

ver v. Blair, 25 N. J. 94; *Pearson v. Darrington*, 32 Ala. 227; *Reese v. Chilton*, 36 Mo. 598; *Clement v. Mattison*, 3 Rich. (S.C.) 93; *Black v. Bryan*, 18 Texas, 453; *Eiler v. Crull*, 99 Ind. 375; in spite of his giving notice to the contrary, *Watkins v. De Armond*, 89 Ind. 553. So, too, if he deserts his wife and family, he is liable for their necessaries. *Hall v. Wier*, 1 Allen, 261; *Walker v. Loughton*, 31 N. H. 111, and notices, special or general, that he will not be bound will not avail him. *Pierpont v. Wilson*, 49 Conn. 450. If, by his cruelty, he compels his wife to leave him, and she dies while away, he is liable for the reasonable expense of her funeral, without notice of her death. *Cunningham v. Reardon*, 98 Mass. 539; *Ambrose v. Kerrison*, 10 C. B. 776; *Bradshaw v. Beard*, 12 C. B. (n. s.), 344. When goods are furnished against the husband's express orders to his wife living apart from him, he can be held only if the circumstances give her implied authority to bind him for necessaries. *Benjamin v. Dockham*, 132 Mass. 181. He is not liable if she leaves without sufficient cause. *Hartmann v. Tegart*, 12 Kan. 177; *Oinson v. Heritage*, 45 Ind. 73; S. C. 15 Am. Rep. 258; *Allen v. Aldrich*, 29 N. H. 63; *Brown v. Mudgett*, 40 Vt. 68; *Sturtevant v. Starin*, 19 Wis. 268; *McCutchen v. McGahay*, 11 Johns. 281; *Rutherford v. Coxe*, 11 Mo. 347; *Brown v. Patton*, 3 Humph. 185; *Porter v. Bobb*, 25 Mo. 36; *Evans v. Fisher*, 10 Ill. 569; *Williams v. Prince*, 8 Strobb. 490; *Ross v. Ross*, 69 Ill.

569; *Bevier v. Galloway*, 71 Ill. 517. Mere separation is not enough. The wife must appear to be without fault. *Lippincott's Est.*, 12 Phila. 142.

Where husband and wife separate by mutual consent, and the husband makes a contract with a third person to maintain the wife, if the wife leave such third person voluntarily, and without just cause, she will not carry with her authority to pledge her husband's credit for her support. *Pidgin v. Cram*, 8 N. H. 350.

The husband has a right to change his domicile, and it is the wife's duty to accompany him, and if she refuses, he is not liable for her support and maintenance. *Babbitt v. Babbitt*, 69 Ill. 277. Husband not liable under penal statute for failure to support, if wife refuses his offer of support at his father's house because of her dislike to his parents. *People v. Pettit*, 74 N. Y. 820. Where by statutes married women may be liable on their contracts, if goods are bought for ordinary domestic use the legal implication is that the husband is liable. *Wilson v. Herbert*, 41 N. J. L. 454; *Chester v. Pierce*, 33 Minn. 370. So if domestic servants are hired. *Wagner v. Nagel*, 33 Minn. 348; *Flynn v. Messenger*, 28 Minn. 208. See further on wife's liability for household necessaries. *McQuillen v. Singer Mfg. Co.* 90 Pa. St. 586; *Cook v. Ligon*, 54 Miss. 368.

¹The right of the parent to the services of his child may be lost by emancipating him. In brief, the

establish for his benefit and protection, and for the care and preservation of any property of which he may be possessed. One universal regulation is, that the right shall cease at a certain age; at twenty-one, or perhaps, in the case of females, at eighteen. Others which are sometimes established are, that very young children shall not be employed in mines, collieries, or factories, and that for a certain portion of the year they shall be placed in schools.

4. The obligation of the parent to support the child, when from immaturity or other cause he is unable to support himself, can hardly be said to confer upon the child a right to such support, because the law provides no means of enforcing the parental obligation for his benefit. The common law in this regard left the interests and protection of the child to what must often prove the imperfect guardianship of the State. In other words, [*40] it imposed *the obligation on the parent as a duty to the State, and not as a duty to the child.

There are other rights to which, in customary but somewhat loose language, it is said the child is entitled: such as the right to protection against injuries and against the unlawful action of others, the right to culture and education, the right to share in the parent's estate.

These are sometimes spoken of as natural rights, and the parent is said to be under an obligation to recognize them. But, as in

methods in which emancipation may take place are the following:

1. By a formal agreement between the father and child to that effect. *Morse v. Welton*, 6 Conn. 547; *Atwood v. Holcomb*, 39 Conn. 270; *Wolcott v. Rickey*, 23 Iowa, 172; *Mason v. Hutchins*, 32 Vt. 780; *Hall v. Hall*, 44 N. H. 293. 2. By the father refusing to care and provide for the child. *Nightingale v. Withington*, 15 Mass. 272; *Atwood v. Holcomb*, 39 Conn. 270. 3. By the father suffering the child to depart and act for himself, and employ his own services at his option. *Johnson v. Terry*, 34 Conn. 259; *Everett v. Sherfey*, 1 Iowa, 356; *Whiting v. Earl*, 3 Pick. 201; *Wodell v. Coggeshall*, 2 Met. 89; *Bray*

v. Wheeler, 29 Vt. 514; *Bell v. Bumpus*, 29 N. W. Rep. 862 (Mich.) That no formal emancipation is necessary, see *Sword v. Keith*, 31 Mich. 247; *Schoenberg v. Voigt*, 36 Mich. 310. A child may be emancipated and still live at home. *Donegan v. Davis*, 66 Ala. 362. There may be complete emancipation by relinquishing the control of the child to another although the latter has not completed a statutory adoption. *West Gardiner v. Manchester*, 72 Me. 509. The consent of a parent to a child's receiving his wages is a license revocable at the will of the parent as between him and the child. *Soldanels v. Missouri, etc., Ry. Co.*, 23 Mo. App. 516.

the case of other so-called natural rights, this can be no more than a moral obligation, and therefore the rights in a legal sense do not exist. We may test this by supposing any one of the supposed rights violated: that, for instance, of protection. A third person beats the child without justification, the father looking on and not giving the protection which the impulses of affection and the sense of justice should prompt him to afford. In such a case the assaulter is responsible to the State for his criminal attack upon a citizen; he is responsible to the child in a civil action, and he may possibly even be liable to the father if the attack has diminished the child's ability to perform labor. But the father incurs no liability to the child for failure to extend protection.'

In thus neglecting the parental obligation he may have demonstrated how lamentably he is wanting in natural feeling, but he has violated no positive command of the law. The same remark holds good when the education of the child is in question. A parent having the necessary ability ought to give his child such an education as will fit him to enter the world of business, literature, science, art, or politics, with such full preparation as will enable him to contend for wealth, position, and honors with those whom he may there encounter. But the duty to do this was never imposed by the law; it was left wholly to the dictates of natural affection, family pride, and the other motives which usually are expected to influence the parent in that direction. If these failed of effect, the child at the common law had no remedy whatever. Some steps have recently been taken by statute for the compulsory education of children; but the duty which statutes impose in that direction is imposed as a duty to the State, and its performance is compelled by imposing penalties, not by allowing the child to bring action against the delinquent parent.

*The old common law did not empower the parent to [*41] dispose of his real estate by testamentary gift and it probably did not permit him to dispose of all his chattels. But since the reign of Henry VIII. a general power to dispose of both species of property has existed, saving, however, the rights of

'A mother, as natural guardian, cannot by an admission deprive her child of a right of action which is a right of property. Power v. Harlow, 57 Mich. 107.

creditors, and of the widow if there was one. While, therefore, it is usually expected that the child will be permitted to share in the parent's estate, the law does not insure this as a right. If the parent sees fit to disinherit him, he has no redress. But if the parent makes no will, the law of distributions and descents apporions the property among the kindred, usually remembering the children first of all.

- There have, in some instances, been statutes which took from the parent some portion of this authority; limiting his power to dispose of property by testamentary gift to a certain proportion thereof, leaving the remainder to pass to those who are designated by the law as heirs and distributees. Even such statutes give no rights to the child as such. They limit the power of the owner over his real estate; but what they give on the owner's death is given, not in recognition of a right, and not necessarily to a child, but to such persons as in that contingency, in view of their relationship to the deceased, the State has thought proper to make his successor in the ownership.

Right to Form the Family. Back of these family rights is the right to form the relation from which at the common law, all family rights spring: the relation of marriage. In various directions this right is hedged about with conditions, established for the general good. *First.* The person must have attained the prescribed age or the act will be inchoate only and require confirmation when that age is reached. *Second.* The consent of parents or guardian may perhaps be required by law. *Third.* There must be the consent of the person to be married, freely given; for the law only sanctions voluntary arrangements. Some act of publicity may be required to precede it, such as the publishing of banns, or the issue and record of a license. *Fourth.* The law may permit it only under certain prescribed forms, the absence of which will render any voluntary action ineffectual. And, even observing these forms, it is only persons of consenting mind who may marry; by which is meant only those persons who have that degree of legal capacity which the law recognizes as sufficient for entering into *contracts of this important nature. When, therefore, it is said that the right to enter into the relation of marriage is universal, this does not exactly express the legal idea. The legal idea is, that every one

has a legal 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.

Domestic Relations in General. Besides the family relations which spring from marriage there are certain domestic relations of another origin. The relation of master and servant, for instance, is one of contract. The relation of master and apprentice is similar, though here the contracting party on one side may really be the State in some cases. The relation of guardian and ward is of various origin but usually is a matter of judicial creation. But none of these are strictly family relations, or give family rights. Family relations, strictly and fully recognized by the law as such, embrace that formed in marriage and those which spring therefrom. The common law did not even take notice of adoption as giving one any permanent family rights. The adopted child was only permitted to occupy the place of a child for the time being; that is to say, he stood in the position of child by sufferance only, and had no share in the distribution of the parent's property at his death.¹ The child born out of

¹The statutes of some States give a child formally adopted the rights, more or less complete, of a child by birth under the laws of descent. This is, of course, a change of the common law. See *Commonwealth v. Nancrede*, 33 Penn. St. 389; *Sewall v. Roberts*, 115 Mass. 262; *Safford v. Houghton*, 48 Vt. 236; *Barnes v. Allen*, 25 Ind. 222; *Russell v. Russell*, 3 South. Rep. 900 (Ala.). If statutes give an adopted child the right to inherit from the foster parent but do not give expressly a reciprocal right to the latter, the estate of an adopted child descends to his blood kindred. *Hole v. Robbins*, 53 Wis. 514; *Barnhizel v. Ferrell*, 47 Ind. 335. In Illinois such child can inherit only from the person adopting, not from a child of such person. *Keegan v. Geraghty*, 101 Ill. 26. If one adopts children of his deceased daughter they

take as his own children and also the share of their mother. *Wagner v. Varner*, 50 Ia. 532. If a man without his wife's concurrence adopts a child, it would not become the heir of his widow. *Sharkey v. McDermott*, 16 Mo. App. 80. As to inheriting when adoption has taken place in another State, see *Ross v. Ross*, 129 Mass. 243; *Keegan v. Geraghty*, 101 Ill. 26. In the absence of statute and without contract to that effect a stepfather is not bound to support stepchildren. *Smith v. Rogers*, 24 Kan. 140; *McMahill v. McMabill*, 113 Ill. 461; *In re Besondy*, 32 Minn. 385; *Norton v. Ailor*, 11 Lea, 563. But step children and adopted children who are received into a family stand for the time being in the position of children. They cannot claim compensation for services performed in the family, neither, on the other hand,

matrimony had, at the common law, no claim whatever upon the parent.¹

[*43] ***Family, as Such, No Rights.** It was remarked in the preceding chapter that the law only recognized individual rights; it did not recognize associations except as so many individuals, each having a distinct legal identity and distinct legal rights. An apparent exception was made in the case of a corporation, but only by aggregating the persons composing the corporation and treating them all as one artificial person. The remark holds good in the case of the family; the family as such has no distinct rights in the law. The father has a certain position in the family, and this he may defend against outside assailants; the wife has also a certain position in the family, and the children have their respective positions; 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. Thus this fundamental relation, which is older than civilization, and must always precede and always accompany it, and without which there can be neither social state in which morality or decency will be recognized, nor civil state with regulated liberty and order, is only indirectly recognized in the recognition of

can they be required to pay for a support received, in the absence of express contract. *Williams v. Hutchinson*, 8 N. Y. 312; *Sharp v. Cropsey*, 11 Barb. 224; *Defrance v. Austin*, 9 Penn. St. 309; *Lanz v. Frey*, 19 Penn. St. 366; *Worcester v. Marchant*, 14 Pick. 510; *Brush v. Blanchard*, 18 Ill. 46; *Freto v. Brown*, 4 Mass. 675; *Bond v. Lockwood*, 33 Ill. 212; *Andrus v. Foster*, 17 Vt. 550; *Lunay v. Vantyne*, 40 Vt. 501; *Hussey v. Roundtree*, *Busbee*, 510; *Gillett v. Camp*, 27 Mo. 541; *Murdock v. Murdock*, 7 Cal. 511; *Mowbry v. Mowbry*, 64 Ill. 383; *Mulbert v. McDavitt*, 16 Gray, 404; *Meyer v. Temme*, 72 Ill. 574; *McMahill v. McMahill*, 113 Ill. 461; *Sword v. Keith*, 31 Mich. 247; *Ruckman's Appeal*, 61 Penn. St. 251; *Brown v. Welsh*, 27 N. J. Eq. 429; *Disenger's case*, 39 N. J. Eq. 227; *Gerdes v.*

Weiser, 54 Ia. 591; *Ela v. Brand*, 63 N. H. 14; *Norton v. Ailor*, 11 Lea, 563. *In re Besondy*, 32 Minn. 385; *Smith v. Rogers*, 24 Kan. 140. In England the statute 4 and 5 W. IV. c. 76, § 75, requires the husband to support the children of his wife, legitimate or illegitimate, until they reach the age of sixteen or their mother dies.

¹ It is provided by statute in several States that the intermarriage of the parents of an illegitimate child, and their recognition of him as their offspring, shall legitimate him. As to such legislation see *Morgan v. Perry*, 51 N. H. 559. The issue of adulterous intercourse becomes lawful by the marriage of the parents after the death of the first wife of the father. *Hawbecker v. Hawbecker*, 43 Md. 516.

rights of its constituent members. Whether it would be wiser for the law to give positive recognition to the family as a legal entity, and confer rights to definite legal positions therein, is something which experience could alone determine. Religion, we have seen, is only indirectly recognized in the law, in the regulations that are made for the protection of worshippers, and yet religion, doubtless, is most prosperous when the State interferes with it least. And it is probably true that in the vast majority of cases the natural impulses and affections have more influence in insuring the observance of moral obligations in the family relations than the law could exercise or possess.

Taking away Rights. All the rights which have been enumerated are subject to be taken away by an act of sovereignty accomplished under legal forms. This is sometimes done by way of forfeiture or punishment, as life or liberty is taken away for felony. In other cases it is done in the regular administration of justice to others, as family rights are taken in granting a divorce, or property is taken *in compelling the satisfaction of a debt. In [*44] still other cases a man deprives himself of the legal protection of rights by his own illegal conduct. Thus, to a certain extent, a man puts aside the protection of the law when he makes an assault upon another, for the other may lawfully inflict injury upon him in necessary self-defense.¹ So, if he engages in an illegal

¹Dr. WOOLSEY, speaking of self-defense, considers the party defending himself, as for the time, in so doing, an instrument of the law in administering its justice. He says: "There are seeming cases of collision which must be explained by the essential limitation of certain rights. One of these is the right of taking life in lawful self-defense, as when a man is attacked by a robber. The harmless passenger and the highwayman have both by nature a right to life, but the right is not unlimited; otherwise the State could not take the life of the criminal, and the man who respects his obligations would be required to renounce for ever the right of self-defense against enemies seeking his

life. The true statement is that the right of self-defense belongs only to the innocent man, and not, in this particular case, to the robber. He has the general right of life, but now he is in effect punished for a crime, and there can be no punishment without deprivation of rights." And again: "It might seem that a man who, in self-defense, takes away the life of a robber, does an injury to another. The true statement, however, seems to have been given already; he does no injury to the robber, although he does harm to him, for he acts as a minister of justice." Political Science, § 18. This is not at all the legal view. The right of self-defense is given solely for self-protection, and it is

act, and thereby exposes himself to the negligence of another, he waives any right to redress, because any exposure to injury under such circumstances is as culpable in him as is the negligence in his associate, and the result comes from a concurrence of blamable conduct. The principle will be further considered in another place. Here it may be stated in a few words: A person cannot make his own illegal action the foundation of a legal right. Therefore, if, as a consequence of his own illegal action, he suffers a wrong, he must not look to the law for redress. *Ex dolo malo non oritur actio*. He has invited what has come, and he must accept it.¹

limited strictly to the necessity. The moment one exceeds the limit of the necessity and proceeds to "punish" his assailant, or to make himself a

"minister of justice," he becomes himself an object of punishment.

¹ Broom, *Legal Maxims*, 571.

* CHAPTER III.

[*45]

CIVIL INJURIES; THEIR ELEMENTS, AND THE REMEDIES FOR THEIR COMMISSION.

In a previous chapter it was said that the law undertakes to give security to the rights of individuals by putting within their reach suitable redress whenever their rights have been actually violated.¹ Before any violation has in fact taken place, the law assumes that none will happen; but that each individual will respect the rights of all others. Therefore, it does not undertake in general to provide preventive remedies; it gives them in a few exceptional cases, which stand on peculiar grounds, and in which the mischiefs flowing from an invasion of rights might be such as would be incapable of complete redress in the ordinary methods, or perhaps in any manner. In most cases it is assumed that, if the law places within the reach of every one a suitable remedy to which he may resort when he suffers an injury, it has thereby not only provided for him adequate protection, but has given him all that public policy demands. The remedies that are aimed at wrongs not yet committed but only threatened, are so susceptible of abuse that they are wisely restricted within very narrow limits.

Redress by the Party's own Act. In a few cases the party injured is allowed to redress his own wrong, in whole or in part, without calling in the aid of the law. But the cases in which this is permitted are not numerous, and they are in the main cases of urgency, in which a resort to the ordinary remedies would be inadequate to complete justice. A general permission to every man to take the law into his own hands for his own redress, would be subversive of civil government; the permission cannot safely go beyond those cases in which force is justifiable in defense of person or property, and other cases resting on similar reasons.

¹Ante, p. 4-6.

[*46] ***Abatement of Nuisance.** One instance in which redress by the act of the party is admitted, is where a nuisance exists to his prejudice; either a private nuisance or a public nuisance from which he suffers a special and peculiar injury. The redress here consists in removing that which constitutes the nuisance, and it is allowed, not because of any injury it may have done, but to prevent the injury it may do. It is, therefore, in some sense, a preventive remedy, not a compensatory remedy: for damages suffered the party is left to the ordinary action.

The question who may abate a nuisance may depend upon whether the nuisance is public or private. If it is a private nuisance, he only can abate it who is injured by its continuance: if it is a public nuisance, he only may abate it who suffers a special grievance not felt by the public in general. Therefore, if one places an obstruction in a public street, an individual who is incommoded by it may remove it; ¹ but unless he has occasion to make use of the highway he must leave the public injury ² to be *redressed by the public authorities. It is the [*47]

¹ *Lincoln v. Chadbourne*, 56 Me. 197. The proprietors of a steamboat on a navigable river may tear away sufficient of a bridge to enable them to take their boat through, where the bridge has been constructed without a draw, and the proprietors, after notice, have neglected to remove the bridge or put in a draw. *State v. Parrott*, 71 N. C. 311. One may remove a wharf built in navigable water in front of and disconnected with his land which prevents access to it. *Larson v. Furlong*, 63 Wis. 323. See *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Inhab. of Arundel v. McCulloch*, 10 Mass. 70. If a highway officer by digging a drain causes a private nuisance to an abutting owner, the latter may abate it if he does not interfere with the use of the road. *State v. Smith*, 52 Wis. 134. If by filling up a public culvert water is turned on land, the owner may open the culvert. *Reed v. Cheney*, 111 Ind. 387. But an encroachment on a public way not amounting to

an obstruction of the travelled part of the road will not justify an individual in abating it. *Godsell v. Fleming*, 59 Wis. 52.

² *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Dimes v. Pettey*, 15 Q. B. 276; *Davies v. Mann*, 10 M. & W. 546; *Bateman v. Bluck*, 18 Q. B. 870; *Eastern Co. R. Co. v. Dorling*, 6 C. B. (N. S.) 821; *Roberts v. Rose*, 3 H. & C. 162; S. C., L. R. 1 Ex. 82; *Arundel v. McCulloch*, 10 Mass. 70; *Brown v. Perkins*, 12 Gray, 89; *Lansing v. Smith*, 8 Cow. 146; *Rogers v. Rogers*, 14 Wendell, 131; *Ely v. Supervisors*, 36 N. Y. 297; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Adams v. Beach*, 6 Hill, 271; *Burnham v. Hotchkiss*, 14 Conn. 311; *State v. Paul*, 5 R. I. 185; *Hopkins v. Crombie*, 4 N. H. 520; *Amoskeag Co. v. Goodale*, 46 N. H. 53; *Rung v. Shoneberger*, 2 Watts, 23; *Philber v. Matson*, 14 Penn. St. 306; *Gates v. Blincoe*, 2 Dana, 158; *Gray v. Ayers*, 7 Dana, 375; *Selman v. Wolfe*, 27 Texas, 68; *Moffett v. Brewer*, 1 Iowa, 348.

existence of an emergency which justifies the interference of the individual.¹

In permitting this redress, certain restrictions are imposed to prevent abuse or unnecessary injury. One of these is, that the right must not be exercised to the prejudice of the public peace: therefore, if the abatement is resisted, it becomes necessary to seek in the courts the ordinary legal remedies.² Another is that,

In *Brown v. Perkins*, 12 Gray, 89, 101, SHAW, Ch. J., says: "The true theory of abatement of nuisance is, that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing." See *Hopkins v. Crombie*, 4 N. H. 520; *Griffith v. McCullum*, 46 Barb. 561; *Bateman v. Bluck*, 18 Q. B. 870; *Mayor, etc., of Colchester v. Brooke*, 7 Q. B. 339, 377. One may not abate as a public nuisance an unsightly building standing in navigable water in front of his villa on the ground that it renders his land less accessible, unless he has failed in an attempt to approach the land, or has been deterred from attempting it. He can abate it only if specially injured by it *qua* public nuisance. *Bowden v. Lewis*, 13 R. L. 189.

¹In *Burnham v. Hotchkiss*, 14 Conn. 310, 317, it is said that a common nuisance may be removed, or, in legal language, abated by any individual; for which the general language of several authorities is cited. But the cases in which the question has been carefully considered restrict the right as above shown.

A right to abate a structure as a nuisance gives one no right to appropriate the materials thereof; *Larson v. Furlong*, 50 Wis. 681, unless such materials were taken tortiously from

the one abating, *id.* 63 Wis. 323. If oysters are planted by one individual in public waters so as to become a public nuisance, another may not take them; *Grace v. Willetts* 14 Alt. Rep. 559 (N. J.); but if the latter, in taking claims rightfully, disturbs the oyster bed unintentionally, he is not liable; *Brown v. DeGroff*, *id.* 419 (N. J.) The fact that one has neglected to abate a nuisance when he might does not preclude his recovery for his injury; *Jarvis v. St. Louis & Co.*, 26 Mo. App. 253; at least not for that afterward suffered, if there was no apparent danger of serious injury at the time of such neglect. *Copper v. Dolvin*, 68 Ia. 757.

²*Miller et al. v. Burch*, 83 Texas, 208; *Day v. Day*, 4 Md. 262; *Turner v. Holtzman*, 54 Md. 148; *Graves v. Shattuck*, 35 New Hamp. 257; *Perry v. Fitzhowe*, 8 Q. B. 757; *Baldwin v. Smith*, 82 Ill. 162. In the case last mentioned, the question mainly discussed was whether, when the nuisance consists in a dwelling house which is inhabited, and which has been wrongfully erected where the defendant had a right of common, the latter could lawfully pull it down while the family were in it; and the conclusion was that from the necessary tendency of such an act to a breach of the peace, the law could not permit it.

In some cases, however, parties have been held justified in removing houses which were nuisances, even while the families were in them. *Davies v. Wil-*

as a general rule, before resorting to such extreme measures, the party responsible for the nuisance should be notified of its existence, and requested to remove it; and the forcible abatement would only be justified when, after lapse of reasonable time, the request was not complied with.¹ This, however, is by no means a universal rule. It has been said, in one case: "Nuisances by act of commission are committed in defiance of those whom such nuisances injure; and the injured party may abate them without notice to the party who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal [*48] act of negligence, which distinguishes this case from most of the other cases which have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord HALE, and appeal to a court of justice."² If we take this as a correct statement of the circumstances under which the nuisance may be abated without previous notice, it would seem that notice is not essential where the grievance has arisen from the positive wrongful act or gross negligence of the party responsible for its continuance, or where it threatens such immediate injury to life or health that the allowance of time for its removal, beyond what is absolutely essential, could not reasonably be demanded. Under this rule, if the nuisance were merely permitted by the alienee of the party creating it, notice to remove it would

Williams, 16 Q. B. 546; *Burling v. Read*, 11 Q. B. 904; *Meeker v. Van Rensselaer*, 15 Wend. 897. But where notice of the intention to remove was not given, it was held to be unjustifiable. *Jones v. Jones*, 1 H. & C. 1.

¹ *Perry v. Fitzhowe*, 8 Q. B. 776; *Burling v. Read*, 11 Q. B. 904; *Davies*

v. Williams, 16 Q. B. 546; *Jones v. Jones*, 1 H. & C. 1; *Meeker v. Van Rensselaer*, 15 Wend. 897; *State v. Parrott*, 71 N. C. 311; *S. C. 17 Am. Rep. 5*.

² *Best, J. in Earl of Lonsdale v. Nelson*, 2 B. & C. 302, 311.

be essential in all cases which were not of extreme urgency; and in such cases this is obviously a very proper requirement.

Another limitation upon the right is, that in its exercise the party must inflict as little injury as possible.³ The fact that he is taking the law into his own hands, imposes upon him a special obligation to keep clearly within the necessity which justifies it; *and if he is guilty of wanton or unnecessary vio- [*49] lence, he is liable for the excess.* A building is not to be destroyed merely because the use to which it is put is a nuisance;⁴

¹ Penruddock's Case, 5 Rep. 101; Jones v. Williams, 11 M. & W. 176; Van Wormer v. Albany, 15 Wend. 262; Meeker v. Van Rensselaer, 15 Wend. 397. In the two cases last cited, buildings were torn down as nuisances during the prevalence of Asiatic cholera, no previous notice having been given, except to the tenants, to remove. And see Hart v. Albany, 8 Paige, 213. See also Occum Co. v. Sprague Co., 34 Conn. 529; Shepard v. People, 40 Mich. 487.

² "Where a person attempts to justify an interference with the property of another, in order to abate a nuisance, he may justify himself as against the wrong doer, so far as his interference is positively necessary. We are also agreed that in abating the nuisance, if there are two ways of doing it, he must choose the least mischievous of the two. We also think if, by one of these alternative methods, some wrong would be done to an innocent third party, or to the public, then that method cannot be justified at all, although an interference with the wrong doer himself might be justified. Therefore, where the alternative method involves such an interference, it must not be adopted, and it may become necessary to abate the nuisance in a manner more onerous to the wrong doer." Blackburn, J. in Roberts v. Rose, L. R. 1 Ex. 82, 89. In removing a chattel wrongfully placed on one's land, one

must do no needless damage to the chattel. Burnham v. Jenness, 54 Vt. 272. Ordinary care and skill is the measure of duty. Mark v. Hudson etc. Co. 103 N. Y. 28.

³ Greenslade v. Halliday, 6 Bing. 379; Roberts v. Rose, L. R. 1 Exch. 82; State v. Moffett, 1 Greene (Iowa), 247; Moffett v. Brewer, Ibid. 348; Indianapolis v. Miller, 27 Ind. 394; Cobb v. Bennett, 75 Pa. St. 326.

⁴ Welch v. Stowell, 2 Doug. Mich. 332; Barclay v. Commonwealth, 25 Penn. St. 503; State v. Paul, 5 R. I. 185; State v. Keeran, 5 R. I. 497; Ely v. Supervisors of Niagara, 36 N. Y. 297; Miller v. Burch, 32 Texas, 208; Brown v. Perkins, 12 Gray, 89; Earp v. Lee, 71 Ill. 193; S. C. 5 Am. Rep. 242. In Van Wormer v. Albany, 15 Wend. 262, and Meeker v. Van Rensselaer, Ib. 397, the destruction of the building itself seems to have been justified, on the ground, apparently, that it was impossible otherwise to remove the cause of disease. This subject was fully and carefully considered, and the authorities collected in Brightman v. Bristol, 65 Me. 426; S. C. 20 Am. Rep. 711. The case was one where a building, in which a business offensive from its smells was carried on, was torn down to abate the nuisance. This method of abatement was held unjustifiable, and the proprietor recovered the full value of his building.

nor because it has become offensive, if the cause of offense can otherwise be removed. The nuisance of a bawdy house is not in the building itself, but in the character of its occupation;¹ and a barn which has become offensive by reason of the accumulation of filth, is to be cleaned instead of destroyed, when cleaning is practicable.² It is only where an erection or structure in itself constitutes a nuisance because of its being erected in a public street, or without right either on public or private grounds that its demolition and removal can be justified.³

Abatement of the nuisance by the act of the party aggrieved does not preclude an action for damages. "It is a preventive remedy merely, and resembles more an entry into land, or recapture of personal property. Neither will bar an action for the original invasion of the plaintiff's right."⁴

Defense of Person or Property. The right to defend one's own person, the right to defend anyone standing in the [*50] relation *of husband and wife, parent and child, or master and servant, and the right to defend one's property, are rights given, not for the redress of injuries, but for their prevention. The right is limited strictly to the necessity, and the redress for any injury actually sustained must be sought by suit.

Recaption or Reprisal is a remedy by the act of the party himself, where any of his personal property, or any person to whose custody he is entitled, is taken or detained away from him. This consists in retaking the same into his own possession whenever or wherever he may peaceably do so. But this right is subordinate to the preservation of the public peace; for "the public peace is a superior consideration to any man's private property," and "if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease; the

¹ King v. Rosewell, 2 Salk. 459; Welch v. Stowell, 2 Doug. Mich. 332; Ely v. Supervisors of Niagara, 36 N. Y. 297.

² The nuisance of a pond of water is not to be abated by filling it up. Finley v. Hershey, 41 Iowa, 389. A tannery is not *per se* a nuisance, and should not be abated as such with-

out proper legal proceedings. Marshall v. Street Commissioner, 36 N. J. 283.

³ Barclay v. Commonwealth, 25 Penn. St. 503.

⁴ Pierce v. Dart, 7 Cow. 609, 613. See, also, Wetmore v. Tracy, 14 Wend. 250; State v. Moffett, 1 Greene, (Iowa) 47.

strong would give law to the weak, and every man would revert to a state of nature."¹

In order to a correct understanding of this right of recaption, it is necessary to have in mind the different circumstances under which one's goods may be upon the premises of another, and the persons who may be responsible for their being there. It is a general rule, that the owner of real estate is entitled to exclusive possession thereof, and every unauthorized entry thereon is a trespass; but if one take the goods of another, and carry them upon his own land, the owner may enter to retake them, because the wrong of the other excuses the entry.²

So if one, though not purposely a wrong-doer himself, has received possession from another whose possession was tortious, the owner may enter to retake them; the tort [*51]feasor being incapable of conferring any better right than he himself had.³

So if one sells goods which are in his own possession, and nothing in the contract of sale indicates that they are to be delivered elsewhere than where they are, the sale itself is an implied license to the purchaser to enter and take the goods away; and this license being coupled with an interest, is incapable of being revoked.⁴

¹ 3 Bl. Com. 4: see *Davis v. Whe-bridge*, 2 Strob. 233; *Hyatt v. Wood*, 4 Johns. 150, 158; *Everton v. Sutton*, 5 Wend. 281, 285; *Higgins v. State*, 7 Ind. 549; *Sterling v. Warden*, 51 N. H. 217; S. C. 12 Am. Rep. 80; *Harris v. Marco*, 16 S. C. 575. But the fact that a breach of the peace was committed in taking the property does not make the taking, if otherwise rightful, a trespass; it only subjects the party to a public prosecution. *Brown v. Cram*, 1 N. H. 171; *Blades v. Higgs*, 10 C. B. (N. S.) 713; *Mills v. Wooten*, 59 Ill. 234.

² *Chapman v. Thumblethorp*, Cro. Eliz. 829; *Patrick v. Colerick*, 3 M. & W. 483; *Webb v. Beavan*, 6 M. & G. 1055; *Richardson v. Anthony*, 12 Vt. 273; *White v. Twitchell*, 25 Vt. 620; *Spencer v. McGowen*, 13 Wend. 256; *Newkirk v. Sabler*, 9 Barb. 652, 656; *Burns v. Johnson*, 1 J. J. Marsh, 196;

State v. Elliott, 11 N. H. 540; *Sterling v. Warden*, 51 N. H. 217, 228; *Allen v. Feland*, 10 B. Mon. 306; *Chambers v. Bedell*, 2 W. & S. 125; provided no more force is used than is necessary to accomplish it. *Hopkins v. Dickson*, 59 N. H. 235; *Carter v. Sutherland*, 52 Mich. 597. The owner of goods levied on as those of the judgment debtor may retake them from the officer. *Burt v. Blake*, 14 Ill. App. 324.

³ *Trudo v. Anderson*, 10 Mich. 357; *Parish v. Morey*, 40 Mich. 417; *McLeod v. Jones*, 105 Mass. 403, 405; S. C. 7 Am. Rep. 539.

⁴ *Wood v. Manley*, 11 Ad. & El. 34; *Giles v. Simonds*, 15 Gray, 441; *Nettleton v. Sikes*, 8 Met. 34; *Miller v. State*, 39 Ind. 267. The sale of growing trees gives a license to enter and cut within a reasonable time. *Heflin v. Bingham*, 56 Ala. 566. The doc-

So where one, upon his own land, has been rightfully in possession of property, but his right has terminated and been acquired by another, the latter may lawfully enter to take it away; as in the case of a government officer, who may justify entering upon the premises of his predecessor to remove the public property there remaining.¹ One who obtains property by a fraudulent purchase becomes a wrong-doer in respect to the possession so soon as the sale is rescinded for the fraud, and the vendor may reclaim it by peaceable entry.² The right to retake [*52] is not lost by *the wrong-doer having put the chattel to such a use that removing it inflicts a damage upon him, but he must take all such risks as are incident to an exercise of the owner's right.³ And in any case, if one's property is on the land of another, with either the express or the implied assent of the latter, the former may enter to remove it,⁴ subject, we should

trine and the limitations upon it are thus stated by Wells, J. in *McLeod v. Jones*, 105 Mass. 403, 406: "A license is implied, because it is necessary to carry the sale into complete effect, and is therefore presumed to have been in the contemplation of the parties. It forms a part of the contract of sale. The seller cannot deprive the purchaser of his property, or drive him to an action for its recovery, by withdrawing his implied permission to come and take it. This proposition does not apply, of course, to a case where a severance from the realty is necessary to convert the subject of the sale into personalty, and the revocation is made before such severance.

"But there is no such inference to be drawn when the property, at the time of the sale, is not upon the seller's premises, or when, by the terms of the contract, it is to be delivered elsewhere. And when there is nothing executory or incomplete between the parties in respect to the property, and there is no relation of contract between them respecting it, except what results from the facts of legal ownership in one and possession in

the other, no inference of a license to enter upon lands for the recovery of the property can be drawn from that relation alone. 20 Vin. Abr. 509, *Trespass*, H. a. 2 pl. 18; *Anthony v. Haney*, 8 Bing. 186; *Williams v. Morris* 8 M. & W. 438."

¹ *Sterling v. Warden*, 52 N. H. 197: see, also, the case of *Burridge v. Nicholetts*, 6 H. & N. 383. A tenant, after the relation is dissolved, may enter to reclaim his goods. *Daniels v. Brown*, 34 N. H. 456.

² *Wheeldon v. Lowell*, 50 Me. 499: see *Rea v. Shepard*, 2 M. & W. 426. If one's cattle are found on the land of another, and there is no evidence how they came there, he may lawfully enter and reclaim them. *Richardson v. Anthony*, 12 Vt. 278.

³ *White v. Twitchell*, 25 Vt. 620. So where stone was tortiously taken from defendant's land by plaintiff to build a pier which defendant rightfully abated. *Larson v. Furlong*, 63 Wis. 323.

⁴ *Nettleton v. Sikes*, 8 Met. 34; *Sterling v. Warden*, 51 N. H. 217; S. C. 12 Am. Rep. 80; *White v. Elwell*, 48 Me. 360; *Schoonover v. Irwin*, 58 Ind. 287.

say, to this restriction: That notice should be given of the intent to do so, whenever, under the circumstances, it can reasonably be supposed that notice to the land-owner can be important to the protection of his own rights. The time and the circumstances, also, ought to be suitable; one should not enter his neighbor's house unannounced, or in the night time, to take away an article left there by permission, nor, if the chattel is under lock, break open doors or fastenings, without first making demand for its restoration.¹ And if a third party shall take the property of one, and place it upon the land of another, without the consent or co-operation of either, while the latter, perhaps, might forbid the entry of the owner to remove it, and hold him a trespasser if he should persist in doing so, yet in that case he would be under obligation to restore it on demand, and the owner might proceed, by replevin, to take it, on his refusal.²

But if the owner is himself a wrong-doer in leaving his property upon another's land, he must take the consequences of his wrongful act, and cannot, by an unlawful entry, acquire a right to make one that shall be lawful.³

*The right of recaption may sometimes be exercised [*53] under circumstances which give to the party exercising it

¹See *Blades v. Higgs*, 10 C. B. (N. S.) 713; *Sterling v. Warden*, 51 N. H. 217; S. C. 12 Am. Rep. 80, and cases cited. *Drury v. Hervey*, 126 Mass. 519, a case of an entry in unreasonable manner to retake an article on breach of condition precedent to complete sale.

²In *Anthony v. Haney*, 8 Bing. 187, it is intimated by TINDAL, Ch. J., that if the occupant of the freehold refused to deliver up the property, the owner might enter and take it, subject to the payment of any damages he might commit. But if he were liable in damages for the entry, it must be because the entry is unlawful; and in that case it might be resisted. There can be no such absurdity as a right of entry and a co-existent right to resist the entry. The case of *Chambers v. Bedell*, 2 W. & S. 225, seems to recognize the right of the

owner, after the demand and refusal, to enter and take away his property, if he can do so peaceably. Compare *Roach v. Dumron*, 2 Humph. 425. If one removes chattels wrongfully placed on his land he must act so as not unreasonably to injure the wrong-doer; *Burnham v. Jenness* 54 Vt. 272.

³*Anthony v. Haney*, 8 Bing. 187; *Roach v. Dumron*, 2 Humph. 425; *Crocker v. Carson*, 33 Me. 436; *Blake v. Johnson*, 14 Johns. 406; *Heermance v. Fernoy*, 6 Johns. 5; *Chess v. Kelsey*, 3 Blackf. 438. One of two tenants in common of a chattel has no right to break into the premises of the other to obtain it. *Herndon v. Bartlett*, 4 Porter, 481; *Crocker v. Carson*, 33 Me. 436. See further, *Huppert v. Morrison*, 27 Miss. 365; *Allen v. Feland*, 10 B. Mon. 306; *Newbold v. Sabler*, 9 Barb. 57; *Chase v. Jefferson*, 1 Houst. 257.

not his own merely, but also property of the wrong-doer. When that is permitted it is of necessity, and because in no other way can practical justice be accomplished. For example, if one purposely or by negligence take a hundred bushels of his neighbor's wheat and commingle it with a hundred bushels of his own barley, so that a separation of the two becomes practically impossible, the law permits the owner of the wheat, in retaking it, to take that which is inseparably commingled with it, since in no other way can he reclaim his own property.¹ The inextricable confusion of his goods with the goods of another gives him this right, provided the intermixture was wrongful. But at his option he may refuse the whole and sue for the value of what has been taken from him.

Suppose, however, that the grain, instead of being different in kind, had all been wheat of the same kind and quality owned severally by the two. In that case, as in the other, separation would have been impossible; but if each were to take from the mass a quantity equal to what he owned when the commingling took place, he would receive, though not exactly his own, yet that which, for all practical purposes, is the equivalent. It would be equal in value, it could be used for the same purposes, and to the senses no difference would be perceptible. To give him back the equal quantity is therefore to do him justice, unless his having

¹ 2 Kent, 364, 365; *Loomis v. Green*, 7 Me. 386; *Wingate v. Smith*, 20 Me. 287; *Moore v. Bowman*, 47 N. H. 494; *Weil v. Silverstone*, 6 Bush. 698; *Alley v. Adams*, 44 Ala. 609; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Willard v. Rice*, 11 Met. 490; *Jenkins v. Steanka*, 19 Wis. 139; *Beach v. Schmultz*, 20 Ill. 185. "All the authorities agree, that if a man wilfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his proportion or any part, of the property, certainly not unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so if the wrongdoer confounds his own goods with goods which he expects may belong to an-

other and does this with intent to mislead that other and embarrass him in obtaining his right the effect must be the same." *The Idaho*, 93 U. S. 575. If the intermixture is fraudulent the injured party may have the whole. *Jewett v. Dringer*, 30 N.J. Eq. 291. If one buys a stock of goods with fraudulent purpose as against the vendor's creditors, and then purposely or through want of proper care mingles other goods with them, he cannot recover against an officer who levies upon all the goods as the property of the fraudulent vendor. *Stearns v. Herrick*, 132 Mass. 114. See *Lehman v. Kelly*, 68 Ala. 192.

The same principle applies to confusion of accounts, *Diversey v. Johnson*, 93 Ill. 547.

been deprived of it for the time has caused him a special injury, in which case he would be entitled to recover damages for that injury. Even if the commingling were malicious or fraudulent, a rule of law which would take from the wrong-doer the whole, when to restore to the other his proportion would do him full justice, would be a rule wholly out of harmony with *the general rules of civil remedy, not only because it [*54] would award to one party a redress beyond his loss, but also because it would compel the other party to pay not damages but a penalty. The infliction of penalties by way of civil remedy is not favored in the law;¹ on the other hand the law inclines against them; construing contracts so as to avoid them, and in many cases giving relief against them in equity, where the parties have expressly stipulated for them.² Therefore, the law in these cases does justice between the parties as nearly as, under the circumstances, is practicable by dividing between them the commingled mass according to their respective proportions.³ Nor is this method of arranging their interests limited to the cases in

¹ Willard, Eq. 56; Sanders v. Pope, 13 Ves. 282; Grigg v. Landis, 21 N. J. Eq. 494.

² Crane v. Dwyer, 9 Mich. 350; White v. Port Huron, etc. R. R. Co., 13 Mich. 256; Wing v. Ralley, 14 Mich. 83; Jaquith v. Hudson, 5 Mich. 123; Grigg v. Landis, 21 N. J. Eq. 494; McKim v. The White Hall Co., 2 Md. Ch. Dec. 510; Skinner v. Dayton, 2 Johns. Ch. 526; Skinner v. White, 17 Johns. 357; Livingstone v. Tompkins, 4 Johns. Ch. 510; Cythe v. La Fontain, 51 Barb. 186; Baxter v. Lansing, 7 Paige, 350; Laurea v. Bernauer, 33 Hun, 307; Hager v. Buck, 44 Vt. 285; Walker v. Wheeler, 2 Conn. 299; Bowen v. Bowen, 20 Conn. 126; Warner v. Bennett, 31 Conn. 468; Horsburg v. Baker, 1 Peters, 239; Smith v. Jewett, 40 N. H. 530; Bradstreet v. Baker, 14 R. I. 546; St Louis, etc. Ry Co. v. Shoemaker, 27 Kan. 677; Scofield v. Tompkins, 95 Ill. 190; Bolster v. Post, 57 Ia. 698; Sanders v. Pope, 12 Vesey, 282; Davis v. West,

Id. 475; Northcote v. Duke, Amb. 511; Storey's Eq. Jur., Sec. 1819; Willard's Eq. Jur., 56.

³ Lufton v. White, 15 Ves. 442; Spence v. Union Marine Ins. Co., L. R. 3 C. P. 427; Ryder v. Hathaway, 21 Pick. 298; Robinson v. Holt, 39 N. H. 557; Moore v. Bowman, 47 N. H. 494; Willard v. Rice, 11 Met. 493; Bryant v. Ware, 30 Me. 295; Hessel-tine v. Stockwell, 30 Me. 237; Holbrook v. Hyde, 1 Vt. 286; Adams v. Myers, 1 Sawyer, 306; Wilkinson v. Stewart, 85 Pa. St. 255; Chandler v. DeGraff, 25 Minn. 88; Stone v. Quaal, 36 Minn. 46. "The general rule that governs cases of intermixture does not apply where the goods intermingled remain capable of identification, nor where they are of the same quality and value, as where guineas are mingled or grain of the same quality. Nor does the rule apply where the intermixture is accidental, or even intentional if it is not wrongful." The Idaho, 93 U. S. 575.

which the commingled mass is exactly the same with the separate parcels: it is sufficient that it is practically the same, so that the separation of that which is equivalent in quantity or measure will give to the party whose property has been wrongfully taken that which is substantially equivalent in kind and value. This rule has been applied to the case of quantities of saw-logs, belonging to different parties but commingled together; and it is held that to give the party whose logs are lost the option of taking from the mass an equivalent in quantity and quality, or of demanding the value, is all that in justice he can require.⁴

[*55] ***Property by Accession.** In another class of cases the owner of property may either lose it by the wrongful act of another, or he may be entitled to reclaim it in a modified or perhaps wholly different form. The reason why the owner is permitted to reclaim his own property from a wrong-doer is, that the protection of property and the peace of society are inconsis-

⁴ *Stephenson v. Little*, 10 Mich. 433; *Jenkins v. Steanka*, 19 Wis. 126; *Ryder v. Hathaway*, 21 Pick. 298; *Hesseltine v. Stockwell*, 30 Me. 237; *Smith v. Morrill*, 56 Me. 566; *McDonald v. Lane*, 7 Can. S. C. R. 462. If the goods can be distinguished or separated, no change, of course, takes place in the property. *Alley v. Adams*, 44 Ala. 60; *Robinson v. Holt*, 39 N. H. 557. There can be no commixture or confusion of goods in the legal sense when logs plainly marked with certain initials are mingled in a boom with other logs not so marked. *Goff v. Brainerd*, 58 Vt. 468. If they are intermingled by consent, the parties become tenants in common of the mass. *Adams v. Meyers*, 1 Sawyer, 306; *Ryder v. Hathaway*, 21 Pick. 299; *Low v. Martin*, 18 Ill. 286. See, *Hance v. Tittabawassee Boom Co.* 38 N. W. Rep. 228. (Mich.) The same is true where they are intermixed by accident. *Moore v. Erie R. Co.*, 7 Lans. 39. When the only practicable method of conducting the business of pork packing is to render

to each bailor of hogs an amount of the product equivalent in kind and quality to the amount delivered, not the animals *in specie*, the bailee may rightfully act according to such method. *Morningstar v. Cunningham*, 110 Ind. 328.

If one allows his goods to be intermingled with those of another, knowing that sales are to be made from the mass, he cannot retake his own from a purchaser in good faith; *Foster v. Warner*, 49 Mich. 641, or hold such purchaser for a conversion; *Preston v. Witherspoon*, 109 Ind. 457. A loss of wheat in an elevator occurring without fault of the depositors must be born rateably by them; *Brown v. Northcutt*, 14 Ore. 529.

As to an intermixture where the party chargeable with it is innocent of intended wrong, see *Bryant v. Ransom*, 20 Vt. 383; *Hesseltine v. Stockwell*, 30 Me. 257; *Thorne v. Colton*, 27 Iowa, 425; *Wetherbee v. Green*, 22 Mich. 311; *Hart v. Morton*, 44 Ark. 447; *Davis v. Krum*, 12 Mo. App. 279.

ent with a state of the law in which a wrong-doer may compel another to sell to him, by seizing the property he desires and leaving the owner to bring suit for its value. Therefore, in general, the owner of property, so long as he can trace and identify his own, may reclaim it. But there are some cases in which he is not permitted to reclaim his own, even though the identification be complete.

In illustration of some of these cases the instance may be given of a stone or board belonging to one man taken by another and built into his house in such a manner that it could not be removed without inflicting injury out of proportion to the value of the stone or board. In such a case the law would not suffer the original owner to reclaim it, but would leave him to his remedy in the recovery of damages, and treat the stone or board as having become a part of the realty by accession. A like loss of property to the original owner might follow where one has taken the personal property of another and expended upon it labor or money of his own, thereby converting it into something substantially different, or adding so greatly to its value that, to permit the original owner to reclaim it, would be shocking to one's sense of justice.

If one has willfully, as a trespasser, taken the property of another and altered it in form or substance by an expenditure of his own labor or money, he will not be suffered to acquire a title by his wrongful action as against the original owner reclaiming his property. Therefore, one whose trees have been converted *into shingles by a trespasser may reclaim his pro- [*56] perty in the shingles,¹ or if they have been made into the frame of a boat, he may have them in that form.² Indeed, the doctrine has been carried so far that in New York it has been held that one whose grain has been taken by a willful trespasser and converted into alcoholic liquors is entitled to demand and recover the new product.³ But "it is on all hands conceded where

¹ Church v. Lee, 5 Johns. 348. See, also, Curtis v. Groat, 6 Johns. 108; Worth v. Northam, 4 Ired. 102.

² Burris v. Johnson, 1 J. J. Marsh. 196. Trees into railroad ties; Strubbee v. Trustees, 78 Ky. 481. If timber is cut by trespasser, not by one in adverse possession, trover will lie so

long as it can be identified. Street v. Nelson, 80 Ala. 230.

³ Silsbury v. McCoon, 8 N. Y. 379. See Riddle v. Driver, 12 Ala. 590. As to damages recoverable from innocent purchasers from trespasser who has cut timber. Railway Co. v. Hutchins, 32 Ohio St. 571. Strubbee v.

the appropriation of the property of another was accidental or through mistake of fact, and labor has in good faith been expended upon it which destroys its identity, or converts it into something substantially different, and the value of the original article is insignificant as compared with the value of the new product, the title to the property in its converted form must be held to pass to the person by whose labor in good faith the change has been wrought, the original owner being permitted, as his remedy, to recover the value of the article as it was before the conversion. This is thoroughly equitable doctrine, and its aim is so to adjust the rights of the parties as to save both, if possible, or as nearly as possible, from any loss. But where the identity of the original article is susceptible of being traced, the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at the first blush.¹ Perhaps no case has gone further than *Wetherbee v. Green*,² in which it was held that one who, by unintentional trespass, had taken from the land of another young trees of the value of twenty-five dollars, and converted them into hoops worth seven hundred dollars, had thereby made them his own, though the identity of trees and hoops was perfectly capable of being traced and established.”³ 2

Trustees, etc., 78 Ky., 481 and cases p. *457-8, *post*.

¹ This qualification has been questioned in Ky. *Strubbee v. Trustees*, 78 Ky. 481.

² 22 Mich. 311.

³ *Isle Royal Mining Co. v. Hertin*, 37 Mich. 332. In this case parties, by mistake, had felled trees on the land of another and cut them into cord wood. The owner of the trees then seized the wood and sold it. The parties cutting it thereupon brought suit in *assumpsit*, claiming that they were entitled to recover either the value of the wood, as having been made their own by the labor expended on it or the value of their labor, which the owner of the trees had now appropri-

ated. By the court: “There is no such disparity in value between the standing trees and the cord wood in this case as was found to exist between the trees and hoops in *Wetherbee v. Green*. The trees are not only susceptible of being traced and identified in the wood, but the difference in value between the two is not so great but that it is conceivable the owner may have preferred the trees standing to the wood cut. The cord wood has a higher market value, but the owner may have chosen not to cut it, expecting to make some other use of the trees than for fuel, or anticipating a considerable rise in value if they were allowed to grow. It cannot be assumed as a rule that a man

***Entry upon Lands to Repossess them.** Of the same nature [*57] as the right of recaption is the right which the owner of lands has, when another is wrongfully in possession thereof, to re-enter when he may do so peacefully, and thereafter to exclude the wrong-doer therefrom. This right may exist either where one *has gone into possession without right, or [*58] where one, having had an estate in, or at least lawful possession of the lands, has had his right terminated by operation of law or by the act of the owner.¹ The chief restraint upon this remedy is sufficiently indicated by what has already been said; it must be had in a peaceful manner, and an actual possession,

prefers his trees cut into cord wood rather than left standing, and if his right to leave them uncut is interfered with, even by mistake, it is manifestly just that the consequences should fall upon the person committing the mistake and not upon him. Nothing could more encourage carelessness than the acceptance of the principle that one who by mistake performs labor upon the property of another should lose nothing by his error, but should have a claim upon the owner for remuneration. Why should one be vigilant and careful of the rights of others if such were the law? Whether mistaken or not is all the same to him, for in either case he has his employment and receives his remuneration, while the inconveniences, if any, are left to rest with the innocent owner. Such a doctrine offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake.

"A case could seldom arise in which the claim to compensation could be more favorably presented by the facts than it is in this, since it is highly probable that the defendant would suffer neither hardship nor inconvenience if compelled to pay the plaintiffs for their labor. But a general principle is to be tested, not by

its operation in an individual case, but by its general workings. If a mechanic employed to alter over one man's dwelling-house shall by mistake go to another which happens to be unoccupied, and before his mistake is discovered, at a large expenditure of labor, shall thoroughly overhaul and change it, will it be said that the owner, who did not desire his house disturbed, must either abandon it altogether, or if he takes possession must pay for labor expended upon it which he neither contracted for nor desired nor consented to? And if so, what bounds can be prescribed to which the application of this doctrine can be limited? The man who by mistake carries off the property of another will next be demanding payment for the transportation; and the only person reasonably secure against demands he has never assented to create, will be the person who, possessing nothing, is thereby protected against anything being accidentally improved by another at his cost and to his ruin." See, also, *Gates v. Rifle Boom Co.*, 38 N. W. Rep. 245 (Mich.)

¹ *Taunton v. Costar*, 7 T. R. 431; *Turner v. Meymott*, 1 Bing. 158; *Argent v. Durrant*, 8 T. R. 403; *Barnes v. Dean*, 5 Watts. 543; *Thompson v. Craigmyle*, 4 B. Mon. 391; *Sharon v. Wooldrick*, 18 Minn. 355.

though wrongful, must not be subverted by the employment of force.¹

Distress of Cattle Damage Fesant. If the cattle of one man stray upon the lands of another, thereby causing him damage, he may distrain and hold them until the damage is estimated and satisfied. This is a common law right, and is regulated by statute. The distress consists in taking the cattle into custody while they are still upon the lands, and impounding them until satisfaction is made. For the protection of the owner, notice to him of the distress is required, and if the compensation is not agreed upon, disinterested appraisers are chosen to assess it. The detention of the cattle is only for the purpose of indemnity, and they must be surrendered when satisfaction is made. In the meantime the distrainer must feed and care for them properly; but if they die or are injured or lost, without his fault, the loss must fall upon the owner.²

The right to distrain cattle *damage fesant* may be affected by statutory regulations making it the duty of the owner of the land to enclose his premises with a fence sufficient for their protection. Where adjoining owners are required by law to construct and maintain respectively a certain portion of the partition fence between them, and one neglects this duty and the cattle of the other enter his premises in consequence, he is precluded from maintaining an action, because the default from which the injury flows in his own.³ But as the obligation in such a [*59] case is *only imposed for the protection of those whose beasts may be lawfully on the adjoining lands, if cattle tres-

¹ See post, Ch. X.

² *Pettit v. May*, 34 Wis. 686; *Taylor v. Welbey*, 36 Wis. 42; *Mosher v. Jewett*, 59 Me. 453; *S. C. 63 Me. 84*; *Rust v. Low*, 6 Mass. 90; *Melody v. Reab*, 4 Mass. 471; *Eames v. Salem & Lowell R. R. Co.*, 98 Mass. 560; *Ladue v. Branch*, 42 Vt. 575. Property cannot be distrained which, at the time, is in the actual possession of the owner. *Storey v. Robinson*, 6 T. R. 138; *Field v. Adames*, 12 Ad. & El. 649. The statutory lien may be waived and an action brought against the owner. *Prather v. Reeve*, 23 Kan.

627; *Keith v. Tilford*, 12 Neb. 371; *Triscony v. Brandenstein*, 66 Cal. 514. If an animal taken *damage fesant* is let go, it cannot afterward be taken for that act. *Buist v. McCombe*, 8 Ont. App. 598. If the owner refuses to pay the damage claimed and neglects to have a statutory appraisement, trover will not lie for refusal to deliver. *Norton v. Rockey*, 46 Mich. 460.

³ *Shepherd v. Hees*, 12 Johns. 433; *Colden v. Eldred*, 15 Johns. 220; *Sturford v. Ingersoll*, 8 Hill, 88; *Cowles v. Balzer*, 47 Barb. 562; *Tonawanda*

pass upon such adjoining lands, and from thence pass upon the premises insufficiently fenced, the owner of such premises is not precluded from a recovery of his damages.¹

Distress of Goods to Compel Performance of Duty. In several cases where an obligation, owing to a party, remained unperformed, the common law permitted him to enforce performance by seizing the goods and chattels of the party in default, and holding them until performance. If performance was not made in reasonable time after seizure, it also permitted him, under proper regulations, to sell the distress. The most common of these cases was that of the non-payment by a tenant of his rent; and this is the only one which has any place in the law of this country. All movable articles which are the subject of property are liable to be seized for rent, including even the chattels of other persons which chance to be in the tenant's possession with the owner's permission; but with this important exception, that articles held by him in the way of trade such as goods of a guest in possession of an inn-keeper, and goods in the hands of a mechanic to be made up or repaired, are privileged for the encouragement of business. And whatever is for the moment in the personal use of the tenant is also, while so used, privileged.² And

R. R. Co. v. Munger, 5 Denio. 260; Akers v. George, 61 Ill. 376; Milligan v. Wehinger, 68 Penn. St. 235; Griffin v. Martin, 7 Barb. 297; Roach v. Lawrence, 56 Wis. 478; Mann v. Williamson, 70 Mo. 661; D'Arcy v. Miller 86 Ill. 102. As to liability where only part of the plaintiff's fence is lawful, see Noble v. Chase, 60 Ia. 261. That stock is prohibited from running at large does not relieve one of the duty of fencing. Duffees v. Judd, 48 Ia. 256. Nor that owner knows his animal is vicious. Runyan v. Patterson, 87 N. C. 343. Nor that cattle came upon land from unenclosed field. Fillmore v. Booth, 29 Kan. 184. The rules of liability are the same where fence is maintained, under agreement in part by each owner. Scott v. Grover, 56 Vt. 499; Baynes v. Chastain, 68 Ind. 376; Hinshaw v. Gilpin, 64 Ind. 116. See Dent v. Ross, 52 Miss. 188, and cases p. *339, *post*.

¹ Lord v. Wormwood, 29 Me. 282; Lyons v. Merrick, 105 Mass. 71; Johnson v. Wing, 3 Mich. 163, and cases pp. *339-40, *post*. Statutes on this subject do not usually go further than to take away the right of action where the owner of lands neglects to enclose them with a proper fence and they are trespassed upon in consequence. He may, therefore, dispense with a fence if he sees fit to leave his premises open to cattle lawfully on the premises which adjoin them. Aylesworth v. Herrington, 17 Mich. 417. As to liability where cattle run at large in an enclosure occupied in common by two or more. See Montgomery v. Handy, 62 Miss. 16; Cole v. State, 72 Ala. 216.

² See 1 Bl. Com. 8, and notes. Home Sewing Machine Co. v. Sloan, 87 Pa. St. 438; Kleber v. Ward, 88 Pa. St. 93; Kennedy v. Lange, 50 Md. 91; Bird v. Anderson, 41 N. J. L. 392.

now, by statute, in this country, this right of distress is in the main taken away; and where not taken away, it is regulated by statute. A consideration of it does not properly belong to our subject.

From the foregoing statement of the law it will appear that the privilege of redressing one's own wrongs is not to any great extent permitted to individuals; indeed, the State cannot [*60] afford *to clothe individuals with its own powers for the purpose of enforcing its laws according to their own judgments, especially when in enforcing the laws they would only be judging of and redressing their own grievances. Order is no less the law of human governments than of the divine government, and individual convenience must be subordinated to it. The cases which are above mentioned are in the main to be regarded as cases in which the individual is permitted to act on his own behalf, in order that he may prevent a mischief already begun from becoming more serious. He interposes obstructions to the lawless conduct of others, he protects his person, he reclaims his property; but only on the condition that he can do so without a breach of the public peace; and he abates a nuisance on the same terms. But to obtain redress for any wrong done him he must invoke the assistance of the law.

Nature of the Legal Redress. The redress the law will give will be suited to the injury suffered. If one's land is taken from him, he shall have the proper writ for its recovery. If personal property is taken which he prefers to recover rather than have judgment for its money value, he may demand back the thing itself. But the principal remedy, and for the most part the only available remedy which the law can give for a wrong, is an award of money estimated as an equivalent for the damage suffered.

How One Becomes a Wrong-Doer. The ways in which one may become liable to an action as for tort are the following:

1. By actually doing to the prejudice of another something he ought not 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 first is the active wrong; the others are usually the wrongs of negligence.

The active wrong may be done by the party in person, or it may be done by some other person for whose conduct generally or under the particular circumstances he is responsible. He is always responsible for the conduct which he counsels, advises or *directs, and for whatever naturally results from [*61] his counsels. That is his wrong which he thus accomplishes through another. Without more than a passing allusion in this place to rules which will receive attention hereafter, it may be stated that the common law holds the husband civilly responsible for the conduct of his wife, the two in law being considered as one person for the purposes of legal redress. They are to be joined in the suit, but the judgment, if one is recovered, may be collected of the husband, and it is immaterial that he never advised the wrong, or that it may have been unknown to him, or against his will. The idea underlying this doctrine is, not that the husband is necessarily in fault, but that the interests of society are best subserved by maintaining the principle of marital unity. Another case of responsibility for the acts of others is that of the master, who, in general, must redress all wrongs negligently committed by servants or others to whom he may have entrusted his business, and who is also responsible for their active wrongs, such as frauds and deceits, which are committed in the line of his business and with his actual or presumed authority. So the magistrate may be responsible for illegally setting the constable in motion; the plaintiff who is back of him may be responsible for the acts of both; the sheriff may be holden for the conduct of his deputy, and so on. If the position of the parties is such relatively that the particular act must be considered as having been, in contemplation of law, advised, counseled, or procured to be done by another, it may be treated as the tort of the party who thus counsels, advises and procures, and he is liable as if he had done it in person.

The wrong may also be done by one person or by several, but when by more than one, it is the several act or neglect of all. It may also be suffered by several, where they have joint interests which are invaded, as where they are joint owners of property, or are partners.

Acts Merely Intended. An act contemplated but not yet accomplished, though it may sometimes be ground for preventive remedies, cannot support an action as for a tort. A tort supposes a wrong actually committed, and this implies a right invaded, or in some manner hindered or abridged. The [*62] mere *intent cannot constitute actionable matter.¹ A malicious person may purpose to libel his rival in business; he may have the libel prepared, put in print ready for dissemination among the people, have messengers ready for its distribution, so that the evil intent and the deliberate purpose to do mischief are manifested in a manner most emphatic and conclusive; but if no other person has yet seen the libel there is no wrong, because the reputation is not yet assailed, and the right of the party to protection in it is therefore not yet violated. It is only assailed when a publication is made. All that precedes the publication rests in intent, and intent may be overcome by repentance, or accident or the interposition of others may prevent its being carried into effect. Any degree of preparation for a tort can never constitute a tort; if the wrong is prevented there is certainly no wrong suffered.

Elements of a Tort. It is said by the authorities that it is the conjunction of damage and wrong that creates a tort, and there is no tort if either damage or wrong is wanting.² Here

¹ Sheple v. Page, 12 Vt. 519; Kimball v. Harman, 34 Md. 407; S. C. 6 Am. Rep. 340; Herron v. Hughes, 25 Cal. 555; Page v. Parker, 43 N. H. 363; Jones v. Baker, 7 Cow. 445.

² Waterer v. Freeman, Hob. 266. "If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title two things must concur; damage to himself and a wrong committed by the other party." BAILEY, J., in Rex v. Pagham, 8 B. & C. 362. Day v. Brownrigg, L. R. 10 Ch. D. 294; Street v. Union Bank, L. R. 30 Ch. D. 156; Knapp v. Roche, 94 N. Y. 329; Brown v. Marshall, 47 Mich. 576; Nat. Copper Co. v. Minn. etc. Co. 57 Mich. 83. Distinction between in-

jury and damage stated; North Vernon v. Voegler, 103 Ind. 314. The pollution of "a stream affords," says FRY J., "a very clear illustration of the difference between injury and damage; for the pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is injury without damage, which would become at once both injury and damage on the cessation of other pollutions." Pennington v. Brinsop, etc. Co. L. R., 5 Ch. D., 769. As one has no right to a gratuity by will, he can maintain no action against another who, by falsehood or otherwise, induces the revocation of a will in his

the word wrong is used in the sense of a thing amiss ; something which for any reason the party ought not to do or to permit, and which does not become the actionable wrong called a tort unless the other element is found in the same case, namely, a damage suffered in consequence of the thing amiss. In this sense we shall frequently be compelled to make use of the word wrong, though it may sometimes be confusing to do so. This is one of the inconveniences which follow from employing a word which signifies a quality to designate a class of cases in which, in its ordinary sense, it is only an element, while it is equally applicable to numerous other cases which are not so classed.

Although damage is a necessary element in an actionable wrong, it is sometimes damage merely implied or presumed ; not *damage shown. There are many cases in which, in point [*63] of fact, a showing of pecuniary damages is impossible, and some where it would be easy to show that none had been sustained, in which, nevertheless, the law adjudges that a tort has been committed. Illustrations might be found in the law of libel. Any person of ordinary information would perhaps be able to name some man of high national reputation, perhaps in public life, perhaps at the bar, or in some other walk of private life, who, during a long and honorable career, had been conspicuous for the purity of his life and for an unblemished reputation, until he had acquired a hold upon the public confidence which no assault could weaken. Let it be supposed now that one is inspired by malice to attack such a reputation, and make it the target for the most preposterous libels. Here is a wrong clearly, a thing amiss ; but if we question ourselves concerning its probable effect, the instinctive answer is, it does not in the least damage the object of this vituperation ; it may give the public a sense of outrage, but the only person actually injured is the person attacking, not the one attacked. The former would be rendered infamous, the latter would be unaffected, except as the

favor. *Hutchins v. Hutchins*, 7 Hill, 104. A man who had intended to publish a directory abandoned his intention by reason of defendant's false representations to his patrons that he would not publish. Held that he was without remedy as an intention is not

property; *Dudley v. Briggs*, 141 Mass. 582.

That injury without damage is not actionable, see *Ming v. Woolfolk*, 116 U. S. 599; *Raynsford v. Phelps*, 49 Mich., 315; *Thomas v. Birmingham Canal Co.*, 49 L. J. (Q. B. D.), 851; *Wittich v. First Nat. Bank*, 20 Fla. 843.

effort to defame his character would be likely to elicit in his behalf evidences of public sympathy and regard. But if he were to feel impelled by a sense of duty to bring suit for the publication, he would not only be held entitled to substantial damages, but the assessment of these would probably be all the more severe because of the impregnable position occupied in the public confidence by the libeled party, which, although it precluded actual damage, at the same time rendered the moral quality of the assault more atrocious.

A more simple case may be that of the man who has entered the field of another for the purpose of plunder, but been frightened away before the mischief was accomplished. Assuming, in such a case, the impossibility of showing the slightest actual injury, the trespasser is nevertheless held liable to pay damages. The ground of liability is, that from every distinct invasion of right, some damage is presumed; and the law therefore makes some award, though no damages are proven, and none are susceptible of proof.¹ If the reason for this is sought for, [*64] we are *not left in perplexity or doubt. The method chosen for the protection of rights being an action for the recovery of damages for their invasion, it is manifest that when a party is convicted of the invasion, the conviction must be

¹ *Ashby v. White*, 2 Ld. Raym., 938, 955; *Herring v. Finch*, 2 Lev. 250; *Hunt v. Dowman*, Cro. Jac. 478; S. C. 2 Roll. R. 21; *Weller v. Baker*, 2 Wils. 414; *Wells v. Watling*, 2 W. Black. 1233; *Blofield v. Payne*, 4 B. & Ad. 410; *Wood v. Waud*, 3 Exch. 748; *Barker v. Green*, 2 Bing. 317. "Actual, perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right in which the law will presume damage." Parke, B. in *Embry v. Owen*, 6 Exch. 353, 368. "I am not able to understand how it can correctly be said in a legal sense that an action will not lie even in case of a wrong or violation of a right, unless it is followed by some perceptible damage which can be established as a matter of fact; in other words, that

injuria sine damno is not actionable. * * "Actual, perceptible damage is not indispensable as a foundation of an action. The law tolerates no further inquiry than whether there has been a violation of a right." STORY, J., in *Webb v. The Portland Manufacturing Co.*, 3 Sumner, 189, 192. See, also, *Williams v. Esling*, 4 Penn. St. 486; *Whittemore v. Cutter*, 1 Gall. 429; *Blanchard v. Baker*, 8 Me. 253; *Woodman v. Tufts*, 9 N. H. 88; *Bassett v. Salisbury Manufacturing Co.*, 28 N. H. 438, 455; *Tillotson v. Smith*, 32 N. H. 90; *Blodgett v. Stone*, 60 N. H., 167; *Lafin v. Willard*, 16 Pick. 64; *White v. Griffin*, 4 Jones, L. 139; *Dixon v. Clow*, 24 Wend. 191. *Charman v. Copeland*, 55 Miss. 467; *Blanchard v. Burbank*, 16 Ill. App. 875.

followed by some consequences disagreeable to himself, or it could not possibly operate as a restraint. As damages are the only penalty which the law provides for the commission of a tort, it is obvious that a recovery of these must be allowed in every case in which a wrong is committed, or those wrongs for which no damages are awarded will be committed with impunity. Subject every man to the necessity of pointing out in what manner a trespass had caused him a pecuniary injury, and for many of the most vexations there might be no redress and for the rights invaded no protection. Under such a rule the eavesdropper might with impunity invade the privacy of one's home, by listening at key-holes and playing the spy at windows, since acts like these, however annoying and reprehensible, could not in any manner tend to impoverish the family, or deprive them of food, or drink, or clothing, or diminish their current revenue.

Lord HOLT has endeavored to express the legal foundation of recovery in these cases as follows: "The damage is not merely pecuniary, for if a man gets a cuff on the ear from another, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal damage."¹

The idea here is, that it is a damage in contemplation of law *though followed by neither loss nor pain, because the [*65] man's right to personal security has been invaded. As is, perhaps, better expressed by BULLER, J., in another case, an action may be supported because "the right has been injured."² And here there is no room for the application of that oft quoted but little understood maxim *de minimis non curat lex*. It is a maxim that may usefully be applied where a party demands that which is insignificant for mere purposes of vexation;³ but it "is not an applicable answer to an action for violating a clear right."⁴ The law must regard the substantial rights of parties,

¹ Ashby v. White, 3 Ld. Raym 938; 955; S. C. 1 Smith Lead. Cas. 425.

² Hobson v. Todd, 4 T. R. 71, 73. "Here," says this judge, "is a wrongdoer, and the plaintiff is entitled to an action without proving any specific damages." "When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount." Lord DEN-

MAN, Ch. J., in Clifton v. Hooper, 6 Q. B. 468. See Fray v. Voules, 1 El. & El. 839, in which an attorney was held liable for compromising a suit, contrary to the instructions of his client, and it was held to be no answer, that the compromise was reasonable and *bona fide*, and for the benefit of the client.

³ Hickey v. Baird, 9 Mich. 32.

⁴ MULLETT, J., in Ellicottville, etc.,

though it may overlook trivial and unimportant matters in giving redress.' Therefore, slight errors in computation may be overlooked, though they may exceed the actual damages flowing from a distinct and palpable wrong, where the maxim, if applied, might inflict incalculable injury.*

The necessity for the protection of the right requiring a presumption of injury from its violation, the law measures that injury by the best standard at its command, and that is a pecuniary standard. But in doing this it must take into account many things which it is impossible to estimate in money, [*66] *but which nevertheless, money must compensate; the chief of these, in many cases, being the personal affront and indignity which are given by the wrongful act. Even a showing that the party was benefited, rather than damnified, would be no defense, since no man is compellable to have benefits thrust upon him offensively, and in defiance of his right of independent action; and if he were, it might be a good defense to rioters who had tossed one in a blanket, that the exercise was beneficial, or who had thrown him into a river, that his voluntary ablutions were not so frequent as health demanded.

A further reason makes the award of damages a necessity to the preservation of rights in many cases, and that is, that immunity tempts to the repetition of the act, and the frequent repetition has a tendency to fix in the minds of the community an impression that it is rightful—an impression that the party doing it, by consent or in some other manner, has become entitled to do it—and the community at length act upon this idea, and when at last complaint is made of the wrong, the frequent repetition becomes a witness in favor of the wrong-doer, and those who are to

Plank Road Co. v. Buffalo, etc., R. R. Co., 20 Barb. 644, 651. See *Ex parte* Becker, 4 Hill, 613; Hall v. Fisher, 9 Barb. 17, 29; Schnable v. Koehler, 28 Penn. St. 181; Kidder v. Barker, 18 Vt. 454; Graver v. Sholl, 42 Penn. St. 58; Case v. Dean, 16 Mich. 12.

* Smith v. Gugerty, 4 Barb. 614, 620; Boyden v. Moore, 5 Mass. 365; Pindar v. Wadsworth, 2 East. 154; Billingsley v. Groves, 5 Ind. 553; Kemp v. Harmon, 11 Ind. 311; Zehner v. Taylor, 15 Ind. 70.

* *Ex parte* Becker, 4 Hill, 613. See, further, Fullam v. Stearns, 30 Vt. 445; Ripka v. Sergeant, 7 W. & S. 9; Hathorn v. Stinson, 12 Me. 183; Dixon v. Clow, 24 Wend. 188; Cowles v. Kidder, 24 N. H. 359; Jewett v. Whitney, 43 Me. 242; Munroe v. Gates, 48 Me. 463; Champion v. Vincent, 20 Texas, 811; Smethhurst v. Journey, 1 Houst. 196; Woolsey v. Judd, 4 Duer, 596, 599; Marzetti v. Williams, 1 B. & Ad. 415; The Reward, 2 Dod. Adm. R. 269, 270.

try the right come prepossessed with the idea that there must be something unsound in the case of the man who is so tardy with his complaint. At length the law itself may raise a presumption of a right, so that if one, by obstructing the waters of a stream, floods his neighbor's land, and perseveres in the wrong for a series of years, he may at last have the protection of the law in doing so, if in the meantime he has not been disturbed. The wrong, by acquiescence and presumption, has then become a right, and to interfere with it will be a legal wrong. For this reason many wrongs damnify the owner, not only by the direct loss they inflict, but by their tendency to obscure and disturb the foundations of the right itself through their frequent repetition.'

*But in a very large proportion of cases the wrong is only [*67] complete when damage is suffered; that is to say, the act done is not wrongful in itself, but only becomes so when an injurious

^a Where the water of a running stream is used without right, "the general principle applies, that although no appreciable damage may be sustained in the particular instance by the wrongful act, yet, as the repetition of such an act might be made the foundation of claiming the right to do the act hereafter, a damage in law has already been sustained, in respect of which an action is maintainable." COLERIDGE, J., in *Rochdale Canal Co. v. King*, 14 Q. B. 134-5. See *Turner v. Sterling*, 2 Lev. 50; 8. C. 2 Vent. 25; *Bower v. Hill*, 1 Bing. N. C. 549; *Mason v. Hill*, 3 B. & Ad. 304; 8. C. 5 B. & Ad. 1; *Wood v. Waud*, 3 Exch. 748. This last was an action for fouling the water of a running stream, to the injury of the plaintiffs, proprietors below. The water was already so polluted by the acts of others, that the act of defendant caused no actual damage to the plaintiff, the water, notwithstanding what was done by them, being just as applicable to useful purposes as it was before. POLLOCK, C. B. "We think, notwithstanding, that the

plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land in its natural state, as an incident to the right to the land on which the water-course flowed; and that right continues, except so far as it may have been derogated from by user or by grant to the neighboring land owners. This is a case, therefore, of an injury to a right. The defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging into the stream the foul water from their works. If the * * other sources of pollution above the plaintiffs should be afterwards discontinued, the plaintiffs, who would otherwise have had in that case pure water, would be compellable to submit to this nuisance, which would then do a serious damage to them." In *Webb v. Portland Manf. Co.*, 8 Sum. 192, Mr. Justice STORY says: "From my earliest reading, I have considered it laid up among the very elements of the common law, that whenever there is a wrong, there is a

consequence follows.¹ Thus, if one build a fire on his own [*68] grounds *there is no wrong in the act, and in law no complaint can be made of it; but if the circumstances surrounding the act render it imprudent and dangerous to the rights of others, and at length it spreads to the premises of others, inflicting damage, this damage completes the injury. In all such cases, that which may cause damage, but as yet has not done so, being something that the party may rightfully do, it cannot be taken notice of as a thing amiss until the damage is suffered; and the case differs from an assault, which in itself is a thing amiss. So if one call another a rogue, this speaking is not in itself a legal wrong, the law not supposing such words to be injurious; but if the person concerning whom they were spoken can show that he lost his employment in consequence, he thereby connects the speaking with a damage, which constitutes it, in law,

remedy to redress it; and that every injury imports damage in the nature of it, and if no other injury is established, the party injured is entitled to a verdict for nominal damages. *A fortiori* this doctrine applies where there is not only a violation of a right of the plaintiff, but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of right, tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain that it may be lost or destroyed without any possible remedial redress. In my judgment the common law countenances no such inconsistency, not to call it by a stronger name. Actual perceptible damage is not indispensable as the foundation of an action. The law tolerates no further inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his

action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him." See, also, p. 200; also *Blanchard v. Baker*, 8 Greenl. 253; *Whittemore v. Cutter*, 1 Gall. 429, 483; *Johns v. Stevens*, 3 Vt. 308; *Ripka v. Sergeant*, 7 W & S. 9; *Gladfelter v. Walker*, 40 Md. 1; *Mellor v. Pilgrim*, 7 Ill. App. 306; *Merrill v. Dibble*, 12 Ill. App. 85; *Green v. Weaver*, 63 Ga. 302; *Freudensteine v. Heine*, 6 Mo. App. 287.

¹ A peculiar case which may be said to illustrate this rule was that of *Ocum Co. v. Sprague Manf. Co.*, 34 Conn. 529. The plaintiffs were a corporation. The defendants maintained a dam, which was said to injure land above, and not owned by them. The plaintiffs bought this land and instituted a suit for flooding the same. It was alleged by the defense that the purchase was made solely for the purpose of bringing the suit, and that the land was not used or intended to be used by the plaintiffs for corporate purposes. If this were proved, the court held the act on could not be sustained. "We are not

a thing amiss, and the tort is then complete. So many things which are actionable as nuisances, only become so when actual damage can be traced to them.¹

Proximate and Remote Cause. It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is, that in law the immediate and not the remote cause of any event is regarded;² and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not to the remote cause. The explanation of this maxim may be given thus: If 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 last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety. To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. A writer on this subject has stated the rule in the following language: If the

aware of any principle of law that will allow corporations, chartered and organized for specific purposes, to purchase or lease property, having no connection with their legitimate business, for the sole purpose of commencing and prosecuting a suit and harassing another under the forms of law." CARPENTER, J., p. 541-2.

¹ See the instructive cases of Radcliffe's Exrs v. Brooklyn, 4 N. Y. 195, and Losee v. Buchanan, 51 N. Y. 476; S. C. Am. Rep. 623, as to the cases in

which that which is not unlawful in itself may become actionable. One who does not own the fee of a street upon which his land abuts is not wronged by the laying of a railroad track in the street until the use of the street becomes a nuisance to him. The damage establishes the wrong. Grand Rapids, etc., R. R. Co. v. Heisel, 38 Mich. 62.

² Bac. Max., reg. 1; Broom Max. 165.

wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action.'

As this principle is of the highest importance in the law of torts, and the right of action in many cases, and the extent of recovery in others depends upon it, it may be well to consider it a little further. In doing this we lay down the following propositions:

1. The one already more than once mentioned, that in the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary and proximate result.

¹ Addison on Torts, p. 6. See *Marble v. Worcester*, 4 Gray, 395, per SHAW Ch. J.; *Anthony v. Slaid*, 11 Met. 290; *Silver v. Frazier*, 3 Allen, 332; *Crain v. Petrie*, 6 Hill, 522; *Dale v. Grant*, 34 N. J. 142; *Haley v. Chicago, etc.*, R. R. Co., 21 Iowa, 15. The result must be the natural and probable consequence of the act, one which could have been foreseen in the light of the attending circumstances if the act does not amount to wanton wrong. *Railway Co. v. Kellogg*, 94 U. S. 469; *Scheffer v. Railroad Co.*, 105 U. S. 249; *Binford v. Johnston*, 82 Ind. 426; *Schmidt v. Mitchell*, 84 Ill. 195; *Eames v. Texas, etc.*, R. R. Co., 63 Tex. 660; *Campbell v. Stillwater*, 32 Minn. 308. The question is, is the damage the natural and reasonable result of the act. The rule is the same in contract or in tort. *The Notting Hill*, L. R. 9 P. D. 105. The damage must be the natural and proximate result. *Ehrgott v. Mayor, etc.*, 96 N. Y. 264; *Wiley v. West Jersey R. R. Co.*, 44 N. J. L. 247. It is enough that the damage is the natural, though not the necessary, result. *Miller v. St. Louis, etc.*, Ry. Co., 90 Mo. 389; *Balt., etc.*, Ry. Co. v.

Kemp, 61 Md. 74. In Wisconsin it has been held that it was unimportant that the injury could not have been contemplated as a probable result. *Brown v. Chicago, etc., Ry. Co.*, 54 Wis. 342. But in a later case it is said that one is not liable if the jury find that the result was not under the circumstances to have been reasonably expected by an ordinarily prudent man. *Atkinson v. Goodrich Tr. Co.*, 60 Wis. 141. When by mistake empty turpentine casks instead of ketchup casks were delivered by a carrier and by the consignee were filled with ketchup, which was spoiled by the turpentine, and the carrier knew the use made of casks so delivered by it, the English Court of Appeal held on demurrer that the carrier was not liable. *Cunningham v. Grt. North. Ry. Co.*, 16 A. & E. R. R. Cas. 254. Defendant used a common article for dyeing its cloths not known at the time to be injurious. A purchaser of the cloth injured by handling it cannot recover, as defendant was not bound to foresee such a result. *Gould v. Slater Woolen Co.*, 17 N. E. Rep. 531 (Mass.)

Here the wrong itself fixes the right of action; we need not go further to show a right of recovery, though the extent of recovery may depend upon the evidence.

2. When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through 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 [*70] to the ordinary course of events, and as a proximate result of a sufficient cause.¹

¹*Vicars v. Wilcocks*, 8 East, 1; *Railroad Co. v. Reeves*, 10 Wall. 176; *Cuff v. Newark, etc., R. R. Co.*, 35 N. J. 17; *S. C. 10 Am. Rep.* 205. A party who by contract is entitled to all the articles to be manufactured by a certain company, he furnishing the raw materials, cannot maintain an action against a wrong doer who by trespass stops the machinery of the company and obstructs its operations in performing the contract. *Dale v. Grant*, 34 N. J. 142, citing *Connecticut Ins. Co. v. New York, etc., R. R. Co.*, 25 Conn. 265; *Rockingham Ins. Co. v. Boscher*, 39 Me. 253; *Anthony v. Slaid*, 11 Met. 290. See also the valuable case of *Kahl v. Love*, 37 N. J. 5.

Reference to a few other cases on this subject may be desirable. A bridge having become impassable, one who desired to carry wood across piled it on the levee to await opportunity. A flood carried it off. Suit was brought for the loss, as being occasioned by the non-repair of the bridge. *Held*, too remote. *Dubuque Wood, etc., Association v. Dubuque*, 30 Iowa, 176. Only the party taking directly under a conveyance, and not a remote purchaser, can maintain an action against the officer who falsely certified the acknowledgment thereof. *Ware v. Brown*, 2 Bond. 267. For a like principle, see *Kahl v. Love*, 37

N. J. 5. If one sells a defective engine, which explodes, only the purchaser from him can maintain an action for negligence in construction. A third person injured by the explosion has no such remedy. *Losee v. Clute*, 51 N. Y. 494; *S. C. 10 Am. Rep.* 633. One who is supporting a pauper for hire can maintain no action against a third person for assaulting and beating the pauper, thereby increasing the expense. *Anthony v. Slaid*, 11 Met. 290. One who has directed his agent to erect a house for him at a certain spot, can have no remedy against one who, by false representations regarding the boundary line, induces the agent in the owner's absence to begin the erection elsewhere. *Silver v. Frazier*, 8 Allen, 382. If there is a defect in a hitching post, and the horse hitched to it is frightened by the running away of another horse, and breaks the post and runs over a person in the street, the latter cannot maintain a suit for the defect in the post as the cause of his injury. *Rockford v. Tripp*, 83 Ill. 247. Plaintiff, who was in bed in her house, was so frightened by a quarrel between her husband and defendant out of doors, the noise of which she heard, as to give premature birth to a child. Defendant did not know of her being in the house nor of her

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 were innocent.¹ But if the original wrong [*71] only *becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another,

physical condition. He had no reason to suppose this injury would follow his acts. Held not liable. *Phillips v. Dickerson*, 85 Ill. 11. The shooting of a dog is not the proximate cause of a woman's illness resulting from fright thereat. *Renner v. Canfield*, 36 Minn. 90. A wire fence between defendants and plaintiff's land rusted and decayed through the former's negligence. The latter's cattle were killed by eating pieces of wire which fell on plaintiff's land. Held, that the death was the natural result of defendant's negligence. *Firth v. Bowling Iron Co.*, L. R. 3 C. P. D. 254. A drunken passenger was lawfully removed from a train and placed away from the track a short distance. He lay down on the track and was run over by another train. Held, that his getting on the track was not the natural, necessary or usual result of having been left near the track. *McClelland v. Louisville, etc., Ry Co.*, 94 Ind. 276. A liquor dealer put a man who had drunk to intoxication in a sleigh and started the horses homeward. Owing to the driver's condition an accident happened and a horse was killed. The liquor seller was held liable for the death. *Dunlap v. Wagner*, 85 Ind. 529, distinguishing earlier cases. The sudden starting of a train without signals made a laborer step aside into the edge of a sand pit. Some sand shortly after fell and pushed him against the cars. The starting of the train

was not the proximate cause. *Handelun v. Burlington, etc., R. Co.*, 82 N. W. Rep. 4, (Ia). A city is not liable for the injury resulting to a person from the breaking in a violent wind of a sound and properly secured liberty pole. *Allegheny v. Zimmerman*, 95 Pa. St. 287. The burning of cotton in a high wind by sparks from a burning building is not the proximate result of failing to forward it promptly from a cotton yard, where it was exposed to fire from locomotives and men smoking. *Wharfboat Ass. v. Wood*, 64 Miss. 661. See, further, *Sharp v. Powell*, L. R. 7 C. P. 253; *Hullinger v. Worrell*, 83 Ill. 220; *Haley v. Chicago, etc., R. R. Co.*, 31 Iowa, 15; *Sledge v. Reid*, 73 N. C. 410; *Bank of Commerce v. Ginocchio*, 27 Mo. App. 661. In this last case loss arose from sending a draft in a letter without a street address, which reached another man of the name of the payee who sold it to plaintiff.

¹ That innocent causes intervene makes no difference. *Rich v. New York, etc., R. R. Co.*, 87 N. Y. 393. Defendant without authority placed a barrier set with spikes across a private road. Some unknown person removed part of it without authority of defendant and set it up across the foot path. Plaintiff on a dark night was walking along the road. After passing the barrier he turned upon the foot path and walked against the part of the barrier which had been

the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote.

We may pause here to give some illustrations of this proposition, beginning with the leading case of *Scott v. Shepherd*, where the facts were that the 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 near the plaintiff's eye, and blinded him. Here was but a single wrong; the origi-

placed there. *Held*, he could recover for injury thereby suffered. After stating the doctrine of *Sharp v. Powell*, that to cause a liability the injury must be a probable result of the act of the person charged and agreeing to it as applied to the facts in that case and doubting its applicability to these facts, the court says:

"At the same time it appears to us that the case before us will stand the test thus said to be the true one, for a man who unlawfully places an obstruction across either a public or private way may anticipate the removal of the obstruction by some one entitled to use the way, as a thing likely to happen; and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near. * * * If the obstruction be a dangerous one, wheresoever placed, it may, as was the case here, become a source of damage, from which should injury to an innocent party occur the original author of the mischief should be held responsible." *COCKBURN, C. J. Clark v. Chambers, L. R. 8 Q. B. D. 827.*

A man left fish brine, poisonous to cattle, in barrels in the street. Another seeing cattle trying to drink it, spilled it in the street. Cattle licked it up and died. The leaving it in barrels in the street held the proximate cause. *Henry v. Dennis, 93 Ind. 42.* A workman fell from a ladder

which broke from a defect and knocked a man below him off a platform. ~~The defect was the proximate cause of the latter's injury.~~ *Ryan v. Miller, 12 Daly, 77.* A man lawfully walking near a railroad track was hit by a cow negligently struck by an engine and thrown off the track. The company was held liable. *Ala., etc., R. R. Co. v. Chapman, 80 Ala. 615.* A horse took fright from the carriage striking an obstruction in the way, and became unmanageable, and ran away, injuring the driver. *Held*, that the obstruction was the proximate cause of the injury. *Clark v. Lebanon, 63 Me. 393, citing Willey v. Belfast, 61 Me. 569; Marble v. Worcester, 4 Gray, 395.* On proximate cause where the injury is caused in part by fright of horse and in part by defective condition of highway, see *Ring v. Cohoes, 77 N. Y. 83; Wright v. Templeton, 132 Mass. 49; Spaulding v. Winslow, 74 Me. 528; Aldrich v. Gorham, 77 Me. 287; Perkins v. Fayette, 68 Me. 152; Crawfordsville v. Smith, 79 Ind. 308.* If a wagon is overturned by an obstruction in a road, and after such an overturn the horse runs upon a railroad track and after running four miles is killed by an engine, the obstruction in the road is not the proximate cause of the injury. *West Mahanoy v. Watson, 9 Atl. Rep. 430 (Pa).*

If parties loan money on forged certificates of stock in a corporation, and afterwards obtain on these new

nal act of throwing the dangerous missile; and though the plaintiff would not have been harmed by it but for the subsequent acts of others throwing it in his direction, yet as these were instinctive and innocent, "it is the same as if a cracker had been flung, which had bounded and rebounded again and again before it had struck out the plaintiff's eye,"¹ and the injury is

certificates from the corporation which prove worthless, the proximate cause of their loss is the forgery, unless they can show that they might have avoided the loss but for the negligence of the corporation when the new certificates were applied for. *Brown v. Howard Ins. Co.*, 42 Md., 384; S. C. 20 Am. Rep. 90. See further, *McCafferty v. Railroad Co.*, 61 N. Y. 178.

¹ *Scott v. Shepherd*, 8 Wils. 403; S. C. 2 W. Bl. 892. And see *Scott v. Hunter*, 46 Penn. St. 193. In *Baltimore & Potomac R. R. Co. v. Reaney*, 42 Md. 117, 136, ALVEY J., says: "In the application of the maxim, *In jure non remota causa, sed proxima spectatur*, there is always more or less difficulty, and attempts are frequently made to introduce refinements that would not consist with principles of rational justice. The law is a practical science, and courts do not indulge refinements and subtleties, as to causation, that would defeat the claims of natural justice. They rather adopt the practical rule, that the efficient and predominating cause, in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned.

"It is certainly true that where two or more independent causes concur in producing an effect, and it cannot be determined which was the efficient and controlling cause, or whether, without the concurrence of both, the

event would have happened at all, and a particular party is responsible for only the consequences of one of such causes, in such case a recovery cannot be had, because it cannot be judicially determined that the damage would have been done without such concurrence. *Marble v. Worcester*, 4 Gray, 895. But it is equally true that no wrong doer ought to be allowed to apportion or qualify his own wrong; and that, as a loss has actually happened whilst his own wrongful act was in force and operation, he ought not to be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was put in operation by his own wrongful act. To entitle such party to exemption he must show not only that the same loss *might* have happened, but that it *must* have happened if the act complained of had not been done. *Davis v. Garrett*, 6 Bing. 716."

So if one negligently frightens the horse of another, and the latter runs against and injures a second horse, the owner of the latter may have his action for the negligence. *McDonald v. Snelling*, 14 Allen, 290. *Forney v. Geldmacher*, 75 Mo. 113; *Billman v. Ind. etc. Co.* 76 Ind. 166, where it is said it is unnecessary that the precise injury should reasonably have been anticipated. One injured by another's horse running away from fright at overturning of vehicle caused by ice negligently left in the street by a third person may recover from the latter. *Lee v. Union R. R. Co.* 12 R. I. 333.

therefore a natural and proximate result of the original act. It *is an injury that should have been foreseen by ordinary [*72] forecast; and the circumstances conjoined with it to produce the injury being perfectly natural, these circumstances should have been anticipated.

An illustration of a different sort is afforded by the case of *Morrison v. Davis*. In that case common carriers undertook to transport goods from Philadelphia to Pittsburgh by canal. While on their way the goods were destroyed by an extraordinary flood. There was evidence that the goods would not have been at the place of injury but for their having been delayed by the lameness of a horse attached to the boat; and the argument made on behalf of the plaintiff was, that the culpability of the defendants in allowing the boat to be delayed by the lameness of the horse, having exposed the boat to the flood, was the proximate cause of the loss. Now, if human foresight could foresee the exact time when such a flood might be anticipated, the argument would be unanswerable; but as this is impossible, and an accident of the sort is as likely to overwhelm a boat that has been moved with due diligence as one that has been unreasonably delayed, it is obvious that the antecedent probabilities are equal, that the delay will save the boat instead of exposing it to destruction.¹ As is said by the Court in the case referred to: "A blacksmith pricks a horse by careless shoeing. Ordinary foresight might anticipate lameness, and some days or weeks of unfitness for use; but it could not anticipate that by reason of the lameness the horse would be delayed in passing through a forest until a tree fell and killed him or injured his rider; and such injury would be no proper measure of the blacksmith's liability."²

¹See *Academy of Music v. Hackett*, 2 Hilt. 217; *Ashley v. Harrison*, 1 E.p. 48; *Butler v. Kent*, 19 Johns. 223.

²Lowrie, J., in *Morrison v. Davis*, 20 Penn. St. 171, 175. See *Hoadley v. Nor. Transp. Co.*, 115 Mass. 304. But had the property been exposed to the flood by a wrongful act concurrent in point of time, the party would have been responsible. *Scott v. Hunter*, 46 Penn. St. 192. Or if the flood had occurred in consequence of a wrongful act. *Dickinson v. Boyle*,

17 Pick. 78. See, further, *Railroad Co. v. Reeves*, 10 Wall. 176; *McGrew v. Stone*, 53 Penn. St. 436; *Denny v. N. Y. Cent. R. R. Co.*, 13 Gray, 481; *George v. Fisk*, 32 N. H. 32; *Alston v. Herring*, 11 Exch. 832. A railroad train running behind time was upset by a gale of wind, and the plaintiff was injured. Had the train been on time the gust would not have reached it. *Held*, that the injury could not be attributed to the delay as the proximate cause, and the railroad

[*73] *In further illustration of this subject, two other cases may be compared; in the first of which a man who had been up in a balloon landed upon private grounds, attracting

company was not liable. *McClary v. Sioux, etc.*, R. R. Co., 8 Neb. 44; 8 C. 19 Am. Rep. 681. See *Daniels v. Ballantine*, 23 Ohio (N. S.) 532; 8 C. 18 Am. Rep. 264. Compare *Read v. Spalding*, 5 Bosw. 395. In New York the doctrine of the cases above cited is rejected. See *Condict v. Grand Trunk R. R. Co.*, 54 N. Y. 500. In that case a common carrier was chargeable with delay in the transportation of goods, and they were burned in its warehouse. *Earl, Com.* "The question to be considered is whether the loss by fire was in such a sense a consequence of the delay as to impose any liability upon the defendant. There was a clause in the conditions annexed to the contract, that the defendant should not be responsible for damage occasioned by fire. There was a similar clause in the contract in the case of *Lamb v. Camden & Amboy R. R. & T. Co.*, 46 N. Y. 271, and it was held that such clause did not exonerate the carrier from a loss occasioned by fire, in case the fire resulted from its own negligence. So in this case, if the loss can be attributed to the fault or negligence of the defendant, it must be held liable. But it is claimed that the delay on the part of the defendant in the transportation of the goods, which exposed them to the fire, was the remote and not the proximate cause of the loss, and hence that the defendant cannot be held liable for the loss without violating the maxim, *causa proxima non remota spectatur*. But the law is otherwise settled in this State. In *Michaels v. New York Central Railroad Company*, 30 N. Y. 564, the defendant received at Albany, from the

box of goods to be transported to Rochester and delivered to the owners. Instead of forwarding the box immediately, it detained the same in its freight house at Albany, to await the rendering of a bill for back charges by the Hudson River Railroad Company. While so detained, the goods were injured by being wet by an unusual and extraordinary rise in the water of the Hudson River; and it was held that the detention of the goods was negligence on the part of the defendant, and that such negligence having concurred in and contributed to the injury to the goods, the defendant was precluded from claiming the exemption from liability which the law would otherwise extend to it. The same rule was held in *Read v. Spaulding*, 30 N. Y. 630, and reiterated by *RAPALLO, J.*, in *Bostwick v. Baltimore & Ohio Railroad Co.*, 45 N. Y. 712. A different rule was applied in *Morrison v. Davis*, 20 Penn. 171, and in *Denny v. New York Central Railroad Co.*, 13 Gray, 481. But those cases were cited in the argument of the cases above referred to in the Court of Appeals, and were not followed. The rule adopted in Massachusetts and Pennsylvania was also applied in *Railroad Company v. Reeves*, 10 Wallace, 176. Those decisions are in direct conflict with the law as settled in this State, and cannot control the decision of this case. The defendant's delay was unreasonable. It was attributable to defendant's fault, and it exposed the goods to the fire by which they were consumed. Hence, its fault contributed to the loss, and it thus became liable."

upon them a considerable number of people, by whom the premises and crops were considerably damaged. For this he was held responsible as for a result he should have fore- [*74] seen and avoided.¹ In the other, a preacher attracted a crowd about him in the public street, some of whom mounted a pile of stones which were private property, and by their weight broke them. Whether the speaker should have anticipated this result, it was said, was a question of fact for the jury. "It cannot be said with judicial certainty that when he stopped to make his speech in the street he must have foreseen, as the natural and probable consequence of his act, that the persons collecting together to listen to him would mount the pile of stones, and even if some of them would, that so many would as, by their connected weight, might break some of the stones. The lowermost stones in the pile were already trusted by the plaintiff with the weight of the uppermost. Height of pile, strength of grain, distance from the speaker, number of bystanders, and perhaps other circumstances, all would enter into the question of the probability of injury. The question was therefore one of fact for the jury, and not of law for the court."²

¹ *Guille v. Swan*, 19 Johns. 381. The case of *Toms v. Whatby*, 35 U. C. Q. B. 195, is a valuable case on the general subject of remoteness of injury from the cause. The facts were that the approach to a bridge was not protected by any railing or guard; that the plaintiff's wife was driving over the bridge, when the horse shied, and backed the carriage over the bank. *Held*, that the injury was to be attributed to the want of the railing as the proximate cause. See also *Wright v. Templeton*, 132 Mass. 49; *Burrell v. Uncapher*, 11 Atl. Rep. 619 (Pa.); *Spaulding v. Winslow*, 74 Me. 528. A railway track was laid in a street with no fence between it and the drive-way. A horse being driven on the street was frightened by a moving car and ran upon the track, throwing out and injuring the plaintiff. In an action against the city, held that the moving of the car was not so far the proximate

cause of the injury as to prevent a recovery. "When several concurring acts or conditions of things,—one of them the wrongful act of defendant—produce the injury, and it would not have been produced but for such wrongful act or omission, such act or omission is the proximate cause of the injury. The injury is one which might reasonably be anticipated as a natural consequence of the act or omission." *Campbell v. Stillwater*, 32 Minn. 308. See *Maher v. Winona, etc., R. R. Co.*, 31 Minn. 401. Compare *De Camp v. Sioux City*, 37 N. W. Rep. 971 (Ia), where because of a defect in the street one could not turn out and avoid collision with a wagon recklessly driven, and the defect was held not the proximate cause of the injury

² *Fairbanks v. Alston*, 70 Penn. St. 86, 91, per AGNEW, J.; *Kerr v. Her-ring*, 11 Exch. 812. The question of

[*75] *It may also be instructive to compare two others, in each of which successive events followed the original cause before the damage was suffered, but in the one the wrong of a third party intervened, while in the other the subsequent acts were blameless. In *Vicars v. Wilcocks*, the special damage from defamation for which a recovery was sought, was the discharge of the plaintiff from his employment before the time for which he had been engaged had expired. But this, as Lord ELLENBOROUGH showed, was "a mere wrongful act of the master, for which the defendant was no more answerable than if, in consequence of the words, other persons had afterward assembled and seized the plaintiff and thrown him into a horse-pond by way of punishment for his transgression." In

proximate cause is usually for the jury upon all the facts. *Eames v. Texas &c. R. R. Co.*, 63 Tex. 660; *Hoag v. Lake Shore &c. R. R. Co.*, 85 Pa. St. 293. See *Ehrgott v. Mayor &c.* 96 N. Y. 264; *Atkinson v. Goodrich Tr. Co.*, 60 Wis. 141; *East Tenn. &c. Co. v. Lockhart*, 79 Ala. 315; *Pullman &c. Co. v. Bluhm*, 109 Ill. 20; *Drake v. Kiely*, 93 Pa. St. 492; *Crowley v. Cedar Rapids etc. Co.*, 65 Ia. 658; *Savage v. Chicago etc. Ry. Co.*, 31 Minn. 419, for applications of the rule. But when the facts are undisputed and the influence of the intervening cause is plain, the question is for the Court. *Hoag v. Lake Shore etc. Co.*, 85 Pa. St. 293; *West Mahanoy v. Watson*, 9 Atl. Rep. 430; *Henry v. St. Louis etc. Co.* 76 Mo. 283. See *Lewis v. Flint etc. Co.* 54 Mich. 55. In *Harrison v. Berkley*, 1 Strob. 525, 529, it is said: "Such nearness in the order of events and closeness in the relation of cause and effect must subsist that the influence of the injurious act may predominate over that of other causes, and shall concur to produce the consequence, or may be traced in those causes. To a sound judgment must be left each particular case. The connection is usually

enfeebled, and the influence of the injurious act controlled, where the wrongful act of a third person intervenes, and where any new agent, introduced by accident or design, becomes more powerful in producing the consequence than the first injurious act. It is therefore required that the consequences to be answered for should be natural as well as proximate. By this I understand not that they should be such as, upon a calculation of chances, would be found likely to occur, nor such as extreme prudence might anticipate, but only that they should be such as have actually ensued, one from another, without the concurrence of any such extraordinary conjuncture of circumstances, or the intervention of any such extraordinary result, as that the usual course of nature should seem to have been departed from."

¹ 8 East. 1. Where a city negligently leaves a pit open in the street, it is not liable to one willfully thrown into it by another. *Alexander v. Newcastle*, 17 N. E. Rep. 200 (Ind.)

² See, also, *Ward v. Weeks*, 7 Bing. 211; *Tutein v. Hurley*, 98 Mass. 211.

Thomas v. Winchester,¹ the defendant, who was a druggist, negligently sold a package of poison labelled as extract of dandelion, a harmless medicine, to another druggist, who re-sold it to a third, who sold it to the plaintiff, who was injured by making use of it, supposing it to be correctly labelled. The court distinguish the case from one in which two parties deal with each other under no obligations but such as their contract imposes, and charged with no duty to third persons, and hold that where one puts up drugs for a dealer, to be used not by him but by such person as may eventually purchase for use, he is *charged with a duty towards every person [*76] who may become purchaser to label them correctly, and the number of intermediate sales that, in the natural course of business, may take place is immaterial.² There is a maxim that

¹ 6 N. Y. 397; S. C. Big. Lead. Cas. on Torts, 602. See, also, *Loop v. Litchfield*, 42 N. Y. 351; S. C. 1 Am. Rep. 543; *Wheeler v. Downer, etc.*, Co., 104 Mass. 64.

² *Lynch v. Nurdin*, 1 Q. B. 29, is relied upon, and *Illidge v. Goodwin*, 5 C. & P., 190 distinguished. And, see, *McDonald v. Snelling*, 14 Allen, 290. And compare *Carter v. Towne*, 103 Mass. 507. If one innocently repeat a slander, the slanderer may be held liable therefor. *Keenholts v. Becker*, 3 Denio, 346. Compare *Hastings v. Palmer*, 20 Wend. 225. As to the consequences that may reasonably be expected to follow a wrongful act, see *Greenland v. Chaplin*, 5 Exch. 243, 248; *Hoey v. Felton*, 11 C. B. (N. S.) 142; *Weatherford v. Fishback*, 4 Ill. 170; *Young v. Hall*, 4 Geo. 95; *Addington v. Allen*, 11 Wend. 875. In *Vandenburgh v. Truax*, 4 Denio, 464, a man who chased a boy with an axe into a store, was held liable for injury done by the boy in the store while endeavoring to escape. If, through one's negligence, his mill-dam gives way, and the force of the water carries away a dam below, and the vol-

ume thus increased inflicts an injury upon a proprietor below, the damage is chargeable to the original negligence, and the party guilty of it may be held responsible. *Pollett v. Long*, 56 N. Y. 200. And, see, *Gilbertson v. Richardson*, 5 C. B. 502; *Powell v. Deveney*, 8 Cush. 300. So when a dam causes sand coming down the stream to be deposited on the land above it. *Himes v. Jarrett*, 2 S. E. Rep. 393 (S. C.). If defendant loosens a shoe put on a horse by plaintiff, a smith, with intent to make him appear a poor workman and deprive him of the custom of the owner of the horse and damage results, he is liable. *Hughes v. McDonough*, 43 N. J. L. 459. A fence about a field was burnt by fire from a locomotive. Cattle pastured near got in and damaged the crop. The railroad company was held liable. *Miller v. St. Louis, etc. Co.* 90 Mo. 389. A child by reason of a defective sidewalk fell into a ditch, in which was glass and was thereby cut. The city was held liable. *Galveston v. Posnainsky*, 62 Tex. 118. Water from a railroad tank ran upon adjoining land in winter and froze. The company was

“fraud is not purged by circuity,” and this is true of any wrongful act. If its influence must naturally, and without the interposition of any extraordinary event, produce to some one an

held liable for the damage done by the freezing. *Chicago, etc. Ry Co. v. Hoag*, 90 Ill. 339. A defective brake broke as a train was increasing speed with the result that a coupling gave way and the train parted. After a little the forward portion stopped and the two parts collided and the conductor was killed. *Held* that there was no intervening cause and that for the use of the defective brake the company was liable to his representative. *Ransier v. Minn. etc. Ry Co.*, 32 Minn. 331. From the breaking down of his carriage due to a defect in the road, a man received a shock. In getting another carriage and driving home he was wet through in a rain and became ill. The jury finding that he acted with reasonable prudence and that his disease was due to the shock aggravated by the exposure, the city was held liable. *Ehrgott v. Mayor, etc.*, 96 N. Y. 264. A locomotive engineer, perceiving that the track had spread, reversed his engine, and in handling the lever injured his arm. The spreading of the track was due to defendant's fault. *Held* that the jury were to decide whether that fault was the proximate cause of the injury. “Reversing the lever is one of the ordinary hazards of plaintiff's employment; yet, if the negligence of the defendant required such act to be done at that particular time and the plaintiff * * acted prudently, with due regard for his own safety and the safety of others, then the defendant is liable.” Following the *Squib* case. *Knapp v. Sioux City, etc. R. R. Co.* 65 Ia. 91 *SEEVERS, J.* See also, *Drake v. Kiely*, 93 Pa. St. 492; *Crowley v. Cedar Rapids, etc. R. R. Co.*, 65 Ia. 659; *Savage v. Chicago, etc. Ry Co.*

31 Minn. 419. This question has frequently arisen where railway passengers have been put off cars at the wrong place and suffered from exposure. In one case a woman so put off, finding no means of conveyance, walked five miles and suffered in consequence, and the carrier was held liable. *Cincinnati, etc. Co. v. Eaton*, 94 Ind. 474. So where a man was made ill by an injury suffered by like negligence and caught a fever then prevalent of which he died. *Terre Haute, etc. R. R. Co. v. Buck*, 96 Ind. 346. So where a pregnant woman was obliged to walk three miles and as a result miscarried, although the carrier did not know her condition. *Brown v. Chicago, etc. Ry Co.* 54 Wis. 342. See *Louisville, etc. R. R. Co. v. Sullivan*, 81 Ky. 624. An opposite conclusion is reached in Colorado where the injury came from the exposure of the woman in her peculiar condition. *Pullman, etc. Co. v. Barker*, 4 Col. 344. See, in line with this case, *Francis v. St. Louis Tr. Co.* 5 Mo. App. 7; and as to a man of 83, *Louisville, etc. Co. v. Fleming*, 14 Lea, 128; see also, *Texas, etc. Ry. Co. v. Case*, 66 Tex. 563. A lad negligently injured by blasting of rocks, after a partial paralysis lasting six months and while still unlikely to recover, contracted pneumonia and died. The attending physician was not prepared to state what caused the pneumonia. *Held* that the court could not charge that the injury was not the proximate cause of the disease, that it did not cause or largely contribute thereto. “It cannot be said that here was a second wrongful act, or a disease, wholly independent of the first

injurious result, it is immaterial what shall be the circuit of events or the number of successive stages.

How far one may be chargeable with the spread of fire negli-

wrong, which caused the death of the boy." *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163. See *Louisville, etc. R. R. Co. v. Jones*, 3 South. Rep. 902 (Ala.) To same effect where a woman was thrown against a car railing and afterward cancer developed. *Balt., etc. Ry Co. v. Kemp*, 61 Md. 74; and, see, *Owens v. Kansas City etc., Co.*, 8 S. W. Rep. 350 (Mo.); *Contra, Jewell v. Railway Co.*, 55 N. H. 84. If an arm is broken by defendant's negligence, he may be liable if a false joint is formed when the patient is treated by surgeons of ordinary skill. *Pullman, etc. Co. v. Bluhm*, 109 Ill. 20. A steerage passenger was in a lower berth when the upper tier fell down through defendant's negligence. This so frightened plaintiff that she became partially paralyzed and had to be removed from her berth by others in order that the upper tier might be repaired. Being unable to help herself after being placed on her feet, she was thrown against a door by the rolling of the vessel, was then picked up by the steward and put in a wet place till the berths were repaired. *Held* she could recover for the injuries suffered by her fall and wetting; that the jury could find her condition of mind to have been caused by the fall of the berths, and that when in that condition defendant did not take proper care of her. *Smith v. Brit. etc. Packet Co.*, 86 N. Y. 408.

On the other hand recent cases illustrate the doctrine that there is no liability if a distinct cause intervenes between the defendant's wrong and the damage. By the wrong of defendant, plaintiff in the night was carried past a station where he had a

right to be left and beyond where he had a right, from the information given him by defendant's servants, to suppose he was when he left the car. Before he suffered any injury he discovered the mistake, and knowing the surroundings started back to reach the road he meant to take. He knew and sought to avoid a cattle guard which he had to cross before he could reach the road. Deceived by the looks of the ground he stepped into the cattle guard before he knew that he was so near it and was injured. *Held* that the falling in was the result of an accident and not the proximate result of being carried by the station and misinformed as to just where the train had stopped; that defendant's wrong was related to the injury only as it was the occasion of bringing plaintiff where the accident occurred. *Lewis v. Flint, etc. Ry. Co.*, 54 Mich. 55. A man injured in a railroad accident became insane and eight months after the accident killed himself. The act of self-destruction was the proximate cause of the death. *Scheifer v. Railroad Co.*, 105 U. S. 249. Between a street and a river a railroad had filled in a space used for its tracks. A house across the street burnt because the fire hose could not reach the river across the tracks. The filling and use of the space was not the proximate cause of the injury. *Bosch v. Burlington, etc. R. R. Co.*, 44 Ia. 402. A traveler having changed cars at a station entered a car upon the train he proposed to take and was ordered out as the train was not ready. He stood for a time on a track in the yard near the car and was struck by a train. *Held* the order to leave the car was

gently started by himself, is one that has attracted no little attention in judicial circles, and led to some difference of opinion. In New York it is held that while the culpable party would be liable to the owner of an adjoining house to which the fire had spread, he would not be liable to one to whose house the fire should spread from the burning of the first; the court apparently being more influenced in their decision by the fact that the oppo-

not the proximate cause of the injury, the injured man having acted deliberately and without excitement or compulsion in taking his position where he did. *Henry v. St. Louis, etc. Ry. Co.*, 76 Mo. 283. Defendant's cars ran off a siding belonging to a third person by reason of its defective construction, and injured plaintiff's boat. Its act in running on the defective track, not the defect in the track, was held the proximate cause. *Fawcett v. Railway Co.*, 24 W. Va. 755. Damage from loss of market is not the proximate result of delay in delivery of freight by collision of vessels. *The Notting Hill*, L. R. 9 P. D. 105. A man knocked another down who was thereupon killed by the kick of a horse. The assault was not the proximate cause. *People v. Rockwell*, 39 Mich. 503. So where the jar caused by the sudden starting of a horse car threw a passenger to the pavement where a runaway horse struck her. *South Side, etc. Co. v. Trich*, 11 Atl. Rep. 627 (Pa.) A mule getting upon a railroad track from lack of a fence, ran along and caught its foot in a very small hole between the ties and was injured. Failure to fence was held not the proximate cause. *Nelson v. Chicago, etc. Ry. Co.*, 30 Minn. 74. See *Railroad Co. v. Guthrie*, 10 Lea, 432. A railway company unlawfully obstructed a highway with cars. While a traveller was waiting to pass, a train came in on the other side of the cars in a lawful manner. His horse

took fright and he was injured. The obstruction of the street was held not the proximate cause. *Selleck v. Lake Shore, etc. Ry. Co.*, 58 Mich. 195. So, where to avoid the obstruction one drove around it where there was no crossing. *Jackson v. R. R. Co.*, 18 Lea, 491; and where cattle stopped on a track and were struck by another train properly handled, running on a parallel track. *Brown v. Wabash, etc. Ry. Co.*, 20 Mo. App. 222. See *Railway Co. v. Staley*, 41 Ohio St. 118, where after passing round the end of the train a woman went upon another street and slipped in the dark on a pile of ice. The sale contrary to statute of a pistol to a boy is not the proximate cause of his injury by it. *Poland v. Earhart*, 70 Ia. 285. *Contra*, *Binford v. Johnston*, 82 Ind. 426, without reference to statute, where cartridges were sold, and the boy's brother afterward shot him. The sale of liquor is not the proximate cause of the death of the buyer resulting from a wound received in an attack, when drunk, upon a house some miles from the place of sale. *Schmidt v. Mitchell*, 84 Ill. 195. It is not the proximate result of furnishing liquor to a minor that the clerk of a hotel where the minor boards injures his hand in knocking the latter down for assaulting him. *Swinfin v. Lowry*, 34 N. W. Rep. 22 (Minn.) See, also, *McCandless v. Chicago, etc. Ry. Co.*, 36 N. W. Rep. 620 (Wis).

site doctrine "would subject to a liability against which no prudence could guard, and to meet which no private fortune would be adequate," than by a strict regard to the logic of cause and effect.¹

In Pennsylvania the same conclusion has been reached, and from similar considerations.² But a different view prevails in *England and in most of the American States. [*77] The negligent fire is regarded as a unity: it reaches the

¹Ryan v. N. Y. Cent. R. R. Co., 35 N. Y. 210. This decision does not appear to have been entirely satisfactory in New York; at least, the courts in subsequent cases have not been very positive in planting themselves upon it. See Webb v. Rome, etc., R. R. Co., 49 N. Y. 420, 427-8; Pollett v. Long, 56 N. Y. 200, 206. Coals from an engine on an elevated railroad fell on a horse in the street below. The horse ran and injured a traveller. The latter was allowed to recover from the railroad, distinguishing the Ryan case and Penn. etc. Co. v. Kerr, 63 Pa. St. 353. Lowery v. Manhattan Ry. Co., 99 N. Y. 158. But where sparks from a mill set fire to another and from the latter the fire spread through several buildings to plaintiff's, he was not allowed to recover from the mill owner. Reiper v. Nicholas, 31 Hun, 491.

²Pennsylvania R. R. Co. v. Kerr, 63 Pa. St. 353. We should say that the weight of this case as a precedent was somewhat diminished by Oil Creek, etc., R. R. Co. v. Keighron, 74 Pa. St. 316, and Pennsylvania R. R. Co. v. Hope, 80 Pa. St. 373; 8 C. 20 Am. Rep. 100. In the last mentioned case, proximate cause is held to be a question for the jury. To the same effect are also the following: Lehigh, etc. R. R. Co. v. McKean, 90 Pa. St. 123; Lake v. Milliken, 62 Me., 240; Willey v. Belfast, 61 Me. 569; Railway Co. v. Kellogg, 94 U. S. 469; Adams v.

Young, 4 N. E. Rep. 599 (Ohio); Green Ridge R. R. Co. v. Brinkman, 64 Md. 52, and see cases *ante*, p *74, note 2. A train upon a track, over which ten minutes before an engine had safely passed, ran into a land slide and was wrecked. Oil upon the train ignited, ran into a river, then unusually swollen, which flowed by the side of the track and was carried down stream some distance, where it set fire to plaintiff's building. In a suit against the railroad company, held that defendant's negligence in not seeing the land slide and stopping in time was not the proximate cause of plaintiff's damage; that the consequences could not have been foreseen as likely to flow from the act. Hoag v. Lake Shore, etc. R. R. Co., 85 Pa. St. 293. But where the oil was ignited by a collision, the opposite conclusion has been reached. Kuhn v. Jewett, 32 N. J. Eq. 647. Where one has negligently set his building on fire, if by reason of the wind as a new and independent agency another's house is burnt, the negligence has been held not the proximate cause of the latter's injury. Penn. Co. v. Whitlock, 99 Ind. 16. By a fire negligently lit adjoining property was set on fire. The injury received by a person in trying to put it out is not the proximate result. Seale v. Gulf, etc. Co., 65 Tex. 274; Hinchey v. Manhattan Ry. Co. 49 N. Y. Super. Ct. 406.

last building as a direct and proximate result of the original negligence, just as a rolling stone put in motion down a hill, injuring several persons in succession, inflicts the last injury as a proximate result of the original force as directly as it does the first; though if it had been stopped on the way and started anew by another person, a new cause would thus have intervened back of which any subsequent injury could not have been traced. Proximity of cause has no necessary connection with contiguity of space or nearness in time. The slow match which causes an explosion after much time and at a considerable distance from the ignition, and the libelous letter which is carried from place to place by different hands before publication, produces an injurious result which is as proximate to the cause and as direct a sequence as if in the one case the explosion had been instantaneous, and in the other the author had called his neighbors together and read read to them his libel.¹

¹ See *Smith v. London, etc., R. R. Co.*, L. R. 5 C. P., 98; *Perley v. Eastern R. R. Co.*, 98 Mass. 414; *Clemens v. Hannibal, etc., R. R. Co.*, 53 Mo. 866; S. C. 14 Am. R. 460; *Poepfers v. Miss., etc., Ry. Co.*, 67 Mo. 715; *Hoyt v. Jeffers*, 30 Mich. 181; *Fent v. Toledo, etc., R. R. Co.*, 59 Ill. 349; S. C. 14 Am. Rep. 13; *Toledo, etc., R. R. Co. v. Muthersbaugh*, 71 Ill. 572; *Annapolis, etc., R. R. Co. v. Gantt*, 39 Md. 115; *Baltimore, etc., R. R. Co. v. Reaney*, 42 Md. 117; *Kellogg v. Chicago, etc., R. R. Co.*, 26 Wis. 223; *Atkinson v. Goodrich, Tr. Co.*, 60 Wis. 141; *Crandall v. Goodrich, Tr. Co.*, 16 Fed. Rep. 75; *Hooksett v. Concord R. R.*, 38 N. H. 242; *Achison, etc., R. R. Co. v. Stanford*, 12 Kan. 354; S. C. 15 Am. R. 362; *Milwaukee, etc., R. R. Co. v. Kellogg*, 94 U. S. 469; *Delaware, etc., R. R. Co. v. Salmon*, 39 N. J. 299; *Louisville, etc., Ry. Co. v. Krimming*, 87 Ind. 351; *Johnson v. Chicago, etc., Ry. Co.*, 31 Minn. 57; *Small v. Chicago, etc., R. R. Co.*, 55 Ia. 583; *Krippner v. Biebl*, 28 Minn. 139, where a fire smouldered for two days in a slough.

In *Annapolis, etc., R. R. Co. v. Gantt*, 39 Md. 115, 141, *BARTOL, Ch. J.*, says: "It is contended on the part of the appellant that, for such injury, the company is not liable under the code, because it was the remote, and not the proximate, consequence of the defendant's negligence. In support of this proposition we have been referred to *Ryan v. N. Y. Central R. R. Co.*, 35 N. Y. 210, and *Penn. R. R. Co. v. Kerr*, 62 Penn. 353.

"In those cases it was held that 'where the fire is communicated by the locomotive to the house of A., and thence to the house of B., there can be no recovery by the latter,' and the decisions are based upon the ground that the fire from the locomotive is not the proximate cause of the destruction of B's house; and his injury being only the remote and indirect result of the wrongful act of the defendant, he cannot maintain an action, according to the maxim, *causa proxima non remota spectatur*. There is no rule of the law better established or more universally recognized.

*4. A fourth proposition may be stated thus: That if [*78] the damage has resulted directly from concurrent wrongful acts or neglects of two persons, each of these acts may be

Whether it was correctly applied in the cases above cited, it is not material for us now to consider; because it is obvious that the facts in the present case clearly distinguish it from those.

"It may be proper to observe that the decisions in 15 N. Y. and 62 Penn. are not supported by any English case that we have seen, and are in conflict with several decisions both in England and in this country, which have been cited in argument by the appellee. Among them we may refer to *Figgott v. Eastern Counties R. Co.*, 3 M. G. and S. 229; *Smith v. L. & S. R. R. Co.*, L. R. 5 C. P. 98; *Perley v. Eastern R. R. Co.*, 98 Mass. 418; *Hart v. Western R. R. Co.*, 13 Met. 99; *Fent v. Toledo, etc., R. R. Co.*, 59 Ill. 349.

"Without attempting to reconcile the various decisions, which would be a fruitless and unprofitable task, or undertaking to define for all possible cases the exact limits and extent of the liability of railroad companies under our code, for damages by fire occasioned by their engines and carriages, we may safely state the rule to be, that when their liability arises it extends to 'all the near and natural consequences of their wrongful act, and not to those which are remote, incidental or exceptional.' *Law Reg. Sep.*, No. 1873, p. 560, Judge Redfield's note. The rule is thus stated by Parsons: 'The defendant is held liable for all those consequences which might have been foreseen and expected as the results of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into consideration.' 2 Pars. on Cont. 456.

The rule is laid down substantially in the same terms by *POLLOCK, C. B.*, in *Rigby v. Hewitt*, 5 Exch. 240. Other definitions might be cited from Judges and text writers; but this would serve no useful purpose. The rule is one which, from its nature and the class of cases where it applies, is incapable of precise definition. It has been correctly said by *MILLER, J.*, speaking for the Supreme Court, 'If we could deduce from the cases the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations.' He adds, 'One of the most valuable *criteria* furnished us by the authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.' *Ins. Co. v. Tweed*, 7 Wall. 52. To apply this criterion to the case before us, it seems too plain for argument that * * the injury to the plaintiff's property was the direct consequence of the fire occasioned by the defendant's locomotive. The fact that the fire began on the side of the railroad and spread to the plaintiff's land, cannot in any just sense be said to render the injury suffered by him of a nature merely remote and incidental within the meaning of the rule. The fire consumed his property in its natural and direct course, without any 'intervening force or power to stand as the cause of the misfortune,' and the injury suffered was therefore its proximate effect.

counted on as the wrongful cause, and the parties held re-
[*79] sponsible, either jointly *or severally, for the injury.¹
Thus, if two persons wrongfully block up a street, so that

"No case has been cited which sustains the defense here made by the appellant. In *Woodruff's Case*, 4 Md. 242, the fire happened in the same way, and neither court nor counsel thought of applying the rule of *causa remota*. So in *B. & O. R. R. Co. v. Dorsey*, 37 Md. 19, the fire originated in the same way, and it was not pretended that the injury to the plaintiff was not a proximate consequence of the defendant's negligence. The language of the court (p. 24) would seem conclusive of the question, as it is here presented. We may refer also to *Field v. N. Y. Central R. R. Co.*, 32 N. Y. 339, where the question was ruled in the same way by the same court which subsequently decided *Ryan v. N. Y. Central R. R. Co.*, 35 N. Y. 210." See, also, *Higgins v. Dewey*, 107 Mass. 494. An ordinary wind is not an independent cause. *Poeppers v. Miss.*, etc., Ry. Co., 67 Mo. 715; *Krippner v. Biebl*, 23 Minn. 139. Nor is the leaving of shavings in a mill yard. *Atkinson v. Goodrich Tr. Co.*, 60 Wis. 141; *Crandall v. Goodrich Tr. Co.*, 16 Fed. Rep. 75. Nor the failure of the person damaged to extinguish the fire. *Wiley v. West Jersey R. R. Co.*, 44 N. J. L. 247.

¹ *Lynch v. Nurdin*, 1 Q. B. 29; *Hilidge v. Goodwin*, 5 C. & P. 190; *McCahill v. Kipp*, 2 E. D. Smith, 413; *Chapman v. N. H.*, etc., R. R. Co., 19 N. Y. 341; *Colegrove v. N. Y.*, etc., R. R. Co., 20 N. Y. 492; *Barrett v. Third Av. R. R. Co.*, 45 N. Y. 623; *Griggs v. Fleckenstein*, 14 Minn. 81; *Powell v. Deveney*, 3 Cusb. 300; *Lane v. Atlantic Works*, 107 Mass. 104; *Weick v. Lander*, 75 Ill. 93; *Ricker v. Freeman*, 50 N. H. 420; S. C. 9 Am.

Rep. 267; *Lake v. Milliken*, 63 Me. 240; S. C. 16 Am. Rep. 456. A man entitled to the use of 400 inches of water in a stream was by the action of the several defendants independently deprived of his rights. No one defendant would perhaps by his use of the water have so reduced the amount as to injure the plaintiff. *Held*, they were jointly liable to him. *Hillman v. Newington*, 57 Cal. 56. So where defendant negligently allowed water to run into a cellar into which by another's independent negligence other water ran. From the cellar the water came into plaintiff's cellar to his injury. The defendant was held liable for the whole damage. *Slater v. Mercereau*, 64 N. Y. 138.

So in cases of injury to passengers of one carrier by collision with cars or vessel of another where both are at fault, each is liable. *Kellow v. Centr. Ia. Ry. Co.*, 68 Ia. 470. *Pittsburgh etc., Co. v. Spencer*, 98 Ind. 186; *Tompkins v. Clay St. R. R. Co.*, 66 Cal. 164; *Wabash, etc., Co. v. Shacklett*, 105 Ill. 364; *Cuddy v. Horn*, 46 Mich. 596. So where the injury arises from a defective joint station platform, *Wabash, etc., Co. v. Wolff*, 13 Ill. App. 437. So, though as between themselves one carrier was wholly to blame, a joint action has been sustained. *Cooper v. Eastern Tr. Co.*, 75 N. Y. 116.

Servants of a railroad company needlessly and negligently placed signal torpedoes on the track where the public had been accustomed to pass. A lad picked one up and carried it away and in playing with it exploded it to the injury of plaintiff. Following *Lynch v. Nurdin* and citing many cases, the court held that

one is injured in attempting to pass them, neither of the culpable parties can excuse himself by showing the wrong of the other, for the injury is a natural and proximate result of his own act under the then existing circumstances, and to excuse either would be to deny all remedy in the case of plain and palpable injury. But if the acts or neglects were 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 law will attribute to his culpable conduct the injurious consequence, and refuse to look beyond it. For illustration the case may be instanced of the escape of gas into a dwelling in consequence of the negligence of the gas company, and the subsequent ignition of the gas through the negligence of a tenant. "If the tenant, upon discovering the presence of gas in large quantity in the house, neglected to give notice to the agents or servants of the defendant, or to take reasonable precautions to remove or exclude the gas, and recklessly brought the flame of a candle in contact with it, thus bringing about injurious effects which would not have followed but for such reckless or negligent conduct on his part, the defendant ought not to be held responsible for those results.¹ Whatever of care was requisite for the protection of the premises under the circumstances was due from the occupant. The *defendant, as well as the plaintiff, had a [*80] right to expect and require it of him. The measure of duty and the extent of liability of the defendant in respect to the property exposed to injury are not affected by the consideration whether the occupant who has charge of it is in fact owner in fee or tenant for years or at will. If the intervening misconduct of the occupant produced the explosion which was the immediate cause of the injury to the building, the plaintiff cannot charge the legal responsibility for that result upon the original negligent act or omission of the defendant."²

Accidental Injuries. For a purely accidental occurrence, caus-

plaintiff was not chargeable with the boy's negligence; that defendant's negligence having rendered the injury possible and probable was the proximate cause thereof. *Harriman v. Pittsburgh, etc., Co.*, 12 N. E. Rep. 451 (Ohio).

¹ Citing *Hunt v. Lowell Gaslight Co.*, 1 Allen, 343; *Sherman v. Fall River Iron Works*, 2 Allen, 524.

² *WILLS, J.*, in *Bartlett v. Boston Gaslight Co.*, 117 Mass. 533, 538.

ing damage without the fault of the person to whom it is attributable, no action will lie, for though there is damage the thing amiss—the *injuria*—is wanting.¹

¹ *Weaver v. Ward*, Hob. 184; *Gibbons v. Pepper*, 1 *Ld. Ray.* 38; *Lloyd v. Ogleby*, 5 *C. B. (n. s.)* 667; *Cotton v. Wood*, 8 *C. B. (n. s.)* 566; *Hammack v. White*, 11 *C. B. (n. s.)* 588; *Alderson v. Waistell*, 1 *C. & K.* 357; *Holmes v. Mather*, *L. R.* 10 *Exch.* 261; *Vincent v. Stenehour*, 7 *Vt.* 62; *Dygart v. Bradley*, 8 *Wend.* 469; *Losee v. Buchanan*, 51 *N. Y.* 476; *S. C.* 10 *Am. Rep.* 623; *Clark v. Foot*, 8 *Johns.* 421; *Sheldon v. Sherman*, 42 *N. Y.* 484; *S. C. (Am. Rep.)* 569; *Newcomb v. Van Zile*, 34 *Hun.* 275; *Wilson v. Rockland Manuf. Co.*, 2 *Harr.* 67; *Spencer v. Campbell*, 9 *W. & S.* 32; *Bynnton v. Rees*, 9 *Pick.* 527; *Rockwood v. Wilson*, 11 *Cush.* 221; *Brown v. Kendall*, 6 *Cush.* 292; *Gault v. Hames*, 20 *Md.* 297; *Robinson v. Grand Trunk R. R. Co.*, 32 *Mich.* 322; *Lewis v. Flint, etc., Ry. Co.*, 54 *Mich.* 55; *Schroeder v. Mich. Car Co.*, 56 *Mich.* 132; *Toledo, etc., R. R. Co. v. Daniels*, 21 *Ind.* 162; *Indianapolis, etc., R. R. Co. v. Truitt*, 24 *Ind.* 162; *P. C. & S. R. R. Co. v. Smith*, 26 *Ohio (n. s.)* 124; *Express Co. v. Smith*, 33 *Ohio St.* 511; *Burton v. Davis*, 15 *La. Ann.* 448; *Brown v. Collins*, 58 *N. H.* 442; *S. C.* 16 *Am. Rep.* 372; *Hanlon v. Ingram*, 3 *Clark (Iowa)*, 81; *Morris v. Platt*, 32 *Conn.* 75; *Strouse v. Whittlesey*, 41 *Conn.* 559; *Chicago, etc., R. R. Co. v. Jacobs*, 63 *Ill.* 178; *Toledo, etc., R. R. Co. v. Jones*, 76 *Ill.* 311; *Lincoln, etc., Co. v. McNally*, 15 *Ill. App.* 181. Damage from extraordinary floods falls under this rule. *Brown v. Susquehanna Boom Co.*, 109 *Pa. St.* 57; *Thatcher v. Baker*, 15 *id.* 22. See *Viterbo v. Friedlander*, 120 *U. S.*, 707. Encamping and hunting in a wilderness district is not such an illegal and mischievous act as will

render the person responsible for all injury that may result to others regardless of diligence, care, or prudence on his part. *Bizzell v. Booker*, 16 *Ark.* 308. Where a party, in self-defense, fired a pistol at his assailant and accidentally shot a third party, he was held not liable for the injury done. *Morris v. Platt*, 32 *Conn.* 75. See, to the same effect, *Paxton v. Boyer*, 67 *Ill.* 132; *S. C.* 16 *Am. Rep.* 615. Where in the use of a steam engine without negligence it explodes and causes injury to others, the owner is not liable therefor. *Losee v. Buchanan*, 51 *N. Y.* 746; *S. C.* 10 *Am. Rep.* 623; *Marshall v. Welwood*, 39 *N. J.* 339; *S. C.* 20 *Am. Rep.* 394. So as to accidents from machinery, where their liability to happen is proved only by their actual happening. *Richards v. Rough*, 53 *Mich.* 212; *Sjogren v. Hall*, *Id.* 274. So as to injuries from the use of dye-stuff supposed harmless. *Gould v. Slater Woolen Co.*, 17 *N. E. Rep.* 531 (*Mass.*). A mule caught its foot in a hole in a railroad track so small that no one could have foreseen such result *Held*, no liability. *Nelson v. Chicago, etc., Ry. Co.*, 30 *Minn.* 74. So where a workman was painting by lamplight the inside of a tank with an approved and long used paint, bought ready for use, and the benzine in the paint caused an explosion. *Allison Mfg. Co. v. McCormick*, 19 *Atl. Rep.* 273 (*Pa.*). From some unexplained cause a telegraph wire across a track sagged, and hitting a brakeman on top of a car broke, at the same time becoming fastened to the car brake. The end caught a man engaged in business

***Damage from the Lawful Exercise of Rights.** It is [*81] *damnum absque injuria* also if through the lawful and proper exercise by one man of his own rights a damage results to another, even though he might have anticipated the result and avoided it. That which it is right and lawful for one man to do cannot furnish the foundation for an action in favor of another.¹

near the depot, and the wire being drawn along by the moving train the man was killed. *Held*, to be an accident. "Negligence," says MITCHELL, C. J., "is not to be presumed upon the fact of an occurrence like that involved in the present case, the statement of which suggests its anomalous, exceptional and extraordinary character." *Wabash, etc., Ry Co. v. Locke*, 14 N. E. Rep. 391, (Ind.) An accident may be defined as an event happening unexpectedly and without fault: if there is any fault there is liability. As where one drives against another by getting on the wrong side of the road in a dark night. *Leame v. Bray*, 3 East. 593. Or by pulling the wrong rein by mistake. *Wakeman v. Robinson*, 1 Bing. 218. See *Shawhan v. Clarke*, 24 La. Ann. 390; *W. U. Tel. Co. v. Quinn*, 56 Ill. 319; *Sullivan v. Scripture*, 3 Allen. 564.

¹ *Aldred's Case*, 9 Co. 58, b.; *Acton v. Blundell*, 12 M. & W. 350; *Chesmore v. Richards*, 2 H. & N. 168; S. C. 7 H. L. Cas. 749; *New River Co. v. Johnson*, 2 El. & El. 435; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; S. C. in Error, 11 Pet. 420; *Roath v. Driscoll*, 20 Conn. 533; *Chatfield v. Wilson*, 23 Vt. 49; *Frazier v. Brown*, 12 Ohio, (N.S.) 294; *Wheatley v. Baugh*, 25 Penn. St. 528.

The rule applies to the case of a landlord, where his tenant's employer has made it a condition of employment that he shall not live in the landlord's house. *Heywood v. Tillson*, 75 Me. 225. So as to the use of streams and water. *De Baun v. Bean*, 29 Hun, 236; *Bullard v. Victory Mfg.*

Co., 77 N. Y. 525; *Hoxsie v. Hoxsie*, 38 Mich. 77; *Railroad Co. v. Carr*, 38 Ohio St. 448; *Chesley v. King*, 74 Me. 164. A man bought land with special reference to a brook of pure water running through it. Afterward a coal mine was opened higher up the stream which afforded the natural drainage for the locality. The water pumped from the mine ran into the stream and polluted it. The Court first held the pollution actionable, *Sanderson v. Penn. Coal Co.*, 86 Pa. St., 401, but afterwards decided it to be *damnum absque injuria*. *Penn. Coal Co. v. Sanderson*, 118 Pa. St. 126.

The exercise of the right to abandon his mine by one of two adjoining mine owners does not give the other a right of action if by reason of such abandonment water, which otherwise would have been pumped out, accumulates and flows into the worked mine. *Nat. Copper Co. v. Minnesota Min. Co.*, 57 Mich. 83; *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583. So, if by working out, the surface sinks and rain, which had before flowed off, falls into the old workings and percolates into an adjoining mine. *Wilson v. Waddell*, L. R. 2 App. Cas. 95; *Lord v. Carbon Iron Co.*, 43 N. J. Eq. 157. So where land between plaintiff's and defendant's had been worked out and by defendant's excavating his, such intervening land fell and caused plaintiff's to subside. *Birmingham v. Allen*, L. R., 6 Ch. D. 284.

From a lawful use of a street, no action arises. *Grand Rapids, etc., R.*

Nor can the absence of commendable motive on the part of the party exercising his rights be the legal substitute or equivalent for the thing amiss which is one of the necessary elements of a wrong. "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."¹

Crimes and Torts Distinguished. It was observed in a previous chapter that the same act may constitute a public offense and also a private injury; or, in other words, may be both a crime and a tort. But whether or not it shall have this two-fold character can never be determined by an analysis of the moral qualities, and a determination of the presence or absence of evil intent. We must look beyond these, and see whether the act comes within the definition of a crime, and also within that of a private injury, and if it does, the fact that it is the one will not prevent its being the other also. Certain acts or omissions are made public offenses by the common law or by statute, 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; and penalties are attached to them, which are imposed on public grounds. These according to their grade, are crimes or misdemeanors, or they are simply things prohibited under penalty. But [*82] where the *same wrongful acts cause damage to private individuals, they come directly within the definition of

R. Co. v. Heisel, 38 Mich. 62; Grand Rapids St. Ry. Case, 48 Mich. 433; see Garrett v. Janes, 65 Md. 260. So as to obstruction of navigation in rebuilding a lawful bridge. Hamilton v. Vicksburg, etc., R. R. Co., 119 U. S. 280; see Abbott v. Kansas, etc., Ry. Co., 83 Mo. 271. Otherwise if the act is not necessary to the public improvement, authorized by law, in the course of which it is done. Hackstack v. Keshena Impr. Co., 66 Wis. 439. Inconvenience suffered in obeying police regulation of the State is wrong without injury. Flint, etc., Ry. Co. v. Detroit, etc., R. R. Co., 81 N. W. Rep. 281 (Mich).

But if by the careful washing of an upper floor, water is made to run into the room below, the upper tenant is liable, provided the lower tenant is not chargeable with the duty of repairing the floor. Patton v. McCanta, 6 S. E. Rep. 849 (S. C).

¹ Parke B. Stevenson v. Newnam, 13 C. B. 235. See Floyd v. Baker, 13 Co. 23; Stowball v. Ansell, Comb. 11; Taylor v. Henniker, 12 Ad. & El. 483; Phelps v. Nowlen, 72 N. Y. 39; Kiff v. Youmans, 86 N. Y. 324. For further discussion of this subject see 82, Chapter XXII.

torts, and are such. If one man strike another in anger, the public peace is broken, and the man assaulted is injured; and there is thus a public wrong and a private wrong. Punishing one does not redress the other, nor does forgiving the one preclude legal proceedings to punish or obtain compensation for the other.

Many attempts have been made to draw a clear distinction between a tort and a crime, but they have not always thrown light upon the subject. Thus Blackstone says: "The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: That private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity. As if I detain a field from a man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public which of us is in possession of the land; but treason, murder and robbery are properly ranked among crimes; since, beside the injury done to individuals, they strike at the very being of society, which cannot possibly subsist where actions of this sort are suffered to escape with impunity."¹ Again, it is said by Lord MANSFIELD: "The offense that is indictable must be such a one as affects the public. As if a man uses false weights and measures, and sells by them to all or many of his customers, or uses them in the general course of his dealings. So, if a man defrauds another under false tokens; for these are deceptions that common care and prudence are not sufficient to guard against. So, if there be a conspiracy to cheat; for ordinary care and caution is no guard against this."² And still another judge has said: "All offenses of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable."³

Now it is not an immaterial matter to the public that one man *takes from another his land, whether it be done by [*83] force or by stealth; and if it were so, the law might well

¹ 4 Bl. Com. 5.

² LAWRENCE, J., in *King v. Higgs*.

³ *Rex v. Wheatly*, Burr. 1125, 1127. *Higgs*, 2 East, 5, 20.

have made no provision on the subject. Among the highest purposes of government are the protection of property and the enforcement of justice in respect thereto, as between those who may be adverse claimants; and for these purposes courts and offices are created and are supported at large expense to the State. Nor can the tendency of any particular act or omission, or the practicability of guarding and protecting against it be the sole and sufficient test of crime and tort; for many things are crimes which due caution might guard against and many things are only torts which are done secretly, and which the prudence of the injured party cannot prevent. Mr. Austin more correctly says: "The difference between crimes and civil injuries is not to be sought in a supposed difference between their tendencies, but in the difference between the mode wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offense which is pursued at the discretion of the injured party or his representative is a civil injury. An offense which is pursued by the sovereign or by the subordinate of the sovereign, is a crime."¹ This more correctly states the real distinction, which after all must be found in positive laws.²

[*84] *In those cases in which wrongs to individuals are regarded as wrongs to the State also, they are so regarded

¹ Austin, Jurisprudence Lec. XVII.

² "It is plain, as matter of philosophical speculation, that any act which injures any member of the body politic injures the body politic. The inference from this proposition would be, that every such act, falling directly though it may, only on an individual, is of a nature to be indictable. But this philosophical view is limited in its practical application by the doctrine that the law does not take cognizance of small things. If an injury is of a private nature, affecting directly and primarily only a single person, though the injury is great in magnitude, it still, as a general proposition, is deemed a small thing in the law, when viewed with reference to the public. The individual injured has, in such a case, his civil remedy, but

an indictment will not lie. * * A better practical statement of the doctrine, therefore, is, that either the act must be in its nature injurious to the public at large, in distinction from individuals, or else it must be a wrong to individuals of a nature which the public takes notice of as done to itself. The books are full of expressions going further than this statement, to the effect that in all cases the act must be a public wrong, in distinction from a private. But clearly such expressions arise from misapprehension; for, to illustrate, nothing can be more purely and exclusively a tort against the individual alone than a simple larceny, where there is no breach of the peace, no public loss of property, since it only changes hands; no open immorality, corrupt-

either because the common law, in consideration of their evil effects upon the social state, or their tendency to disturb it, has declared them such, or because the statute law, on similar considerations, has made them punishable on a public prosecution. Other wrongs are regarded by the law as private wrongs, merely because it is believed that sufficient protection is given when a remedy is provided which the party wronged can pursue at his option. If he pursues this remedy and obtains redress, any incidental injury the public may have suffered from the act or omission constituting the wrong is supposed to be too insignificant to demand the attention of the State; if he overlooks or forgives the wrong, no one else is supposed sufficiently concerned to warrant an interference.

The foregoing constitutes the only reliable distinction between a crime and a tort; but some of their respective characteristics may be mentioned. In a crime, the most conspicuous and inseparable element is the intent; in a tort, on the other hand, the intent is usually of subordinate importance; sometimes of no importance whatever. The State will not punish an act as a crime unless there is an evil intent either actually indulged or imputable. Where there has been no purpose to disobey the public laws, there cannot, in general, be a crime. A murder lies not in the killing, but in accomplishing a murderous purpose. If one knock another down purposely, it is a crime; but if carelessly, it is only a tort. If one negligently burn his neighbor's house, it is no arson, but it is a tort, because the neighbor had a right to enjoy his house in peace, and to have others observe toward him due care in any action that might endanger his property. But there may be a negligence so gross as to be criminal; the criminal inattention to the rights and safety of others, supplying the place of intent. Such would be the case if the keeper of a savage beast were to leave it to wander at large, or if one on the roof of his dwelling were to throw [*85] the snow and ice into the public street without looking to

ing the minds of the young; no person in any way affected but he who takes and he who loses the thing stolen; and, as in larceny, so in many other crimes. * * Whenever the public deems that an act of wrong to individuals is of such a nature as to

require the public protection to be cast over the individual, with respect to the act, it makes the act punishable at the suit of the public; or, in other words, it makes it a crime." 1 Bishop, Cr. Law, §§ 532, 533, 3d ed.

ascertain if persons were passing; or if a sportsman were to fire in the direction and within the reach of a crowd of people; or if the conductor of a railway train were to run out of time in disregard of orders. In the case of negligence so gross, the law implies a guilty intent; or, in other words, it implies that the culpable party must have intended the natural and probable consequences of that which he did or neglected to do, and it holds him accountable accordingly.¹

A classification of the various cases of injuries not actually intended may assist in determining the criminal or civil responsibility. The following will, perhaps, be sufficient:

1. Those where an individual, in the exercise of his rights, has accidentally, but without negligence, caused damage to another; as where the horse he was driving has taken fright and run his vehicle against the other's vehicle or person. In such a case he is not legally responsible, either civilly or criminally. No one is in fault; the injury is to be attributed to inevitable accident, and the damage must be left where it chanced to fall.

2. Those where a man, in exercising his rights, has been guilty of negligence to the injury of another. In these cases there is wrong in the negligence, and there is consequently that conjunction of wrong and damage which constitutes a tort.

3. Those where a party who causes the injury was at the time acting recklessly, or with such gross negligence that an injury has followed which should have been anticipated by him. These may be both crimes and torts. A killing by such recklessness or gross negligence would be punished as criminal manslaughter. A case of fatal wounds inflicted while indulging in rude and dangerous sports might be one of this description.²

¹ James v. Campbell, 5 C. & P. 372; Regina v. Towers, 12 Cox C. C. 530; Regina v. Macleod, Id. 534; Regina v. Finney, Id. 625; Regina v. Jones, Id. 628; People v. Fuller, 2 Park. C. R. 16; Rice v. State, 8 Mo. 561; State v. Vance, 17 Iowa, 138; Lee v. State, 1 Cold. 62; Sparks v. Commonwealth, 3 Bush, 111; Chrystal v. Commonwealth, 9 Bush, 669; State v. Center, 35 Vt. 378; U. S. v. Keller, 19 Fed. Rep. 633; State v. Justus, 11 Oreg. 178; as to responsibility for death from careless handling of loaded pistol; State v.

Emery, 78 Mo. 77; State v. Hardie, 47 Ia. 647; Robertson v. State, 2 Lea, 239. With no evil intent and with the patient's consent, a physician applied kerosene in such way as to produce death. Held guilty of manslaughter on the ground that he had been guilty of gross and reckless negligence. Com. v. Pierce, 138 Mass. 165.

² Pennsylvania v. Lewis, Add. (Pa.) 279; as to death from boxing with soft gloves. Reg. v. Young, 10 Cox Cr. C. 371.

4. Those where a party, though not intending the particular injury, was, nevertheless, engaged in doing that which was unlawful. Here it is proper that he be held to an accountability *beyond that which he is under when lawfully [*86] doing what he has a right to do. These, also may be both public and private wrongs. The case of one who, while committing a trespass, accidentally kills the person trespassed upon, is an illustration. What is thus unintentionally done in the course of a trespass is and must be blamable. The killing, though by accident, is manslaughter.¹

The foregoing will sufficiently indicate the grounds on which the criminal law punishes evil intent, and also recklessness. The law so far makes allowances for the infirmities of our nature as not to punish a mere failure to observe ordinary care as a crime, though injury result; but it may justly and properly compel restitution by the party in fault to the party injured.²

¹ State v. Center, 35 Vt. 378; Rice v. State, 8 Mo. 561. Where a man causes the death of his insane wife by negligently exposing her to the weather insufficiently clad, a criminal intent need not be averred, nor proved, in order to constitute manslaughter. A naked, negligent omission of a known duty, when it causes or hastens the death of a human being, constitutes manslaughter. State v. Smith, 65 Me. 257.

Where one wrongfully took a box from a refreshment stand, on a pier, and wantonly threw it into the sea and killed a person swimming below, it was held that whether or not the act was manslaughter, depended on the question of the man's negligence, not on the fact that a civil wrong had been done in taking up and throwing away the box. Reg. v. Franklin, 15 Cox Cr. C. 163; S. C. 5 Am. Crim. R. p. 377.

² In the private suit, a conviction in the public prosecution cannot be proved for the purpose of making out a cause of action. Smith v. Rummens, 1 Camp. 9. It has been held, how-

ever, that if the defendant plead guilty in the criminal suit, this is evidence against him in the civil suit. Eno v. Brown, 1 Root, 523. Mr. Phillips says it is *conclusive* against him. 3 Phil. Ev. 518. But in another place he speaks with more reserve. 2 Phil. Ev. 54. Mr. Starkie says the conviction on a plea of guilty is evidence, *like any other admission*. 2 Stark. Ev. 218, note. And, see, Stephens v. Jack, 3 Yerg. 403; Ward v. Green, 11 Conn. 455; Bradley v. Bradley, 2 Fairf. 367; Mead v. Boston, 8 Cush. 404. If the guilty party has been convicted, on trial, and punished for the crime, he may, nevertheless, contest the fact of guilt in a civil suit instituted by the aggrieved party, and the judgment in the criminal suit is not admissible in evidence to establish it. The reason given in some cases is, that the plaintiff in the civil suit may have been a witness, by means of whose testimony a conviction was had, and to receive the conviction in evidence in his behalf would be to enable him indirectly to prove his case by his own oath; but the better ground is, that the parties

There is in England a rule regarding the order of proceedings when an action is both a public and private offense. The rule is, that if the public offense is of the grade of felony, the private remedy is suspended until the public justice is satisfied. Sometimes it is said that the private wrong is merged in the public wrong; but this is inaccurate; it is not merged or *swallowed up, it is only stayed for the time. The rule is stated by LORD ELLENBOROUGH as follows: "The law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offense; and after a verdict, either of acquittal or conviction, a civil action may be maintained."¹

Looking for the reason of the rule, which seems a harsh one, we discover it in the fact that in that country the party injured is relied upon to take the place of public prosecutor; and his

to the two proceedings are not the same, and there is consequently a want of mutuality. *Duchess of Kingston's Case*, 20 How. St. Trials, 538; *Gibson v. McCarthy*, Ca. Temp. Hard. 311. See *England v. Bourke*, 3 Esp. 80; *Cook v. Field*, *ib.* 133; *The King v. Boston*, 4 East. 572; *Burdon v. Browning*, 1 Taunt. 519; *Jones v. White*, 1 Str. 68; *Maybee v. Avery*, 18 Johns. 352; *Mead v. Boston*, 3 Cush. 404; 1 Hale P. C. 410; 1 Stark. Ev. 332; 1 Greenl. Ev. § 587 and note; 1 Phil. Ev., Ch. 4, § 2; 2 *Ibid.* Ch. 1, § 1.

¹ *Crosby v. Leng*, 12 East, 409. See 1 Hale, P. C. 548; *Masters v. Miller*, 4 T. R. 320; *Higgins v. Butcher*, *Yelv.* 89; *Gibson v. Minet*, 1 H. Bl. 569; *Gimson v. Woodfull*, 2 C. & P. 41; *White v. Spettigue*, 13 M. & W. 603; *Stone v. Marsh*, 6 B. & C. 551. The suspension of civil remedy is frequently spoken of in the books as a merger of the civil action in the felony; but, as was well said by RICHARDSON, Ch. J., in *Pettingill v. Rideout*, 6 N. H. 454: "to call a suspen-

sion of civil remedy till the criminal justice of the State is satisfied a merger is, in our opinion, very little, if anything, short of an abuse of language." The suspension might take place when there was no felony at all; for if the circumstances were such that there was reasonable ground to believe the action of the party was felonious, the civil remedy was denied until after his guilt or innocence had been determined in a criminal prosecution. *Prosser v. Rowe*, 2 C. & P. 421; *Crosby v. Leng*, 12 East, 409; *Gimson v. Woodfull*, 2 C. & P. 41. The law on this subject seems now in an unsettled state in England. In a late case where the question was fully considered upon all the cases, the court remarked that the old doctrine was exploded, but the decision turned on the fact that it did not appear whether there had been a neglect to prosecute. *Midland Ins. Co. v. Smith*, L. R. 6 Q. B. D. 561. See also *Wells v. Abrahams*, L. R. 7 Q. B. 554. *Ex parte Ball*, L. R. 10 Ch. D. 667.

interest in the accomplishment of public justice is enlisted and kept active by postponing the redress of his private grievance. But the reason for this suspension of private remedy failed when property which was the subject of felony had passed into the hands of innocent parties, by purchase or otherwise, and in such cases, as no prosecution of these parties was demanded at the hands of the public, the owner might proceed at once for the recovery of his property or its value.¹

In this country the common law doctrine of the suspension of civil remedy in case of felony has not been recognized. The reason usually assigned is, that in this country the duty of prosecuting for public offenses is devolved upon a public officer chosen for the purpose, instead of being left, as in England, to the voluntary action of the party injured by the crime.” *The civil and the criminal prosecution may [*88] therefore go on *pari passu*, or if the latter is not commenced at all, the failure to seek public justice is no bar to the private remedy.

In many cases of public wrongs the law can take no notice of private injuries as constituting the foundation of a lawful claim for compensation. Any rule that may be prescribed by the law on this subject must be a practical rule, and no rule can be practical which undertakes to give private damages in every case of a public injury. A single illustration will make this plain. Let it be supposed that a house on one of the public streets of a city is entered in the daytime and robbed, the family being first outraged or murdered. We instance such a case in order to show how a public crime of great enormity may cause injury to private interests. Every individual in the city—we might almost say in the country—is injured by the crime. His sense of security is disturbed, his enjoyment of his property is diminished, he feels the necessity of greater precautions to protect his home and family, he is more uneasy when abroad, he perhaps incurs

¹ *Marsh v. Keating*, 1 Bing. N. C. 197; *Stone v. Marsh*, 6 B. & C. 551; *White v. Spettigue*, 13 M. & W. 603; *Lee v. Bayes*, 18 C. B. 599.

² *Plummer v. Webb*, 1 Ware, 69; *Pettingill v. Rideout*, 6 N. H. 454; *Boardman v. Gore*, 15 Mass. 331; *Boston & Worcester R. R. Co. v. Dana*,

1 Gray, 83; *Hyatt v. Adams*, 16 Mich. 180; *Allison v. Bank of Va.*, 6 Rand. 204; *Ballew v. Alexander*, 6 Humph. 433; *Hepburn's Case*, 3 Bland. 114; *Foster v. Commonwealth*, 8 W. & S. 77; *Blassingame v. Graves*, 6 B. Mon. 38. But see *Sawtell v. West. R. R. Co.*, 61 Ga. 567.

additional expense for locks and bolts, or he employs watchmen to guard his premises day and night. Here are important elements of damage, such as the law would take notice of and give redress for if the case concerned him alone. But the case does not concern him alone; it concerns everybody; the damage which every person suffers is only a part of the general injury to the whole public; to redress it in private suits would require an apportionment of the general injury. But the apportionment would not only be an impracticable thing in itself, from the impossibility of ascertaining in what degree each had suffered injury, but the attempt itself, and the infinity of suits which would be requisite in the case of a single crime, would make such serious demands upon the judicial machinery of the State as could not by any possibility be met. Nothing more need be said to show that the law cannot recognize a public injury as a ground for private action.¹

There may, nevertheless, be a special and particular injury to an individual in any case of a public injury; special in [*89] that the *public do not share it at all. In the case supposed, the individual robbed has suffered special damage, and for this damage the law permits a private action. It is no answer to such an action that the general public, whose houses were not broken into, have suffered in other ways. Again: a wrong may be committed by forcibly driving an elector from the polls. The general public is injured, because the complete expression of the public sentiment in the manner provided by law, has been defeated. But the elector himself has suffered a special and particular injury in being deprived of his vote; he has lost a right which he is supposed to value highly, and he shall therefore have his action. No special embarrassment is encountered in giving a remedy to him for his peculiar injury.

Nor is it any objection to private actions that several may suffer special injuries from the same public offense. "If many persons receive a private injury from a public nuisance, every man shall have his action;" the test in each case being, not the number injured, but the special and personal character of the injury. A person may dam a navigable stream so as to ruin it as

¹ Bishop Cr. Law, Sec. 534, 8d ed.;
1 Bl. Com. 219.

White, Ld. Raym. 938, citing Williams' Case. 5 Rep. 72; Co. Litt. 56 a;

* Per HOLT, Ch. J., in *Ashby v. Corley v. Lancaster*, 81 Ky. 171.

a highway, and in so doing may injure the several millers who were accustomed to make use of its water for operating their machinery. However numerous these millers may be, they do not in the aggregate constitute the public; and, in a legal sense, neither the public nor any other individual is concerned with the special damage which each of their number sustains.¹

If we could imagine a state of things in which a people, without any antecedent experience in government, were proceeding to frame a code of laws, we might suppose the question worthy of consideration, whether the government should not, when its laws were violated to the injury of one of its subjects, proceed, of its own motion, to compel the proper redress; especially when compelling redress would have for one of its purposes the prevention of disorder and wrong in the future. But the answer to such a question must be, that to leave to the government the detection and punishment of those who violate private rights would be to require of it an omnipresence and a minute *supervision of private affairs which would render it in- [*90] tolerable. The best government is that which, in its structure and machinery, affords least occasion for official interference. If the institution of proceedings for the redress of private wrongs is left to the parties injured, it may fairly be assumed that all cases will be brought to notice which the general interest requires shall be dealt with. It may also be assumed that many wrongs which are wrongs not of deliberate purpose and not serious, will be overlooked, though an officious government might be disposed to add to the disturbance they have caused by making them the subject of investigation. Good order is often as much promoted by overlooking insignificant breaches of order as by punishing them; and while justice demands that all parties be at liberty to have their complaints heard, good policy also requires that the option should be left to parties injured to waive redress if they see fit to do so. †

Contracts and Torts. Passing now from a consideration of torts as they are found to be akin to or coincident with public wrongs, we may briefly direct attention to another side, on which

¹ *Henley v. Lyme Regis*, 5 Bing. 91; 8 Exch. 319; *King v. Richards*, 8 T. S. C. 3 B. & Ad. 77; *Nicholl v. Allen*, R. 634.
1 B. & S. 936; *McKinnon v. Penson*,

they seem to be mere breaches of contract. Indeed, in many cases an action as for a tort or an action as for a breach of contract may be brought by the same party on the same state of facts. This, at first blush, may seem in contradiction to the definition of a tort, as a wrong unconnected with contract; but the principles which sustain such actions will enable us to solve the seeming difficulty.¹

¹ "Ordinarily the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. Where such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still, a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test.

* * * * *

At the foundation of every tort must lie some violation of a legal duty, and, therefore, some unlawful act or omission (Cooley on Torts, 60). Whatever, or however numerous or formidable, may be the allegations of conspiracy, of malice, of oppression, of vindictive purpose, they are of no avail; they merely heap up epithets, unless the purpose intended, or the means by which it was accomplished, are shown to be unlawful. (*O'Callaghan v. Cronan*, 121 Mass. 114; *Mahan v. Brown*, 13 Wend. 261.) Un-

less the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, where, beyond the contract obligation to transport and deliver safely, there is a duty born of the relation established to do the same thing. In such a case and in the kindred cases of principal and agent, of lawyer and client, of consignor and factor, the contract establishes a legal relation of trust and confidence; so that upon a breach of the contract there is not merely a broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused; there is constructive fraud, or a negligence that operates as such, and it is that fraud and that negligence, which, at bottom, makes the breach of contract actionable as a tort. (*Coggs v. Bernard*, 2 Lord Raym. 909; *Orange Bank v. Brown*, 3 Wend. 161.) It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of

If one by means of a false warranty is enabled to accomplish a sale of property, the purchaser may have his remedy upon the contract of warranty, or he may bring suit for the tort.¹ The tort consists in his having been, by fraud and falsehood, induced to make the purchase. There is a broken contract, but there is also something more: there is deception to the injury of the purchaser in procuring the contract to be made. Suit may be brought on the contract, ignoring the fraud; but it may also be brought for the fraud, and then the contract will not be counted on, though it will necessarily be shown, in order to make appear how the deception was injurious. The tort in such a case is *connected with the contract only as it enabled the tortfeasor to bring the party wronged into it.*

There are also, in certain relations, duties imposed by law, a failure to perform which is regarded as a tort, though the rela-

that wider range of legal duty, which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself or exercise his own rights as not to injure another. (*Kerwhacker v. C. C., etc., R.R. Co., 5 Ohio St. 188.*) Whatever the origin, such legal duty is uniformly recognized and has been constantly applied as the foundation of actions for wrong; and it rests upon and grows out of the relations which men bear to each other in the framework of organized society. It is then doubtless true, that a mere contract obligation may establish no relation out of which a separate and specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the tort

grow out of the entire range of facts of which the breach of the contract was but one." *FINCH J., in Rich v. New York, etc., Co., 87 N. Y. 392.*

¹ *Langridge v. Levy, 2 M & W. 519; Dobell v. Stevens, 5 D. & Ry. 490; West v. Emery, 17 Vt. 583; Ives v. Carter, 24 Conn. 392; Johnson v. McDaniel, 15 Ark. 109; Newell v. Horn, 45 N. H. 421; Carter v. Glass, 44 Mich. 154.*

² In *Dean v. McLean, 48 Vt. 412, 8 C. 21 Am. Rep. 130*, it was decided that one who had contracted for running his logs over a dam, and agreed to pay all damages, might be sued in case for a negligent injury which was within the contract. The court relies upon cases where, though there is a contract against waste, an action on the case for waste is nevertheless sustained. *Kinlyside v. Thornton, 2 Bl. R. 1111*, and upon the familiar case of common carriers, alluded to in the next paragraph of the text. When the gist of the action is the breach of a contract which must be proved to make a case, all persons jointly liable on the contract must be sued in tort. *Whittaker v. Collins, 34 Minn. 299.*

tions themselves may be formed by contract covering the same ground. The case of the common carrier furnishes us with a conspicuous illustration. The law requires him to carry with impartiality and safety for those who offer. If he fails to do so, he is chargeable with a tort. But when goods are delivered to him for carriage, there is also a contract, express or by operation of law, that he will carry with impartiality and safety; and if he fails in this there is a breach of contract. Thus for the breach of the general duty, imposed by law because of the relation, one form of action may be brought, and for the breach of contract another form of action may be brought. Other bailees of property occupy a similar position; they assume certain duties in respect to the property by receiving it. The keeper of an inn does this in respect to property confided to his care by his guests, and his failure to perform the duty of an innkeeper is tortious, though in contemplation of law there are between him and his guest contract relations also.¹ But these are exceptional cases. The rule is general that where contract relations exist the parties assume toward each other no duties whatever besides those the contract imposes.²

¹ The rule is stated by JERVIS, Ch. J., as follows: "Where there is an employment, which employment itself creates a duty, an action on the case will be for a breach of that duty, although it may consist in doing something contrary to an agreement made in the course of such employment, by the party upon whom the duty is cast." *Courtenay v. Earle*, 10 C. B. 83. And, see, *Govett v. Rad- inge*, 3 East, 67. *Morgan v. Ravey*, 6 H. & N. 265.

A passenger negligently injured may sue in contract or in tort. *Baltimore, etc., Ry. Co. v. Kemp*, 61 Md. 619; *Nevin v. Pullman, etc., Co.*, 106 Ill., 222. A child traveling with its mother and an officer, carried at expense of government, may recover in tort for the carrier's negligence, though the contract of carriage is not with them. *Austin v. Grt. W. Ry. Co.*, L. R. 2 Q. B. 442; *Martin v. Grt. Ind.*

Ry. Co., L. R. 3 Exch. 9. So a father may recover for injury to his son, or a master for injury to his apprentice, though the contract is not with the father or master. *Berringer v. Grt. East Ry. Co.*, L. R. 4 C. P. D., 163, distinguishing *Alton v. Ry. Co.*, 19 C. B. (N. S.) 213. *Ames v. Un. Ry. Co.*, 117 Mass. 541. See *Foulkes v. Metr. Dist. Ry. Co.*, L. R. 4 C. P. D., 167, S. C. 5 C. P. D. 157, as to recovery where contract was made with another connecting company. See also *Pontifex v. Midland Ry. Co.*, L. R. 3 Q. B. D., 23; *Fleming v. Manchester, etc., Ry. Co.*, L. R. 4 Q. B. D., 81.

² See *Quay v. Lucas* 25 Mo. App. 4; *McGuire v. Kiveland* 56 Vt. 62. But if in addition to an indebtedness an element of wrong arises to warrant it, the creditor may sue in tort. *Monroe v. Whipple*, 56 Mich. 516. This was trover for failure to turn over money collected by a township treasurer.

Waiving a Tort. There are a few cases in which a party is permitted to treat that which is purely a tort as having created *a contract between himself and the wrong doer, [*92] and waiving his right of action for the tort, to pursue his remedy for the breach of the supposed contract. These cases are not numerous.

It is said by an eminent judge in one case that "no party is bound to sue in tort where, by converting the action into an action on contract, he does not prejudice the defendant; and, generally speaking, it is more favorable to the defendant that he should be sued in contract, because that form of action lets in a set-off and enables him to pay money into court."¹ This, however, is stating the rule much too broadly, for in most cases the tortfeasor could not be prejudiced by converting the action into one on contract if the law would suffer it.

The right to waive a tort and sue in assumpsit seems to have been first distinctly recognized in an action² where assumpsit was brought by an administrator to recover the moneys received by the defendant on a sale made by him, without authority, of debentures belonging to the estate. It was objected that the action would not lie, because the defendant sold the debentures under a claim of administration in himself, and therefore could not be said to receive that money to the use of the plaintiff, which, indeed, he had received to his own use; but the plaintiff ought to have brought trover or detinue for the indentures. POWELL, J., said: "It is clear the plaintiff might have maintained detinue or trover for the indentures, but the plaintiff may dispense with the wrong and suppose the sale made by his consent, and bring an action for the money that they were sold for as money received to his use." And HOLT, Ch. J., said: "Suppose a person pretends to be guardian in socage, and enters into the land of the infant and takes the profits; though he is not rightful guardian, yet an action of account will lie against him. So the defendant in this case pretending to receive the moneys the debentures were sold for in the right of the intestate, why should he not be answerable for it to the intestate's administrator?"

Now, in looking at the facts of this case, we find that one person has sold something belonging to another, and received and

¹ TINDALL, Ch. J., in *Young v. Marshall*, 8 Bing. 43.

² *Lamine v. Bonell*, Ld. Raym. 1216.

retained the money for it. On the facts thus stated, the law will unquestionably raise an implication of promise to pay the [*93] money *to the party entitled to it. This implication, under ordinary circumstances, would be conclusive, and would support an action of assumpsit. Now, can it be any answer to such an action for the defendant to say, "True, I have turned your property into money, but I did so in denial of your right; I did so with intent to deprive you of the proceeds; in other words, I insist upon having done it as a wrong and repudiate all suggestion of agreement to pay?" The answer appears to be this: If there are in the case all the elements of an implied contract, it is of no consequence that there is, over and beyond those, some other fact or circumstance not in any way militating against the plaintiff's claim, but rather the reverse, which constitutes a tortious element and might support an action as for a tort. Here, as the defendant cannot possibly be prejudiced by that course, the plaintiff may ignore the tortious element and rely solely upon the facts which support the implication of a promise. He may waive that which rendered the act, in the legal sense, wrongful, and rely upon the remainder.

No question is made of this doctrine, where, as a result of the tortious act, the defendant has come into possession of money belonging to the plaintiff. The law will not permit him to deny an implied promise to pay this money to the party entitled.¹

¹ See *Hitchin v. Campbell*, 2 W. Bl. 827; *Abbotts v. Barry*, 2 B. & B. 369; *Powell v. Rees*, 7 A. & E. 426; *Berley v. Taylor*, 5 Hill, 577; *Miller v. Miller*, 9 Pick. 34; *Gilmore v. Wilbur*, 12 Pick. 120; *Appleton v. Bancroft*, 10 Met. 231; *Morrison v. Rodgers*, 2 Scam. 317; *Statt v. Evans*, 35 Ill. 455; *Leighton v. Preston*, 9 Gill, 201; *Gray v. Griffith*, 10 Watts, 431; *Goodenow v. Luyder*, 3 Greene (Iowa), 599; *White v. Brooks*, 43 N. H. 402; *Lord v. French*, 61 Me. 420. "The principle is," says POLLOCK, C. B., "that the owner of property wrongfully taken has a right to follow it and adopt any act done to it, and treat the proceeds as money had and received to his use." *Neat v. Hard-*

ing, 20 Law. J. Rep. (N. S.) Exch. 250; S. C. 4 Eng. L. & Eq. 464. "Subject," he adds, "to certain exceptions," which, however, he does not point out. In *Hull v. Peckham*, 8 R. I. 370, it was held that where goods had fraudulently been bought without an intent to pay for them, the seller might follow them into the hands of an assignee, and if the latter had sold them, recover from him in an action for money had and received. Citing *Thurston v. Blanchard*, 22 Pick. 18. The principle applies to one who sells chattels in violation of a trust. *Rand v. Nesmith*, 61 Me. 111. And to one who steals and sells them. *Boston, etc., R. R. Co. v. Dana*, 1 Gray, 83; *Shaw v. Coffin*, 53

Mr Addison, in his treatise on the law of torts, dismisses this *subject after very brief consideration. "If a man," [*94] he says, "has taken possession of property, and sold or disposed of it without lawful authority, the owner may either disaffirm his act and treat him as a wrong-doer, and sue him for a trespass or for a conversion of the property, or he may affirm his acts and treat him as his agent, and claim the benefit of the transaction; and if he has once affirmed his acts and treated him as an agent, he cannot afterward treat him as a wrong-doer, nor can he affirm his acts in part and avoid them as to the rest. If, therefore, goods have been sold by a wrong-doer, and the owner thinks fit to receive the price, or part thereof, he ratifies and adopts the transaction, and cannot afterward treat it as a wrong."¹ But this is scarcely doing the subject full justice. Lord Mansfield long ago held that where one refused to account for a masquerade ticket in his possession belonging to another, he might be sued in assumpsit for its value, the fact of his refusal to account for it being sufficient evidence that he had sold it.* Suppose, however, it had appeared that he had not sold it, but that he still retained and refused to surrender it; had it been asked whether, on this state of facts, the plaintiff could have recovered in assumpsit, it would have been necessary to concede that the authorities are in conflict. The decisions are quite numerous in this country that assumpsit cannot be maintained unless the property of which the plaintiff has been deprived has been converted into money.² *But other cases [*95] decide that if the defendant has converted the property

Me. 254; 8 C. 4 Am. Rep. 290; Howe v. Clancy, 53 Me. 130.

¹Addison on Torts, 33, citing Brewer v. Sparrow, 7 B. & C. 810 and Lythgoe v. Vernon, 5 H. & N. 180; 29 Law J. Exch. 164.

²Humbly v. Trott, Cowp. 875.

³Jones v. Hoar, 5 Pick. 285; Glass Co. v. Wolcott, 2 Allen, 227; Mann v. Locke, 11 N. H. 246, 248; Smith v. Smith, 43 N. H. 536; Morrison v. Rogers, 3 Ill. 317; O'Reer v. Strong, 13 Ill. 689; Kelty v. Owens, 4 Chand. 166; Elliott v. Jackson, 3 Wis. 649; Stearns v. Dillingham, 22 Vt. 624;

Willett v. Willett, 3 Watts, 277; Pear-soll v. Chapin, 44 Penn. St. 9; Guthrie v. Wickliffe, 1 A. K. Marsh. 83; Fuller v. Duren, 36 Ala. 73; Tucker v. Jewett, 32 Conn. 563; Sanders v. Hamilton, 3 Dana, 550; Barlow v. Stalworth, 27 Geo. 117; Pike v. Bright, 29 Ala. 332; Emerson v. McNamara, 41 Me. 565. Compare Bennett v. Francis, 2 B. & P. 550; Read v. Hutchinson, 8 Camp. 352. Tort may be waived "only when subsequent to the tort which, of itself, gave a cause of action there has been the reception by the wrong-doer of

in any manner to his own use, that is sufficient. The following are illustrations: Trading off the property for other property; turning one's cattle wrongfully into another's field and pasturing them there; employing an apprentice without the master's assent, and so on. In all these cases, it will appear, all the elements of an implied contract are found, and we can conceive of no sufficient reason for denying the right to bring *assumpsit*.¹ But by all the authorities it is conceded that where the act is a naked trespass an action of *assumpsit* cannot be maintained, because the elements of an *assumpsit* are wanting. In most cases this is clear enough. Suppose one commits an assault and battery upon another, there is absurdity in the suggestion of a contract that the one party should permit this and the other should pay for it a reasonable compensation. Suppose his cattle had invaded his neighbor's premises and trampled down and destroyed his crops, the ground for an implication of contract is equally wanting. There is a wrong, nothing more and nothing

money or that which he received as the equivalent of money for the property of the plaintiff." *Miller v. King*, 67 Ala. 575; *Smith v. Jernigan*, 3 South Rep. 515 (Ala.); *Saville v. Welch*, 58 Vt. 683. So if converted note is used to pay a debt with. *Doon v. Ravey*, 49 Vt. 293. In *Noyes v. Loring*, 55 Me. 408, 412, *WALTON, J.*, says: "It is only in favor of the action for money had and received, which has been likened in its spirit to a bill in equity, that the rule is relaxed that the evidence must correspond with the allegations and be confined to the matter in issue, and this relaxation, by which a party is allowed to aver a promise and recover for a tort, being a departure from principle and the correct rule of pleading, ought not to be extended to new cases."

¹ *Miller v. Miller*, 7 Pick. 133; *Budd v. Hiler*, 27 N. J. 43; *Stockett v. Watkins' Admr.* 2 G. & J. 326; *Welch v. Bagg*, 12 Mich. 42; *Hill v. Davis*, 8 N. H. 384; *Floyd v. Wiley*, 1 Mo. 430; *Ford v. Caldwell*, 8 Hill. (S. C.), 248;

Baker v. Cory, 15 Ohio 9; *Fiquet v. Allison*, 12 Mich. 328; *Bowen v. School Distr.*, 36 Mich. 149; *Webster v. Drinkwater*, 5 Me. 319; *Jones v. Buzzard*, 1 Hemp. 240; *Johnson v. Reed*, 8 Ark. 202; *Labeaume v. Hill*, 1 Mo. 643; *Norden v. Jones*, 33 Wis. 600. See also note to *Putnam v. Wise*, 1 Hill. 240; note to 2 Greenl. Ev. §108. In *Schweitzer v. Weiber*, 6 Rich. 159, this doctrine was held applicable to the case of one who had wrongfully taken property, and in whose hands it had been accidentally destroyed. "The tort may be waived and *assumpsit* maintained whenever the property taken has been converted either into money or into any other beneficial use by the wrong-doer, and especially where it has been so applied to his use as to lose its identity" (citing text). "So long as the trespasser retains in its original shape the property taken, he may logically deny that he holds it under a contract * * * but when he has parted with it either for money or other property or when he has mingled it with his

less.¹ We cannot imply a contract that one party should proceed to destroy the other's crops and then pay him for it. That is an unnatural transaction, and we cannot suppose it would take place except as a wrongful act.

Torts by Relation. There are many cases in which one's right to institute proceedings for a wrong may only accrue after the wrong has been committed, and where, if he is wronged at all *it must be by relation. The bankrupt law affords [*96] an illustration: the title of the assignee in bankruptcy relating back to the time when the act of bankruptcy was committed, so as to avoid all dispositions of his property made by the bankrupt after that time. The question then arises, what remedy the assignee may have against those who may have intermeddled with the goods, intermediate the act of bankruptcy and the suing out of the commission; and the rule, in England, is that trover may be brought for the value,² but not trespass.³

own, or consumed it in its use or changed its form, he should not be permitted to deny the assumption to pay its value which the law imputes from his method of dealing with it." Here trees cut but not sold. *Evans v. Miller*, 58 Miss. 120. "When goods or things have been wrongfully taken or converted, whether sold or disposed of or not by the wrong-doer, the tort may be waived, the transaction treated as a sale and an action maintained upon the implied promise to pay the price or value of the goods." * * * But where "damages have been committed by one's cattle to the crops or personal property of another, without the owner's participation in the trespass or benefit therefrom and in the absence of any promise," the injured party cannot recover damages *ex contractu*. *Tightmeyer v. Mongold*, 20 Kan. 90. If the possession is acquired as the result of contract relations and the article is kept and not turned into money, *assumpsit* lies. *Coe v. Wager*, 42 Mich. 49; *McLaughlin v. Salley* 46 Mich. 219. See, also, *Halleck v. Mixer*, 16 Cal. 574; *Cooper*

v. Berry, 21 Geo. 526; *Randolph Iron Co. v. Elliott*, 34 N. J. 184.

¹ See *Noyes v. Loring*, 55 Me. 408, where the authorities on this point are collected. In that case a party fraudulently procured an advertisement to be published at the expense of the town, and he was held not to be liable in *assumpsit*. A mere detention of a chattel is not enough. *Weiler v. Kershner*, 109 Pa. St. 219; *Tolan v. Hodgboom*, 38 Mich. 624. To try the title to use of water *assumpsit* on an implied promise to pay for the use of it, will not lie. *North Haverhill, etc., Co. v. Metcalf*, 63 N. H. 427. See, also, *Watson v. Stever*, 25 Mich. 386; *Moses v. Arnold*, 43 Iowa 187; *Finlay v. Bryson*, 84 Mo. 664; *Sandeen v. R. R. Co.*, 79 Mo. 278.

² *Balme v. Hutton*, 9 Bing. 471, in which all prior cases are carefully reviewed. An assignee rightfully took possession of goods, but converted them prior to the appointment of a receiver. The latter was allowed to bring trover. *Terry v. Bamberger*, 14 Blatchf. 234.

³ *Smith v. Clarke*, 1 T. R. 475.

It is a general rule that one shall not be made trespasser by relation;¹ but the rule will not prevent a party who has been wronged by unauthorized action before his title became perfected obtaining redress in some form of action; and if the injury consisted in making way with personal property, trover, in which the value might be recovered, would be the appropriate action, while trespass for the recovery of indefinite damages might not lie.² So case may be brought against one committing waste upon lands intermediate a purchase on execution and the time when the title was perfected by deed.³ In the case of estates of deceased persons, however, the distinction between trespass and case as a remedy for wrongs intermediate the death of the testator or intestate and the issue of letters, does not appear to have been recognized, and the personal representative has been allowed to recover in either form of action, according as the facts would have warranted it had letters been issued before the wrong was done.⁴

¹ Case v. DeGoer, 3 Calnes, 261; Jackson v. Douglass, 5 Cow. 458; Wickham v. Freeman, 12 Johns. 183; Bacon v. Kimmel, 14 Mich. 201. See Heath v. Ross, 12 Johns. 140; Hess v. Griggs, 43 Mich. 397; Ward v. Carp River Iron Co., 50 Mich. 522.

² Balme v. Hutton, 9 Bing. 471.

³ Stout v. Keyes, 2 Doug. (Mich.) 84. Trover will lie against the purchaser of logs cut by a trespasser be-

tween sale and delivery of deed. Whitney v. Huntington, 34 Minn. 458.

⁴ Sharpe v. Stallwood, 5 M. & G. 760; Searson v. Robinson, 2 Fost. & F. 351; Carlisle v. Benley, 3 Me. 250; Valentine v. Jackson, 9 Wend. 302; Manwell v. Briggs, 17 Vt. 176; Brackett v. Hoitt, 20 N. H. 257; Bell v. Humphrey, 11 Humph. 451.

*CHAPTER IV.

[*97]

THE PARTIES WHO MAY BE HELD RESPONSIBLE FOR TORTS.

The rules of law respecting the capacity to form contract relations, and the consequent liability for failure to observe such as are entered into, are in the main very precise and definite. Leaving out of view a few exceptional cases, and speaking generally, it may be said that one is not authorized to deal with others on the footing of contract, unless he is of the full age of twenty-one years; and that he cannot make the most simple agreement, or enter into the most ordinary legal obligation a day earlier. Neither can he enter into contracts if he is unsound in mind; but his care and protection, and the making of contracts therefor must devolve upon others. The rules of law on this subject have in view the protection of classes supposed, from their immaturity and weakness, incapable of fully protecting themselves; and though to some extent they are necessarily arbitrary, they are not, because of that quality, a hardship or grievance to those whom they preclude from entering into contracts. Neither are they a hardship or grievance to others whom they deprive of the opportunity to make contracts with immature or imbecile people. As the gains which might be derived from such contracts would be likely to be gains at the expense of those incompetent to protect their own interests, there can be no just complaint of the law which precludes them.

There are also rules of a like definite character as regards criminal responsibility. An infant under the age of seven can commit no offense against the State. The reason is, that at that immature period he is incapable of understanding political or social duties or obligations, and the law assumes, as a conclusion not to be disputed—not to be put aside by the uncertain judgment of others—that he cannot harbor a criminal intent. After that age, until he reaches fourteen, the case is open to proof of actual capacity and actual malice. An idiot or an insane

[*98] person is also *incapable of committing a crime, and to punish one of these as a criminal would be to punish him for a mere animal or insane impulse, or for mere unreasoning and motiveless action, for which he was in no proper sense responsible; to punish him, in short, for his misfortune. The right of the State to protect its people against injurious acts by such persons, and for that purpose to put them under restraints or into confinement, is plain enough; but to punish, as for a wrong, a party incapable of indulging an evil intent is a mere barbarity; not useful as a discipline to the individual punished, and of evil example instead of warning to others. It is, therefore, never to be provided for, but carefully to be guarded against. It is no doubt true that insane persons accused of crime are sometimes convicted and suffer punishment; but this is never intended, and it is attributable to difficulties inherent in such cases; difficulties in discriminating between mental disease and criminal perversion; difficulties in testimony, and infirmities in tribunals. Such results are the misfortunes and accidents of criminal administration, not results at which it aims.

In determining whether there shall be civil responsibility for wrongs suffered, a standpoint altogether different is occupied. A wrong is an invasion of right, to the damage of the party who suffers it. It consists in the injury done, and not commonly in the purpose, or mental or physical capacity of the person or agent doing it. It may or may not have been done with bad motive; the question of motive is usually a question of aggravation only. Therefore the law, in giving redress, has in view the case of the party injured, and the extent of his injury, and makes what he suffers the measure of compensation. A blow by a youth of eighteen may inflict as serious an injury as a blow by a man of mature years, and the torch of a child may destroy a house as effectually as though applied on the twenty-first birthday, instead of the tenth. If, therefore, redress is the object of the law, the party injured should have the same redress in the one case as is provided for him in the other. Neither is it now protection to society that is sought, except as any enforcement of just laws tends incidentally to its protection. There is consequently no anomaly in compelling one who is not chargeable with wrong intent to make compensation for an injury committed by him; for, as is said in an early case "the reason is, because he

that is "damaged ought to be recompensed."¹ If recompense is what the law aims at, it is readily perceived that the question of civil responsibility for wrongs suffered is one that directs our attention chiefly to the injury done; and that the weakness of the party committing it, or the absence of any deliberate purpose to injure, must commonly be of little or no importance. ²

Wrongs by Lunatics, etc. The case of an injury suffered at the hands of a lunatic furnishes us with an apt illustration. Let it be supposed that one of this unfortunate class meets a traveler on the highway, and, by force, or by the terror of his threats, takes from him his horse and vehicle, and abuses or destroys them. In a sane person this may have been highway robbery; but the lunatic is incapable of a criminal intent, and therefore commits no crime. Neither is the case one in which a contract to pay for the property, or for the injury, can be implied, for the law can imply no contract relations where the capacity to enter into them is withheld. But a plain wrong has been done, because the traveler has been forcibly deprived of his property; and if the person at whose hands the wrong has been suffered is possessed of an estate from which compensation can be made, no reason appears why this estate should not be burdened to make it. In other words, it seems but just that the consequences of the unfortunate occurrence should fall upon the estate of the person committing the injury, rather than upon that of the person who has suffered it.³

One eminent law writer has doubted if there ought to be any responsibility in such a case. "In the case of a *compos mentis*," he says, "although the intent be not decisive, still the act punished is that of a party competent to foresee and guard against the consequences of his conduct; an inevitable accident has always been held an excuse. In the case of a lunatic it may be urged both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may well be termed inevitable accident."⁴

¹ *Lambert v. Bersey*, L. Raym. 431.
See *Bersey v. Olliott*, L. Raym. 467.

² *Morse v. Crawford*, 17 Vt. 499; S. C. Ewell's Leading Cases, 635; *McIntyre v. Sholty*, 18 N. E. Rep. 239 (Ill.)

³ *Sedgwick on Damages*, 455. The cases on the subject of the liability of persons *non compos* are well collected in *Ordonaux's Judicial Aspects of Insanity*, Chapter VII.

[*100] *This view has plausibility, and it would be perfectly sound and unanswerable if punishment were the object of the law when persons unsound in mind are the wrong doers. But when we find that compensation for an injury received is all that the law demands, the plausibility disappears. Undoubtedly there is some appearance of hardship—even of injustice—in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties. But the question of liability in these cases, as well as in others, is a question of policy; and it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public, or of his neighbors, or at the expense of his own estate. If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences rather than the other; no more propriety or justice in making others bear the losses resulting from his unreasoning fury when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum when his own estate is ample for the purpose.

All questions of public policy must be settled on a consideration of what on the whole is the rule that will best subserve the general welfare. Among the considerations bearing on the proper rule in the case of an incompetent person are such as relate to the appointment of a committee or guardian empowered by law to take charge of him and restrain his action so as to prevent injury to himself or to others. The appointment of this custodian is properly attended to by relatives or friends; those who have a personal or family interest in him, or who might be entitled to succeed to his estate if it were preserved. Would it not be an important stimulus to their action if the estate is to be held responsible for all injuries committed by him to others; and would it not tend to indifference on their part if the law were to leave any injured party to bear the loss without redress? Unless these questions can be answered in the negative, the reasons for holding his own estate responsible seem conclusive,

for *the State at large is deeply concerned in hav- [*101] ing all incompetent persons in charge of competent and responsible guardians, whose business it shall be to care for them and to guard both them and the public against such injuries as would be likely to result from their condition.

Another important consideration is derived from the fact that the distinction between insanity and the cunning of malice is not always sufficiently clear for ready detection, and a rule of irresponsibility in respect to such persons would be likely to result in similar difficulties in civil cases to those which have brought the administration of criminal law into disrepute wherever the plea of insanity is interposed. Nothing could present to the depraved mind a stronger temptation to simulate insanity for purposes of mischief and revenge than a rule of law which would give full immunity in case the deception proved successful, and which would put at risk where it did not only the amount of actual injury inflicted; and this, too, in the case of those disorders, real or pretended, the evidences of which are often so vague, intangible and deceptive that experts sometimes fail to see them when they unquestionably exist, and perceive them with distinctness when they do not. It is generally believed, and with abundant reason, that sometimes in the administration of the criminal law, persons who are abnormal only in ungovernable passion and depravity escape the proper consequences of their criminal conduct on a plea of mental disease; and on the other hand a careful observation of the workings of criminal tribunals will leave upon the mind no doubt that the jury that should dispassionately try the question of criminal responsibility, is sometimes urged on and impelled by public passion and clamor to find in the freaks of delusion the evidences of criminal intent and depravity, and to convict and punish those who are only deserving of compassion. That evils of this sort are inseparable from the administration of the criminal law must probably be admitted; but they have no necessary place where only civil redress is given, and it seems better to exclude them by an invariable rule that mental disease or infirmity shall be no defense to an action for tort.

The reasons that have controlled in these cases are not very clearly set forth by the authorities, but the law has always held insane persons and other incompetents responsible for

[*102] damages *resulting from their tortious actions,¹ and it has given all the usual remedies against them, even to the very severe one of the taking of the body in execution while that barbarous mode of compelling redress was allowable in other cases.²

But it does not follow that the responsibility of persons mentally incompetent should be co-extensive in all respects with that of other persons. If compensation to the person wronged is what is aimed at, the difference in some cases will be very manifest; for sometimes that which might be seriously injurious if done by a person *sui juris*, will be perfectly harmless when the actor is insane. In other cases where that which is done is unquestionably injurious, the extent of the injury will depend very largely on the presence or absence of an actual evil design. An illustration of the class last mentioned is afforded by the case of *Krom v. Schoonmaker*.³ There a magistrate was sued for issuing void process on which the plaintiff was arrested. The case, on its facts, seemed one of gross outrage. It was proved that the magistrate had no complaint before him; that he refused bail after the arrest, and that he avowed a determination to pursue the plaintiff until he should be incarcerated in prison under a conviction. This made out a case of very serious oppression and wrong, such as a jury would be warranted in condemning by a heavy award of what are sometimes called punitive or vindictive damages. But when it was shown that the magistrate was insane, all the aggravation of the wrong disappeared. A sane man could only have done such an act from malice, and the outrage and injury to the arrested party would be greatly enhanced by the motive. The insane man could have no malice, but would probably act under the delusion that official duty impelled him.

¹ 2 Saund. Pl. and Ev. 318, 1163; 1 Chit. Pl. 76; Shearm. & Redf. on Neg. § 51, 57; Broom Com. 684, 857; Weaver v. Ward, Hob. 134; Moore v. Crawford, 17 Vt. 499; Bush v. Pettibone, 4 N. Y. 300; Krom v. Schoonmaker, 3 Barb. 650; Cross v. Kent, 32 Md. 581; Behrens v. McKenzie, 23 Iowa, 343; Lancaster Co. Bank v. Moore, 78 Penn. St. 407, 412; Ward v. Conatser, 4 Bax. 64; McIntyre v. Shol-

ty, 13 N. E. Rep. 230 (Ill.) So for injury from defective condition of his real estate. Morain v. Devlin, 133 Mass. 87. An execution upon a judgment in tort is not vitiated by defendant's lunacy at the time of the judgment or the sale. White v. Farley, 81 Ala. 563.

² *Ex parte* Leighton, 14 Mass. 207.

³ 3 Barb. 650.

The aggravation of motive would consequently be wholly wanting. While, therefore, the sane person might justly be compelled to pay damages proportioned to the malignity of his motives, the insane person would make full reparation if he were required to meet the actual damages which the injured party had suffered in *person or estate, leaving wholly out of view [*103] any aggravation which malice might have supplied.'

This, it will be perceived, is a very important difference in the responsibility of competent and incompetent persons in some cases. But there are other cases in which the differences must be greater still. It has been seen that in some cases malice is a necessary ingredient in the tort. How can a *non compos* be responsible in such cases; such, for instance, as malicious prosecution or libel? Legal malice certainly cannot be imputed to one who in law is incompetent to harbor an intent. It would seem a monstrous absurdity, for instance, if one were held entitled to maintain an action for defamation of character for the thoughtless babbling of an insane person to his keepers, or for any wild communication he might send through the mail, or post upon the wall. There can be no tort in these cases, because the wrong lies in the intent, and an intent is an impossibility. The rules which preclude criminal responsibility are strictly applicable here, because there is an absence of the same necessary element.* And if, in the case of defamatory publications, it be said that after all the requirement of malice as an element in the wrong is only nominal, still there can be no tort, because presumptively the utterances, or rather publications, which proceed from a diseased brain cannot injure.

* So held where the wrong was an act of violence. *McIntyre v. Sholty*, 13 N. E. Rep. 239 (Ill.)

* See *Dickinson v. Barber*, 9 Mass. 225; *Horner v. Marshall*, 5 Munf. 466; *Bryant v. Jackson*, 6 Humph. 199; *Yeates v. Reed*, 4 Blackf. 463; *Gates v. Meredith*, 7 Ind. 440. In this last case it was decided that insanity, though caused by drunkenness, would preclude responsibility for what would otherwise be slander. "Slander must be malicious. An idiot or

lunatic, no matter from what cause he became so, cannot be guilty of malice. He may indulge the anger of the brute, but not the malice of one 'who knows better.'" PERKINS, J. In *Horner v. Marshall*, 5 Munf. 466, the collection of a judgment for slander was enjoined, on the ground that the defendant at the time of the speaking was in a state of partial mental derangement on the subject to which the speaking related.

Torts by Infants. The general rule is that an infant is responsible for his torts, as any other person would be.¹ The following cases are illustrations: Where boys of twelve and four- [*104] teen *trespassed upon a school district and disturbed the school;² where a boy of six broke and entered the plaintiff's premises and broke down and destroyed his shrubbery and flowers;³ where an infant committed a disseisin and ejectment was brought against him;⁴ where an infant lessee carried off and converted to his own use crops to which he was not entitled;⁵ where an infant employé embezzled his employer's property which had been committed to his charge;⁶ where an infant induced another to commit a trespass,⁷ and so on.

In cases like the foregoing, the intent with which the wrongful act is done, is unimportant, except as it may, in some of them, bear upon the quantum of damages. But in those cases in which malice is a necessary ingredient in the wrong, an infant may or may not be liable, according as his age and capacity may justify

¹ *Burnard v. Haggis*, 14 C. B. (N. S.) 45; *Mills v. Graham*, 4 B. & P. 140; *Campbell v. Stakes*, 2 Wend. 188; *Hartfield v. Roper*, 21 Wend. 620; *Neal v. Gillett*, 23 Conn. 437; *Sikes v. Johnson*, 16 Mass. 389; *Walker v. Davis*, 1 Gray, 506; *Peterson v. Haffner*, 59 Ind. 130. A father is not liable for the independent wrong of the child. *Brohl v. Lingeman*, 41 Mich. 711; *Maddox v. Brown*, 71 Me. 432. Nor for the child's negligence with which he has no connection. *Baker v. Morris*, 38 Kan. 580; *Schlossberg v. Lahr*, 60 How. Pr. 450. He is liable only if at the time the child was acting in his service. The presumption is that the child is so acting if he is living at home and using his father's team with which he does the wrong. *Schaefer v. Osterbrink*, 67 Wis. 495.

² *School District v. Bragdon*, 23 N. H. 507.

³ *Huchting v. Engel*, 17 Wis. 230.

⁴ *Marshall v. Wing*, 50 Me. 62, citing *McCoon v. Smith*, 3 Hill, 147; *Bekley v. Newcomb*, 24 N. H. 363.

⁵ *Baxter v. Bush*, 29 Vt. 465, citing *Green v. Sperry*, 16 Vt. 392. See, also, *Walker v. Davis*, 1 Gray, 506; *Green v. Sperry*, 16 Vt. 390; *Oliver v. McClellan*, 21 Ala. 675. An infant stakeholder of an illegal wager is liable in trover for a refusal to deliver back the stakes on demand. *Lewis v. Littlefield*, 15 Me. 233. But an infant is not liable for conversion where the relation between the parties is one of bailment, and the real grievance of the plaintiff is the failure of the infant to perform his contract. *Root v. Stevenson*, 24 Ind. 115. See *Curtin v. Patton*, 11 S. & R. 305.

⁶ *Peigne v. Sutcliffe*, 4 McCord, 337. Further, as to conversions, see *Manby v. Scott*, 1 Sid. 129; *Bristow v. Eastman*, 1 Esp. 172; *Conklin v. Thompson*, 29 Barb. 218; *Moore v. Eastman*, 1 Hun, 578; S. C. 4 N. Y. Sup. Ct. (T. & C.) 37.

⁷ *Sykes v. Johnson*, 16 Mass. 389. In respect to trespasses, it is said in this case, "There is no exception in the law in favor of *femmes covert* or minors."

imputing malice to him or preclude the idea of his indulging it. The case of alleged defamation affords a suitable illustration. The absurdity of a suit against a child three years old would be sufficiently manifest, but not more so than the granting of immunity to the malicious utterances of a youth of twenty. And while it would be impossible to name any age which should constitute the dividing line between responsibility and irresponsibility in these and all similar cases, there would be no difficulty in reaching the conclusion that for all malicious injuries the wrong doer should be held responsible if he has arrived at an age and a maturity of mind which should render *him morally [*105] responsible for the consequences of intentional action.

All general statements that an infant is responsible like any other person for his torts, are to be received with the qualification that the tort must not be one involving an element which in his particular case must be wanting. If a child less than seven years of age cannot be held responsible for a larceny because of defect of understanding and incapacity to harbor a felonious intent, it would seem preposterous to hold him responsible for a slander, the moral quality of which he would be much less likely to appreciate, and injury from which must be purely imaginary.

But not only is the fact of infancy important in cases in which malice is an ingredient in the tort, but it is not without its influence in other cases. Torts springing from negligence may be instanced. While an infant is liable for these, the question of actual maturity and capacity is important, not only as it may bear upon the question whether negligence actually existed, but also as it may guide in determining whether the plaintiff in the particular transaction was not himself chargeable with fault.¹

¹ Neal v. Gillett, 23 Conn. 437. In this case infants from 18 to 18 years of age were sued in case for negligently frightening a horse in playing a game of ball, causing him to run away. SANFORD, J. says, p. 442: "The youngest of these defendants was thirteen years of age, and in the absence of all proof to the contrary, must be presumed to have been emancipated from the dominion of mere childish instincts; and we think it would be mischievous to hold that

persons of the age of thirteen years are, on account of their youth alone, absolved from the obligation to exercise their rights with ordinary care. It may not be easy to fix upon the exact age when childish instinct and thoughtlessness shall cease to be an excuse for conduct which in an adult would be considered and treated as a want of ordinary care; but it is sufficient for the determination of this point that these defendants had clearly passed that age."

Whoever has transactions with a person of immature and slender capacity, or is so brought into relations with such a person that the negligence of the latter may expose him to injury, may reasonably on his own part be charged with a higher degree of care and caution than could be required of him in the like dealings or under similar circumstances with other persons. But, putting aside all question of contributory want of care, on the part of the person injured, the liability of the infant rests on the same ground with that of other persons. If an injury has [*106] been *suffered by another for the want of ordinary care and prudence on his part, he is responsible.¹

What shall be deemed to constitute ordinary care and prudence on his part is a question to be considered hereafter.

The fact that an act committed by an infant was advised or commanded by one occupying a position of influence or authority over him is not important when an action of tort is brought against him, as it might be in some cases, were a criminal prosecution to be instituted. The person who has sustained the injury may always look for redress to the person committing it, and he is under no obligation to inquire whether some other person may not have been instrumental in causing it. That fact would be important only in case he should elect to hold such other person responsible. Therefore it is no defense for the infant, that in what he did he was merely obeying his father's command.²

An infant, as the owner or occupant of lands, is under the same responsibility with other persons for any nuisance created or continued thereon to the prejudice or annoyance of his neighbors, and for such negligent use or management of the same, by himself or his servants, as would render any other owner or occupant liable to an adjoining proprietor. Here, also, the intent is immaterial. The wrong consists in the fact that enjoyment of one's own property or rights is diminished or destroyed by an improper use or unreasonable use or misuse of the property of another.

¹ "This is necessary, because otherwise there would be no redress for injuries committed by such persons, and the anomaly might be witnessed of a child, having abundant wealth, depriving another of his property

without compensation." Shearm. & Redf. on Neg. § 57.

² *Humphrey v. Douglass*, 10 Vt. 71; *Scott v. Watson*, 46 Me. 362. See *Tift v. Tift*, 4 Denio, 175; *Wilson v. Garrard*, 59 Ill. 51.

There are some cases, however, in which an infant cannot be held liable as for tort, though on the same state of facts a person of full age and legal capacity might be. The distinction is this: If the wrong 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 an 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. The reason is obvious: To permit this to be done *would deprive the infant of that shield of protection which, in matters of contract, the law has wisely placed before him. Therefore, if case be brought against an infant for the immoderate use and want of care of a horse which has been bailed to him, infancy is a good defense; the gravamen of the complaint being merely a breach of the implied contract of bailment.¹ So infancy is a defense to an action by a ship owner against his supercargo for a breach of his instructions regarding a sale of the cargo, whereby the same was lost or destroyed.²

So if an infant effects a sale by means of deception and fraud, his infancy protects him. The general rule on this subject has been given in a recent case as follows: "An infant is liable in an action *ex delicto* for an actual and willful fraud only in cases in which the form of action does not suppose that a contract has existed; but where the gravamen of the fraud consists in a transaction which really originated in contract, the plea of infancy is a good defense. For simple deceit on a contract of sale or exchange there is no cause of action, unless some damage or injury results from it; and proof of damage could not be made without referring to and proving the contract. An action on the case for deceit on a sale is an affirmance by the plaintiff of the contract of sale; and the liability of the defendant in such an action could not be established without taking notice of and proving the contract."³ Lord (Chief Justice GIBBS states the

¹ Jennings v. Rundall, 8 T. R. 336. See Manby v. Scott, 1 Sid. 129; Eaton v. Hill, 50 N. H. 235; Root v. Stevenson, 24 Ind. 115.

² Vasse v. Smith, 6 Cranch, 126; S. C. 1 Am. Lead. Cas. 237; S. C. Ew-

ell's Lead. Cas. 195. See Studwell v. Shapter, 54 N. Y. 249.

³ Gilson v. Spear, 38 Vt. 311, per KELLOGG, J. S. C. Ewell's Lead. Cas. 201. See Graves v. Neville, 1 Keb. 778. In Word v. Vance, 1 Nott

same rule more concisely: "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 on his promise."¹

And the same rule applies if, in the purchase of property, he is guilty of fraud or deception, by means whereof the owner is induced to make a sale.²

[*108] *There are cases in which it has been decided that if property is bailed to an infant for a definite purpose, and he does in respect to it some specific wrongful act not warranted by the bailment, and which would have rendered any other person responsible to the bailor in an action as for a conversion, the infant is also liable to a like action. Thus, it has been held that an infant who hires a horse to go to a place agreed upon, but drives him to another, in a different direction, is liable in trover for an unlawful conversion of the horse.³ Such an action, it is said, is not founded on the contract, and it is not necessary to show the contract in a suit for the conversion.⁴

It has also been held, that if an infant hires a horse, and is guilty of such violence and cruelty as to cause its death, an action of trespass may be maintained against him, though, had an action been brought on the contract of bailment, infancy would have been a defense. "If the infant does any willful and positive act, which amounts on his part to an election to disaffirm the contract, the owner is entitled to the immediate possession. If

& McC., 197, an infant was held liable in case on a false warrant, but the point is apparently not much considered. One claiming to have been defrauded by an infant in a horse trade, brought replevin. Inasmuch as this was not an action for deceit in affirmation of the sale, which would not lie, it was held he might show the fraud. *Nolan v. Jones*, 53 Ia. 387.

¹*Green v. Greenbank*, 2 Marsh. 485.

²In *Wallace v. Morss*, 5 Hill, 391, an infant is held by the court (COWEN, J.,) "chargeable by action for a tort. In obtaining goods fraudulently, with an intention not to pay for them; but this is explained in a subsequent

case as having been probably an action of trover to recover the value of goods obtained by false representations, and the title to which consequently did not pass." *Campbell v. Perkins*, 8 N. Y., 430, 440.

³*Homer v. Thwing*, 3 Pick. 492; *S. C. Ewell's Lead*, Cas. 188. See, also, *Fish v. Ferris*, 5 Duer, 49; *Woodman v. Hubbard*, 25 N. H. 73; *Towne v. Wiley*, 23 Vt. 355; *Hall v. Corcoran*, 107 Mass. 251; *Schenk v. Strong*, 4 N. J. 87; *Freeman v. Boland*, 14 R. I. 39.

⁴*Hall v. Corcoran*, 107 Mass. 251, 256. See, on the general subject, *Tucker v. Moreland*, 10 Pet. 58.

he willfully and intentionally injures the animal, an action of trespass lies against him for the tort. If he should sell the horse, an action of trespass would lie, and his infancy would not protect him." But "if the plaintiff declares in case, he affirms the contract of hiring, and the plea of infancy is a good defense to such an action; for he cannot affirm the contract, and at the same time, by alleging a tortious breach thereof, deprive the defendant of his plea of infancy."¹ "From the moment an infant becomes a trespasser," it is said, in another case following this, "his plea of infancy fails him."² But as this doctrine rests upon the fact that the plaintiff, who is allowed a choice of remedies in such cases *has elected to pursue that which is in form *ex delicto*, instead of that which sounds in contract, it is manifest that it cannot be adopted as a general principle without taking from infants all legal protection in a large class of contracts. The doctrine has been sharply criticised in Pennsylvania, whose courts refuse to follow it,³ adopting, as applicable to such cases, the language of Sir JAMES MANSFIELD, that "the form of

¹ WALWORTH, Chancellor, *Campbell v. Stakes*, 2 Wend. 137, 143-4.

² *Fish v. Ferris*, 5 Duer, 50. And, see, *Moore v. Eastman*, 1 Hun, 578; S. C. 4 N. Y. Sup. Ct. (T. & C.) 37; *Lewis v. Littlefield*, 15 Me. 235; 1 Pars on Cont. 264. An infant hired a mare to ride. He was told she was not fit for leaping. He allowed a friend to take her, who undertook to leap her over the fence, and she fell and was killed. BYLES, J: "The rule is plain, both as to married women and infants, that you cannot, by suing *ex delicto*, change the nature and extent of their liability. Here, however, the mare was let for the specific purpose of a ride along the road, and for the purpose of being ridden only by the defendant. The defendant not only allows his friend to mount, but allows him to put the mare to a fence, for which he was told she was unfit. * * The defendant is clearly responsible for the wrong done. * * To use the mare

as he did was an act of tort, just as distinct from the contract as if the defendant had run a knife into her and killed her." *Burnard v. Haggis*, 14 C. B. (N. S.) 45, 53, 53.

³ *Wilt v. Welsh*, 6 Watts, 9. The ground of this action was, that the defendant, an infant, had hired a horse to go to one place, and had driven him to another and more distant place. Declaration in trover. *GIBSON*, Ch. J., reviews the New York and Massachusetts cases, and rejects them as unsound, holding the defendant not liable. *Penrose v. Curren*, 3 Rawle, 351, was a similar case, except that there the horse was killed by hard usage. Says ROGERS, J.: "The foundation of the action is contract, and disguise it as you may, it is an attempt to convert a suit originally in contract into a constructive tort, so as to charge the infant." Approved in *Livingston v. Cox*, 6 Penn. St. 360, 363. Compare *Root v. Stevenson's Admr.*, 24 Ind. 115, 120.

the action cannot alter the nature of the transaction," and that, "though the non-performance of that which is originally contract may be made the subject of an action of tort, the foundation of that action must still be in contract."¹

But the weight of authority putting out of view any question regarding the proper form of action would seem to be with the New York cases.²

The question whether an infant is liable in tort for falsely representing himself to be of full age, whereby he [*110] induces another to contract with him to his prejudice, is one upon which great differences of judicial opinion have been expressed. In England it is thoroughly established that he is not liable.³ The English cases have often been approved in this country, and the tendency of authority here is with them.⁴ But other cases hold the contrary.⁵

¹ *Weall v. King*, 12 East, 452. And, see, *Studwell v. Shapter*, 54 N. Y. 249. Compare *Eaton v. Hill*, 50 N. H. 235, 240. In this last case it is held that case will lie against an infant for a positive wrongful act to property bailed to him, and that it is not necessary, as was held in *Campbell v. Stakes*, to bring trespass. See, also, *Schenk v. Strong*, 4 N. J. 87.

² See, besides the cases referred to in Maine and New Hampshire, *Story on Sales*, § 28; 1 Pars. on Cont. 316.

³ *Johnson v. Pye*, 1 Lev. 169; 1 Sid. 253, and 1 Keb. 905; *Price v. Hewett*, 8 Exch. 146; *Liverpool, etc., Association v. Fairhurst*, 9 Exch. 422; *Bartlett v. Wells*, 81 L. J. Q. B. 57; S. C. 1 B. & S. 836; *Wright v. Leonard*, 11 J. Scott (N. S.), 258; *De Roo v. Foster*, Ib. 272. Where, by false representations, a minor has obtained a lease of furnished premises the lessor is entitled to have the lease declared void and possession given him, but defendant cannot be held for use and occupation. *Lemprière v. Lange*, L. R. 12 Ch. D. 675.

⁴ *Brown v. Dunham*, 1 Root, 273; *Geer v. Hovey*, Ib. 179; *Wilt v. Welsh*,

6 Watts, 9; *Curtin v. Patton*, 11 S. & R. 309; *Stoolfodz v. Jenkins*, 12 S. & R. 403; *Livingston v. Cox*, 6 Penn. St. 360; *Kean v. Coleman*, 39 Penn. St. 299; *Brown v. McCune*, 5 Sandf. (S. C.) 224, *Homer v. Thwing*, 3 Pick. 492; *Merriam v. Cunningham*, 11 Cush. 40; *Carpenter v. Carpenter*, 45 Ind. 142; *Burns v. Hill*, 19 Geo. 22; *Kilgore v. Jordan*, 17 Texas, 341; *Tucker v. Moreland*, 10 Pet. 59.

⁵ See *Ward v. Vance*, 1 N. & McCord, 197; *Peigne v. Sutcliffe*, 4 McCord, 387; *Fitz v. Hall*, 9 N. H. 441; *Norris v. Vance*, 3 Rich. 164; *Seabrook v. Gregg*, 2 S. C. (N. S.) 79. In *Fitz v. Hall*, supra, PARKER, Ch. J., undertakes to lay down a general rule as follows: "The principle," he says, "seems to be that, if the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject matter of it, the infant cannot be charged for this breach of his promise or contract by a change in the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, willful and positive

*The protection against personal responsibility which [*111] the law accords to an infant does not go so far as to vest in him the title to property which he has obtained by fraud, or on a contract which he disaffirms. If he still retains the property when the contract is disaffirmed, he must restore it on demand, and on his failure to do so, the original owner may obtain

wrong in itself, then, although it may be connected with a contract, the infant is liable. The representation in *Johnson v. Pye*, and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of assumpsit. The matter arises purely *ex delicto*. The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the lots, but that by no means makes it part and parcel of the contract. It was antecedent to the contract, and if an infant is liable for a positive wrong connected with a contract, but arising after a contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract."

This decision is pronounced by the editors of the American Leading Cases, in their notes to *Tucker v. Moreland*, Vol. I., to be "clearly unsound," and they say that "the representation, by itself, was not actionable, for it was not an injury, and the avoidance of the contract, which alone made it so, was the exercise of a perfect legal right on the part of the infant. The contract in such a

case as *Fitz v. Hall* forms an essential part of the right of action, and no liability growing out of contract can be asserted against an infant. The test of an action against an infant is, whether a liability can be made out without taking notice of the contract." But Mr. Parsons, who approves the case, says the learned editors mistook the real ground of the decision in *Fitz v. Hall*, which was that a fraudulent representation, whereby money or goods are obtained by an infant, is an actionable injury. 1 Para. on Cont. 5th Ed. 318, note. See *Walker v. Davis*, 1 Gray, 506. The case was approved by REDFIELD, Ch. J., in *Towne v. Wiley*, 28 Vt. 359, but denied to be sound in *Gibson v. Spear*, 38 Vt. 311, 315, in which it is said: "We think that the fair result of the American as well as of the English cases is that an infant is liable in an action *ex delicto* for an actual and willful fraud only in cases in which the form of action does not suppose that a contract has existed; but that where the *gravamen* of the fraud consists in a transaction which really originated in contract, the plea of infancy is a good defense." The principle thus stated would exclude many cases in which it is admitted an infant is liable. With deference it may be suggested whether, where a party has never intended to rely upon the contract of an infant, or to have any contract dealings at all with one, justice to him and "protection" to the infant does not require that the fraud shall be dealt with in like man-

it on replevin, or recover its value in an action of trover.¹ And where the property was obtained by fraud the infant has been held liable, though the conversion took place before the time when the price was payable by the terms of the fraudulent contract.²

As the doctrine *respondet superior* rests upon the relation of master and servant, which depends upon contract, actual [*112] or *implied, it is obvious that it can have no application in the case of an infant employer, and he, therefore, is not responsible for torts of negligence by those in his service.³ Nor can he be made a trespasser by relation through the ratification of a wrongful act which another has assumed to do on his behalf, but without his knowledge.⁴

It seems that if an infant tortiously convert the money of another to his own use, or tortiously dispose of the property of another, receiving money therefor, the tort may be waived and assumpsit maintained.⁵ The reasons for this are well set forth in a Vermont case.⁶

ner as would any other distinct tortious act. In *Eckstein v. Frank*, 1 Daly, 334, Judge DALY denies the soundness of *Johnson v. Pye*, and considers it overruled in *New York* by *Wallace v. Morss*, 5 Hill, 392. In *Indiana* in a late case it is held that an infant is liable in tort for the actual loss resulting from a false and fraudulent representation of his age where by reason of it a contract has been made with him. "Thus an equitable conclusion is reached and one in harmony with his liability in tort." *Rice v. Boyer*, 108 Ind. 472. All the cases agree that, if an infant is sued on his contract, his fraud will not preclude his relying upon his infancy in a defense in that suit. *Burley v. Russell*, 10 N. H. 184; *Merriam v. Cunningham*, 11 Cush. 40; *Brown v. McCune*, 5 Sandf. (S. C.) 244; *Studwell v. Shafter*, 54 N. Y. 249. There are statutes in some States rendering infants responsible for their false assertions of majority. See *Schouler, Dom. Rel.* 570; *Ewell's Lead. Cas.* 205, 206.

¹ *Mills v. Graham*, 1 New Rep. 140; *Badger v. Phinney*, 15 Mass. 359; *Walker v. Davis*, 1 Gray, 506; *Kilgore v. Johnson*, 17 Texas, 341; *Pars. on Cont.* 5th Ed. 319; *Reeve Dom. Rel.* 244; *Schouler, Dom. Rel.* 555.

² *Walker v. Davis*, 1 Gray, 506; *Schouler, Dom. Rel.* 555-6.

³ *Robbins v. Mount*, 4 Robt. 553; *S. C.* 33 How. Pr. 34.

⁴ *Burnham v. Seaverns*, 101 Mass. 360. See *Armitage v. Widoe*, 36 Mich. 124. Nor is he liable as innkeeper upon the custom of the realm. *Cross v. Andrews*, *Carth.* 161; *Cro. Eliz.* 622.

⁵ *Bristow v. Eastman*, 1 Esp. 172; *Shaw v. Coffin*, 58 Me. 254. See *Peigne v. Sutcliffe*, 4 McCord, 387; *Munger v. Hess*, 28 Barb. 75.

⁶ *Elwell v. Martin*, 32 Vt. 217, *ALDIS, J.*: "The defendant, a minor, tortiously, and without the knowledge or consent of the plaintiff, took from him one hundred and ninety dollars in money: is he liable therefor in assumpsit for money had and received? It is admitted that if he were an adult

*It has been decided in Illinois, that if an infant [*113] makes a purchase for cash, and pretends to make payment

he would be so liable. Where property has been tortiously taken and converted into money, the plaintiff may sue in tort, or he may waive the tort and sue in assumpsit. When it is said that he waives the tort, it is not meant that he does any act or makes any averment in his declaration to that effect. He simply brings assumpsit instead of trespass or trover, and thereby foregoes the advantage he would have if he sued tortwise to claim higher or exemplary damages, and to proceed against the person of the defendant. By bringing assumpsit he pursues a remedy milder and more favorable to the defendant. The defendant cannot be worse and may be better off by being sued *ex contractu*. Such is the law as applicable to adults.

"It is also admitted that the defendant is liable for the tort, and that the damages recoverable in an action *ex delicto* cannot be less than the money tortiously taken, which would be the measure of damages in assumpsit. But it is claimed that although infancy is no bar to the cause of action in tort, although the infant is fully liable for the tort, still if the plaintiff elects to sue in assumpsit, then the infant, on account of the form of action, can plead his infancy in bar of the suit.

"The plea of infancy is allowed to protect the infant from imposition, to shield him against the consequences of his inexperience and ignorance. Hence, his express promises do not bind him. Even for necessities, which he must have, or otherwise he would starve, he is not liable by virtue of any express promise; for if he promise to pay an unreasonable price for them, he is not bound by such

promise but only to pay a reasonable price which is *implied*.

"As infancy does not protect him from the consequences of and liability for his tortious acts, why should it furnish him with defense against them when sued *ex contractu* instead of *ex delicto*? The right to elect the form of action belongs to the plaintiff. The infant cannot be injured, but may be benefited by being sued in assumpsit. Why may not an infant be allowed to have a milder remedy brought against him as well as adult tortfeasors?

"The promise upon which he is made liable is not an express one. The law implies it from the wrongful act. It is not a contract in which he may have been cheated, and against which infancy shields him, but a willful wrong which he has committed against another, and in which the law implies the obligation to make the restitution. Here the necessity is to protect, not the infant, but society. The plea should cease when the reason for it ceases. Although the action is assumpsit, yet the substance is in tort, and when the substance has been made to appear by proof, we see no reason why the form of action which is favorable to the infant may not be maintained. In the substance of the proceedings there is no anomaly and none as to the form which is not fully answered by allowing such suits to stand against adults.

"The action, we think, is fully sustained by authority. *Bristow v. Eastman*, reported in 1 Esp. 172, and in *Peake*, 223, is an authority to show that an infant who has embezzled money may be sued for it in assumpsit.

"As reported in *Espinasse*, it is a

[*114] by delivery of a *check on a bank where he has no funds,

direct decision on the point. In Peake it is said that the plaintiff proved that the defendant acknowledged the fraud and promised to pay after he came of age, so that the point was not determined. In this view it is but the doctrine of Lord Kenyon. We notice, however, that the case is more fully reported in Espinasse, and seems to bear upon its face the marks of greater accuracy and a more thorough knowledge of the case.

"The doctrine there held by Lord Kenyon, that an infant is liable in assumpsit for money he has embezzled, has been recognized and adopted by several elementary writers on the subject of infancy; by Judge Reeve, in his Domestic Relations, 246: by Prof. Greenleaf, 2 Greenleaf's Ev. Sec. 368, and by Story on Contracts, p. 64. It is questioned upon what seems to us insufficient ground in an article in the American Jurist, January, 1839. See, also, Bing. on Infancy, p. 111, and 1 Am. Leading Cases, 261.

"The defendant has cited several cases to show that to sue in assumpsit the plaintiff must waive the tort, and that then the case must proceed as if the money was received without wrong, and the defendant only liable for a breach of contract. Such is, unquestionably, the theory of the law, and the principle is recognized in the cases cited. Conant v. Raymond, 2 Aik., 243; Fisher v. Jail Commissioners, 3 Vt. 323; Young v. Marshall & Poland, 21 E. C. L. 437 (8 Bing. 43.)

"But this does not settle the question here at issue, whether an infant tortiously taking money can plead infancy in bar when sued in assumpsit, for the validity of a plea as a defense may, and ordinarily should turn, not upon the form of the action, but its substantial merit. Indeed, the

language of Ch. J. Tindall, in the case last cited, shows upon what grounds and why a party may waive the tort, and the reasons assigned show that it may as well be waived in the case of an infant as of an adult. He speaks of it as a general rule, that 'no party is bound to sue in tort, where, by converting the action into an action of contract, he does not prejudice the defendant, and, generally speaking, it is more favorable to the defendant to be sued in contract.'

"In the same case, Bosanquet and Alderson, Judges, say that by waiving the tort the plaintiff does not affirm the wrongful acts of the defendant, but merely waives his claim to damages for the wrong, and is content to sue for the proceeds of the wrongful act.

"Our attention has been called to the principle generally recognized and established in this State in West v. Moore, 14 Vt. 449, that where the liability really arises by breach of a contract, though accompanied by fraud or tort, the plaintiff shall not be allowed to change the form of action and hold the infant liable *ex delicto* for the tort. The reason of the decisions stands upon the plain ground of protecting the infant against his liabilities really arising upon contract. In tort the infant might be liable for greater damages than upon contract, and when the substantive cause of action is upon a contract, he ought not to be liable at all. The cases under this head are numerous. Sometimes it is difficult to tell which most preponderates, the contract or the tort, and the rule which has been sometimes applied as a tort, that the conversion must be willful, and not constructive by breach of the contract, seems just in theory, though very difficult in prac-

the title to the property does not pass, and its value may be recovered in trover.¹

Torts by Drunkards. The fact that a tort was committed while a defendant was intoxicated is no excuse whatever. This has been held in actions for slander.² It is conceivable, however, that the amount of the recovery might be considerably affected by a showing that the wrong was committed under such conditions that no one would have been likely to attach importance to the utterances.

***Torts Committed Under Duress.** In general, one can- [*115] not excuse a tort by showing that he committed it under duress. In Tennessee, however, it has been decided that it is a good defense to show that a tort was committed under the orders of the defendant's military superior, which at the time he was compelled to obey.³

Torts of Married Women. Where husband and wife jointly commit a wrong, the action therefor is properly brought against the husband alone, for the whole may be assumed to be his act.⁴

tical application. See the cases on this point collected in 1 Am. Lead. Cases, 260, *et seq.*

"But it by no means follows that because an infant may not be made liable for his contracts by changing the form of action to tort, that he shall not therefore be made liable *as contractus*, where he is in fact liable for his wrongful acts, and the law implies from them in all other cases the promise and the duty of making restitution. To extend to an infant the privilege of defeating his legal liability by setting up his infancy as a defense, not to the cause of action, but to the form in which it is declared upon, would not, we think, be a reasonable conclusion from the acknowledged principles upon which the privilege of infancy is granted to him, and is not required by any of the rules regulating the forms of action. On the contrary, it would convert the shield into a sword."

¹ Mathews v. Cowan, 59 Ill. 341.

² McKee v. Ingalls, 5 Ill. 80; Reed v. Harper, 25 Iowa, 87.

³ McKeel v. Bass, 5 Cold. 151; Waller v. Parker, 5 Cold. 476. In these cases the defendants were soldiers in the confederate army, and might, perhaps, have justified under the rules of war. Compare Mitchell v. Harmony, 18 How. 115. See Buron v. Denman, 2 Exch. 167, in which the trespass of the defendant in breaking up the barracoon of the plaintiff on the coast of Africa, and freeing his slaves, was held justified by the subsequent ratification of the act by the government, this being equivalent to a prior command.

⁴ Com. Dig. Baron & Feme. V.; 2 Saund. Pl. & Ev. 192; McKeowen v. Johnson, 1 McCord, 578; Cassin v. Delany, 38 N. Y. 178. The wife should not be made defendant in an action for the wrongful joint possession of a chattel by her and her husband. Longey v. Leach, 57 Vt. 377.

But "as a general rule, a married woman is answerable for her wrongful acts, including frauds, and she may be sued in respect of such acts jointly with her husband, or separately if she survives him. The liability is hers; though living with the husband, it must be enforced in an action against her and him, which, to charge him, must be brought to a conclusion during their joint lives."¹ If she survives him, the suit may proceed against her separately.² There is a presumption, however, corresponding to that which is made in the criminal law, that if a wrong is committed by the wife, in the presence of her husband, it must have been committed by his consent and under his influence, and, consequently, is his wrong rather than that of the wife, and should be redressed in a suit against him alone.³ But any such presumption is liable to be overthrown by evidence.⁴ [*116] "The true view is," says Mr. Bishop,⁵ "that when *the husband is present during the commission of a tort by the wife, whether himself actually participating in it or not, *prima facie* the wrong shall be deemed his alone; but both in civil and criminal causes, this *prima facie* case may be rebutted, and each of the two may be deemed, in law, the doer of the wrong, the same as though they were unmarried.⁶ Therefore, if husband

¹ WILLES J., *Wright v. Leonard*, 11 C. B. (N. S.) 253, 266. If a divorce takes place between them, the husband is no longer liable for her previous torts. *Capel v. Powell*, 17 C. B. (N. S.) 743. To justify the exemption of the wife from liability, the presence and command of the husband must concur. An offense by his direction but not in his presence, or in his presence but not by his direction is not within the rule which gives immunity to her. *Hildreth v. Camp*, 41 N. J. L. 306. On the other hand it is held in Ohio that the husband need not be present when the wife acts or know that the act was contemplated or that it has been committed. *Holtz v. Dick*, 42 Ohio St. 23. And in Arkansas, in a case where the husband was held for slander spoken in his presence the law is similarly laid down. *Kosminsky v. Goldberg*, 44

Ark. 401. The husband is liable for his wife's slander. If uttered in his presence he alone should be made a party; if not, they should be sued jointly. *Quick v. Miller*, 103 Pa. St. 67.

² *Capel v. Powell*, 17 C. B. (N. S.) 744; *Smith v. Taylor*, 11 Geo. 20, 22; *Estill v. Fort*, 2 Dana, 237; *Hawk v. Harman*, 5 Binn. 43.

³ *Ball v. Bennett*, 21 Ind. 427; *Baker v. Young*, 44 Ill. 42; *Brazil v. Moran*, 8 Minn. 236; *Quick v. Miller*, 103 Pa. St. 67; *Kosminsky v. Goldberg*, 44 Ark. 401.

⁴ *Miller v. Sweitzer*, 22 Mich. 391; *Cassin v. Delaney*, 38 N. Y. 178.

⁵ *Law of Married Women*, Vol. 2, §258.

⁶ *Citing Marshall v. Oakes*, 51 Me. 808; *Warner v. Moran*, 60 Me. 227; *The State v. Cleaves*, 59 Me. 298; *Carleton v. Haywood*, 49 N. H. 314;

and wife join in a malicious prosecution, she being really an active party as well as he, she may be joined with him as defendant in an action to recover damages for it, though she performed no act in which he was not present concurring.¹ And it is the same where they join in a battery."² If the wife is the active party in a tort, the declaration will either count upon the tort as that of the wife alone, or as that of both husband and wife³; though, if the case be in trover, the conversion must be averred to be for the use of the husband.⁴ This was the common law rule; but where, by statute, the wife retains and acquires real and personal estate the same as a *femme sole*, no reason is perceived why she might not be charged with a conversion to her own use.⁵

But the element of contract is as important here as in the law of infancy. The same reasons which would preclude the indirect redress of the infant's breach of contract, by [*117] treating it as a tort, will preclude the like redress in the case of the contract of a married woman.⁶ And here, also, we encounter the same difficulties when we undertake to draw the line of distinction between cases which are really in their substance, cases of contract, though a wrong may be involved, and cases in which a wrong stands apart from the contract. The

Simmons v. Brown, 5 R. I. 299; *Tobey v. Smith*, 15 Gray, 535. The husband and wife may be held jointly liable for a tort committed by her in his absence, if it is done at his instigation. *Handy v. Foley*, 121 Mass. 259.

¹Referring to *Cassin v. Delaney*, 38 N. Y. 178. See, also, *Simmons v. Brown*, 5 R. I. 299, and cases cited.

²Citing *Roadcap v. Sipe*, 6 Grat. 213, and *Drury v. Dennis*, Yelv. 106. See, also, *Yeates v. Reed*, 4 Blackf. 463; *Estill v. Fort*, 2 Dana, 237; *Baker v. Young*, 44 Ill. 42; *Keyworth v. Hill*, 3 B & A. 685; *Vine v. Saunders*, 4 Bing. (N. C.) 96.

³*Bishop, Law of Married Women*, Vol. 2, § 259.

⁴*Estill v. Fort*, 2 Dana, 237; *Tobey v. Smith*, 15 Gray, 535; *Kowing v. Manly*, 49 N. Y. 192, 193; *Shaw v.*

Hallihan, 46 Vt. 889; S. C. 14 Am. Rep. 628. Compare *Heckle v. Lurvey*, 101 Mass. 344; S. C. 3 Am. Rep. 366.

⁵See *Hagebush v. Ragland*, 78 Ill. 40. "A *femme covert* is liable for fraud committed by her in dealing with her separate property, or by her husband, as her agent, to the same extent as individuals in all respects capable of acting *sui juris*. *Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 N. Y. 577. This liability necessarily results from the capacity conferred on her to acquire, hold and transfer property, and to deal with her separate estate, as if she were unmarried." ALLEN, J., in *Vanneman v. Powers*, 56 N. Y. 89, 42.

⁶See *Burnard v. Haggis*, 14 C. B. (N. S.) 45.

English cases, which hold, as we have seen, that an infant cannot be made liable as for a tort for falsely affirming that he is of age, and thereby effecting a contract, are supported in their principle by others, which affirm that the wife may rely upon her coverture as a defense to contracts obtained by her on a false assertion that she was unmarried.¹

There is reasoning in some of these cases which does not appear entirely satisfactory; for it assumes that if an action might be supported for the breach of such a contract, "the wife would lose the protection which the law gives her against contracts made by her during coverture. * * For every such contract would involve in itself a fraudulent representation of her capacity." * But we can hardly agree that the making of a contract involves an assertion of competency to make a lawful contract. Such a doctrine would make every contract by an infant involve a false assertion of majority, which is far from being the common understanding. It seems much more reasonable to act on a supposition that every person satisfies himself whether those with whom he deals are competent to contract; and if he makes no inquiry when dealing with one under disability, the sensible conclusion is that he relies upon honor and integrity rather than upon legal responsibility. It is quite certain that no one understands, when a purchase is made on credit, that there is any implied assertion by the buyer that he has property sufficient to make good his promise to pay. The seller is supposed to have informed himself on that point, and to consent to run the risk. But [*118] when the *seller refuses to deal, except after assurance of legal responsibility, this is an express refusal to assume the risk, and the doctrine that he nevertheless shall do so seems to us as questionable in logic, as it certainly is in morals. But the authorities are as above stated.²

In the recent changes in the common law effected by statute

¹ See *Cooper v. Witham*, 1 Lev. 247; 1 Sid. 375; 2 Keb. 399, in which the contract effected by means of the fraud was a contract of marriage. Husband and wife are not liable for the fraud of the wife in the purchase by her of goods on a false assertion that she and her children were in destitute circumstances. *Woodward v.*

Barnes, 46 Vt. 332; S. C. 14 Am. Rep. 626.

² *Pollock, C. B.*, in *Adelphi Loan Ass'n. v. Fairhurst*, 9 Exch. 422. See, also, *Wright v. Leonard*, 11 C. B. (N. S.) 256.

³ In *Keen v. Coleman*, 39 Penn. St. 299, a married woman had obtained property on a false assertion that she

in the several States, whereby married women have been given an independent power to make contracts and to control property, it is not very clear how far the law of torts has been modified. We should probably be safe in saying that so far as they give validity to a married woman's contracts, they put her on the same footing with other persons, and when a failure to perform a duty under a contract is in itself a tort, it may doubtless be treated as such in a suit against a married woman. The same would probably be true of any breach of a duty imposed upon a married woman as owner of property which she possesses and controls the same as if sole and unmarried. In Illinois it has been decided that under the new statutes the husband is not liable for a slander of the wife in which he did not participate, though the statutes on the subject, which were supposed to have changed the common law, were silent as regards her torts, and only purported to secure to the woman her property and earnings and the full control and enjoyment thereof.¹ This is, perhaps, a sound conclusion. Certainly the reasons on which the new legislation proceeds are such as should leave the wife to respond alone for her torts, for they assume that she is fully capable of controlling her own actions, and can and will act independently of her husband.²

was a widow, giving her obligations therefor. When proceedings were taken to enforce these, she relied upon her coverture. *LOWRIE*, Ch. J.: "She may be liable to an action for the deceit practiced by her, but she had no legal power to execute this bond, and she cannot be legally bound. * * If a legal incapacity can be removed by a fraudulent representation of capacity, then the legal incapacity would have only a moral bond or force, which is absurd."

¹ *Martin v. Robson*, 65 Ill. 129; S. C. 16 Am. Rep. 578. See *Chicago*, etc., *R. R. Co. v. Dickson*, 77 Ill. 331. A similar rule is laid down in *Kansas*. *Norris v. Corkill*, 32 Kan. 409. So in *Michigan*, unless her act is in some way connected with the husband's authority or owing to his fault.

Ricci v. Mueller, 41 Mich. 214. In *Pennsylvania* the husband, under the act of 1887, is not liable for the wife's individual tort. *Kuklence v. Vocht*, 13 Atl. Rep. 198. In *Missouri* the husband is jointly liable. *Merrill v. St. Louis*, 12 Mo. App. 466. In *Maine* she may be liable for her husband's tort committed as her agent in enforcing some supposed right affecting her property. *Ferguson v. Brooks*, 67 Me. 251.

But in *Ohio* and *Indiana* it is held that the modern statutes do not change the common law rule. *Holtz v. Dick*, 42 Ohio St. 23; *Choen v. Porter*, 66 Ind. 194.

² In *Illinois*, *Michigan*, and *Iowa*, the statutes relative to the rights of married women have been held to entitle the wife to recover for her own

[*119] ***Torts by Corporations.** Corporations are responsible for the wrongs committed or authorized by them, under substantially the same rules which govern the responsibility of natural persons. It was formerly supposed that those torts which involved the element of evil intent, such as batteries, libels, and the like, could not be committed by corporations, inasmuch as the State, in granting rights for lawful purposes, had conferred no power to commit unlawful acts; and such torts, committed by corporate agents, must consequently be *ultra vires*, and the individual wrongs of the agents themselves. But this idea no longer obtains.¹ It is true, as a rule, that as the corporation is created for a particular purpose only, and endowed with powers to accomplish that purpose, nothing can be done by it or in its name that is not within the intent of its charter. It must indeed act through agents and officers; but if these undertake to do what the corporation is not empowered to do, their action cannot impose a liability upon the corporation. An apt illustration is the case of fraudulent representations made by an officer of a national bank in the sale of railroad bonds on commission. As the bank has no power to make such sales, the fraud is the individual wrong of the officer.² But many torts are unintentional, and

use the damages suffered from a personal tort. *Chicago, etc., R. R. Co. v. Dunn*, 52 Ill. 260; *Hennies v. Vogel*, 66 Ill. 401; *Chicago, etc., R. R. Co. v. Dickson*, 67 Ill. 122; *Berger v. Jacobs*, 21 Mich. 215; *Musselman v. Galligher*, 32 Iowa, 383; *Pancoast v. Burnell*, Id. 394; *Mewhirter v. Hatten*, 42 Iowa, 288; S. C. 20 Am. Rep. 618. In New York it is held that the wife's time in the household still belongs to the husband, and therefore he should sue for an injury which disables her from performing household duties. *Brooks v. Schwerin*, 54 N. Y. 343. And perhaps it would be held in any of the States that the husband might still sue for the consequential injury to himself. See *Mewhirter v. Hatten*, 42 Iowa, 288; S. C. 20 Am. Rep. 618.

¹ "The doctrine which was formerly sometimes asserted that an ac-

tion will not lie against a corporation for a tort is exploded. The same rule in that respect now applies to corporations as to individuals. They are equally responsible for injuries done in the course of their business by their servants." *FIELD, J. Baltimore, etc., R. R. Co. v. Fifth Bapt. Church*, 108 U. S., 317, 330. A cemetery association not organized for profit is liable in tort. *Donnelly v. Boston, etc., Ass.*, 15 N. E. Rep. 505 (Mass.) But a corporation for charitable purposes is not liable for an assault by one of its officers upon an inmate. *Perry v. House of Refuge*, 63 Md. 20. See *Benton v. Trustees of Boston City Hosp.*, 140 Mass. 13.

² *Weckler v. First Nat'l. Bank*, 43 Md. 591. The general rule that a corporation is not liable for such wrongs by its agents as are beyond the scope of corporate authority, is

arise through neglect of agents and servants, while others, though intentional, are committed by agents or servants in the supposed interest of their employers, and under circumstances which may justify them in believing that what they do is fairly *authorized, and a part of their duty under their employ- [*120] ment. To deny redress against the corporation would in many cases be a denial of all remedy. The rule is now well settled that, while keeping within the apparent scope of corporate powers, corporations have a general capacity to render themselves liable for torts, except for those where the tort consists in the breach of some duty which from its nature could not be imposed upon or discharged by a corporation. The rule of liability embraces not only the negligences and omissions of its officers and agents who are put in charge of or employed in the corporate business, but also all tortious acts which have been authorized by the corporation, or which are done in pursuance of any general or special authority to act in its behalf on the subject to which they relate, or which the corporation has subsequently ratified.¹ And in deciding upon this liability the disposition of the courts has

recognized in *Poulton v. Railway Co.*, L. R. 2 Q. B., 534; *Edwards v. Railway Co.*, L. R. 5 C. P. 445; *Walker v. S. E. Railway Co.*, 5 C. P. 640; *Allen v. Railway Co.*, L. R. 6 Q. B. 65; *Coleman v. Riches*, 16 C. B. 104; *Udell v. Atherton*, 7 H. & N. 172, 181; *Isacs v. Third Ave. R. R. Co.*, 47 N. Y. 122; S. C. 7 Am. Rep. 418; Ill. Cent. R. R. Co. v. Downey, 18 Ill. 259; *Little Miami R. R. Co. v. Wetmore*, 19 Ohio N. S. 110; *Miller v. Burlington, etc., R. R. Co.*, 8 Neb. 219. But, if the corporation assumes to do unauthorized acts in the course of which a tort is committed, it is liable. So, if a bank, with the knowledge and acquiescence of its directors, is accustomed to take special deposits not authorized by its charter, it is liable for the loss of such a deposit through gross carelessness. "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no applica-

tion." * * * "An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers." *Nat. Bank v. Graham*, 100 U. S. 699. Generally it may be said that a corporation is liable for the consequences of tortious acts done by its authority, though not within the scope of its powers, express, implied or incidental. *Central R. R., etc., Co. v. Smith*, 76 Ala. 572. See *South, etc., R. R. Co., v. Chappell* 61 Ala. 527; *Alexander v. Relfe*, 74 Mo. 495; *New York, etc., R. R. Co. v. Haring*, 47 N. J. L. 137.

¹ *Mayor, etc., of Lyme Regis v. Henley*, 1 Bing (N. C.) 222, 240; *Smith v. Birmingham Gas Co.*, 1 Ad. & El. 526; *Maund v. Monmouthshire Co.*, 4 M & G. 452; *Eastern R. R. Co. v. Broom*, 6 Ex. 314; *Goff v. Great Nor. R. R. Co.*, 3 El. & El. 672; *Philadelphia, etc., R. R. Co. v. Quigley* 21

been to consider corporate officers, agents and servants as possessing a large and liberal discretion, and to hold the corporation liable for all their acts within the most extensive range of the corporate powers.¹ This is just to the public, and it is not unreasonable when regarded from the standpoint of the corporation, but will tend to insure greater care and caution in the selection of those who are to be entrusted with corporate affairs. Therefore a corporation may even be liable for an assault and battery, when its agent in committing it was performing some act within the limits of his authority, but wrongfully or with excessive force.²

[*121] *The rule is illustrated by the case of an official report of the corporation, made through its board of direction, in which is embodied a libel on a business rival. Such a libel is a corporate wrong, because the report is a corporate act, and the directors were acting within the scope of their authority in making it. Had the board ordered the publication of any other paper in the supposed interest of the corporation, it would have been equally a corporate act, and a libel contained in it a corporate wrong.³

How. 202; *Thayer v. Boston*, 19 Pick. 511; *Monument Nat'l Bk. v. Globe Works*, 101 Mass. 57; *Sheldon v. Kalamazoo*, 24 Mich. 383; *Brokaw v. New Jersey, etc., R. R. Co.*, 32 N. J. 338; *Lynch v. Metr. El. Ry. Co.*, 90 N. Y. 77; *Erie City Iron Works v. Barber*, 106 Pa. St. 125; *Payne v. R. R. Co.* 13 Lea, 507. So whether the corporation received any benefit from the act or not. *Kansas Lumber Co. v. Central Bank*, 34 Kan. 635. So though the particular act was wilful and not directly authorized or even against instructions. *Penn., etc. Co. v. Weddle*, 100 Ind. 138; *Evansville, etc. Co. v. McKee*, 99 Ind. 519; *Terre Haute, etc. Co. v. Jackson*, 81 Ind. 19.

¹ Redf. on Railways, 3d ed. 510, citing *Phil. & Read. R. R. Co. v. Derby*, 14 How. 463, 483; *Noyes v. Rutland & Burlington R. R. Co.*, 27 Vt. 110. See *Hutchinson v. Western, etc. R. R.*

Co., 6 Heisk. 634; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116.

² *Monument Bank v. Globe Works*, 101 Mass. 57; *Ramsden v. Boston, etc., R. R. Co.*, 104 Mass. 117; *Brokaw v. New Jersey, etc., R. R. Co.*, 32 N. J. 328; *Atlantic, etc. R. R. Co. v. Dunn*, 19 Ohio (N. S.) 162; *Passenger R. R. Co. v. Young*, 21 Ohio (N. S.) 518; S. C. 8 Am. Rep. 78; *Baltimore, etc. R. R. Co. v. Blocher*, 27 Md. 277; *Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202; S. C. 2 Am. Rep. 39; *Hanson v. European, etc. R. R. Co.*, 62 Me. 81; S. C. 16 Am. Rep. 404; *Higgins v. Watervliet T. & R. Co.*, 44 N. Y. 23; S. C. 7 Am. Rep. 293; *St. Louis, etc., R. R. Co. v. Dalby*, 19 Ill. 353; *Eastern Counties R. R. v. Broom*, 6 Exch. 314; *Frost v. Domestic, etc., Co.* 133 Mass. 563; *Denver, etc., Co. v. Harris*, 122 U. S. 597.

³ *Whitfield v. Southeastern R. R. Co.*, El. Bl. & El. 115, 121; *Philadel-*

If, on the other hand, some servant of the corporation, who supposed he might advance its interests by decrying the business of a rival, were to proceed to do so by communications in the daily press, it is plain that these, though having in view the same purpose which the publication by the official board was meant to accomplish, can in no sense be regarded as corporate acts. They have not the corporate authorization; they are not made within the apparent scope of the servant's duty; and the tort is consequently an individual tort purely and solely, and redress must be sought accordingly.

The same reasons that sustain an action against a corporation for a libel would sustain one for a malicious prosecution; and though the courts of Missouri and Alabama at one time held that no such action would lie,¹ they have receded from this position² and it is now generally held that such action can be sustained.³ A corporation may also be liable for false imprison-

phia, etc., *R. R. Co. v. Quigley*, 21 How. 202; *Maynard v. Fireman's*, etc., *Ins. Co.*, 34 Cal. 48; *Aldrich v. Press Printing Co.*, 9 Minn. 133. Corporation liable for the publication of a libel by its agent with its authority. *Howe Mach. Co. v. Souder*, 58 Ga. 64; *Evening Journal Co. v. McDermott*, 44 N. J. L. 430; *Johnson v. St. Louis Dispatch Co.*, 2 Mo. App. 565; *Samuels v. Evening Mail Ass.* 75 N. Y. 604; and for slander uttered against another's business, *Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun, 153. A joint stock company is likewise liable for libel. *Van Aernam v. McCune*, 32 Hun, 316, and in *Dom. Tel. Co. v. Silver*, 10 Can. S. C. R. 238, a telegraph company is held liable for its agent's sending a libellous dispatch which was printed in a newspaper where there was a contract by which the agent was to furnish news to the paper. But it has been held that a member of a mutual aid society cannot sue the association as a partnership for slandering him, he being so united with it that there could be no partnership tort which would not

make him a joint tortfeasor. *Gilbert v. Crystal*, etc., *Lodge*, 4 S. E. Rep. 905 (Ga).

¹ *Childs v. Bank of Missouri*, 17 Mo. 213; *Owsley v. Montgomery*, etc., *R. R. Co.*, 37 Ala. 560.

² *Boogher v. Life Ass.*, 75 Mo. 319; *Iron Mt. Bank v. Merc. Bank*, 4 Mo. App. 505; *Jordan v. Ala.*, etc., *R. R. Co.*, 74 Ala. 85.

³ *Vance v. Erie R. R. Co.*, 32 N. J. 834; *Goodspeed v. East Haddam Bank*, 32 Conn. 530; *Copley v. Sewing Machine Co.*, 2 Woods, 494; *Fenton v. Sewing Machine Co.*, 9 Phill. (Penn.) 189; *Walker v. S. Eastern R. R. Co.*, L. R. 5 C. P. 640; *Edwards v. Midland Ry. Co.*, L. R. 6 Q. B. D. 287; *Williams v. Planters' Ins. Co.*, 57 Miss. 759; *Morton v. Met. Life Ins. Co.*, 34 Hun, 363; *Penn.*, etc., *Co. v. Weddle*, 100 Ind. 133; *Reed v. Home Savings Bank*, 130 Mass. 443. In Maryland it is held that the agent who caused the prosecution must have been expressly authorized so to do either in advance or by subsequent ratification in order to bind the corporation. *Carter v. Howe Machine*

ment, under circumstances corresponding to those which would sustain an action for any other forcible wrong.¹

[*122] *A corporation may also be liable for frauds. "Strictly speaking, a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation."²

While the agent keeps within the limits of his authority, there is a legal unity between the corporation and its agent, as much when his acts are wrongful and tortious as when they are rightful.³ And a corporation has even been held responsible for a

Co., 51 Md. 290. In *Green v. Omnibus Co.*, 7 C. B. (N. S.) 290, 302, ERLE, C. J., says: "I take the whole tenor of the authorities to show that an action for a wrong does lie against a corporation, when the act of the corporation—the thing done—is within the purpose of the corporation; and it has been done in such a manner as to constitute what would be an actionable wrong if done by a private individual."

¹ *Goff v. Great Western R. R. Co.*, 3 El. & El. 672; *Roe v. Birkenhead, etc.*, R. R. Co., 7 Exch. 36; *Frost v. Domestic, etc. Co.* 133 Mass. 563; *Am. Expr. Co. v. Patterson*, 73 Ind. 430; *Evansville, etc. Co. v. McKee*, 99 Ind. 519; *Carter v. Howe Machine Co.*, 51 Md. 290; *Wheeler, etc. Co. v. Boyce*, 13 Pac. Rep. 609 (Kan.) The corporation is not liable if what was done by the servants was not in the line of duty. *Allen v. London, etc. R. R. Co.*, L. R. 6 Q. B. 65; *Poulton v. London, etc.*, R. R. Co., 2 Q. B. 534; *Edwards v. London, etc.*, R. R. Co., L. R. 5 C. P. 445. But although they exceed the powers conferred on them

and do what the corporation is not authorized to do, so long as they are attempting to do what they believe pertains to the service, the corporation is liable. *Lynch v. Metr. El. Ry. Co.* 90 N. Y. 77.

² *Ranger v. Great Western R. R. Co.*, 5 H. L. Cas. 71, 86, per Lord Chancellor CRANWORTH. *Houldsworth v. Glasgow Bank*, L. R. 5 App. Cas. 317; *Weir v. Bell L. R.*, 3 Exch. D. 238. And see *Barwick v. Eng. Joint Stock Co.*, L. R. 2 Exch. 258; *Concord Bank v. Gregg*, 14 N. H. 331; *Scofield, etc. Co. v. State*, 54 Geo. 635; *N. Y., etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Peoples v. Patapsco, etc. Co.*, 77 N. C. 233.

³ *New Orleans, etc. R. R. Co. v. Bailey*, 40 Miss. 395. See *Bruff v. Mali*, 36 N. Y. 200. A fraud committed by a bank cashier in the usual course of the business of the bank intrusted to him binds the bank. *Mackey v. Commercial Bank*, L. R., 5 P. C. 394; *Fishkill Savings Inst. v. Nat. Bank*, 80 N. Y. 162; *Craigie v. Hadley*, 99 N. Y. 131.

fraudulent issue of certificates of stock by its authorized agent, though the issue was in excess of its capital stock.¹

And it has been held that an action lies against a corporation for conspiracy.²

We have no occasion to follow this subject further at this time, as the rules regarding the liability of corporations for the acts of their agents and officers are the same with those which apply as between masters and servants generally, and will be considered in another place.

What has been said on this subject will apply to public corporations as well as to private. Towns, counties, villages and cities must respond for such torts of their officers, agents and servants as have been committed or suffered by corporate authority. So far as the rules which apply to them are peculiar, they will be examined hereafter.

Even the State or the General Government may be guilty of individual wrongs; for while each is a sovereign, it is a corporation also, and as such capable of doing wrongful acts. The difficulty here is with the remedy, not with the right. No sovereignty is subject to suits, except with its own consent.³ But either this consent is given by general law, or some tribunal is established with power to hear all just claims. Or if neither of these is done, the tort remains; and it is always to be presumed that the legislative authority will make the proper provision for redress when its attention is directed to the injury.

¹ *New York, etc. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Tome v. Parkesburg Br. R. R. Co.* 39 Md. 36. See *Merchants' Bank v. State Bank*, 10 Wall. 604; *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532. Where it was an officer's duty to issue certificates signed by himself and another officer, the former signed his own name and forged the other's and issued the instruments to a purchaser in good faith. The company refused to recognize the issue and register the shares and it was held liable for such refusal. *Shaw v. Port Philip, etc. Co. L. R.*, 13 Q. B. D., 103. Corporation is liable for fraud of its offi-

cers in wrongfully cancelling certificates and issuing others. *Factors, etc. Co. v. Marine, etc. Co.*, 81 La. Ann. 149. But where for his own advantage a secretary without express instructions made a false report as to the validity of certain stock transfers, the Company was held not liable. *Brit. Mut. Bkg. Co. v. Charnwood, L. R.* 18, Q. B. D. 714.

² *Buffalo, etc. Co. v. Standard Oil Co.*, 106 N. Y. 669.

³ *United States v. Peters*, 5 Cranch, 139; *Osborn v. Bank of U. S.*, 9 Wheat. 738; *United States v. McLemore*, 4 How. 236; *Hill v. United States*, 9 How. 336.

[*124]

*CHAPTER V.

WRONGS IN WHICH TWO OR MORE PERSONS PARTICIPATE.

Classification. Wrongs, as respects the number of persons who may be responsible for their commission, are either individual or joint. Some wrongs are in their nature necessarily individual, because it is impossible that two or more should together commit them. The case of the oral utterance of defamatory words is an instance; this is an individual act, because there can be no joint utterance. He alone can be liable who spoke the words; and if two or more utter the same slander at the same time, still the utterance of each is individual, and must be the subject of a separate proceeding for redress.¹ It has been said, however, that if several unite in singing the same defamatory song, the singing may be treated as the joint slander of all;² but this is on grounds that distinguish it from an ordinary speaking; each speaker having his part in a joint utterance, and the individual voice being a part only of what reaches the ear of the hearer as a whole.

Conspiracy. On the other hand, some torts are in their nature joint torts, because the action of several is required to accomplish them. Reference is not had here to the physical ability to accomplish the wrongful act, such as might be required in overturning a house or in checking by a dam the flow of a rapid river, but to some element in the wrong that consists in the concurrence of two or more actors. Such a case would be a conspiracy to ruin one in his reputation, or to defraud him

¹ Chamberlain v. Goodwin, Cro. Jac. 647; Swithin v. Vincent, 2 Wils. 227; Chamberlaine v. Willmore, Palm. 313; Patten v. Gurney, 17 Mass. 182; State v. Roulstone, 3 Sneed, 107; Webb v. Cecil, 9 B. Mon. 198.

² *Dictum*, Thomas v. Rumsey, 6 Johns. 26, 31. Even here, however, we suppose the person wronged might bring his separate action for the tenor slander, the bass slander, etc.

of his *property; originating in combination, and carried out by joint action, or at least in pursuance of the joint arrangement and understanding.' If conduct is complained of which only becomes actionable because of the dishonest combination to accomplish some wrongful act, this combination must be shown, and one man cannot combine with himself; he must have associates. It is seldom, if ever, however, that a case can occur in which a man may not have redress without counting on the joint wrong; for the injury accomplished by means of the conspiracy may be treated as a distinct wrong in itself, irrespective of the steps that led to it. The general rule is, that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action.¹ The damage is the gist of the action, not the conspiracy;² and though the conspiracy may be said to be of itself a thing amiss, it must nevertheless, until something has been accomplished in pursuance of it, be looked upon as a mere unful-

¹ *Saunders v. Freeman*, Plow. 209; *Burton v. Fulton*, 49 Penn. St. 151; *Hutchins v. Hutchins*, 7 Hill, 104; S. C. *Bigelow*, Lead Cas. on Torts, 207; *Brannock v. Bouldin*, 4 Ired. 61; *Wildee v. McKee*, 111 Pa. St. 335.

² *Saville v. Roberts*, 1 Ld. Raym. 374; *Cotterell v. Jones*, 11 C. B. 713; *Sheple v. Page*, 12 Vt. 519; *Patten v. Gurney*, 17 Mass. 186; *Eason v. Petway*, 1 Dev. & Bat. 44; *Kimball v. Harman*, 34 Md. 407; S. C. 6 Am. Rep. 340; *Laverty v. Van Arsdale*, 65 Penn. St. 507; *Parker v. Huntingdon* 2 Gray, 124; *Bowen v. Matheson*, 14 Allen, 499; *Herron v. Hughes*, 25 Cal. 555; *Page v. Parker*, 40 N. H. 47; *Same v. Same*, 43 N. H. 363. The general agent of a railroad company posted a notice that any employee trading with plaintiff would be discharged. The latter sued the agent and the company. As the agent's act was not unlawful, it was held there could be no conspiracy. *Payne v. Railroad Co.*, 13 Lea, 507. An action for conspiracy will lie against three men

where one, in pursuance of a joint plan, bought goods from plaintiff on credit, sold them to the other two and absconded, although he made no positive fraudulent representation, when he bought them. "The essence of a conspiracy, so far as it justifies a civil action for damages, is a concert or combination to defraud or to cause other injury to person or property which actually results in damage to the person or property of the person injured or defrauded." *Dwight C. Place v. Minster*, 65 N. Y. 89. So a conspiracy to boycott a steamer line resulting in damage is actionable. *Mogul S. S. Co. v. McGregor*, L. R., 15 Q. B. D. 476.

³ *Jones v. Baker*, 7 Cow. 445; *Hutchins v. Hutchins*, 7 Hill, 104; *Sheple v. Page*, 12 Vt. 519; *Laverty v. Van Arsdale*, 65 Penn. St. 507; *Adler v. Fenton*, 24 How. 407; *Bush v. Sprague*, 51 Mich. 41; *Douglass v. Winslow*, 52 N. Y. Sup. Ct. 439; *Garing v. Fraser*, 76 Me. 37.

filled intention of several to do mischief.¹ When the mischief is accomplished, the conspiracy becomes important, as it affects the means and measure of redress; for the party wronged may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it. The significance of the conspiracy consists, therefore, in this: That it gives the person injured a remedy against parties not otherwise connected with the wrong. It is also significant as constituting matter of aggravation, and as such tending to increase the plaintiff's recovery.²

As it is the wrong accomplished—in other words, the [*126] *deprivation of some right—that must support the action, it follows that if what the plaintiff has been deprived of was not a right at all, but an advantage merely hoped for, he cannot maintain his suit. Therefore, he cannot maintain an action for conspiring to induce one not to make him a gratuity by will; he having no legal right to such gratuity.³ Nor can he have an action for conspiracy to induce his debtor to put his property out of his hands; since the fraudulent transfer leaves it still subject to legal process.⁴ Nor, in general, will an action lie for conspiracy to induce one to violate his contract; though it would seem that some cases might be so extraordinary in their facts as to be exceptions to this general rule.⁵

¹ *Kimball v. Harman*, 34 Md. 407; S. C. 6 Am. Rep. 340; *Place v. Minister*, 65 N. Y. 89; *Cotterell v. Jones*, 11 C. B. 713; *Schwab v. Mabley*, 47 Mich. 572; *Bush v. Sprague*, 51 Mich. 41; *McHenry v. Sneer*, 56 Ia. 649.

² *Kimball v. Harman*, 34 Md. 407; *Street v. Packard*, 76 Me. 148; *Garing v. Fraser*, 76 Me. 37. When actionable injury is set out as done by several, conspiracy need not be shown except to secure a joint judgment. *Lubricating Oil Co. v. Standard Oil Co.*, 42 Hun, 153. In an action against several for deceit by false representations a fraudulent combination to deceive and defraud must be shown; but when it is shown, any act of one in furtherance of the conspiracy is the act of all. *Brinkley v. Platt*, 40 Md. 529; *Hornblower v.*

Crandall, 78 Mo. 581; *Breedlove v. Bundy*, 96 Ind. 319. Mere silent approval of an unlawful act does not render one liable as a conspirator. *Brannock v. Bouldin*, 4 Ired. 61.

³ *Hutchins v. Hutchins*, 7 Hill, 104.

⁴ *Austin v. Barrows*, 41 Conn. 287.

⁵ A conspiracy to ruin an actor by hisses, groans, etc., during his performances may be actionable, though the public have a right to manifest disapproval of an actor's performance. The wrong consists in the combination to do it unfairly and of malice. *Gregory v. Brunswick*, 6 M. & G. 205. That a conspirator expected to derive no profit from the wrong is immaterial to his responsibility. *Stockley v. Hornidge*, 8 Q. & P. 11.

Though a conspiracy is charged, yet if on the trial, the evidence connects but one person with the wrong actually committed, the plaintiff may recover against him as if he had been sued alone.¹

***What constitutes Participation.** Most wrongs may [*127] be committed either by one person or by several. When several participate, they may do so in different ways, at different times, and in very unequal proportions. One may plan, another may procure the men to execute, others may be the actual instruments in accomplishing the mischief, but the legal blame will rest upon all as joint actors. In some cases one may also become a joint-wrong-doer by consenting to and ratifying what has been done by others. But this cannot be done by merely approving a wrong, or by expressing pleasure or satisfaction at its being accomplished.²

¹READ, J. "This is an action upon the case in the nature of a conspiracy against the defendants for falsely and maliciously combining and conspiring to prevent the plaintiff from obtaining employment as a school teacher, and by reason of which combination and conspiracy he was deprived of employment as a school teacher, and prevented from earning support for himself and his family as such. The damage sustained by the plaintiff is the ground of the action, not the conspiracy. 'Where the action is brought against two or more, as concerned in the wrong done, it is necessary, in order to recover against all of them, to prove a combination or joint act of all. For this purpose it may be important to establish the allegation of a conspiracy. But if it turn out on the trial that only one was concerned, the plaintiff may still recover, the same as if such one had been sued alone. The conspiracy or combination are nothing, so far as sustaining the action goes, the foundation of it being the actual damage done to the

party.' *Hutchins v. Hutchins*, 7 Hill, 104; *Jones v. Baker*, 7 Cowen, 445; *Parker v. Huntington*, 2 Gray, 124. The court was therefore clearly in error in saying there could be no recovery against one only." *Laverty v. Van Arsdale*, 65 Penn St., 507, 509. But to warrant a judgment in an action against two for conspiracy to defraud by a collusive judgment, both must be guilty of fraud. *Collins v. Cronin*, 11 Atl. Rep. 869 (Pa.)

² Thus, where one who knew that a bailee of a team had hired it to go to one place, rode with him to another, in violation of the bailee's duty, it was held he was not liable as a trespasser in so doing. *Hubbard v. Hunt*, 41 Vt. 376. See, also, *Langdon v. Bruce*, 27 Vt. 657. One who sees a fraud being accomplished before his eyes, by inducing a person to become surety for another who is irresponsible, does not become liable for fraud by merely failing to put the party on his guard. "If the defendants merely knew of the designs and contrivances of the principal party to impose on the plaintiff, that would

Adoption of a Wrong. In order to constitute one a wrongdoer by ratification, the original act must have been done in his interest, or been intended to further some purpose of his own. Lord COKE, on this subject, says: "He that agreeth to a trespass after it is done is no trespasser, unless the trespass was done to his use or for his benefit, and then his agreement subsequent amounteth to a commandment."¹ Chief Justice TINDALL presents the same principle more fully, in the following language: "That an act for another by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it

not be a conspiracy, though they did not, as they might, disclose the matter thus known by them." RUFFIN, Ch. J., in *Brannock v. Bouldin*, 4 Ired. 61. Any person present at the commission of a trespass, here an assault, encouraging or exciting the same, or who approves the same, is liable as principal; and proof that one is present without disapproving it, is evidence from which in connection with other circumstances a jury may infer assent. Mere presence as a spectator does not render one a participator. *Hilmes v. Stroebel*, 59 Wis. 74. See *Rhinehart v. Whitehead*, 64 Wis. 42. *Blue v. Christ*, 4 Ill. App. 351. Mere membership in an association does not make one liable for a malicious prosecution instituted by the association. The member must be shown to have aided in it intentionally. *Johnson v. Miller*, 63 Ia. 529; 69 Ia. 562. Joint liability for false imprisonment only covers the time when all were participants. *Bath v. Metcalf*, 14 N. E. Rep. 133 (Mass). To make one liable for false arrest by another, mere approval is not enough, he must have encouraged it in some way. *Cooper v. Johnson*, 81 Mo. 483. See, further,

as to liability of party for false imprisonment by officer or magistrate. *Gelezeleuchter v. Niemeyer*, 64 Wis. 316; *Fenelon v. Butts*, 49 Wis. 342; *Gibbs v. Randlett*, 58 N. H. 407; *Ocean S. S. Co., v. Williams*, 69 Ga. 251; and by his attorney; cases, *infra*, p. *132 n. 1. A conductor who permits a passenger to travel on his train carrying goods known by the conductor to have been stolen, is not thereby liable to the owner. If he takes part of such goods as fare he is liable to that extent. *Randlette v. Judkins*, 77 Me. 114.

¹ 4 Inst. 317. See *Eastern Counties R. R. Co. v. Broom*, 6 Exch. 314; *Hull v. Pickersgill*, 1 B. & B. 282; *Wilson v. Tumman*, 6 M. & Gr. 236; *Harrison v. Mitchell*, 13 La. Ann. 260; *Collins v. Waggoner*, Breese, 26; *Beveridge v. Rawson*, 51 Ill. 504; *Allred v. Bray*, 41 Mo. 484; *Grund v. Van Vleck*, 69 Ill. 479; *Vanderbilt v. Turnpike Co.*, 2 N. Y. 479; *Brainerd v. Dunning*, 30 N. Y. 211. The government is liable for the illegal acts of its officers which it expressly adopts. *Wiggins v. United States*, 3 Ct. Claims, 412. See *Buron v. Deaman*, 2 Exch. 167.

be *founded on a tort or a contract, to the same extent [*128] as by, and with all the consequences that follow from, the same act done by his previous authority. Such was precisely the distinction taken in the Year Book, 7 Hen. 4, fo. 35,—that if the bailiff took the heriot claiming property in himself, the subsequent agreement of the lord would not amount to a ratification of his authority, as bailiff at the time; but if he took it at the time as bailiff of the lord, the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by ANDERSON, Ch. J., in Godbolt's Reports, 109. 'If one have cause to distrain my goods, and a stranger, of his own wrong, without any warrant or authority given him by the other, takes my goods, not as servant or bailiff to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot; for once he was a trespasser and his intent was manifest.'" The ratification should also be with full knowledge of the facts, or with the purpose of the party, without inquiry, to take the consequences upon himself.¹ It is not conclusive that the party receives and appropriates a benefit from what is done,² or that he employs counsel to defend the trespasser,³ or that he takes steps in the direction of a compromise.⁴ These are acts which any one may do for another as a matter of friendship or favor merely, and

¹ *Wilson v. Tumman*, 6 M. & Gr. 236, 242. See, also, *Bird v. Brown*, 4 Exch. 756, 798. It was held in *Wilson v. Tumman* that if a sheriff had made himself liable as trespasser, the subsequent ratification of his act by the plaintiff would not make him a trespasser also; the sheriff not being his agent, but the agent of the law. Following this decision are *Tilt v. Jarvis*, 7 U. C. C. P. 145; *McLeod v. Fortune*, 19 U. C. Q. B. 98. But see *Murray v. Lovejoy*, 2 Cliff. 191, and 3 Wall. 1; *Knight v. Nelson*, 117 Mass. 458.

² *Lewis v. Read*, 13 M. & W. 834; *Adams v. Freeman*, 9 Johns. 118; *Dally v. Young*, 3 Ill. App. 89. The adoption must be clear and founded

on a clear knowledge of the tort committed. Here defendant was sued for false arrest in an action brought by another in his name. *Tucker v. Jerris*, 75 Me. 184.

³ *Hyde v. Cooper*, 26 Vt. 552; *Lewis v. Read*, 13 M. & W. 834. But, if a principal derives all the benefit derivable from his agent's tort and has the only interest in it, he is liable for the wrong. *Dunn v. Hartford*, etc. R. R. Co., 48 Conn. 434.

⁴ *Buttrick v. Lowell*, 1 Allen, 172; *Eastern Counties R. R. Co. v. Broom*, 6 Exch. 314. See *Woollen v. Wright*, 1 H. & C. 554.

⁵ *Roe v. Birkenhead*, etc., Railway Co., 7 Exch. 36; S. C. 7 Eng. L. and Eq. 546.

without contemplating further responsibility than is involved in the acts themselves.

But while the mere expression of approval of a wrong, or gratification at its commission, would not of itself constitute a legal injury, by relation or otherwise, there may, perhaps, be an exception to this general rule in the case of a wrong [*129] which one *does in excess of authority while in the employ of another. The question what the master's authority will authorize and cover is primarily one between the parties to the contract of service; and we see no reason to question that the master may enlarge it retrospectively, so as to make it embrace any action which the servant has done in reliance upon or under pretence of it. And it is difficult to distinguish an approval of the act from an adoption, under the circumstances indicated.

Questions of ratification often arise between the party to a suit and the officer who serves his process.¹ Whatever the officer is, by his process, commanded to do, is understood to be directed by the party himself, who causes the writ to be issued and delivered to the officer, that the exigency thereof may be complied with. Therefore, to the extent of the command, the party is responsible for what the officer shall do; but as the process would be a full protection if legal, it follows that there can be no liability of the party, because of obedience to the command of the process, unless the process itself was issued without authority. Supposing the process to be legal, there may still be liability on the part of the officer, if he shall overstep his authority, or shall take the goods of one person when commanded to take those of another, and in other like cases. But in these cases the party to the writ is neither morally nor technically responsible for the departure from the command of the writ, unless he advised or assisted the officer therein.² Mere neglect to interpose objection

¹ Perkin v. Proctor, 2 Wils. 382; Parsons v. Lloyd, 3 Wils. 341; Barker v. Braham, 3 Wils. 377; Currey v. Pringle, 11 Johns. 444; McGuinty v. Herick, 5 Wend. 240. See Wing v. Hussey, 71 Me. 185, on what constitutes participation in such case.

² Wilson v. Tuffman, 6 M. & G. 244; Whitmore v. Greene, 13 M. & W.

104; Walley v. M'Connell, 13 Q. B. 911; Averill v. Williams, 4 Denio, 295; Chapman v. Douglass, 5 Daly, 244; Abbott v. Kimball, 12 Vt. 551. See Bissell v. Gold, 1 Wend. 210; Taylor v. Trask, 7 Cow. 249; Syndacker v. Brosse, 51 Ill. 375. By taking out an execution and delivering it to the officer the party is responsible for the

is not sufficient, nor, it seems, is an expression of opinion that the officer's proceedings are warranted by law.¹ But where a plaintiff and his attorney were aware of all the facts concerning the levy upon property not belonging to the defendant in the writ, approved of it, and on request refused to consent to its being released, they were held jointly liable with the officer as trespassers.² Many cases go further than this, and hold the party *responsible where the officer has departed from [*130] the command of his writ, or from his instructions, if the party has afterwards approved what was done, and has taken, or is seeking to take, a benefit from it.³ Where, however, the plaintiff receives only such benefits as he would have been entitled to under a lawful service of the writ, he cannot, from this fact alone, be held to be a participant in the officer's trespasses.⁴

sale, and by doing this and taking the order on which an attachment is based he is held to have ratified the act of the officer in levying an attachment on the property. *Peterson v. Poir*, 67 Ia. 402. For levy by his direction under a judgment jurisdictionally void, the plaintiff is liable jointly with the officer. *Shaw v. Rowland*, 32 Kan. 154. If upon a void judgment an execution regular on its face is issued, the plaintiff is liable for the proceeds which come to his hands from a sale but not as for a conversion where the officer's action made the levy invalid but the plaintiff was not connected with the irregularity. *Gunz v. Heffner*, 33 Minn. 215. If a plaintiff directs service on specific property he is liable if the officer is a trespasser; otherwise if the process is simply given to the officer and he decides on the property to be seized. *Corner v. Mackintosh*, 48 Md. 374. For the omission of the officer to serve properly a valid writ or to allow the selection of an exemption, though in the presence of the plaintiff, the latter is not liable. *Michels v. Stork*, 44 Mich. 2. A sheriff wrongfully took money from the person of a

prisoner and creditors severally issued attachments against the money. The officers and creditors were held not jointly liable in tort. *Dahms v. Sears*, 13 Ore. 47.

¹ *Hyde v. Cooper*, 26 Vt. 552.

² *Cook v. Hopper*, 23 Mich. 511. A party who orders the sheriff to refuse sufficient bail and keep defendant in custody is liable. *Gibbs v. Randlett*, 58 N. H. 407.

³ See *Tompkins v. Haile*, 3 Wend. 406; *Root v. Chandler*, 10 Wend. 111; *Allen v. Crary*, 10 Wend. 349; *Davis v. Newkirk*, 5 Denio, 94; *Ball v. Loomis*, 29 N. Y. 412; *Leach v. Francis*, 41 Vt. 670; *Stroud v. Humble*, 2 La. Ann. 930; *Bonnel v. Dunn*, 28 N. J. 153; *Knight v. Nelson*, 117 Mass. 458; *Wetzell v. Waters*, 18 Mo. 896; *Nelson v. Cook*, 17 Ill. 443; *Syndacker v. Brosse*, 51 Ill. 357; *Beveridge v. Rawson*, 51 Ill. 504; *Deal v. Bogue*, 20 Penn. St. 228. Where party and officer pleaded jointly admitting taking, held jointly liable, as by the plea the party adopted the officer's course. *Taylor v. Ryan*, 15 Neb. 573.

⁴ *Hyde v. Cooper*, 26 Vt. 552. The case was one in which an officer had

[*131] *One method of ratification as between the party to the suit and the officer is by the former giving to the latter a bond of indemnity, or other security, against the consequences of his action.¹

proceeded to sell property on execution without sufficient notice. The plaintiff in the execution was sued in trespass as a participant in the wrong. It appeared that before the sale he had expressed the opinion that the notice was sufficient, and also that he received the money on execution. REDFIELD, Ch. J., "As a general rule, perhaps, where the mistake is one of fact, and such as makes the officer a trespasser, and the party knowing all the facts, consents to take the avails of a sale, or where he counseled the very act, which creates the liability of the officer, he is implicated to the same extent as the officer. But when the party does not direct or control the course of the officer, but requires him to proceed at his peril, and the officer makes a mistake of law in judging of his official duty, whereby he becomes a trespasser, even by relation, the party is not affected by it, even when he receives money, which is the result of such irregularity, although he was aware of the course pursued by the officer. He is not liable unless he consents to the officer's course, or subsequently adopts it. And if he does that, he cannot maintain an action against the officer for doing the act, and the consequence would be that, if receiving the avails of a sale on execution were to be regarded in all cases as amounting to a ratification of the conduct of the officer, in the sale, it must preclude the creditor from all suits against the officer on that account: which has never been so regarded. The party may always take money, which the officer informs him he has legally collected,

without assuming the responsibility of indorsing the perfect legality of the entire detail of the officer's official conduct in the matter.

"For if the officer is compelled to refund to the debtor, on account of his irregularity of procedure, that will not affect the right of the creditor to retain the money. He is still entitled to retain the money against the officer. And the party cannot claim the money of the creditor, without thereby affirming the sale. So that the creditor's accepting the amount of money, for which the property is sold, is no more a ratification of the conduct of the officer than if he took the money of the officer on any other liability. The money is the officer's, whether he was a trespasser or not, and he is, at all events, liable to the creditor. If the sale was irregular, that is his loss, and he must still pay the creditor; and accepting the money is but taking pay for the officer's liability to the creditor for his default in the sale if it was irregular. So that, in any view of the case, there is no ground of implicating the defendant."

The case of *Lewis v. Read*, 13 M. & W. 834, lays down the same doctrine. That was a case in which bailiffs distrained goods not belonging to the tenant and not on the demised premises. These were sold and the landlord received the proceeds. *Held*, not to make him liable unless he ratified the act of the bailiffs with knowledge of the irregularity, or chose, without inquiry, to adopt their acts and take upon himself all risks.

¹*Murray v. Lovejoy*, 2 Cliff. 191, and 3 Wal. 1; *Herring v. Hoppock*,

Participation by Attorneys. An attorney who delivers a writ to an officer for service does not personally assume any responsibility in respect thereto, except to this extent, that he is understood as directing the officer to proceed to obey the command of the writ. If, therefore, the writ is illegal, and the officer makes himself a trespasser in serving it, the attorney is liable as joint trespasser with him.¹ But if the officer exceeds the command of the writ, or does anything which its command, if legal, would not justify, the attorney is not responsible,² unless he counsels or assists in it, in which case his liability rests upon the same ground as that of any other participant in a trespass.³ If an attorney sues out an illegal writ, the party for whom he acts is so far identified with him in the proceedings that he is responsible for what is done under it;⁴ but the plaintiff is not responsible for any illegal action taken or directed by the attorney *which the plaintiff did not advise, consent to, [*132] or participate in, and which was not justified by any authority he had given.⁵

Wrongs by Deputies. Whenever an officer is authorized by law to appoint a deputy who shall be empowered to perform his

15 N. Y. 409, 413; *Root v. Chandler*, 10 Wend. 110; *Knight v. Nelson*, 117 Mass. 458; *Lewis v. Johns*, 34 Cal. 629; *Crossman v. Owen*, 62 Me. 528. It may be done in much less formal manner. See *Bishop v. Viscountess Montague*, Cro. Eliz. 824.

¹ *Burnap v. Marsh*, 13 Ill. 535.

² *Seaton v. Cordray*, *Wright* (Ohio), 102; *Averill v. Williams*, 1 Denio, 501; *Adams v. Freeman*, 9 Johns. 118; *Vanderbilt v. Turnpike Co.*, 2 N. Y. 479; *Ford v. Williams*, 13 N. Y. 577; *Cook v. Hopper*, 23 Mich. 511.

³ *Hardy v. Keeler*, 56 Ill. 152; *Cook v. Hopper*, 23 Mich. 511.

⁴ *Barker v. Braham*, 3 Wils. 368; *Bates v. Pilling*, 6 B. & C. 38; *Foster v. Wiley*, 27 Mich. 244; S. C. 15 Am. Rep. 185; *Newberry v. Lee*, 3 Hill, 623; *Armstrong v. Dubois*, 4 Keyes, 291. A plaintiff may be liable for his attorney's arresting a man on ex-

ecution without express instruction, from him. *Shattuck v. Bill*, 142 Mass. 56; *Guilleaume v. Rowe*, 94 N. Y. 268. See *Gearon v. Bank*, 50 N. Y. Super. Ct. 264.

⁵ *Freeman v. Roshier*, 13 Q. B. 780; *Ferguson v. Terry*, 1 B. Mon. 96; *Adams v. Freeman*, 9 Johns. 118; *Fox v. Jackson*, 8 Barb. 355; *Welsch v. Cochran*, 63 N. Y. 181; S. C. 20 Am. Rep. 519. On the other hand an attorney is not to be charged with participation in the evil intention of his client from the mere fact that he acts as attorney in a matter in which the client acts fraudulently. *McKinney v. Curtiss*, 60 Mich. 611. Nor in malicious prosecution from knowledge of his client's malice alone. Otherwise if he also knows there is no probable cause. *Peck v. Chouteau*, 91 Mo. 138; *Staley v. Turner*, 21 Mo. App. 244.

official duties, the rule is general that the principal shall respond for all the deputy's misfeasances or nonfeasances, while he acts by color of his appointment. Taking the case of the sheriff as an illustration, the rule is laid down very clearly in the numerous cases cited in the margin, that the sheriff is liable to the plaintiff in the writ for the deputy's misconduct or neglect to his injury.¹ But he is also liable for the deputy's misfeasances and nonfeasances which injure the defendant² or any third person.³ Nevertheless, the fact that the sheriff is responsible does not relieve the deputy, who is equally liable with the sheriff for all his positive misfeasances;⁴ but when a mere neglect to perform an official duty is complained of, only the sheriff can be sued, because only upon him does the official duty rest.⁵

General Rules of Joint Liability. Proceeding now to a particular examination of the rules of liability where the [*133] fault is *legally or otherwise chargeable to more than one person, it will be convenient to classify the wrongs into

¹ *Blunt v. Sheppard*, 1 Mo. 219; *Marshall v. Hosmer*, 4 Mass. 60; *Esty v. Chandler*, 7 Mass. 464; *M'Intyre v. Trumbull*, 7 Johns. 35; *Curtis v. Fay*, 37 Barb. 64; *Pond v. Leman*, 45 Barb. 152; *Mason v. Ide*, 30 Vt. 697; *Seaver v. Pierce*, 42 Vt. 325; *Stimpson v. Pierce*, 42 Vt. 334; *Whitney v. Farrar*, 51 Me. 418; *Remlinger v. Weyker*, 22 Wis. 333; *Clute v. Goodell*, 2 McLean, 193; *Prosser v. Coots*, 50 Mich. 262; *Grabenheimer v. Budd*, 3 South. Rep. 724 (La). He may be liable after his term has expired for acts of a deputy to whom he has turned over an unexecuted writ. *Ross v. Campbell*, 19 Hun, 615. He is liable for disobedience of instructions, though in good faith, by the deputy. *Smith v. Judkins*, 60 N. H. 127. He is not liable for the default of a special deputy selected by the plaintiff. *Skinner v. Wilson*, 61 Miss. 90, and see pp. *397-8 *post*.

² *Woodgate v. Knatchbull*, 2 T. R. 148; *Grunnell v. Phillips*, 1 Mass. 529; *Knowlton v. Bartlett*, 1 Pick. 270.

See *Morgan v. Chester*, 4 Conn. 387; *Waterbury v. Westervelt*, 9 N. Y. 598.

³ *Ackworth v. Kempe*, Doug. 41; *Campbell v. Phelps*, 17 Mass. 244; *Norton v. Nye*, 56 Me. 211; *Rider v. Chick*, 59 N. H. 50. But the sheriff is not liable to a third party who is merely injured as surety for the defendant by some misconduct of the deputy. *Harrington v. Ward*, 9 Mass. 251.

⁴ *Purrington v. Loring*, 7 Mass. 388; *Ross v. Philbrick*, 39 Me. 29; *Remlinger v. Weyker*, 22 Wis. 333.

⁵ *Cameron v. Reynolds*, Cowp. 408; *Hutchinson v. Parkhurst*, 1 Aik. 258; *Buck v. Ashley*, 37 Vt. 475; *Armistead v. Marks*, 1 Wash. (Va.) 325; *Rose v. Lane*, 3 Humph. 218; *Paddock v. Cameron*, 8 Cow. 212. The rule seems to be different in Massachusetts. *Draper v. Arnold*, 13 Mass. 449. On his special promise to pay money collected on execution the deputy may be held. *Tuttle v. Love*, 7 Johns. 470; *Rose v. Lane*, 3 Humph. 218; *Abbott v. Kimball*, 19 Vt. 55'.

those of intent and those not of intent, inasmuch as the existence of wrongful intent is in many cases of the highest importance.

1. **Wrongs Intended.** Where several persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it under circumstances which fairly charge them with intending the consequences which follow, it is a very reasonable and just rule of law which compels each to assume and bear the responsibility of the misconduct of all.¹ To require the party injured to ascertain and point out how much of the injury was done by one person and how much by another, or what share of responsibility is fairly attributable to each as between themselves, and to leave this to be apportioned among them by the jury according to the mischief found to have been done by each, would, in many cases, be equivalent to a practical denial of justice. The law does not require this, but on the other hand permits the party injured to treat all concerned in the injury as constituting together one party, by their joint co-operation accomplishing certain injurious results, and liable to respond to him in a gross sum as damages.²

But while the law permits all the wrong-doers to be proceeded against jointly, it also leaves the party injured at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy regardless of the participation of the others. While the wrong is joint it is also in contemplation of law several; the wrong of one man in beating another is not the less his personal wrong because of a third person having held the assaulted party while another delivered the blows, or because still others stood by, and by force or threats pre-

¹Miller v. Fenton, 11 Paige, 18; Nelson v. Cook, 17 Ill. 443; Turner v. Hitchcock, 20 Iowa, 310; McManus v. Lee, 43 Mo. 206; Wallace v. Miller, 15 La. Ann. 449; Lewis v. Johns, 34 Cal. 629; Shepherd v. McQuilkin, 2 W. Va. 90; Woodbridge v. Conner, 49 Me. 353; Brown v. Perkins, 1 Allen, 89; Barden v. Felch, 109 Mass. 154; Johnson v. Barber, 10 Ill. 425.

²Page v. Freeman, 19 Mo. 421;

Wright v. Lathrop, 2 Ohio 33; Hawkins v. Hatton, 1 N. & McC. 318; Knickerbacker v. Colver, 8 Cow. 111; Knott v. Cunningham, 2 Sneed, 204; McGehee v. Shafer, 15 Texas, 198; Turner v. Hitchcock, 20 Iowa, 310; Wheeler v. Worcester, 10 Allen, 591. A provocation received by one may be proved in mitigation of damages in an action against several defendants for a joint assault. Davis v. Franke, 33 Gratt. 413.

[*134] vented *the intervention of the police. The officer who serves a void writ is not the less an individual wrong-doer because of the magistrate being liable for having issued it. And while in such cases the person injured may pursue all, so he may pursue any number of those who are legally chargeable with the wrong; if one is sued alone, it is no defense to him that others are not brought in to share the responsibility; if all are sued, one cannot excuse himself by showing the insignificance of his participation as compared with that of others.¹ The rules regarding remedies which are applied to breaches of contracts are obviously inapplicable here. When contracts are distinct, though they may be as intimately related as are contracts for the different classes of work on the same building, the breach of both cannot be redressed in the same suit, because neither contractor is legally concerned with the conduct of the other, and to unite a controversy with each in one action would only breed confusion and difficulty, since the issues must be distinct, and separate results must be reached in the judgment. On the other hand, if two jointly undertake the work, it is the right of both to be made parties when complaint is made of non-performance; the other party has accepted their joint undertaking, and he cannot elect to separate in his suit those who have not consented to sever in their contract. The case of wrong-doers is wholly dif-

¹ *Farebrother v. Ansley*, 1 Camp. 343; *Wilson v. Milner*, 2 Camp. 452; *Pitcher v. Bailey*, 8 East, 171; *Booth v. Hodgson*, 6 T. R. 405; *Merryweather v. Nixan*, 8 T. R. 186; *Vose v. Grant*, 15 Mass. 505; *Wheeler v. Worcester*, 10 Allen, 591; *Campbell v. Phelps*, 1 Pick. 62; *Wilford v. Grant*, *Kirby*, 114; *Thweatt v. Jones*, 1 Rand. 328; *Dupuy v. Johnson*, 1 Bibb, 562; *Acheson v. Miller*, 18 Ohio, 1; *Wallace v. Miller*, 15 La. Ann. 449; *Moore v. Appleton*, 26 Ala. 633; *Rhea v. White*, 3 Head, 121; *Murphy v. Wilson*, 44 Mo. 313; *Silvers v. Nerdlinger*, 30 Ind. 53; *Bishop v. Ely*, 9 Johns. 294; *Williams v. Sheldon*, 10 Wend. 654; *Mayne v. Griswold*, 3 Sandf. 463; *Blanchard v. Burbank*, 16 Ill. App. 375.

The plaintiff may even bring different forms of action against the different participants in the wrong; as trespass against one, trover against another, and so on. *DuBose v. Marx*, 52 Ala. 506. When separate actions are brought for a joint trespass, plaintiff can recover against one or more though others be acquitted and if separate judgments are obtained he make his election to take the larger judgment or pursue the solvent party and when made he is concluded. This is a privilege of which he cannot be deprived. He can have only one satisfaction but the judgment satisfied must be the one he has elected to take. *Power v. Baker*, 27 Fed. Rep. 396.

ferent; the party injured has not assented to their action; he has not agreed what the consequences shall be if one or more shall trespass upon his rights, nor is he morally under obligation to pursue his remedy in any particular form because of that form being most to their convenience. Whatever course is seemingly most for his interest, it is just that he should be at liberty to select.

*Nor, after suit is brought, can there be any apportion- [*135] ment of responsibility, whether the suit be against one or against all. Each is responsible for the whole, and the degree of his blamableness as between himself and his associates is immaterial.¹ When the contributory action of all accomplishes

¹The huntsman who trespasses upon the plaintiff's grounds with his dogs, followed by a great number of people on foot and on horseback, who trample down and destroy crops, is responsible for the whole injury. *Hume v. Oldacre*, 1 Stark. 351. If action is brought against one of several wrong-doers, the judgment should be what the most culpable ought to pay, whether the defendant be that person or not. *Bell v. Morrison*, 27 Miss. 68. *Huddleston v. West Bellevue*, 111 Pa. St. 110. At least as to compensatory damages. *McCarthy v. De Armit*, 99 Pa. St. 63. In defending trespass to try title one may defend as to so much of the tract as he claims and disclaim as to the rest but, if instead of so doing, he with other defendants denies plaintiff's right to whole tract and all the defendants are beaten, then he becomes liable jointly with his co-defendants and severally for the result of the trespass. *Walker v. Read*, 59 Tex. 187. In trespass against two or more there can be but one assessment of damages, and it must be for the same amount against all who are found guilty. If a case for exemplary damages is made against one and not against the others, he may dismiss as to the latter and recover his exemplary

damages against the former. *Pardridge v. Brady*, 7 Ill. App. 639. The rule as to this is otherwise in Pennsylvania. If punitive damages are sought, they must be assessed only as the most innocent defendant is liable for them. If he is not liable at all for such none should be given. *McCarthy v. DeArmit* 99 Pa. St. 63.

Plaintiff was entitled to the use of 400 inches of water in a stream. By the action of the several defendants independently he was deprived of the use of so much water. No one of them perhaps by his use of the water would have so reduced the amount as to injure plaintiff. *Held*, that they were jointly liable to him. *Hillman v. Newington*, 57 Cal. 56. So where water from defendant's roof negligently escaped with water from another source into plaintiff's cellar adjoining, the defendant is liable for the whole damage. *Slater v. Mersereau*, 64 N. Y. 138. But where several independently pollute a stream with sewage, each from his own premises, each is only liable for the damage he has done to a lower abutter, not each for all the damage done, distinguishing the case from one of direct injury from concurrent acts. *Chipman v. Palmer*, 77 N. Y. 51.

a particular result, it is unimportant to the party injured that one contributed much to the injury and another little; the one least guilty is liable for all, because he aided in accomplishing all.¹

To charge one with participation in a wrong, it is generally essential that he should personally have contributed to it; but this, as has already been shown, may have been by advising or procuring it to be done, when he did not otherwise take part in it. In some cases, also, the ratification of the act is sufficient; and in all cases where one has obtained possession of the property of another without right, he is a wrong-doer in retaining it, irrespective of any questions regarding the liability of others. It was once held in Massachusetts that a sheriff who was not present when his deputy, in the service of a writ, committed a trespass, could not be held liable as a joint trespasser with him;² but the better doctrine is, that the sheriff, by construction of law, is always present with the deputy who bears his process, and is legally responsible for his acts.³ In New York, 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 were all held responsible as joint wrong-doers.⁴ In Iowa, where an officer attached goods in favor of several plaintiffs, and [*136] by virtue of several writs, the plaintiffs in these writs, though present together at the time of the levy, were held not liable to a joint action, unless concert and co-operation between them was made out.⁵ But this conclusion may well be doubted. In Massachusetts, where different creditors, acting separately and without concert, caused their creditor to be arrested on their several writs by the same officer, their joint liability was affirmed on reasons that seem conclusive.⁶ And concert and co-

¹ *Berry v. Fletcher*, 1 Dill. 67, 71. Where a jury, in an action against several wrong-doers, return a verdict for a certain amount, and then proceed to apportion it among the defendants, this apportionment is a nullity. *Currier v. Swan*, 63 Me. 323.

² *Campbell v. Phelps*, 1 Pick. 62. See *Moulton v. Norton*, 5 Barb. 286.

³ *Morgan v. Chester*, 4 Conn. 387; *King v. Orser*, 4 Duer, 431; *Waterbury v. Westervelt*, 9 N. Y. 593; *Balme v. Hutton*, 9 Bing. 471, 474.

⁴ *Sprague v. Kneeland*, 10 Wend. 161. If one sells and another buys goods, knowing of the claim of another, the latter may hold them jointly liable for a conversion. *Babcock v. Gill*, 10 Johns. 287.

⁵ *Eddy v. Howard*, 23 Iowa. 175. Compare *Ellis v. Howard*, 17 Vt. 330.

⁶ *Stone v. Dickinson*, 5 Allen, 29. BIGELOW, Ch. J., in delivering the opinion of the court, instances the case of the levy of several writs in favor of different parties on the same

operation may doubtless make a joint wrong of several acts not otherwise connected,¹ and which, without co-operation, could only be treated as independent trespasses.²

When the suit is against several joint wrong-doers, the judgment must be for a single sum against all the parties found responsible.³ As it may happen that this judgment may not be against all the parties liable, either because the plaintiff was not at first aware of the full extent of the combination which has injured him, or because he was unable, when first suing, to obtain service on all the parties connected with it, it becomes a question of importance whether, after thus proceeding against a part, he may afterwards sue others. And the question is the same if, having voluntarily elected to pursue a part only, he finds, after obtaining judgment, that the pecuniary responsibility is not what he had supposed.

Whatever may have been the reason for proceeding at first against less than the whole, it is conceded on all sides that a previous suit against one or more is no bar to a new suit against the

goods, by the same officer, as one in which a joint liability would be unquestionable. Where a sheriff wrongfully, while goods are in his possession under a previous wrongful levy, attaches them again, he and the attaching creditor are jointly liable. *Cox v. Hall*, 18 Vt. 191.

¹ See *Higy v. Williams*, 16 Johns. 315.

² Of the necessity of co-operation in some form to constitute the joint wrong, see *Bard v. Yohn*, 26 Penn. St. 482. Mere presence is not sufficient. *Berry v. Fletcher*, 1 Dill. 67. *Hilmes v. Stroebel*, 59 Wis. 74; *Blue v. Christ*, 4 Ill. App. 351. A mere purchaser at a sale by the officer who receives from him immediate possession is not responsible in trespass. His purchase does not of itself make him a participant in the wrongful seizure, and he is not made a trespasser by relation. He and the officer are not jointly liable for a wrongful seizure. *Gloss v. Black*, 91 Pa. St. 418. For two

separate injuries, one committed by one party and one by another, there is no joint liability. *Himes v. Jarrett*, 2 S. E. Rep. 393 (S. C.); *Cooper v. Blair*, 14 Oreg. 255. See *Ray v. Light*, 34 Ark. 421. A brakeman put a young lad on a train, prevented his getting off till the train had gone some miles. If the conductor was present directing and consenting to the brakeman's act, they were joint trespassers. If he was not present so directing but afterward knowing of it refused to stop the train, he was himself a trespasser, but not jointly with the brakeman. "When two or more commit separate trespasses, there is no joint liability." *Drake v. Kiely*, 93 Pa. St. 492.

³ In South Carolina, at an early day, the practice of apportioning damages among wrong-doers, by the verdict, appears to have been sanctioned and established. *Smith v. Singleton*, 2 McMul. 184. But see *Berry v. Fletcher*, 1 Dill. 67.

others, even though the first suit be pending, or have [*137] proceeded *to judgment when the second is brought.

The second, or even a subsequent suit may proceed until a stage has been reached in some one of them at which the plaintiff is deemed in law to have either received satisfaction, or to have elected to rely upon one proceeding for his remedy to the abandonment of the others.

But the authorities are not agreed as to what that stage is. The rule laid down in *Brown v. Wootton* is that a recovery and judgment in a suit against one joint wrong-doer is a bar to any further action against others. The action was trover for the conversion of certain plate. The defendant pleaded that the plaintiff had theretofore brought suit for the same conversion against one J. S., and had recovered judgment in that suit, and taken the body in execution. "All the court held the plea to be good, for the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced *in rem judicatum* and to certainty, which takes away the action against the others; and therefore Popham said: If one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason *e contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other, and the alleging that he hath the one in execution for this cause is not an answer to the purpose; and the difference between this case and the case of debt upon an obligation against two, is because there every one is chargeable and liable to the entire debt, and therefore a recovery against one is not a bar against the other until satisfaction. FENNER said: That in case of trespass, after the judgment given, the property of the goods is changed, so as he may not seize them again. Wherefore, by all the court *nullo contradicanti*, nor any of the defendant's counsel being there, it was adjudged for the defendant."¹

This case has been followed in England,² but, except in Vir-

¹ *Brown v. Wootton*, Cro. Jac. 73; *Yelv.* 67.

² *Buckland v. Johnson*, 15 C. B. 145; *King v. Hoare*, 13 M. & W. 494, 504;

Brinsmead v. Harrison, L. R. 6 C. P. 584. See *Adams v. Ham*, 5 U. C. Q. B. 292; *Sloan v. Creasor*, 23 U. C. Q. B. 127.

ginia and Rhode Island,³ it has not met with favor in this *country. It was expressly disapproved by the [*138] Supreme Court of New York, when presided over by Chief Justice KENT, and was pronounced by him to be a departure from the earlier English decisions.⁴ The rule laid down by that eminent jurist, and which has since been generally followed in this country, is, that the party injured may bring separate suits against the wrong-doers, and proceed to judgment in each; and that no bar arises as to any of them until satisfaction is received.⁴ In Tennessee it is agreed that a judgment against one joint wrong-doer is not of itself a bar to suits against the others; but it is said that "the more reasonable doctrine, on the other hand, is, that as each of the wrong-doers is liable for his own act, separate actions may be brought at the same time, or successively, against each of the several trespassers, in each of which the plaintiff may proceed to judgment. But as he can claim or enforce only one satisfaction for the same injury, he must elect against which of the several he will proceed to execution for the satisfaction of his damages. If the several assessments vary in amount, he may elect to take the larger sum, or, if the defendants be not all solvent, he may elect to proceed against the solvent party. And such election, followed by actual satisfaction of that particular judgment, will preclude the plaintiff from proceeding against either of the other defendants upon the judgments recov-

¹ *Wilkes v. Jackson*, 2 H. & M. 355.

² *Hunt v. Bates*, 7 R. I. 217. A town being liable by statute for negligently leaving in a highway objects tending to frighten horses, and an individual for the same matter being liable at common law, they are not joint tortfeasors, so that if a judgment recovered against the latter has been proved against his bankrupt estate, the injured person is not estopped from pursuing the town. He may look to either till indemnified. *Bennett v. Fifield*, 13 R. I. 139.

³ *Livingston v. Bishop*, 1 Johns. 290, followed *Knickerbacker v. Colver*, 8 Cow. 111.

⁴ *New York*: *Livingston v. Bishop*, 1 Johns. 290. *Kentucky*: *Elliott v.*

Porter, 5 Dana, 209; *Sharp v. Gray*, 5 B. Mon. 4; *United Society v. Underwood*, 11 Bush, 265; S. C. 21 Am. Rep. 214. *Massachusetts*: *Elliott v. Hayden*, 104 Mass. 180; *Knight v. Nelson*, 117 Mass. 458. See *Stone v. Dickinson*, 5 Allen, 29; *Brown v. Cambridge*, 8 Allen, 474. *West Virginia*: *Griffie v. McClung*, 5 W. Va. 181. *Connecticut*: *Morgan v. Chester*, 4 Conn. 387; *Ayer v. Ashmead*, 31 Conn. 447. *Ohio*: *Wright v. Lathrop*, 2 Ohio, 33. *Vermont*: *Sanderson v. Caldwell*, 2 Aik. 195; *Stewart v. Martin*, 16 Vt. 397. *Iowa*: *Turner v. Hitchcock*, 20 Iowa, 810. *Texas*: *McGehee v. Shafer*, 15 Texas, 198. *Illinois*: *Union, etc., Co. v. Shacklett*, 19 Ill. App. 145.

cred against them, except for the costs of the respective cases, which he may enforce the collection of by execution."¹ In some other States it is held that when execution is taken [*139] out by the plaintiff on one judgment, he has thereby made his final election. "Hence, a final judgment and an execution, or an order for an execution against one of several joint trespassers is a discharge of all the others."²

The doctrine which prevails in the majority of the States has met with the approval of the federal courts,³ and there seems to be no good reason why it should not be generally accepted and followed.⁴

Enforcing satisfaction of his damages by the collection of one judgment, will not preclude the plaintiff from collecting his costs in other judgments. He is entitled to take out executions for their collection.⁵

It is to be observed in respect to the point above considered, where the bar accrues in favor of some of the wrong-doers by reason of what has been received from or done in respect to one or more others, that the bar arises not from any particular form

¹ *Knott v. Cunningham*, 2 Sneed, 204, 210. This is a little blind, but the inference from it seems warranted, that if execution on one judgment proves unavailable, it may be returned, and one taken out on another. The earlier case of *Christian v. Hoover*, 6 Yerg. 505, is in accord with the New York cases and the general current of American authority.

² *Indiana*: *Allen v. Wheatley*, 3 Blackf. 332; approved in *Fleming v. McDonald*, 50 Ind. 278. *Maine*: *White v. Philbrick*, 5 Me. 147. *Alabama*: *Golding v. Hall*, 9 Port. 169; *Blann v. Crocheron*, 20 Ala. 320. *Missouri*: *Page v. Freeman*, 19 Mo. 421. *Michigan*: *Boardman v. Acer*, 18 Mich. 77. Compare *Brady v. Whitney*, 24 Mich. 154; *Kenyon v. Woodruff*, 33 Mich. 310. If judgment is taken against one alone, tender of payment upon that is no bar, unless the plaintiff elects to receive it. *Blann v. Crocheron*, 20 Ala. 320.

³ *Murray v. Lovejoy*, 2 Cliff. 191; S. C. 3 Wal. 1.

⁴ Perhaps if a levy on chattels has been made, sufficient to satisfy the judgment, that should at least suspend all further remedy for the time. See *Kenyon v. Woodruff*, 33 Mich. 310; *F. & M. Bank v. Kingsley*, 2 Doug. (Mich.) 379; *Freeman on Judgments*, § 475, and cases cited.

⁵ *Windham v. Wither*, Stra. 515; *Livingston v. Bishop*, 1 Johns. 290, 293; *Knickerbacker v. Colver*, 8 Cow. 111; *First Nat. Bank v. Piano Co.*, 45 Ind. 5; *Ayer v. Ashmead*, 31 Conn. 447. See *Lord v. Tiffany*, 98 N. Y. 412. In a joint action for libel several judgments were rendered. The smaller judgment was paid. Upon payment of costs the other defendant was entitled to have the judgment against him satisfied. *Breslin v. Peck*, 38 Hun, 623.

that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent. Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar as to all.¹ But it has been *decided in Indiana that where the wrong consisted [*140] in the conversion by two of certain specific items of prop-

Turner v. Hitchcock, 20 Iowa, 310; Tompkins v. Clay St. R. R. Co., 66 Cal. 164; Urton v. Price, 57 Cal. 270; Lord v. Tiffany, 98 N. Y. 412. Release to one releases all. McGehee v. Snafer, 15 Tex. 198, although the release expressly stipulates that the other defendants should not be discharged. Mitchell v. Allen, 25 Hun, 543. Note taken from one, but not paid, is no satisfaction. Ayer v. Ashmead, 31 Conn. 447, lays down the general rule. See Allison v. Connor, 36 Mich. 283; Gilpatrick v. Hunter, 24 Me. 18; Ellis v. Bitzer, 2 Ohio, 89; Bronson v. Fitzhugh, 1 Hill, 185. A partial satisfaction by one is admissible in mitigation of damages sought to be recovered against another. Knapp v. Roche, 91 N. Y. 329. In trover against two, after judgment against one and for the other defendant, plaintiff discontinued as to the former by unsealed agreement and sued the other again. *Held*, that the discontinuance was no bar. Nothing less than a satisfaction operates as a discharge. "Neither recovery of judgment unsatisfied in whole or in part, nor release of one on receipt of partial satisfaction, where it is expressed in the release that the sum paid is received only in part satisfaction, operates as a bar." Sloan v. Herrick, 40 Vt. 227. "When a technical release under seal, imparting consideration, is given, it is a bar to further action. If the contract is not one from which the law deems conclusively that the injured party has been satisfied for the wrong done, then a

question of fact arises whether what has been received is in full. If not, it is only a satisfaction *pro tanto* against another. This doctrine is sustained by the weight of authority in all cases where the amount of the demand is capable of proof and computation, though there is a conflict where damages are mainly in the discretion of the jury as in case of assault." This held in a case where an agreement unsealed for \$200 was given in release of one, and was held only a release *pro tanto* against the other. Ellis v. Esson, 50 Wis. 138. Where a convict in the penitentiary received injuries while employed by contractors, under charge of the penitentiary officers, and he presented to the legislature a petition for relief, and a sum was granted to and received by him: *Held*, that this was a bar to any suit against the contractors, as the relief received from the State implied that the State was a joint wrong-doer. Metz v. Soule, 40 Iowa, 236. Plaintiff sued H. for libel for publishing three articles in a paper. Two other articles were published in the same paper. He sued defendants for publishing the five, the first three being the same as those covered by the suit against H. After judgment against H. had been paid, defendants moved to vacate the judgment against them. *Held*, that the plaintiff suffered more than a single injury; that the publication twice by defendants alone of the matter previously published by them and H. jointly was a new

erty, it was competent to settle with one on his returning a part of what had been taken, and to proceed afterward against the other.¹ The decision was expressly confined to the specific facts, and could not safely be carried very far. But where property has been converted, a settlement in respect to a part of it is no bar to a suit for the conversion of the remainder.²

2. Wrongs not Intended. Passing now to the class of unintended wrongs, we find them to consist most commonly in the neglect 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 cases several persons may be found blamable, but if it does not follow that all can be held liable to the party wronged. The rule is general in such cases, that the legal wrong is chargeable only to the party who, by his contract, assumed the duty, or upon whom the law imposed it; in other words, as the breach of duty constitutes the wrong, the person who in legal contemplation, is wrong-doer is the person who was burdened with the duty, and who has failed in its performance.³ The exceptions to the rule must be of those cases in which the act or omission constitutes in itself a positive wrong, independent of any conventional or statutory duty; in which case the party chargeable with it may be held liable, whether subject to the conventional or statutory duty or not. An illustration may, perhaps, make this point sufficiently plain.

A common carrier undertakes for the transportation of goods

and distinct injury; that so much of the verdict as was based on those publications was not satisfied by the payment of the judgment against *H. Woods v. Pangburn*, 75 N. Y. 495.

¹ *Fitzgerald v. Smith*, 1 Ind. 310.

² *McCrillis v. Hawes*, 88 Me. 566; citing *Benbridge v. Day*, 1 Salk, 218. There are statutes in some States which permit parties to settle with one or more who are jointly liable to them, without discharging the others. Settlement with one not liable was held, in *Turner v. Hitchcock*, 20 Iowa, 310, not to bar suits against

those who were. Citing *Wilson v. Reed*, 3 Johns. 175.

³ In an action of tort for malpractice growing out of a contract for professional services of a firm of physicians, only the negligent partner was sued. *Held*, that as the gist of the action was the breach of the contract, all persons jointly liable on the contract must be joined. *Whittaker v. Collins*, 34 Minn. 299. But where the gist is negligence on the part of the occupants of a building in leaving an elevator shaft unprotected, the non-joinder of one is immaterial. *Fisher v. Cook*, 17 N. E. Rep. 763 (Ill.)

from the Mississippi to the seaboard. His duty by law is to carry safely and deliver within a reasonable time, and if he fails to do so he can only excuse himself by showing that the delays or injuries have resulted from the act of God or of the public enemy. Let it be supposed that the servants of the carrier are negligent in the performance of their tasks; they do not load the *goods promptly, or they delay trains unreasonably on the [*141] road, and in consequence, when the goods reach their destination, an advantageous market that should have been secured is lost. On these facts it is plain that there has been a breach of the duty owing to the consignor; and a breach, too, for which the servants of the carrier are blamable. But when we proceed to inquire whose duty has not been observed, it is equally plain that it is not that of the servant, for with him the consignor had entered into no relations whatever. The servant owes duties to the carrier, his master, by whom he may be called to account for his negligence; but no third party by whom he has not been employed, can presume to hold him to responsibility for unfaithful service. The consignor must, therefore, find his remedy against the party he employed, and the latter, if he has trusted to negligent servants, must assume the responsibility.¹

The case supposed is one of mere neglect to do with legal promptness what duty required the master to do or have done. On the other hand, if the servant by some distinct and positive wrongful act shall destroy or injure the goods, there is in contemplation of law a wrong not only by the master but by the servant also: by the master, because his conventional duty to carry and deliver safely the goods entrusted to him has failed in performance, and by the servant because, while the wrong done by him is a breach of his contract relations with the master, it would equally be a wrong to the owner of the goods if no such contract relations existed. In making out a cause of action it might be necessary to show the duty in order to bring the responsibility home to the party who was not an active participant in the injury; but whoever was personally instrumental would be responsible, whether he had assumed any conventional duty or not. The obligation to abstain from positive wrongs rests upon every one, and does not depend upon contracts or other circumstances.

A similar illustration may be drawn from the class of duties

¹ Shearm. & Redf. on Neg., § 111.

springing from the ownership of lands. One may have upon his lands an excavation, which leaves the land of his neighbor without sufficient collateral support. If the land in this condition is left in charge of his servant, who understands the danger to the neighbor's interests, he ought, perhaps, considering [*142] the *question as one of moral obligation, to take such steps as would prevent the threatened injury; but the legal duty to do so is imposed not on him, but on his master, and the master alone can be looked to, in case injury should occur. But if the servant himself, in the absence of the master, were to dig the pit, his personal responsibility for the resulting injury might be insisted upon. The distinction here is between an injury which might have been avoided by active steps which the law did not require of the servant, and an injury which his negligence has caused. Negligence is always unlawful.¹

The case of carriers of persons is a conspicuous instance in which the failure of a servant to observe due care may constitute a legal wrong to third parties, and render him and his master jointly responsible. In undertaking to carry, the carrier assumes the duty to carry safely, so far as the highest vigilance will enable him to do so. A railroad company, acting as such carrier, employs an engineer, whose duty to the company is to run the train with skill and prudence. Now, although there are no contract relations between the engineer and the person who is to be carried, yet, when an individual is placed in a position of responsibility, and the property, and especially the persons of others, are entrusted to his prudence, his skill, and his fidelity, so that his negligence may inflict serious, and, perhaps, irreparable injury, it is reasonable that the law should make it the right of every person thus circumstanced to demand from him a vigilance corresponding to the responsibility. And this we understand to be the rule.² The negligence in such cases is that of both master and

¹ Richardson v. Kimball, 28 Me. 463. A. owned a boiler and ran a saw mill. B. and C. entered into partnership with him to build and run a grist mill, using A.'s boiler certain days in the week. On the other days A. used it to run his saw mill. On one of these latter it exploded. B. and C. owned a quarter interest in the boiler. *Held*, B. and C. were not

liable for the injury caused by the explosion. Young v. Bransford, 12 Lea, 232.

² Hutchinson v. York, etc. R. R. Co., 5 Exch. 343, 350, per ALDERSON, B.; McMillan v. Saratoga, etc. R. R. Co., 20 Barb. 449, 454, per ALLEN, Ch. J. See Shearm. & Redf. on Neg. §§ 112, 115.

servant, and the liability, as in other cases where two or more are chargeable with a wrong, may be enforced in a suit against one or against both.¹ The joint liability would seem to be still *plainer where the servant is guilty of a positive [*143] act of misfeasance to the property or person being carried. When a train conductor puts a man off the cars without justification, or commits an assault on a passenger in the cars, or runs his train past a station where passengers are to be left, or is guilty of any other misconduct of a like nature, the person injured is under no obligation to look beyond him for redress. Nevertheless, he may, at his option, unite the railroad company as a defendant, or sue it separately.² And in the case of carriers of persons, the obligation not to expose life or limb to injury by negligence is one which is independent of contract relations, and exists, whether a consideration has been received for the carriage or not. The duty to carry safely one who is received for carriage is a public duty, and a contract or the payment of fare is not necessary to create it.³ This is the rule which has been applied to railroad companies, and it should be the rule governing

¹ *Cary v. Webster*, 1 Str. 480; *Wilson v. Peto*, 6 Moore, 47; *Johnson v. Barber*, 10 Ill. 425; *Carman v. Steubenville, etc., R. R. Co.*, 4 Ohio, (N. S.) 399; *Suydam v. Moore*, 8 Barb. 358, 363; *Bailey v. Bailey*, 61 Me. 361; *Wright v. Wilcox*, 19 Wend. 843; *Montfort v. Hughes*, 3 E. D. Smith, 591. Perhaps the courts of Massachusetts would not sustain a joint liability, unless the master was present and participating. See *Parsons v. Winchell*, 5 Cush. 592. In New York the doctrine of the text is considered unquestionable. See *Phelps v. Wait*, 30 N. Y. 78. Defendant furnished horses and wagon and another man drove them to carry passengers for him. They divided the money so earned. The driver in the absence of defendant negligently ran over the plaintiff. Defendant held liable for the negligence of his associate in the common enterprise. *Stroher v. Elting*, 97 N. Y. 102. The Massachu-

setts doctrine was followed in *Campbell v. Portland Sugar Co.*, 62 Me. 552; S. C. 16 Am. Rep. 503.

² *Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202; S. C. 2 Am. Rep. 39; *Burnham v. Grand Trunk R. R. Co.*, 63 Me. 298; S. C. 18 Am. Rep. 220; *Priest v. Hudson Riv. R. R. Co.*, 40 How. Pr. 456; *Coleman v. N. Y. & N. H. R. R. Co.*, 106 Mass. 160; *Redding v. South Carolina R. R. Co.*, 3 S. C. Rep. 1; S. C. 16 Am. Rep. 681; *Baltimore, etc., R. R. Co. v. Blocher*, 27 Md. 277; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465; *Pennsylvania R. R. Co. v. Vandiver*, 43 Penn. 365; *Brokaw v. New Jersey R. R. Co.*, 32 N. J. 328; *Kline v. Central Pacific R. R. Co.*, 39 Cal. 587.

³ *Nolton v. Western R. R. Co.*, 15 N. Y. 444; *Derby v. Reading R. R. Co.*, 14 How. 468; *Jacobus v. St. Paul R. R. Co.*, 20 Minn. 125; *Marshall v. York, etc., Railway Co.*, 11 C. B. 655. See cases Ch. XX, page *642.

individuals who are not common carriers. If a person volunteers, through himself or his servants, to transport others by modes or under circumstances calculated to expose them to danger, he should be held to assume the duty of care in so doing, and the duty to make compensation, in case he should become the instrument of a negligent injury to his charge.

The case of a libel in a newspaper may give us a further illustration of joint and several liability for a tort. A libel may be written by a subordinate and published in the paper without the knowledge of the proprietor, but the proprietor will nevertheless be responsible, though the publication may have been entirely against his desire, and offensive to him when brought to

[*144] his *knowledge. The publication of the paper is in law his act, whether managed by him in person or intrusted to agents; and if he fails to exclude libelous matter he fails in that supervision of his own business which is due to the public, and he cannot excuse himself by showing that he did not authorize a wrong which it was his duty to guard against and render impossible.¹ But the subordinate is responsible also, because he, like every other person, is under obligation at all times and in all positions to abstain from inflicting the injury of defamation.

A corporation has been held responsible to persons to whom its agent, acting within the apparent scope of his powers, had issued fraudulent certificates of stock, whereby they were defrauded.² The responsibility of both principal and agent here would seem unquestionable, the agent being the active wrongdoer and the principal responsible for his acts.

Contribution and Indemnity as Between Wrong-Doers. As

¹ *Dunn v. Hall*, 1 Ind. 344; *Buckley v. Knapp*, 48 Mo. 152; *Perrett v. Times Newspaper*, 25 La. Ann. 170; *Dole v. Lyon*, 10 Johns. 446; *Wilson v. Noonan*, 27 Wis. 598.

² *New York & N. H. R. R. Co. v. Schuyler*, 17 N. Y. 593; *Same v. Same*, 84 N. Y. 30. See *Bridgeport Bank v. N. Y. & N. H. R. R. Co.*, 30 Conn. 231. From failure to keep a highway in repair whereby injury is suffered, one highway commissioner may be

liable, although the negligence is that of the three commissioners. Not being a corporation, there is no reason for making an exception to the general rule that any one of several wrongdoers may be sued. *Babcock v. Gifford*, 29 Hun, 186. Distinguishing *Bassett v. Fish*, 75 N. Y. 303, where school trustees were held not individually liable for negligence because they were a body corporate.

under the rules already laid down the party wronged may, at his election, compel any one of the parties chargeable with the act, or any number less than the whole, to compensate him for the injury, it becomes a consideration of the highest importance to the person or persons thus singled out and compelled to bear the loss, whether the others who were equally liable may be compelled to contribute for his relief. On this subject there is a general rule, and there are also some very important exceptions. The general rule may be found expressed in the maxim that no man can make his own misconduct the ground for an action in his own favor. If he suffers because of his own wrong-doing, the law will not relieve him. The law cannot recognize equities as springing from a wrong in favor of one concerned in committing it.¹

*But there are some exceptions to the general rule which [*145] rest upon reasons at least as forcible as those which support the rule itself. They are of cases where, although the law holds all the parties liable as wrong-doers to the injured party, yet as between themselves some of them may not be wrong-doers at all, and their equity to require the others to respond for all the damages may be complete. There are many such cases where the wrongs are unintentional, or where the party, by reason of some relation, is made chargeable with the conduct of others.

A case in point is where a railroad company is made to pay damages for an injury caused by the carelessness of one of its servants." Here the injured party may justly hold both the

¹ *Merryweather v. Nixan*, 8 T. R. 166; *Pearson v. Skelton*, 1 M. & W. 504; *Wooley v. Batte*, 2 C. & P. 417; *Adamson v. Jarvis*, 4 Bing. 66; *Colburn v. Patmore*, 1 C. M. & R. 73; *Mitchell v. Cockburne*, 2 H. Bl. 379; *Campston v. Lambert*, 18 Ohio, 81; *Seiz v. Unna*, 1 Biss. 521; S. C. in *Error*, 6 Wal. 327; *Minnis v. Johnson*, 1 Dev. 171; *Armstrong Co. v. Clarion Co.*, 66 Penn. St. 218; *Philadelphia v. Collins*, 63 Penn. St. 106; *Coventry v. Barton*, 17 Johns. 142; *Stone v. Hooker*, 9 Cow. 154; *Miller v. Fenton*, 11 Paige, 18; *Rhea v. White*, 8 Head, 121; *Anderson v. Saylor*, Id. 551; *Percy v. Clary*, 32 Md. 245;

Spalding v. Oakes 42 Vt. 348; *Churchill v. Holt*, 131 Mass. 67; *Bard v. Midvale Steel Works*, 12 Phila. 255.

* Where the owner or occupant of premises creates a nuisance in the sidewalk adjoining the same, without the authority of the municipal authorities, either express or implied, and the city is compelled to pay damages to a person for a personal injury, caused by the same, the author of such a nuisance will be responsible to the city for the damages so paid by it. *Gridley v. City of Bloomington*, 68 Ill. 47. See *Chicago v. Robbins*, 2 Black, 418 and cases p. *626

company and its servants to responsibility; but the actual wrong, so far as it is one in morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it entrusts its business. As between the company and its servants the latter alone is the wrong-doer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself.¹

On the other hand, suppose the servant be directed by the officers of the company to do a certain act which it turns out they had no right to do, and for doing which he is made to pay damages. Here, if the act was a plain and manifest wrong, as would be leaving the cars to commit a battery, the servant can have no indemnity, because he must have known the act to be unlawful; but if the act directed was one he had reason to suppose was legal, and he obeyed directions on that supposition, it *would ill become the railroad company to demand

that he be treated as a wrong-doer when called upon to indemnify him against the consequences of the act its officers had directed. In such a case the servant is not in morals a wrong-doer at all, and his claim to indemnity would be based upon a faithful obedience to orders which he had a right to presume were rightful, nothing to the contrary appearing.²

A similar case is presented where an officer executes imperfect or defective process under a promise of indemnity, or in good

post. Where a lot owner should build a walk and in default of his doing it the duty falls upon a public board, he and it are not joint tort feorsors if from failure to build it, a traveller is injured. *Detroit v. Chaffee*, 37 N. W. Rep. 882 (Mich.) Where damage has been done by failure of defendant to repair a bridge, as was its duty, to one dealing with plaintiff and using the bridge, and plaintiff has paid for the damage, he may have indemnity from party chargeable directly with duty of repairing the bridge. *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121.

¹ See *Mainwaring v. Brandon*, 8 Taunt. 203; S. C. 2 Moore, 125; *Res-*

pass v. Morton, Hardin, 234; *Smith v. Foran*, 43 Conn. 244; S. C. 31 Am. Rep. 647; *Grand Trunk R. R. Co. v. Latham*, 63 Me. 177.

² *Humphries v. Pratt*, 2 D. & Clark, 288; *Morris v. Brokley*, 8 East. 172, note; *Walker v. Hunter*, 2 M. G. & S. 324; *Bond v. Ward*, 7 Mass. 125; *Spangler v. Commonwealth*, 16 S. & R. 68; *Commonwealth v. Van Dyke*, 57 Penh. St. 34; *Tarr v. Northey*, 17 Me. 113; *Howard v. Clark*, 43 Mo. 344; *Chamberlain v. Beller*, 18 N. Y. 115; *Howe v. Buffalo, etc., R. R. Co.*, 37 N. Y. 297; *Nelson v. Cook*, 17 Ill. 446; *Grace v. Mitchell*, 31 Wis. 533; S. C. 11 Am. Rep. 613; *Long v. Neville*, 36 Cal. 455.

faith serves process on the wrong person or property, on a like promise, or at the special request or under the direction of the plaintiff. In general, as already stated, the officer must take upon himself the responsibility for all action which purports to be official,¹ and if he serves void process, or renders himself a trespasser in the service of valid process, it does not excuse him that he had for the purpose the participation or the advice of the plaintiff or his attorney; that fact only makes another party liable with him. Neither will that fact entitle him to indemnity, for the parties are both wrong-doers, and each is a free agent in what is done, not being at all under the control of the other. But if the question of law or of fact is in doubt, it is not incompetent for the officer to allow the party suing out process to take upon himself the responsibility; and when he does so and agrees to indemnify the officer, the agreement may be enforced. This is upon the same ground, that though as to the party injured both may be technically in the wrong, it is not so as between the parties themselves.² Such case may be *contrasted with cases in which the thing done was a [*147] palpable wrong, such, for instance, as the publication of a libel, in which the most formal agreement to indemnify will be void.³

¹ *Nelson v. Cook*, 17 Ill. 443.

² *Nelson v. Cook*, 17 Ill. 443; *Crossman v. Owen*, 62 Me. 528. As to the right of an officer to demand indemnity, see *Commonwealth v. Van Dyke*, 57 Penn. St. 34; *Chamberlin v. Beller*, 18 N. Y. 115; *Smith v. Cicotte*, 11 Mich. 383; *Grace v. Mitchell*, 81 Wis. 533; S. C. 11 Am. Rep. 613. A promise to indemnify against liability for an act not known at the time to be unlawful is valid. *Coventry v. Barton*, 17 Johns. 142; *Stone v. Hooker*, 9 Cow. 154; *Armstrong Co. v. Clarion Co.*, 66 Penn. 218; S. C. 5 Am. Rep. 368; *Avery v. Halsey*, 14 Pick. 174. Where an officer is induced by the false statements of another as to the ownership of certain property, to take it into his possession, and issued and compelled to pay

damages for so doing, he is entitled to indemnity from the party guilty of the fraud and those assisting him therein. *Kenyon v. Woodruff*, 38 Mich. 310.

³ *Shackell v. Rosier*, 2 Bing. (N. C.) 634; *Arnold v. Clifford*, 2 Sumner, 238; *Atkins v. Johnson*, 43 Vt. 78; S. C. 5 Am. Rep. 260. See *Nelson v. Cook*, 17 Ill. 443. "There is no implied obligation to contribute between tortfeasors, and if such liability can be created by express promise the promise must rest upon some other consideration than the fact of the tort and of the relation of the accused parties to each other in the guilty transaction." *Nichols v. Nowling*, 83 Ind. 488. An agreement by a prisoner that if the officer will permit him to go at large he will appear at the

The foregoing are cases of indemnity; that is to say, cases in which the party actually in the wrong was compelled to relieve of the whole burden the party only technically in the wrong. But there are cases of contribution which are supported by reasons equally satisfactory. Two persons, we will suppose, are jointly concerned in a transaction, and in carrying it out according to arrangement and without any intent to injure others, they are nevertheless made liable by some invasion of another's right. Here, if one were compelled to make good the loss, we should say his right to contribution was undoubted. As between himself and his associate he was not a wrong-doer at all.¹

An attempt has been made in some cases to lay down a general rule by which it may be determined in every case whether the party is or is not entitled to contribution. Thus, in [*148] Ohio, *the judicial conclusion is, that "the common sense rule and the legal rule are the same, namely, that when parties think they they are doing a legal and proper act, contribution will be had; but when the parties are conscious of doing a wrong, courts will not interfere."²

time of trial or will pay the creditor's debt, is void, and if the officer renders himself liable by accepting it and permitting the prisoner to go, he can recover no indemnity, his act being unlawful. *Pitcher v. Bailey*, 8 East, 171; *De Mesnil v. Dakin*, L. R. 3 Q. B. 17; *Riley v. Whittiker*, 49 N. H. 145; *Ayer v. Hutchins*, 4 Mass. 370; *Appleby v. Clark*, 10 Mass. 59; *Hopkinson v. Leeds*, 78 Penn. St. 396.

¹ *Bailey v. Bussing*, 28 Conn. 455; *Wooley v. Batte*, 2 C. & P. 417; *Pearson v. Skelton*, 1 M. & W. 504; *Horbach's Administrator v. Elder*, 18 Penn. St. 33; *Moore v. Appleton*, 26 Ala. 633. This rule has been applied to one of several officers of a corporation who had been held liable to a creditor of the corporation for the neglect of all to file certain certificates as required by statute. "By accepting their positions as officers," it was said, "they impliedly agreed that they would make and publish the an-

nual certificate, and falling in this, that they would become responsible to the creditors of the corporation. While engaged, therefore, in a lawful business, they have been guilty of a neglect which has exposed them to this liability." As between themselves, therefore, the rules of contribution that prevail between joint contractors, rather than those between joint tortfeasors, ought to apply. *Nickerson v. Wheeler*, 118 Mass. 295, 298.

² *Acheson v. Miller*, 2 Ohio, (N. S.) 203. This was a case of contribution as between sureties, a part of whom had become trespassers in an endeavor to enforce payment of the debt by the principal. Compare *Grund v. Van Vleck*, 69 Ill. 479, where a partner, not present, and not consenting to the suing out of an illegal distress warrant, was held not responsible in trespass, because of that relation. Citing *Petrie v. Lamont*, 1 C. & M. 57. If

This statement is a little inaccurate, in that it denies redress in the cases only in which parties are conscious of wrong-doing. There are many cases in which the absence of consciousness of wrong could not excuse a man either in law or morals. An English case states the rule more concisely as follows: "The rule that the wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."¹ If he knew the act was illegal, or if the circumstances were such as to render ignorance of the illegality inexcusable, then he will be left by the law where his wrongful action has placed him.²

It may be thought that the maxim that the law will not relieve a party from the consequences of his own wrong-doing partakes more of severity to the particular person singled out by the *plaintiff for pursuit, than it does of general [*149] justice. It may be right to punish him, but is it right to exempt from punishment others equally guilty? If strict justice,

not responsible to the principal action, he could not, we suppose, be held entitled to contribute on the ground merely of a possible benefit from the proceedings. See, further, *Ives v. Jones*, 3 Ired. 538; *Bryan v. Landon*, 5 Thomp., &c., (N. Y.) 594.

¹ *Adamson v. Jarvis*, 4 Bing. 66, 73, per BEST, C. J. See *Betts v. Gibbins*, 3 Ad. & El. 57, 74; *Humphreys v. Pratt*, 3 Dow. & Cl. 288; *Avery v. Halsey*, 14 Pick. 174; *Jacobs v. Polard*, 10 Cush. 287, 289, per BIGELOW, J.

² The right of contribution has been applied to the case of two counties, one of which had been compelled to pay damages to a person who had been injured by the breaking down of a bridge which both were under obligation to maintain. *Armstrong Co. v. Clarion Co.*, 66 Penn. St. 218. In Vermont it has been held that where one of two joint owners of a vicious animal was compelled to pay damages to a party injured through the animal not being kept under restraint, he could not recover contribution of the other, al-

though the latter was in charge of the animal when the injury occurred. *Spalding v. Oaks*, 42 Vt. 343. If the wrong consist in an assault on the person, and not merely a trespass to property, no contribution can be demanded, however innocent of wrong intent the wrong-doer may be. *Cumpston v. Lambert*, 18 Ohio, 81. In one case, it is said, that by modern authorities the principle of non-contribution is confined to cases where there has been moral wrong. It, therefore, includes a case where the wrong was a breach of trust. *Herr v. Barber*, 2 Mackey 545; so, *Sherner v. Spear*, 92 N. C. 148. But fraudulent grantees of land, where the deeds to them are set aside by a judgment creditor of their grantor may have contribution between themselves in favor of those who pay the creditor. *Janvrin v. Curtis*, 63 N. H. 312, and in case of an unsuccessful attempt at fraud, contribution may be decreed in equity. *Goldsborough v. Darst*, 9 Ill. App. 205.

as between individuals were all that was aimed at, we should be compelled to answer this question in the negative; and we must therefore look further for the reason of the rule.

It has already been intimated that the rule, as we have given it, is one of very general application, and not by any means confined to cases of joint torts. Whoever, by his pleadings in any court of justice, avows that he has been engaged with others in an unlawful action, or has concerted with them an unlawful enterprise, and that in arranging for or carrying it out he has been unfairly treated by his associates, or has suffered an injustice which they should redress, will be met by the refusal of the court to look any further than his complaint, which it will at once order dismissed. The following reasons may be assigned for this action: 1. The discouragement of all illegal transactions by distinctly apprising every person who engages in them that the risk he incurs is not merely of being compelled to share with the others the loss that may follow, for this, in many cases would be insignificant, and in all cases would be small in proportion to the size and formidable character of the combination. He is, therefore, given to understand that whoever takes part in an illegal transaction must do so under a responsibility only measured by the whole extent of the injury or loss; an understanding very well calculated to make men to hesitate who, under a different rule, would be disposed to give full scope to evil inclinations. But 2. The State, from a consideration of its own pecuniary interests, and of the interests of other litigants, may wisely refuse to assist in adjusting equities between persons who have been engaged in unlawful action. The expense of administering justice is always a large item in the State's expenditures, and one which must be borne by the common contributions of the people. Where one has suffered from participation in an unlawful undertaking, what justice can there be in any demand on his part that the State shall supply courts and officers and incur expense to indemnify him against a loss he has encountered through a disregard of its laws? Here the question is not merely one of what is right, as between himself and his associates, but what is best for the interest of the State. When that question is up [*150] for *consideration, the fact is not to be overlooked that there are unavoidable difficulties and necessary evils connected with litigation which multiply rapidly as the cases

increase in number. Courts and juries, at the best, are but imperfect instruments for the accomplishment of justice; and the greater the volume of litigation, the less is the attention which any particular case is likely to receive, and the greater the probability that right may be overcome by artifice, or by a false and deceptive exposition of the facts. Trusty justice must follow after wrong with deliberate and measured tread; and every honest litigant in seeking it must be more or less impeded, when those who have no just claim on the consideration of the court are allowed to push their complaints before it. It is not necessary to look further for reasons in support of the rule to which attention has been directed.

The application of this rule to the cases of partnerships and corporations is somewhat peculiar. A corporation is an artificial person, and the artificial personality is to be considered in its legal transactions instead of the personality of its members. A partnership is also, for all the legitimate purposes of its business, a legal entity, though it is taken notice of and reached by legal process, only through the personality of its members. There may be wrongs by corporations, and wrongs by partnerships; and where these consist in a mere breach of conventional duty, it has been seen already that those only are to be pursued upon whom the duty rests, which, in these cases, would be the partnership or corporation; and when the association is made responsible, the members necessarily share the loss in proportion to their respective interests. On the other hand, if an individual is made responsible for a tort committed in the service of any joint association, his right to indemnity must be governed by the rules which prevail in the relation of master and servant, and which need not be repeated here.'

'If one in the employ of a corporation commits a distinct trespass, which he must have known to be such, it is immaterial who encouraged, directed, or commanded it; and if his own negligence has brought injury upon another, he alone is liable, and cannot insist on being indemnified. *Poulton v. London & S. W. R. R. Co.*, L. R. 2 Q. B. 535; *Evansville & C. R. R. Co. v. Baum*,

26 Ind. 70; *Ill. Central R. R. Co. v. Downey*, 18 Ill. 259; *Vanderbilt v. The R. T. Co.*, 2 N. Y. 479; *Foster v. Essex Bank*, 17 Mass. 478; *Rounds v. D. L. & W. R. R. Co.*, 3 Hun, 320; *Kirby v. Penn. R. R. Co.*, 76 Penn. St. 506, 509; *Waller v. Martin*, 17 B. Mon. 181; *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110. A partner may maintain an action against another for the destruction of his indi-

[*151] ***Injury Sustained in Wrong-doing.** A further illustration of the rule which refuses redress to one participating in a wrong may be had where two persons are engaged in the same unlawful enterprise or action, and in prosecuting it one is injured by the negligence of the other.¹ The case of a riot may be instanced, in which several persons are engaged destroying property or inflicting personal injuries on third parties, and in the course of it one unintentionally inflicts injury upon one of his associates. The case stated is perceived to be one where the injured party, but for the element of wrong which it involves on his part, would unquestionably have been entitled to redress. Had he, for example, been a mere passer-by,² or had a like injury occurred to him through the negligence of another, while engaged in play, or under any circumstances which charged him with no illegality and no negligence, the rule of law would have been clear, and his right to redress unquestionable. Another case like that of the riot, in principle, would be that of two smugglers, one of whom owns the vessel by which the illegal venture is made, and the other undertakes to manage it, but carelessly strands it while running illegally into port. Still another may be suggested, of parties engaging in sports on Sunday, when they are illegal, in the course of which one is injured, for want of due care on the part of the other. In all the cases supposed, the party injured must undertake to trace his injury to the negligence of the other; but in doing so, he will show that at the time he was engaged in unlawful action, and that it was only because of such action that the opportunity was afforded for the negligent injury. The injury, therefore, is as directly traceable to his own breach of the law as to the negligence of his associate; each has combined to produce it, and without both it could not have occurred. What the plaintiff must ask, therefore, must be this: That the law shall relieve him from the consequences of his disregard of the law; and this, as already stated, it will refuse to do.³ His demand is based upon his own violation of duty to the political society.

vidual property used in the firm business. *Newby v. Harrell*, 5 S. E. Rep. 284.

¹ See *Wallace v. Cannon*, 38 Geo. 199. Also *Peacock v. Terry*, 9 Geo. 137, where one sought to recover for

fraud in a transaction in which he was a participant in the fraudulent purpose.

² *James v. Campbell*, 5 C. & P. 873.

³ It might also be said that where one engages with others in a breach

*The cases which most often occur in which this principle is involved are those in which the negligent party is wholly blameless, except for his negligence, and only the injured party has been guilty of intentional breach of the law. Many of these cases arise under the laws forbidding the transaction of ordinary business on Sunday, and also forbidding travel on that day, except for purposes of necessity or charity. Under these statutes one who engages in business, or travels on that day, is presumptively engaged in an illegal transaction, and if he claims compensation for an injury resulting from it, he must rebut the presumption by showing that what he did was necessary or had a benevolent purpose.¹ This rule has been applied in the case of suits against a town or city for injury received on Sunday, in consequence of defects in the highway which the corporation was bound, by statute, to keep in repair. In such a case, unless the plaintiff shows a justifiable cause for being abroad on the street, he cannot recover.² If he can show that he was on his way to attend religious services, he makes out a sufficient cause; and, in this country, where religious opinion is free and entire religious equality is the rule of the law, no inquiry concerning the character of the services can be raised beyond this: Was the party on his way to the meeting for the honest purpose of divine worship and religious instruction? If so, the errors and absurdities of his belief, and the nature of the services, provided the laws of morality and public decency are not violated, are matters which concern only himself.³ So, if he can show

of the law, he is chargeable with want of due care, so that his injury at the hands of one of his associates is to be attributed to the concurring negligence of both. Or it may be said that usually it is only reckless parties who plan and engage in unlawful action, and therefore the want of care and prudence on the part of the associates ought to be assumed as one of the probable concomitants, the risks of which each must be understood to take upon himself when he engages in the unlawful act.

¹ *Bosworth v. Swansey*, 10 Met. 363, 365; *Stanton v. Metropolitan R. R.*

Co., 14 Allen, 485; *Hinckley v. Penobscot*, 42 Me. 89.

² *Bosworth v. Swansey*, 10 Met. 363; *Jones v. Andover*, 10 Allen, 18; *Johnson v. Irasburg*, 47 Vt. 28; S. C. 19 Am. Rep. 111; *Holcomb v. Danby*, 51 Vt. 428; *Connolly v. Boston*, 117 Mass. 6; S. C. 19 Am. Rep. 396; *Hinckley v. Penobscot*, 52 Me. 89; *Tillock v. Webb*, 56 Me. 100; *Cratty v. Bangor*, 57 Me. 423; S. C. 2 Am. Rep. 56.

³ In *Feltal v. Middlesex R. R. Co.*, 109 Mass. 398, a woman was injured through the negligence of a railroad company on her way home from a

that he was only passing from one part of his premises to [*153] another for the *necessary care of his stock, or looking after his stray cattle, or going to witness his neighbor's will, or to have his own will executed,¹ or to visit the sick or the poor, or to do any other act which it is morally fit and proper should be done on that day,² he thereby relieves his conduct from the imputation of illegality by thus making it appear either that, in the legal sense of the term, he was not traveling at all, or that his travel was for a charitable purpose, or was justified by the necessity of the case.³ And the authorities fully warrant us in saying that the words charity and necessity, in the statutes, are not to receive any narrow or technical construction, but a sensible one that will embrace all cases not fairly within the mischief intended to be prevented. As has been said in Illinois, the moral fitness and propriety of what was done are not to be judged of in the abstract, but are to be determined under the circumstances of each particular case.⁴ In Massachusetts, it has been decided that one who, on Sunday, travels several miles to visit a stranger and is injured by the negligence of the railway company, cannot recover for the injury unless some special occasion of necessity

spiritualist meeting. As a part of the exercises at the meeting was an exhibition of "spiritual manifestations;" but these she did not attend, and she gave evidence that she believed in spiritualism, and attended the meeting as a matter of conscience and for worship. COLT, J.: "The necessity of traveling, within the exception in the Lord's Day Act, is to a great extent determined by its moral fitness and propriety, and it would have been erroneous to have ruled, as matter of law, that traveling for such a purpose was not within the exception. *Bennett v. Brooks*, 9 Allen, 118; *Commonwealth v. Sampson*, 97 Mass. 407; *Hamilton v. Boston*, 14 Allen, 475. It was for the jury to say, upon all the evidence, whether the meeting was of the character claimed by the plaintiff, and whether she attended it for the honest purpose of

divine worship and religious instruction."

¹ We should think this a reasonable deduction from *Bennett v. Brooks*, 9 Allen, 118, in which the execution of a will on Sunday was held proper and lawful.

² *Commonwealth v. Knox*, 6 Mass. 76; *Johnson v. People*, 81 Ill. 469. See *Logan v. Mathews*, 6 Penn. St. 417.

³ See the Massachusetts statutes reviewed in *Hamilton v. Boston*, 14 Allen, 475. In that case it was held that a person walking a short distance with a friend for exercise on Sunday was not violating the statute against traveling on that day, and might recover for an injury suffered by reason of a defect in the street. To same effect, *Davidson v. Portland*, 69 Me. 116; and see *Barker v. Worcester*, 139 Mass. 74.

⁴ *Johnson v. People*, 81 Ill. 469.

or charity can be shown for the visit.¹ In contrast with this is *the case in Vermont where the plaintiff was in- [*154]

¹Stanton v. Metropolitan R. R. Co., 14 Allen, 485. The suit was against a street railway company for an injury attributed to their negligence while plaintiff was being carried on one of their cars. GRAY, J.: "It is not and could not be denied that the plaintiff was 'traveling,' within the meaning of these statutes, at the time of suffering the injury complained of. He was proceeding in a street car drawn by horses from Charlestown, entirely across the city of Boston, in which he resided, to Roxbury, on the opposite side.

"It is equally clear that he was not traveling from necessity or charity. He had left Boston on the morning of the same day, and spent the greater part of the day in Charlestown, for the purpose of collecting a debt. A negotiation between a creditor and his debtor, or any other act done for the purposes of private gain, under no apparent or extraordinary emergency, is neither necessary nor charitable in any sense. *Ex parte* Preston, 2 Ves. & B. 812; Phillips v. Innes, 4 Cl. & Fin. 284; Bennett v. Brooks, 9 Allen, 120; Jones v. Andover, 10 Allen, 18. His subsequent visit to a friend of his companion, who does not appear to have been any relation or friend of his own, was equally unnecessary upon the most liberal construction of the statute. Pearce v. Atwood, 13 Mass. 351; Flagg v. Millbury, 4 Cush. 244; Logan v. Mathews, 6 Penn. State R. 417.

"Being engaged in a violation of law, without which he would not have received the injury sued for, the plaintiff cannot obtain redress in a court of justice. Way v. Foster, 1 Allen, 408; Hamilton v. Boston, ante 477. The opposite view, approved by the Supreme Court of Pennsylvania in Moh-

ney v. Cook, 26 Penn. State R. 342, and by Mr. Justice GRIER, in Philadelphia, etc., R. R. v. Philadelphia, etc., Towboat Co., 23 How. 218, is inconsistent with the established law of the Commonwealth.

"The defendants may have been justified in running their cars for the purpose of transporting passengers to and from public worship, or for other necessary or charitable objects. But the fact that the defendants were acting lawfully would not protect the plaintiff in unlawful traveling, or increase his right to maintain an action against them. Commonwealth v. Knox, 6 Mass. 78; Myers v. State, 1 Conn. 502; Scully v. Commonwealth, 85 Penn. State R. 511." See, further, Smith v. Boston & Maine R. R. Co., 120 Mass. 490; S. C. 21 Am. Rep. 538. Traveling on the cars on Sunday bars passenger's recovery. Bucher v. Fitchburg R. R., 131 Mass. 156. So driving to make a call after attending a funeral. Davis v. Somerville, 128 Mass. 594. See Lyon v. Desotelle, 124 Mass. 387. So if a railroad employee is injured in the service. Day v. Highland St. Ry. 138 Mass. 118; Read v. Boston, etc., Co. 140 Mass. 199. If one sailing for pleasure is run down by negligence of officers of a steamer, he cannot recover; otherwise, if the collision was a wanton act. Wallace v. Merrimack, etc., Co., 138 Mass. 95. But one may recover if injured by a defect in street while walking home Sunday evening from making a social call. Barker v. Worcester, 139 Mass. 74. So if a dog runs out and frightens a horse unlawfully driven. White v. Lang, 128 Mass. 598. The Massachusetts doctrine is followed in the Federal Courts where the injury occurs in that State. Bucher v. Caeshire R. Co., 8 S. C. Rep. 974.

jured when traveling eight miles to visit his young children, who were living with an aunt, and in which he was held to be justified on the ground of necessity. The necessity intended by the statute, it was said, was a moral and not a physical necessity. An act which, under the circumstances, is fit and proper to be done, is not prohibited. The plaintiff could not fully discharge his obligations to his children without being where they were. Under these circumstances it was morally proper for him to travel to them, and no other facts or circumstances were necessary to show the fitness of his traveling. His duties to his children arose out of his relations to them; the propriety of the journey out of its necessity to the discharge of his duties.¹

[*155] *Other cases in which relief to one injured while violating the Sunday laws has been denied are the following: A party aiding the owner to clear out his wheel pit and injured while doing so by the negligence of the owner;² one defrauded in an exchange of horses on that day;³ one who lets to another a horse to be ridden or driven on Sunday, and finds it injured by negligent or immoderate driving;⁴ but this doctrine has been often questioned, and at last has been overruled in the State where it originated.⁵

The cases arising under the Sunday laws must be considered in connection with a familiar principle in the law of civil wrongs, which, as applied by other courts, would leave them without support. The principle is, that to deprive a party of redress because of his own illegal conduct, the illegality must have contributed

¹ WHEELER, J., in *McClary v. Lowell*, 44 Vt. 116, 118; S. C. 8 Am. Rep. 366. On the general subject see, also, *Commonwealth v. Sampson*, 97 Mass. 407; *Commonwealth v. Josselyn*, *ib.* 411; *Connolly v. Boston*, 117 Mass. 64; S. C. 19 Am. Rep. 396; *Gorman v. Lowell*, *ib.* 65. For a son to hire a horse to visit his father on Sunday is not illegal. *Logan v. Mathews*, 6 Penn. St. 417.

² *McGrath v. Merwin*, 113 Mass. 467; S. C. 17 Am. Rep. 119.

³ *Robeson v. French*, 12 Met. 24. In *Myers v. Meinrath*, 101 Mass. 366, it was decided that an action will not

lie for the conversion of a chattel delivered on Sunday in exchange for another, and retained by the defendant notwithstanding the return of the other by the plaintiff. Compare *Tucker v. Mowrey*, 12 Mich. 363.

⁴ *Gregg v. Wyman*, 4 Cush. 322. See *Parker v. Latner*, 60 Me. 528; *Wheldon v. Chappel*, 8 R. I. 230, 233.

⁵ See *Woodman v. Hubbard*, 25 N. H. 67; *Morton v. Gloster*, 46 Me. 520; *Sutton v. Wauwatosa*, 29 Wis. 21; S. C. 9 Am. Rep. 534; *Hall v. Corcoran*, 107 Mass. 251; S. C. 9 Am. Rep. 30; *Harrison v. Marshall*, 4 E. D. Smith, 271.

to the injury. Applying this to the case of injuries received from defects in the highway while traveling on Sunday, the following has been said of it: "To make good the defense (of illegality) it must appear that a relation existed between the act or violation of law, on the part of the plaintiff, and the injury or accident of which he complains and the relation must have been such as to have caused or helped to cause the injury or accident, not in a remote or speculative sense, but in the natural and ordinary course of events, as one event is known to precede or follow another. It must have been some act, omission or fault naturally and ordinarily calculated to produce the injury, or from which the injury or accident might naturally and reasonably have been anticipated under the circumstances. It is obvious that a violation of the Sunday law is not of itself an act, omission or fault *of t his kind, with reference to a defect in the [*156] highway or in a bridge over which a traveler may be passing, unlawfully though it may be. The fact that the traveler may be violating this law of the State, has no natural or necessary tendency to cause the injury which may happen to him from the defect. All other conditions and circumstances remaining the same, the same accident or injury would have happened on any other day as well. The same natural causes would have produced the same result on any other day, and the time of the accident or injury, as that it was on Sunday, is wholly immaterial so far as the cause of it or the question of contributory negligence is concerned. In this respect it would be wholly immaterial, also, that the traveler was within the exceptions of the statute, and traveling on an errand of necessity or charity, and so was lawfully upon the highway." ¹

¹ *Sutton v. Wauwatosa*, 29 Wis. 21, 26. In this case the Massachusetts cases are examined, and their soundness denied in an able opinion by Dixon, Ch. J. The principle he relies upon was fully recognized in Massachusetts, in a case in which one sued for an injury to his vehicle which, at the time, was standing in a public street in a manner prohibited by city ordinance, and where notwithstanding he was held entitled to recover. *Steele v. Burkhardt*, 104

Mass. 59; S. C. 6 Am. Rep. 191. Citing *Jones v. Andover*, 10 Allen, 20, and distinguishing *Gregg v. Wyman*, 4 Cush. 322, and *Way v. Foster*, 1 Allen, 408, "where the plaintiff was obliged to lay the foundation of his action in his own violation of law." In *Holt v. Green*, 73 Penn. St. 198, 200; S. C. 13 Am. Rep. 737, *MERCUR, J.*, says: "The test whether a demand connected with an illegal transaction is capable of being enforced by law, is whether the plaintiff requires the

[*157] *And in New York, where the carriers of passengers have a right to transport persons on Sunday for some purposes, it has been decided that all who are carried by them are entitled to protection against their negligence, and may recover for a negligent injury, irrespective of the purpose for which they were traveling.¹ And we should say that the weight of authority at this time was in favor of the doctrine so clearly stated by the

aid of the illegal transaction to establish his case. *Swan v. Scott*, 11 S. & R. 164; *Thomas v. Brady*, 10 Penn. St. 170; *Scott v. Duffy*, 14 Penn. St. 20. If a plaintiff cannot open his case without showing that he has broken the law, a court will not assist him. *Thomas v. Brady*, supra. It has been well said that the objection may often sound very ill in the mouth of a defendant, but it is not for his sake the objection is allowed; it is founded on general principles of policy which he shall have the advantage of, contrary to the real justice between the parties. That principle of public policy is, that no court will lend its aid to a party who grounds his action upon an immoral or upon an illegal act. *Mitchell v. Smith*, 1 Binn. 118; *Seidenbender v. Charles's Admrs.*, 4 S. & R. 159. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on on its own violation. *Coppell v. Hall*, 7 Wall. 558."

In *Mohney v. Cook*, 26 Penn. St. 342, the fact that the plaintiff was navigating a stream in violation of the Sunday laws was held no bar to a recovery against one who, by erecting an obstruction in the stream, caused an injury to the boat. But the law in that case provided a specific remedy for its violation, which, in the opinion of the court, precluded any other. And denying to him redress for an injury would, in effect, be imposing a further penalty.

¹ *Carroll v. Staten Island R. R. Co.*

58 N. Y. 126; S. C. 17 Am. Rep. 231, citing and relying upon *Philadelphia, etc., R. R. Co. v. Towboat Co.* 23 How, 209. The case seems to be grounded in part on the fact that the contract to carry was legal on the part of the railroad company, and the obligation to carry with care was incident to it. One may recover for carrier's negligence, though he is on a Sunday excursion. *Opsahl v. Judd*, 80 Minn. 126. See *Knowlton v. Milwaukee, etc., Co.*, 59 Wis. 278. In an action against a carrier for failure to deliver cattle, it was claimed that the delay was justifiable, as to have delivered sooner would have necessitated Sunday transportation. It was held that such transportation was a work of necessity, and even if not, that the carrier could not rely in defense on the shipper's infraction of law in shipping stock at a time which necessitated Sunday transportation. *Phila., etc., R. R. Co. v. Lehman*, 56 Md. 209. *Merritt v. Earl*, 29 N. Y. 115, decides that the fact that a contract for the carriage of property was made on Sunday will not preclude a recovery for a loss thereof. A bailment on Sunday does not change the title, and the bailor may recover as for a conversion, if the bailee fails in performance and converts the property to his own use. *Dwight v. Brewster*, 1 Pick. 50. See *Lewis v. Littlefield*, 15 Me. 233; *Logan v. Mathews*, 6 Penn. St. 417; *Stewart v. Davis*, 31 Ark. 518; *Phalen v. Clark*, 19 Conn. 421.

Wisconsin court, and which had previously been announced by the courts of Pennsylvania and New Hampshire, and by the Federal Supreme Court.¹

The fact that a party injured was at that time violating the law, does not put him out of protection of the law; he is never put by the law at the mercy of others. If he is negligently *injured in the highway, he may have [*158] redress, notwithstanding at the time he was on the wrong side of the way, provided this fact did not contribute to the

¹ Woodman v. Hubbard, 25 N. H. 67; Norris v. Litchfield, 35 N. H. 271; Corley v. Bath, Id. 530; Dutton v. Weare, 17 N. H. 34; Mohny v. Cook, 26 Penn. St. 342; Philadelphia, etc., R. R. Co. v. Towboat Co., 23 How. 209. See Hamilton v. Goding, 55 Me. 419; W. Helden v. Chappel, 8 R. I. 230; Armstrong v. Toler, 11 Wheat. 258. The following cases have more or less bearing in the same direction: Alger v. Lowell, 8 Allen, 402; Bigelow v. Reed, 51 Me. 325; Davis v. Mann, 10 M. & W. 548. That the illegality of such travelling does not prevent recovery, see, further, Sewell v. Webster, 59 N. H. 556; Platz v. Cohoes, 89 N. Y. 219; Knowlton v. Milwaukee, etc., Co., 59 Wis. 278. "A defendant who is sued in tort cannot justify the tort whether wilful or negligent by proving that the plaintiff when injured was transgressing the law, so long as the tort and transgression are independent or disconnected except in time and place in their relation to each other." DUBREZ, C. J. Baldwin v. Barney, 12 R. I. 392.

In a case in Maine it appeared that plaintiff took a walk for recreation on Sunday, stopped for a glass of beer, and afterward fell on a sidewalk where was a ridge of ice. The city was held liable for his injury. The court say: "Walking on the Sabbath for exercise is

not against the statute. Stepping aside for a glass of beer may have been a violation of law. If it was, and it had nothing to do with causing the accident, it offered no excuse for a defective highway. To exonerate the city from liability, it must appear that plaintiff's violation of law contributed to the accident." Davidson v. Portland, 69 Me. 116. In the case of Baker v. Portland, 58 Me. 199; S. C. 4 Am. Rep. 274, BARROWS, J., considers the subject with great care, and reaches the same conclusion with the court in Wisconsin. The action was one brought against the city for an injury occasioned by a defective way. The plaintiff at the time was driving more than six miles an hour, in violation of a city ordinance. The Judge told the jury that this was no defense, provided the fast driving did not in any degree contribute to produce the injuries complained of. *Held*, correct. But if one uses the highway for an illegal horse race, he is entitled to no redress for an injury received in consequence of the way being out of repair. McCarthy v. Portland, 67 Me. 167.

It does not defeat recovery that one was driving unlawfully if a dog runs out and frightens his horse to his damage. Schmid v. Humphrey, 48 Ia. 653; White v. Lang, 128 Mass. 598.

injury.¹ So a party who engages in an unlawful game may recover for an injury suffered while playing it,² and so may one who participates in a race and is willfully run down by his competitor.³

¹ *Baker v. Portland*, 58 Me. 199; S. C. 4 Am. Rep. 274; *Daniels v. Clegg*, 28 Mich. 82; *Beckerle v. Weiman*, 12 Mo. App. 354. See *Stewart v. Machias Port*, 48 Me. 477; *Morton v. Glosster*, 46 Me. 520. If travellers meet at the intersection of city streets the statute as to turning to the right does not apply. Each must use reasonable care. *Morse v. Sweeney*, 15 Ill. App. 486. The fact that a vessel run into and injured by another was at the time disregarding the law in any particular, only bears on the question of negligence, and is not conclusive against a recovery of damages for the injury suffered from the collision. *Blanchard v. Steamboat Co.*, 59 N. Y. 292; *Hoffman v. Union Ferry Co.*, 68 N. Y. 385; and see cases, *post*,* 666.

² *Etchberry v. Leiville*, 2 Hilton, 40.

³ **MERRICK, J.:** "It appears from the bill of exceptions to have been fully proved upon the trial that the defendant willfully ran down the plaintiff and broke his sleigh, as is alleged in the declaration. No justification or legal excuse of this act was asserted or attempted to be shown by the defendant; but he was permitted, against the plaintiff's objection, to introduce evidence tending to prove that it was done while the parties were trotting horses in competition with each other for a purse of money, the ownership of which was to be determined by the issue of the race. And it was ruled by the presiding judge, that if this fact was established, no action could be maintained by the plaintiff to recover compensation for the damages he had sustained, even though the injury complained of was willfully inflicted.

Under such instructions the jury returned a verdict for the defendant.

"We presume it may be assumed as an undisputed principle of law that no action will lie to recover a demand, or a supposed claim for damages, if, to establish it, the plaintiff requires aid from an illegal transaction, or is under the necessity of showing, and depending in any degree upon, an illegal agreement, to which he himself has been a party. *Gregg v. Wyman*, 4 Cush. 322; *Woodman v. Hubbard*, 5 Foster, 67; *Phalen v. Clark*, 19 Conn. 421; *Simpson v. Bloss*, 7 Taunt. 246. But this principle will not sustain the ruling of the court, which went far beyond it and laid down a much broader and more comprehensive doctrine. Taken without qualification, and just as they were given to the jury, the instructions import that, if two persons are engaged in the same unlawful enterprise, each of them, during the continuance of such engagement, is irresponsible for willful injuries done to the property of the other. No such proposition as this can be true. He who violates the law must suffer its penalties, but yet in all other respects he is under its protection and entitled to the benefits of its remedies.

"But in this case the plaintiff had no occasion to show, in order to maintain his action, that he was engaged, at the time his property was injured, in any unlawful pursuit, or that he had previously made any illegal contract. It is true that, when he suffered the injury, he was acting in violation of the law; for all horse trotting upon wagers for money is expressly declared by statute to be a misdemeanor

*By the decisions it is settled that if two persons voluntarily engage in a fight, which implies a license by each that the other may strike him, this license being illegal and void, either party injured by the other may have his action for the battery.¹ Further illustrations of the general principle may be found in those cases in which it has been decided that even a trespasser may demand redress when the injury he receives can not be justified as a necessary and moderate employment of force in defense of one's person or possessions.²

punishable by fine and imprisonment. St. 1846, c. 200. But neither the contract nor the race had, so far as appears from the facts reported in the bill of exceptions, or from the intimations of the court in its ruling, anything to do with the trespass committed upon the property of the plaintiff. That he had no occasion to show into what stipulations the parties had entered, or what were the rules or regulations by which they were governed in the race, or whether they were in fact engaged in any such business at all, is apparent from the course of the proceedings at the trial. The plaintiff introduced evidence tending to prove the wrongful acts complained of in the writ, and the damage done to his property, and there rested his case. If nothing more had been shown, he would clearly have been entitled to recover. He had not attempted to derive assistance either from an illegal contract or an illegal transaction. It was the defendant, and not the plaintiff, who had occasion to invoke assistance from proof of the illegal agreement and conduct in which both parties had equally participated. From such sources neither of the parties should have been permitted to derive a benefit. The plaintiff sought nothing of this kind, and the mutual misconduct of

the parties in one particular cannot exempt the defendant from his obligation to respond for the injurious consequences of his own illegal misbehavior in another." *Welch v. Wesson*, 6 Gray, 505.

¹ *Boulter v. Clark*, Bull. N. P. 16; *Mathew v. Ollerton* Comb. 218; *Logan v. Austin*, 1 Stew. 476; *Hannen v. Edes*, 15 Mass. 346; *Brown v. Gordon*, 1 Gray, 182; *Stout v. Wren*, 1 Hawks, 420; *Bell v. Hansley*, 3 Jones (N. C.), 181; *Dole v. Erskine*, 35 N. H. 503; *Adams v. Waggoner*, 33 Ind. 531; S. C. 5 Am. Rep. 230; *Bartlett v. Churchill*, 24 Vt. 218; *Shay v. Thompson*, 59 Wis. 540; *Jones v. Gale*, 22 Mo. App. 637. See *State v. Newland*, 27 Kan. 764. The statutory penalty for refusing to send a message by telegraph is incurred, though the message was intended to accomplish an immoral purpose. *Western U. Tel. Co. v. Ferguson*, 57 Ind. 495.

² *Bird v. Holbrook*, 4 Bing. 628; *Loomis v. Terry*, 17 Wend. 496; *Sherfry v. Bartley*, 4 Sneed, 58; *Curtis v. Carson*, 2 N. H. 539; *Ogden v. Claycomb*, 52 Ill. 365; *Trogden v. Henn.*, 85 Ill. 237; *Steinmetz v. Kelly*, 73 Ind. 442. A trespasser may recover for an injury by a vicious bull kept on the land trespassed upon. *Marble v. Ross*, 124 Mass. 44.

[*160]

*CHAPTER VI.

WRONGS AFFECTING PERSONAL SECURITY.

In this chapter will be considered those wrongs which affect the bodily organization of individuals, or which deprive them of their rightful liberty of movement. These are wrongs which 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 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. In the course of what is said, it will appear that, as regards the person itself—the bodily existence—the purpose of the law is to establish such rules as shall constitute a complete protection against any violence whatsoever, whether perceptible injury results from it or not. Such rules are as practicable here as they are impracticable in some cases of rights of a more indefinite and intangible character; such, for example, as the right to protection in reputation.

ASSAULTS AND BATTERIES.

Assaults. An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented.¹ Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol

¹ There must be proof of violence actually offered so near that harm might ensue if the party was not prevented. *People v. Lilley*, 43 Mich. 521. The assault need not be committed in anger. *Johnson v. McConnell*, 15 Hun, 293. It has been held

that the violence need not be used toward the person of the man assaulted. Striking and kicking his horse, attached to a wagon, in which he is, may be an assault on him. *Clark v. Downing*, 55 Vt. 259.

at one who is within its range;¹ the pointing of a pistol not loaded at *one who is not aware of that fact, and [*161] making an apparent attempt to shoot;² shaking a whip

¹ *State v. Taylor*, 20 Kan. 643. Not if he is not within range. *Tarver v. State*, 43 Ala. 354. Shooting a gun loaded only with powder at twenty steps distance is an assault. *Crumbly v. State*, 61 Ga. 582. But to put one's hand upon his sword, and say, "If it were not assize time I would not take such language from you," is no assault. *Redman v. Edolfe*, 1 Mod. 3. Neither is it, if one presents a pistol, accompanied by words which negative an intent to employ it. *Blake v. Barnard*, 9 C. & P. 626. Words alone never constitute an assault. *State v. Mooney*, Phil. (N. C.) 434; *Smith v. State*, 39 Miss. 521; *Warren v. State*, 33 Tex. 517; *Reid v. State*, 71 Ga. 865; *Norris v. Casel*, 90 Ind. 143; *Scott v. Fleming*, 16 Ill. App. 339, but the provocation may be shown in mitigation of punitive damages. *Corcoran v. Harran*, 55 Wis. 120. See *People v. Lilley*, 43 Mich. 521. Threatening if attacked to cut down one with an axe, held in striking attitude, does not constitute an assault if no actual attempt is made to use the axe. *Cutler v. State*, 59 Ind. 300. See *Reid v. State*, 71 Ga. 865; *Bishop v. Ranney*, 59 Vt. 316. But where one drew a pistol, and pointing it at a man who attempted to stop his team, exclaimed, "I will shoot any man who attempts to stop my mules," *Add.*, to be an assault. CHALMERS, J.: "A man has the legal right to protect his property against trespass, opposing force to force. If, therefore, the offer had simply been to commit a common assault, as by declaring that he would strike with his hand, or with some implement or weapon not dangerous, Hairston would have been guilty of no offense. If a man takes

my hat, or offers to do so, against my will, and I, drawing back my hand, declare that I will strike if he does not forbear, I only meet the trespass by an offer to use such force as may be appropriate and necessary. But I cannot at once leap to an assault with deadly weapons and a threat to kill. If I were to kill under such circumstances, the killing would be murder; and hence I have made an assault which, if carried into a battery, with fatal results, would constitute the gravest crime. As no trespass upon property will primarily justify the taking of life, so an offer to commit a trespass cannot justify an assault with a deadly weapon, accompanied by threat to kill unless the party desists. The means adopted are disproportionate to, and not sanctioned by, the end sought. We think, therefore, that Hairston might well have been convicted of an assault. *Morgan's Case*, 3 Ired. 186; *Myerfield's Case*, Phil. (N. C.) 108; *Smith v. State*, 39 Miss. 521." *Hairston v. State*, 54 Miss. 639, 693.

² *Beach v. Hancock*, 27 N. H. 223; *Regina v. St. George*, 9 C. & P. 483; *Richels v. State*, 1 Sneed, 606. See *Rapp v. Commonwealth*, 14 B. Mon. 614; *State v. Cherry*, 11 Ired. 475. Threatening to shoot, with pistol in hand, is an assault, though it be neither cocked nor loaded. *State v. Church*, 53 N. C. 15. *Contra*, *State v. Sears*, 86 Mo. 169; see *McKay v. State*, 44 Tex. 43. Compare *Regina v. James*, 1 C. & K. 530. Presenting an unloaded gun at one who supposes it to be loaded within shooting distance is not such an assault as can be punished criminally, although it may sustain a civil ac-

or the fist in a man's face in anger;¹ riding or running after him in threatening and hostile manner with a club or other weapon,² and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person; "a right to live in society without being put in fear of personal harm."³

[*162] * **Batteries.** A successful assault becomes a battery. A battery consists in an injury actually done to the person of another in an angry or revengeful, or rude or insolent manner, as by spitting in his face, or in any way touching him in anger, or violently jostling him out of the way.⁴ The wrong here consists, not in the touching, so much as in the manner or spirit in which it is done, and the question of bodily pain and injury is important only as affecting the damages. Thus, to lay hands on another in a hostile manner is a battery, though no damage follows; but to touch another, merely to attract his attention, is no battery, and not unlawful.⁵ And to push gently

tion. *Chapman v. State*, 78 Ala. 463, citing many cases. Holding an uncocked gun without threatening words or gestures near one, while a third person threatens him is not an assault. *Flournoy v. State*, 7 S. W. Rep. 865 (Tex.)

¹ See *People v. Yslas*, 27 Cal. 630; *State v. Rawles*, 65 N. C. 334. In this last case it is held that where several persons, with implements that may be used for offensive purposes, including a gun, follow another, though at a considerable distance, and, by threatening and insulting language, put him in fear, and drive him out of his way, it is an assault. See *State v. Martin*, 85 N. C. 508; *State v. Horne*, 92 N. C. 805.

² *Martin v. Shoppe*, 8 C. & P. 373. Making apparently an attempt to ride over one is an assault. *State v. Sims*, 8 Strob. 137. It is an assault upon a woman to chase after her, calling upon her to stop, with an apparent

purpose to commit a rape upon her, though she is not overtaken. *State v. Neeley*, 74 N. C. 435; S. C. 21 Am. Rep. 496. So to put one's arm round her neck. *Goodrum v. State*, 60 Ga. 509. So to sit upon the bed of a woman and lean over her making indecent proposals. *Newell v. Whitcher*, 58 Vt. 584.

³ GILCHRIST, J., in *Beach v. Hancock*, 27 N. H., 223, 229. The judge truly says: "Without such security society loses most of its value. Peace and order and domestic happiness inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security."

⁴ 1 Hawk. P. C. 263; *Coward v. Baddeley*, 4 H. & N. 478; *Bigelow, Lead. Cas. on Torts*, 231. Every battery includes an assault. *Fitzgerald v. Fitzgerald*, 51 Vt. 420.

⁵ *Coward v. Baddeley*, 4 H. & N. 478.

against one, in the endeavor to make way through a crowd, is no battery; but to do so rudely and insolently is, and may justify damages proportioned to the rudeness.¹

Batteries Assented To. It is implied, in an assault or battery, that it is committed against the assent of the person assaulted; but there are some things a man can never assent to, and therefore his license in such cases can constitute no excuse. He can never consent, for instance, to the taking of his own life. His life is not his to take or give away; it would be criminal in him to take it, and equally criminal in any one else who should deprive him of it by his consent. The person who, in a duel, kills another, is not suffered to plead the previous arrangements and the voluntary exposure to death by agreement, as any excuse whatever. The life of an individual is guarded in the interest of the State, and not in the interest of the individual alone; and not his life only is protected, but his person as well. Consent cannot justify an assault.

But suppose, in the duel one is not killed, but only wounded; may he have an action against his adversary for this injury? If there is any reason why he may not, it must be because he has consented to what has been done. *Volenti non fit injuria*. But if he had no right or power to consent, and the consent expressed *in words was wholly illegal and void, the question [*163] then is, how a consent which the law forbids can be accepted in law as a legal protection?

Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. He is not injured by a negligence which is partly chargeable to his own fault. A man may not even complain of the adultery of his wife, which he connived at or assented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone.

But in case of a breach of the peace it is different. The State is wronged by this, and forbids it on public grounds. If men fight, the State will punish them. If one is injured, the law will

¹Cole v. Turner, 7 Mod. 149; Bigelow, Lead. Cas. on Torts, 231.

not listen to an excuse based on a breach of the law. There are three parties here, one being the State, which, for its own good, does not suffer the others to deal on a basis of contract with the public peace. The rule of law is therefore clear and unquestionable, that consent to an assault is no justification.¹ The exception to this general rule embraces only those cases in which that to which assent is given is matter of indifference to public order; such as slight batteries in play or lawful games,² such unimportant injuries, as even when they constitute technical wrongs, may well be overlooked and excused by the party injured, if not done of deliberate malice. But an injury, even in sport, would be an assault, if it went beyond what was admissible in sports of the sort, and was intentional.³

Deception may sometimes be equivalent to force as an [*164] *ingredient in an assault. Thus it has been said in Massachusetts: "If one should hand an explosive substance to another and induce him to take it by misrepresenting or concealing its dangerous qualities, and the other, ignorant of its character, should receive it and cause it to explode in his pocket or hand, and should be injured by it, the offending party would be guilty of a battery, and that would necessarily include an assault; although he might not be guilty even of an assault if the substance failed to explode, or failed to cause any injury. It would

¹ Buller, N. P., 16; Stephens, N. P., 211; Mather v. Ollerton, Comb. 218; Hannen v. Eies, 15 Mass. 346; Stout v. Wren, 1 Hawks. 420; Bell v. Hansley, 3 Jones, (N. C.) 131; Logan v. Austin, 1 Stew. 476; Adams v. Waggoner, 33 Ind. 531; S. C. 5 Am. Rep. 231; Shay v. Thompson, 59 Wis. 540; Jones v. Gale, 22 Mo. App. 637; Commonwealth v. Collberg, 119 Mass. 530; S. C. 20 Am. Rep. 328. This case comments upon and dissents from State v. Beck, 1 Hill, (S. C.) 363, and Champer v. State, 14 Ohio, (N. S.) 437, in which it was held that a fight by agreement was not an assault. But in Barholt v. Wright, 12 N. E. Rep. 185 (Ohio), this last case is explained as depending on a statute and it is held that consent does not bar the ac-

tion but goes in mitigation. See State v. Newland, 27 Kan. 764; Smith v. Simon, 37 N. W. Rep. 548 (Mich). A servant armed in defense of his master's right was shot by an attacking party. *Held*, that the maxim *volenti non fit injuria* did not apply. Denver etc. Co. v. Harris, 123 U. S. 597.

² If one is injured in mutual play, it is no battery, unless there was an intention to injure. Fitzgerald v. Cavin, 110 Mass. 153. As to liability for death from boxing in sport with soft gloves, see Reg. v. Young, 10 Cox Cr. C. 371.

³ See Christopherson v. Bare, 11 Q. B. 473, 477; Peterson v. Huffner, 59 Ind. 130.

be the same if it exploded in his mouth or stomach. If that which causes the injury is set in motion by the wrongful act of the defendant, it cannot be material whether it acts upon the person injured externally or internally, by mechanical or chemical force."¹ This was said in a case in which a party was prosecuted as for a criminal assault and battery for delivering to another something to be eaten, in which a deleterious drug was concealed, intending that the latter should eat it and be affected by it, as actually took place. The deceit by means of which the person was induced to take the drug was, it was said, a fraud upon the will, equivalent to force in overpowering it.²

Intent. In batteries there must always be an intent, express or implied to do the injury; and therefore an accidental hurt, in which the actor was blameless, is no battery. But it is not essential that the precise injury which was done should have been designed. One who hurls a missile into a crowd may have no one in view as the object of injury, but he commits a battery upon the person struck.³ So if two persons fight, and unintentionally one strikes a third, this is a battery of the latter, and is not excused as mere accident, for the purpose was to strike an unlawful blow to the injury of some one.⁴

***Battery in Self-Protection.** In any case of forcible [*165] assaults on the person, as in other cases of actions seemingly unlawful there may sometimes be lawful justification. Thus, the right of one person to complete immunity may be waived by such unlawful action on his part as renders necessary, or at least excusable, the employment of force to resist him. An

¹ *Wells, J.*, in *Commonwealth v. Stratton*, 114 Mass. 303; S. C. 19 Am. Rep. 350.

² Citing *Commonwealth v. Burke*, 105 Mass. 376; S. C. 7 Am. Rep. 531; *Commonwealth v. Stratton*, 114 Mass. 303; S. C. 19 Am. Rep. 350; *Regina v. Loch*, 13 Cox C. C. 244; *Regina v. Sinclair*, 13 Id. 28; *Regina v. Button*, 8 C. & P. 660, and disapproving *Regina v. Hanson*, 2 C. & K. 912. Where defendants induce, by an offer of money, an habitual drunkard to drink three pints of liquor at a sitting and

so produce death, his administrators may recover for the death. *McCue v. Klein*, 60 Tex. 168. If one has a right to enter into the possession of lands, deception to obtain a peaceful entry does not make it wrongful. *Stearns v. Sampson*, 59 Me. 568.

³ *Scott v. Shepherd*, 2 W. Bl. 892. One who in sport and not meaning to do harm, but intentionally threw a piece of mortar at another and injured a third person is liable for a battery. *Peterson v. Haffner*, 59 Ind. 130.

⁴ *James v. Campbell*, 5 C. & P. 872.

instance is where one attempts a battery of another, in which case the latter is not obliged to submit until an officer can be found or a suit commenced; but he may oppose violence to violence, and the limit to his privilege to do so is only this: that he must not employ a degree of force not called for in self-defense; he must not inflict serious injuries unnecessarily in repelling slight injuries; nor take life unless life or limb is in danger, nor even then if, by retreating, he can safely avoid such extremity.¹ When he exceeds the limits of necessary protection, and employs excessive force, he becomes a trespasser himself, and his assailant may recover damages from him for repelling the assault with a violence not called for.² In such a case each

¹ That one may repel force by force see *Miller v. State*, 74 Ind. 1; *Keep v. Quallman*, 32 N. W. Rep. 233 (Wis.); *Drew v. Comstock*, 57 Mich. 176. As one is under no obligation to use care to avoid an assault by retreating, contributory negligence is no defense to an action for assault and battery. *Steinmetz v. Kelly*, 73 Ind. 442; *Norris v. Casel*, 90 Ind. 143. Excessive force in resenting opprobrious words justifies counter assault in self-defense. *Tucker v. Walters*, 2 S. E. Rep. 639 (Ga.). But in Vermont it is held that one has no right to use force in self-defense, if he has other means of avoiding an assault which at the time seem to him sufficient. *Howland v. Day*, 56 Vt. 318. As to the obligation of one violently assaulted to retreat, see *Haynes v. State*, 17 Geo. 465; *Tweedy v. State*, 5 Iowa, 433; *State v. Dixon*, 75 N. C. 275; *People v. Harper*, Edm. Sel. Cas. 180.

As to the limit of violence in self-defense, see the following cases: *State v. Kennedy*, 20 Iowa, 569; *State v. Shippey*, 10 Minn. 223; *Erwin v. State*, 29 Ohio (N. S.), 186; *Murray v. Commonwealth*, 79 Penn. St. 311; *Roach v. People*, 77 Ill. 25; *Holloway v. Commonwealth*, 11 Bush, 344; *Lewis v. State*, 51 Ala. 1; *Eiland v. State*, 52 Ala. 323; *Irwin v. State*, 43

Tex. 236; *McPherson v. State*, 20 Ark. 225; *Miller v. State*, 74 Ind. 1.

If persons are acting in concert in attacking a man, his right of defending himself applies as to each one in the party if the circumstances were such as to cause a reasonable belief that each one is a party to the attack. *Jones v. State*, 20 Tex. App. 665. If one brings on a fight, he can not defend an action on the ground of self-defense, though in great danger during the affray. *Jones v. Gale*, 22 Mo. App. 637; *People v. Miller*, 49 Mich. 23; *State v. Newland*, 27 Kan. 764; *Thomason v. Gray*, 82 Ala. 291; *McNay v. Stratton*, 9 Ill. App. 215; *Pape v. State*, 69 Ala. 229; *Johnson v. State*, 69 Ala. 253; *Bankston v. Folks*, 38 La. Ann. 267. But if the defendant has only used provoking words and has not actually first assaulted plaintiff, the rule is different, since the provocation does not justify an assault upon him. *Norris v. Casel*, 90 Ind. 143. *Cross v. State*, 63 Ala. 40. Where one has brought on a fight he may not use a deadly weapon until he has made an effort in good faith to withdraw. *Presser v. State*, 77 Ind. 274.

² *Cockcroft v. Smith*, Salk. 642; *State v. Wood*, 1 Bay, 351; *Elliott v. Brown*, 2 Wend. 497; *Curtis v. Car-*

party may have an action against the other: the one for the original assault, and the other for the assault which commences with the employment of excessive force.¹ But in New York it has been held that the latter alone can have a remedy in such a case; a conclusion that seems to attach more importance to the apparent anomaly of giving to each party a remedy on the same state of facts than to substantial justice or to the principles which underlie legal remedies.²

son, 2 N. H. 539; *Dole v. Erskine*, 35 N. H. 503; *Philbrick v. Foster*, 4 Ind. 442; *Steinmetz v. Kelly*, 72 Ind. 442; *Trogden v. Henn.*, 85 Ill. 237; *Bartlett v. Churchill*, 24 Vt. 218; *Brown v. Gordon*, 1 Gray, 183. See *Ogden v. Claycomb*, 53 Ill. 865; *Riddle v. State*, 49 Ala. 389. An unlawful arrest may be resisted like any other unlawful assault. *Williams v. State*, 44 Ala. 41, and authorities cited; *People v. McLean*, 36 N. W. Rep. 231 (Mich.).

¹ *Dole v. Erskine*, 35 N. H. 503, 510. And, see, *Gizler v. Witzel*, 83 Ill. 822; *Ogden v. Claycomb*, 53 Ill. 865.

² *Elliott v. Brown*, 2 Wend, 497. In *Dole v. Erskine*, 35 N. H. 503, 510, EASTMAN, J., questions the doctrine of this case in the following language: "Up to the time that the excess is used, the party assaulted is in the right. Until he exceeds the bounds of self-defense he has committed no breach of the peace, and has done no act for which he is liable; while his assailant, up to that time, is in the wrong, and is liable for his illegal acts. Now, can this cause of action which the assailed party has for the injury inflicted upon him, and which may have been severe, be lost by acts of violence subsequently committed by himself? Can the assault and battery, which the assailant himself has committed, be merged in or set off against the excessive force used by the assailed party? Unless this be so, and the

party first commencing the assault and inflicting the blows, and thus giving to the other side a cause of action, can have the wrong thus done and the cause of action thus given wiped out by the excessive castigation he receives from the other party, then each party may maintain a separate action: the one that is assailed for the assault and battery first committed upon him, and the assailant for the excess of force used upon him beyond what was necessary for self-defense.

"We think that these are not matters of set-off; that the one cannot be merged into the other, and that each party has been guilty of a wrong for which he has made himself liable to the other. There have, in effect, been two trespasses committed: the one by the assailant in commencing the assault, and the other by the assailed party in using the excessive force. And, upon principle, we do not see why the one can be an answer to the other, any more than an assault committed by one party on one day can be set off against one committed by the other party on another day. The only difference would seem to consist in the length of time that had elapsed between the two trespasses. In a case where excessive force is used, the party using it is innocent up to the time that he exceeds the bounds of self-defense. When he uses the excessive force, he then, for the first time, becomes a trespasser. And

[*166] *There can be no higher justification for the employment of force than that which a woman may make in defense of her chastity; and, if necessary, it may extend to the taking of life. But the necessity should be apparent on [*167] the facts as they then *presented themselves to her mind. And what the woman may do for herself she may doubtless call in the aid of others to assist her in.

As words never constitute an assault, neither will they justify the employment of force in protection against them, however gross or abusive they may be.¹ There are probably exceptions to this general statement in the case of words grossly insulting to females; at least one would be excused where grossly vulgar and insulting language was employed in the presence of his family, if he were promptly to put a stop to it by force.

wherein consists the difference, except it be that of time, between a trespass committed by him then and one committed by him on the person the day after?

"In *Elliot v. Brown*, it is conceded that both parties may be indicted and both be criminally punished, notwithstanding it was there held that a civil action can be maintained only against him who has been guilty of the excess. If this be so, and each party can be criminally punished, then each must have been guilty of an assault and battery upon the other; and if thus guilty, why should not a civil action be maintained by each? It would seem that the fact that both are indictable shows that each is in the wrong as to the other, and that each has a cause of action against the other, and that such cause of action may be successfully prosecuted, unless one is to be set off against the other. That torts are not the subjects of set-off is entirely clear.

"We arrive, then, at the conclusion that the causes of action existing in such cases cannot be set off, the one against the other, nor merged, the one into the other, but that each party may maintain an action for the

injury received; the assailed party for the assault first committed upon him, and the assailant for the excess above what was necessary for self defense.

"This rule, it appears to us, will do more justice to the parties, and more credit to the law, than the other, for by it the party who commenced the assault, and who has been the moving cause of the difficulty, is made to answer in money, instead of having his assault merged in the one which he has provoked, and which has been inflicted upon him by his antagonist."

¹ See *Hawk. P. C.* ch. 28 § 22. *People v. Angeles*, 61 Cal. 188. See, also, *Staten v. State*, 30 Miss. 619; *Briggs v. State*, 29 Geo. 723.

² *Richardson v. Zuntz*, 26 La. Ann. 313; *State v. Martin*, 30 Wis. 216; *Sorgenfrei v. Schrader*, 75 Ill. 397; *Murray v. Boyne*, 43 Mo. 472. See *Norris v. Casel*, 90 Ind. 143; *Cross v. State*, 63 Ala. 40. Nor will a disregard of one's religious scruples. That a priest is about to administer a sacrament to a person in an almshouse does not justify him in forcibly expelling from the room a person lawfully there. *Cooper v. McKenna*, 124 Mass. 284.

Defense of Family. Such force as one may employ in his own defense he may also employ in defense of his wife, his child, or any member of his family.¹ But to revenge the wrongs of himself or of his family is no part of his legal right, and when the danger is repelled, justification for the further use of violence is at an end.²

Defense of Possessions. One may also justify an assault or battery committed in defending his possession of property, either personal or real, subject to the same restriction that he must not employ excessive force.³ He may not only

¹ *Patten v. People*, 18 Mich. 314; *Commonwealth v. Malone*, 114 Mass. 295; *Stoneman v. Commonwealth*, 25 Grat. 887; *Staten v. The State*, 30 Miss. 619; *State v. Johnson*, 75 N. C. 174; *Tickell v. Read*, Lofft. 215.

² *Cockcroft v. Smith*, 11 Mod. 43; *State v. Gibson*, 10 Ired. 214; *Barfoot v. Reynolda*, 2 Stra. 953; *Regina v. Driscoll*, 1 C. & M. 214.

³ *Abt v. Burgheim*, 80 Ill. 92; *Ayres v. Birch*, 85 Mich. 501; *Johnson v. Perry*, 56 Vt. 703; *Fossbinder v. Svitak*, 16 Neb. 499; *Green v. Goddard*, 2 Salk. 641. The intentional taking of life in resisting a trespass can never be justified. 1 Russ. on Crimes, 220; 4th ed. 1027. The owner of land is justifiable in beating a trespasser only when the battery is necessary to the defense of his property. *Stachlin v. Destrehan*, 2 La. Ann. 1019. He may not shoot one for merely driving across his land. *Everton v. Egate*, 38 N. W. Rep. 794 (Neb.) He may remove a trespasser from his premises, using no more force than needful for that purpose. *McCarty v. Fremont*, 23 Cal. 196; *Kiff v. Youmans*, 86 N. Y. 324; *Woodman v. Howell*, 45 Ill. 367; *Beecher v. Parmele*, 9 Vt. 352; *Brothers v. Morris*, 49 Vt. 460; *People v. Payne*, 8 Cal. 341, *People v. Batchelder*, 27 Cal. 69; *Breitenbach v.*

Trowbridge, 81 N. W. Rep. 403 (Mich). One may not strike an unarmed trespasser with a stick till one has failed in removing him by gently laying hands on him. *State v. Burke*, 82 N. C. 551. But in defending property against a trespasser who draws a deadly weapon, if one is in reasonable apprehension of danger, his use of a deadly weapon may be justifiable. *People v. Dann*, 53 Mich. 490; *State v. Taylor*, 82 N. C. 554. See *Souther v. State*, 18 Tex. App. 352.

So in protecting possessions from trespasses of animals, only necessary force is to be used. *Thompson v. State*, 67 Ala. 106; *McIntire v. Plaisted*, 57 N. H. 606. See *Anderson v. Smith*, 7 Ill. App. 354; *Avery v. People*, 11 Ill. App. 332; *Livermore v. Batchelder*, 141 Mass. 179; *Marshall v. Blackshire*, 44 Ia. 475; *State v. Bates*, 92 N. C. 784. See, also, pp. *345-6, and cases *post*.

A man assaulted in his dwelling is not obliged to retreat, but may defend his possession to the last extremity. *Pond v. People*, 8 Mich. 150; *Pitford v. Armstrong*, *Wright* (Ohio), 94. He may kill a burglar breaking in. *McPherson v. State*, 22 Geo. 478. See, further, *Thompson v. State*, 55 Geo. 47; *Palmore v. State*, 29 Ark. 248; *Wall v. State*, 51 Ind. 453; *State v. Stock*.

[*168] resist an *aggression upon his property, but if his possession is actually invaded, he may employ force to remove the intruder, if the latter fail to go on request. In the language of the law, his defense will be, that he laid his hands gently on the trespasser and removed him by the employment of so much force as was necessary, and no more.¹ But although one is permitted to defend a right by force, it does not follow that he is at liberty to recover by force a right which is denied; the latter can only be justified in extreme cases, such as would justify force in preventing crime or in arresting offenders.²

Spring Guns. Spring guns are sometimes set on private grounds as a defense against trespassers. The setting of these instruments is not of itself an unlawful act;³ but if a trespasser is killed or seriously injured by one, the only defense the person setting it can make is that the injury was inflicted in defense of his freehold. But the force that causes homicide or dangerous injury is clearly excessive, and, therefore, not justifiable.⁴ A killing to repel a mere trespass to property is never justifiable,⁵ though one may resist to any extent the forcible taking [*169] from *himself, without authority of law, of that which is his own, and any criminal assault upon person or premises.

Ferocious Dogs. The use of ferocious animals in defense of property, like the use of spring guns, may, under some circumstances, be the employment of unlawful force. Much would

ton, 61 Mo. 383; *State v. Abbott*, 8 W. Va. 741; *State v. Burwell*, 63 N. C. 661.

¹ *Harrison v. Harrison*, 43 Vt. 417; *Drew v. Comstock*, 57 Mich. 176.

² It is no defense to an action for assault and battery that the defendant had an irrevocable license to enter upon the plaintiff's land to remove personal property, and that in the attempt to exercise it the plaintiff withstood him. *Churchill v. Hulbert*, 110 Mass. 42; S. C. 14 Am. Rep. 578. Citing *Sampson v. Henry*, 18 Pick. 336; *Commonwealth v. Haley*, 4 Allen, 318. One may not retake prop-

erty by violence where the title is disputed. *Harris v. Marco*, 16 S. C. 575. A right of property will not justify assault and battery to regain possession wrongfully withheld. *Bliss v. Johnson*, 73 N. Y. 529.

³ *State v. Moore*, 31 Conn. 479.

⁴ *Bird v. Holbrook*, 4 Bing. 623; *Gray v. Combs*, 7 J. J. Marsh. 478; *Hooker v. Miller*, 37 Iowa, 613; S. C. 18 Am. Rep. 18; *Aldrich v. Wright*, 53 N. H. 398, 404; S. C. 16 Am. Rep. 339.

⁵ *State v. Vance*, 17 Iowa, 138. See *Loomis v. Terry*, 17 Wend. 496.

depend upon the circumstances, the character of the animal and the probability of his doing extreme injury.¹

What has been said of spring guns and ferocious dogs will apply to any dangerous means employed against trespassers, and by which one might be seriously injured without previous warning.

Excessive Force a Question of Fact. The question whether the force employed in defense of person, family, or property, is excessive, must generally be one of fact. Some cases are so clear that the judge would be warranted in saying that as matter of law the force was or was not excessive; but they are not numerous.²

FALSE IMPRISONMENT.

The Nature of the Wrong. False imprisonment is a wrong akin to the wrongs of assault and battery, and consists in imposing, by force or threats, an unlawful restraint upon a man's freedom of locomotion.³ *Prima facie* any restraint put by fear or force upon the actions of another is unlawful and constitutes a

¹ This subject will be referred to in the chapter which considers the responsibility of owners of property for injuries done or occasioned by it.

² *Commonwealth v. Bush*, 112 Mass. 280; *Edwards v. Leavitt*, 46 Vt. 126; *Commonwealth v. Mann*, 116 Mass. 58; *Hanson v. European, etc., R. R. Co.*, 63 Ma. 84; S. C. 16 Am. Rep. 404; *Currier v. Swan*, 63 Ma. 323; *State v. Taylor*, 82 N. C. 554. An unintentional injury inflicted in self-defense and without negligence, is no assault. *Morris v. Platt*, 32 Conn. 75; *Paxton v. Boyer*, 67 Ill. 132; S. C. 16 Am. Rep. 615. Where B. seized A. by the arm and swung him violently around two or three times, then letting him go, and as a result of this force he came violently against C., who, in instantly pushing him away, pushed him against a hook, whereby he was injured, it was held that B., not C., was responsible in trespass for this injury. *Ricker v. Freeman*, 50

N. H. 420; S. C. 9 Am. Rep. 267. This decision follows the celebrated squib case of *Scott v. Shepherd*, 2 W. Bl. 892, referred to, ante, p. *71.

³ *PATTERSON, J.*, in *Bird v. Jones*, 7 Q. B. 742, 752; *Crowell v. Gleason*, 10 Me. 325. A sheriff may be guilty of false imprisonment if he keeps a prisoner, lawfully arrested, in jail for thirty days without bringing him before a magistrate. *Anderson v. Beck*, 64 Miss. 113. So a party may be liable for malicious abuse of lawful process after arrest. *Wood v. Graves*, 144 Mass. 365.

False imprisonment is a trespass committed by unlawful arrest and imprisonment. If the imprisonment is under legal process but the action has been begun and carried on maliciously and without probable cause, the wrong is malicious prosecution. *Gelzenleuchter v. Niemeyer*, 64 Wis. 316; *Murphy v. Martin*, 58 Wis. 276; *Marks v. Townsend*, 97 N. Y. 590;

false imprisonment, unless a showing of justification makes [*170] it a true or legal imprisonment. Therefore, if an officer, without process or with void process, notifies a person that he arrests him, and the person so notified submits and accompanies him, this is an imprisonment. "It is the fact of compulsory submission which brings a person into imprisonment; and impending and threatened physical violence, which to all appearance can only be avoided by submission, operates as effectually if submitted to as if the arrest had been forcibly accomplished without such submission. There are cases in which a party who does not submit cannot be regarded as arrested until his person is touched; but when he does submit no such necessity exists."¹ "If the party is under restraint, and the officer manifests an intention to make a caption, it is not necessary there should be actual contact."² Just as little will constitute imprisonment by others than officers. To tell one on a ferry that he shall not leave it until a certain demand is paid, is an imprisonment if one submits through fear, though the person is not touched and no actual violence offered.³ But it is no imprisonment to turn one from the way he desires to go, if he is not otherwise restrained, and is at liberty to go back or to go elsewhere than in the direction he was started in. It is a wrong which may be redressed in an action on the case, but it is not an imprisonment.⁴

Mullen v. Brown, 138 Mass. 114; *Herzog v. Graham*, 9 Lea, 152. See *Lewin v. Uzuber*, 65 Md. 341. If the arrest is unlawful, malice need not be shown. *Chrisman v. Carney*, 33 Ark. 316.

As to joint liability of officer or attorney or magistrate in false imprisonment, see cases supra. p. 147 n. 1, 151 n. 4. The party and attorney are protected if the writ protects the officer. *Wheaton v. Beecher*, 49 Mich. 348; *Hill v. Taylor*, 50 Mich. 549. The burden of proof to show the imprisonment lawful is on the defendant. *Hicks v. Faulkner*, L. R. 8 Q. B. D. 167; differing from the rule in malicious prosecution.

¹ *CAMPBELL, J.*, in *Brushaber v. Stegemann*, 22 Mich. 266, 269. And, see, *Pike v. Hanson*, 9 N. H. 491.

² *VAUGHAN, J.*, in *Granger v. Hill*, 4 Bing. (N. C.) 212, 222. And, see, *Bird v. Jones*, 7 Q. B. 742; *Warner v. Riddiford*, 4 C. B. (N. S.) 190. While manual seizure is not necessary to constitute an arrest, there must be that or its equivalent in some sort of personal coercion. *Hill v. Taylor*, 50 Mich. 549.

³ *Smith v. State*, 7 Humph. 43, 45. Shutting up in a room, threatening with weapons to extort a promise, is false imprisonment. *Hildebrand v. McCrum*, 101 Ind. 61. But it is not if one goes with another voluntarily though hoaxed. *State v. Lunsford*, 81 N. C. 528.

⁴ *Bird v. Jones*, 7 Q. B. 742. But see, *Harkins v. State*, 6 Tex. App. 457.

Restraints in certain Relations. The justification of imprisonment may be either under process or without process. In certain relations a degree of restraint is permitted by the law, for which no writ or legal process of any sort is usually required. The following are the cases referred to: The parent in respect to the child, the guardian in respect to the ward, the master in respect to his apprentice, the teacher in respect to his pupil, and the bail in respect to his principal. The latter it is usual to regulate by statute, and one of the regulations is, that arrest and imprisonment, shall not take place without the exhibition of proper papers showing the relation and the rights under it. The others are cases resting upon principles which are so familiar that little *need be said concerning them here. Re- [*171]straints are admissible within such limits as the parent, guardian, teacher, or master, in the exercise of a sound discretion, may decide to be necessary. To a certain extent a judicial power is vested in him which others are not at liberty to interfere with, except in a case of manifest abuse. To take by itself the case of the parent, though the old ideas regarding the need of severity and strict discipline have to a large extent passed away, the father may still not only restrain the liberty of his infant child, but he may, as reason shall seem to him to require, inflict corporal punishment for misbehavior. The limit to his authority is that uncertain limit that the correction must be moderate, and dictated by reason and not by passion.¹ If he plainly exceeds all bounds, he is liable to criminal prosecution, but it seems never to have been held that the child might maintain a personal action for his injury. In principle there seems to be no reason why such an action should not be sustained; but the policy of permitting actions that thus invite the child to contest the parent's authority is so questionable, that we may well doubt if the right will ever be sanctioned.

A guardian of the *person* of his ward has a right of personal restraint corresponding to that of the parent, but without, in general, the power of chastisement. That power would probably be possessed in extreme youth if the ward were received into the family of the guardian, who thus was placed, in respect to him, *in loco parentis*.

¹ Johnson v. State, 2 Humph. 283. Winterburn v. Brooks, 2 C. & K. 16.

The relation of master and apprentice is formed under statutes, and these give the master the authority he possesses. A power of restraint to a limited extent, to compel performance of duties under the articles, he probably possesses, but it is not clear that this is true generally. By the English law the master possessed the authority of moderate personal chastisement when his judgment advised it.¹

The teacher to whom a child is committed by his parents or guardian has also the right of restraint, and even of punishment, to compel obedience to lawful orders. Like the parent's, the authority must be exercised with moderation, and while all [*172] *presumptions favor the correctness of his action,² yet, in a clear case of abuse of authority, he may be held liable as for a criminal assault, and also in a civil suit for damages.³

The authority of the bail in respect to his principal, for whose conduct he has become responsible, is to arrest and surrender him in exoneration of his liability. It is a limited authority and must be exercised without needless violence or annoyance.⁴

Circumstances may place one in authority over another, when restraint would not only become excusable, but a duty. Thus, the safety of a ship, its passengers and crew, might depend upon the strict subordination of all persons on board; and all persons must then, of necessity, submit themselves to the proper orders of the master.⁵

¹ See *Penn v. Ward*, 2 C. M. & R., 338. One employed for another under contract for service is not liable to punishment by the master. *Schouler Dom. Rel.* 616; *Mathews v. Terry*, 10 Conn. 455.

² *Cooper v. McJunkin*, 4 Ind. 290; *State v. Pendergrass*, 2 Dev. & Bat. 865; *Commonwealth v. Randall*, 4 Gray, 36; *Hathaway v. Rice*, 19 Vt. 102. *Sheehan v. Sturges*, 53 Conn. 481; *Danenboffer v. State*, 69 Ind. 295. Not liable for error of judgment when he has acted in good faith. *Heritage v. Dodge*, 9 Atl. Rep. 722 (N. H.) *Fertich v. Michener*, 111 Ind. 472. Not liable for false imprisonment in detaining a pupil a short time after school hours. *Id.*

³ *Commonwealth v. Randall*, 4 Gray, 36; *Lander v. Seaver*, 32 Vt. 114. *Patterson v. Nutter*, 78 Me. 509. It has been held that if the child's parent gives him directions what to do, the teacher has no right to punish the child for obeying them. *Morrow v. Wood*, 35 Wis. 59. At least in the absence of a compulsory education law. *State v. Misner*, 50 Ia. 145. If such directions interfered with school regulations, expulsion would seem to be the proper remedy.

⁴ See *Cooley*, *Const. Lim.* 341, and note.

⁵ *Brown v. Howard*, 14 Johns. 119; *Flemming v. Ball*, 1 Bay, 8.

Requisites of Legal Process. Excepting the cases already named, and a few more which will be referred to further on, whoever would justify an arrest must have legal process duly emanating from some judicial authority. This process must be pleaded, and it must have certain requisites, in order to render it available as a defense. Speaking generally, these requisites are the following: It must have been issued by a court or officer having authority of law to issue such process, and there must be nothing on the face of the process apprising the officer to whom it is delivered for service, that in the particular case there was no authority for issuing it. When the process will bear this test, the officer is protected in obeying its command.

As the rules of protection by process are the same, whether unlawful restraint upon the person is in question, or unlawful intermeddling with goods, it will be convenient to postpone a particular consideration of them until trespasses to property are discussed. In this place only a very few general rules will be mentioned.

*1. A writ may be absolutely void because it does not [*173] emanate from the court or officer purporting to issue it. This may happen because it is forged, or because some unauthorized person has assumed to fill out and issue process in the name of a magistrate. It has been decided in New York, and also in Illinois, that if a justice of the peace, who, by law, has authority to issue writs in person, shall deliver blanks to an officer, with leave to fill them up at discretion, and then issue them, such permission would be void, and the writs issued in pursuance of it nullities.¹ It should be said that in those States the justice is the clerk of his court, as well as the judge of it.

2. A writ may be void because it proceeds from a court or magistrate having, by law, no jurisdiction of the subject matter, either generally, or to the extent to which it has been assumed. Illustrations of this will be given in another place. It is enough to say now, that when this defect exists, it will generally appear

¹ *Pierce v. Hubbard*, 10 Johns. 405; *People v. Smith*, 20 Johns. 68; *Raferty v. People*, 69 Ill. 111; S. C. 72 Ill. 37; S. C. 18 Am. Rep. 601. See, also, *Burslem v. Fern*, 2 Wils. 47. Where one has caused the arrest of a person on one charge and the

justice changes the charge and inflicts a fine for something else, the complainant is not liable for damage arising from the illegal acts of the justice. *Frankfurter v. Bryan*, 12 Ill. App. 549.

on the face of the proceeding, though the rule is by no means universal.¹

3. The writ may also be void 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. In such cases there may have been jurisdiction in fact, but because it is not shown, it is as if it did not exist. If, for example, a magistrate issues a warrant for committing one to prison without reciting therein an accusation, a trial, and a conviction, he issues a process which is apparently unwarranted, and the officer to whom it is delivered is bound to know that he would not be protected in serving it.²

¹ But where the jurisdiction depends not on matter of law, but on matter of fact which the court or magistrate is to pass upon, the decision upon it is conclusive, and a protection not only to the officer serving process, but to the court or magistrate also. *Brittain v. Kinnard*, 1 Brod. & B. 432; *Mather v. Hood*, 8 Johns. 44; *Mackaboy v. Commonwealth*, 2 Virg. Cas. 268; *Clarke v. May*, 2 Gray, 410; *State v. Scott*, 1 Bailey, 294; *Wall v. Trumbull*, 16 Mich. 228; *Sheldon v. Wright*, 5 N. Y. 497; *Freeman on Judgments*, § 523, and cases cited. *Lange v. Benedict*, 73 N. Y. 12; *Bocock v. Cochran*, 32 Hun, 521. See, *Goodwine v. Stephens*, 63 Ind. 112. The party who does nothing but make the complaint is not liable though in fact there is no jurisdiction. *Langford v. Boston, etc., Co.*, 144 Mass. 431. Unless in the affidavit for the writ there is entire lack of evidence of a jurisdictional fact. *Dusy v. Helm*, 59 Cal. 188. But where a justice upon a complaint showing on its face that the offense charged was barred by time, issues process and commits the prisoner, he is liable. *Vaughn v. Congdon*, 56 Vt. 111. And one may be liable who draws up complaint and warrant, takes latter from the magistrate and gives it to the officer

with orders to arrest at any cost. *Loomis v. Render*, 41 Hun, 268. If an order of arrest is made by a judge having jurisdiction, the party and attorney is protected though the order be set aside afterward or reversed on appeal. *Marks v. Townsend*, 97 N. Y. 590. *Bamberger v. Kahn*, 43 Hun, 411; *Fischer v. Langbein*, 103 N. Y. 84.

² The officer is bound to know the law, and that his writ is bad on its face, if such is the fact. *Grumon v. Raymond*, 1 Conn. 39; *Lewis v. Avery*, 8 Vt. 287; *Clayton v. Scott*, 45 Vt. 386. So if examining magistrate convicts and constable takes to jail. *Patzack v. Von Gerichten*, 10 Mo. App. 424. In serving a valid process, he is liable only for acts not authorized by it. *Gage v. Barnes*, 11 Vt. 195; *Churchill v. Churchill*, 12 Vt. 661. But for such acts he may be treated as a trespasser. *Coffin v. Field*, 7 Cush. 355; *Morse v. Reed*, 28 Me. 481; *Smith v. Gates*, 21 Pick. 55; *Gordon v. Clifford*, 28 N. H. 402; *Cate v. Cate*, 44 N. H. 211. This is so, even where that which he did was done by command of his official superior, who, in giving the command, exceeded his lawful authority. *Griffin v. Wilcox*, 21 Ind. 370; *Jones v. Commonwealth*, 1 Bush. 34.

*4. The writ may also be void for many other reasons, [*174] such as that it is tested of a Sunday or other day which is *dies non* for such process, or that it was issued without compliance with some statutory requisite which is a condition precedent and shows the defect on its face; or for other defects, which will be more particularly referred to hereafter. It is enough to repeat here that the writ which an officer can justify himself in serving must be a valid writ and that those concerned in issuing it must be able by the law to justify its issue.

Arrest Without Warrant. There are sometimes circumstances which in themselves are a command of arrest as imperative as could be any command by official authority. These cases, in general, are plain, and they rest upon the inherent right of society to defend itself against sudden assaults, not by regular proceedings merely, but, in emergencies, by the spontaneous action of its members.

In all civil cases it is not supposed that public justice will suffer, or that any one can be seriously injured or incommoded by any such delay in arresting a wrong-doer as may be requisite to obtain proper legal process. Neither, in general, can any similar delay be supposed prejudicial in the case of minor offenses against the State. But it may be reasonably expected that a felon will flee from justice if an opportunity is afforded him, and also that, if he knows he is suspected, he will do what may be in his power to obliterate the evidences of his crime. In these circumstances are found forcible reasons for prompt action in his arrest; but the reasons would be still more imperative if the criminal conduct was discovered before the crime was complete. If one were detected in maliciously setting fire to his neighbor's house, the moral obligation to make immediate arrest, and the legal right to do so would be equally plain. They might not be so imperative or so clear in the case of some other felonies, but the difference would be in degree only.

*When the propriety of an arrest without process is in [*175] question, the problem always is, how to harmonize the individual right to liberty with the public right to protection. Where process issues, the proceedings required in obtaining it constitute a sufficient precaution against causeless arrests: the magistrate decides on the facts presented to him that sufficient

reason exists. But if one without this protection were to arrest upon his own judgment, he ought to be able, when called upon, to show that his judgment was warranted. To do this he should show either—

1. A felony actually committed; and
2. Facts that have come to his knowledge which justified him in suspecting the person arrested to be the felon; or
3. A felony being committed, and an arrest to stay and prevent it.¹

This seems to be the least that could be required; the fact of felony, and personal knowledge of the guilt of the particular person, or reason for suspecting him; and if one errs in these particulars, it is better that he be left to take the consequences, than that they be visited upon an innocent party who is improperly arrested.² But a peace officer may properly be treated with more indulgence, because he is specially charged with a duty in the enforcement of the laws. If by him an arrest is made on reasonable grounds of belief, he will be excused, even though it appear afterwards that in fact no felony had been committed.³

¹ *Ruloff v. People*, 45 N. Y. 213; *Keenan v. State*, 8 Wis. 132; *Neal v. Joyner*, 89 N. C. 287. A citizen may arrest on fresh pursuit one seen pocket-picking. *Kennedy v. State*, 107 Ind. 144. If one causes an officer to arrest, without warrant, a person for a misdemeanor not committed in the officer's presence, he cannot escape liability unless the charge is well founded. *McGarrahan v. Lavers*, 3 Atl. Rep. 592 (R. I.); *Taaffe v. Slevin*, 11 Mo. App. 507. So if one, not an eye witness, causes an officer to arrest for such misdemeanor, he is liable. *Ross v. Leggett*, 28 N. W. Rep. 695 (Mich.) Where an officer arrested a woman and took her to the station on no other justification than that of vague hearsay and suspicion of a third person that she had had something to do with making way with a missing person, the officer himself making no inquiry whatever into the facts, the arrest was held totally un-

warranted. *Somerville v. Richards*, 37 Mich. 299. An arrest by a constable out of his jurisdiction must be regarded as an arrest without warrant, even though he may have a warrant which commanded the arrest within his jurisdiction. *Krug v. Ward*, 77 Ill. 603.

² *Holley v. Mix*, 3 Wend. 350; *Commonwealth v. Deacon*, 8 S. & R. 47; *State v. Roane*, 2 Dev. 58; *Brockway v. Crawford*, 3 Jones N. C. 434; *Eanes v. State*, 6 Humph. 53; *Long v. State*, 12 Geo. 293; *Reuck v. McGregor*, 32 N. J. 70; *State v. Holmes*, 48 N. H. 377.

³ *Marsh v. Loader*, 14 C. B. (n. s.) 535; *Lawrence v. Hedger*, 3 Taunt. 14; *Davis v. Russell*, 5 Bing. 354, 365; *Wakely v. Hart*, 6 Binn. 816; *Burns v. Erben*, 40 N. Y. 463; *Holley v. Mix*, 3 Wend. 350; *Rohan v. Sawin*, 5 Cush. 281; *Drennan v. People*, 10 Mich. 169; *State v. Underwood*, 75 Mo. 230. In such cases probable

Forcible breaches of the peace, in affrays, riots, etc., are placed, as regards arrest without warrant, on the footing of felonies. *The reason for this is found in their tendency [*176] to lead to serious, and perhaps fatal injuries.' Peace officers are also allowed, without warrant, to enforce the ordinary laws of police by the arrest of vagrants, and drunken and disorderly persons, detaining them for the action of the proper police magistrates.³ And it is said, by an old writer on criminal law, that "it hath been adjudged that any one may apprehend a common, notorious cheat, going about the country with false dice, and being actually caught playing with them, in order to have him before a justice of the peace, for the public good requires the utmost discouragement of all such persons, and the restraining of private persons from arresting them without a warrant from a magistrate would often give them an opportunity for escaping."³ These remarks will apply to professional gam-

cause is a question of law depending on the reasonable belief of the party. *McCarthy v. DeArmit*, 99 Penn. St. 63.

¹ *Republica v. Montgomery*, 1 Yeates, 419; *City Council v. Payne*, 2 N. & McCord. 475; *State v. Brown*, 5 Harr. (Del.) 505; *Phillips v. Trull*, 11 Johns. 487; *Vandever v. Mattocks*, 8 Ind. 479. The officer may so arrest to prevent a threatened breach of the peace. *Hayes v. Mitchell*, 80 Ala. 183. But not for a past breach not committed in his presence. *Quinn v. Heisel*, 40 Mich. 576. *Way's Case*, 41 Mich. 299; *People v. Haley*, 48 Mich. 495. So generally as to past misdemeanor; *People v. McLean*, 36 N. W. Rep. 231 (Mich.) But he may upon fresh pursuit for an offense less than felony though not committed in his view. *State v. Sims*, 16 S. C. 486. Even if the offense is committed in his presence he may not delay five hours before attempting to arrest. *Wahl v. Walton*, 30 Minn. 506. A deputy sheriff cannot arrest for past misdemeanor where a warrant has been issued if he does not have it in his possession at the time. *People v.*

McLean, 36 N. W. Rep. 231 (Mich.) An officer is not justified in arresting, upon a letter or telegram from a peace officer of another county or state, without warrant where a misdemeanor is charged. *Manning v. Mitchell*, 73 Ga. 660, or an offense not a crime by the laws of his own state. *Malcolmson v. Scott*, 56 Mich. 459.

² *Beville v. State*, 16 Tex. App. 70; *Wiltse v. Holt*, 95 Ind. 469. But the fact that one at the time orderly has been recently intoxicated is no justification for arrest without warrant. *Newton v. Locklin*, 77 Ill. 103. In Massachusetts if an officer arrests for drunkenness one in fact not drunk, he is liable civilly. *Phillips v. Fadden*, 125 Mass. 198., but not criminally. *Com. v. Cheney*, 141 Mass. 102. If a peace officer arrests one without warrant on an oral complaint by another, and handcuffs and confines him, he will be held liable for false imprisonment, if it turns out that he was innocent. *Griffin v. Coleman*, 4 H. & N. 265. See *Ross v. Leggett*, 28 N. W. Rep. 675 (Mich.)

³ *Hawk P. C.* 2 c. 12, § 20. That

blers and cheats on the public thoroughfares; if they are found plying their unlawful vocation there, they are properly and justly classed with night walkers and other persons without reputable means of support, and who prey in one form or another on the public.

Imprisonment of Insane Persons. The imprisonment of persons alleged to be insane is likely, in some cases, to lead to injustice, and demands some special attention. In the vast majority of cases in which persons are restrained of their liberty for supposed insanity, there has been no adjudication whatever. The father discovers that his child is disordered in mind, and he places him in an asylum. The husband does the same with his wife, or the wife with her husband. Generally this is proper and commendable, if affection or a sense of duty has prompted and governed the action; but when there is no legal supervision, it is always possible that the motive may be a base instead of [*177] a just one. The difficulty of obtaining redress in such cases is sufficiently serious to require most careful consideration for the general subject.

The rights and liabilities of parties in the cases of such confinement may be considered under two heads:

1. When there has been no adjudication.
2. When an adjudication has taken place and a judicial declaration of insanity has resulted.

Under the right of self-defense there must undoubtedly be authority to seize and restrain any person incapable of controlling his own actions, and whose being at large endangers the safety or property of others.¹ Humanity requires that the restraint should be suited to the unfortunate condition, and should have in view the restoration to reason, if that be possible; but regulations for that purpose must be by the arrangement of parties concerned, or they must be prescribed by law. Where an arrest is made merely for protection, it is only required of the person making it that he treat the person arrested with the utmost

one in the night time, disobeying the orders of the city board of health, in a manner dangerous to the public health, may be arrested without warrant, see *Mitchell v. Lemon*, 34 Md. 176.

¹ Every man for his own protection may restrain the fury of a lunatic. *Brookshaw v. Hopkins*, Loft. 235. This right ceases when the seizure is no longer reasonably necessary. *Keleher v. Putnam*, 60 N. H. 30.

kindness and consideration consistent with the safety of others, and that he do no more in imposing restraint than protection requires. But he must make sure of his facts, and be certain that they will justify him. As in arresting a supposed felon, so in this case, it is not an honest belief on his part, or purity of motive, that can afford protection: he assumes to be both accuser and judge, and the consequences of any error are very properly visited upon him.¹ If there is no insanity, the party arrested may rightfully resist, even to the extent of inflicting fatal injuries; and he may recover exemplary damages for the injury and disgrace which he suffers in the attempt to fix upon him the stigma and the disabilities of mental unsoundness.

But not every insane person is a dangerous person. Nothing can be more harmless to others than a person afflicted with some of the milder forms of insanity. If self-protection, and not the benefit of the supposed insane person, is made the justification for confinement without adjudication, it must wholly fail in such cases.² It is not insanity that excuses, but insanity of a type that *impels the person to acts which endanger the [*178] rights of others. If the State has made provision for the care of insane persons, it will be proper to commit them to such asylums as may have been provided, but if either private individual or officer shall take the responsibility of doing this without previous adjudication, he must take on his personal responsibility the risk of all errors.

It is sometimes provided by statute that no one shall be restrained of his liberty as an insane person except upon the certificate of a reputable physician, or, perhaps, of more than one. Such a certificate may prevent injustice in some cases, but as a physician is not a judicial officer, and has no judicial powers, it is not an adjudication and cannot be given the force of law so as to protect parties who imprison one not insane in fact.³ It might assist in showing that the parties had acted in good faith, and therefore ought not to be visited with exemplary damages;

¹ *Look v. Dean*, 108 Mass. 116; S. C. 11 Am. Rep. 323. The fact that a deputy constable acted under the orders of his principal is no excuse. *Id.*

² *Anderson v. Burrows*, 4 C. & P. 310; *Scott v. Wahan*, 8 Fost. & Finl.

328; *Look v. Dean*, 108 Mass. 116; S. C. 11 Am. Rep. 323; *Lott v. Sweet*, 33 Mich. 308. See *Commonwealth v. Kirkbride*, 3 Brewster, 586.

³ See *Underwood v. People*, 32 Mich. 1; S. C. 20 Am. Rep. 633.

but it could not bind the party whose reason had been condemned without a hearing. Nothing but a judicial investigation, instituted for the purpose of trying the question of sanity, and in which the supposed *non compos* is allowed the opportunity of being heard, can conclude him.¹

¹ Those cases in which one has committed an act which, in a sane person, would be a crime, and has been acquitted on the ground of insanity, are always embarrassing. If the verdict is right on the facts, the principle on which he is acquitted is plain enough. No one can commit a crime who is incapable of harboring a criminal intent. The difficult question concerns what shall be done with him afterward. And one would naturally suppose that this question ought not to be a difficult one. If a person, from mental disease, is unable to control his own actions, and is impelled by delusions or frenzy to commit violence upon others, he ought to be subjected to legal restraint.

The popular belief is, however, that in a large proportion of these cases the defense of insanity was a fraud, or at least the suggestion of insanity has been seized upon as an excuse for discharging a guilty person for whose acquittal the jury could suggest no other reason. This belief has subjected the administration of the law to much criticism; and by some unthinking people the law itself is assailed. The fault in such cases is that the jury, improperly actuated by sympathy, assign one reason for an acquittal, when the real reason is something quite different. They say, "We acquit because of insanity," when in their hearts they mean, "We acquit because we think the act excusable on grounds the law does not accept as an excuse." They assign a valid excuse because they know the real excuse is not valid. Shall a party thus excused be turned loose upon

society? This is the problem. Certainly if he is insane he ought not to be, and the verdict of the jury must be accepted as conclusive that at the time to which their inquiry was directed he was insane in fact. But that time was not the time of the trial; it was the time of the alleged criminal act. Suppose, now, it be provided by legislation that a person thus acquitted shall be committed to an asylum as a permanent inmate; is this admissible?

The difficulties in the way of such legislation are the following: 1. There has as yet been no adjudication that the person at the time of acquittal is insane, and, if not, he cannot lawfully be confined. An insanity which has passed away cannot excuse an imprisonment. 2. If it be allowable to assume that an insanity found to exist at one time still continues, and on that ground to commit the party to an asylum as presumptively insane, still the supposed *non compos* would have a right to disprove this presumption at any time. To deny him the right to have his case investigated on the facts at any time, would be to distinguish his case from that of other insane persons; and this must be justified on some legal ground. It certainly could not be justified on the ground that the jury had rendered an improper verdict; the verdict must be taken as correct. But as no other ground can possibly be suggested, it must follow that the restraint of liberty, though based upon a verdict which found the existence of insanity, must be made to cease whenever a judicial investiga-

*But an insane person, without any adjudication, may [*179] also lawfully be restrained of his liberty for his own benefit, either because it is necessary to protect him against a tendency to suicide or to stray away from those who would care for him, or because a proper medical treatment requires it. The restraint for this purpose may be imposed under the direction of those *who, by reason of relationship, are the [*180] proper custodians of the person, or by the State acting through its proper officers.¹

What is said here concerning persons insane will apply to all who, by reason of disease or mental infirmity of any sort, are incapable of subjecting their actions to the control of reason.

MALICIOUS PROSECUTION.

The Nature of the Wrong. It is the lawful right of every man, who believes he has a just demand against another, to institute a suit and endeavor to obtain the proper redress. If his belief proves to be unfounded, his groundless proceedings may possibly cause a very serious injury to the defendant; the mere assertion of a serious claim at law being capable, in some circumstances, of affecting materially one's standing and credit. But to treat that as a legal wrong which consists merely in asserting a claim which cannot satisfactorily be established, would be plainly impolitic and unjust. The failure to sustain it might possibly have come from the death of a witness or other loss of

tion, which is a matter of right, shall determine that insanity does not exist. It is not possible constitutionally to provide that one shall be imprisoned as an insane person who can show that he is not insane at all. Neither is it competent to order one confined until certain designated officers, on their voluntary investigation, shall certify that reason is restored. *Underwood v. People*, 32 Mich. 1. If these cases are mischievous, the remedy is to be found in a correction of the public sentiment which tolerates, and indeed invites, improper convictions, and not in setting aside fundamental principles.

Selectmen and overseers of the poor have no authority *ex officio* to control and restrain persons of unsound mind. Like all other persons they may, from the necessity of the case, confine them for a reasonable time to prevent mischief, until proper proceedings can be had for the appointment of a guardian. No one can confine an insane person indefinitely, except under the sanction and upon compliance with the formalities of the law. *Colby v. Jackson*, 12 N. H. 526.

¹ *Ordranax, Judicial Aspects of Insanity*, p. xxxviii. *Introd.*

testimony, from false evidence, from a mistake of law in the judge, from misconduct in the jury, from any cause rather than fault in the plaintiff himself. To compel him, as the penalty for instituting a suit he cannot sustain, to pay the costs of a defense is generally all that is just, and is sufficient to make persons cautious about instituting suits which they have reason to believe are baseless.

It is equally the lawful right of every man to institute or set on foot criminal proceedings wherever he believes a public offense has been committed. Here the injury is likely to be more serious if the proceeding is unwarranted, but here, also, it would be both unjust and impolitic to make the prosecution which fails an actionable wrong. In some cases complainants are required to become responsible for costs, but this is usually the only liability.

Nevertheless it is a duty which every man owes to every other not to institute proceedings maliciously, which he has no good reason to believe are justified by the facts and the law. Therefore, an action as for tort will lie when there is a concurrence of the following circumstances:

- [*181] *1. A suit or proceeding has been instituted without any probable cause therefor.¹
2. The motive in instituting it was malicious.
 3. The prosecution has terminated in the acquittal or discharge of the accused.

Each of these circumstances requires separate attention. And what is said in this place will concern criminal proceedings only.

¹ Procuring a search warrant is sufficient as institution of a proceeding. *Carey v. Sheets*, 67 Ind. 375. Filing an affidavit as beginning of bastardy proceedings. *Coffey v. Myers*, 84 Ind. 105. Taking out a peace warrant. *Hyde v. Greuch*, 62 Md. 577. But an arrest by an officer based upon an affidavit not made in any cause is not ground for an action. *Lewin v. Uzuher*, 65 Md. 341. It is not of itself a defense to the action that the complaint was defective and charged no offense. *Potter v. Gjert-*

sen, 34 N. W. Rep. 746 (Minn.); *Bell v. Keepers*, 14 Pac. Rep. 542 (Kan.); *Stocking v. Howard*, 78 Mo. 25. If a magistrate erroneously supposes that facts set up in an affidavit constitute a crime and upon it issues process, the affiant is not liable. *Hahn v. Schmidt*, 64 Cal. 284; *Newman v. Davis*, 58 Ia. 447. If in embodying affiant's statement in a complaint the magistrate adds the word feloniously, the meaning of which affiant does not know, the latter is not liable. *Rogers v. Hassard*, 2 Ont. App. 507.

Probable Cause. The first of these is the existence of probable cause. This involves a consideration of what the facts are, and what are the reasonable deductions from the facts. It is, therefore, what is denominated a mixed question of law and fact. If the facts are not in dispute the question is for the court.¹ Upon disputed facts the jury must be left to pass,² but the court must determine on the facts found whether or not probable cause existed.³ Many judges have attempted to define what shall constitute probable cause. Says Chief Justice TINDALL: "There must be a reasonable cause, such as would operate on the mind of a discreet man; there must be a probable cause, such as would operate on the mind of a reasonable man." Another eminent judge has said, "There must be such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the person is guilty."⁴ Says

¹ *Busst v. Gibbons*, 6 H. & N. 913; *Boyd v. Cross*, 35 Md. 194; *McWilliams v. Hoban*, 43 Md. 56; *Speck v. Judson*, 63 Me. 207; *Cooper v. Waldron*, 50 Me. 80; *Sweet v. Negus*, 30 Mich. 406; *Chapman v. Cawrey*, 50 Ill. 512; *Thompson v. Force*, 65 Ill. 370; *Swaim v. Stafford*, 4 Ired. 392; *Harkrader v. Moore*, 44 Cal. 144; *Pangburn v. Bull*, 1 Wend. 345; *Masten v. Deyo*, 2 Wend. 424; *Ulmer v. Leland*, 1 Me. 135. *Crescent City, etc., Co. v. Butchers, etc. Co.*, 120 U. S. 141; *McNulty v. Walker*, 64 Miss. 198; *Bell v. Keepers*, 14 Pac. Rep. 542 (Kan.); *Sartwell v. Parker*, 141 Mass. 405.

² "It is generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause or that they do not." *STRONG, J., Stewart v. Sonneborn*, 28 U. S. 187. *Hicks v. Faulkner*, L.R. 8 Q. B. D. 167; *Humphries v. Parker*, 52 Me. 502; *Driggs v. Burton*, 44 Vt.

124; *Heyne v. Blair*, 62 N. Y. 19; *Thaule v. Krekeler*, 81 N. Y. 428; *Cole v. Curtis*, 16 Minn. 182; *Burton v. St. Paul, etc., Co.*, 33 Minn. 189; *Eastin v. Bank*, 66 Cal. 123; *Fulton v. Onesti*, 66 Cal. 575; *Emerson v. Skaggs*, 52 Cal. 246; *Meysenberg v. Engelke*, 18 Mo. App. 346; *Johnson v. Miller*, 63 Ia. 529; *Woodworth v. Mills*, 61 Wis. 44; *Angelo v. Faul*, 85 Ill. 106; *Travis v. Smith*, 1 Penn. St. 234; *Walbridge v. Pruden*, 102 Penn. St. 1; *Hamilton v. Smith*, 39 Mich. 232; *Johns v. Marsh*, 52 Md. 323; *Thelin v. Dorsey*, 59 Md. 539; *Vinal v. Core*, 18 W. Va. 1; *Ramsey v. Arrott*, 64 Tex. 820. But in South Carolina the question of probable cause is held to be for the jury under suitable instructions. *Caldwell v. Bennett*, 22 S. C. 1.

³ *Broad v. Ham*, 5 Bing. (N. C.), 722.

⁴ *SHAW, Ch. J., in Bacon v. Towne*, 4 Cush. 217, 238. "If every man who suffers by the perpetration of a crime were bound, under the penalty of heavy damages, to ascertain before he commences a prosecution that he has

[*182] another: * "Anything which will create in the mind of a reasonable man the belief that a felony existed, and that the party charged was in any way concerned in it, is probable cause."¹ A mere belief, therefore, that cause exists is not sufficient, for one may believe on suspicion and suspect without cause, or his belief may proceed from some mental peculiarity of his own; there must be such grounds of belief as would influence the mind of a reasonable person, and nothing short of this could justify a serious and formal charge against another.² Still, some allowance must be made for the excitement under which prosecutions for supposed offenses against the complainant himself are almost necessarily instituted. The complainant cannot be required

such evidence as will insure a conviction, few prosecutions would be set on foot, the guilty would escape while conclusive evidence was sought for; offenses of every grade would, for the most part, go unpunished, and the penal law would be scarcely more than a dead letter. The law, therefore, protects the prosecutor if he have reasonable or probable ground for the prosecution, that is, if he have such ground as would induce a man of ordinary prudence and discretion to believe in the guilt and to expect the conviction of the person suspected, and if he acts in good faith on such belief and expectation." *Faris v. Starke*, 3 B. Mon. 4, 6, per MARSHALL, Ch. J. The belief may be based upon purely circumstantial evidence. *Raulston v. Jackson*, 1 Sneed, 128.

¹ O'NEILL, Ch. J., in *Braveboy v. Cockfield*, 2 McMul. 270, 274.

² *Mowry v. Whipple*, 8 R. I. 360; *Farnam v. Feeley*, 56 N. Y. 451; *Winebiddle v. Porterfield*, 9 Penn. St. 187, 139; *Collins v. Hayte*, 50 Ill. 353; *Hall v. Suydam*, 6 Barb. 83, 89. In *Fagnan v. Knox*, 66 N. Y. 525, 526, CHURCH, Ch. J., says: "The question of what constitutes probable cause does not depend upon whether the offense has been committed in fact,

nor whether the accused is guilty or innocent, but upon the prosecutor's belief, based upon reasonable grounds. *Bacon v. Towne*, 4 Cush. 217. The prosecutor may act upon appearances; if the apparent facts are such that a discreet and prudent person would be led to the belief that the accused had committed a crime, he will not be liable in this action, although it may turn out that the accused was innocent. *Carl v. Ayrea*, 53 N. Y. 14. If there is an honest belief of guilt, and there exist reasonable grounds for such belief, the party will be justified. But however suspicious the appearances may be from existing circumstances, if the prosecutor has knowledge of facts which will explain the suspicious appearances and exonerate the accused from a criminal charge, he cannot justify a prosecution by putting forth the *prima facie* circumstances and excluding those within his knowledge which tend to prove innocence." Such a case must be presented to the mind as would induce a sober, sensible and discreet person to act upon it. *Barron v. Mason*, 81 Vt. 189. See *Spengler v. Davy*, 15 Grat. 381; *Bauer v. Clay*, 8 Kan. 530; *Boyd v. Cross*, 35 Md. 194; *Travis v. Smith*, 1 Penn. St. 234; *Shaul v.*

to act with the same impartiality and absence of prejudice in drawing his *conclusions as to the guilt of the [*183] accused that a person entirely disinterested would deliberately do, any more than a person assaulted could be expected to judge of his danger with the like coolness and impartiality.¹ And all that can be required of him is that he shall act as a reasonable and prudent man would be likely to act under like circumstances.²

The test of probable cause is to be applied as of the time when the action complained of was taken; and if upon the facts then known the party had no probable cause for action, it will be no protection to him that facts came to his knowledge afterwards that might have constituted a justification had he been aware of them.³ Neither is he justified if he knew the facts, but did not believe them.⁴

Advice of Counsel. It may perhaps turn out that the complainant, instead of relying upon his own judgment, has taken the advice of counsel learned in the law and acted upon that. This should be safer and more reliable than his own judgment,

Brown, 28 Iowa, 87; S. C. 4 Am. Rep. 151; *Galloway v. Burr*, 32 Mich. 332; *Gee v. Patterson*, 63 Me. 49. There should be such a state of facts and circumstances as would induce men of ordinary prudence and conscience to believe the charge to be true. *Driggs v. Burton*, 44 Vt. 124. See, further, *Stone v. Stevens*, 12 Conn. 219; *Jacks v. Stimpson*, 18 Ill. 791; *Lawrence v. Lanning*, 4 Ind. 194; *Bank of British N. A. v. Strong*, 1 App. Cas., Priv. Coun. 307; S. C. 16 Moak, 24; *Hicks v. Faulkner*, L. R. 8 Q. B. D. 167; *Johns v. Marsh*, 52 Md. 323; *Johnson v. Miller*, 69 Ia. 562; *Jordan v. Ala. &c. R. R. Co.*, 81 Ala. 220; *Forbes v. Hagman*, 75 Va. 168; *Casey v. Sevaton*, 30 Minn. 516; *Spalding v. Lowe*, 56 Mich. 366; *Chapman v. Dunn*, Id. 31; *King v. Colvin*, 11 R. L. 582; *Planter's Ins. Co. v. Williams*, 60 Miss. 916; *Krulowitz v. Eastern R. R.*, 140 Mass. 573;

Vansickle v. Brown, 68 Mo. 627; *Dwain v. Discalso*, 66 Cal. 415; *Bitting v. Ten Eyck*, 82 Ind. 421.

¹ *Cole v. Curtis*, 16 Minn. 182. *Carter v. Sutherland*, 52 Mich. 597.

² *Bourne v. Stout*, 62 Ill. 261.

³ *Delegal v. Highley*, 3 Bing. (N.C.) 950; *Bell v. Pearcy*, 5 Ired. 83; *Johnson v. Chambers*, 10 Ired. (N. C.) L. 287; *Galloway v. Stewart*, 40 Ind. 156; S. C. 19 Am. Rep. 677; *Skidmore v. Bricker*, 77 Ill. 164; *Josselyn v. McAllister*, 25 Mich. 45; *Foshay v. Ferguson*, 2 Denio, 617. See *Sims v. M'Lendon*, 3 Strob. 557.

⁴ See cases cited in last note; also *Bigelow*, Lead. Cas. on Torts, 198, 200. Although suspicious circumstances may seem to afford probable cause the prosecutor is liable if he knows the accused is innocent, or does not believe him guilty. *Woodworth v. Mills*, 61 Wis. 44; *Plummer v. Johnson*, 35 N. W. Rep. 334 (Wis.)

not only because it is the advice of one who can view the facts calmly and dispassionately, but because he is capable of judging of the facts in their legal bearings. A prudent man is therefore expected to take such advice; and when he does so and places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause,¹ provided the disclosure appears to have been full and fair, and not to have withheld any of the material facts. But the advice must be [*184] that of *a person accepted and licensed by the courts as one learned in the law and competent to be adviser to clients and to the court; and if one chooses to accept and rely upon the opinion and advice of a justice of the peace or other layman, he may do so in aid of his own judgment, but it cannot

¹ *Ravenga v. Mackintosh*, 2 B. & C. 693; *Stone v. Swift*, 4 Pick. 339; *Walter v. Sample*, 25 Penn. St. 275; *Hall v. Suydam*, 6 Barb. 83; *Olmstead v. Partridge*, 16 Gray, 381; *Ames v. Snider*, 69 Ill. 376; *Wicker v. Hotchkiss*, 63 Ill. 107; S. C. 14 Am. Rep. 75; *Burgett v. Burgett*, 43 Ind. 78; *Stewart v. Sonneborn*, 98 U. S. 187; *St. Johnsbury, &c. Co. v. Hunt*, 59 Vt. 294; *Sharpe v. Johnston*, 76 Mo. 660; *Jones v. Jones*, 71 Cal. 89; *Allen v. Codman*, 139 Mass. 136; *Jordan v. Ala., &c. R. R. Co.*, 81 Ala. 220. But it is also held that such advice bears on the question of malice, not probable cause. *Wright v. Hanna*, 98 Ind. 217; *Brewer v. Jacobs*, 23 Fed. Rep. 217; *Lemay v. Williams*, 32 Ark. 166; *Ramsey v. Arrott*, 64 Tex. 320.

² *Ash v. Marlow*, 20 Ohio, 119; *Walter v. Sample*, 25 Penn. St. 275; *Kimmel v. Henry*, 64 Ill. 505; *Sharp v. Johnston*, 59 Mo. 557; *Cooper v. Utterbach*, 37 Md. 282; *Bliss v. Wyman*, 7 Cal. 257; *Anderson v. Friend*, 85 Ill. 135; *Meshner v. Iddings*, 34 N. W. Rep. 328 (Ia.); *Wild v. Odell*, 56 Cal. 136. In *Ravenga v. Mackintosh*, 2 Barn. & Cress. 692, 698, it is said to be "a question for the jury whether he acted *bona fide* on the opin-

ion, believing that he had a cause of action." And on this point, see *Ross v. Innis*, 26 Ill. 259, 279; *Center v. Spring*, 2 Iowa, 393; *Eastman v. Keasor*, 44 N. H. 518; *Potter v. Seale*, 8 Cal. 217; *Josselyn v. McAllister*, 23 Mich. 300; *Williams v. Vanmeter*, 8 Mo. 339; *Hill v. Palm*, 38 Mo. 13. The mere fact of getting advice is not conclusive in favor of the defendant. *Lytton v. Baird*, 95 Ind. 349; *Hogg v. Pinckney*, 16 S. C. 387; *Lemay v. Williams*, 32 Ark. 166; *Ramsey v. Arrott*, 64 Tex. 320. The advice must be honestly given and acted on in good faith. *Allen v. Codman*, 139 Mass. 136; *Jordan v. Ala. &c. R. R. Co.*, 81 Ala. 220; *Parkhurst v. Masteller*, 57 Ia. 474; *Roy v. Goings*, 112 Ill. 656. No protection if sought as a means of covering malice. *McCarthy v. Kitchen*, 59 Ind. 500. The attorney must not be interested in the subject matter. *White v. Carr*, 71 Me. 555. All facts known, or which could, with reasonable diligence, have been ascertained, must be disclosed. *Motes v. Bates*, 80 Ala. 383; *Roy v. Goings*, 112 Ill. 656; *White v. Carr*, 71 Me. 555. Enough, if disclosure is of all facts known. *Johnson v. Miller*, 69 Ia. 562.

afford him any protection.¹ Moreover, when he places himself under the guidance of counsel, if facts subsequently come to his knowledge which seem to be important, it is his duty to communicate these to counsel, if he expects to rely upon his advice as a justification in the steps subsequently taken.²

Proof of Want of Probable Cause. The burden of proof to show a want of probable cause is upon the plaintiff.³ In other words, the want of probable cause will not be inferred from the mere failure of the prosecution.⁴ Nor does malice establish a want of probable cause, because, as is well said in one case, a person actuated by the plainest malice may nevertheless have a justifiable reason for prosecution;⁵ and, indeed, the offense itself, or the belief in its having been committed, is likely to excite malice. An acquittal and discharge by a magistrate having power to bind over, is evidence of want of probable cause, as is

¹ *Olmstead v. Partridge*, 16 Gray, 331; *Beal v. Robeson*, 8 Ired. 276; *Straus v. Young*, 36 Md. 246; *Burgett v. Burgett*, 43 Ind. 78; *Stanton v. Hart*, 27 Mich. 539; *Murphy v. Larson*, 77 Ill. 172; *Sutton v. McConnell*, 46 Wis. 209; *Brobst v. Ruff*, 100 Penn. St. 91; *Gee v. Culver*, 12 Oreg. 228; *Colbert v. Hicks*, 5 Ont. App. 571; *McCullough v. Rice*, 59 Ind. 580; *Coleman v. Heurich*, 2 Mackey 189; *Stewart v. Sonneborn*, 98 U. S. 187.

² *Cole v. Curtis*, 16 Minn. 182; *Ash v. Marlow*, 20 Ohio, 119.

³ See on the burden of proof, *Abrath v. Northeastern Ry. Co.* L. R. 11 Q. B. D. 440; *Legallee v. Blaisdell*, 134 Mass. 473; *McFarland v. Washburn*, 14 Ill. App. 369; *Sutton v. Anderson*, 103 Penn. St. 151; *Bernar v. Dunlap*, 94 Penn. St. 329. As to what is evidence of want of probable cause, *Krulevitz v. Eastern R. R.*, 143 Mass. 228.

⁴ *Boyd v. Cross*, 35 Md. 194, and

cases cited; *Good v. French*, 115 Mass. 201; *Levy v. Brannan*, 39 Cal. 485; *Wilkinson v. Arnold*, 11 Ind. 45; *Frost v. Holland*, 75 Me. 108; *Anderson v. Friend*, 85 Ill. 135.

⁵ TINDALL, Ch. J., in *Williams v. Taylor*, 6 Bing. 183, 186. And, see, *Heyne v. Blair*, 62 N. Y. 19, 22; *Foshay v. Ferguson*, 2 Denio, 617; *Skidmore v. Bricker*, 77 Ill. 164; *Krug v. Ward*, 77 Ill. 603; *Chapman v. Cawrey*, 50 Ill. 512; *Caperson v. Sproule*, 39 Mo. 39; *Hall v. Hawkins*, 5 Humph. 357; *Bell v. Percy*, 5 Ired. 88; *Center v. Spring*, 2 Clarke (Iowa), 393; *Cloon v. Gerry*, 13 Gray, 201; *Kidder v. Parkhurst*, 3 Allen, 393; *Wade v. Walden*, 23 Ill. 425; *Travis v. Smith*, 1 Penn. St. 234; *Stewart v. Sonneborn*, 98 U. S. 187; *Sharpe v. Johnston*, 76 Mo. 660; *Flickinger v. Wagner*, 46 Md. 580; *Bitting v. TenEyck*, 82 Ind. 421; *Meysenberg v. Engelke*, 18 Mo. App. 346.

the ignoring of a bill by a grand jury.¹ But neither of these is conclusive.²

[*185] *If the defendant is convicted in the first instance and appeals, and is acquitted in the appellate court, the conviction below is conclusive of probable cause.³

Malice. The burden of proving that the prosecution was malicious is also upon the plaintiff.⁴ If a want of probable cause is shown, malice may be inferred; but the deduction is not a necessary one,⁵ and the mere discontinuance of a criminal prosecu-

¹ *Mitchinson v. Cross*, 58 Ill. 866; *Cooper v. Utterbach*, 37 Md. 282; *Israel v. Brooks*, 23 Ill. 575; *Sappington v. Watson*, 50 Mo. 83; *Frost v. Holland*, 75 Me. 108; *Bornholdt v. Souillard*, 86 La. Ann. 103; *Sharpe v. Johnston*, 76 Mo. 660. In *Apgar v. Woolston*, 43 N. J. L. 57, it is held that the failure of the grand jury to indict is not *prima facie* evidence of want of probable cause; but the finding of an indictment is *prima facie* evidence of probable cause. *Peck v. Chouteau*, 91 Mo. 138, *Ricord v. Centr. Pac. &c. Co.*, 15 Nev. 167; *contra*, *Motes v. Bates*, 80 Ala. 382; so is recognizing to appear after waiver of examination. *Vansickle v. Brown*, 63 Mo. 627; so is the disagreement of the jury on first trial. *Johnson v. Miller*, 63 Ia. 529.

² *Parkhurst v. Masteller*, 57 Ia. 474; *Barber v. Gould*, 20 Hun, 446; *Sharpe v. Johnston*, 76 Mo. 660; *Raleigh v. Cook*, 60 Tex. 438; *Plassan v. La. Lottery Co.*, 34 La. Ann. 246; *Hale v. Boylen*, 22 W. Va. 234.

³ *Griffs v. Sellars*, 4 Dev. & Bat. 176; *Whitney v. Peckham*, 15 Mass. 242; *Payson v. Caswell*, 22 Me. 212; *Witham v. Gowen*, 14 Me. 362. Unless the conviction was procured by fraud. *Welch v. Boston*, etc., R. R. Co., 14 R. I. 609; *Phillips v. Kalamazoo*, 53 Mich. 33; *Womack v. Circle*, 32 Gratt. 324. See *Labar v. Crane*,

49 Mich. 561. A conviction, unreversed, if based on fraud, will not be conclusive of probable cause. *Olson v. Neal*, 63 Ia. 214. Otherwise if unjust but not fraudulent. *Severance v. Judkins*, 73 Me. 376. Nor is the binding over by a magistrate. *Diemer v. Horner*, 17 Pac. Rep. 205.

⁴ *Dietz v. Langfitt*, 63 Penn. St. 234; *Purcell v. McNamara*, 9 East. 361; *Savil v. Roberts*, 1 Salk. 14, 15; *Wilans v. Taylor*, 6 Bing. 183; *McKnown v. Hunter*, 30 N. Y. 625; *Flickinger v. Wagner*, 46 Md. 581.

⁵ *Pangburn v. Bull*, 1 Wend. 345; *Merriam v. Mitchell*, 13 Me. 439; *Fuller v. Glidden*, 68 Me. 559; *Dietz v. Langfitt*, 63 Penn. St. 234; *Gilliford v. Windel*, 108 Penn. St. 142; *Mowry v. Whipple*, 8 R. I. 360; *Cooper v. Utterbach*, 37 Md. 282; *Harpham v. Whitney*, 77 Ill. 82; *Roy v. Goings*, 112 Ill. 656; *Holliday v. Sterling*, 62 Mo. 321; *Vansickle v. Brown*, 68 Mo. 627; *Ewing v. Sanford*, 19 Ala. 605; *Harkrader v. Moore*, 44 Cal. 144; *Paukett v. Livermore*, 5 Clarke (Iowa), 277; *Strickler v. Greer*, 95 Ind. 596; *Heap v. Parrish*, 104 Ind. 36; *Block v. Meyers*, 33 La. Ann. 776; *Bobbin v. Kingsbury*, 138 Mass. 538; *Falvey v. Faxon*, 143 Mass. 284; *Carson v. Edgeworth*, 43 Mich. 241; *Hoyt v. Fallett*, 65 Tex. 550; *Wagstaff v. Schippel*, 27 Kan. 450; *Stewart v. Sonneborn*, 98 U. S. 187; *Johnson*

tion, or the acquittal of the accused, will establish for the purposes of this suit neither malice nor want of probable cause.¹ But if an arrest is made in a civil suit which is afterward voluntarily discontinued, the discontinuance has been held to furnish *prima facie* evidence of a want of probable cause.² Legal malice is made out by showing that the proceeding was instituted from any improper or wrongful motive, and it is not essential that actual malevolence or corrupt design be shown.³ Sometimes the accompanying circumstances show the bad motive very clearly, as for instance, where an arrest on an unfounded criminal charge was made use of to compel the surrender of securities to which both parties were equally entitled.⁴ This is a sort of malice sufficiently common to need special mention.

***What is an end of the Proceeding.** The termination [*186] of the proceeding must, in general, be by a final acquittal.⁵ It is not enough that the parties in a case which they might

¹ Ebberts, 6 Sawy. 538; Murphy v. Hobbs, 7 Cal. 541; Casebeer v. Rice, 18 Neb. 203.

² Willans v. Taylor, 6 Bing. 183; Yocum v. Polly, 1 B. Mon. 358; Skidmore v. Bricker, 77 Ill. 164; Kidder v. Parkhurst, 3 Allen, 393; Bitting v. Ten Eyck, 82 Ind. 421, and cases p. 213 n. 5; Spear v. Hiles, 67 Wis. 350; Hamilton v. Smith, 39 Mich. 222; Johns v. Marsh, 53 Md. 323; Jordan v. Ala., etc., Co., 81 Ala. 220; Gee v. Culver, 18 Oreg. 598. Mere ill-will without an act intended to injure is not malice. Peck v. Chouteau, 91 Mo. 138.

³ Burhans v. Sanford, 19 Wend. 417; Nicholson v. Coghill, 4 B. & C. 21; Green v. Cochran, 43 Iowa, 544.

⁴ Page v. Cushing, 38 Me. 523; Barron v. Mason, 31 Vt. 189; Harpham v. Whitney, 77 Ill. 32. The jury are the exclusive judges of malice. Munns v. Dupont, 3 Wash. C. C. 31; Center v. Spring, 2 Clarke (Iowa), 393; Mitchel v. Jenkins, 5 B. & A. 567; Stewart v. Sonneborn, 98 U. S. 187; Vinal v. Core, 18 W. Va. 1;

Bartlett v. Hawley, 37 N. W. Rep. 580 (Minn). But whether the facts found are such as to warrant the inference of malice is for the court. Sharpe v. Johnston, 76 Mo. 660. When the court holds that there is a want of probable cause there is evidence of malice for the jury. When such want is the only evidence of malice the jury are not bound by the holding of the court to find malice. As evidence of malice the question of probable cause is wholly for the jury. Hicks v. Faulkner, L. R. 8 Q. B. D. 167; Quartz Hill Co., v. Eyre, L. R. 11 Q. B. D. 674.

⁵ Kimball v. Bates, 50 Me. 308. See Willans v. Taylor, 6 Bing. 183; Brown v. Randall, 36 Conn. 56; Krug v. Ward, 77 Ill. 603; Prough v. Entriken, 11 Penn. St. 81; Schmidt v. Weidman, 63 Penn. St. 173. Or to enforce payment of a debt. Ross v. Langworthy, 18 Neb. 492.

⁶ Bacon v. Towne, 4 Cush. 217; Boyd v. Cross, 35 Md. 194; Kirkpatrick v. Kirkpatrick, 39 Penn. St. 238; Williams v. Woodhouse, 3 Dev. (N.

lawfully settle, have effected a compromise, and thereby terminated it.¹ Or that the defendant was discharged because the offense was misnamed in the papers, or because of formal defects.² But if the proceeding is *ex parte* to hold to bail, and the accused party has no opportunity to disprove the case made against him, he may maintain the suit, notwithstanding he was required to give bail;³ and so he may, if on a preliminary examination before a magistrate on charge of crime he is discharged.⁴ Whether the entry of a *nolle prosequi* by the prosecuting officer is a sufficient discharge has been made a question. In some cases it has been held that it was;⁵ but other cases hold the contrary.⁶ The reason assigned in these last cases is, that the finding of the grand jury is some evidence of probable cause, and another indictment may be found on the same complaint. But the reasonable rule seems to be, that the technical prerequisite is only that the

C.) L. 257. A proceeding is terminated where verdict of not guilty is rendered; where grand jury ignore a bill; where *nol. pros.* is entered; where the accused has been discharged from jail or imprisonment. *Lowe v. Wartman*, 47 N. J. L. 418. If one brings an action while an appeal from a decision in his favor is pending and it is reversed his action falls. *Marks v. Townsend*, 97 N. Y. 590.

¹ *McCormick v. Sisson*, 7 Cow. 715; *Hamilburgh v. Shephard*, 119 Mass. 30; *Mayer v. Walter*, 64 Penn. St. 288. So if indictment quashed for insufficiency in law. *McKensie v. Mo. Pac. Ry. Co.* 24 Mo. App. 392. But if one compounds under protest to procure his discharge, this does not afterwards estop him from showing the groundlessness and malice of the proceeding. *Morton v. Young*, 55 Me. 24.

² *Sears v. Hathaway*, 12 Cal. 277.

³ *Stewart v. Gromett*, 7 C. B. (N. S.) 191. Where a peace warrant is maliciously taken out, no termination need be shown. *Hyde v. Greuch*, 62 Md. 577.

⁴ *Cardinal v. Smith*, 109 Mass. 158;

S. C. 12 Am. Rep. 582; *Sayles v. Briggs*, 4 Met. 421; *Burkett v. Lanata*, 15 La. Ann. 337; *Moyle v. Drake*, 141 Mass. 238; *Swensgaard v. Davis*, 33 Minn. 368. So as to bastardy proceedings. *Coffey v. Myers*, 84 Ind. 105. So if discharged on *habeas corpus*. *Zebley v. Storey*, 12 Atl. Rep. 569 (Penn.).

⁵ *Brown v. Randall*, 86 Conn. 56; S. C. 4 Am. Rep. 34; *Hays v. Blizzard*, 30 Ind. 457; *Chapman v. Woods*, 6 Blackf. 504; *Stanton v. Hart*, 27 Mich. 539; *Woodworth v. Mills*, 61 Wis. 44; *Kennedy v. Holladay*, 25 Mo. App. 503; *Bell v. Matthews*, 16 Pac. Rep. 97 (Kan.); *Hatch v. Cohen*, 84 N. C. 602; *Clegg v. Waterbury*, 88 Ind. 21.

⁶ *Bacon v. Towne*, 4 Cush. 217; *Parker v. Farley*, 10 Cush. 279; *Brown v. Lakeman*, 12 Cush. 482; *Cardinal v. Smith*, 109 Mass. 159; S. C. 12 Am. Rep. 582. *Nol. pros.* not enough without order of discharge by Court. *Langford v. Boston, etc., Co.*, 144 Mass. 431. But see *Graves v. Dawson*, 133 Mass. 419, where discharge, after binding over and before indictment, on motion of district attorney, followed by *nol. pros.* held sufficient.

particular prosecution be disposed of in such a manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one.⁴

***Joint Liability.** All concerned in originating and [*187] carrying on a malicious prosecution are jointly and severally responsible; it is not necessary that all should have been complainants.⁵ But if one merely furnishes the prosecuting officer with the facts, and the latter, on his own judgment, commences a prosecution, making use of the former as a witness, this is not a prosecution by the witness, and unless he interferes improperly afterwards, he cannot be held responsible as having instituted it.⁶

Malicious Civil Suits: In some cases an action may be maintained for the malicious institution of a civil suit, but the authorities are not entirely agreed what cases are embraced within the rule. The case of the malicious institution of proceedings in bankruptcy is undoubtedly one. If these are instituted maliciously, and without probable cause, and terminate without an adjudication of bankruptcy, an action will lie for the damages sustained. "The general grounds of this action are, that the commission was falsely and maliciously sued out, that the plain-

⁴ *Clark v. Cleveland*, 6 Hill, 344, 347; *Casebeer v. Rice*, 18 Neb. 203; *Apgar v. Woolston*, 43 N. J. L. 57. See *Cardinal v. Smith*, 109 Mass. 159; *Driggs v. Burton*, 44 Vt. 124. It has been held that if one institutes a criminal proceeding, and is the prosecuting witness therein, but fails to appear after several adjournments, and the accused, for that reason, is suffered to go at liberty, this is sufficient termination of the prosecution, even though there be no record of the discharge. *Leever v. Hamill*, 57 Ind. 423. The dismissal of a complaint with intent, afterwards executed, of laying another in a higher court, is not a sufficient termination. *Schippel v. Norton*, 16 Pac. Rep. 804 (Kan.).

⁵ *Stansbury v. Fogle*, 37 Md. 369; *Clements v. Ohrlly*, 2 C. & K. 686;

Johnson v. Miller, 69 Ia. 562. An attorney's knowledge of his client's malice will not alone make him liable; otherwise if in addition he knows there is no probable cause. But he may act on such information as his client gives him. *Peck v. Chouteau*, 91 Mo. 138; *Staley v. Turner*, 21 Mo. App. 244. If an agent of a corporation at instigation and upon advice of company's attorney makes a complaint, he is not personally liable as prosecutor. *Jordan v. Ala., etc., R. R. Co.*, 81 Ala. 220. The treatment of the person by county officers is not an element of damage against the prosecutor. *Zebley v. Storey*, 12 Atl. Rep. 569 (Penn.).

⁶ *Wasserman v. Louisville, etc., R. R. Co.*, 28 Fed. Rep. 802. See *Murphy v. Walters*, 34 Mich. 130, a case of false imprisonment.

tiff has been greatly damaged thereby, scandalized upon record, and put to great charges in obtaining a supersedeas to the commission: here is falsehood and malice in the defendant, and great wrong done to the plaintiff thereby. Now, wherever there is an injury done to a man's property by a false and malicious prosecution, it is most reasonable he should have an action to repair himself."¹

The case of a civil suit begun maliciously, and without probable cause, by the arrest of the party, is another.² So is the case of a suit commenced by an attachment of property; the reasons which support the action in that case being much the same with those which have been found sufficient where commission in bankruptcy is sued out.³ And in Ohio it has been held [*188] that the *suit will lie, even though there may have been a valid cause of action, if in fact there was no probable cause for the attachment, and it was taken out maliciously; also,

¹ See in *Chapman v. Pickersgill*, 2 Wils. 145, and *Farley v. Danks*, 4 El. & Bl. 493; *Whitworth v. Hall*, 2 B. & Ad. 695. So for causing a petition to be filed to wind up a trading company. *Quartz-Hill Co. v. Eyre*, L. R. 11. Q. B. D., 674.

² *Collins v. Hayte*, 50 Ill. 337, 353; *Burhans v. Sanford*, 19 Wend. 417; *Watkins v. Baird*, 6 Mass. 506; *Austin v. Debnam*, 3 B. & C. 139; *Sinclair v. Eldred*, 4 Taunt. 7. The voluntary discontinuance of such a suit is *prima facie* evidence of want of probable cause, but to suffer a judgment of *non pros.*, or as in case of nonsuit, is not. *Burhans v. Sanford*, 19 Wend. 417.

³ *Preston v. Cooper*, 1 Dill. 589; *Williams v. Hunter*, 3 Hawks. 545; *Wood v. Weir*, 5 B. Mon. 544; *McCullough v. Grishobber*, 4 W. & S. 201; *Walser v. Thies*, 56 Mo. 89; *Holliday v. Sterling*, 62 Mo. 321; *Fullenwider v. McWilliams*, 7 Bush, 389; *Spengler v. Davy*, 15 Grat. 381; *Hayden v. Shed*, 11 Mass. 500; *Lindsay v. Larned*, 17 Mass. 190; *Pierce v. Thompson*, 6 Pick. 193; *Nelson v. Danielson*,

82 Ill. 545. If one believes upon reasonable grounds that the debt existed, there is probable cause. *Kaufman v. Wicks*, 63 Tex. 234. That another creditor has sued out an attachment is not. *Carothers v. McIlhenny Co.*, 63 Tex. 138. Probable cause is to be determined by the same rules as in case of crimes. *Burton v. St. Paul & C. Co.*, 33 Minn. 189. Not a bar to such action that the suit was settled. *Brand v. Hinchman*, 36 N. W. Rep. 664 (Mich.) which see for what is sufficient to make an attachment. Such action will not lie while the original action is pending on appeal. *Reynolds v. DeGeer*, 13 Ill. App. 118. If the defendant was not served with process in the attachment suit, it is not necessary for him to show that it terminated in his favor. *Bump v. Betts*, 19 Wend. 421. The fact that the plaintiff, in bringing suit, was compelled to give an indemnity bond, will not protect him against an action for the malicious suit. *Lawrence v. Hagerman*, 56 Ill. 68; S. C. 8 Am. Rep. 674. See *Burnap v. Wight*, 14 Ill. 801.

that it is not essential in such a case that the suit in attachment should be first terminated.¹ If, however, the validity of the attachment was allowed to be tested, and its justification inquired into, in some distinct proceeding while the suit itself was pending, we should say that a suit for maliciously suing out the writ could not be brought until the writ itself was dissolved or quashed.

Still another case in which an action will lie for the malicious institution of unfounded proceedings not criminal in their nature, is where they are taken to have the party declared insane, and put under guardianship. Such proceedings are almost necessarily damaging beyond what a civil suit can well be; and, if unfounded and malicious, deserve more than a mere punishment in costs.²

In some cases it has been held 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;³ but the English authorities do not justify this statement, and

¹ *Fortman v. Rottier*, 8 Ohio, (N. S.) 548, citing and relying upon *Tomlinson v. Warner*, 9 Ohio, 104. In a late case, where use of property had been enjoined, it is said an action lies whenever, by virtue of any order or writ in a cause, the defendant in that cause "has been deprived of his personal liberty, or the possession, use, or enjoyment of property of value." *Newark Coal Co. v. Upson*, 40 Ohio St. 17.

² *Lockenour v. Sides*, 57 Ind. 360. In Colorado it has been held that an action will lie for falsely "suing out and prosecuting before the Commissioner of the General Land Office of the United States, an officer having jurisdiction, &c., a caveat impeaching the plaintiff's entry [of public lands] on the ground and allegation of fraud." *Hoyt v. Macon*, 2 Col. 113. So for suing out an injunction. *Butchers &c. Co. v. Crescent City &c. Co.*, 37 La. Ann. 874; *Newark Coal Co. v. Upson*, 40 Ohio St. 17, but not

for procuring a writ of estrepement, a preventive remedy. *Eberly v. Rupp*, 90 Penn. St. 259. Nor for bringing ejectment, *Muldoon v. Rickey*, 103 Penn. St. 110, *McNamee v. Minke*, 49 Md. 123. See *Allen v. Codman*, 139 Mass. 636. It will for bringing successive groundless actions at a distance from defendant's home. *Payne v. Donegan*, 9 Ill. App. 566. See *Magner v. Renk*, 65 Wis. 364. If one has a set off allowed in a suit he cannot sue for malice in its prosecution. *Dolan v. Thompson*, 129 Mass. 205. So if two cross suits are settled. *Sartwell v. Parker*, 141 Mass. 405.

³ See *Closson v. Staples*, 42 Vt. 209; S. C. 1 Am. Rep. 316, where the subject was fully and carefully examined. Also, *Whipple v. Fuller*, 11 Conn. 581; *Marbourg v. Smith*, 11 Kans. 554; *Burnap v. Albert*, Taney, 244; *Cox v. Taylor's Admr.* 10 B. Mon. 17; *Woods v. Finnell*, 13 Bush, 628; *Eastin v. Bank*, 66 Cal. 123.

there is much good reason in what has been said in a [*189] *Pennsylvania case, that "if the person be not arrested, or his property seized, it is unimportant how futile and unfounded the action might be; as the plaintiff, in consideration of law, is punished by the payment of costs."¹ If every suit may be retried on an allegation of malice, the evils would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first.

Malicious Abuse of Process. If process, either civil or criminal, is willfully made use of for a purpose not justified by the law, this is abuse for which an action will lie. The following are illustrations: Entering up a judgment and suing out execution after the demand is satisfied;² suing out an attachment for an amount greatly in excess of the debt;³ causing an arrest for more than is due;⁴ levying an execution for an excessive amount;⁵ causing an arrest when the party cannot pro-

¹ SHARSWOOD, J., in *Mayer v. Walter*, 64 Penn. St. 283, citing *Ray v. Law*, 1 Pet. C. C. 207; *Kramer v. Stock*, 10 Watts, 115; *Cross v. Elliott*, 69 Me. 387; *Smith v. Hintrager*, 67 Ia. 109. See *Gonzales v. Cobliner*, 68 Cal. 151; *Brown v. Cape Girardeau*, 90 Mo. 377. This subject has been treated at length in an article, discussing many cases by Mr. Lawson. 80 Am. Law Reg. 281, 353.

² *Barnett v. Reed*, 51 Penn. St. 190.

³ *Savage v. Brewer*, 16 Pick. 453; *Moody v. Deutsch*, 85 Mo. 237.

⁴ *Jenings v. Florence*, 2 C. B. (N. S.) 467; *Austin v. Debnam*, 3 B. & C. 139.

⁵ *Sommer v. Wilt*, 4 S. & R. 19; *Churchill v. Siggers*, 3 El. & Bl. 929. In this case, Lord CAMPBELL, Ch. J., says, p. 937: "To put into force the process of the law maliciously, and without any reasonable or probable cause, is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case. Process

of execution on a judgment seeking to obtain satisfaction for the sum recovered is *prima facie* lawful; and the creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied, and that execution was sued out for a larger sum than remained due upon the judgment. Without malice and the want of probable cause, the only remedy for the judgment-debtor is to apply to the court or judge that he may be discharged, and that satisfaction may be entered up on the payment of the balance justly due. But it would not be creditable to our jurisprudence if the debtor had no remedy by an action where his person is, or his goods have been taken in execution for a larger sum than remained due on the judgment, this having been done by the creditor maliciously and without reasonable or probable cause: *i. e.*, the creditor well knowing that the sum for which the execution is sued out is excessive, and his motive being to oppress and injure

cure bail, *and keeping him imprisoned until, by stress [*190] thereof, he is compelled to surrender property to which the other is not entitled.¹ In these cases, proof of actual malice is not important, except as it may tend to aggravate damages; it is enough that the process was willfully abused to accomplish some unlawful purpose.²

Arrests for an Ulterior Purpose. One way in which process is sometimes abused, is by making use of it to accomplish not the ostensible purpose for which it is taken out, but some other purpose for which it is an illegitimate and unlawful means. An illustration is where, by means of a subpoena, and on pretence of desiring his testimony, a person is brought within the reach of process which otherwise could not have been served upon him. Here there may in strictness be no unlawful action, and possibly no suit would lie; but it is the duty of the court, where the service of the writ is brought about by deception through abuse of other process, or by any unlawful act, to take care that no benefit be derived from it. The effectual mode to accomplish this will be to set aside the service as unauthorized. It has, therefore, been very justly said that the courts will not tolerate service of process on any person who, for that purpose, has been deceitfully brought within their jurisdiction; a court will also protect from arrest "*eundo et redeundo*," not only the parties, but also the

the debtor. The court or judge, to whom a summary application is made for the debtor's liberation, can give no redress beyond putting an end to the process of execution on payment of the sum due, although, by the excess, the debtor may have suffered long imprisonment, and have been utterly ruined in his circumstances."

¹ Grainger v. Hill, 4 Bing. N. C. 212; Krug v. Ward, 77 Ill, 603. So filing a notice *lis pendens* charging that the owner was not the real owner. Smith v. Smith, 20 Hun, 555. So arresting an engineer late at night when about to take out a train, when arrest might have been made during the day. Smith v. Weeks, 60 Wis. 94. False imprisonment will lie for malicious abuse of lawful process after

arrest. Wood v. Graves, 144 Mass. 365. The action is confined to a use of process to compel defendant to do some collateral thing which he could not lawfully be compelled to do. Johnson v. Reed, 136 Mass. 421. And see Bartlett v. Christhilf, 18 Atl. Rep. 518 (Md.) To sustain an action for abuse of process both malice and want of probable cause, must be shown and advice of counsel may be a defense. Emerson v. Cochran, 111 Penn.St.619; Eberly v. Rupp, 90 Penn. St. 259. See also Juchter v. Boehm, 67 Ga. 534; Crusselli v. Pugh, 71 Ga. 744; *Contra*, probable cause need not be shown. Hazard v. Harding, 63 How. Pr. 326.

² See Stewart v. Cole, 46 Ala. 646.

witnesses, who in obedience to its process, or *in furtherance of its proceedings*, appear within its jurisdiction.¹ So, if a party is detained over Sunday, when civil process cannot be served, and is arrested the next day, he will be discharged;² and so if he is detained on a void writ, or one that has become *functus officio*,³ or without any writ at all, until one shall be obtained.⁴ So if service is accomplished by unlawfully breaking into a dwelling-house.⁵ The principle is, that no one shall derive advantage [*191] from *abuse of the process of the courts, or by his own fraud or other misconduct. And the principle should apply to cases where the process of extradition, either as between the States or as between one sovereignty and another, is resorted to for the purpose of obtaining service of civil process.⁶

In some of the cases above mentioned, an action for false imprisonment would lie; but where there has been no actual illegal detention, the fraudulent use of the process to bring one within a jurisdiction must be actionable.⁷

Officer Serving his own Process. The law will not permit an officer to serve process in a case in which he is a party or is the complainant. "The law wisely foreseeing that the ministers of

¹ ROBINSON, J., in *Slade v. Joseph*, 5 Daly, 187. See *Luttin v. Benin*, 11 Mod. 50; *United States v. Edme*, 9 S. & R. 147; *Goupil v. Simonson*, 3 Abb. Pr. 474. The court will not sanction any attempt to bring a party within its jurisdiction by fraud or misrepresentation. *Carpenter v. Spooner*, 2 Sanf. 717, 718; *Baker v. Wales*, 45 How. Pr. 137; *McNab v. Bennett*, 64 Ill. 158. Service of process on one fraudulently brought within the jurisdiction is null and void. *Wood v. Wood*, 78 Ky. 624; *Duringer v. Moschino*, 93 Ind. 495. But the arrest of a witness is not a cause of action apart from malice and want of probable cause. The remedy is by application for discharge. *Smith v. Jones*, 76 Me. 138.

² *Lyford v. Tyrrel*, Anstr. 85; *Wells v. Gurney*, 8 B. & C. 769. Procuring arrest in order to serve other pro-

cess is an abuse of process. Service will be set aside. *Byler v. Jones*, 79 Mo. 261, 22 Mo. App. 623.

³ *Loveridge v. Platstow*, 2 H. Bl. 20; *Ex parte Wilson*, 1 Atk. 152.

⁴ *Birch v. Proddger*, 4 B. & P. 135; *Barlow v. Hall*, 2 Anstr. 462.

⁵ *Hsley v. Nichols*, 12 Pick. 270; *People v. Hubbard*, 24 Wend. 369; *Swain v. Mizner*, 8 Gray. 182.

⁶ See Wharton, Conf. L. § 2965; *In re Hawes*, 4 Am. Law Times Rep. (n. s.) 524; *Compton v. Wilder*, 40 Ohio St. 130. But if the creditor has had no part in the extradition he may proceed in a civil action. *Nichols v. Goodheart*, 5 Ill. App. 574.

⁷ Where those not privy to the fraud obtain service by means thereof, such service is valid. *Slade v. Joseph*, 5 Daly, 187. See *State v. Ross*, 21 Iowa, 467; *Adriance v. Lgrave*, 59 N. Y. 110.

justice should be freed, as far as practicable, from all the improper bias which may result from self-interest, has declared that no man shall be his own officer, and that no one shall in his own person, and by his own hand, do himself right by legal process. Therefore, where an officer is interested, it declares that another shall act; and this, in principle, applies to all, though to some with greater, others with less, force."¹ Nor can any reasonable distinction be taken as respects the nature of the process or the degree of interest; the broad ground is the safest, that no officer who is interested in a suit, or who is even a party to it without interest, shall serve any process appertaining to it from the commencement to the conclusion.² This is by no means a mere technical rule, but as the law, upon very imperative reasons, makes official returns conclusive for very many purposes, a different doctrine would be equivalent, in numerous cases, to making the officer judge in his own cause, and placing the other party at his mercy. A service, therefore, by the officer in such a case must be a mere nullity.³

*Where an officer cannot act, neither can the deputy, [*192] since the deputy can act only for him and in his name.⁴ And if the officer is not a party, but is the husband of a party this also would disqualify him.⁵

Arrest of Privileged Persons. The arrest of a person privi-

¹ COLCOCK, J., in *Singletary v. Carter*, 1 Bailey, 467.

² *Singletary v. Carter*, 1 Bailey, 467; *Knott v. Jarboe*, 1 Met. (Ky.) 504; *Gage v. Graffan*, 11 Mass. 181; *Chambers v. Thomas*, 3 A. K. Marsh, 536; *Boykin v. Edwards*, 21 Ala. 261; *Woods v. Gilson*, 17 Ill. 218; *Ford v. Dyer*, 26 Miss. 243; *Filkins v. O'Sullivan*, 79 Ill. 524.

³ It is sometimes forbidden by statute, but where that is the case the statute is generally looked upon as affirming common law principles. See *Knott v. Jarboe*, 1 Met. (Ky.) 504.

⁴ *Gage v. Graffan*, 11 Mass. 181; *May v. Walters*, 2 McCord, 470.

⁵ See *Scanlan v. Turner*, 1 Bailey, 421. The exclusion ought to go fur-

ther, and embrace near kinship, and perhaps does. One difficulty may be encountered in some of our statutes, which make provision for a service by some other officer when a sheriff is interested or a party, but do not go further.

It is held in New York that the officer may serve the process in his own favor by which suit is commenced, if it is not process of arrest. *Bennett v. Fuller*, 4 Johns. 486; *Tuttle v. Hunt*, 2 Cow. 436; *Putnam v. Man*, 3 Wend. 202. The danger of such a doctrine is perceived in the last case, in which it is held that the constable's return of service of a summons in his own favor is not traversable.

leged from arrest is not a trespass, even though the officer may be aware of the facts. It is only voidable; the party may waive his privilege, or at his option he may apply for his discharge to the court in which the suit is commenced, or on *habeas corpus*: and where the privilege is given on public grounds, or for the benefit of another, he may be discharged on the proper application of any one concerned. Thus, if a witness is arrested while in attendance on court as such, the party who has subpoenaed him may move for his discharge, or the court, of its own motion, may order it.¹

¹ *Blight v. Fisher*, Pet. C. C. 41; *Tarlton v. Fisher*, Doug. 671; *Magnay v. Burt*, 5 Q. B. 381; *Yearsley v. Heane*, 14 M. & W. 322, 334; *Fletcher v. Baxter*, 2 Aik. 224; *Waterman v. Merritt*, 7 R. L. 345; *Fox v. Wood*, 1 Rawle, 143; *Aldrich v. Aldrich*, 8 Met. 102; *Wilmarth v. Burt*, 7 Met. 257; *Smith v. Jones*, 76 Me. 138. The exemption extends to service of civil summons. *In re Healey*, 53 Vt. 694; *Kauffman v. Kennedy*, 25 Fed. Rep. 785. *Gregg v. Sumner*, 21 Ill. App. 110. But not to case of arrest for an indictable offense. *Ex parte Levi*, 28 Fed. Rep. 651.

Where one has come into the jurisdiction as a plaintiff and then been subpoenaed as a witness in another

court, he is privileged from service of process while such witness, to which he would not have been liable unless he had come into the jurisdiction. *Small v. Montgomery*, 23 Fed. Rep. 707. One is privileged from service of a summons while in another state attending to taking of depositions to be used in suit of his in his own state, service being made before he can return home after the close of such taking. *Green v. Youngs*, 17 Ill. App. 106. A non-resident defendant attending a U. S. Court at which his presence is necessary, is privileged from service of a new writ against him. *Wilson Sewing Machine Co. v. Wilson*, 23 Fed. Rep. 808.

*CHAPTER VII

[*193]

THE WRONGS OF SLANDER AND LIBEL.

The wrong of a malicious prosecution, which was considered in the preceding chapter, is akin to the wrongs known under the designation of slander and libel. Though it is injurious in that it is likely to subject the party to expense and trouble to make good his defense, it is also a most effective species of defamation, the defamatory matter being not only published, but made more formal, and apparently authoritative, by the machinery of the law being made use of for the purpose.

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.¹

By defamation is understood a false publication, calculated to bring one into disrepute.

Publication. In a legal sense, there is no wrong until the defamatory charge or representation is given to the world. This is done when it is put before one or more third persons; it is then said to be published.² To say to a man's face any evil thing concerning him is no defamation; 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, and consequently nothing to affect the party's reputation. The reputation is not assailed, and cannot presumably be injured when the false charge is made only to the party himself.

¹ Mr. Townsend, in his *Treatise on Slander and Libel*, § 21, note, collects many definitions which have been given of these wrongs.

² To allege merely that one "printed" a libel is not enough. *Sproul v. Pillsbury*, 72 Me. 20.

If the party who is thus falsely accused repeats it to [*194] others,* by way of complaint or otherwise, it may then become public, but it is still no slander, because the publication is not made by the defamer. He has, it is true, uttered the charge, but he has not published it; and the responsibility is upon the accused himself, if, by his own act, he brings it before the public. So 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 if he keeps such a paper in his possession, he must, at his peril, see that it does not fall into the hands of others; if it does, the publication is in law attributable to him as the party who originated the wrong, and was the means of its becoming injurious. But delivering the writing to the party himself is no more a publication of a libel than would be the addressing to him of defamatory words.¹

¹ Whether it would be a publication of the libel if it is only delivered to the agent of the party, who is sent by his principal for it, *quere*. The decision in *Brunswick v. Harmer*, 14 Q. B. 185, is in the affirmative. Compare *Haynes v. Leland*, 29 Me. 233; *Sutton v. Smith*, 13 Mo. 120. That is no publication of a slander which is spoken in a foreign language which the hearer does not understand. *Kiene v. Ruff*, 1 Iowa, 482. The printing in a Dutch paper circulating in the United States a libellous article is a publication. *Steketee v. Kimm*, 48 Mich. 322. If a letter sent by post is read only by the receiver there is no publication. *Spaits v. Poundstone*, 87 Ind. 522. If read by a third person to receiver who cannot read, no publication if sender did not know of receiver's ignorance. *State v. Syphrett*, 2 S. E. Rep. 624 (S. C.) Under an act making insulting words actionable, there is a sufficient publication if a letter with such words is sent and read by the receiver. *Rolland v. Batchelder*, 5 S. E. Rep. 695 (Va.) Sending by mistake a letter to B intended to be sent to A, in whose

hands it would be privileged is not actionable. *Tompson v. Dashwood*, L. R. 11 Q. B. D. 43. Sending a report by a corporation to its agents who employ men, that a servant has been discharged for stealing is a publication. *Bacon v. Mich. Centr. R. R. Co.* 55 Mich. 224. Compare, *De Senancour v. Soc. La Prévoyance*, 16 N. E. Rep. 553 (Mass.) To say to a woman "M has had intercourse with you," is held a publication in a suit by *M. Marble v. Chapin*, 133 Mass. 225. If a third person cuts from a paper defamatory words and sends them to the betrothed of the person named, the one who caused their insertion is liable for such publication. *Zier v. Hofflin*, 33 Minn. 66. See *Clay v. People*, 86 Ill. 147. But the original author of a slander is not liable for its unauthorized repetition by another. *Shurtleff v. Parker*, 130 Mass. 293; *Hastings v. Stetson*, 126 Mass. 329. So where an "interview" in one paper is copied in another paper in another State. *Clifford v. Cochrane*, 10 Ill. App. 570. A repetition in presence of third person at plaintiff's request of words spoken to the latter is not a

Publication implies volition and actual or presumed wrongful intent. Therefore, if one who acts in a public or *quasi* public capacity, or as agent of another, receives a defamatory paper to carry and deliver to a third person, and he does so in good faith, and without knowledge of the contents, as an express agent might carry and deliver letters, or a servant, on his master's command, do the same, this is no publication by him, though it would be by the sender when delivery is made.¹ But in general, all persons in any manner instrumental in making or procuring to be made the defamatory publication are jointly and severally responsible therefor. Therefore, one, in the course of whose business a libel is published by his agent, may be joined with the agent in an action for the publication, or may be proceeded against as principal, under the doctrine *respondeat superior*. But if the agent publishes an injurious charge without the assent of his principal, express or implied, the agent alone can be held accountable. Where no express assent or authorization is made, the question whether assent is to be implied, is often a somewhat* difficult one, and must be determined by the nature [*195] of the agency, the course of the business, etc. Thus, the assent of the proprietor of a business must be presumed to have been given to the reports, advertisements, etc., published by his agents in managing it, and to the letters written by them in carrying it on; * but when the party to a suit places his case in the

publication. *Heller v. Howard*, 11 Ill. App. 554. As to what is not a publication in case of expulsion of church member, see *Landis v. Campbell*, 79 Mo. 433.

¹ *Townshend on Slander and Libel*, § 121. It is no publication by one who picks up and delivers a sealed letter, the contents of which are unknown to him. *Fonville v. M'Nease*, *Dudley*, 303. Every sale and delivery of a printed libel is a fresh publication. *Staub v. Van Benthuyzen*, 36 La. Ann. 467. If a news vendor does not know that a paper sold contains a libel, and his ignorance does not arise from negligence and he does not know, nor ought he to have known, that the paper is likely to contain libellous

matter, he is not from the sale liable for a publication. *Emmens v. Pottle*, L. R. 16 Q. B. D. 354. See *Prescott v. Tousey*, 50 N. Y. Sup. Ct. 12.

* Philadelphia, etc., R. R. Co. v. *Quigley*, 21 How. 202; *Maynard v. Fireman's Fund Ins. Co.* 34 Cal., 48. Not for libellous letters written outside of the scope of his agency. *South. Expr. Co. v. Fitzner*, 59 Miss. 581. And, see cases p. *121, *Supra*. One partner in the furniture business is not liable for another's independent act in putting a libellous placard in front of their store. *Woodling v. Knickerbocker*, 31 Minn. 268. Otherwise if he participates. *Atlantic, &c., Co. v. Paulk*, 3 South Rep. 800 (Ala.)

hands of an attorney, he has not the ordinary supervision of a principal over his business, and cannot be understood as authorizing the case to be conducted in any other than a lawful and legitimate way; and he is therefore not responsible if the attorney shall insert defamatory matter in his pleadings, or abuse his privilege of speech in addressing the jury, unless his express assent is shown.¹

The publisher of a newspaper must, at his peril, see that the supervision of his business is such as to exclude all libellous publications, and he is responsible, though one is made without his knowledge, and notwithstanding stringent regulations made by himself, which, if observed, would have prevented it.² This liability is not planted on the ground merely of the duty of the principal to see that his business is managed in good faith and with proper care, but it corresponds to the liability of one who, having brought upon his premises something extremely liable to inflict great and irreparable injury, is required at all events to make good the injury resulting from the inadequacy of his precautions.³

SLANDER.

Words Actionable per se. Certain publications are said to be actionable *per se*. By this is meant that an action will lie for

¹ *Hardin v. Cumstock*, 2 A. K. Marsh. 480.

² *Perrett v. Times Newspaper*, 25 La. Ann. 170; *Buckley v. Knapp*, 48 Mo. 152; *Storey v. Wallace*, 60 Ill. 51; *Commonwealth v. Morgan*, 107 Mass. 199; *Scripps v. Reilly*, 35 Mich. 371; *Same Case*, 38 Mich. 10; *Andres v. Wells*, 7 Johns. 260; *Dunn v. Hall*, 1 Ind. 345. One partner in business of publishing a newspaper is liable for the express malice of the other. *Lothrop v. Adams*, 133 Mass. 471. So for that of an agent. *Bruce v. Reed*, 104 Penn. St. 408; *Contra*, *Eviston v. Cramer*, 57 Wis. 570; *Scripps v. Reilly*, 38 Mich. 10, if due care has been exercised in his retention and selection. See, also, *Haines v. Schultz*, 14 Atl. Rep. 438 (N. J.) See *Mecabe*

v. Jones, 10 Daly, 222, as to liability of holder of majority of the stock of a company who exercises some supervision over the articles printed. If a puffing article written by plaintiff is published at his request, an unintentional mistake of the printer does not make the publication a malicious libel. *Sullings v. Shakespeare*, 46 Mich. 408.

³ A journalist cannot protect himself from the consequences of publishing a libel by assurances of its truthfulness, and by a contract of indemnity from the writer. *Atkins v. Johnson*, 43 Vt. 78. But if he publishes an article, supposing it to be innocent, as upon its face it seems to be, he may be excused. See *Smith v. Ashley*, 11 Met. 367.

making them without proof of actual injury, because their necessary or natural and proximate consequence would be to cause* injury to the person of whom they are spoken, [*196] and therefore injury is to be presumed.¹ In the case of certain other publications no such presumption can be made, because observation does not justify a like conclusion. Therefore, in such cases, the publications are only actionable on averment and proof that injury which the law can notice actually followed as a natural and proximate consequence.

In the recent case of *Pollard v. Lyon*, spoken words, as a cause of action, are classified by Mr. Justice OLIFFORD 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."²

The first four of these classes are of words actionable *per se*. The fifth embraces cases which are actionable only when the special damage is averred.

Brief notice will be taken of these several classes.

1. Words which impute to the Party an Indictable Offense. It is agreed on all hands that it is not always *prima facie* ac-

¹ Townshend on Slander and Libel, § 146. Proof of special damage in such case is inadmissible. *Boldt v. Budwig*, 19 Neb. 739. The law implies malice in the absence of justification. *Belck v. Belck*, 97 Ind. 73. Whether words are slanderous *per se* depends not on the law of the state where they were spoken, but of that

where the act is stated to have taken place. *Dufresne v. Weise*, 46 Wis. 290.

² *Pollard v. Lyon*, 91 U. S. Rep. 225, 226. In La. the damages recoverable for the utterance of words not slanderous *per se* are limited to the actual damage proved. *Shotorno v. Fourichon*, 4 South Rep. 71.

tionable to impute to one an act which is subject to indictment and punishment. Importance in the law of defamation is attached to the inherent nature of the indictable act, and also to the punishment which the law assigns to it. In the leading case of *Brooker v. Coffin*, the following was given as the test: "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, then the words will be in [*197] themselves* actionable;" and this test has been accepted and applied so often and so generally that it may now be accepted as settled law.¹

¹ See *Pollard v. Lyon*, 91 U. S. Rep. 225; *Anonymous*, 60 N. Y. 263; *McKee v. Wilson*, 87 N. C. 300. In *Miller v. Parish*, 8 Pick. 384, 385, PARKER, C. J., says: "It is objected that a false and malicious charge of fornication against a female will not sustain an action of slander, because fornication is not a crime at common law, and is not punishable by statute with ignominious punishment. We do not think that the objection is valid; for whenever an offense is charged which, if proved, may subject the party to a punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable." In England it is held that words which impute any crime, though it be not indictable, are actionable *per se*. *Wood v. Beavan*, L. R. 11 Q. B. D. 609.

The above rule approved in *Cox v. Bunker Morris*, 269. In *Perdue v. Burnett*, Minor, (Ala.) 138, the words, "You have altered the marks of four of my hogs," were held in themselves actionable, as they charge an act involving moral turpitude, and an indictable offense, although the punishment may not be infamous.

They must convey a charge of some act criminal in itself, and indictable as such, and subjecting the

party to an infamous punishment or some offense involving moral turpitude. *McCuen v. Ludlum*, 17 N. J. 12.

In *Gosling v. Morgan*, 32 Penn. St. 273, 275, the undisturbed authority of the leading cases of *Shaffer v. Kintzer*, 1 Binn. 537; *McClury v. Ross*, 5 Binn. 218, and *Andreas v. Koppenhefer*, 3 S. & R. 255, establishes the principle that "words spoken of a private person are only actionable when they contain a plain imputation not merely of some indictable offense, but one of an infamous character, or subject to an infamous and disgraceful punishment." *S. P. Klumph v. Dunn*, 66 Penn. St. 141; *Hoag v. Hatch*, 23 Conn. 535, 590. It is not sufficient that they impute to a person merely the violation of a penal or criminal law, but that they charge him with a crime, which involves moral turpitude, or would subject him to an infamous punishment.

To the same effect are *Dottarer v. Bushey*, 16 Penn. St. 204, 209; *Stitzell v. Reynolds*, 67 Penn. St. 54, 57.

In *Ranger v. Goodrich*, 17 Wis. 78, 80, per Paine, J.: "It is a general rule that words charging another with a crime involving moral turpitude punishable by law are actionable."

In *Montgomery v. Deeley*, 3 Wis.

*In the application of this test results have been worked [*198] out in some cases which cannot be said to be entirely satisfactory. Thus, it has been held in Pennsylvania that to charge one with having made a libel is slanderous; the punishment at the common law having been infamous, and the offense itself, in its higher degree, being infamous.¹ And in New York, to charge one with removing landmarks is held slanderous, on the ground that the offense involves moral turpitude.² On the other

709, 712, the court quote *Brooker v. Coffin*, 5 Johnson, 188, recognizing the same test.

In *Filber v. Dautermann*, 26 Wis. 518, 520, the court say: "This is certainly 'a crime involving moral turpitude,' and subjects the party guilty of its commission to 'an infamous punishment,'" citing above Wisconsin cases, and *Benaway v. Conyne*, 3 Chand. (Wis.) 214.

Hollingsworth v. Shaw, 19 Ohio St. 430, 433: "These authorities, and the general current of decisions, warrant us in saying that to render words actionable *per se*, on the ground that they impute criminality to the plaintiff, they must, 1st, be such as charge him with an indictable offense; and, 2d, the offense charged must involve a high degree of moral turpitude, or subject the offender to infamous punishment."

In *Davis v. Brown*, 27 Ohio St. 326, 328, "The words must import a charge of an indictable offense, involving moral turpitude or infamous punishment."

Same rule in *Dial v. Holter*, 6 Ohio St. 223, 241, and in *Alfele v. Wright*, 17 Ohio St. 238, 241.

See, further, *Perdue v. Burnett*, Minor, (Ala.) 138; *Howard v. Stephenson*, 2 Const. Rep. (S. C.) 403; *Gage v. Shelton*, 3 Rich. 242.

Some cases go further, and seem to require that, in order to render the charge actionable *per se*, the act imputed shall not only be subject to an

infamous punishment, but also involve moral turpitude. Thus, in *Redway v. Gray*, 31 Vt. 292, 298, the court, through *POLAND, J.*, say: "We think that in addition to the offense charged being punished corporeally, it must impute moral turpitude, and the true reason why assaults, and breaches of the peace, and violations of the liquor law, are not such offenses as make words charging them actionable, is because they do not necessarily, and in a legal sense, imply moral turpitude. The offense of larceny does necessarily imply it, and there is no distinction between grand and petty larceny in this respect." See, also, *Smith v. Smith*, 2 Sneed, 473.

¹ *Andres v. Koppenhefer*, 3 S. & R. 255.

² *Young v. Miller*, 3 Hill, 21. See *Todd v. Rough*, 10 S. & R. 18; *Beck v. Stitzel*, 21 Penn. St. 522; *Hoag v. Hatch*, 23 Conn. 585; *Townshend on Slander and Libel*, § 155, and cases cited. The grade of crime—whether felony or misdemeanor—is immaterial. *Young v. Miller*, 3 Hill, 21, and cases cited. In Massachusetts it has been held actionable *per se* to charge a woman with drunkenness; that offense being subject to disgraceful punishment. *Brown v. Nickerson*, 5 Gray, 1. To accuse one of committing an assault and battery is not *per se* slanderous. *Billings v. Wing*, 7 Vt. 439. The charge may be made in indirect terms or by way of interroga-

hand, whatever the moral turpitude involved in the act, it is generally agreed that it is not actionable *per se* to charge it if it is not indictable, even though it be punishable as disorderly conduct. Therefore, to charge a female with being a common prostitute is held not actionable without averment of special damage, though it is difficult to conceive that any other charge can be more likely to injure, and the conduct itself is punishable as vagrancy.¹

tion; *Gorham v. Ives* 2 Wend. 534; *Gibson v. Williams*, 4 Wend. 320; or by way of expressing belief merely. *Dottarer v. Bushey*, 16 Penn. St. 204.

Where dogs are the subject of larceny it is actionable *per se* to charge one with stealing a dog. *Harrington v. Miles*, 11 Kan. 480; S. C. 15 Am. Rep. 355.

It is not actionable *per se* to say: "You have took my pocket book and have it in your pocket." *Christal v. Craig*, 80 Mo. 367. "You will steal." *Bays v. Hunt*, 60 Ia. 251. To charge with sodomy is not, in Ohio. *Melvin v. Weiant*, 86 Ohio St. 184. With being a cheat. *Pollock v. Hastings*, 88 Ind. 248. With buying liquor when selling it is a crime. *Sterling v. Jugenheimer*, 69 Ia. 210. It is to say: "He tried to steal a dog but could not." *Berdeaux v. Davis*, 58 Ala. 611. "He stole my coin." *Wilson v. McCrory*, 86 Ind. 170. So to charge one with poisoning stock. *Lemons v. Wells*, 78 Ky. 117. To charge one with being an abortionist. *De Pew v. Robinson*, 95 Ind. 109. With public indecency. *Sellers v. Jenkins*, 97 Ind. 430. With writing an obscene communication. *Halstead v. Nelson*, 36 Hun, 149. With getting money by false pretences. *Lafollett v. McCarthy*, 18 Ill. App. 87. With "slow poisoning" her husband. *Campbell v. Campbell*, 54 Wis. 90. With furnishing watered milk where the act is a crime involving moral turpitude and infamous punishment.

Geary v. Bennett, 53 Wis. 444. See *Brooks v. Harison*, 91 N. Y. 83. See also *Bacon v. Mich. Cen. R. R. Co.*, 55 Mich. 224; *West v. Hanrahan*, 28 Minn. 385; *Boogher v. Knapp*, 76 Mo. 457. To call one a "felon editor" after the person has undergone his sentence, is not justified by showing the conviction. *Leyman v. Latimer*, L. R. 3 Ex. D. 352.

¹ *Brooker v. Coffin*, 5 Johns. 188; *S. C. Bigelow*, Lead. Cas. on Torts, 77. See *Keiler v. Lessford*, 2 Cranch, 190; *Pollard v. Lyon*, 91 U. S. Rep. 225; *Bissell v. Cornell*, 24 Wend. 354; *Terwilliger v. Wands*, 17 N. Y. 54; *Wilson v. Goit*, 17 N. Y. 442; *Stanfield v. Boyer*, 6 Har. & J. 248; *Woodbury v. Thompson*, 3 N. H. 194; *Boyd v. Brent*, 3 Brev. 241; *Underhill v. Welton*, 32 Vt. 40; *Castleberry v. Kelly*, 26 Geo. 606; *W. v. L.*, 2 Nott & McCord, 204; *Berry v. Carter*, 4 Stew. & Port. 387; *Elliott v. Ailsberry*, 2 Bibb, 473; *Linney v. Maton*, 13 Texas, 449; *McQueen v. Fulgham*, 27 Texas, 463. In Massachusetts this rule is rejected, and the imputation of unchastity to a female is held actionable *per se*. *Miller v. Parish*, 8 Pick. 384. But fornication is there indictable and punishable by fine, and in case the fine is not paid, by imprisonment. In Wisconsin, where fornication is made punishable by statute, it is actionable to charge it. *Mayer v. Schleichter*, 29 Wis. 646. So, also, in Iowa. *Cox v. Bunker*, Morris, 269; *Haynes v. Ritchey*, 30 Iowa, 76. So, in Texas. *Zeliff v. Jen-*

So,* to charge one with having sworn falsely, without [*199] connecting the charge with any pending proceedings in court, is not actionable, because, though the taking of a false oath may be disgraceful, it is not an indictable offense, unless taken under such circumstances as would make it perjury.¹ And, however positive may be the charge, if it is accompanied with words which qualify the meaning, and show to the bystanders that the act imputed is not criminal, this is no slander, since the charge, taken together, does not convey to the minds of those who hear it an imputation of criminal conduct. Thus, it would not be slanderous *per se* to say: "He is a thief: he has stolen my land;" land not being the subject of larceny, and one part of the charge being relieved of its criminal character by the other part.²

nings, 61 Tex. 458, but see *Ross v. Fitch*, 58 Tex. 148. And, see, *Frisbie v. Fowler*, 2 Conn. 707; *Sexton v. Todd*, *Wright*, 817; *Wilson v. Runyan*, *Wright*, 651; *Malone v. Stewart*, 15 Ohio, 319. Words imputing unchastity slanderous *per se*. *Kedrolivansky v. Niebaum*, 70 Cal. 216; *Page v. Merwin*, 54 Conn. 426; *Reitan v. Goebel*, 33 Minn. 151; *Williams v. McManus*, 38 La. Ann. 161; *Barnett v. Ward*, 36 Ohio St. 107. In the following States to impute unchastity to a female is actionable by statutes: Alabama, Maryland, North Carolina, South Carolina, Kentucky, Missouri, Michigan, Illinois, Indiana, New York.

The wrongful act of a third party, induced by the slander, will not support an action where the words are not actionable *per se*. *Vicars v. Wilcocks*, 8 East. 1. As to what will constitute special injury, see *Moody v. Baker*, 5 Cow. 413; *Pettibone v. Simpson*, 66 Barb. 492; *Beach v. Ranney*, 2 Hill, 309; *Davies v. Solomon*, L. R. 7 Q. B. 112.

¹ *Ward v. Clark*, 2 Johns. 10, and cases cited. *Schmidt v. Witherick*, 29 Minn. 156. But to say of one,

"He has sworn to a damned lie, and I will put him through for it," is held actionable, as implying that the false oath was taken under such circumstances as made it punishable. *Crone v. Angell*, 14 Mich. 340; *Brown v. Hanson*, 53 Geo. 632; *Gilman v. Lowell*, 8 Wend. 573; *Sherwood v. Chace*, 11 Wend. 38; *Cpons v. Robinson*, 3 Barb. 625; *Spooner v. Keeler*, 51 N. Y. 527. Words are actionable which imply a false oath in a judicial proceeding, although no such proceeding existed. *Bricker v. Potts*, 13 Penn. St. 200; or the person did not testify. *Holt v. Turpin*, 78 Ky. 433. But to render words actionable *per se* they need not necessarily bear a criminal import. If they would be understood so to do in the ordinary use of language it is enough. *Stroebel v. Whitney*, 31 Minn. 384. See *Campbell v. Campbell*, 54 Wis. 90.

² *Stitzell v. Reynolds*, 67 Penn. St. 54; *Brown v. Myers*, 40 Ohio St. 99; *Ogden v. Riley*, 14 N. J. 186; *Underhill v. Welton*, 32 Vt. 40; *McCaleb v. Smith*, 22 Iowa, 242; *Edgerly v. Swain*, 32 N. H. 478; *Ayers v. Grider*, 15 Ill. 37; *Norton v. Ladd*, 5 N. H. 203; *Trabue v. Mays*, 8 Dana, 138;

[*200] *It has been sometimes supposed that the reason for holding an imputation of an indictable offense slanderous was, that it imperiled the party and exposed him to the risk of prosecution and punishment; but the authorities are not consistent with this view. The charge of criminal conduct for which punishment has been inflicted, or which has been pardoned, or a prosecution for which is 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.¹ It is not, therefore, the danger that might follow from the charge, but the disgrace of the scandal that constitutes the injury. And to say of one, "He is a perjured villain," is actionable to the same extent as to charge him with perjury in a particular suit; the word perjured necessarily implying the commission by him of a crime.²

Williams v. Hill, 19 Wend. 305; *Dexter v. Taber*, 12 Johns. 239; *Crone v. Angell*, 14 Mich. 340. See *Phillips v. Barber*, 7 Wend. 439; *Parmer v. Anderson*, 33 Ala. 78; *Pegram v. Styron*, 1 Bayley, 595; *Perry v. Man*, 1 R. I. 263; *Miller v. Johnson*, 79 Ill. 58; *Wright v. Lindsay*, 20 Ala. 428; *Blanchard v. Fisk*, 2 N. H. 398; *Cock v. Weatherby*, 13 Miss. 333; *Allen v. Hillman*, 12 Pick. 101. If from the language it appears that the words were not intended to charge a crime, but were mere abuse, not slanderous *per se*. *Fawsett v. Clark*, 48 Md. 494. But if the words impute a crime, they are, though the charge could not be true; nor does the disbelief of the hearers alter the rule, unless there was an express or implied qualification showing that no crime was intended to be charged. *Rea v. Harrington*, 58 Vt. 181. If words actionable in themselves are spoken of a transaction which is not a crime and of which the hearers have full knowledge, they are not actionable. *Pollock v. Hastings*, 88 Ind. 248. The test is, does the speaker intend by the words to make the charge, and do

the hearers understand him to so intend, and is the charge as made false. *Shull v. Raymond*, 23 Minn. 66. See *Trimble v. Foster*, 87 Mo. 49.

¹ *Carpenter v. Tarrant*, Cas. Temp. Hardw. 339; *Smith v. Stewart*, 5 Penn. St. 372; *Holley v. Burgess*, 9 Ala. 728; *Van Ankin v. Westfall*, 14 Johns. 233; *Krebs v. Oliver*, 12 Gray, 239; *Shipp v. McCraw*, 3 Murph. 463. A child too young to be punishable for a crime may nevertheless maintain an action for slander in charging him with it. *Stewart v. Howe*, 17 Ill. 71.

² *Sabin v. Angell*, 46 Vt. 740, charge that one is a thief. *Noonan v. Orton*, 32 Wis. 106, charge of perjury; See, also, *Fisher v. Rotereau*, 2 McCord, 189; *Hogg v. Wilson*, 1 Nott & McC. 216; *Little v. Barlow*, 26 Geo. 423; *Pierson v. Steortz*, Morris, 136; *McKee v. Ingalls*, 5 Ill. 30; *Van Akin v. Caler*, 48 Barb. 58; *Davis v. Johnston*, 2 Bailey, 579; *Kennedy v. Gifford*, 19 Wend. 296. It has often been decided that to charge one with having been a convict is actionable *per se*. See *Smith v. Stewart*, 5 Penn. St. 372, where the previous cases are

3. Words which impute to the Party a Contagious or Infectious Disease. The reason for holding such words actionable is, that they tend to exclude the party from society; and therefore *the charge should impute the existence of the [*201] disease at the time.¹ What diseases would be embraced within this rule is not certain, but it is probable that at the present day only those which are contagious or infectious, and which are also usually brought upon one by disreputable practices: and the list would perhaps be limited to venereal diseases.²

3. Words Damaging as respects Office or Profession. This class of cases, in order to be *prima facie* actionable, must clearly appear to be spoken of the party in respect to his office, profession or employment, and if the words counted on do not by themselves show this, the declaration must contain the necessary averments to connect them.³ An illustration of such a slander is when a professional man is charged with general professional ignorance or incompetency.⁴

collected. Also, *Indianapolis Sun v. Horrell*, 53 Ind. 527. To say of one, "I know enough that he has done to send him to the penitentiary," is actionable *per se*. *Johnson v. Shields*, 25 N. J. 116. To say of one, "He was once accused of stealing a horse; he sued the accusers, and at the trial a verdict was brought in for the defendants," is equivalent to a charge that he is guilty of larceny. *Johnson v. St. Louis Despatch Co.*, 65 Mo. 539.

¹ *Taylor v. Hall*, 2 Stra. 1189; *Wilhams v. Holdredge*, 22 Barb. 396; *Carlslake v. Mapledoram*, 2 T. R. 473; *Nichols v. Gray*, 2 Ind. 83; *Bruce v. Soule*, 69 Me. 502.

² See *Watson v. McCarthy*, 2 Kelly, 57; *Irons v. Field*, 9 R. I. 216; *Nichols v. Guy*, 2 Ind. 83; *Kaucher v. Blinn*, 29 Ohio (N. S.) 62.

³ *Ayre v. Craven*, 2 Ad. & El. 7.

⁴ *Camp v. Martin*, 23 Conn. 86. See cases of slanders of physicians; *Ayre v. Craven*, 2 Ad. & El. 7; *Jones v. Diver*, 23 Ind. 184; *Sumner v. Ut-*

ley, 7 Conn. 258; *Camp v. Martin*, 23 Conn. 86; *Secor v. Harris*, 18 Barb. 425; *Carroll v. White*, 33 Barb. 615; *Rice v. Cottrel*, 5 R. I. 340; *DePew v. Robinson*, 95 Ind. 109. So though the words relate to but a single case if they import so gross disregard of duty as necessarily to injure him. *Pratt v. Pioneer Press Co.*, 35 Minn. 251; *Lynde v. Johnson*, 39 Hun, 12; see *Gauvreau v. Superior Pub. Co.*, 62 Wis. 403. An article referring to one solely as coroner is not basis for an action alleging injury to one as physician. *Purdy v. Rochester & Co., Co.*, 96 N. Y. 372. Cases of slanders of lawyers; *Rich v. Cavanaugh*, 2 Penn. St. 187; *Goodenow v. Tappan*, 1 Ohio, 60; *Garr v. Selden*, 6 Barb. 416; *Chipman v. Cook*, 2 Tyler, 456. See *Ludwig v. Cramer*, 53 Wis. 193; *Hetherington v. Sterry*, 23 Kan. 426; *Barr v. Moore*, 87 Penn. St. 385. Cases of slanders of clergymen; *McMillan v. Birch*, 1 Binn. 178; *Hayner v. Cowden*, 27 Ohio, (N. S.) 292; *Hartley v. Herring*, 8 T. R. 130; *Gallwey v. Mar-*

[*202] *4. 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. Therefore, a false charge that in respect to one person might be slanderous, if made in respect to another would support no action. The reason would be that in the one case it would be almost certainly injurious, while in the other no presumption of injury would arise. Thus, if it be said of a day laborer, "He is a bankrupt," the remark, so far as his business is concerned, is perfectly harmless, while if the same remark were made of a merchant, or of any one to whose business a good financial credit was indispensable, the natural and probable tendency would be to inflict an injury which would be serious and might be disastrous.¹ The merchant is therefore slandered when his pecuniary credit is impugned; the day laborer is not.

shall, 24 Eng. L. & E. 463; Chad-dock v. Briggs, 13 Mass. 248.

The following are further illustrations: Charge that the postmaster would rob the mail: *Craig v. Brown*, 5 Blackf. 44; charge that the chief engineer of the fire department was drunk at a fire; *Gottbehuet v. Hubachek*, 36 Wis. 515; statement of a justice of the peace, in connection with his office, that he is a rascal, villain and liar; *King v. Chaundler*, 2 Raym. 1363. And, see, *Lindsey v. Smith*, 7 Johns. 359; *Gove v. Blethen*, 21 Minn. 80. But the rule does not apply if at the time the words were spoken the party had ceased to hold the office. *Gibbs v. Prices, Styles*, 231; *Collins v. Mellen*, Cro. Car. 282; *Bellamy v. Burch*, 16 M. & W. 590; *Forward v. Adams*, 7 Wend. 204; *Edwards v. Howell*, 10 Ired. 211; *Allen v. Hillman*, 12 Pick. 101. So to assail the character or integrity of a judge. *Robbins v. Treadway*, 2 J. J. Marsh, 540; *Hook v. Hackney*, 16 S. & R. 335. Or of a justice of the peace. *Oram v. Franklin*, 5 Blackf. 42. *Spiering v. Andrae*, 45 Wis. 330. Or of a circuit court commissioner. Lan-

sing v. Carpenter, 9 Wis. 540. To charge a certificated master mariner with drunkenness while in command of his vessel at sea, was held actionable in *Irwin v. Brandwood*, 2 Hurl. & Colt. 960. So to charge a clergyman with incontinence. *Gallwey v. Marshall*, 9 Exch. 294. Or with misappropriating collections and being unfit to be a minister. *Franklin v. Browne*, 67 Ga. 272. Or a school superintendent with official corruption. (Here a libel). *Hartford v. State* 96 Ind. 461; see *Larrabee v. Minn. Tribune Co.* 36 Minn. 141. Or the architect of a public building with mental unsoundness. *Clifford v. Cochran*, 10 Ill. App. 570. Or a temperance organizer with being a seducer and hypocrite. *Finch v. Vifquain*, 11 Neb. 280.

¹ *Brown v. Smith*, 13 C. B. 599; *Mott v. Comstock*, 7 Cow. 654; *Sewall v. Catlin*, 8 Wend. 291; *Ostrom v. Calkins*, 5 Wend. 263; *Nelson v. Borchenius*, 52 Ill. 236. To call a drover a bankrupt is actionable. *Lewis v. Hawley*, 2 Day, 495. The following cases relating to other callings illustrate the rule: *Phillips v. Hæfer*, 1

The rules which protect persons against slanders in their business are nevertheless applicable to all kinds and all grades of business; to the day laborer and the servant as much as to the banker, the broker or the merchant.¹ And while men engaged in *rival business may puff their own wares, and [*203] will be excused for any extravagance of statement, so long as they do not unjustly assail the business of their rivals, yet they have no more liberty in making unfounded and injurious imputations against rivals to the prejudice of their business than they have upon other persons, but must keep within the same limits of truth and fairness.²

Penn. St. 62; Burtch v. Nickerson, 17 Johns. 217; Fitzgerald v. Redfield, 51 Barb. 484; Orr v. Skofield, 56 Me. 483; Fowles v. Bowen, 30 N. Y. 20. It is not actionable to say of a dealer that his goods are bad or inferior to those dealt in by another, where no deceit or wrong is imputed to him. Boyntons. Shaw, &c., Co., 15 N. E. Rep. 507 (Mass.); Tobias v. Harland, 4 Wend. 537. Otherwise to charge a tradesman in print with counterfeiting genuine articles and their trademarks. Steketee v. Kimm, 48 Mich. 822. To say of a hotel keeper that "he kept no accommodations, and that one could not get a decent meal or bed if he tried," is slanderous *per se*. Trimmer v. Hiscock, 27 Hun, 364. So to charge a butcher with selling veal taken from an unborn calf. Singer v. Bender, 64 Wis. 169. But derogatory words as to quality of articles furnished by a caterer are not. Dooling v. Budget Pub. Co., 144 Mass. 258. In Riding v. Smith, 1 Exch. Div. 91; S. C. 16 Moak, 547, an action by a trader was sustained for words charging his wife, who was his assistant in business, with having committed adultery on the premises, special damage being proved. POLLOCK, B.: "The courts have at all times been extremely careful as to verbal slander; but where you find

that the nature of the words is such that damages would naturally follow from their being uttered, and that damage has arisen, then there is a cause of action. * * The words were spoken on a public occasion, when the clergyman was about to read himself in, in order that he might become the incumbent of the parish, and the defendant, in the presence of four persons at least, uttered the words with regard to his conduct with the wife of the plaintiff."

¹ Terry v. Hooper, 1 Lev. 115. Any charge of dishonesty, spoken of one in connection with his business, whereby his character in such business may be injuriously affected, is actionable. Orr v. Skofield, 56 Me. 483; Backus v. Richardson, 5 Johns. 476; Noeninger v. Vogt, 88 Mo. 589.

² Young v. Macroe, 32 L. J. Q. B. 6. S. C. 3 Best & Smith, 264, was a case where a mineral oil merchant published a chemist's report which reflected unfavorably upon the oil sold by a rival merchant. It was held that the action would not lie, provided the report was the result of a *bona fide* analysis of the oils, and contained nothing known to the defendant as false at the time of publication. In Boynton v. Remington, 8 Allen, 397, it was held no libel upon

5. **Words Not Actionable per se.** The fifth class of cases embraces all those in which the untruthful statement is not deemed in law to be necessarily of a damaging character, but which can be and is shown to have been damaging in the particular case, by reason of special circumstances which are set out in the declaration. Thus, if one say of another, "He is a rogue," the law will not imply a resulting injury; but if it be shown that in consequence of the imputation he was discharged from [*204] *an employment, or was refused employment, the special injury is thus made to appear.¹ So, although to say of a female 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 It is not thought necessary to attempt any enumeration

a dealer in coal, in L. who had advertised genuine Franklin coal for sale, to publish the following advertisement: "Caution: The subscribers, the only shippers of the true and original Franklin coal, notice that other coal dealers in L. than our agent J. S., advertise Franklin coal. We take this method of cautioning the public against buying of other parties than J. S., if they hope to get the genuine article, as we have neither sold nor shipped any Franklin coal to any party in L. except our agent, J. S." Of this BIGELOW, C. J., says: "This was within the privilege of fair dealing, and cannot be tortured into a disparagement of the plaintiff's character." But in *Harman v. Delaney*, 2 Sta. 898, it was held actionable to indulge in general reflections upon the character of a party and his conduct of his business. So in *Weiss v. Whittemore*, 28 Mich. 266, it was held actionable *per se* to publish of an agent for the Steinway pianos, but who had formerly been agent for both that and the Knabe pianos, that he had in every instance

while holding such double agency, recommended the Knabe piano as the best, and advised his customers to buy that, as being superior in every respect to the other. See, also, *Western Counties Manure Co. v. Lawes, & Co.*, L. R. 9 Exch. 218; S. C. 10 Moak, 391. It is a species of slander of credit for a banker to refuse to honor the check of his customer who has money on deposit subject to call, and an action may be maintained for the refusal. *Marzetti v. Williams*, 1 B. & Ad. 415; *Rolin v. Steward*, 14 C. B. 595.

¹ *Oakley v. Farrington*, 1 John. Cas. 129. So where the terms "cheat and swindler" are used. *Odiorno v. Bacon*, 6 Cush. 185. If words are not slanderous *per se*, plaintiff must show what they were intended and understood to mean, and the testimony of the hearers as to how they understood them is admissible. *Nidver v. Hall*, 67 Cal. 79.

² *Shepherd v. Wakeman*, 1 Sid. 79; *Reston v. Promfeict*, Cro. Eliz. 639; *Davis v. Gardiner*, 4 Co. 16; *Davies v. Solomon*, L. R. 7 Q. B. 112; *Moody*

of the cases in which such actions are sustained, as it could be to little purpose in illustrating a doctrine so general. The injury must be pecuniary in its nature, but it is immaterial whether it be great or small, except as the amount of the recovery will depend upon it.'

LIBEL.

Compared with Slander. The difference between slander and libel is sometimes said to be this: the one is oral defamation and the other is defamation propagated by printing, pictures, or other means open to the sight. There is, however, a difference in the substance of what shall constitute an actionable charge. It is perfectly reasonable to allow greater liberty of vocal speech than of writing or printing, for two very plain reasons:

1. Vocal utterance does not imply the same degree of deliberation; it is more likely to be the expression of momentary passion or excitement, and is not so open to the implication of settled malice. Therefore, if one shall say of his neighbor, "He is a rascal," there is no very strong probability that the expression will be received by by-standers as anything more than a mere vituperative epithet, indicative of the feelings of the utterer, rather than of his convictions. Therefore to such oral *expressions little importance is generally attached. On [*205] the other hand the same words deliberately written or printed and afterward placed before the public, usually justify an inference that they are the expression of settled conviction, and they affect the public mind accordingly.

v. Baker, 5 Cowen, 351; *Olmstead v. Miller*, 1 Wend. 510; *Williams v. Hill*, 19 Wend. 305; *Pettibone v. Simpson*, 66 Barb. 492; *Underhill v. Welton*, 32 Vt. 40.

¹ *Beach v. Ranney*, 2 Hill, 309; *Basil v. Elmore*, 65 Barb. 627; *S. C.* 48 N. Y. 561, and the cases cited above. It was once held in New York that mere mental distress, physical illness and inability to labor occasioned by the aspersion, were sufficient special damage to sustain an action. *Bradt v. Towsley*, 13 Wend. 253; *Fuller v. Fenner*, 16 Barb. 333. But these cases are overruled. *Terwilliger v.*

Wands, 17 N. Y. 54; *Wilson v. Goit*, 17 N. Y. 442. It is not a bar to an action for slander that the speaker was drunk when he spoke, nor that he has subsequently apologized. *Williams v. McManus*, 38 La. Ann. 161. But no action lies for words spoken in the heat of a quarrel brought on by plaintiff if his reputation is not affected by them. *Johnston v. Barrett*, 36 La. Ann. 320. Partners suing for a libel on the firm cannot recover for individual mental anguish, but for such injury as they have sustained in their joint trade. *Donaghue v. Gaffy*, 53 Conn. 43.

2. An oral charge is merely heard, and the agency of the wrong-doer in inflicting injury is at an end when the utterance has died upon the ear. But the written or printed charge may pass from hand to hand indefinitely and for many years. It is an ever continuous defamation so long as that by means of which it is communicated remains in existence.

These reasons are taken notice of in the law, and some charges are held to be *prima facie* actionable as libel that are not actionable as oral slander, unless there be averment and proof that actual injury has resulted. In other words, injury is presumed to follow the apparently deliberate act of putting the charge in writing or print, or of suggesting it by means of picture or effigy, where a mere vocal utterance to the same effect might be disregarded as probably harmless.

Classification of Libellous Charges. In libel, as in slander, defamatory publications are classified as publications actionable *per se*, and publications actionable on averment and proof of special damage. In the first class are embraced all cases of publications which would be actionable *per se* if made orally. These cases, therefore, require no further attention. It also embraces all other cases where the additional gravity imparted to the charge by the publication can fairly be supposed to make it damaging. Thus, to say of a man, "I look upon him as a rascal," is no slander, unless shown to be damaging; but if it be published of him in one of the public journals, the presumption that injury follows is reasonable and legitimate.¹ So, to call a man in print "an imp of the devil and cowardly snail," is libellous, though an oral imputation of the sort would be presumably harmless.² So, to charge a teacher with falsehood in a report made to the official board, and with general untruthfulness, is libellous *per se*.³ The *general rule is stated thus: Any false and malicious writing published of another is libellous *per se*, when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or

Williams v. Karnes, 4 Humph. 9; Cropp v. Tilney, 8 Salk, 226; J. Anson v. Stewart, 1 T. R. 748. See Whitney v. Janesville Gazette, 5 Biss. 830.

¹ Price v. Whitely, 50 Mo. 439. See Atwill v. Mackintosh, 120 Masa. 177; Cary v. Allen, 39 Wis. 481.

² Lindley v. Horton, 27 Conn. 58.

hinder virtuous men from associating with him.¹ "The nature of the charge," it is said in one case "must be such the court can legally presume [the plaintiff] has been degraded in the estimation of his acquaintances, or of the public, or has suffered some other loss, either in his property, character, or business, or in his domestic or social relations in consequence of the publication."² A published charge that the plaintiff, being a member of a certain political party, at one of its nominating conventions, offered a certain resolution, under the influence of a bribe, is a charge of this character. "When a citizen undertakes to exercise any of his political privileges, it is certainly his duty to act upon public considerations; to be influenced in such a matter by pecuniary motives, though it may not be punishable in some cases as a crime, is always disgraceful. Every one who, for a bribe, gives his vote or his influence to a candidate for nomination to a public position, does such act in secret, thus showing, by his avoidance of the public gaze, his consciousness of the unworthy part he is playing. Therefore, to print and publish that a man has been guilty of such an act must necessarily be to hold him up to the derision and contempt of the community."³ So, to publish of one, "His slanderous reports nearly ruined some of our best merchants" is libellous.⁴ So it is to publish, "He did a good thing in his sober moments, in the way of collecting soldiers' claims against the government, for a fearful percentage. The blood money he got from the boys in blue

¹ *Lindley v. Horton*, 27 Conn. 58, 61; *Thomas v. Crowell*, 7 Johns. 264; *Clark v. Binney*, 2 Pick. 115; *McCorkle v. Burriss*, 5 Binn. 349; *Price v. Whitely*, 50 Mo. 439; *Hand v. Winton*, 38 N. J. 122; *Donaghue v. Gaffy*, 54 Conn. 257; *Crocker v. Hadley*, 103 Ind. 416; *Tillson v. Robbins*, 68 Me. 295; *Foster v. Scripps*, 39 Mich. 376; *Bradley v. Cramer*, 59 Wis. 309.

² *Stone v. Cooper*, 2 Denio, 299.

³ *BEASLEY*, Ch. J., in *Hand v. Winton* 38 N. J. 122. See *Fitch v. De Young*, 66 Cal. 339; *Barr v. Moore*, 87 Penn. St. 385. So it is libellous to charge a man with being a drunkard, a cuckold, a tory. *LUMPKIN*, J. "I never yet saw the man who liked to be

considered a sot or drunkard. Noah, the first drunken man, became thereby an object of ridicule to his own son. It was the third part of the then male world that manifested this mockery for this habit, and the other two-thirds did but conceal it. * * But this paper did not stop with imputing excessive debauchery to old man Thompson; it alleges further that he was decoyed into his cups for the purpose of being made a cuckold. If this charge would not expose him to universal scorn and contempt, I know not what would." *Giles v. State*, 6 Geo. 276-283.

⁴ *Cramer v. Noonan*, 4 Wis. 231.

in this way is supposed to be a big thing," etc.¹ So it is to publish, "He appears to have been in collusion with ruffians."² So, since the belief that one is not in his right mind has a natural tendency to withdraw from him the association of his fellows, to publish of one that he is insane, and a fit person to be sent to the lunatic asylum, is libellous.³ But it is not libellous to say of a merchant, he has refused to contribute his mite with his fellow merchants to water the street in front of his store: this may possibly have some tendency to induce an ill opinion of him; but as it implies neither moral nor legal wrong, but at most only a want of liberality, it is not libellous.⁴ Acts which neither the moral code nor the law of the land requires, it cannot be libellous to charge him with not performing.

Besides the publications mentioned, any untrue and malicious charge which is published in writing or print is libellous when damage is shown to have resulted as a natural and proximate consequence.

¹ Sanderson v. Caldwell, 45 N. Y. 398.

² Snyder v. Fulton, 34 Md. 128; and see Woodard v. Eastman, 118 Mass. 403; Day v. Backus, 31 Mich. 241; Stilwell v. Barter, 19 Wend. 487; Hart v. Reed, 1 B. Mon. 166.

³ Perkins v. Mitchell, 81 Barb. 461. It is libellous *per se* to publish of a man that he is "a skunk." Massuere v. Dickens, 35 N. W. Rep. 349 (Wis.) A "swine." Solverson v. Peterson, 64 Wis. 198. Of a brick maker that "he is in the hands of a sheriff." Hermann v. Bradstreet Co., 19 Mo. App. 227. Of a merchant that "he is financially embarrassed." Newell v. How, 81 Minn. 235. That one's house has been searched under legal process for stolen goods without success. State v. Smily, 37 Ohio St. 30. For other illustrations see, Shattuc v. McArthur, 25 Fed. Rep. 133; Shelby v. Sun Printing Co., 38 Hun, 474; Broad v. Deuster, 8 Biss. 265; State v. Mayberry, 33 Kan. 441.

⁴ People v. Jerome, 1 Mich. 142. It is not libellous *per se* to call one a

"crank." Walker v. Tribune Co, 20 Fed. Rep. 827. To publish of a merchant that he has made a chattel mortgage. Newbold v. Bradstreet, 57 Md. 88. Of grain dealers that they have combined to reduce the price of grain. Achorn v. Piper, 66 Ia. 694. Of a supervising architect that he took a commission from contractors to whom he gave work. Legg v. Dunleavy, 80 Mo. 558. So it is not a libel that a company issued an order that "any employee who trades with P. will be discharged." Payne v. R. R. Co., 13 Lea. 507. Nor to charge a merchant with ejecting a tenant for ceasing to deal with him. Donaghue v. Gaffy, 53 Conn. 43. Nor for a bank cashier to return paper indorsed "we return unpaid draft. He pays no attention to notices." Plato v. Gielfuss, 47 Wis. 491. Nor for a firm to notify their customers "we will not hereafter take in payment checks" on a certain bank. Capital &c. Bank v. Henty L. R. 7 App. Cas. 741.

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, though it is not always a defense to a criminal prosecution. But even in a civil suit it is necessary to plead it specially.² The law implies the falsehood of a damaging charge, and will not suffer it to be brought in [*208] question unless the plaintiff by the pleadings is apprised of the purpose to do so.³

Where the charge complained of imputes to the plaintiff criminal conduct, and the truth is relied upon as a justification, it is sufficient to support the plea by a preponderance of evidence; it is not necessary that the crime be made out beyond a reasonable doubt.⁴ This is a general rule where the question of criminality

¹ *Gottbuehne v. Hubachek*, 86 Wis. 515. So in slander. *Filber v. Dautermann*, 28 Wis. 134.

² *Updegrave v. Zimmerman*, 13 Penn. St. 619; *Porter v. Botkins*, 59 Penn. St. 484; *Barns v. Webb*, 1 Tyler, 17; *Hutchinson v. Wheeler*, 85 Vt. 830; *Sheahan v. Collins*, 20 Ill. 325; *Thomas v. Dunaway*, 30 Ill. 373; *Van Ankin v. Westfall*, 14 Johns. 233; *Wormouth v. Cramer*, 3 Wend. 895; *Beardsley v. Bridgman*, 17 Iowa, 290; *Thompson v. Bowers*, 1 Doug. Mich. 321; *Huson v. Dale*, 19 Mich. 17; *Treat v. Browning*, 4 Conn. 408; *Kelley v. Dillon*, 5 Ind. 426; *Knight v. Foster*, 39 N. H. 576; *Jarnigan v. Fleming*, 43 Miss. 710; *Bourland v. Eidson*, 8 Gratt. 27; *Scott v. McKinish*, 15 Ala. 663; *Donaghue v. Gaffy*, 53 Conn. 43. If, however, the communication was privileged, so as not to be actionable, in the absence of malice, the truth may be shown without being pleaded. *Chapman v. Calder*, 14 Penn. St. 365; *Edwards v. Chandler*, 14 Mich. 471. The truth of the charge cannot be proved in mitigation of damages when not pleaded. *Thompson v. Bowers*, 1 Doug. Mich. 321, and cases cited. *Donaghue v. Gaffy*, 53 Conn. 43.

³ It is questionable whether the law ought not to hold truthful publications libellous in some cases, where they relate to matters that no one has any business to bring before the public at all, and are made with no other purpose than to annoy and subject to ridicule. Thus it is conceivable that the most innocent acts in a man's private life, or personal peculiarities, for which he is in no way responsible, may be so made use of by a mischievous person as to destroy the comfort of life; and it seems unreasonable that no personal redress can be had. The criminal law sometimes punishes truthful publications where they are made without justifiable occasion; and if the fact stated, conceding its truth, is not of a character that should affect one injuriously, and the damaging consequence results from the artful and persistent manner in which the publisher places it before the public, it would seem that there ought to be some remedy besides such as the public authorities may see fit to pursue.

⁴ *Ellis v. Buzzell*, 60 Me. 209; S. C. 11 Am. Rep. 204; *Matthews v. Huntley*, 9 N. H. 146; *Kincade v. Bradshaw*, 3 Hawks, 63; *McBee v. Fulton*,

is made an issue in a civil suit; it is sufficient to establish it by such evidence as would support any other fact involved in a civil controversy.¹ Some cases, however, dissent from this doctrine, and require the same strict proof of the charge that would be required if the party were on trial for the alleged crime; that is, of guilt beyond a reasonable doubt.²

Words alleged to be libellous will receive an innocent construction if they are fairly susceptible of it, and when it is uncertain whether they convey a defamatory imputation the question is one for the jury.³

[*209] *When the truth is relied upon as a defense, it must be proved substantially as laid.⁴ The rule of the common law is, that an unsuccessful attempt to justify may be taken into account in aggravation of damages;⁵ but this rule is abolished by statute in some States.

47 Md. 403; *Riley v. Norton*, 65 Ia. 306, overruling earlier cases in Iowa; *Express, &c., Co. v. Copeland*, 64 Tex. 354.

¹ *Schmidt v. N. Y. Union Ins. Co.*, 1 Gray, 529; *Gordon v. Parmelee*, 15 Gray, 413; *Scott v. Home Ins. Co.*, 1 Dill. 105; *Elliott v. Van Buren* 33 Mich. 49; S. C. 20 Am. Rep. 668; *Washington Ins. Co. v. Wilson*, 7 Wis. 169; *Blaeser v. Milwaukee, &c., Ins. Co.*, 37 Wis. 31; S. C. 19 Am. Rep. 747; *Knowles v. Scribner*, 57 Me. 495; *Marshall v. Thames, &c., Ins. Co.*, 43 Mo. 586; *Rothschild v. Am. Cent. Ins. Co.*, 62 Mo. 356. See *Williams v. Gunnels*, 66 Ga. 521.

² *Chalmers v. Shackell*, 6 C. & P. 475; *Thurtell v. Beaumont*, 1 Bing. 339; *Willmet v. Hanner*, 8 C. & D. 695; *Fountain v. West*, 23 Iowa, 9; *Ellis v. Lindley*, 38 Iowa, 461; *Tucker v. Call*, 45 Ind. 31.

³ *Mulligan v. Cole*, L. R. 10 Q. B. 549; S. C. 14 Moak, 352; *Jenner v. A'Beckett*, L. R. 7 Q. B., 11; S. C. 1 Moak, 9; *Thompson v. Grimes*, 5 Ind. 385; *Zier v. Hofflin*, 33 Minn. 66. It is competent to show how foreign words are commonly understood.

Blakeman v. Blakeman, 31 Minn. 396. Seemingly innocent words may be shown to have been intended and understood in another than the usual meaning. *Works v. Stevens*, 76 Ind. 181; *Knapp v. Fuller*, 55 Vt. 311. Where words are unequivocal, and there is nothing to show that they were used in an unusual sense, the court must determine whether they cover a crime. *Pittsburgh, &c., Ry. Co. v. McCurdy*, 114 Penn. St. 534.

⁴ *Carpenter v. Bailey*, 56 N. H. 283; *Evarts v. Smith*, 19 Mich. 55; *Whittemore v. Weiss*, 33 Mich. 348; *Palmer v. Smith*, 21 Minn. 419; *Sheehey v. Cokley*, 43 Iowa, 183; S. C. 23 Am. Rep. 236.

⁵ *Root v. King*, 7 Cow. 613; *Gorman v. Sutton*, 32 Penn. St. 247; *Uddegrove v. Zimmerman*, 13 Penn. St. 619; *Freeman v. Tinsley*, 50 Ill. 497; *Harbison v. Shook*, 41 Ill. 141; *Cavanaugh v. Austin*, 42 Vt. 576. See *Aird v. Fireman's, &c., Co.*, 10 Daly, 254. It may be evidence of malice, but is not ground itself for giving direct damages. *Ward v. Dick*, 47 Conn. 300. Where by statute such failure is not sufficient to base an inference of

Malice. The definitions of slander and libel usually include malice as one of the necessary ingredients. From what has already appeared, however, it is manifest that they must employ this word in some other than the ordinary sense. In many cases of aggravated injury, there is really no malice at all, and no intent to injure; at most, there is only thoughtlessness or negligence; as where one thoughtlessly repeats a rumor, or a newspaper publisher copies from some other paper an article concerning a stranger, which he supposes to be true, but which is not so in fact. Sometimes there is not even negligence; as where a publisher has taken all reasonable precautions to prevent untrue and injurious publications, and one nevertheless creeps in as the result of accidental circumstances. In all such cases the absence of malice may be important to protect one against exemplary damages; but it cannot bar the action. It seems misleading, therefore, to employ the terms malice, and malicious, in defining these wrongs; and, in a legal sense, as used they can only mean that the false and injurious publication has been made without legal excuse. One may be excused in morals and yet not in law; it is the protection of the party injured the law aims at, not the punishment of bad motive instigating bad action in the party injuring him.¹

malice upon, the justification must be more than colorable. *Proctor v. Houghtaling*, 37 Mich. 41. But in a late Georgia case it is held that proof which tends to support, but is insufficient to prove, a justification may be considered in mitigation of damages. *Henderson v. Fox*, 6 S. E. Rep. 164.

¹ "Malice, in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." *BAYLEY, J.*, in *Bromage v. Prosser*, 4 B. & C. 255. Malice is alleged in the declaration, "rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose." *ABBOTT, Ch. J.*, in *Duncan v. Thwaites*, 3 B. &

C. 556, 585. See *Moore v. Stevenson*, 27 Conn. 14; *Barr v. Moore*, 87 Penn. St. 385; *Macleay v. Scripps*, 52 Mich. 214. Belief in the truth of the charge, and the absence of ill will toward the defendant, cannot be proved as a defense to an action for defamation. *Smart v. Blanchard*, 42 N. H. 137; *Lick v. Owen*, 47 Cal. 252; *Wilson v. Noonan*, 35 Wis. 321; *Wozelka v. Hettrick*, 93 N. C. 10. That malice is implied from the falsity of the charge, see *Hatch v. Potter*, 7 Ill. 725; *Rearick v. Wilcox*, 81 Ill. 77; *Pennington v. Meeks*, 46 Mo. 217; *Mousler v. Harding*, 33 Ind. 176; *Indianapolis Sun v. Horrell*, 53 Ind. 527; *Moore v. Butler*, 48 N. H. 161; *Dillard v. Collins*, 25 Grat. 343; *King v. Root*, 4 Wend. 113; *Lick v. Owen*, 47 Cal. 252; *Parker v. Lewis*, 2 Green (Iowa)

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*PRIVILEGED CASES.

There are some cases, however, in which the existence of malice, or of such recklessness or negligence as in other branches of the law is received as the equivalent of malice, is absolutely essential to the action. This will be readily understood when the fact is called to the mind that the law of slander and libel concerns the administration of justice in all its departments, and has much to do with the discussion of public affairs in the journals of the day and otherwise, and with all public transactions. A question of defamation is therefore not always a question merely of private scandal; it may, on the other hand, involve questions of the highest public importance. The forms of defamation are numerous and varied. A man may be defamed by an unjust removal from office on unfounded charges; by injurious testimony given in courts of justice; by the unwarranted deductions of counsel in presenting his case adversely to the jury, and in many other ways where, notwithstanding, the agent in the injury was wholly free from legal fault. Thus, a great public character may, perhaps, suffer in reputation all his life time from 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. We unhesitatingly recognize the fact that in many cases, however damaging it may be to individuals, there should and must be legal immunity for free speaking, and that justice and the cause of good government would suffer if it were otherwise. With duty often comes a responsibility to speak openly and act fearlessly, let the consequences be what they may; and the party upon whom the duty was imposed must be left accountable to conscience alone, or perhaps to a supervising pub-

811; *Bergmann v. Jones*, 94 N. Y. 51, and from publication of words actionable *per se*; *Barr v. Moore*, 87 Penn. St. 385. A repetition may be shown to prove malice; *Noeninger v. Vogt*, 88 Mo. 589; *Reitan v. Goebel*, 33 Minn. 151; *Ward v. Dick*, 47 Conn. 300. Failure to publish a retraction promptly is evidence of malice. *Hermann v. Bradstreet Co.* 19 Mo. App.

227. *Contra*, *Bradley v. Cramer*, 66 Wis. 297. If a statement is *prime facie* privileged, malice is not shown by the fact the speaker evinced indignation, nor by the fact that accidentally persons heard it as to whom it was not a privileged communication. Nor by an unprivileged repetition with good motives. *Fahr v. Hayes*, 13 Atl. Rep. 261. (N. J.)

lic *sentiment, but not to the courts. What would be [*211] the condition of the witness, for instance, were he under the necessity of calculating, when giving his testimony, not merely whether it satisfied his conscience, but also whether he could prove it to be true should he be sued for slander in giving it? It is beyond doubt, that to subject him to such responsibility would at least detract largely from the reliability of evidence and multiply the opportunities for operating upon the fears of witnesses to the serious detriment of justice.

The difficulties in some of these cases are taken notice of by the law, and are provided against as far as is possible by the rule that the person whose duty it is to speak shall be privileged to speak freely. The reasons for giving him protection, however, are not the same in all cases: in some they seem to be conclusive and absolute; in others they operate with less force and with less conclusiveness; and the differences have not been overlooked in the classification of cases which has been made by the authorities.

This classification may be given as follows:

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, but only to this extent: that the circumstances are held to preclude any presumption of malice, but still leave the party responsible if both falsehood and malice are affirmatively shown.¹

Cases of Absolute Privilege. Of the cases absolutely protected, that of the witness in judicial proceedings has already been alluded to. No action will lie against him at the suit of the party injured by his false testimony, even though malice be charged; but he must be left to be dealt with by the criminal law.² The rule assumes, however, that he will not wander

¹ The burden of showing malice is on the plaintiff, and if defendant honestly believed the facts stated to be true, he will not be deprived of his privilege because he had not reasonable grounds for his belief. *Clark v. Molyneux*, L. R. 3 Q. B. D. 237, and see *Odgers* on Libel and Slander, p. 277, cases.

² *Revis v. Smith*, 19 C. B. 126; *Hen-*

derson & Broomhead, 4 H & N. 569; *Seaman v. Netherclift*, 1 C. P. Div. 540; affirmed on appeal, 2 C. P. D. 53; *Marsh v. Ellsworth*, 50 N. Y. 309; *Terry v. Fellows*, 21 La. Ann. 375; *Smith v. Howard*, 28 Iowa, 51. *Liles v. Gaster*, 42 Ohio St. 631; *Hutchinson v. Lewis*, 75 Ind. 55. The protection extends to evidence given before a military court of inquiry.

[*212] from *the case in giving his testimony, and abuse his privilege by testifying to that which is impertinent and immaterial, and which has not been called out by questions of counsel.¹ The case of jurors speaking freely to their fellows in the consultations of the jury-room, concerning the proper subject-matter of their deliberations, is one of like protection.² The case of the party presenting his case to court or jury, or of counsel standing in his place doing the same, is also one of absolute privilege. Says Chief Justice SHAW: "We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere would import malice and be actionable themselves, are not actionable, if they are applicable and pertinent to the subject of the inquiry. The question, therefore, in such cases is, not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they are relevant or pertinent to the cause or subject of the inquiry. And in determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings

Dawkins v. Lord Rokeby, L. R. 8 Q. B. 255. Same case, on appeal, 7 Eng. and Irish Appeal Cases, 744; and before a parliamentary committee, *Goffin v. Donnelly*, L. R. 6 Q. B. D. 307.

What a witness says in testimony is privileged, even if the court attempted to stop him, provided he had a right to say it as an explanatory part of an answer he had made. *Seaman v. Netherclift*, 1 C. P. Div. 540; *S. C.* 18 *Moak*, 176.

It has been held, however, that one not a party to a suit may have an action against another also not a party, for suborning witnesses to testify falsely in that action, whereby his character was defamed. *Rice v. Coolidge*, 121 *Mass.* 393. In other cases it has been held that such a suit would not lie by a party to the action,

because it would be in effect to overhaul the merits of an action already conclusively tried as between the parties. *Bostwick v. Lewis*, 2 *Day*, 447; *Smith v. Lewis*, 3 *Johns.* 157. *Dunlap v. Glidden*, 31 *Me.* 435.

¹ *White v. Carroll*, 42 *N. Y.*, 161; *S. C.* 1 *Am. Rep.* 504; *Calkins v. Sumner*, 13 *Wis.* 193; *Kidder v. Parkhurst*, 3 *Allen*, 393; *Smith v. Howard*, 28 *Iowa*, 51; *Barnes v. McCrate*, 32 *Me.* 442; *Shodden v. McElwee*, 5 *S. W. Rep.* 602 (*Tenn.*) See *Hunckel v. Voneiff*, 14 *Atl. Rep.* 500. (*Md.*) But the test has been said to be whether they were spoken by the witness without being stopped by the court or counsel, and under the supposition that they were relevant. *Steinecke v. Marx*, 10 *Mo. App.* 580.

² *Dunham v. Powers*, 42 *Vt.* 1; *Rector v. Smith*, 11 *Iowa*, 302.

with which a party or counsel who naturally and almost necessarily identifies himself with his client, may become animated, by constantly regarding one side only of an interesting and animated controversy, in which the dearest rights of such party may become involved. And if these feelings sometimes manifest themselves in strong invectives, or exaggerated expressions, beyond what the occasion would strictly justify, it is to be recollected that this is said to a *judge who hears both [*213] sides, in whose mind the exaggerated statement may be at once controlled and met by evidence and argument of a contrary tendency from the other party, and who, from the impartiality of his position, will naturally give to an exaggerated assertion, not warranted by the occasion, no more weight than it deserves. Still, this privilege must be restrained by some limit, and we consider that limit to be this: that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject-matter of the inquiry. Subject to this restriction, it is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the cases and advocating and sustaining the rights of their constituents; and this freedom of discussion ought not be impaired by numerous and refined distinctions.”¹ This is a clear statement of a wise and proper general rule, with its just limitations.

¹ *Hoar v. Wood*, 3 Met. 193. See, also, *Brook v. Montague*, Cro. Jac. 90; *Hodgson v. Scarlett*, 1 B. & Ald. 232; *McMillan v. Birch*, 1 Binn. 178; *Ring v. Wheeler*, 7 Cow. 725; *Hastings v. Lusk*, 22 Wend. 410; *Mower v. Watson*, 11 Vt. 536; *Lea v. White*, 4 Sneed, 111; *Marshall v. Gunter*, 6 Rich. 419; *Ruohs v. Backer*, 6 Heisk. 395; *Lester v. Thurmond*, 51 Geo. 118; *Jennings v. Paine*, 4 Wis. 358; *Lawson v. Hicks*, 38 Ala. 279; *Brow v. Hathaway*, 13 Allen, 239. *Maulsby v. Reifsnider* 14 Atl. Rep. 505. (Md.) A counsel's statement is absolutely privileged when made in the course of a judicial proceeding, even though it

be false, malicious, and irrelevant to the issue in the case, and without reasonable and probable cause. Counsel stand on the same ground as witnesses and judges. *Munster v. Lamb*, L. R. 11 Q. B., D. 588. Unanimous opinion in the Divisional Court and in Court of Appeal.

Translating from a foreign language into the English, without malice, and for the benefit of an attorney, is privileged. *Zuckerman v. Sonnenschein*, 62 Ill. 115. Communications between client and counsel are privileged. *Wood v. Thornly*, 58 Ill. 464.

A legislator has a protection which is even more complete and absolute, because, in his case, it is not permitted to question elsewhere what he may have said in speech or debate, except for the purposes of political redress in elections. It is customary in the American constitutions to declare this exemption from responsibility in positive terms; but it exists independent of such a declaration as a necessary principle in free government; and this has been recognized ever since the case of the six members, whom an attempt was made to arrest and punish for their action in Parliament in the time of Charles the First. It is not permissible in the case of legislators, to raise the question whether what they may have said or written was or [*214] was not *pertinent to what was before them for official action; it is enough that at the time they were acting as legislators, either at the sessions of the House of which they were members, or upon one of its committees.¹ Whether a like privilege would be conceded to members of inferior bodies, possessing certain legislative functions, such as city councils, boards of supervisors, etc., is not so clear. Undoubtedly they would be privileged; but they occupy a somewhat different position from legislators proper. The latter constitute an independent department of the government, and as such are not subject to judicial supervision and control, and their judgment of what their duty requires them to say should be conclusive. But the members of these inferior bodies have no such independent powers, and are sufficiently protected if the law exempts them from responsibility for whatever is said by them which is pertinent to any inquiry or investigation pending or proposed before them, but leaves them accountable when they wander from the subject in hand to assail others.

The executive of the nation and the governors of the several States are exempt from responsibility to individuals for their official utterances. So are all judges of courts and judicial officers, while acting within the limits of their jurisdiction.²

¹ Coffin v. Coffin, 4 Mass. 1; State v. Burnham 9 N. H. 34; Perkins v. Mitchell, 31 Barb. 461.

² Townshend on Slander and Libel, § 227; Scott v. Stansfield, L. R. 3 Exch. 220. If an alleged libel is a

part of a justice's return, it is privileged whether his motive was good or bad, if the return is made under a belief, though erroneous, that the matter was relevant. Aylesworth v. St. John, 25 Hun, 156.

The pleadings and other papers filed by parties in the course of judicial proceedings, are privileged, so long as they do not wander from what is material to libel parties.¹ 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.²

Cases Conditionally Privileged. The cases only conditionally privileged are those in which the utterance or publication is on *a lawful occasion, which fully protects it, [*215] unless the occasion has been abused to gratify malice or ill will. A petition to the executive, or other appointing power, in favor of an applicant for an office, or a remonstrance against such an applicant, is a publication thus privileged. No action will lie for false statements contained in it, unless it be shown that it was both false and malicious.³ And this rule will apply to petitions, applications and remonstrances of all sorts addressed by the citizen to any officer or official body, asking what such officer or body may lawfully grant, or remonstrating against anything which it might lawfully withhold. It is a necessary part of the right of petition that such papers, presented in good faith,

¹ *Astley v. Younge*, 1 Burr. 807; *Henderson v. Broomhead*, 4 H. & N. 570; *Wyatt v. Buell*, 47 Cal. 624; *Vause v. Lee*, 1 Hill (S. C.), 197; *Lea v. White*, 4 Sneed, 111; *Garr v. Selden*, 4 N. Y. 91; *Hardin v. Cumstock*, 2 A. K. Marsh. 480; *Strauss v. Meyer*, 48 Ill. 385; *Spaids v. Barrett*, 57 Ill. 269; *Vinas v. Merch., &c., Co.*, 33 La. Ann. 1265; *McLaughlin v. Cowley*, 127 Mass. 316; 131 Mass. 70; *Prescott v. Tousey*, 53 N. Y. Sup. Ct. 56; though the complaint is dismissed, *Dada v. Piper*, 41 Hun. 254. A petition alleging misconduct in office filed by a receiver against his co-receiver in the action in which they were appointed is privileged. *Bartlett v. Reifsnider* 14 Alt. Rep. 518. (Md.) A bill in chancery prepared by counsel and sworn to, but never filed, is privileged. *Burnham v. Roberts*, 70 Ill. 19.

² *Allen v. Crofoot*, 2 Wend. 515; *Hartock v. Reddick*, 6 Blackf. 255; *Briggs v. Byrd*, 12 Ired. 377. See *Worthington v. Scribner*, 109 Mass. 487; S. C. 12 Am. Rep. 736; *Eames v. Whittaker*, 123 Mass. 342; *Burke v. Ryan*, 36 La. Ann. 951. But see, *Kelly v. Lafitte*, 28 La. Ann. 435. So an affidavit that a constable is unfit to select a jury. *Rainbow v. Benson*, 32 N. W. Rep. 852 (Ia). In *Pierce v. Sard*, 37 N. W. Rep. 677, (Neb.) it is held that to render privileged statements to a magistrate charging a crime they must be based on reasonable and probable cause.

³ *Thorn v. Blanchard*, 5 Johns. 508; *Bodwell v. Osgood*, 3 Pick. 379; *Harris v. Huntington*, 2 Tyler, 129; *Gray v. Pentland*, 2 S. & R. 23; *Larkin v. Noonan*, 19 Wis. 82; *Whitney v. Allen*, 62 Ill. 472; *Vanarsdale v. Laverly*, 69 Penn. St. 103.

should be protected.¹ And it is privileged while being circulated as well as after it is presented.² All official communications made by an officer in the discharge of a public duty are under the like protection.³ 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, it is proper should be thus communicated.⁴

¹ *Lake v. King*, 1 *Lev.* 240; *Reid v. DeLorme*, 2 *Brev.* 76; *Thorn v. Blanchard*, 5 *Johns.* 508; *Vanarsdale v. Laverty*, 69 *Penn. St.* 103; *Venderzee v. McGregor*, 12 *Wend.* 545; *Howard v. Thompson*, 21 *Wend.* 319; *Bradley v. Heath*, 12 *Pick.* 163. Where the Privy Council, in removing an officer, is not acting judicially, a letter to it charging him with irregularity, is not absolutely privileged. *Proctor v. Webster*, L. R. 16 Q. B. D. 112.

² *Venderzee v. McGregor*, 12 *Wend.* 545; *Streety v. Wood*, 15 *Barb.* 105. But it must be addressed to the authority having power to give the relief asked. *Fairman v. Ives*, 5 *B. & Ald.* 642; *Hosmer v. Loveland*, 19 *Barb.* 111. See *Milam v. Burnside*, 1 *Brev.* 295. And a paper which assumes the form of a petition, but is never presented, or meant to be, has no protection. *State v. Burnham*, 9 *N. H.* 34.

³ *Maurice v. Worden*, 52 *Md.* 283; *Dewe v. Waterbury*, 6 *Can. S. C. R.* 143; *In re Inv. Comm.* 11 *Atl. Rep.* 429 (R. I.) So communications in prosecuting an inquiry as to a crime for the purpose of detecting the criminal. *Eames v. Whittaker*, 123 *Mass.* 342. Statements made by patron of a school to the trustees, charging bad character in one of the teachers, are privileged. *Harwood v. Keech*, 4 *Hun.* 389; *Wieman v. Mabee*, 45 *Mich.* 484; *Decker v. Gaylord*, 35 *Hun.* 584. The privileged cases of this class are well enumerated by EMMETT, J., in *Perkins v. Mitchell*,

81 *Barb.* 461, 467. And, see, *Hart v. Von Gumpach*, L. R. 4 *Priv. Council*, 439; *S. C.* 4 *Moak*, 138. The communication of the principal of a public institution to the trustees of charges of immorality in a subordinate is privileged. *Halstead v. Nelson*, 86 *Hun.* 149. And, see, *O'Connor v. Sill*, 60 *Mich.* 175.

⁴ *Hershaw v. Bailey*, 1 *Exch.* 743; *Farnsworth v. Storrs*, 5 *Cush.* 412; *Chapman v. Calder*, 14 *Penn. St.* 385; *O'Donoghue v. McGovern*, 23 *Wend.* 26; *Haight v. Cornell*, 15 *Conn.* 74; *Servatius v. Pichel*, 34 *Wis.* 292; *Streety v. Wood*, 15 *Barb.* 105; *Van Wyck v. Aspinwall*, 17 *N. Y.* 190. That pertinent statements, made at a town meeting, are privileged, see *Smith v. Higgins*, 16 *Gray*, 251; *Kirkpatrick v. Eagle Lodge*, 26 *Kan.* 384. An affidavit as to the credibility of a witness at a trial before a masonic lodge is not privileged where neither witness nor affiant are lodge members. *Nix v. Caldwell*, 81 *Ky.* 293. Communications between members of the same church in the course of church discipline are privileged. *Jarvis v. Hathway*, 3 *Johns.* 180; *Smith v. Youmans*, 3 *Hill (S. C.)* 85; *York v. Pease*, 2 *Gray*, 232; *Lucas v. Case*, 9 *Bush*, 297; *Landis v. Campbell*, 79 *Mo.* 433; *Over v. Hildebrand*, 93 *Ind.* 19. As to what are privileged statements and communications in church discipline, see *Farnsworth v. Storrs*, 5 *Cush.* 412; *Servatius v. Pichel*, 34 *Wis.* 292. A bishop's charge to his clergy is privileged. *Laughton v.*

***Cases Privileged on Individual Reasons.** Other cases [*216] have an aspect less important in the public considerations that bear upon them, but 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 concerning whom it is made.¹ As an illustration the case may be taken of the father who discusses with his daughter the character, habits, reputation and abilities of one who has sought her hand in marriage. In such a case it is plain that not only ought the discussion to be privileged, but that the father ought to be at liberty to speak not merely what he knows, but what he believes and suspects.² To require him at his peril to keep strictly within the limits of what he could prove to be true, would be to make no allowance for the confidence properly belonging to the relation, or for the agitation and alarm which paternal feelings would naturally experience when an alliance believed to be improper was proposed. The case suggested is one of a large class of cases in which the like privilege is allowed and in which it is necessary to show not only that the communication was false, but also that it was made with evil intent. Confidential communications between one and his professional

Bishop of Sodor & Man, L. R. 4 Priv. Council, 495; S. C. 4 Moak, 162.

A member of an association of ministers made charges against another member of unministerial conduct, which were by order of the association published in certain denominational papers. *Held*, that the person's action before the association and the publication which followed the action of the association were conditionally privileged. *Shurtleff v. Stevens*, 51 Vt. 501. But a letter to a member of such association with reference to another member, written by one not a member, is not privileged. *Shurtleff v. Parker*, 130 Mass. 293. A circulation of false statements about a clergyman by a member of his parish outside of the church and not to the church authorities is not privileged. *State v. Beauvenu*, 36 La. Ann. 378.

¹ A communication privileged as between the sender and receiver, may lose the privilege, if sent unnecessarily by postal card or postal telegram. *Williamson v. Freer*, L. R. 9 C. P. 393; S. C. 10 Moak. 225. But not if sent by mistake to, and read by another. *Tompson v. Dashwood*, L. R. 11 Q. B. D. 43.

² *Todd v. Hawkins*, 8 C. and P. 88. See *Joannes v. Bennett*, 5 Allen, 170. Reports by one employed by a father to ascertain the standing of his daughter's husband, made to the father and mother, are privileged. *Atwill v. Mackintosh*, 120 Mass. 177. Friendship alone will not warrant a communication to a woman about her suitor unless it be in reply to a request for such information. *Byam v. Collins*, 89 Hun, 204.

adviser, whether legal, medical, or spiritual, should be and are shielded with the same protection.¹ So are confidential communications between a principal and his agent in any [*217] matter *connected with the business.* And where confidential inquiries are made concerning the character and conduct of servants, or the responsibility of tradesmen, and the like, by one having an interest in knowing, and of one who may be supposed to have had special opportunity in his own dealings or affairs to acquire the information, the answers are in like manner privileged.² If one makes it his business to

¹ But there is no privilege to a priest in making charges against members of his congregation in relation to their business from the pulpit. *Fitzgerald v. Robinson*, 112 Mass. 371. Nor is there any privilege to a stranger who interferes in negotiations of marriage, though there would be to a near relative. *Joannes v. Bennett*, 5 Allen, 170. Compare *Coxhead v. Richards*, 2 M. G. & S. 569; *Bennett v. Deacon*, Id. 628.

² *Washburn v. Cooke*, 3 Denio, 110; *Knowles v. Peck*, 42 Conn. 886; S. C. 19 Am. Rep. 542. So are those between a patron of a school and the trustees concerning the character of a teacher. *Harwood v. Keech*, 4 Hun, 389; and see cases p. 253, n. 3, *supra*. So one whose house has been set on fire may communicate to his family his suspicions as to the incendiary. *Campbell v. Bannister*, 79 Ky. 205. The owner of a building which has been set on fire may caution persons in the building against particular persons suspected of being the incendiaries. *Lawler v. Earle*, 5 Allen 23. The landlord may caution the tenant respecting the character of sub-tenants. *Knight v. Gibbs*, 3 Nev. & Man. 469; S. C. 1 A. & E. 43.

³ *Pattison v. Jones*, 8 B. & C. 578; *Storey v. Challands*, 8 C. & P. 234; *Dunman v. Bigg*, 1 Camp. 269, note; *Amann v. Damm*, 8 C. B. (N. S.) 597;

Bradley v. Heath, 12 Pick. 163; *Elam v. Badger*, 23 Ill. 498; *White v. Nichols*, 8 How. 266; *Lewis v. Chapman*, 16 N. Y. 375; *Fowles v. Bowen*, 30 N. Y. 20; *Noonan v. Orton*, 32 Wis. 106; *Hatch v. Lane*, 105 Mass. 394; *Atwill v. Mackintosh*, 120 Mass. 177; *Fahr v. Hayes*, 13 Atl. Rep. 761 (N.J.) So in answer to inquiries of a mother, to charge her minor child with stealing. *Long v. Peters*, 47 Ia. 239. So statement of investigating officer as to worthiness of poor person to one interested in aiding such person. *Waller v. Loch*, L. R. 7 Q. B. D. 619. One who believes himself possessed of knowledge which if true may affect the rights of another has the right in good faith to communicate such belief. Here a servant of a vendor informed the vendee of cattle of the vendor's fraud. *Mott v. Dawson*, 46 Ia. 533. So where statements were made to a church officer as to character of a curate. *Clark v. Molyneux*, L. R. 3 Q. B. D. 237. A letter volunteering to an employer information of his servant's untrustworthiness is not privileged when sent to effect the writer's purpose and not to give the employer in good faith information necessary to protect him from a knave. *Over v. Schiffing*, 102 Ind. 191. The directors of a society for promoting female medical education, may, in a published report,

furnish information 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, if made without malice and in self-defense is privileged.³

Liberty of the Press. The several State constitutions, like the federal constitution, have been careful to preserve the freedom of the press. They have not, however, undertaken to define it, and what is meant by it is not made very plain by the authorities. On one point all are agreed, namely, that the freedom of

caution the public against trusting a person who had formerly been employed to obtain and collect subscriptions on their behalf, but has since been dismissed, if the caution is given in good faith, and is required for the protection of the corporation and the public. BIGELOW J.: "A party cannot be held responsible for a statement or publication tending to disparage private character, if it is called for by the ordinary exigencies of social duty, or is necessary and proper to enable him to protect his own interest, or that of another, provided it is made in good faith and without a willful design to defame." *Gassett v. Gilbert*, 6 Gray, 94, 97, citing *Toogood v. Spying*, 1 C. M. & R. 193; *Child v. Affleck*, 9 B. & C. 403, and other cases. But where a mutual insurance company printed, in a newspaper so that the general public as well as members might see it, a false statement as to an agent, it was held liable. *Holliday v. Ont. Farmers', &c. Co.* 1 Ont. App. 483, and cases cited. Statement of reasons for discharge by the officer of a corporation to the discharged employee in the room where the question is

asked is privileged if given in truth, honesty and fairness and without malice, and this though other persons were within hearing of the officer's statement and his statement charged the employee with stealing. *Beeler v. Jackson*, 64 Md. 589. See *Billings v. Fairbanks*, 136 Mass. 177; 139 Id. 66. See also on subject of privilege in notifying employees of discharge of another employee for stealing. *Bacon v. Mich. Cent. R. R. Co.*, 33 N. W. Rep. 181 (Mich.)

¹ *Ormsby v. Douglass*, 37 N. Y. 477; *Trussell v. Scarlett*, 18 Fed. Rep. 214; *Erber v. Dun*, 12 Fed. Rep. 526. See *State v. Lonsdale*, 48 Wis. 343; *Locke v. Bradstreet Co.*, 23 Fed. Rep. 771; see also *Kingsbury v. Bradstreet Co.*, 35 Hun, 212.

² *Taylor v. Church*, 8 N. Y. 452; *Sunderlin v. Bradstreet*, 46 N. Y. 188; *King v. Patterson*, 9 Atl. Rep. 705 (N. J.) In the last case there is a full discussion and very vigorous dissent in view of modern methods of business. See, also, *Beardsley v. Tappan*, 5 Blatch. 497.

³ *Chaffin v. Lynch*, 1 S. E. Rep. 803 (Va.); 6 Id. 474; *Odgers on Libel*, 225 and cases cited.

the press implies exemption from censorship, and a right in all persons to publish what they may see fit, being responsible for the abuse of the right.¹ But whether the conductor of a public journal has any privilege above others in publishing, is not so clear. The freedom of the press was undoubtedly intended to be secured on public grounds, and the general purpose may be said to be, 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. With [*218] this end *in view not only must freedom of discussion be permitted, but there must be 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. There should consequently be freedom in discussing, in good faith, the character, the habits, and mental and moral qualifications of any person presenting himself, or presented by his friends, as a candidate for a public office, either to the electors or to a board or officer having powers of appointment.² The same freedom of discussion should be allowed 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.³

¹ Story on Const. § 1889, 2 Kent, 17; Rawle on Const. Ch. 10; Cooley Const. Lim. 420; 4 Bl. Com. 151; Commonwealth v. Blanding, 3 Pick. 304.

² Lewis v. Few, 5 Johns. 1; King v. Root, 4 Wend. 113; Hunt v. Bennett, 4 E. D. Smith, 647; S. C. 19 N. Y. 173; Curtis v. Mussey, 6 Gray, 261; Aldrich v. Printing Co., 9 Minn. 133; Mayraut v. Richardson, 1 N. & McC. 348. See Gathercole v. Miall, 15 M. & W. 319; Purcell v. Sowler, L. R. 1 C. P. Div. 781; S. C. in Error, 2 C. P. Div. 215; State v. Balch, 31 Kan. 465; Express Printing Co. v. Copeland, 64 Tex. 354. Otherwise if the article falsely accuses the candidate of a crime. Bronson v. Bruce, 59 Mich. 467. As to liability of individual citizens in like circumstances, see Marks v. Baker, 28 Minn. 162; Mott v. Daw-

son, 46 Ia. 533; Bays v. Hunt, 60 Ia. 251; Wheaton v. Beecher, 33 N. W. Rep. 503 (Mich.)

³ Purcell v. Sowler, 1 C. P. Div. 781; Wason v. Walter, L. R. 4 Q. B. 78; Kelley v. Sherlock, L. R. 1 Q. B. 686; Kelley v. Tinling, L. R. 1 Q. B. 699; Palmer v. Concord, 48 N. H. 211; Miner v. Detroit, &c., Co., 49 Mich. 358. As to what is matter of public interest, see Purcell v. Sowler, L. R. 2 C. P. Div. 215, qualifying the decision in the court below. Also, Davis v. Duncan, L. R. 9 C. P. 396; S. C. 10 Moak, 223; Henwood v. Harrison, L. R. 7 C. P. 606; S. C. 3 Moak, 398. A newspaper article attacking a State Senator for his votes and attributing corrupt motives for them, is libellous *per se*. "If one goes out of his way to asperse the personal character of a public man

The public press is also allowed to give full reports of judicial trials and hearings, provided they are not *ex parte* merely, and are not indecent or blasphemous.¹ But such reports must be confined to the actual proceedings, and must contain no defamatory *observations, headings or comments.* The [*219] reason why the publication of *ex parte* proceedings is

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. "The conduct of public officers is open to public criticism, and it is for the interest of society that their acts may be freely published, with fitting comments or strictures. But a line must be drawn between hostile criticism upon public conduct and the imputation of bad motives or criminal offenses where such motives or offenses cannot be justly and reasonably inferred from the conduct." *Neub v. Hope*, 111 Penn. St. 145. See *Bourreseau v. Detroit Evening Journal*, 30 N. W. Rep. 376 (Mich.); *Maclean v. Scripps*, 52 Mich. 214. A false and damaging charge, tending to ruin the professional standing of a physician, is not conditionally privileged because he is a city physician and the charge refers to his conduct as such. *Foster v. Scripps*, 39 Mich. 376. In general the same rules are applied to criticism by individuals upon public officers. To charge a city official with making a report upon a paving material for an illicit reward at the dictation of persons interested in the pavement, is not privileged. Official acts may be freely criticised, and entire freedom of expression used as to the act itself, and such criticism will be *prima facie* privileged. But the occasion will not excuse an aspersive attack on the motives and character of the officer; to excuse such attack

truth must be shown. *Hamilton v. Eno*, 81 N. Y. 116. See, *Com. v. Wardwell*, 136 Mass. 164; *Briggs v. Garrett*, 111 Penn. St. 404; *Rowand v. DeCamp*, 96 Penn. St. 493. The trustee of a mining corporation is not such a public officer as to render the incumbent amenable to criticism through newspapers, as in case of persons filling public offices of trust and confidence, in the proper administration of which the community has an interest. *Wilson v. Fitch*, 41 Cal. 363.

¹ *Hoare v. Silverlock*, 9 C. B. 20; *Lewis v. Levy*, El. B. & El. 537; *Ryalls v. Leader*, L. R. 1 Exch. 296; *Terry v. Fellows*, 21 La. Ann. 375; *Gazette Co. v. Timberlake*, 10 Ohio, (N.S.) 548; *Torrey v. Field*, 10 Vt. 353; *Saunders v. Baxter*, 6 Heisk. 369; *Storey v. Wallace*, 60 Ill. 51; *McBee v. Fulton*, 47 Md. 403. The privilege extends to proceedings in the nature of trials in voluntary associations; as, for example, a medical society. *Barrows v. Bell*, 7 Gray, 301.

² *Styles v. Nokes*, 7 East. 493; *Del-egal v. Highley*, 3 Bing. N. C. 950; *Thomas v. Crowell*, 7 Johns. 264; *Pittock v. O'Niell*, 63 Penn. St. 253; S. C. 3 Am. Rep. 544; *Usher v. Severance*, 20 Me. 9; *Scripps v. Reilly*, 35 Mich. 371; *Story v. Wallace*, 60 Ill. 51; *Bathrick v. Detroit, &c., Co.*, 50 Mich. 629. There is no privilege attached to printing contents of a divorce bill merely filed in a court office before a public judicial hearing is had. *Barker v. St. Louis, &c., Co.*, 3 Mo. App. 377. Nor of a petition to disbar an attorney so filed in vacation

not privileged is, that it has a tendency "to prejudice those whom the law still presumes to be innocent, and to poison the source of justice."¹

The privilege of the press is not confined to those who publish newspapers and other serials, but extends to all who make use of it to place information before the public.²

No privilege seems to be accorded to the publication of news;³ but publishers will not be 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 and the press may lawfully warn the public against the con-

before docketing or hearing. *Cowley v. Pulsifer*, 137 Mass. 392. Nor to printing slanderous remarks of counsel during a trial. *Cone v. Godshalk*, 13 Phila. 575. See, also, *McDermott v. Evg. Journal Co.*, 43 N. J. L. 488, on what is not a report of a judicial proceeding. The report of judicial proceedings to be privileged must not only be fair, but made in good faith and without malice. *Stevens v. Sampson*, L. R. 5 Ex. D. 53.

¹ Per ELLENBOROUGH, Ch. J., in *Rex v. Fisher*, 2 Camp. 563. See *Duncan v. Thwaites*, 3 B. & C. 556; *Flint v. Pike*, 4 B. & C. 473; *Charlton v. Watton*, 6 C. & P. 385; *Behrens v. Allen*, 3 Fost. & Fin. 135; *Huff v. Bennett*, 4 Sandf. 120; *Stanley v. Webb*, 4 Sandf. 21; *Matthews v. Beach*, 5 Sandf. 256; *Usher v. Severance*, 20 Me. 9. But if the result of an *ex parte* proceeding is that the accused party is discharged, the proceeding, it seems, may be published. *Curry v. Walter*, 1 B. & P. 525; *Lewis v. Levy*, El. Bl. & El. 537; *Usill v. Hales*, L. R. 3 C. P. D. 819. A member of a legislative body, it is said in England, is not privileged in publishing the words of a speech

made by him to the House. *Rex v. Lord Abingdon*, 1 Esp. 226; *Rex v. Creevy*, 1 M. & S. 273. But in this country, where the publication of speeches and debates is made by authority of law, it would seem that the privilege to publish must be as broad as the privilege to speak. In Louisiana it is held that a newspaper is privileged in publishing the testimony taken before a Congressional committee. *Terry v. Fellows*, 21 La. Ann. 375. There is no privilege in publishing a slander uttered by a murderer at the gallows. *Sanford v. Bennett*, 24 N. Y. 20. Nor merely because the publication relates to a matter of public interest. *Wilson v. Fitch*, 41 Cal. 363.

² See *Barrows v. Bell*, 7 Gray, 301.

³ *Barnes v. Campbell*, 59 N. H. 128; *Pratt v. Pioneer Press Co.*, 30 Minn. 41; *Mallory v. Same*, 34 Minn. 531. See *Bronson v. Bruce*, 59 Mich. 467; *Negley v. Farrow*, 60 Md. 158.

⁴ *Daily Post Co. v. McArthur*, 16 Mich. 447; *Perrett v. New Orleans Times*, 25 La. Ann. 170; *Scripps v. Reilly*, 35 Mich. 371; *Gibson v. Cincinnati Enquirer*, 5 Cent. L. Jour. 330.

duct and *motives of those who are believed to be dis- [*220] loyal, or to threaten the peace of the State; and the fair and honest discussion of matters of public interest is always privileged.¹

Repeating Slanders and Libels. There is no privilege in repeating defamatory publications. Therefore it is no defense that the defendant only repeated what had been told him by another whose name he gives, or copied into his newspaper a charge originating elsewhere, or published it as an advertisement or communication. Sometimes the fact may mitigate damages, but it cannot excuse the publication.² Neither is it a defense that a report was current and generally believed that the plaintiff was guilty of what was imputed to him,³ or that the publication professed to give a rumor merely.⁴

¹ *Kinyon v. Palmer*, 18 Iowa, 377. The result of a trial may be given as an item of news. *Whitney v. Janeville Gazette*, 5 Biss. 330. Matters held not to come within rule as to public interest. *Atkinson v. Detroit & Co.*, 46 Mich. 341; *Tryon v. Evg. News Assn.*, 39 Mich. 636. An interview on a matter of public interest "must be made upon a proper occasion, from a proper motive and must be based on reasonable or probable cause." *Press Co. v. Stewart*, 14 Atl. Rep. 51 (Penn.)

² *Rex v. Newman*, 1 El. & Bl. 268; *Parker v. McQueen*, 8 B. Mon. 16; *Hampton v. Wilson*, 4 Dev. 468; *Keney v. McLaughlin*, 5 Gray, 3; *Evans v. Smith*, 5 T. B. Mon. 363; *Hotchkiss v. Oliphant*, 2 Hill, 510; *Sheahan v. Collins*, 20 Ill. 325; *McDonald v. Woodruff*, 2 Dill. 244; *Sans v. Joeris*, 14 Wis. 663; *Funk v. Beverly*, 13 N. E. Rep. 573 (Ind.) No excuse that at the time he expresses a doubt of its truth, nor that he repeats it to get advice whether person affected should be informed of it, when there is no confidential relation existing between them. *Branstetter v. Dorough*, 81 Ind. 527. But,

see, *Cook v. Howe*, 77 Ind. 442. That he repeats the story will not shield one unless at the time of the repetition he gives the plaintiff an action against the original author. *Johnson v. St. Louis & Co.*, 65 Mo. 539. It is not a repetition for one to say to another "A. said all she wanted to about P." *Pauley v. Drain*, 6 S. W. Rep. 329 (Ky.)

³ *Moberly v. Preston*, 8 Mo. 462; *Knight v. Foster*, 39 N. H. 576; *Cade v. Redditt*, 15 La. Ann. 492; *Clarkson v. M'Carty*, 5 Blackf. 574; *Johnston v. Lance*, 7 Ired. 448; *Perrett v. Times Newspaper*, 25 La. Ann. 170.

⁴ *Wheeler v. Shields*, 3 Ill. 348; *Mason v. Mason*, 4 N. H. 110. See *Thompson v. Bowers*, 1 Doug. (Mich.) 321; *Treat v. Browning*, 4 Conn. 408; *State v. Butnam*, 15 La. Ann. 166. Giving with the publication the name of the author is no protection. *Dole v. Lyon*, 10 Johns. 447; *Cates v. Kellogg*, 9 Ind. 306; *Haines v. Welling*, 7 Ohio, 253; *Fowler v. Chichester*, 26 Ohio, (n. s.) 9; *Cummerford v. McAlvoy*, 15 Ill. 311; *Inman v. Foster*, 8 Wend. 602. Nor is it a defense that a rumor existed previous to the publication to the same effect. *Haskins v.*

Slander of Property. A person may be as seriously injured by misrepresentation of his property as by the slander of himself in respect to his business; and, indeed, the two often go together. But there may be misrepresentation in respect to particular articles of property not connected with one's business, and where the injury will concern the property alone. Such misrepresentation is actionable, provided it is malicious [*221] and *damaging; but malice will not be presumed, and damage must be alleged and proved.¹

Slander of Title. An action lies for maliciously slandering the title to the plaintiff's property; but here, as in slander of property, it is necessary to aver and prove both malice and damage. The action rests upon the general principle that when one injures another by any wrongful and malicious conduct, he is liable in an action on the special case.* It is of course never wrongful for one to assert a title in himself to property, or to seek to establish it by judicial proceedings, provided this is done in good faith; and good faith must be presumed while the proceedings are pending; but we have seen that after they are disposed of, an action may lie, if malice and want of probable cause be made out.²

Lumsden, 10 Wis. 359; Knight v. Foster, 39 N. H. 576; Carpenter v. Bailey, 53 N. H. 500; Skinner v. Powers, 1 Wend. 451; Beardsley v. Bridgman, 17 Iowa, 290. But the fact may mitigate damages. Farr v. Rasco, 9 Mich. 353.

¹ Gott v. Pulsifer, 122 Mass. 235; S. C. 23 Am. Rep. 322. If the falsity of the representations is proved, and injury resulting therefrom, it is said malice is to be presumed. Swan v. Tappan, 5 Cush. 104.

² Malachy v. Soper, 3 Bing. (N. C.) 371. In this case and in Bigelow's notes thereto, Lead. Cas. 54-59, the authorities are fully collected.

* See ante. p. *180. The action is founded on malice. Walkley v. Bostwick, 49 Mich. 374; Meyrose v. Adams, 12 Mo. App. 329; Dodge v. Colby, 37 Hun, 515. An action for slander of title to letters patent will lie. Andrew v. Deshler, 45 N. J. L. 167; Meyrose v. Adams, 12 Mo. App. 329. And to a trademark and it survives. Hotchard v. Mège, L. R., 18 Q. B. D. 771. If the words are spoken by a stranger the law implies malice; otherwise if by one interested in it and for his own protection. Andrew v. Deshler, 45 N. J. L. 167.

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*CHAPTER VIII.

INJURIES TO FAMILY RIGHTS.

Family Rights. In a previous chapter it has been said 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.¹ The reasons for this are to be found in the barbarous condition of society when the common law was forming; a condition when physical force counted for very much more than now, when serfdom and villenage very largely prevailed, and when wife and children were to husband and father rather servants and dependents than equals, and were expected to look to him for protection against wrongs at the hands of others. The husband and father, in a primitive state of society, is naturally regarded as the representative of the family, and rights in which all are concerned may be expected to find their best protection through him. Social changes have been going on more rapidly in modern times than the modification of legal principles, and the common law of family rights is, in most particulars, not greatly different now from what it was when it tolerated a man in inflicting personal chastisement on his wife or his marriageable daughter.

Wrongs to the Husband. While thus 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. How, for instance, was the husband to have civil redress for any wrong suffered at the hands of the wife? He could not have it by way of award of damages, for the wife's property, so far as it was personal, and the usufruct and enjoyment of it, so [*223] far as it *was real, was transferred to the husband by the marriage. For gross breaches of the marriage covenant

¹ Ante, p. 44.

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. He must protect his rights as husband by physical restraint or correction.

The right of the husband to inflict personal chastisement upon the wife has probably entirely passed away.¹ There are, indeed, some recognitions of it within a few years last past, but the spirit of the age rejects it as a reminiscence of barbarism.² It cannot be affirmed that an action can be sustained by the wife for an assault upon her by the husband, but such an assault would be taken notice of by the criminal law as an offense against the State. And from any forcible restraint put upon the actions of the wife, and which would constitute an imprisonment, the wife might have relief on *habeas corpus*.

If we direct attention to the remedies which, at the common law, the husband might have against third persons, for a violation of his rights as husband, we find them all grounded upon or permeated with the ideas which mark their origin in a rough and uncultivated society.

1. He might have redress against third persons for an injury suffered by him in respect to the property which the wife had brought him. But as such redress would rest upon principles which are common to other cases, it calls for no special comment here.

[*224] *2. He might have a special action on the case against one who should seduce his wife or entice her away from

¹ *Peannan v. Peannan*, 1 Swab. & Trist. 609; *People v. Winters*, 2 Park. C. R. 10; *Commonwealth v. McAfee*, 108 Mass. 458.

² In *State v. Rhodes*, 1 Phil. (N. C.) 453, it is said that, although the laws of the State do not recognize the right of the husband to whip his wife, yet that the courts will not interfere to punish him for moderate correction of her, even though there had been no provocation. One is naturally a little curious to know what can be moderate correction where there has been no fault. In *Poor v. Poor*, 8 N. H. 307, 313, RICHARDSON, Ch. J., says:

“Whatever the old books may say upon the subject, there never was, in my opinion, in the relation between husband and wife, when rightly understood, anything that gave to the husband the right to reduce a refractory wife to obedience.” In the same case, however, the judge says that when the wife “is ill treated on account of her own misconduct, her remedy is in a reform of her manners, unless the return from the husband is wholly unjustified by the provocation, and quite out of proportion to the offense.” P. 316.

him.¹ The ground of such an action is the infliction upon the husband of some one or more of the following injuries: 1. Dishonor of the marriage bed. 2. Loss of the wife's affections.² 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 that most usually accompany this most serious of domestic wrongs. The extent of the injury in any case must depend in great measure upon the previous relations of the parties. If these were cordial and affectionate, and such as are expected to exist when a suitable marriage has been formed under a proper sense of the obligations and responsibilities that belong to it, the wrong of the seducer who succeeds in withdrawing the wife's affections from her husband, and induces her

¹ *Winsmore v. Greenbank*, Willes, 577; *Weedon v. Timbrell*, 5 T. R. 357; *Rabe v. Hanna*, 5 Ohio, 530; *Preston v. Bowers*, 13 Ohio, (N. S.) 1; *Hadley v. Heywood*, 121 Mass. 236; *Barbee v. Armstead*, 10 Ired. 530; *Croze v. Rutledge*, 81 Ill. 266; *Conway v. Nicol*, 34 Iowa, 533. The fact that the defilement was forcible, and a crime does not bar the action. *Egbert v. Greenwalt*, 44 Mich. 245. Nor does the wife's consent. *Wales v. Miner*, 89 Ind. 118. But it may reduce damages. *Ferguson v. Smethers*, 70 Ind. 519. Recovery may be had for loss of *consortium*, implied in crim. con., whether the intercourse is with or against her will and although no loss of service results. *Bignouette v. Paulet*, 134 Mass. 123. No recovery can be had by the husband for loss of reputation and honor of his children. *Ferguson v. Smethers*, 70 Ind. 519. The action may be brought after a divorce from the wife. *Wood v. Matthews*, 47 Ia. 409; *Wales v. Miner*, 87 Ind. 118. Where the gist of the action is crim. con. no recovery can be had for loss of service, &c. unless the crim. con. is proved. *Wood v. Matthews*, 47 Ia. 409.

² In *Heermance v. James*, 47 Barb. 120, an action was sustained by a husband against one who was alleged to have poisoned and prejudiced the mind of his wife against him, alienated her affections, counselled and aided her to commence proceedings for divorce, whereby she refused to recognize or receive him as her husband, though she did not abandon him. The judge says her remaining with him under the circumstances "would rather add the provocation of insult to the keenness of suffering. It would continue before him a present, living, irritating, aggravating, if not consuming, source of grief, which even her absence might in a measure relieve." So where a divorce is procured though for the husband's fault, if without defendant's interference none would have been sought. *Modisett v. McPike*, 74 Mo. 636. One who secretly sold laudanum to a wife, which she used as a beverage, whereby her health was greatly impaired, was held liable to the husband as being guilty of assisting her in the violation of her duty as wife. *Hoard v. Peck*, 56 Barb. 202.

to live with him a life of shame, it is impossible adequately to measure. If, on the other hand, the husband was a libertine, and has brought shame upon his family by his own notorious misconduct, and if the wife, after the destruction of her affection by his own abuse and misconduct, has finally surrendered her own honor, it is difficult to understand what claim he can have to legal consideration. And between these extreme cases there may be numerous others differing so widely in their facts that, while it may be wise to give a right of action in all, yet the [*225] measure *of redress must be left largely to the discretion of the proper legal tribunal, which shall be at liberty to award much or little, according as they find that much or little has been lost by the complaining party.¹ And even though the husband may himself have been chargeable with no wrong in his marital relations, yet if the wife's affections were withdrawn from him before the defendant is chargeable with interference, the fact is important as bearing upon the question of damages.² The action for seducing the wife away from the husband is by no means confined to the case of improper and adulterous relations; but it 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. If, however, the interference is by the parents of the wife, on an assumption that the wife is ill treated to an extent that justifies her in withdrawing from her husband's so-

¹ The bad character of the husband will not mitigate damages, unless he be guilty of unchastity or other wrong to the wife herself. *Norton v. Warner*, 9 Conn. 172.

² The wife's letters or statements may be proved to show the previous state of their relations, and of her feelings toward her husband. *Willis v. Bernard*, 8 Bing. 376; *Gilchrist v. Bale*, 8 Watts, 355; *Palmer v. Crook*, 7 Gray, 418; *Holtz v. Dick*, 42 Ohio St. 23. See, *White v. Ross*, 47 Mich. 172. In *Hadley v. Heywood*, 121 Mass. 236, 239, it is said that "any unhappy relations existing between the plaintiff and his wife, not caused by the conduct of the defendant, may

affect the question of damages, and were properly submitted to the jury; but they were in no sense a justification or palliation of the defendant's conduct. They are not allowed to affect the damages because the acts of the defendant are less reprehensible, but because the conduct of the husband is such that the injury which such acts occasion is less than otherwise it might have been." One who receives a wife to his home who was treated with cruelty by her husband, cannot recover from the husband for her support if one of his motives in receiving her was to facilitate adulterous intercourse. *Almy v. Wilcox*, 110 Mass. 443.

ciety and control, it may reasonably be presumed that they have acted with commendable motives, and a clear case of want of justification may be justly required to be shown before they should be held responsible.¹ One who merely harbors a wife who, without his consent, has left her husband, and thereby encourages her in withholding from him the performance of marital duties, will be liable for so doing if she left without justification, but not otherwise.²

***Wrongs to the Wife.** For an injury to the wife, either [*226] intentionally or negligently caused, 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.³ But if the injury resulted in her death, this cannot, at the common law, be taken into account, either as the ground of action or as an aggravation of

¹ *Hutcheson v. Peck*, 5 Johns. 196; *Bennett v. Smith*, 21 Barb. 439; *Campbell v. Carter*, 3 Daly, 165; *Holtz v. Dick*, 42 Ohio St. 23. If a father removes the wife, unable from illness to leave herself, at her request, acting in good faith upon complaints of cruelty made by the wife, he is justified, even if the husband's conduct was in fact not improper. *Smith v. Lyke*, 13 Hun, 204. See *White v. Ross*, 47 Mich. 170.

² *Philip v. Squire, Peake*, N. P. 82; *Barnes v. Allen*, 30 Barb. 663. A stranger may give a wife continued shelter and support against her husband's will only when her husband's violence endangers her personal safety. *Johnston v. Allen*, 5 S. E. Rep. 666 (N. C.) If one estrange a wife's affection he is liable, although there is no elopement or adultery. *Rinehart v. Bills*, 82 Mo. 534. So if one takes away a wife with her consent and against her husband's. *Higham v. Vanosdol*, 101 Ind. 160.

³ *Matteson v. N. Y. Cent. R. R. Co.*, 35 N. Y. 487; *Hopkins v. Atlan-*

tic, &c., R. R. Co., 94 U. S. 11; *Barnes v. Martin*, 15 Wis. 240; *Kavanaugh v. Janesville*, 24 Wis. 618; *Smith v. St. Joseph*, 55 Mo. 456; *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557, 570; *McKinney v. Stage Co.*, 4 Iowa, 420; *Mowry v. Chaney*, 48 Iowa, 609; *Berger v. Jacobs*, 21 Mich. 215; *Matthew v. Centr. Pac. R. R. Co.*, 63 Cal. 450; *Bloomington v. Annett*, 16 Ill. App. 199. Such action survives to the husband's representatives. *Cregin v. Brooklyn, &c., Co.*, 75 N. Y. 192. In it a husband may recover for loss of society. *Jones v. Utica, &c., Co.*, 40 Hun, 349. In Iowa he may recover if the wife is a mere housewife, not if she follows an independent employment. *Fleming v. Shenandoah*, 67 Ia. 505. In Pennsylvania he may recover in such an action for loss of service, expenses, &c. *Nanticoke v. Warne*, 106 Penn. St. 373; but in his action for his wife's use there can be no recovery for loss of earning power. *King v. Thompson*, 87 Penn. St. 365.

damages, and the husband's recovery must be limited to the loss suffered intermediate the injury and death.¹

The term services, when employed to indicate the ground on which the husband is allowed to maintain an action, is used in a peculiar sense, and fails to express to the common mind the exact legal idea intended by it. Whatever may have been the case formerly, or may now be the case in some states of society, service, in the sense of labor or assistance, such as a servant might perform or render, is not always given by or expected from the wife; and if an action were to put distinctly in issue the loss of such services, it might, perhaps, be shown in the most serious cases that there was really no loss at all. But it could not be reasonable that the wrong-doer should escape responsibility because the family he has wronged were in such circumstances, moved in such circles, and were subject to such claims, by reason of public position or otherwise, that physical labor by the wife was neither expected nor desired. The word service has come to us in this connection from the times in which the action originated, and it 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 ordinary sense 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

[*227] ***Actions by the Wife.** For an injury suffered by the wife in her person, such as would give a right of action to any other person, a suit might be instituted in the joint name of the husband and wife. This suit would be distinct from that which the husband might institute for the loss of services and expenses, and would embrace damages for physical and mental suffering.³ The damages recovered, however, would belong to

¹ Hyatt v. Adams, 16 Mich. 180. See Pack v. New York, 3 N. Y. 489.

² Perhaps if a voluntary separation has taken place between husband and wife, which, by their agreement, is to be permanent, no action at all can be sustained. Fry v. Derstler, 2 Yeates, 278.

³ Dengate v. Gardiner, 4 M. & W. 6; Hyatt v. Adams, 16 Mich. 180. The wife may now sue alone for injuries. Stevenson v. Morris, 37 Ohio St. 10; Matthew v. Centr. Pac. R. R. Co., 63 Cal. 450; Bloomington v. Annett, 16 Ill. App. 199.

the husband alone. This rule appears to be changed by the statutes of some of the States, which, in excluding the husband's common law interest in the real and personal estate of the wife, are held to take from him the right to compensation for the torts suffered by her.¹

For a personal tort by the husband to her person or reputation, the wife can sustain no action, and she must rely upon the criminal laws for her protection, or seek relief in separation or in proceedings for a divorce. It is also generally supposed that the wife can have no action against one who should seduce the husband's affections from her, or in any manner deprive her of his care and society.² But where, by statute, the wife is given full *dominion and control of the property pur- [*223] chased or otherwise acquired by her, the marital relation

¹ Mich. Cent. R. R. Co. v. Coleman, 28 Mich. 440; Musselman v. Galligher, 32 Iowa, 383; Pancoast v. Burnell, 32 Iowa, 394; Chicago, &c., R. R. Co. v. Dunn, 52 Ill. 260; Hayner v. Smith, 63 Ill. 430; Hennies v. Vogel, 66 Ill. 401. The woman may recover for diminished capacity to labor. Jordan v. Middlesex, &c., Co., 138 Mass. 425. But in Iowa only if she has a business separate from her husband's. Dickens v. Des Moines, 37 N. W. Rep. 165. It is held in Maine that an action by husband and wife for an injury to the wife survives on her death in favor of her personal representative. Norcross v. Stuart, 50 Me. 87. See, also, Crozier v. Bryant, 4 Bibb, 174; Pattee v. Harrington, 11 Pick. 221. At the common law the action would have abated under such circumstances, but on the death of the husband, the wife surviving, it would have survived to her.

² Kent, 182; Reeve, Dom. Rel. 110; Lynch v. Knight, 9 H. L. Cas. 577. This was an action by the wife, the husband being joined for conformity, against one who had said of her that she was "almost seduced" by a third person named, before her marriage, in consequence of the utter-

ing of which words her husband refused to live with her. The special damage alleged was the loss of the *consortium* of the husband. The court of Queen's Bench in Ireland sustained the action, and its judgment being affirmed in the Exchequer Chamber by a divided court, was removed thence to the House of Lords. Lord Chancellor CAMPBELL held that the action might have been maintained had the act of the husband, in refusing to live with his wife, been reasonable under the circumstances, which, in his opinion, it was not. Lord CRANWORTH expressed his concurrence, but Lord WENSLEYDALE denied that an action for the loss of *consortium* from the wrongful act of the defendant would lie in any case. The judgment was reversed. We see no reason why such an action should not be supported, where, by statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her; and it is held she may maintain an action in her own name for alienating the husband's affections and causing a separation. Breiman v. Paasch, 7 Abb. N. C. 249; Warner v. Miller, 17 Abb. N. C. 221; Jaynes v. Jaynes, 39 Hun, 40; Mehrhoff v.

would not protect the husband against an action for any unlawful interference with the property.¹ But even under these statutes the wife cannot maintain an 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 existed.³

Action by the Parent: The injury which one may suffer in the relation of parent seems, at the common law, to be limited to an action for the recovery of damages for being deprived of the child's services. The action is therefore planted rather upon a loss in the character of the master of a servant than in that of the head of a family. This sometimes leads to results which are extraordinary, for it seems to follow, as a necessary consequence, that if the child, from want of maturity or other cause, is incapable of rendering service, the parent can suffer no pecuniary injury, and therefore can maintain no action when the child is abducted or injured. Such have been the decisions.⁴

Mehrhoff, 26 Fed. Rep. 13. So if the husband sends away the wife. *Westlake v. Westlake*, 34 Ohio St. 621. But in Indiana it is held otherwise on the ground that it is not an injury to the person. *Logan v. Logan*, 77 Ind. 558.

¹ *Emerson v. Clayton*, 32 Ill. 492; *Martin v. Robson*, 65 Ill. 129; *Chestnut v. Chestnut*, 77 Ill. 346; *Starkweather v. Smith*, 6 Mich. 377; *Larison v. Larison*, 9 Ill. App. 27. She may maintain replevin if living apart from him. *White v. White*, 58 Mich. 546; *Howland v. Howland*, 20 Hun, 472. The husband, where such statutes exist, cannot bring trover against a third person for the conversion of the wife's property. *Taylor v. Jones*, 52 Ala. 78. The husband may bring replevin against his wife. *Carney v. Gleissner*, 62 Wis. 493. But, in Michigan, he may not abandon her and obtain by replevin household goods, exempt from execution and on which a mortgage is not valid without his

wife's signature. *Smith v. Smith*, 53 Mich. 538.

² *Peters v. Peters*, 42 Iowa, 182; *Longendyke v. Longendyke*, 44 Barb. 366; *Schultz v. Schultz*, 89 N. Y. 644. And it seems the husband is still liable for the carrying on by the wife of an illegal business on her own account. *Commonwealth v. Barry*, 115 Mass. 146; S. C. 2 Green Cr. Rep. 285, and note.

³ *Longendyke v. Longendyke*, 44 Barb. 366; *Peters v. Peters*, 42 Iowa, 182; *Abbott v. Abbott*, 67 Me. 304; *Libby v. Berry*, 74 Me. 286; *Nickerson v. Nickerson*, 65 Tex. 281; *Phillips v. Barnet*, 1 Q. B. Div. 436; S. C. 17 Moak, 100. These were trespass for assault and battery committed while the marriage relation existed, and action brought after divorce. *Freethy v. Freethy*, 42 Barb. 641, was an action of slander brought under like circumstances.

⁴ *Hall v. Hollander*, 7 D. & Ry. 133; S. C. 4 B. & C. 660; *Eager v. Grim-*

*Loss of service to the parent may be occasioned by [*229] enticing the child away,¹ by forcibly abducting the child,² by beating or otherwise purposely injuring the child,³ by a negligent injury which disables the child from labor,⁴ 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 right of action in each, being distinct rights, cannot be joined.⁵

wood, 1 W. H. & G. 61; Grinnell v. Wells, 7 M. & G. 1033; S. C. 8 Scott N. R. 741. In this last case it is intimated that for the abduction of a helpless child there can be no action, because the child is incapable of performing services. But we doubt the soundness of the doctrine. The services of a child, no more than those of a wife, are to be estimated by the merely physical and gross standard; they do not consist in the hewing of wood and drawing of water merely, but they are such returns of affection as the child, in his condition, is capable of; and many a parent has been made to feel that these, in the case of afflicted and helpless children, are often beyond all estimate. To abduct a child who, if afterward abandoned and thrown upon the world, will be capable of caring for himself, or be likely to be cared for by others, in the expectation of remuneration by his future labors, is a venial wrong, and a very slight injury, in comparison with the carrying off of one who, if then abandoned, will be presently and prospectively helpless, and therefore abandoned to probable want and misery. Compare Dennis v. Clark, 2 Cush. 347. In any event the parent might recover for trouble and expense in the care, nursing, etc., of the injured child. Durden v. Barnett, 7 Ala. 169; Dennis v. Clark, supra. He may recover for the loss of his timespent in nursing the child. Con-

nell v. Putnam, 58 N. H. 534. So may one in *loco parentis*, but not for loss of service without proof of it. Whitaker v. Warren, 60 N. H. 20.

¹ And this, whether the child be male or female. Sherwood v. Hall, 3 Sumn. 127; Bundy v. Dodson, 28 Ind. 295; Everett v. Sherfey, 1 Iowa, 356; Caughey v. Smith, 47 N. Y. 244; Plummer v. Webb, 4 Mason, 380; Stowe v. Heywood, 7 Allen, 118; Sargent v. Mathewson, 38 N. H. 54. But knowledge in the defendant of the relation should be averred. Butterfield v. Ashley, 6 Cush. 249, and cases cited.

² Magee v. Holland, 27 N. J. 86.

³ Hoover v. Heim, 7 Watts, 62; Hammer v. Pierce, 5 Harr. 171; Cowden v. Wright, 24 Wend. 429; Whitney v. Hitchcock, 4 Denio, 461; Klingman v. Holmes, 54 Mo. 304.

⁴ Karr v. Parks, 44 Cal. 46. It has been held in Indiana, that where one suffered a negligent injury in his own person, and by the same negligence his wife and child were injured, this was all, as to him, one cause of action. Cincinnati, &c., R. R. Co. v. Chester, 57 Ind. 297.

⁵ Rogers v. Smith, 17 Ind. 323. The father may recover, notwithstanding the action in behalf of the child. Evansich v. G. C., &c., Ry. Co., 57 Tex. 123; Welton v. Middlesex, &c., Co., 125 Mass. 130. But he cannot recover for the child's suffering.

Where the charge is that defendant has enticed the child away from the parent, his motive for his action is important, and may sometimes furnish him with justification. 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 therefore justifiable. In New Hampshire it has been said that if one give protection and shelter to a child, with a view or intent of enabling or encouraging him to keep away from his father, or with the knowledge that it aided or encouraged him to keep away, this would be wrongful and actionable conduct.¹ A similar rule has been laid down in Iowa,

where one who had employed a runaway child, without knowledge of his misconduct, was held liable for retaining him in his service after notice that the father objected, but not before.²

In Connecticut it was held, at an early day, that the father might sustain an action against one who enticed his minor daughter from his service, and procured her to be married to another person without his consent. The marriage, however, was averred to be fraudulent, and to have been procured in order to obtain the discharge of a relative of the defendant from a prosecution for bastardy; and it was also averred that the marriage had been annulled by the legislature for the fraud.³ In Kentucky, where no fraud in the marriage was averred, it was decided that the action might be sustained for enticing the minor daughter from her mother's service and procuring her to be married, but that the recovery of damages must be restricted to the time which elapsed previous to the time when the marriage actually took place.⁴ In Massachusetts it is denied with much good reason that any such action can be maintained—the girl being of the age of legal consent—even though by statute the conduct of the defendant would have been punishable as a crime.⁵ The reason is tersely and clearly stated in the opinion: "The law of marriage entirely overrides the general principles of right of the parent to the services of the child, or the duties from one to the

¹ Sargent v. Mathewson, 88 N. H. 54.

² Everett v. Sherfey, 1 Iowa, 356. See, to the same effect, Butterfield v. Ashley, 6 Cush. 249.

³ Hills v. Hobert, 2 Root, 48 (1793).

⁴ Jones v. Tevis, 4 Litt. 25 (1823.)

⁵ Hervey v. Moseley, 7 Gray, 479. See, also, Goodwin v. Thompson, 3 Greene (Iowa), 329; Holland v. Beard, 59 Miss. 161.

other as servant and master, by allowing the female child to terminate it at any moment after she arrives at the age of twelve years, by uniting herself to some one in marriage. If the marriage of the daughter was a legal act, from the time of its consummation the daughter was legally discharged from all further duties to perform services for her parent, having assumed new relations inconsistent therewith."

Where seduction of a daughter is the injury complained of, some of the anomalies of basing the right of recovery upon the loss of services are deserving of special notice. A statement of the conclusions of the judicial mind under different sets of circumstances will show what these anomalies are.

**First*—The father suing for this injury in the case of [*231] a daughter actually at the time being 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. That an actual loss is suffered under such circumstances the law will conclusively presume, and evidence that the daughter was accustomed to render no service will not be received. And while this supposed loss will constitute the nominal ground of recovery, a substantial award of damages will be supported, based on the injury to the parental feelings and the shame and mortification which must follow from such a wrong. To this also may be added any pecuniary expense which the parent has been put to for care, medical attendance, etc.¹

Second—If the daughter at the time was not actually a member of the father's household, yet if she were not in the actual

¹ Bennett v. Allcott, 2 T. R. 166; Manvell v. Thomson, 2 C. & P. 303; Thompson v. Ross, 5 H. & N. 16; Harris v. Butler, 2 M. & W. 539; Blaymire v. Haley, 6 M. & W. 55; Hedges v. Tagg, L. R. 7 Exch. 283; Clark v. Fitch, 2 Wend. 459; Hewitt v. Prime, 21 Wend. 79; Bartley v. Richtmyer, 4 N. Y. 38; Knight v. Wilcox, 14 N. Y. 413; White v. Nellis, 31 N. Y. 405; Furman v. Van Sise, 56 N. Y. 435; Kennedy v. Shea, 110 Mass. 147; Howland v. Howland, 114 Mass. 517; Blanchard v. Ilsley, 120

Mass. 487; S. C. 21 Am. Rep. 535; McAulay v. Birkhead, 13 Ired. 28; Vossel v. Cole, 10 Mo. 634; Emery v. Gowen, 4 Me. 33. It makes no difference whether the debauching was by artifice or force. Lawrence v. Spence, 99 N. Y. 609; Lavery v. Croke, 52 Wis. 612. The father's administrator may recover for a seduction. Noice v. Brown, 39 N. J. L. 569. If before any expense is incurred by the father the daughter marries he cannot recover. Humble v. Shoemaker, 70 Ia. 223.

service of another, and the father had a right to recall her to his own service, he may maintain the action the same as if she actually had been recalled or had returned.¹

Third—But if the daughter was actually in the service of another, no action could be maintained by the parent, [*232] 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

¹ Bolton v. Miller, 6 Ind. 265; Bartley v. Richtmyer, 4 N. Y. 38; Martin v. Payne, 9 Johns. 387; Mulvehall v. Millward, 11 N. Y. 343; Hornketh v. Barr, 8 Serg. & R. 36; Kennedy v. Shea, 110 Mass. 147; Van Horne v. Freeman, 6 N. J. 323; Mercer v. Walmsley, 5 H. & J. 27; White v. Murtland, 71 Ill. 250; Roberts v. Connelly, 14 Ala. 239; Blagge v. Ilsley, 127 Mass. 191; Ogborn v. Francis, 44 N. J. L. 441. In Terry v. Hutchinson, L. R. 3 Q. B. 599, it is held that the moment an actual service of the daughter with another is terminated, even though it be wrongfully, and she intends to return to her father, he has a right to her services, and may maintain the action. See Ellington v. Ellington, 47 Miss. 329; Van Horn v. Freeman, 6 N. J. 323. In Blanchard v. Ilsley, 120 Mass. 487, S. C. 21 Am. Rep. 535, the woman who was seduced resided at the time in the family of a married sister, without paying for her board, but with no agreement with her father or herself for any payment for services. *Held*, that the sister's husband could not sue, as master, for her seduction.

A stepfather cannot bring an action when the girl is at work for some one else, and he cannot control her services, even though she return to his house for confinement. Kinney v. Laughenour, 89 N. C. 365.

² Dean v. Peel, 5 East, 49; South v.

Denniston, 2 Watts, 474; Nickleson v. Stryker, 10 Johns. 115; Dain v. Wycoff, 7 N. Y. 191. The father may sue if he retains right to command the services of the child though she be at the time in another's service. Mohry v. Hoffman, 86 Penn. St. 358; Riddle v. McGinnis, 22 W. Va. 253; Lavery v. Crooke, 52 Wis. 612. The action being grounded on loss of service, the fact that the daughter is of full age is immaterial. Keller v. Donnelly, 5 Md. 211; Greenwood v. Greenwood, 28 Md. 370; Vossel v. Cole, 10 Mo. 634; Sutton v. Huffman, 32 N. J. 58; Wert v. Strouse, 38 N. J. 184; Stevenson v. Belknap, 6 Iowa 97; Lipe v. Eisenlerd, 33 N. Y. 229; Bennett v. Allcott, 2 T. R. 166; Harper v. Luffkin, 7 B. & C. 387. In this last case the daughter was married, but was living apart from her husband with her father. If the daughter is above the age of 21, she must be actually a member of the family or the parent cannot sue. Clark v. Fitch, 2 Wend. 459; McDaniel v. Edwards, 7 Ired. 408; Lee v. Hodges, 13 Gratt. 726; Patterson v. Thompson, 24 Ark. 55; Kendrick v. McCrary, 11 Geo. 603; Sutton v. Hoffman, 32 N. J. 58; Wert v. Strouse, 38 N. J. 184. If she does live at home it is immaterial that she gives her services voluntarily and pays board. Lamb v. Taylor, 8 Atl. Rep. 760 (Penn.).

all.¹ To this last statement this exception is to be made: that if the defendant procured the woman to enter his service fraudulently and for the purpose of withdrawing her from her family and seducing her, this is a wrong which precludes his claiming any rights or protection as master, and the parent may support an action as if the hiring had never taken place.²

This statement of the law is sufficient to show some of its absurdities, and to justify some recent statutory changes.

The time when the cause of action is deemed to have accrued may depend upon the form of action. This 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 characterises his entry upon the land, and the seduction is to be regarded as an aggravation of the trespass.³ Trespass, therefore, can only be brought by the parent 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, actually or by presumption of law, suffered in consequence of the seduction, the right of action is deemed to arise from this expense or loss, but the action must be in case for the consequential injury. It is, therefore, sufficient 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 being varied to meet the facts, but the substantial recovery being the *same in each case.⁴ In New York, however, [*233] this distinction is denied, and it is held that whether the form of action be trespass or case, the actual or supposed relation which supports the action must have existed at the time of the seduction.⁵ That would certainly be true were the action brought by one who sustains only the conventional relation of master to the woman seduced: he cannot hire a disabled servant, and then claim the wrong which disabled her as an injury to himself; but where the parent sues, the real relation has existed from the first

¹ See *Edmondson v. Machell*, 2 T. R. 4; *Bennett v. Allcott*, 2 T. R. 166; *Manvell v. Thomson*, 2 C. & P. 303.

² *Speight v. Oliviera*, 2 Stark. 435; *Dain v. Wyckoff*, 18 N. Y. 45.

³ *Hubbell v. Wheeler*, 2 Aik. 359;

Parker v. Meek, 3 Sneed, 29; *Logan v. Murray*, 6 Serg. & R. 175.

⁴ *Parker v. Meek*, 3 Sneed, 29; *Ellington v. Ellington*, 47 Miss. 329. *Sargent v. —*, 5 Cow. 106.

⁵ *Bartley v. Richtmyer*, 4 N. Y. 38.

—the right of control being only suspended while the daughter was in the service of another—and the law imposes upon the parent certain obligations in the support of his children from which he is not released by their misconduct. There is, consequently, a very obvious difference between a master hiring a disabled servant and a parent receiving back to his home a disabled child. In the former case the master assumes no consequences except as, in view of his own interest, he bargains to do so; but in the latter, the child must be taken as she is, and the cause of action may well be held to relate back to the time when the wrongful act was committed from which injurious consequences subsequently flow.¹

It is not essential to the maintenance of the suit that pregnancy should have resulted;² it is sufficient if the ability to perform services was in any degree impaired as a direct consequence of the defendant's conduct.³

If the father is deceased, the mother may bring the action for this injury.⁴

[*234] *It has been said above that the damages in these cases are by no means measured by the loss of service and the incidental care and expenses. It has been well said in Pennsylvania that "proof of the relation of master and servant, and of the loss of service, by means of the wrongful act of the defendant, has relation only to the form of the remedy, and that the

¹ In *Coon v. Moffitt*, 3 N. J. 583, a mother was held entitled to sue for the seduction of her daughter, the seduction taking place before the father's death and the confinement afterward. The subject is carefully examined by PENNINGTON, J., in this case, who suggests that a master, where the service began after the seduction, might also recover for loss of service in confinement if his contract for the service antedated the seduction.

² *Abrahams v. Kidney*, 104 Mass. 222; *White v. Nellis*, 31 Barb. 279, or sexual disease. *Blagge v. Ilsley*, 127 Mass. 191.

³ See *Knight v. Wilcox*, 14 N. Y. 413; *Boyle v. Brandon*, 13 M. & W.

738. Compare *Eager v. Grimwood*, 1 Exch. 61.

⁴ *Coon v. Moffitt*, 3 N. J. 583; *Sargent v. —*, 5 Cow. 106; *Furman v. Van Sise*, 56 N. Y. 435; *Gray v. Durland*, 51 N. Y. 424. *Felkner v. Scarlet*, 29 Ind. 154. It must appear that the mother was actually entitled to the child's services. *Hobson v. Fullerton*, 4 Ill. App. 280; *Ryan v. Fralick*, 50 Mich. 483.

Under the statutes of New York a wife who has been abandoned by her husband, and keeps a boarding-house on her own account, may sue in her own name for the seduction of her daughter, over 21 years of age, who lives with her and performs services for her. *Badgley v. Decker*, 44 Barb. 577.

action being sustained in point of form by the introduction of these technical elements, the damages may be given as a compensation to the plaintiff, not only for the loss of service, but also 'for all that the plaintiff can feel from the nature of the injury.'"¹ Similar expressions are to be met within the decisions of other courts.² When thus the substantial ground of recovery is found not to be the ground on which the action is nominally planted, we cannot refrain from uniting with the Supreme Court of Mississippi in expressions of regret that the law should be chargeable with such manifest absurdities, and in agreeing that "that system of jurisprudence which punishes in damages the slightest aggression upon property, but denies redress to the father, and if he be dead, to the mother, for the defilement of an infant daughter, except upon the predicate of a loss of services, is at variance with the sentiments and *conscience of [*235] this age."³ But the evil is not one to be corrected by judicial action; to uproot it would be to create new law, and this is the province of legislation. Many States now have statutes which allow suits for seduction to be brought for the benefit of the woman herself, some near relative, or a guardian being suffered to bring it, and all allegations of loss of service being dispensed with.⁴

¹ Lewis, J., in *Phelin v. Kenderdine*, 20 Penn. St. 354, 361, quoting 2 Greenl. Ev., § 579.

² See, particularly, *Lipe v. Eisenlerd*, 32 N. Y. 229, 236, per DENIO, Ch. J.; *Clark v. Fitch*, 2 Wend. 459; *Stiles v. Tilford*, 10 Wend. 338; *Pruitt v. Cox*, 21 Ind. 15; *Felkner v. Scarlet*, 29 Ind. 154; *Taylor v. Shelkett*, 66 Ind. 297; *Phillips v. Hoyle*, 4 Gray, 568; *Grable v. Margrave*, 4 Ill. 372; *White v. Murtland*, 71 Ill. 250; *Kendrick v. McCrary*, 11 Geo. 603; *Ellington v. Ellington*, 47 Miss. 329; *Lunt v. Philbrick*, 59 N. H. 59; *Morgan v. Ross*, 74 Mo. 318; *Rollins v. Chalmers*, 51 Vt. 592. So in an action for enticing away a child, the parent may recover for his mental suffering. *Stowe v. Heywood*, 7 Allen, 118; *Magee v. Holland*, 27 N. J. 86. In the case of injuries to the child, for

which he would have an action in his own behalf, the recovery of the parent must be restricted to the actual pecuniary loss. *Cowden v. Wright*, 24 Wend. 429; *Whitney v. Hitchcock*, 4 Denio, 461; *Karr v. Parks*, 44 Cal. 46; *Sykes v. Lawlor*, 49 Cal. 236; *Boyd v. Blaisdell*, 15 Ind. 73; *Donahoe v. Richards*, 38 Me. 376; *Rooney v. Milw. Chair Co.*, 65 Wis. 397; *Dunn v. Cass Ave. Ry. Co.*, 21 Mo. App. 188; *Durkee v. Centr. Pac. R. R. Co.*, 56 Cal. 388. He may recover for loss of service, care of child, and expense resulting from injury, for a period not extending beyond the child's majority. *Frick v. St. Louis &c. Co.*, 75 Mo. 542.

³ *Ellington v. Ellington*, 47 Miss. 329, 351.

⁴ See *Updegraff v. Bennett*, 8 Iowa, 72; *Felkner v. Scarlet*, 29 Ind. 154.

Wherever this action is permitted at the common law, it is assumed that the plaintiff is not in fault. If he was assenting to the seduction, or connived at it, or without objection permitted such improper action on the part of the defendant as might naturally, and in fact did, lead to it, these facts may be pleaded in bar of a recovery.¹

Adopted Children. A conspicuous feature of some of the systems of law is the facility with which they permit the formation of family relations with which ties of blood have no necessary connection. This is accompanied by some formal act of adoption, and the child adopted comes into the family with all the rights of a child by birth, and subject to all the same duties and obligations. It has been said on a preceding page² that the common law knows nothing of an adoption with such consequences. Nevertheless, if one is received into the family by adoption, the remedies in respect to third persons will be the same, while the relation exists, that they would be in the case of a child by nature.

Wrongs to a Child. For an injury suffered by the child in that relation no action will lie at the common law. The obligation of the parent to support him is only enforced by proceedings on behalf of the public, and not by suit in the name of or on behalf of the child. And no action will lie against *236] a third *person for depriving a child of his source of support by means of an injury to the parent. By statute, however, a remedy is given in a few cases which will be considered fur-

As to the effect of giving a statutory remedy upon the common law right, see *Cross v. Goodman*, 20 Up. Can. Q. B. 242; *Watson v. Watson*, 49 Mich. 540; *Weiber v. Meyersham*, 50 Mich. 602. There must be some false promise. Intercourse is not enough to make seduction where woman succs herself. *Baird v. Bochner*, 33 N. W. Rep. 694 (Ia.) Where a statute gives a woman a right of action for her seduction, she cannot recover if she is equally guilty with the man. *Breon v. Henkle*, 14 Oreg. 494. When the seduced woman may sue in her own

name, she may bring an action after as well as before a marriage to a third person. *Dowling v. Crapo*, 65 Ind. 209.

¹ *Reddie v. Scoolt*, 1 Peake, 316; *Seagar v. Sligerland*, 2 Caines, 219; *Smith v. Mastin*, 15 Wend. 270; *Vossel v. Cole*, 10 Mo. 634. But where a statutory action is allowed to be brought for the woman's benefit, the conduct of the nominal plaintiff, it would seem, should not prejudice her recovery.

² Ante, p. *42.

ther on. Where the child is injured in his own property or person, redress has no necessary connection with the family relation.

Actions by Guardians. The guardian is either of the ward's person, or of his estate, or of both. The guardian of the estate may maintain all proper suits for its protection. 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. It has been held that he may bring suit for the seduction of his female ward, the right being grounded on the legal control he has over the minor's services.¹ But the contrary has been held in Massachusetts, where he has no such control.²

Action for Loss of Marriage. The first of family rights is that of forming the relation of marriage, observing for the purpose such rules as have been prescribed by statute as pre-requisites. The first of these, and in nearly all the States the only indispensable one is that of competent consent. If, after consent once given, one of the parties refuses performance, this, in law, is a mere breach 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.³ There is something in it more than a failure to keep an agreement: there is failure to atone for a great wrong accomplished by means of a confidential relation.

The prevention of a marriage by the interference of a third person, cannot, in general, in itself, be a legal wrong. Thus if one, by solicitations, or by the arts of ridicule or otherwise, shall induce one to break off an existing contract of marriage, no action will lie for it, however contemptible and blamable may be the conduct. But a loss of marriage may be such a special injury as will support an action of slander or libel, where the party was induced to break off the engagement by false and damaging *charges not actionable *per se*.⁴ Here [*237] the action, it is perceived, is for the defamation, and the

¹ Fernsler v. Moyer, 3 W & S. 416.

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² Blanchard v. Hsley, 120 Mass. 487;

⁴ Davis v. Gardiner, 4 Coke, 16;

S. C. 21 Am. Rep. 487.

Parkins v. Scott, 1 H. & C. Cas. 153;

³ See the subject referred to in the

loss of the marriage only the damage flowing from the injury. A contemplated marriage might be prevented by the forcible separation of the parties, or by the imprisonment of one of them; but the wrong in contemplation of law, would consist in the assault, or in the false imprisonment, and not in the loss of marriage. The suit might, therefore lie in favor of one party, and not in favor of the other, if only one was subjected to the illegal force.

It has been held, however, that if one, by the false and malicious assertion to the intended husband that the woman is already his own wife, succeeds in breaking up an intended marriage, the woman may have an action against him for this fraud.¹

As the age of consent to marriage is usually below the age of full capacity to act on the child's own behalf, there may in some cases be an apparent conflict of rights in respect to forming the relation of marriage. Previous to the child's legal emancipation, the parent is entitled to control his actions, and may rightfully withhold consent from a contemplated marriage, and break it up. But on the other hand, the child, if over the age of consent, may enter into the relation of marriage if he can succeed in doing so, and the relation will be perfectly legal and valid. Here is an apparent conflict of rights; but a real conflict of rights can never exist; for what one has a lawful right to do, another cannot have a lawful right to prevent. The solution of the apparent difficulty is to be found in this: The minor child has not, in strictness of law, when he reaches the age of consent, a *right* to form the relation of marriage, but only the *capacity* to do so. The age of consent is merely the age fixed by the law, below which a marriage is voidable. The marriage of a minor above that age, though in strictness of law it should not be formed without parental consent, is nevertheless sustained on grounds of public policy; and parental rights are made to yield to it. The parent may prevent the marriage if he can, but failing in this, his rights are incidentally abridged by the marriage, [*238] as they *would be if consent were given. The marriage displaces parental rights instead of creating a conflict.²

Nelson v. Staff, Cro. Jac. 422; Southold v. Daunston, Cro. Car. 269; Moody v. Baker, 5 Cow. 351.

¹ Shepherd v. Wakeman, 1 Sid. 79.

² See Hervey v. Moseley, 7 Gray,

479. A father has no claim to the services of a minor daughter after her marriage when that takes place after the age of consent. Such marriage is valid though against parental wishes.

Fraudulent Marriage. A very serious wrong may be accomplished by inducing one, through misrepresentation and fraud, to enter into an illegal marriage. It was decided in an early case, that where a married man, by falsely assuming to be single, succeeded in inducing a woman to marry him, she might, on discovering the deception, maintain an action against him for the injury.¹ This doctrine has been applied in New York to the case of one from whom his wife had procured a decree of divorce, leaving him incapacitated to marry again during her life time.² The tort in such a case consists in the fraud accomplished, to the woman's serious, and perhaps permanent injury. Nor can it be essential that any false affirmations should have been made in words. The woman to whom marriage is offered by one she does not know to be married is not bound, at her peril, to suspect him of intended crime, and to question him accordingly; but she may rightfully assume, as she commonly will, that he has lawful authority to do what he proposes, and his conduct in proposing is of itself a false affirmation if he has not.

Known impotency on the part of the man, it would seem, must be a fraud on the marriage; and being with child by another man at the time of the marriage, and not disclosing the fact, would be a like fraud in the woman. For these the marriage might be annulled by a competent court,³ but they afford no ground for an action at the common law.

A marriage may be void because made in reliance upon

Aldrich v. Bennett, 63 N. H. 415; *Holland v. Beard*, 59 Miss. 161. If a girl is married shortly before reaching the age of consent, and continues to cohabit after reaching such age, the marriage is valid and want of consent of her parents is immaterial. *Holtz v. Dick*, 42 Ohio St. 23.

¹ *Anonymous v. Skinner*, 119.

² *Blossom v. Barrett*, 37 N. Y. 434.

A similar action was brought in Maine, after the man's death, against his personal representative, and sustained. *Withee v. Brooks*, 65 Me. 14. In Pennsylvania, however, it was held the right of action did not survive. *Glum v. Carr's Admr.*, 31 Penn.

St. 533. In *Higgins v. Breen*, 9 Mo. 497, a woman who had been united in a void marriage with a married man, whom she believed to be single, was held entitled, after his death, to recover against his estate the value of her services.

³ *Scott v. Shufeldt*, 5 Paige, 43; *Reynolds v. Reynolds*, 3 Allen, 605; *Donovan v. Donovan*, 9 Allen, 140; *Morris v. Morris*, Wright, (O.) 630; *Ritter v. Ritter*, 5 Blackf. 81. Antinuptial incontinence in the woman is no ground whatever for annulling a marriage. *Leavitt v. Leavitt*, 13 Mich. 452; *Varney v. Varney*, 52 Wis. 120.

[*239] a *fraudulent divorce. Fraudulent divorces are sometimes procured by going into foreign jurisdictions for the purpose, where neither courts nor legislature can have authority to grant them, because of the absence of the jurisdictional fact of residence. Where a marriage is entered into, in reliance upon such a divorce, with one not aware of the facts, the wrongs committed are precisely the same as if no such divorce had ever been obtained. They do not, therefore, require further notice here. The first marriage, under such circumstances, of course remains unaffected by the second, except as the latter constitutes a wrong which may justify a divorce. It does not discharge the guilty party from any of the duties or obligations imposed upon him by the first and legal marriage.

Burial Rights. In respect to the burial of the dead, if anywhere, shall we find in the common law a recognition of legal rights in the family as an aggregate of persons. Even in that case, however, the recognition is very faint and uncertain. An unlawful interference with the buried dead of the family might probably be restrained by injunction on their joint application,¹ and *the owner of the lot in which the body was deposited might maintain trespass *quare clausum* for its

¹ See Kincaid's Appeal, 66 Penn. St. 411, where burial rights are considered, and cases referred to. It is decided in this case that the grant of a burial lot in a cemetery, though purporting to be in fee, is only for so long as the ground is used for cemetery purposes, and that, under competent legislation, the cemetery may be vacated, and the bodies removed to other grounds without the consent of the family. Citing *Windt v. German Reformed Church*, 4 Sandf. Ch. 471; *Richards v. N.W. Prot. Dutch Church*, 32 Barb. 42; *Price v. Meth. Ep. Church*, 4 Ohio, 515; *Brick Presb. Church v. New York*, 5 Cow. 538; *Coates v. New York*, 7 Cow. 585; *City Council v. Wentworth Baptist Church*, 4 Strob. 306. Approving the Pennsylvania case, see *Partridge v. First Independent Church*, 39 Md. 631.

Where the use of cemetery grounds for that purpose is discontinued, the lot owner has a right to remove monuments as personality. *Ibid.* After the lot owner has for twenty years cared for his lot, the cemetery association cannot prohibit his doing it and do the work itself. *Silverwood v. Latrobe*, 13 Atl. Rep. 161 (Md.) The right of the owner of a cemetery lot much resembles that of the owner of a pew in a church. This last right is gone if the church is destroyed by fire or by time. *Freleigh v. Platt*, 5 Cow. 494; *Gay v. Baker*, 17 Mass. 435; *Howard v. First Parish, &c.*, 7 Pick. 137. And the owner has no right to compensation from the parish if use of the church is abandoned. *Fassett v. First Parish, etc.*, 19 Pick. 361. Neither has he if it is torn down because it has become unfit for use.

disinterment, and recover substantial damages, in awarding which, the injury to the feelings would be taken into consideration.¹ In Indiana it has been said that "the bodies of the dead belong to the surviving relations, as property, and that they have a right dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated."² But the common law recognized no such property, though it did recognize 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

Painful questions, which have never been passed upon by the courts, might arise, if a dispute should spring up among the relatives of the dead concerning the place where the body should be deposited. It has been decided, in an opinion of much research, that when the body has once been interred in a particular cemetery, without objection, the widow may be enjoined from removing it on the application of the heir, and the reasoning of the court would apply equally if the position of the parties were reversed.⁴ But in Pennsylvania it is held that the widow's con-

Gorton v. Hadsell, 9 Cush. 508. See Van Houten v. Reformed Dutch Church, 17 N. J. Eq. 126. But if it is destroyed maliciously, or merely for the convenience of the parish, indemnity is due. Gay v. Baker, 17 Mass. 435; Voorhees v. Presbyterian Church, 8 Barb. 135; S. C. 17 Barb. 103; Kellogg v. Dickinson, 18 Vt. 266; Cooper v. Presbyterian Church, 32 Barb. 222; *In re* Presbyterian Church, 3 Edw. Ch. 155; Gorton v. Hadsell, 9 Cush. 508. A church member whose relatives are buried in a churchyard cannot from that fact deny the validity of an act allowing the church to raise the bodies in the yard on the ground that it violates the obligation of any contract. Craig v. First Presb. Church, 88 Penn. St. 42.

¹ Meagher v. Driscoll, 99 Mass. 281. At the common law, the only remedy for the wrongful removal of a body buried in church grounds was by indictment. Regina v. Shatpe, Dears.

& B. 160; S. C. 40 Eng. L. & Eq. 581. A mortgagor of a cemetery lot may restrain the mortgagee from interfering with the bodies interred therein. Thompson v. Hickey, 8 Abb. N. C. 159.

² Bogert v. Indianapolis, 13 Ind. 134, 138, per PERKINS, J. In New York it has been held that a person in charge of a corpse holds it as a trust for all interested in it from family ties or friendship, and that equity will make such disposition as seems just under all the circumstances, and in a contest before burial between the child of a first wife and a second wife, the wish of the child was followed. Snyder v. Snyder, 60 How. Pr. 368.

³ 2 Bl. Com. 429; Matter of Brick Presb. Church, 3 Edw. Ch. 155, 168; Meagher v. Driscoll, 99 Mass. 281, 284; Pierce v. Proprietors, &c., 10 R. I. 227, 242.

⁴ Pierce v. Proprietors, &c., 10 R. I. 227; S. C. 14 Am. Rep. 667. See Guthrie v. Weaver, 1 Mo. App.

trol of the body ceases with the burial, and that thereafter its disposition belongs to the next of kin.¹

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.²

[*241] ***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 from levy and sale on legal process for the satisfaction of debts. These exemptions are, for the most part, made for the benefit of the family, and to householders only. The provisions are so different in different states that it would be idle to attempt, in any such space as is at our command, to make an abridged statement of the law. In many States the husband can only dispose of an interest in exempt property with his wife's consent, and if he fails to resort to the proper legal remedies for the protection of the exemption, the wife may bring suits for the purpose.³

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.⁴

Master and Servant. The wrongs which the master may sustain in that relation at the hands of others are substantially confined to being deprived of services. Connected with this, however, may be incidental damages, such as expenses in care and attention for the servant, medicines, etc., when the loss is occasioned by some violence to the servant, or injury to his health, so that his care devolves upon the master, and perhaps other

136. In this case it was decided that the husband who had buried his wife in her father's cemetery lot, and who desired to remove it, and was prohibited, could not maintain replevin for the coffin and its contents against the father, the body not being property, and the coffin ceasing to be merchandise when buried.

¹ *Wynkoop v. Wynkoop*, 42 Penn. St. 203, 302. Equity will restrain interference with a husband in remov-

ing his wife's body to another burial place if he has not freely consented to its interment where it is. *Wild v. Walker*, 130 Mass. 422.

² *Spooner v. Brewster*, 3 Bing. 136; *Partridge v. First Independent Church*, 39 Md. 631.

³ See cases collected in *Smyth on Homesteads and Exemptions*, §§ 456, and 521.

⁴ *Smyth on Homesteads and Exemptions*, Ch. XI.

incidental expenses in some cases. The principles which govern the recovery have been sufficiently indicated in speaking of parent and child.¹ The wrongs which a servant might suffer at the hands of third persons would be redressed, independent of the relation.

INJURIES BY THE USE OF INTOXICATING LIQUORS.

Within the last few years statutes have been passed in a number 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. Also for injuries to [*242] means of support; for the expense and trouble of caring for the intoxicated person; and for other injuries and losses which are particularly pointed out in the statutes, which are here copied. All these provisions are for the benefit and protection of the family, and are therefore here presented; but it has been deemed better to give them in detail, than to attempt to bring together their several provisions under one head.²

Arkansas. An act applying to Washington county only provides that "every husband, wife, parent, guardian, 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 of any person, habitual or otherwise, 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, in said county of Washington, in whole or in part, of such person or persons, and recover full damages," etc. The act is evidently defective, probably in consequence of some accidental omission.³

Connecticut. "Whoever shall sell intoxicating liquor to any

¹ See Schouler Dom. Rel. 631, 632, and cases cited.

² We have not thought it worth while to give the provisions which exist in some of the States authorizing the wife to sue for and recover the moneys paid by the husband for

liquors illegally sold to him, or those which invalidate the leases of buildings to be used for the sale of liquors in violation of law, &c., except where they give special actions of tort.

³ Laws of 1873 p. 385.

person, who thereby becomes intoxicated, and while so intoxicated shall, in consequence thereof, injure the person or property of another, shall pay just damages to the person injured, to be recovered in an action under this statute; and if the person selling such intoxicating liquor is licensed, the recovery of a judgment for such damages shall be conclusive evidence of a breach of the bond.”¹

Illinois. “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 [*243] 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 *femme 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

¹ General Statutes, Revision of 1875, p. 269, § 9.

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

Statutes giving such action, it seems, are to be construed strictly.² The wife can maintain no action unless she can show *injury in person, property, or means of sup- [*244] port. Anguish or pain of mind or the feelings suffered by her by reason of her husband's intoxication are not elements of damages.³ Exemplary damages cannot be awarded unless actual damages are proved, and then they may be if aggravating circumstances are shown;⁴ and the defendant, when exemplary damages are claimed, may show facts in mitigation, such as that he had forbidden his clerk, by whom the sale was made, to sell to the defendant,⁵ or that the wife and husband drank liquors together.⁶ Proof of injury to means of support need not be direct,

¹ Rev. Stats. 1874, p. 438, §§ 8, 9 and 13, re-enacting sections, 4, 5 and 7 of Laws of 1872, p. 553.

² *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Kellerman v. Arnold*, 70 Ill. 632; *Fentz v. Meadows*, 72 Ill. 540. The landlord's liability does not cover reversioners or holders of contingent interests. *Castle v. Fogerty*, 19 Ill. App. 442. The act only applies to those engaged in liquor traffic. It does not cover a case of giving a drink from kindness or courtesy. *Aden v. Cruse*, 21 Ill. App. 391.

³ *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Fentz v. Meadows*, 72 Ill. 540; *Flynn v. Fogarty*, 106 Ill. 263. She can recover only for such damage as is the direct proximate effect of a particular intoxication. *Barks v. Woodruff*, 12 Ill. App. 96. The mere intoxication of the husband, unaccompanied with any injury to the person of the wife,

or to his or her means of support, gives no right of action. *Confrey v. Stark*, 73 Ill. 187.

⁴ *Roth v. Eppy*, 80 Ill. 283, explaining *Freese v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Kellerman v. Arnold*, 71 Ill. 632; *Keedy v. Howe*, 72 Ill. 133; *Fentz v. Meadows*, 72 Ill. 540; *Bates v. Davis*, 76 Ill. 222; *Albrecht v. Walker*, 73 Ill. 69; *Brantigam v. While*, 73 Ill. 561; *Graham v. Fulford*, 73 Ill. 596; *Hackett v. Smelsley*, 77 Ill. 109; *McEvoy v. Humphrey*, 77 Ill. 388; *Cobb v. People*, 84 Ill. 511; *Schimmelfenig v. Donovan*, 18 Ill. App. 47; *Kadgin v. Miller*, Id. 474.

⁵ *Freese v. Tripp*, 70 Ill. 496; *Fentz v. Meadows*, 72 Ill. 540; *Brantigam v. While*, 73 Ill. 561; *Bates v. Davis*, 76 Ill. 222. But the fact that the sales were made by a clerk in violation of instructions would be no defense to the action. *Keedy v. Howe*, 72 Ill. 133.

⁶ *Roth v. Eppy*, 80 Ill. 283; *Hackett v. Smelsley*, 77 Ill. 109. See *Reget v.*

but is to be made out by circumstances,¹ and it is no excuse to the defendant that he could not reasonably have foreseen the consequences.² Neither is it a defense that others also sold liquors to the husband,³ but where several are liable there can be but one recovery for the injury.⁴ 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 the person of the wife.⁵ The widow may bring the action after the death of the husband caused by in- [*245] toxication.⁶ The section for the recovery *of two dol- lars per day for taking charge of and providing for the intoxicated person has no application to the case of intoxication caused by liquors given to him.⁷ The sum can only be recovered in an action of debt as prescribed in the statute;⁸ and the sum named in the statute is the limit of the recovery.⁹ In making out a case it is not required to make it out beyond a reasonable doubt, but only by a preponderance of evidence.¹⁰

Bell, 77 Ill. 593. The liability of the defendant to indictment for the same act is no bar to exemplary damages. Brannon v. Silvernail, 81 Ill. 434.

¹ Horn v. Smith, 77 Ill. 381; Roth v. Eppy, 80 Ill. 283. As to what constitutes an injury to means of support, see Meidel v. Anthis, 71 Ill. 241; Hackett v. Smelsley, 77 Ill. 109; McCann v. Roach, 81 Ill. 213.

² Roth v. Eppy, 80 Ill. 283.

³ Emory v. Addis, 71 Ill. 273; Hackett v. Smelsley, 77 Ill. 109. See O'Leary v. Frisbey, 17 Ill. App. 553. If some defendants by sales have produced the habit of drinking and others by sales the particular intoxication which resulted in death, only the latter can be held by the widow. Tetzner v. Naughton, 12 Ill. App. 148.

⁴ Emory v. Addis, 71 Ill. 273.

⁵ Hackett v. Smelsley, 77 Ill. 109.

⁶ Hackett v. Smelsley, 77 Ill. 109.

To permit recovery for death she must show a sale or gift of the liquor, which wholly, or in part, caused the intoxication; death caused by the intoxication; injury from the death to

her means of support. Flynn v. Fogarty, 106 Ill. 263. A death resulting from an assault committed upon the husband for abusive language used by him while intoxicated, is not to be referred to the sale of the liquor as the cause. Shugart v. Egan, 83 Ill. 56. A fall suffered by a wife while following her intoxicated husband to see where he got liquor, is not the natural and proximate result of the sale. Johnson v. Drummond, 16 Ill. App. 641. But a person shot by a drunken man because of the intoxication, may recover of the seller. King v. Haley, 86 Ill. 106. Where one is killed while drunk by a train, the death cannot be said not to be a proximate result of the sale when he had to cross tracks to reach his home in going from the saloon. Schroder v. Crawford, 94 Ill. 357.

⁷ Brannan v. Adams, 76 Ill. 331.

⁸ Confrey v. Stark, 73 Ill. 187.

⁹ Brannan v. Adams, 76 Ill. 331.

¹⁰ Robinson v. Randall, 82 Ill. 531.

In this case it is held that the mere

Indians. "Any person or persons who shall, by the sale of intoxicating liquor, with or without permit, cause the intoxication, in whole or in part, of any other person, shall be liable for and be compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, for every day he or she is so cared for, which sum may be recovered in an action of debt before any court having competent jurisdiction.¹

"In addition to the remedy and right of action provided for in section eight of this act, 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 name, severally or jointly, against any person or persons who shall, by selling, bartering or giving away intoxicating liquors, have caused the intoxication, in whole or in part, of such person; and any person or persons owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquor is to be sold therein, or having leased the same for other purposes, shall knowingly permit therein the sale of intoxicating liquor, or who having been informed that intoxicating liquor is sold therein that has caused, in whole or in part, the intoxication of any person, who shall not immediately, after being so informed, take legal steps, in good faith, to *dispossess said tenant or lessee, shall be liable jointly [*246] with the person selling, bartering, or giving away intoxicating liquor as aforesaid, to any person or persons injured, for all damages, and for exemplary damages: *Provided, however,* that execution on any such judgment shall first be levied on the property of the person selling, bartering or giving away such liquor; and in the event of a failure or insolvency of such property to satisfy the judgment, then on the property of the other defendants. A married woman shall have the same rights to bring suit and to control the same, and the amount received as a

fact that one has a prejudice against persons engaged in the sale of intoxicating liquors does not disqualify him from sitting as a juror, but if he will not give the same weight to the

testimony of one so engaged that he would to persons engaged in other business, he is disqualified.

¹ General Laws, 1873, p. 154, § 8.

femme sole, and all damages received 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. 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, bartering, or giving away shall take place. All suits for damages under this act may be by any appropriate action in any of the Courts of this State having competent jurisdiction. All judgments recovered under the provisions of this act may be enforced without any relief or benefit from the valuation or appraisement laws.”¹

Under this provision a wife bringing suit must establish the following facts: 1. The intoxication of the husband, habitual or otherwise. 2. That she has been injured in person or property, or means of support, in consequence of such intoxication. 3. That the intoxication from which the injury resulted was caused, in whole or in part, by the selling, bartering, or giving of intoxicating liquors to her husband by the defendant.² Each person who, by selling, bartering, or giving intoxicating liquors, [*247] *contributed in part to the intoxication causing the injury complained of, is liable to the full extent of the injury, and all such persons may be joined, or one may be sued.³ And a clerk or salesman who sells liquor is a joint wrong-doer with his principal, and may be joined in an action with him.⁴ A wife sufficiently avers her injury by alleging that her husband was intoxicated by liquor purchased of the defendant, and thereby neglected his work and squandered his money, and damaged

¹ General Laws, 1873, p. 155, § 12. This act was repealed in 1875, and a new act substituted which required a bond of all dealers in liquors, to be given to the State and filed with the county auditor, and contained the following provision: “Every person who shall sell, barter, or give away any intoxicating liquors in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond filed in the auditor’s office, as required by section four of this act, to any person who shall

sustain any injury or damage to their person or property, or means of support, on account of the use of such intoxicating liquors so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction.” General Laws, Special Session, 1875, p. 59, § 20. No decisions are reported under this provision.

² Fountain v. Draper, 49 Ind. 441.

³ Fountain v. Draper, 49 Ind. 441.

⁴ Barnaby v. Wood, 50 Ind. 405; English v. Beard, 51 Ind. 489.

the plaintiff in her means of support.¹ One who was prevented from following his usual occupation by being struck, beaten, and wounded by an intoxicated person, was held entitled to a remedy against the liquor-seller under this statute, and was not required to join the intoxicated person as co-defendant.² But where an intoxicated person, while in that condition, received an injury which he would not have received if sober, and which resulted in his death, the intoxication, it was held, was only the remote cause of the death, and therefore an action could not be sustained by his widow under this statute.³ Under section eight, above quoted, the plaintiff was entitled to recover for taking care of the intoxicated person only for the time he remained intoxicated.⁴

When the wife sues, her anxiety of mind, mortification, sorrow and loss of her husband's society cannot enter into the measure of damages she may recover; and if the sale of liquor to the husband was an illegal act, exemplary damages cannot be awarded, as that would be in effect to expose the seller to double punishment.⁵

This legislation is constitutional,⁶ and it applies to those licensed to sell intoxicating liquors as well as to others.⁷ It is not necessary, when the wife sues for an injury in her person and means of support, that she should unite her husband with her as plaintiff.⁸

Iowa. "Any person who shall, by the manufacture [*248] or sale of intoxicating liquors, contrary to the provisions of this chapter, 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 one dollar per day in

¹ *Barnaby v. Wood*, 50 Ind. 405.
See *Schlosser v. State*, 55 Ind. 82.

² *English v. Beard*, 51 Ind. 489.
The liquor seller is liable to the owner of a horse borrowed by the buyer of the liquor for injury to it due to the buyer's inability to drive after being placed in the vehicle by the seller.
Dunlap v. Wagner, 85 Ind. 529.

³ *Krach v. Heilman*, 53 Ind. 517;
Collier v. Early, 54 Ind. 559; *Backus v. Dant*, 55 Ind. 181.

⁴ *Krach v. Hellman*, 53 Ind. 517.
Proof that beer was sold, without showing what kind of beer, or that it was intoxicating, does not show an unlawful sale. *Schlosser v. State*, 55 Ind. 82.

⁵ *Körner v. Oberly*, 56 Ind. 284;
Schafer v. Smith, 63 Ind. 236.

⁶ *Wilkerson v. Rust*, 57 Ind. 172,
citing the preceding cases.

⁷ *Wilkerson v. Rust*, 57 Ind. 172.

⁸ *Mitchell v. Ratts*, 57 Ind. 259.

addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in a civil action before any court having jurisdiction thereof." ¹

"Every 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 intoxication, habitual or otherwise, of any person, shall have a right of action, in his or her own name, against any person who shall, by selling intoxicating liquors, cause the intoxication of such person, for all damages actually sustained, as well as exemplary damages; and a married woman shall have the same right to bring suit, prosecute and control the same, and the amount recovered, as if a single woman; and all damages recovered by a minor under this section shall be paid either to such minor or his parent, guardian, or next friend, as the court shall direct, and all suits for damages under this section shall be by civil action in any court having jurisdiction thereof." ²

The words "any person who shall, by selling," etc., in a previous statute, giving a similar right, were held to embrace any person making the sale, whether the owner or the son, clerk or servant of the owner. ³ A joint action will not lie against several persons whose places of business are distinct, who make separate sales of liquor to the same person, at least where it does not appear that such sales caused a single act of intoxication. ⁴ It is not enough that their sales contributed to a general besotted condition. ⁵ The wife suing cannot recover, unless she shows an actual injury. ⁶ And where she sues for an injury to her means of support by the sale of intoxicating liquors to her husband, the question what circumstances will warrant exemplary

¹ Code of 1873, p. 288, § 1556. The chapter is the Prohibitory Liquor Law, so called.

² Ibid. § 1557.

³ State v. Stricker, 33 Iowa, 395; Worley v. Spurgeon, 38 Iowa, 465.

⁴ La France v. Krayner, 42 Iowa, 143. Each one who contributes to the intoxication is liable only for the damage caused by his own act. Richmond v. Shickler, 57 Ia. 486; Flint v.

Gauer, 66 Ia. 696; Higgins v. Kavanaugh, 52 Ia. 368.

⁵ Hitchner v. Ehlers, 44 Iowa, 40.

⁶ Calloway v. Laydon, 47 Ia. 456. Evidence of abusive language and conduct is inadmissible unless it has affected the woman's health. Welch v. Jugenheimer, 56 Ia. 11. But mental suffering if the result of injury to the person may be compensated. Ward v. Thompson, 48 Ia. 588.

damages *is for the jury, and the court should not instruct [*249] the jury that certain facts should or should not aggravate the damages.¹

Kansas. "Every person who shall, by the sale, barter or gift of intoxicating liquors, cause the intoxication of any other person, such person or persons 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 five dollars per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication; which sum may be recovered by a civil action before any court having jurisdiction.

"Every 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 intoxication, habitual or otherwise, of any person, such wife, child, parent, guardian, employer or other person shall have a right of action in his or her own name against any person who shall, by selling, bartering or giving intoxicating liquors, have caused the intoxication of such person, for all damages actually sustained, as well as exemplary damages; and a married woman shall have the right to bring suits, prosecute and control the same and the amount

¹ *Goodenough v. McGrew*, 44 Iowa, 670. But later it has been held that the plaintiff has a right to such damages in every case where there has been a willful violation of statute which has occasioned injury. *Fox Wunderlich*, 64 Ia. 187. See *Weitz v. Ewen*, 50 Ia. 34; *Ward v. Thompson*, 48 Ia. 588. Under another statute providing a forfeiture to the school fund by any person who should give or sell intoxicating liquors to an intoxicated person, it was held not necessary to prove that defendant knew the person was intoxicated. *Church v. Higham*, 44 Iowa, 482. Wine is "intoxicating liquor." *Worley v. Spurgeon*, 38 Iowa, 465. If the wife voluntarily contributes to the intoxication she cannot recover.

Huff v. Aultman, 69 Ia. 71. But she may if she buys from compulsion or to keep husband at home. *Ward v. Thompson*, 48 Ia. 588. Or if she did not assent to the sale causing the particular intoxication from which injury ensued. *Rafferty v. Buckman*, 46 Ia. 195. Plaintiff need not prove her case beyond a reasonable doubt. *Welch v. Jugenheimer*, 56 Ia. 11. To hold the owner liable it was held that it must appear that he knew and consented to the sale to the person in question. *Meyers v. Kirk*, 57 Ia. 421, but the consent may be inferred from circumstances. *Loan v. Etzel*, 62 Ia. 429. But under the present act mere knowledge of the use of the building is enough. *Judge v. Flournoy*, 37 N. W. Rep. 130.

recovered, the same as if unmarried; and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parents, guardian or next friend, as the court shall direct; and all suits for damages, under this act, shall be by civil action in any of the courts of this State having jurisdiction thereof.

“The giving away of intoxicating liquors, or other shifts or device to evade the provisions of this act, shall be deemed and held to be an unlawful selling within the provisions of this act.”¹

Maine. The Prohibitory Liquor Law, so called, provides that if any person not authorized as thereby provided [*250] “shall sell any *intoxicating liquors to any person, he shall be liable for all the injuries which such person may commit while in a state of intoxication resulting therefrom, in an action on the case in favor of the person injured.”²

Massachusetts. “Every husband, wife, child, parent, guardian, employer, or other person, who is injured in person, property, or means of support, by an intoxicated person, or in consequence of 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, by selling or giving intoxicating liquor, have caused, in whole or in part, such intoxication; any person or persons owning, renting, leasing, or per-

¹ General Statutes, 1868, p. 399, §§ 9, 10, and 11. Laws of 1881, ch. 123, § 15. While each child has a right of action, the children cannot bring a joint action. *Durein v. Pontious*, 34 Kan. 353. A seller is liable who directly contributes to the intoxication though others have caused it in part. *Werner v. Edmeston*, 24 Kan. 147; *Jockers v. Borgman*, 29 Kan. 109. The wife is not barred because she signed a petition to allow defendant to sell. *Id.* Exemplary damages are not to be given unless the conduct of the seller has been wanton, reckless or willful. But it is wanton if a sale is made after the wife, finding the hus-

band drunk in a saloon, has notified the keeper to sell no more to him. *Id.*

² Rev. Stat. 1871, p. 304, § 32. In Rev. Stat. Me. 1883 Ch. 27 § 49, are provisions in the main like those in § 21 of Mass. Act printed above. There can be no exemplary damages without actual damages. *Gilmore v. Mathews*, 67 Me. 517. The owner who knowingly has a building in which liquors are kept for sale is liable. The cause of action is the causing or contributing to intoxication. *McGee v. McCann*, 69 Me. 79. Parents cannot join in an action for death of son caused by intoxication. *Id.*

mitting the occupation of any building or premises, and having knowledge that intoxicating liquor is to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquor, shall, if any such liquor sold or given therein causes in whole or in part, the intoxication, of a person, be liable, severally or jointly with the person or persons selling or giving intoxicating liquor as aforesaid, for all damages sustained; and the same may be recovered in an action of tort: *Provided*, that no lessor of real estate shall be liable for such damages if the occupant holds a license for the sale of such liquor: and provided, further, that no owner or lessor of any building or premises held under lease, on the 13th day of April, in the year 1879, shall be liable under the provisions of this section for any damages resulting from the lawful sale or giving away of spirits or intoxicating liquor on said premises during the term of said lease. A married woman may bring such action in her own name, and all damages recovered by her shall enure to her separate use; and all damages recovered by a minor shall be paid over to such minor, or to such person in trust for him, and on such terms, as the court may direct. In case of the death of either party the action and right of action shall survive to or against his executor or administrator. The party injured, or his or her legal representative may bring either a joint action against the person intoxicated and the person or persons who furnished the liquor, or a separate action against either.

“Whoever, by himself or his agent or servant, shall sell or give intoxicating liquor to any minor, or allows a minor to loiter upon the premises where such sales are made, shall forfeit one hundred dollars for each offense, to be recovered by the parent or guardian of such minor, in an action of tort.

“The husband, wife, parent, child, guardian or employer of any person who has or may hereafter have the habit of drinking spirituous or intoxicating liquor to excess, may give notice in writing, signed by him or her, to any person requesting him not to sell or deliver spirituous or intoxicating liquor to the person having such habit. If the person so notified at any time, within twelve months thereafter, sells or delivers any such liquor to the person having such habit, or permits such person to loiter on his premises, the person giving the notice may, in an action of tort, recover of the person notified such sum not less than one

hundred nor more than five hundred dollars, as may be assessed as damages: *Provided*, the employer giving said notice shall be injured in his person or property. A married woman may bring such action in her own name, and all damages recovered by her shall inure to her separate use. In case of the death of either party, the action and right of action shall survive to or against his executor or administrator."¹

[*251] *Michigan. "Every wife, child, parent, guardian, husband, or other person who shall be injured in person or property or means of support by any intoxicated person, or by reason of the intoxication of any person, or by the reason of the selling, giving, or furnishing any spirituous, intoxicating, fermented or malt liquors to any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating or malt liquor, have caused or contributed to the intoxication of such person or persons, or who have caused or contributed to such injury; and the principal and sureties to the bond hereinafter mentioned, shall be liable, severally and jointly, with the person or persons so selling, giving, or furnishing any spirituous, intoxicating, or malt liquors as aforesaid; and in any such action provided for in this section the

¹ Pub. St. Mass. Ch. 100, § 21, 24, 25. A subsequent section provides that "the terms intoxicating liquor or liquors, in this act shall be construed to include ale, porter, strong beer, lager beer, cider, and all wines, as well as distilled spirits."

A dealer who has been requested by a wife not to sell to her husband who drinks to excess, is liable for his servant's sale to such husband although the servant negligently disobeys orders in making such sale. *George v. Gobey*, 128 Mass. 289. What is a sufficient notice. *Kennedy v. Saunders*, 142 Mass. 9. A husband may maintain an action for injury to his means of support by selling his wife liquor. *Moran v. Goodwin*, 130 Mass. 158. If a defendant has caused the intoxication in whole or in part, he is liable for the whole damage. There is no

apportionment of damage. *Bryant v. Tidgewell*, 133 Mass. 86. But no recovery can be had for intoxication caused by a habit to the formation of which a defendant has contributed, unless he caused the particular intoxication complained of. *Id.* There is nothing in the act giving a right to recover for death due to intoxication. *Barrett v. Dolan*, 130 Mass. 366.

A dealer may be liable for selling to a minor, giving to him and allowing him to loiter on the premises, though all three violations were part of the same transaction. The mother may bring an action in such case in the absence of proof that the minor's father is living. *McNeil v. Collinson*, 130 Mass. 167. As to the liability of surety on dealer's bond, see *Day v. Frauk*, 127 Mass. 497.

plaintiff shall have a right to recover actual and exemplary damages. And in every action by any wife, husband, parent, or child, general reputation of the relation of husband and wife, parent and child, shall be *prima facie* evidence of such relation; and the amount recovered by every wife or child shall be his or her sole and separate property."¹ The previous statute, repealed in 1875, was somewhat less comprehensive. It provided "that every wife, child, parent, guardian, husband, or other person, who shall be injured in property, means of support, or otherwise, by any intoxicated person, or by reason of the intoxication of any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating liquor or otherwise, have caused or contributed to the intoxication of such person or persons; and in any such action the plaintiff shall have a right to recover actual and exemplary damages."²

*Under the repealed statute it was held that one was not [*252] liable for the consequences of an unauthorized appropriation of his liquors by another without his knowledge. Nor should he be charged with exemplary damages, unless his conduct was willful, wanton, reckless, or otherwise deserving of punishment beyond what the requirement of mere compensation would impose. But it is no excuse for him that the sale or gift was by his servants employed in his business, and in disobedience of his orders.³ The statute contemplates the recovery of damages to the extent of the injury in every case, and of exemplary damages where they

¹ General Laws, 1875, p. 284. § 3, as amended; General Laws, 1877, p. 213; 1883, p. 215. The bond mentioned is one which every liquor dealer is required to give, the condition of which is not to sell or deliver liquors to any minor, habitual drunkard, or person in the habit of becoming intoxicated, or to any person whose husband, wife, parent, child, guardian, or employer shall notify him that he is in the habit of drinking to excess, etc.

² General Laws of 1871, p. 363. This was an amendment to the Prohibitory Liquor Law, so called. Comp.

L. 1871 Ch. 79. The same section declared all payments for liquors sold in violation of law should be "considered as having been received without consideration, and against law and equity, and any money or other property paid therefor may be recovered back by the person paying the same, his wife, or any of his children, or his parent, guardian, husband, or employer." See *Hemmens v. Bentley*, 32 Mich. 89.

³ *Kreiter v. Nichols*, 28 Mich. 496. So under act of 1875. *Kehrig v. Peters*, 41 Mich. 475. See *Smith v. Reynolds*, 8 Hun, 128.

are appropriate; but there can be no recovery unless there be some injury. The right of action does not spring from the relationship alone, and in the absence of actual damage to the complaining party. If liquors are sold to one previously intemperate, and not supporting his wife, the wife suing is not entitled to recover as for the loss of the sober, intelligent society of the husband and of means of support; the liability must be measured by the effects produced upon the husband and wife as they were, and not as they might have been.¹

Missouri. The statutes require of every dram-shop keeper a bond, and provide that if he shall "sell, give away, or otherwise dispose of, or suffer the same to be done about his premises, any intoxicating liquors, in any quantity, to any minor, without the permission of the parent, master or guardian of such minor first had and obtained," he shall forfeit and pay to such parent, master, or guardian, for every such offense, fifty dollars, to be recovered by civil action, or in the name of the county on the bond.²

Nebraska. "The person so licensed [to sell intoxicating liquors] shall pay all damages that the community or [*253] individuals *may sustain in consequence of such traffic; he shall support all paupers, widows and orphans, and the expenses of all civil and criminal prosecutions growing out of or justly attributable to his retail traffic in intoxicating drinks; said damages and expenses to be recovered in any court of competent jurisdiction by any civil action on the bond named and required in section five hundred and seventy-two, a copy of

Ganssly v. Perkins, 30 Mich. 492. The wife may recover for her mental anguish and exclusion from society. *Friend v. Dunks*, 37 Mich. 25. But not exemplary damages, where it does not appear that seller knew the buyer had a family. *Kehrig v. Peters*, 41 Mich. 475; *Steele v. Thompson*, 42 Mich. 594. She cannot recover if she has caused or encouraged sale to her husband. *Rosecrants v. Shoemaker*, 60 Mich. 4. There can be no apportionment of liability among sev-

eral when all their sales contribute to a death. *Steele v. Thompson*, 42 Mich. 594. The "other person" in the statute does not include the user of the liquor where he has had money stolen from him while drunk. *Brooks v. Cook*, 44 Mich. 617. But does include one not a parent injured by collision with a wagon driven by a drunken minor. *Flower v. Witkovsky*, 37 N. W. Rep. 364 (Mich.)

² General Statutes, 1865, p. 421, § 20.

which, properly authenticated, shall be taken in evidence in any court of justice in this State; and it shall be the duty of the county clerk to deliver, on demand, such copy to any person who may claim to be injured by such traffic.

"It shall be lawful for any married woman, or other person at her request, to institute and maintain, in her own name, a suit on any such bond for all damages sustained by herself and children on account of such traffic, and the money when collected shall be paid over for the use of herself and children.

"On the trial of any suit under the provisions hereof the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action, to prove that the defendant or defendants sold or gave liquor to the person so intoxicated, or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received; and in an action for damages brought by a married woman, or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification."¹

New Hampshire. "If the husband, wife, parent, child, brother, sister, or other near relative, guardian, or employer of any person who has the habit of drinking spirituous liquors to excess, shall give notice in writing, by him or her signed, to any

¹Nebr. Comp. Laws 1885, Ch. 50, §§ 15, 16, 18. Damages may be recovered when death has ensued. *Roose v. Perkins*, 9 Neb. 304. Not necessary that the liquor should have been all that was sold on the day of the death. *Id.* Death need not have been foreseen as a result of the sale. Here it occurred in a quarrel. *McClay v. Worrall*, 18 Neb. 44. A pauper supported by her son may recover for sale which caused the son's death. *Id.* The widow and children may sue jointly if they form a family. *Roose v. Perkins*, 9 Neb. 304, and all who furnish are liable, *Id.* and may

be joined as defendants. *Kerkow v. Bauer*, 15 Neb. 150. Wife may not recover for injury to her feelings. *Elshire v. Schuyler*, 15 Neb. 561, but may for her own money squandered and also damages for loss of support. *Greenlee v. Schoenheit*, 37 N. W. Rep. 600. On measure of damages, see *Warrick v. Rounds*, 17 Neb. 411. The drinker may recover for damage to himself. *Buckmaster v. McElroy*, 31 N. W. Rep. 76 (Neb.) The word "beer" denotes an intoxicating liquor within the meaning of the statute. *Kerkow v. Bauer*, 15 Neb. 150.

person not to furnish any spirituous liquor to the person who has such habit; if the person so notified shall furnish any spirituous liquor, for a consideration or otherwise, to the person who has such habit, at any time within one year after such notice [*254] given, *the person giving such notice may, in an action of tort brought by him or her, recover of the person so notified any sum not less than fifty dollars nor more than five hundred dollars, which may be assessed by the jury as damages; and any married woman may bring such action in her own name, and recover such damages to her own use.¹

“Whenever any person in a state of intoxication shall commit any injury upon the person or property of any other individual, any person, who by himself, his clerk or servant, shall have unlawfully sold or furnished any part of the liquor causing such intoxication, shall be liable to the party injured for all damage occasioned by the injury so done, to be recovered in the same form of action as such intoxicated person would be liable to, and both such parties may be joined in the same action; and in case of the death or disability of any person, either from the injury received as herein specified, or in consequence of intoxication, from the use of liquor unlawfully furnished as aforesaid, any person who shall be in any manner dependent on such injured person for means of support, or any party on whom such injured person may be dependent, may recover from the person unlawfully selling or furnishing any such liquor as aforesaid, all damage or loss sustained in consequence of such injury, to be recovered in an action on the case; and any married woman may bring such action in her own name, and recover such damages to her own use.”²

Under the act of 1870, above given, trespass for assault and battery was maintained against four persons jointly, who separately sold liquors in violation of law to the party committing the assault.³ The act does not give to one upon whom a person becomes dependent in consequence of intoxication produced by liquor unlawfully furnished, and who was not previously dependent on such party, a right of action against the person so unlawfully furnishing the liquor for the damages resulting from such intoxication.⁴ That portion of the act which gives a remedy

¹ Rev. Stat., 1867, p. 210, § 22.

² Laws of 1870, p. 403.

³ Bodge v. Hughes, 53 N. H. 614.

⁴ Hollis v. Davis, 56 N. H. 74.

where death resulted is constitutional, and for the death of the husband his widow, who was dependent upon him for her support, may bring suit.¹

***New York.** "Every husband, wife, child, parent, [*255] 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 name, against any person or persons who shall, by selling or giving away intoxicating liquors, cause the intoxication, in whole or in part, of such person or persons, and any person or persons owning or renting or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, 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 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."²

This act is constitutional, and applies as well to those who sell with license as those who sell without it.³ As to what makes out a cause of action under it, see cases cited in the margin.⁴ It is no defense that the liquor was sold by defendant's bar-tender

Bedore v. Newton, 54 N. H. 117. The husband may be "such injured person" upon whom the wife was dependent. *Squires v. Young*, 58 N. H. 192.

¹ Laws, 1873, Ch. 646, § 1.

² *Baker v. Pope*, 2 Hun, 556; *Quain v. Russell*, 12 Hun, 376. The plaintiff must show some damage to means of support, but both direct and consequential damages are recoverable. *Volans v. Owen*, 74 N. Y. 526. The damage need not be the natural, reasonable, or probable consequence of the sale. It is enough that while intoxicated, acts, though criminal,

were done by which plaintiff's means of support have been affected. *Ncu v. McKechnie*, 95 N. Y. 632. So, when a man, while drunk killed another, and was sent to prison, the wife was allowed to recover from the seller. *Beers v. Walhizer*, 43 Hun, 254. In its application to owners of premises the act is constitutional. *Bertholf v. O'Reilley*, 74 N. Y. 509; *Franklin v. Schermerhorn*, 8 Hun, 112.

⁴ *Quain v. Russell*, 8 Hun, 319; *S. C.* 12 Hun, 376; *Bertholf v. O'Reilley*, 8 Hun, 16; 74 N. Y. 500; and cases in preceding note.

without his knowledge and against his instructions.¹ When the owner of the building is sued, there must be clear and satisfactory proof establishing the permission to occupy with knowledge that liquors were to be sold therein.² An action can be sustained under it for the the death of the intoxicated person, if the death was a result necessarily following and attributable to the intoxication.³ A joint action will not lie against two or more persons who separately, at different times and places, have sold liquor to the same person, though the several sales contributed to the intoxication which produced the injury.⁴

[*256] *North Carolina. "The father, or if he be dead, the mother, guardian or employer of any minor to whom sale or gifts shall be made in violation of this act, shall have a right of action in a civil suit against the person or persons so offending by such sales or gifts; and upon proof of any such illicit sales or gifts, shall recover from such party or parties so offending such

¹ Smith v. Reynolds, Hun, 128. See Kreiter v. Nichols, 28 Mich. 496.

² Mead v. Stratton, 8 Hun, 148; 87 N. Y. 493, where a married woman was held liable though her husband kept the bar, she knowing the business was carried on. The owner and the tenant may be joined in the suit. Bertholf v. O'Reilly, 8 Hun, 16; Jackson v. Brookins, 5 Hun, 530.

³ Mead v. Stratton, 87 N. Y. 493. See Jackson v. Brookins, 5 Hun, 530.

⁴ Jackson v. Brookins, 5 Hun, 530; Morenus v. Crawford, 15 Hun, 45. In Hayes v. Phelau, 4 Hun, 773, it is said that the statute should receive a strict construction, and that a right of action only exists against the vendors, &c., of the liquor when it also lies against the intoxicated person. But this is denied in Quain v. Russell, 8 Hun, 319. Whether a knowledge of the habits of the husband would warrant the giving of exemplary damages, *quere*. Dubois v. Miller, 5 Hun, 332. To hold the owner of the building for exemplary damages, there

must be bad motive, or proof of aggravating circumstances with which he is connected. Rawlins v. Vidvard, 84 Hun, 205. Fact of selling without a license for a long time may be shown as affecting such damages. Neu v. McKechnie, 95 N. Y. 637. In Franklin v. Schermerhorn, 8 Hun, 112, it is held that as each member of the family may sue, one who sues alone can only recover his proportion of the injury. The wife cannot sue if intoxication is produced by liquor procured and furnished by her. Elliott v. Barry, 84 Hun, 129. No action will lie at suit of the father in case of incapacitating of adult son unless he shows that he has been obliged to support the son and so has been injured in his means of support, or that he has lost a support afforded him by the son. Stevens v. Cheney, 36 Hun, 1. No action will lie in N. Y. for damage done in Vt. by reason of intoxication produced by liquor sold in N. Y. Goodwin v. Young, 34 Hun, 252.

exemplary damages as a jury may assess: *Provided*, such assessment shall be not less than twenty-five dollars." ¹

Ohio. "That 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, such wife, child, parent, guardian, employer or other 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 the owner of, lessee or person or persons renting or leasing any building or premises, having knowledge that intoxicating liquors are to be sold therein in violation of law, or having leased the same for other purposes, shall knowingly permit intoxicating liquors to be sold in such building or premises that have caused the intoxication, in whole or in part, of such person or persons, shall be liable severally or jointly, with the person or persons selling or giving intoxicating liquors as aforesaid, for all damages sustained, as well as exemplary damages; and a married woman shall have the same right to bring suits and control the same, and the amount recovered, as a *femme 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 *li- [*257] quors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon premises where such unlawful sale or giving away shall take place; and all suits for damages under this act shall be by a civil action in any of the courts of this State having jurisdiction thereof: *Provided*, that such husband, wife, child, parent, guardian or other interested person liable to be so injured by any sale of intoxicating liquors to any person or persons aforesaid, shall desire to prevent the sale of intoxicating liquors to the same, shall give notice either in writing or verbally, before a witness or witnesses, to the person or persons so selling or giving the intoxicating liquors, or to the owner or lessor of the premises wherein such intoxicating liquors are given or sold, or shall file with the township or corpor-

¹ Laws of 1873-74, p. 94, § 2.

ation clerk in the township, village or city wherein such intoxicating liquor may be sold, notice to all liquor-dealers not to sell to such person or persons any intoxicating liquors from and after ten days from the date of so filing such notice; and such notice or notices filed with such clerk shall be entered by the clerk of such township, city, or village in a book to be kept for such purpose, which said book shall be open for the inspection of all persons interested; any notice entered in such book shall be erased and so obliterated as not to be legible by the officer having charge of the same, upon the demand of the person or persons by whom such notice was filed, and thereafter such notice shall cease and end; otherwise, the aforesaid injured person or persons shall not be entitled to real or exemplary damages for the alleged injuries which they may have sustained by the intoxication of any of the aforesaid persons, viz.: husband, wife, child, parent, guardian, employer, or any other person or persons, whomsoever: *Provided*, that such notice, whether served personally or filed with the clerk, as aforesaid, shall during its existence inure to the benefit of all persons interested, the same as if a notice had been served by each."¹

The cause of action under this statute is in the nature [*258] of a *tort.* One who contributes to the intoxication is presumed to have intended it, and is liable for the damages resulting, though others may by their illegal sales have contributed thereto, without his knowledge and without preconcert with him.* The wife may bring the action after the decease of

¹Laws of 1875, p. 85. This is an amendment of Laws of 1854, p. 154, § 7, which was once before amended, Laws of 1870, p. 102. The section as here given is very blind in some parts, and pains have been taken to give the exact punctuation as officially printed. The decisions here referred to were made under the law as it stood before the amendment, but in the particulars touched upon the change is not material.

²Reugler v. Lilly, 26 Ohio (N. S.) 48. It need not be proved beyond a reasonable doubt. Lyon v. Fleahman, 84 Ohio St. 151.

³Boyd v. Watt, 27 Ohio, (N. S.) 259;

Sibila v. Bahney, 34 Ohio St. 399. Sales to an habitual drunkard with knowledge of his habit which contribute to keep it up, render the sellers jointly liable to the wife, although the sellers were in no way connected in business. Rantz v. Barns, 40 Ohio St. 43. One may be liable for sales to another though a third person pays for the liquor. Sibila v. Bahney, 34 Ohio St. 399. For cases in which proceedings were taken to divest a tenant of possession of leased premises, for violation of this act by selling liquor thereon, see McGarvey v. Puckett, 27 Ohio, (N. S.) 689; Justice v. Lowe, 26 Ohio, (N. S.) 372.

the husband,¹ and may recover exemplary damages where the right to recover actual damages is established, and without proof of malice or other circumstances of special aggravation.² A sale of the wife's property by her husband is an injury to her property.³

It has been recently decided, on full deliberation, that the statute only applies where the sales which caused the injury were illegal and forbidden.⁴

Pennsylvania. "The husband, wife, parent, child or guardian of any person who has or may hereafter have the habit of drinking intoxicating liquor to excess, may give notice in writing, signed by him or her, to any person, not to sell or deliver intoxicating liquor to the person having such habit; if the person so notified, at any time within twelve months after such notice, sells or delivers any such liquor to the person having such habit, the person giving the notice may, in an action of tort, recover of the person notified any sum not less than fifty nor more than five hundred dollars, as may be assessed by the court or judge as damages. A married woman may bring such action in her own name, notwithstanding her coverture, and all damages recovered by her shall go to her separate use. In case of the death of either party, the action and right of action given by *this section, shall survive to or against his executor or administrator without limit as to damages."⁵

Rhode Island. If any person in a state of intoxication commits any injury to the person or property of another, the person who furnished him with any part of the liquor which occasioned

Schneider v. Hosier, 21 Ohio, (N. S.) 98.

¹ **Schneider v. Hosier**, 21 Ohio, (N. S.) 98. An injury to means of support is ground for the action though habitual drunkenness is not proved. **Sibila v. Bahney**, 84 Ohio St. 399. As to what constitutes an injury to means of support, see this case, and also **Mulford v. Clewell**, 21 Ohio, (N. S.) 191. As to what constitutes an injury to the person, see also this last case. For the death of the person in-

toxicated no recovery can be had. **Kirchner v. Myers**, 35 Ohio St. 85.

² **Mulford v. Clewell**, 21 Ohio, (N. S.) 191.

³ **Baker v. Beckwith**, 29 Ohio, (N. S.) 314. The decision merely construes the statute; and it could afford little or no light for the construction of the statutes of other States. Some of the other statutes certainly give this redress where the sales themselves are not forbidden.

⁴ **Laws of 1875**, p. 41, § 7.

his intoxication, if the same was furnished in violation of this act, shall be liable to the same action by the party injured as the person intoxicated would be liable to; and the party injured or his or her legal representatives, may bring either a joint action against the person intoxicated and the person who furnished the liquor, or a separate action against either."

"The husband, wife, parent, child, guardian or employer of any person who has or may hereafter have the habit of drinking intoxicating liquor to excess, may give notice in writing, signed by him or her, to any person requesting him not to sell or deliver spirituous or intoxicating liquor to the person having such habit. If the person so notified at any time within twelve months thereafter, sells or delivers any such liquor to the person having such habit, or permits such person to loiter on his premises, the person giving the notice may in an action of trespass on the case, recover of the person notified, such sum as may be assessed as damages: *Provided*, the employer giving said notice shall be injured in his person, business or property. A married woman may bring such action in her own name, and all damages recovered by her, shall inure to her separate use. In case of the death of either party, the action and right of action shall survive to or against his executor or administrator." ¹

Vermont. "Whenever any person, by reason of intoxication, shall commit or cause any injury upon the person or property of any other individual, any person who by himself, his clerk, or servant, shall have unlawfully sold or furnished any part of the liquor causing such intoxication, shall be liable to the party injured for all damage occasioned by the injury so done, to be recovered in the same form of action as such intoxicated person would be liable to; and both such parties may be joined in the same action, and in case of the death or disability of any person, either from the injury received as herein specified, or in [*260] *consequence of intoxication from the use of liquors unlawfully furnished as aforesaid, any person who shall be in any manner dependent on such injured person for means of support, or any party on whom such injured person may be dependent, may recover from the person unlawfully selling or furnishing any such liquor as aforesaid, all damage or loss sustained

¹ Laws of 1875, p. 24, §§ 32 and 34.

in consequence of such injury, in any court having jurisdiction in such cases; and coverture or infancy shall be no bar to proceedings for recovery in any case arising under this act, and no person shall be disqualified as a witness, by reason of the marriage relation in any proceeding under this act.”¹

West Virginia. “Any husband, wife, child, parent or guardian may serve upon any person engaged in the sale of intoxicating liquors a written notice not to sell or furnish such liquors to the wife, husband, child, parent or ward of the person giving such notice; and thereafter, if the person so served with such notice shall, by himself or another, sell or furnish such liquors to the person named in said notice, and by reason thereof the person to whom such liquor is sold or furnished shall become intoxicated, and, while in that condition, do damage to another, or shall, by reason of such intoxication, injure any person in his or her means of support who may have the legal right to look to him therefor, upon due proof that such liquors were sold or furnished as aforesaid, and that the person mentioned in said notice was, at the time of service thereof, in the habit of drinking to intoxication, an action may be maintained by the husband, wife, child, parent or guardian of the person mentioned in said notice, or other person injured by him as aforesaid, against the person selling or furnishing him such liquors, as well as for all such damages as the plaintiff has sustained by reason of the selling or giving of such liquors, as for exemplary damages, and if the person so proceeded against has given the bond and security hereinafter provided for, such suit may be brought and prosecuted upon such bond, against him and his sureties therein. Such suit may be brought and prosecuted by a married woman in any case where the person mentioned in such notice is her husband or infant child, and the damages recovered therein shall be her sole and separate property, and governed by the provisions of the code of *West Virginia in relation to the separate prop- [*261] erty of married women. Where such suit is brought by

¹ Act of 1869, as amended in 1874; Laws 1874, p. 53. The dependency must be legal. No action arises to a woman unlawfully living as a wife and to an illegitimate child. Good v.

Towns, 56 Vt. 410. An inn keeper who has furnished the liquor cannot recover for the drunken man's trespass. Aldrich v. Harvey, 50 Vt. 162.

a guardian, the damages recovered therein shall be the property of his ward."¹

Wisconsin. "Any person or persons, who shall be injured in person, property or means of support by or in consequence of the intoxication of any minor or habitual drunkard, shall have a right of action severally or jointly in his, her or their name against any person or persons who have been notified or requested in writing by the authorities designated in section 10 of this act, the husband, wife, parents, relatives, guardians or persons having the care or custody of such minor or habitual drunkard, not to part with liquor or other intoxicating drinks to them, and who, notwithstanding such notice and request, or shall knowingly sell or give away intoxicating liquors, thereby causing the intoxication of such minor or drunkard, and shall be liable for all damages resulting therefrom. A married woman shall have the same right to bring suit and to control the same as a *femme sole*, and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parents, guardian or next friend, as the court shall direct, and all suits for damages 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 deemed and held to be an unlawful selling within the provisions of this act."

This legislation is constitutional.² The wife who takes care of an intoxicated person may recover compensation therefor under the statute;⁴ and if she is injured in her health in so doing, and put to the expense of a physician and attendant for him, and of a physician for herself, and is obliged to employ assistance in her own business in consequence of her attendance upon her husband, these constitute elements of damage under the act.⁵ Driving the wife from the house by threats

¹ Laws of 1877, p. 144, § 16. Damages for death caused by intoxication may be recovered under the statute. *Pegram v. Stortz*, 6 S. E. Rep. 485, which see as to when exemplary damages may be given.

² Laws of 1874, p. 303, § 16 and 20.

³ *State v. Ludington*, 33 Wis. 107;

Wightman v. Devere, 33 Wis. 570. These were decisions under a previous statute, but are applicable to this.

⁴ *Wightman v. Devere*, 33 Wis. 570.

⁵ *Wightman v. Devere*, 33 Wis. 570. What should constitute exemplary damages was somewhat discussed in

and *intimidation, but without actual violence, is such [*262] physical injury as she may recover for, and damages may be added for the injury to her feelings and the indignity suffered by her.¹ Means of support will include what the husband might have earned by his labor and attention to business, and contributed to the support of the family.² It is immaterial whether the sale was made by defendant in person or by a servant.³

ACTIONS FOR CAUSING DEATH BY WRONGFUL ACT, ETC.

It has heretofore been stated, that at the common law, no civil action would lie for causing the death of a human being.⁴ By this was not meant that the act which caused the death might not, under some circumstances, give a right of action, but that it must be a right not springing from the death itself. Thus it has been shown that the master of a servant, or any one who is lawfully entitled to command the services of another, may bring action against a wrong-doer who deprives him of those services. Now, 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 common law gave a remedy for the loss, but only for the time intermediate the injury and the death. The master, parent, etc., suing might, however, recover any incidental damages he might have suffered, such as expenses for medical attendance, care and nursing up to that time; but the estimate must be confined to the pecuniary loss, and not cover mental suffering.⁵ And it has been held, in England, that where a passenger is being carried by a railway company, and is killed through a breach of the implied obligation of the company to convey carefully, his personal representative may maintain an action for the damage to his personal

this case, and also whether the wife could recover for loss of means of support if the husband did not support her before.

¹ Peterson v. Knoble, 85 Wis. 80.

² Wightman v. Devere, 33 Wis. 570.

³ Peterson v. Knoble, 85 Wis. 80.

For questions arising out of the repeal of the statute under which the

foregoing decisions were made, see Dillon v. Linder, 36 Wis. 344.

⁴ Ante, p. 15.

⁵ Osborn v. Gillett, L. R. 8 Exch. 88; Hyatt v. Adams, 16 Mich. 180; Covington, &c. R. R. Co. v. Packer, 9 Bush, 455; Sherman v. Johnson, 58 Vt. 40; Bell v. Centr. R. R. Co., 73 Ga. 520; Sullivan v. Un. Pac. R. R. Co., 1 McCrary, 301.

estate arising in his life time from medical expenses and loss occasioned by his inability to attend to business.¹ But such redress is exceedingly inadequate in any case, and where [*263] the *death is instantaneous, as well as in very many other cases, the principles which have supported recovery in the cases above mentioned can have no application, and no redress at all was possible at common law. This was a great and an admitted defect, and the British Parliament undertook to remedy it in the year 1846 by an act which is familiarly known as Lord Campbell's Act, and which has formed the model for much of the legislation in this country on the same subject.

It was provided by this important statute "That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"That every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties in such shares as the jury, by their verdict, shall direct."²

¹ Bradshaw v. Lancashire, &c. R. Co., L. R. 10 C. P., 189 (1875.)

² Stat. 9 and 10 Vic. c. 93, §§ 1 and 2. The third section provided that only one action should lie for and in respect of the same subject matter of complaint; and it limited the time for bringing this to twelve calendar months from the death. The fifth

provided that the word "person" should apply to bodies politic and corporate, that the word "parent" should include father and mother, grandfather and grandmother, and stepfather and stepmother; and the word "child" should include son and daughter, grandson and granddaughter, and stepson and step-

It is seen, on a perusal of this statute, that it gives an action *only when the deceased himself, if the injury had [*264] not resulted in his death, might have maintained one.

In other words, it continues for the benefit of the wife, husband, etc., a right of action which, at the common law, would have terminated at the death, and enlarges its scope to embrace the injury resulting from the death.¹ If, therefore, the party injured had compromised for the injury, and accepted satisfaction previous to the death, there could have been no further right of action, and consequently no suit under the statute.² It is a logical conclusion, also, that if the negligence of the person killed

daughter. By Stat. 27 and 28 Vic. c. 95, if there is no executor or administrator, the action may be brought by any of the persons for whom an executor or administrator might have brought it.

¹ Read *v. Great Eastern R. Co.*, L. R. 3 Q. B. 555; *Senior v. Ward*, 1 El. & El. 385; *McCubbin v. Hastings*, 27 La. Ann. 713; *Conner's Admr. v. Paul*, 12 Bush, 144. (In Louisiana the widow and heirs can only recover as the deceased might have recovered.) They cannot recover for the loss caused by his death. *Vredenburg v. Behan*, 33 La. Ann. 627. So in N. H., but recovery may be had for the mental suffering of the decedent, as well as the physical. *Corliss v. Worcester & C. R. R.*, 63 N. H. 404. In R. I. no action can be maintained except for an injury for which the deceased, had he survived, could have sued. No recovery can be had for the benefit of the husband where the wife was detained away from him and he was so slandered to her that she died. *Neilson v. Brown*, 13 R. I. 651. (In Illinois if after beginning an action the plaintiff dies as the result of the injury, that action does not survive to his administrator, but the latter may bring another action for the injury, which has caused the death and in this only the pecuniary loss to the

estate can be recovered. *Holton v. Daly*, 106 Ill. 131. See, also, *Ind., &c., Co. v. Stout*, 53 Ind. 143. (In Ohio it is said the administrator can bring an action for the injury under the same restrictions and on the same grounds that the party injured, if death had not ensued, might have done. *Meara's Admr. v. Holbrook*, 20 Ohio, (N. S.) 137. (It is held in Kentucky, *X* that where the death is not instantaneous, there are two causes of action, one for mental and bodily suffering before death, and the other for the loss of life; but that only one can be maintained, and that the party entitled to sue must elect between them, and that the pendency of one action would abate the other. *Conner's Admr. v. Paul*, 12 Bush, 144.

² Read *v. Great Eastern R. Co.*, L. R. 3 Q. B. 555. See, also, *Carey v. Berkshire R. R. Co.*, 1 Cush. 479; *Kearney v. Boston, &c., R. R. Co.*, 9 Cush. 103; *Bancroft v. Boston, &c., R. R. Co.*, 11 Allen, 34; *Commonwealth v. Vermont, &c., R. R. Co.*, 108 Mass. 7; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Littlewood v. Mayor &c.*, 89 N. Y. 24; *Soule v. New York, &c., R. R. Co.*, 24 Conn. 575; *Murphy v. New York, &c., R. R. Co.*, 29 Conn., 496; *Goodsell v. Hartford, &c., R. R. Co.*, 33 Conn. 51.

contributed proximately to the fatal injury, no action can be maintained on the statute, because he himself could have brought none had the injury not proved fatal.¹ So if the injury was caused by the negligence of a fellow servant, no action will lie under the statute against the master, unless the statute, by construction, appears to give it in such case.² A question has also been made in some States whether suit could be maintained where the death was instantaneous; and in Massachusetts, under a some- [*265] what nice and technical construction of *the statute, it was decided that the action would not lie in such a case.³ But probably under no existing statute would it be so held now.

¹ *Senior v. Ward*, 1 El. & El. 385, following *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. Cas. 266, and generally followed in this country. *Cordell v. New York, &c. Co.*, 75 N. Y. 330; *Corcoran v. Boston &c., Co.*, 133 Mass. 507; *Ind. &c., Co. v. Greene*, 106 Ind. 279. So whether the action is civil or criminal. *State v. Maine Centr. R. R. Co.*, 76 Me. 357. Under some statutes contributory negligence is no defense, though it may go in mitigation of damages. See *Nashville, &c., R. R. Co., v. Smith*, 6 Heisk. 174. It is not a defense in Mass. *Merrill v. Eastern R. R.*, 139 Mass. 252; *Com. v. Boston, &c., R. R. Co.*, 134 Mass. 211. If death results from an affray, fact that deceased brought it on is no defense. *Darling v. Williams*, 35 Ohio, St. 58; *Besenecker v. Sale*, 8 Mo. App. 211.

² The Iowa statute is held to require that construction. *Philo v. Ill. Cent. R. R. Co.*, 33 Iowa, 47. See *McDonald v. Eagle, &c., Co.*, 68 Ga. 839.

³ The decision was under the statute of 1842, which provided that "the action of trespass on the case for damage to the person shall hereafter survive, so that, in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or

against his executor or administrator, in the same manner as if he were living." *Kearney v. Boston, etc., R. Corp.* 9 Cush. 108. Compare *Bancroft v. Boston, &c., R. Corp.* 11 Allen, 34. The rule is still followed in that State. *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90; *Dietrich v. Northampton*, 138 Mass. 14; *Mulchey v. Washburn, &c. Co.*, 14 N. E. Rep. 106. If one survives a brief time and is conscious, more than nominal damages are recoverable. *Nourse v. Packard*, 138 Mass. 307. Otherwise if unconscious. *Tully v. Fitchburg, &c. Co.*, 134 Mass. 499. In Georgia and South Carolina and New Jersey if the death is instantaneous there can be no recovery for the death of a wife or child. *Womack v. Centr. R. R. &c. Co.*, 5 S. E. Rep. 63 (Ga.); *Edgar v. Castello*, 14 S. C. 20; *Grosso v. Del. &c. R. R. Co.*, 13 Atl. Rep. 233 (N. J.) Under the Tennessee statute a similar ruling was made. *Louisville, &c. R. R. Co. v. Burke*, 6 Coldw. 45; but this was overruled in *Nashville, &c. R. R. Co. v. Prince*, 2 Heisk. 580. And, see, *Fowlkes v. Nashville, &c. R. R. Co.*, 9 Heisk. 829. In Connecticut the court distinguish their statute from that of Massachusetts, and hold the suit maintainable in case of instantaneous death. *Murphy v. New*

But there is another class of statutes in the United States quite distinct from Lord Campbell's Act, and which give rights of action irrespective of any that the deceased himself might have had.¹ By this we mean that they give to some designated beneficiary or beneficiaries a right that only comes into existence after the death, and is not the survival, continuation, or enlargement of any pre-existing right. Thus, a Georgia statute provides that "A widow, or, if no widow, a child or children may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter case to the surviving child or children."² In the main, however, such an action must be supported on the same principles as those which govern the action under Lord Campbell's Act.

***Remedy Local.** In several States it is held that the [*266] remedy is purely local and can only be brought in the State whose statutes give it and where the killing takes place.³

York, &c. R. R. Co., 30 Conn. 184. In New York the conclusion is the same. *Brown v. Buffalo, &c., R. R. Co.*, 22 N. Y. 191. So in Texas and Iowa; *Int. &c. Co., v. Kindred*, 57 Tex. 491; *Worden v. Humeston, &c., Co.*, 33 N. W. Rep. 629, (Ia.); *Conners v. Burlington, &c., Co.*, 32 N. W. Rep. 465, (Ia.)

¹ These, however, may provide that the action shall be brought by the executor or administrator, or which is the same thing, by the personal representative. See *Hagen v. Kean*, 3 Dill. 124. A widow cannot sue under this designation. *Ibid.* For a somewhat peculiar statute, see *James v. Christy*, 18 Mo. 162.

² Code of 1873, p. 511 § 2971. The husband can bring no action under this statute for the homicide of his wife. *Georgia, &c., Co., v. Wynn*, 42 Geo. 331. But a child may for the death of the mother. *Atlanta, &c., R. R. Co., v. Venable*, 65 Ga. 55.

Whatever would have defeated the husband's action will defeat the widow's. *Atlanta, &c., R. R. Co., v. Webb*, 61 Ga. 586; *Berry v. Northeastern R. R. Co.*, 72 Ga. 137. In some of the States the proceeding against railroad companies causing death by negligence is by indictment, and a fine is imposed on conviction; but it is for the benefit of the widow, children, or heirs and the principles applicable in civil cases apply. *State v. Railroad*, 52 N. H. 523.

³ *Woodward v. Mich., &c., R. R. Co.*, 10 Ohio St. 121; *Needham v. Grand Trunk, &c., Co.*, 38 Vt. 294; *McCarthy v. Chicago, &c., Co.*, 18 Kan. 46; *State v. Pittsburgh, &c., Co.*, 45 Md. 41; *Armstrong v. Beadle*, 5 Sawy. 484; *Chicago, &c., Co., v. Schroeder*, 18 Ill. App. 328. See *Hamilton v. Hannibal &c., Co.*, 10 Pac. Rep. 57 (Kan.). A foreign administrator cannot sue under the statute. *Ill. Central, &c., Co., v.*

In Massachusetts the same conclusion has been reached, the court regarding the recovery which the statute authorizes as in the nature of a statute penalty, which, though sued for by the administrator, is to be distributed not as a part of the estate generally, but according to a special statutory rule.¹

Where a suit was brought in Georgia for the killing of the plaintiff's husband in Alabama, it was decided that the suit could not be maintained because by the statute of Alabama the right of action is given to the personal representative.² But if the company doing the injury in Alabama is a Georgia corporation and the suit is brought by a Georgia administrator, the action will lie.³ In New York it was at one time held that the remedy was local,⁴ but the rule now is 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 Such is the rule in Iowa,⁶ Mississippi,⁷ Indiana,⁸ and Pennsylvania,⁹ and the Supreme Court of the

Cragin, 71 Ill. 177; *Limekiller v. Hannibal, &c., Co.*, 33 Kan. 83. See *Hulbert v. Topeka*, 34 Fed. Rep. 510.

¹ *Richardson v. New York Cent. R. Co.*, 98 Mass. 85. So far as this case treats the statute as in its nature penal, it is opposed to *Beach v. Bay State Co.*, 30 Barb. 433, and *Lamphear v. Buckingham*, 33 Conn. 237. In a late case a Massachusetts administrator was denied a recovery under the statute as to survival of action where the injury occurred in Connecticut, as by the laws of that State, though there was no survival, a penal action lay upon the same state of facts. *Davis v. New York, &c., Co.*, 143 Mass. 301.

² *Selma R. R. Co. v. Lacey*, 49 Geo. 106.

³ *Central R. R., &c., Co. v. Swint*, 73 Ga. 651.

⁴ *Whitford v. Panama R. R. Co.*, 23 N. Y. 465. It makes no difference, as was decided in this case, that the defendant is a New York corporation. See *Mahler v. Transportation Co.*, 35 N. Y. 352; *Campbell v. Rogers*, 2 Handy, (Ohio,) 110.

⁵ *Leonard v. Columbia, &c., Co.*, 84 N. Y. 48. An action lies for causing death of a New York citizen on the high seas on a vessel owned by a citizen of that State and registered therein. *McDonald v. Mallory*, 77 N. Y. 546.

⁶ *Morris v. Chicago, &c., Co.*, 65 Ia. 727. But no recovery can be had under the statute of the State where the suit is brought. *Hyde v. Wabash, &c., Co.*, 61 Ia. 441.

⁷ *Chicago, &c., Co. v. Doyle*, 60 Miss. 977. Where a death occurs in Tennessee, and by the law of that State an administrator is to sue, a Mississippi administrator may recover in Mississippi, though if the injury had occurred there he would not have been the proper party. Ill. Cent. &c., Co., v. *Crudup*, 63 Miss. 291; *contra*, *Vawter v. Miss., &c., Co.*, 84 Mo. 679.

⁸ *Jeffersonville, &c., Co. v. Hendricks*, 26 Ind. 228; 41 Ind. 48; *Burns v. Grand Rapids, &c., Co.*, 15 N. E. Rep. 230 (Ind.).

⁹ *Knight v. West Jersey R. R. Co.*, 108 Penn. St. 250. In Texas a resident of the State has no right to recover

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; the fund recovered to be distributed according to the New Jersey law.¹

In Alabama under a statute giving an action against the county where one was killed by lynching, etc., it has been held that aliens, though resident abroad, may sue,² and it would probably be so held under any of the statutes referred to.

Who Liable. Where the action is given without any restriction as to the parties who shall be liable, it may be brought against not only natural persons, but corporations, public as well as private.³ By some statutes, however, the remedy, or perhaps *a special remedy, is given against railroad com- [*267] panies only, and of course the statute cannot be extended by construction. In Minnesota, and perhaps some other States, it may be brought against a steamboat by name to establish a liability against it.⁴ On a construction of the statutes of Maine it is held that where one is killed by the negligent operation of a railroad in the hands of a lessee, neither the railroad company nor the lessee is liable;⁵ but this seems not consistent with some decisions elsewhere.⁶

for death from an injury suffered in another jurisdiction where there is no similar statute. *Willis v. Missouri, &c., Co.*, 61 Tex. 432.

¹ *Dennick v. Railroad Co.*, 103 U. S. 11.

² *Luke v. Calhoun Co.*, 52 Ala. 115.

³ *Chicago v. Major*, 18 Ill. 349; *Chicago v. Starr*, 42 Ill. 174; *Southwestern R. R. Co. v. Paulk*, 24 Geo. 356. Such acts apply to municipalities though when passed they were not liable for injuries from their defective roads. *Merkle v. Bennington*, 58 Mich. 156. Corporations are of course responsible for the acts of their servants in these as in other cases. *McAunich v. Mississippi, &c. R. R. Co.*, 20 Iowa, 339; *Sherman v. Western Stage Co.*, 24 Iowa, 515. Under the N. Y. act

of 1847, the personal representatives of the wrong doer are not liable for the death. *Hegerich v. Keddie*, 99 N. Y. 258. Under the Texas act a sheriff is not liable for the act of his deputy in causing the death of an escaping prisoner. *Hendrix v. Walton*, 6 S. W. Rep. 749.

⁴ *Boutiller v. The Milwaukee, 8 Minn.* 97.

⁵ *State v. Consolidated, &c. Co.*, 67 Me. 479.

⁶ In *Railroad Co. v. Barron*, 5 Wall. 90, where one was killed by the negligent use by one company of the railroad track of another, the latter company was held responsible. Citing *Ohio, &c., R. R. Co. v. Dunbar*, 20 Ill. 623, and *Nelson v. Vermont, &c., R. R. Co.*, 26 Vt. 717, which were cases

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 is no estate.¹ Under many of the statutes, however, some one or more of the parties to be benefited by the recovery may sue. Thus, in Alabama, the father, or if he be dead, the mother, may bring suit where the person killed was a minor child.² Several States have similar statutes. In Iowa, it seems by construction, in endeavoring to accommodate the statute to the common law, it is held that where the parents are authorized to sue for the killing of a minor child, there may be two actions: one by a parent, to recover damages for the loss during what would have been the child's minority, and one by an administrator for subsequent damages.³ In Georgia the statute provides that [*268] "a widow, *and if no widow, a child or children, may recover for the homicide of the husband or parent;" and it is held that if the widow sues and marries pending the suit, she may proceed to judgment notwithstanding the marriage.⁴ 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.⁵ In California the rule is the same, and in

where railroad companies were held liable for injury to stock under corresponding circumstances. In Illinois, where a road is leased, lessor and lessee are both liable for the loss of cattle consequent on failure to fence the road. *Ill. Cent. R. R. Co. v. Kanouse*, 39 Ill. 272; *Toledo, &c., R. R. Co. v. Rumbold*, 40 Ill. 143. A trustee operating the road for the benefit of creditors is held liable in Connecticut. *Lamphear v. Buckingham*, 38 Conn. 237.

¹ *Hartford, &c., R. R. Co. v. Andrews*, 36 Conn. 213. The deceased was resident in Maine, but killed in Connecticut, having no property in the last named State, but administration was permitted to be taken there. See *Perry v. St. Joseph, &c., Co.*, 29 Kan. 420.

² Code, 1876, § 2899. Under the Act of 1885, the personal representa-

tive must sue. *Stewart v. Louisville &c., Co.* 4 South Rep. 373 (Ala.). In Louisiana, also, the father may sue for the loss of his minor child by wrongful act or default. *Frank v. New Orleans, &c., R. R. Co.*, 20 La. Ann. 25.

³ *Walters v. Chicago, &c., R. R. Co.*, 36 Iowa, 458. See *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Barley v. Chicago, &c., R. R. Co.*, 4 Biss. 490.

⁴ *Georgia, &c., Co., v. Garr*, 57 Geo. 277. An adult child of one who has left neither widow nor minor child cannot recover. *Mott v. Cent. R. R. &c., Co.*, 70 Geo. 680. Minor child may recover for the death of the mother. *Atlanta &c. Co., v. Venable*, 65 Geo. 55.

⁵ *David v. Southwestern R. R. Co.*, 41 Geo. 223; *Macon, &c., R. R. Co. v. Johnson*, 38 Geo. 409, 435. It seems to be required by statute in

the suit continued for the use of the children, any discussion of what would be proper compensation to the widow is wholly irrelevant and should be excluded.¹ But in Georgia where the widow brings suit and carries it to judgment in her own name, the damages which can be considered are only her own damages, and not those suffered by the children also.² One of the troublesome things connected with this action where others than the personal representative suè, is that it is difficult to provide for the distribution of the moneys recovered among the persons whom the statute intends to benefit; and in general no attempt is made to do it.³ If the widow sues, she recovers for her own

this State that the widow suing for the killing of her husband should allege a criminal prosecution therefor, or show some excuse for the failure to institute one. *Allen v. Atlanta St. R. R. Co.*, 54 Geo. 503; *Weekes v. Cottingham*, 58 Geo. 559. *Sawtell v. Western &c., R. R. Co.* 61 Geo. 567. In Alabama it is held that the common law doctrine of the merger of the civil action in the felony has no application to this statutory action. *Lankford's Admr. v. Barrett*, 29 Ala. 700.

¹ *Taylor v. W. P. R. R. Co.*, 45 Cal. 323.

² *Macon, &c., R. R. Co. v. Johnson*, 38 Geo. 409. In Pennsylvania the administrator cannot sue. *Books v. Danville*, 95 Penn. St. 158. When a minor leaves a widow his parents have no right of action. *Lehigh Iron Co. v. Rupp*, 100 Penn. St. 95. In W. Va. the husband as administrator may recover for the death of the wife. *Dimmey v. Wheeling &c., Co.*, 27 W. Va., 32. In Illinois there can be but one action which covers all damage. If there is a widow, it accrues to her; if not, to the children; if no widow or children, then to the "other person" dependent. *Beard v. Skeldon*, 113 Ill. 584. In Nebraska and Minnesota the administrator must sue. *Wilson v. Bumstead*, 12 Neb. 1;

Scheffer v. Minn. &c., Ry. Co., 32 Minn. 125. In Missouri, where if the widow fails to sue within six months, the children may, the voluntary dismissal by the widow of her suit brought within the six months does not give the children the right to sue. *McNamara v. Slavens*, 76 Mo. 329. In Tennessee the widow can dismiss the suit against the wishes of the child. *Stephens v. Railroad Co.*, 10 Lea, 448. In Mississippi the administrator may recover irrespective of the action given to the next of kin. *Vicksburg &c., Co. v. Phillips*, 64 Miss. 693. If he is the next of kin and sole distributee the whole damage may be recovered in one action. *Ill. &c., R. R. Co. v. Crudup*, 63 Miss. 291. In Texas the widow cannot recover for her own sole benefit when the mother of the deceased is alive. *Dallas &c., Co. v. Spiker*, 59 Tex. 435. Action of widow not barred by living apart from husband if she has not forfeited right to support. *Id.* 61 Tex. 427.

³ In Texas there is one action for the benefit of all and the jury divides the amount recovered among the beneficiaries. *Railroad Co. v. LeGierse*, 51 Tex. 189. Under the Wisconsin statute the widow takes the benefit to the exclusion of the children. *Schadewald v. Milw. &c., Ry. Co.*, 55 Wis. 569.

benefit, where if an administrator had sued, the recovery must have been divided with children. And where statutes permit actions to be brought by one of several who would be entitled to sue, and make no provision for distributing the recovery, it would seem that there might be question of the right to maintain two or more actions by the intended beneficiaries severally.

The Beneficiaries. Where the personal representative brings the suit, his position in respect to it and to the moneys recovered is peculiar. The cause of action is not given in favor of the estate proper.¹ If it was, the moneys would be accounted [*269] for with *other assets, and, in case of an estate otherwise insolvent, would be appropriated by creditors. But 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. Thus, under the English statute the action is to be for the benefit of the wife, husband, parent, or child; it is clear that creditors can have no share in this, but the recovery must be a special fund, to be paid over by the personal representative to the person or persons for whom the statute intends it.² It is also obvious that there might be cases in which no action could be brought by an executor or administrator, because of there being no person in existence who would be entitled to the moneys. Thus, if the action be given for the benefit of the widow and children only, and there be neither, there can be no action;³ and it seems to be necessary in some States to

¹ See *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Chicago v. Major*, 18 Ill. 349; *Waldo v. Goodsell*, 33 Conn. 432; *Haggerty v. Central R. R. Co.*, 31 N. J., 349; *Houston, &c. Ry. Co. v. Hook*, 60 Tex. 403. See *Gibbs v. Hannibal, &c. Co.*, 87 Mo. 143; *South, &c. R. R. Co. v. Sullivan*, 59 Ala. 272.

² *Chicago v. Major*, 18 Ill. 349; *Lyon's Admr. v. Cleveland, &c. R. R. Co.*, 7 Ohio, (N. S.) 336; *Andrews v. Hartford, &c. R. R. Co.*, 34 Conn. 57.

³ It seems that in Ohio, where the

action is given for the benefit of the widow and next of kin, if the action is brought for the killing of the wife, the husband is entitled as next of kin to such share as he would take in her estate under the statute of distributions; the words "next of kin" being used in the statute in this peculiar sense. *Steel v. Kurtz*, 28 Ohio, (N. S.) 191. Compare *Lucas v. N. Y. Cent. R. R. Co.*, 21 Barb. 245. If parents and child are killed at once, there can be no action. *Gibbs v. Hannibal, &c. Co.*, 82 Mo. 143. The emancipation

name in the declaration the person for whose benefit the suit is brought, and to show the relationship.¹ But where the recovery is to be distributed as the personal estate of an intestate would be, it must be assumed that kindred exist, and it need not be averred.²

***What is Wrongful Act, Neglect, or Default.** In most [*270] cases the question of the right to recover is merely a question of negligence, and is to be governed by the same principles and considerations as questions of negligence where the results were less serious.³ The reader is therefore referred to the chapter on negligent injuries for their discussion. Where the act was one of intentional violence, the question that would

of the son is not conclusive against recovery for the benefit of the next of kin. *St. Joseph, &c. Ry Co. v. Wheeler*, 10 Pac. Rep. 461 (Kan.) The fact that the children of the deceased are adults, not living with him, is not conclusive against their pecuniary interest in his life. *Lockwood v. New York, &c. Co.*, 98 N. Y. 533. Brothers and sisters of a deceased minor may reasonably expect pecuniary advantage from the continuance of the life. *Chicago, &c. Co. v. Keefe*, 114 Ill. 222. The claim need not amount to a legal right to support; reasonable expectation of pecuniary benefit is enough. *Balt., &c. R. R. Co. v. State*, 60 Md. 449. See, *Id.* 63 *Id.* 135.

¹ Where the declaration mentions the father only, the recovery must be limited to his loss, and cannot be extended by showing on the trial that there are also a mother and brothers and sisters. *Quincy Coal Co. v. Hood*, 77 Ill. 63. See *Chicago, &c. R. R. Co. v. Morris*, 26 Ill. 400. In Indiana it is sufficient to aver that there are persons who would be entitled, but they need not be named. *Jeffersonville, &c. R. R. Co. v. Hendricks*, 41 Ind. 49. And, see *Woodward v. Chicago, &c. R. R. Co.*, 23 Wis. 400; *Lu-*

cas v. N. Y. Cent. R. R. Co., 21 Barb. 245.

Where children are made the beneficiaries, illegitimate children are not included. *Dickinson v. N. E. Railway Co.*, 2 H. & C. 735. But they may be entitled as next of kin of their mother when she is the person killed. *Muhl v. Southern, &c., R. R. Co.*, 10 Ohio, (n. s.) 272. The mother of an illegitimate child cannot recover for its death. *Gibson v. Midland Ry. Co.*, 2 Ontario, 658.

² *Alabama, &c. R. R. Co. v. Waller*, 48 Ala., 459.

Where the statute makes the widow and next of kin the beneficiaries, the action may be maintained where there is a widow and no kindred, or where there is next of kin and no widow. *Oldfield v. New York, &c., R. R. Co.*, 14 N. Y. 310; *Haggerty v. Central R. R. Co.*, 31 N. J. 340; *Lyons v. Cleveland, &c., R. R. Co.*, 7 Ohio, (n. s.) 336.

³ The mere fact that a minor is killed in course of a dangerous employment will give the mother no right of action. She must show facts entitling the minor, had he lived, to recover. *Texas, &c., R. R. Co. v. Crowder*, 7 S. W. Rep. 709 (Tex).

arise if the right of recovery were disputed must be one of justification or excuse, and would be the same as in cases of trespass to the person.¹ This also, therefore, requires no special discussion here.

Proximate Cause. 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 unskillful surgical operation.²

What Damages Recoverable. It seems to have been made a question, both in England and this country, whether, if the plaintiff showed the wrong, resulting in death, but failed to prove actual damages, he was entitled to recover even the nominal damages which are supposed to flow from any technical legal wrong. In England the rule is settled that the action will not be supported for the recovery of merely nominal damages.³ The ground seems to be that no one shows himself entitled as beneficiary until he shows that personally he has suffered; in other

¹ *White v. Maxcy*, 64 Mo. 552. If it is sought to hold one as accessory to a homicide, he must be shown to have done something. His mere presence at the killing is not enough. *Gray v. McDonald*, 28 Mo. App. 477. Under the Kentucky statute, which only gives an action where the death was caused by the "willful neglect" of another, no action will lie if the killing was intentional. *Spring's Admr. v. Glenn*, 12 Bush, 172. But a carrier is liable for a wanton injury causing death inflicted on a passenger by its servant. *Winnegar v. Centr. &c., Co.*, 4 S. W. Rep. 237. Under the R. I. statute, no liability where the death ensues from a failure to act, as to put a sufficient cover on a cistern. *Bradbury v. Furlong*, 18 R. I. 15. An action will not lie for hastening death, as of a wounded man carried on the cars. *Jackson v. St. Louis, &c., Co.*, 87 Mo. 422. One

will lie for causing death of a drunkard by inducing him to drink a great quantity of liquor at one sitting. *McCue v. Klein*, 60 Tex. 169.

² *Sauter v. N. Y. Cent. &c., R. R. Co.*, 66 N. Y. 50. *Nagel v. Miss. &c., R. R. Co.* 75 Mo. 658. See on proximate cause of death. *Scheffer v. Railroad Co.*, 105 U. S. 249; *Beauchamp v. Saginaw Mining Co.*, 50 Mich. 163, and cases in Ch. III pp. *70 et seq. *supra*.

³ *Duckworth v. Johnson*, 4 H. & N. 653; *Boulter v. Webster*, 13 W. R. 289; 11 L. T., (N. S.) 598. Compare *Lyons v. Cleveland, &c., R. R. Co.*, 7 Ohio, (N. S.) 336; *Pennsylvania R. R. Co. v. Ogier*, 35 Penn. St. 60; *Quin v. Moore*, 15 N. Y. 432. In Kansas nominal damage may be recovered although the life is of no pecuniary value to the next of kin. *Atchison, &c. Co., v. Weber*, 33 Kan. 543.

words, that, as in some cases of slander, it is necessary to prove special damage, in order to convert what may be a moral wrong into a legal wrong, so here the wrongful act or default is not shown to be a tort to the person complaining of it until he traces *perceptible injurious consequences to himself. [*271] But where the statute fixes a minimum of recovery, as some of those in this country do, there would seem to be no doubt of the right of one who establishes a technical ground of action to recover this minimum sum without any specific showing of loss.¹ But in this country as well as in England, the ground of recovery must be something besides an injury to the feelings and affections, or a loss of the pleasure and comfort of the society of the person killed; there must be a loss to the claimant that is capable of being measured by a pecuniary standard.² Exemplary damages are therefore not to be recovered, unless the statute expressly, or by implication, allows them, as in some instances it does.³ But in estimating *actual dam- [*272] ages, some departure from the standards applied in

¹ *Lamphear v. Buckingham*, 33 Conn. 237. The minimum sum fixed by statute was one thousand dollars, and the court awarded it on overruling demurrer to the declaration.

² *Franklin v. Southeastern R. Co.*; 3 H. & N. 211; *Blake v. Midland R. Co.*, 18 Q. B. 93; *Pym v. Great Nor. R. Co.*, 4 Best & S. 396; *Mitchell v. N. Y. Cent., &c., R. R. Co.*, 2 Hun, 535; S. C. 5 N. Y. Sup. Ct. (T. & C.) 122; *Chicago v. Major*, 18 Ill. 349; *Chicago, &c., R. R. Co. v. Harwood*, 80 Ill. 88; *Rockford, &c., R. R. Co. v. Delaney*, 82 Ill. 198; *Brady v. Chicago*, 4 Biss. 448; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Louisville, &c., R. R. Co. v. Case's Admr.*, 9 Bush, 728; *Ohio, &c., R. R. Co. v. Tindall*, 13 Ind. 366; *Ewen v. Chicago, &c., R. R. Co.*, 88 Wis. 614; *Pennsylvania R. R. Co. v. Zebe*, 33 Penn. St. 318; *Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St. 315; *Telfer v. Northern R. R. Co.*, 30 N. J. 188; *Donaldson v. Mississippi, &c., R.*

R. Co., 18 Iowa, 280; *Mynning v. Detroit &c., R. R. Co.*, 59 Mich. 257; *Holmes v. Oreg. &c., R. R. Co.*, 6 Sawy. 263; *Galveston v. Barbour*, 62 Tex. 172. See *St. Louis &c., Co. v. Freeman*, 36 Ark. 41. The pain and suffering by the deceased are not elements of damage to be recovered by survivors. *Barron v. Illinois, &c., R. R. Co.*, 1 Biss. 412. In Scotland the jury are permitted to award a solatium for injured feelings. *Patterson v. Wallace*, 1 Macq. H. L. Cas. 748.

³ See *Myers v. San Francisco*, 42 Cal. 215, in which a judgment of five thousand dollars for the killing of a child seven years of age by the running of a fire-engine over it, was sustained as not excessive. In Kentucky punitive damages are allowed by the statute when the fatal neglect is willful. *Jacobs v. Louisville, &c., R. R. Co.*, 10 Bush, 263. See *Chiles v. Drake*, 2 Met. (Ky.) 146. As to what willful neglect is, see *Lexington v. Lewis's Admr.*, 10 Bush, 677. As to

other cases is essential, as otherwise, in some cases, no recovery could be had at all, though the statute plainly gives the action. If a parent sues for the killing of a minor child, who is yet too young to render services, it is manifest that for the time being there could be no pecuniary loss whatever; and whether the child, if living, would ever become serviceable, must be matter for speculation only. Yet, as the statutes plainly give the right of action for the benefit of the parent, without restriction to circumstances, but manifestly assume that there is some injury in every case, the right to recover in these cases must be deemed unquestionable.¹ So the parent may recover for causing

exemplary damages under the Texas act, see *Houston &c., Co. v. Cowser* 57 Tex. 293. Lord CAMPBELL thought that in getting at actual damages the amount of an insurance policy that became payable at the death should be deducted. See note to 4 Best & S. 403. But the contrary was held in *Sherlock v. Alling*, 44 Ind. 184; *Carroll v. Miss. Pac. R. R. Co.*, 88 Mo. 239; *Terry v. Jewett*, 78 N. Y. 338. See *Kellogg v. New York &c., Co.*, 79 N. Y. 72; *Balt. &c., R. R. Co. v. Wightman*, 29 Gratt. 431; *North Penn. Co. v. Kirk*, 90 Penn. St. 15. The ground of recovery in Tennessee seems to be much broader than in most States, and is fully explained in *Collins v. East Tennessee, &c., R. R. Co.*, 9 Heisk. 841. See, also, *Nashville, &c., R. R. Co. v. Prince*, 2 Heisk. 580; *Nashville &c., R. R. Co. v. Smith*, 6 Heisk. 174; *Haley v. Mobile &c., Co.*, 7 Bax. 239; *Nashville &c., Co. v. Smith*, 9 Lea, 470; *East Tenn. &c., R. R. Co. v. Toppins*, 10 Lea, 58. In Connecticut, under an act passed in 1848, the recovery was for the damages for the personal injury and suffering of the party himself if he survived, but for the same damages if he did not survive. *Seger v. Barkhamsted*, 22 Conn. 290; *Masters v. Warren*, 27 Conn. 293. The act was amended in 1853 so as to fix

a minimum of one thousand dollars and a maximum of five thousand dollars to the amount of the recovery, but without changing the basis of recovery. *Soule v. New York, &c., R. R. Co.*, 24 Conn. 575; *Goodsell v. Hartford, &c., R. R. Co.*, 33 Conn. 51.

¹ It was denied, however, in Georgia. See *Allen v. Atlanta, &c., Street Railway Co.*, 54 Geo. 503. Not necessary to show actual damage suffered to warrant substantial recovery. *Nagel v. Miss., &c., Ry Co.*, 75 Mo. 653; *Grogan v. Broadway, &c., Co.*, 87 Mo. 321; *Gorham v. New York, &c., Co.*, 23 Hun, 449. See *Hoppe v. Chicago, &c., Co.*, 61 Wis. 357; *Little Rock, &c., Co. v. Barker*, 39 Ark. 491; *Scheffler v. Minn., &c., Ry. Co.*, 32 Minn. 518. In *Chicago v. Major*, 18 Ill. 349, a recovery of eight hundred dollars for causing the death of a child four years old was supported. A still larger judgment for the killing of a young child was supported in *Louisville, &c., R. R. Co. v. Connor*, 9 Heisk. 19. And see *Chicago v. Scholten*, 75 Ill. 468; *Philadelphia, &c., R. R. Co. v. Long*, 75 Penn. St. 257; *Quin v. Moore*, 15 N. Y. 432; *Ihl v. Forty-Second Street, &c., R. R. Co.*, 47 N. Y. 817; *Un. Pac., &c., Co. v. Dunden*, 14 Pac. Rep. 501 (Kan). The present value of the future earnings of the child during

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 accustomed donations of the child constitute an element of damage, and the parent may give evidence of his own pecuniary circumstances and dependent condition, as tending to show that his loss was probably greater than it would have been had he been independent in respect to pecuniary means.¹ The true basis of recovery seems to be stated by POLLOCK, C. B: "It has been held," he says, "that these damages are not to be given as a *solatium*. That was so decided for the first time *in banc*, in *Blake v. Midland Railway Company*." That case was tried before PARKE, B., who told the jury that the Lord Chief Baron had frequently ruled at *nisi prius*, and without objection, that the claim for damage must be founded on *pecuniary loss, actual or expected, and [*273] that mere injury to feelings could not be considered. It is also clear that the damages are not to be given merely in reference to the loss of a legal right, for they are to be distributed among relations only, and not to all individuals sustaining such a loss; and accordingly the practice has not been to ascertain what benefit could have been enforced by the claimants, had the deceased lived, and give damages limited thereby. If, then, the damages are not to be calculated on either of these principles, nothing remains except that they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life."² In some cases

minority, less the cost of its maintenance, and the expenses of sickness and burial, is the measure of damage. *Burton v. Chicago, &c., Co.*, 55 Ia. 496. See *Penn., &c., Co. v. Lilly*, 73 Ind. 252; *Lehigh, &c., Co. v. Rupp*, 100 Penn. St. 95; *Robel v. Chicago, &c., Co.*, 35 Minn. 84; *Rains v. St. Louis, &c., Co.*, 71 Mo. 164; *Frick v. St. Louis, &c., Co.*, 75 Mo. 542; *Hickman v. Miss., &c., Co.*, 23 Mo. App. 344; *Parsons v. Mo. Pac., &c., Co.*, 6 S.W. Rep. 464 (Mo). But in Wisconsin it is held that the expectation of benefit beyond majority may be considered. *Johnson v. Chicago, &c., Co.*, 64 Wis. 425. Age and circum-

stances of the parent may be considered. *Johnson v. Chicago, &c.*, 64 Wis. 425; *Int., &c., R. R. Co. v. Kindred*, 57 Tex. 491. *Contra*, *Chicago v. McCulloch*, 10 Ill. App. 459.

¹ *Chicago v. Powers*, 42 Ill. 169. See *Chicago, &c., R. R. Co. v. Shannon*, 43 Ill. 338; *Potter v. Chicago, &c., R. R. Co.* 22 Wis. 615; *Ewen v. Chicago, &c., R. R. Co.*, 38 Wis. 618; *Barley v. Chicago, &c., R. R. Co.*, 4 Biss. 430; *North Penn., &c., Co. v. Kirk*, 90 Penn. St. 15.

² 18 Q. B. 93.

³ *Franklin v. South Eastern R. Co.*, 3 H. & N. 211. See *Dalton v. South Eastern R. Co.*, 4 C. B., (N. S.) 296;

the reasonable expectation is fairly measured by the legal right; as where the widow sues for the loss of her husband, who was legally bound to furnish her a reasonable support during her life time according to his condition in life; and the loss of this reasonable support is the measure of her recovery.¹ Under the

Pym v. Great Nor. R. Co. 2 Best & S., 759; 4 Best & S. 396; *Grotenkemper v. Harris*, 25 Ohio (n. s.) 510; *Kessler v. Smith*, 66 N. C. 154; *Railroad Co. v. Barron*, 5 Wall. 90; *Ewen v. Chicago, &c. R. R. Co.*, 88 Wis. 618; *Steel v. Kurtz*, 28 Ohio, (n. s.) 191; *Huntingdon, &c. R. R. Co. v. Decker*, 84 Penn. St. 419; *Mansfield Coal Co. v. McEnery*, 91 Penn. St. 185; *Demarest v. Little*, 47 N. J. L. 28; *Shaber v. St. Paul, &c. Co.*, 28 Minn. 103; *Atchison &c. Co. v. Brown*, 26 Kan. 443, where an adult left a mother who had some property of her own. In New York it is held that the pecuniary loss may consist of actual damages, that is an actual, definite loss, capable of proof, and also of prospective and general damages, incapable of precise, definite estimate. In estimating the value of a human life the age, sex, health and intelligence of deceased, and condition and circumstances of survivors must be shown. *Houghkirk v. Pres., &c., D. & H. C. Co.*, 92 N. Y. 219. See *Carpenter v. Buffalo, &c., R. R. Co.*, 38 Hun, 116. A husband may recover for funeral expenses of the wife as an item of damage from the death. *Murphy v. New York, &c., Co.*, 88 N. Y. 445, and cases cited. Damages of wife for death of husband embrace loss of support and protection during her probable life-time, increase that earnings of husband would have made to her wealth, and reasonable expectation she had of pecuniary advantage by ultimately receiving a share thereof as heir and disappointment of such expectation and probable pecuniary loss therefrom. Law-

son v. Chicago, &c., Ry. Co., 64 Wis. 447. She cannot recover for loss of the husband's companionship. *Board of Com'rs v. Legg*, 93 Ind. 523. Under the Canadian statute the injury is not confined to a pecuniary interest "in a sense so limited as only to embrace loss of money or property" where action is brought for the death of wife and mother for the benefit of the husband and children. Injury must not be sentimental nor the damage a solatium, but it need not be susceptible of reduction to dollars and cents. *St. Lawrence, &c., Ry. Co. v. Lett*, 11 Can. S. C. R. 422. In California the statute allows a recovery by the wife for the loss of husband's society and by the father for something beside the loss of service of the child. *Beeson v. Green Mt., &c., Co.*, 57 Cal. 20; *Cook v. Clay, St. &c., Co.*, 60 Cal. 604; *Nehrbas v. Centr. Pac. &c., Co.*, 62 Cal. 320. The parent may recover for his mental suffering. *Cleary v. City R. R. Co.*, 18 Pac. Rep. 269. In Virginia the recovery is not limited to pecuniary damages. *Matthews v. Warner*, 29 Gratt. 570; *Balt. &c., R. R. Co. v. Noell*, 32 Gratt. 394. In Alabama something more than a solatium or compensation may be recovered. The act is punitive. *South, &c., R. R. Co. v. Sullivan*, 59 Ala. 272.

¹ *Macon, &c., R. R. Co. v. Johnson*, 88 Geo. 409. Approved in *Atlanta, &c., R. R. Co. v. Ayres*, 53 Geo. 13; *Georgia, &c., Co. v. Pittman*, 73 Geo. 325. Compare *Catawissa R. R. Co. v. Armstrong*, 53 Penn. St. 233. Nursing, medical attendance, and

Georgia statute it seems to be held that when action is brought in the interest of children for the loss of their father, the damages should be the present worth of a reasonable support for them during minority, according to the expectation of the father's life, and in view of his condition in life, prospects, habits, etc.¹ In Pennsylvania the rule adopted is thus stated: "The loss is 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 expendi- [*274] ture."² In some other States the probable value of the nurture, instruction, and physical, moral and intellectual training which the parent for whose loss the suit is brought might have given to the children, are considered proper elements of damages.³

In some cases the circumstances may be said to reasonably fix a maximum of recovery, because they set a limit to the probable ability to give assistance. Thus, if the deceased is a common laboring man, and it is not shown that he could bring to the assistance of the family other resources than his daily earnings, an award of five thousand dollars is clearly excessive.⁴ So when the suit is brought for the benefit of the mother, an award so large that the interest upon it would exceed all his probable earnings is manifestly greater than the pecuniary loss could possibly be, where it appears that the deceased was without property or other expectations.⁵

In England an award in favor of the father of seventy-five

funeral expenses may probably be added. Pennsylvania R. R. Co. v. Bantom, 54 Penn. St. 495; Cleveland, &c., R. R. Co. v. Rowan, 66 Penn. St. 393. The probability of the widow's subsequent marriage should not be taken into account. Baltimore & Ohio R. R. Co. v. State, 83 Md. 542.

¹ David v. South Western R. Co., 41 Geo. 223. See, also, Baltimore & Ohio R. R. Co. v. State, 83 Md. 542.

² SHARSWOOD, J., in Pennsylvania R. R. Co. v. Butler, 57 Penn. St. 335. See Pennsylvania R. R. Co. v. Brooks, 57 Penn. St. 339; Cleveland, &c., R.

R. Co. v. Rowan, 66 Penn. St. 393; Huntingdon, &c., R. R. Co. v. Decker, 84 Penn. St. 419.

³ Tilley v. Hudson River R. R. Co., 29 N. Y. 252; Ill. Cent. R. R. Co. v. Weldon, 52 Ill. 290; Castello v. Landwehr, 28 Wis. 522; Board of Comr's v. Legg, 93 Ind. 523.

⁴ Ill. Cent. R. R. Co. v. Weldon, 52 Ill. 290.

⁵ Chicago, &c. R. R. Co. v. Bayfield, 37 Mich. 205. See Hutton v. Windsor, 34 Up. Can. Q. B. 487; Rose v. Des Moines R. R. Co., 39 Iowa, 246.

pounds was set aside in one case, where it appeared that he was old and infirm, and the deceased only assisted him in some work, from which he received three shillings and sixpence per week. This seems a very strict application of the law. An American court would probably not disturb a verdict, unless the excess appeared more manifest.²

Many of the statutes fix a maximum of recovery, five thousand dollars being a common limitation.

The action by the father for the negligent killing of his minor child cannot be joined with an action at the common law for a personal injury to himself caused by the same negligent act.³

¹ *Franklin v. South Eastern R. Co.*, 8 H. & N. 211.

² As to proper latitude to be allowed in estimating damages, see *Railroad Co. v. Barron*, 5 Wall. 90, 105.

³ *Cincinnati, &c. R. R. Co. v. Chester*, 57 Ind. 297. A suit will lie in admiralty upon the statute. *Holmes*

v. Oreg., &c., Ry. Co., 6 Sawy. 262. As to when the action arises with reference to limitation acts, see *Ewell v. Chicago, &c. Co.*, 29 Fed. Rep. 57; *Rutter v. Miss., &c. Co.*, 81 Mo. 169; *Lung Chung v. North. Pac., &c. Co.*, 19 Fed. Rep. 254.

*CHAPTER IX.

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WRONGS IN RESPECT TO CIVIL AND POLITICAL RIGHTS.

The Term Civil Rights. If we employ the term civil rights in the comprehensive sense in which it has already been made use of,¹ we might with propriety discuss under that title all classes of rights not strictly political. It has been found more convenient, however, to follow the common method, and to speak of some classes of rights separately; such, for instance, as rights in real and personal property, incorporeal rights, etc. In this regard we follow the practice of writers on general jurisprudence and constitutional law, who, in discussing sovereign powers, speak of the power to tax, the police power, etc., as if these stood apart from the general powers of government, when in fact in their exercise they are only particular manifestations of the general sovereignty. The method is well enough because it is convenient; at the same time it is desirable not to be misled by the use of so comprehensive a term in a sense comparatively narrow. The use of the term civil rights in this latter sense has been brought about within a few years in connection with legislation to preclude discrimination against colored people; and in the public mind it has not embraced some rights which are quite fundamental—such, for example, as the right to acquire property—because, as to these, there was no controversy and no occasion to legislate.

Civil liberty has also been spoken of, and an attempt made to show in what it consists.² At the same time the power of the legislature to regulate civil rights and the necessity for its employment was recognized. In now directing attention 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 [*276]

¹ Ante, p. 33.² Ante, pp. 8-10.

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. Even when that is not the case, however, a discussion of the law of wrongs could not well omit the wrongs by government.

Right to Labor and to Employ Labor. 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. This is one of the first and highest of civil rights.

State Regulation of Employments. Within certain limits which cannot with accuracy be conclusively defined, the State must always be at liberty to determine what are lawful employments, and to make others unlawful by forbidding them. This liberty is exercised by making games of chance unlawful, and in some States by forbidding the traffic in intoxicating drinks. The assumption supporting such prohibitions is, that the employments forbidden are hurtful and demoralizing; and they are prohibited in the exercise of a legislative discretion which is subject to no extraneous control. Passing from the cases of prohibition, we find that the authority to regulate business embraces every class and variety of occupation, and that it may be exercised either in respect to the person who may follow or be employed in the business, or as to the methods in which the business may be conducted, or both.

The general principle of constitutional liberty is, that there must be no exclusions from lawful employments. Nevertheless, the law may make exceptions in some cases where the reasons therefor are sufficient on grounds of public policy. Without doubt persons may be excluded because their immaturity or imbecility would render the employment hurtful to themselves or dangerous to others, or for any other reason special and peculiar to their cases, and which presents a fair case for the exercise of the legislative judgment. The case of the employment of small children in mines or manufactories is an apt illustration. Forbidding this is sometimes a matter of humanity, and the right to do so is plain.¹ The exclusion of females might perhaps [*277] be *justified on physical grounds of equal validity in

¹ Commonwealth v Hamilton Mfg. Co., 120 Mass. 333.

the case of some employments.¹ And where an occupation is peculiarly susceptible of abuse, it may be proper for the State to surround it with special restrictions, and to require those who propose to enter upon it to take out a special license and give security for good behavior, and to refuse altogether to issue licenses to persons of known bad character. Such regulations are usually made for the cases of hackmen, saloon-keepers, proprietors of billiard halls, of theaters, shows, etc.

The final test of what is a reasonable regulation must be found in the legislative judgment, unless the constitution has provisions on the subject. What the legislature ordains and the constitution does not prohibit must be lawful.² But if the constitution does no more than to provide that no person shall be deprived of life, liberty, or property, except by due process of law, it makes an important provision on this subject, because it is an important part of civil liberty to have the right to follow all lawful employments. Regulations invidiously framed to exclude persons or classes must be held forbidden by the constitutional provision referred to.³ The grant by the State of monopolies in trade must

¹Granting licenses for the sale of intoxicating drinks to males only, does not violate the constitutional provision which forbids the grant of special privileges or immunities. *Blair v. Kilpatrick*, 40 Ind. 812. A regulation which should forbid the employment of females in any place where intoxicating liquors are sold might be supported by very strong reasons growing out of the peculiar temptations to vice and crime where the sexes are brought together in the habitual indulgence in alcoholic stimulants.

²*Danville R. R. Co. v. Commonwealth*, 73 Penn. St. 29, 33; *Randle v. Pacific R. R. Co.*, 65 Mo. 325.

³A municipal ordinance prohibiting washing and ironing in public laundries between 10 p. m. and 6 a. m., is valid as a police regulation. *Barbier v. Connolly*, 113 U. S. 27. But an ordinance regulating such laundries which confers on the city

authorities arbitrary power to interfere with or prevent the carrying on of the business and to make illegal discrimination between persons in similar circumstances, is invalid. *Yick Wo v. Hopkins*, 118 U. S. 356. See *Stockton Laundry Case*, 26 Fed. Rep. 611. If under the guise of police regulation to protect health, personal rights are arbitrarily invaded, the legislation is invalid. So held as to act prohibiting making of cigars in tenement houses. *In re Jacobs*, 98 N. Y. 98, and act prohibiting making of any substitute for butter. *People v. Marx*, 99 N. Y. 377. In Missouri an act of the latter kind has been sustained. *State v. Addington*, 77 Mo. 110. Indiscriminate sale of opium may be forbidden. *Nevada v. Ah Chew*, 16 Nev. 50. The sellers of patent rights may be required to file copy of letters patent with the county clerk. *Brechbell v. Randall*, 102 Ind. 528.

also be held forbidden by it. These were long since decided to be illegal in England,¹ and they are equally illegal in this country.² Still, the legislature, when it grants special privileges or franchises, may undoubtedly make them exclusive. The distinction seems to be this: The following of the ordinary and necessary employments of life is a matter of right, and cannot be made to depend upon the State's permission or license, [*278] except *to this extent: that if the business offers temptations to exceptional abuses, it may be subjected to special and exceptional regulations, and among these may be the requirement of a license. But when the State gives permission to do something not otherwise lawful, it may in its discretion make the gift exclusive. Thus, it may grant an exclusive ferry, or an exclusive right to erect a toll-bridge, or to set up a lottery, and no one is wronged, because no one had such a liberty before, and therefore no one is deprived of any thing by the grant.

Right to form Business Relations. It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress. Thus, if one is prevented by the wrongful act of a third party from securing some employment, he has sought, he suffers a legal wrong, provided he can show that the failure to employ him was the direct and natural consequence of the wrongful act. The difficulty here is, that this will in general be a consequence of some other legal wrong, and will constitute an

¹ *Darcy v. Allain*, 11 Rep. 84.

² It has nevertheless been decided that the State may grant to a corporation the exclusive control of the business of slaughtering cattle for its principal city, and that this is no invasion of civil rights. *Slaughter-house Cases*, 16 Wall. 36. The subject is discussed by the author at length in the *Princeton Review* for March-

April, 1878. Referring to the same grant, the court has held that a legislature by making a contract in the charter cannot prevent a subsequent legislature from modifying or abrogating the charter, so far as it affects public health or morals. *Butchers' Union, &c. Co. v. Crescent City, &c. Co.*, 111 U. S. 746.

aggravation of damages rather than a distinct cause of action. Thus, the libel of a serving-man may induce one needing his services to refuse him employment;¹ but here the libel is the cause of action, and the loss of employment is the proof that special damage has flowed from it. It cannot probably be safely affirmed that inducing one by any means whatsoever not in themselves unlawful to refuse a person employment will give a cause of action. A wrong of that sort would be accomplished either, *first*, by the presentation of reasons, or, *second*, by means of a conspiracy: in the former case there would be no legal wrong if *there were no such false assertions as would [*279] support an action; in the latter, if the conspiracy were made effectual by means of unlawful acts, the wrong would be manifest; but what shall be deemed unlawful acts in the case of a conspiracy it is not very easy to determine.

Conspiracy to Prevent Employment. By conspiracy is here intended, a combination of two or more persons to accomplish, by some concerted action, an unlawful end of the injury of another. It was shown in a preceding chapter that the conspiracy was not in itself a legal wrong; it is a thing amiss, when it has an unlawful purpose in view, but it does not become a legal wrong until the unlawful purpose is accomplished, or until some act, distinctly illegal, is done towards its accomplishment. Nor is it perceived that the end itself can be unlawful if it can be accomplished by perfectly lawful means.*

¹ In *Ashley v. Harrison*, 1 Esp. 48, where a manager sued for a libel on an actor in his employ, alleging as special damage that the actor was thereby made sick and disabled from acting, Lord KENYON ruled that the damages were too remote; and in *Vicars v. Wilcocks*, 8 East, 1, it was held, that being discharged from service because of a slander not otherwise actionable would not make it so. A notice by a master to his servants that any servant dealing with or renting a house from a third person, gives the latter no action against the master. *Payne v. Railroad Co.*, 13 Lea, 507; *Heywood v. Tillson*, 75 Me. 225.

* To conspire maliciously and vexatiously, and without reasonable or probable cause, to commence and actually commencing a suit in the name of a third party against the plaintiff, is not actionable where no legal damage is alleged. *Cotterell v. Jones*, 11 C. B. 713. See *Wellington v. Small*, 8 Cush. 145. But a conspiracy to injure a teacher in his profession by false statements as to his character, followed by damage, is actionable. *Wildee v. McKee*, 111 Penn. St. 335. So is one to "boycott" a line of steamers and drive it out of a certain trade. *Mogul S. S. Co. v. McGregor, L. R.*, 15 Q. B. D. 476.

There may be a difference in the law between breaking up a service actually entered upon or contracted for, and inducing a person by any species of inducements not unlawful in themselves to refuse to contract for service. The latter may be wrong in morals, but not illegal: the former is an actionable wrong, standing upon exactly the same footing as the wrong by which the master loses his servant's assistance through his being wrongfully disabled. This general subject was recently so fully considered by the Court of Queen's Bench in an action brought for maliciously procuring an actor to break his contract of service with the plaintiff, that a reference to the case, and to the authorities upon which it was decided, seems to be all that is important in this connection. It was held in that case by the majority of the court that the action will lie whether the service had actually been entered upon or not, provided a valid contract for it was in existence.¹ On the other hand it has been decided that a [*280] 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; the ground of it being that the party to the contract might of its own volition have broken his promise without being liable as for a wrong, and "that an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several. The quality of the act, and the nature of the injury inflicted by it, must determine the question whether the action will lie." ² It

¹ *Lumley v. Gye*, 2 El. & Bl. 216, citing the cases for enticing away or harboring servants, *Adams v. Bafeald*, 1 Leon. 240; *Blake v. Lanyon*, 6 T. R. 221; *Pilkington v. Scott*, 15 M. & W. 657; *Hartley v. Cummings*, 5 C. B. 247; *Sykes v. Dixon*, 9 Ad. & El. 693. The same rule followed in case of contract for personal service. *Bowen v. Hall*, L.R., 6 Q. B. D. 333. One who maliciously procures the discharge of another from his employment is liable, although the term of hiring is not fixed, and the servant cannot maintain an action against the master. Such wanton interference is not the exercise

of a legal right. *Chipley v. Atkinson*, 1 South Rep. 934 (Fla).

² *Kimball v. Harman*, 34 Md. 507; *S. C. 6 Am. Rep. 340*, citing *Hutchins v. Hutchins*, 7 Hill, 104; *Wellington v. Small*, 3 Cush. 145; *Adler v. Fenton*, 24 How. 407; *Cotterell v. Jones*, 11 C. B. 718. A conspiracy between a debtor and a third person to defraud a creditor by the debtor delivering property over to the third party and then taking the benefit of the insolvent law, was held actionable in *Perrod v. Morrison*, 2 Pen. & Watts, 126, criticised in *Wellington v. Small*, 3 Cush. 145.

is difficult to understand, however, why a conspiracy to deprive one of labor contracted for can be any different in nature or damaging quality from a conspiracy to deprive him of property bargained for, or of anything else of value. There is no peculiar sacredness to the right to service over any other right, and no good reason can be suggested for protecting it differently.¹

But the acts done in pursuance of a conspiracy may be unlawful in themselves if they include deception, threats,² intimidation, or any species of duress whatsoever, whether employed upon the laborer or upon the employer. Any one has an undoubted right to refuse to be employed by another, but 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 liberty of action of others. Upon this point the recent case of *Carew v. Rutherford* is instructive.

In that case, for some disregard of their regulations, a contractor, who had not agreed to be bound by them, was fined by a labor organization, and was threatened that, unless he paid the *fine, his workmen should leave his employ, and [*281] that the power of the association should be used to prevent others engaging in his service. Says CHAPMAN, Ch. J.: "We have no doubt that a conspiracy against a mechanic who is under the necessity of employing workmen in order to carry on his business, to obtain a sum of money from him which he is under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering into his employment, or by threatening to do this, so that he is induced to pay the money

¹An action may perhaps be maintained for inducing a man to break a contract of marriage. *Sheperd v. Wakeman*, 1 Sid. 79.

²See *Green v. Button*, 2 C. M. & R. 707; *Rice v. Manley*, 66 N. Y. 82; S. C. 23 Am. Rep. 30. Defendant with two hundred men went upon plaintiff's premises, and halting the men some distance from a mill went in to consult the foreman about the employees joining a strike for shorter hours. In his absence, the men

against his cautioning went into the mill and did some violent acts. Defendant held liable as a trespasser. "No man," says the court, "has a right to enter upon the premises of another for the purpose of inducing persons in the employment of that other to leave their employment to the injury of their employer for the purpose of working less hours or getting higher wages." *Webber v. Barry*, 33 N. W. Rep. 289 (Mich).

demand, under a reasonable apprehension that he cannot carry on his business without yielding to the illegal demand, is an illegal, if not a criminal, conspiracy; that the acts done under it are illegal; and that the moneys thus obtained may be recovered back, and if the parties succeed in injuring his business, they are liable to pay all the damage thus done to him. It is a species of annoyance and extortion which the common law has never tolerated. This principle does not interfere with the freedom of business, but protects it. Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases, and on the best terms he can. He may change from one occupation to another, and pursue as many different occupations as he pleases, and competition in business is lawful. He may refuse to deal with any man or class of men; and it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price or without certain conditions.¹

* * Freedom is the policy of this country. * * The acts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country, and if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both.”² The same general prin-

¹ Citing *Commonwealth v. Hunt*, 4 Met. 111; *Boston Glass Manufactory v. Binney*, 4 Pick. 425; *Bowen v. Matheson*, 14 Allen, 499.

² *Carew v. Rutherford*, 106 Mass. 1, 13. See *Hilton v. Eckersley*, 6 El. & Bl. 47. A master brought action against the Executive Board of a Longshoremen's Union. Defendants were not in the plaintiff's employ and procured plaintiff's workmen to quit work in a body to compel plaintiff to accede to defendant's demands with reference to the pay of the workmen, and further attempted to boycott the plaintiff's business in order to compel the payment of such wages, by which action plaintiff was seriously injured.

“Associations have no more right to inflict injury upon others than individuals have. All combinations and associations designed to coerce workmen to become members, or to interfere with, obstruct, vex or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members; or designed to prevent employers from making a just discrimination in the rate of wages paid to the skillful and to the unskillful; to the diligent and to the lazy; to the efficient and to the inefficient; and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to

ciple has also been declared in England, where the court went so far as to enjoin a labor association which, by means of placards, advertisements, etc., was endeavoring to prevent laborers from *entering the plaintiff's employment. The jus- [*282] tification for this action was found in the fact that the organization was proceeding to destroy the value of the plaintiff's property; by their threats and intimidation rendering it impossible for the plaintiffs to obtain workmen, without whose assistance the property would become utterly valueless for the purposes of their trade.¹ The same doctrine would undoubtedly be applied to the case of employers, who, by combination and unlawful means, should prevent or seek to prevent the employment of any special class of laborers. Every man has the liberty of employing and being employed, and every man must respect the like liberty in others.

Unlawful Combinations. A combination formed by agreement between a number of employers in the same line of business, to suspend or carry on business, as the majority shall agree, is void, because in restraint of trade.² 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 will not encourage or assist a laborer contrary to certain rules agreed upon, or seek to procure employment for those not associated with them.³ These are plain cases.

dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with their lawful employment of other persons, or designed to abridge any of these rights, are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means, and accompanied by damage, are actionable." Old Dominion Steam Ship Co. v. McKenna, 30 Fed. Rep. 48. BROWN, J.

¹ Springhead Spinning Co. v. Riley, Law R. 6 Eq. Cas. 551. Boycotting a factory by parading in front of it

with banners inscribed with threatening words may be enjoined. *Sherry v. Perkins*, 17 N. E. Rep. 307 (Mass).

² *Hilton v. Eckersley*, 6 El. & Bl. 47, 66. One not injured in his business by a combination of dealers cannot complain of the combination as unlawful. *Fairbank v. Newton*, 50 Wis. 628.

³ *Hornby v. Close*, L. R. 2 Q. B. 153. And see *Farrer v. Close*, L. R. 4 Q. B. 602; *Commonwealth v. Hunt*, 4 Met. 111; *People v. Fisher*, 14 Wend. 9. The right of a slave, freed by the thirteenth amendment to the Constitution, to be paid for his services,

Right to be Carried by Common Carriers. The business of common carriers is a *quasi* public business; a term which we employ, because it is often made use of, and because it indicates that the public have some rights in respect to the business which do not exist in the case of business of a purely private character. No man becomes a common carrier except with his own consent; but when he does so, he must conform to those principles of the common law under which the business has grown up, and which have always required of the common carrier impartiality in his business as between individuals; he must carry for all, and he must carry under impartial regulations.¹ But the com- [*283] mon law *does not determine what shall be the scope of his business; 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 persons only; the discrimination being based on distinctions which are not objectionable as being arbitrary, but having some principle to support them. It is not perceived, for example, that any principle of the common law should preclude a person from undertaking to carry from point to point, as a permanent business, persons of one sex only; making special arrangements for their accommodation, while another, perhaps, makes other arrangements for the other sex. But where no such discrimination was made, certain liberty of action in receiving and rejecting persons was always admissible, because it could always be justified on grounds of impartiality and reason. To take a plain case: A railroad company could never be compelled to receive and carry in one of its ordinary passenger coaches a man whose appearance was shocking to the sense of decency of others, or a man in a state of beastly intoxication, or a man afflicted with contagious disease.² The compulsion of impartial carriage is established on public grounds, and for the public benefit, and it is manifest that the public good does not require that persons should be received for carriage under such circumstances. But since it is impossible to anticipate all the cases which may arise to render discriminations proper, the law allows to carriers the liberty of making

where he continued in the former master's service, began immediately, without any special contract. *Handy v. Clark*, 4 *Houston*, 16.

¹ 2 *Kent. Com.* 451; *Redf. on Railw.* Vol. 2, *Introd. Ang. on Carriers.*

² See *Jencks v. Coleman*, 2 *Sum.* 231; *Markham v. Brown*, 8 *N. H.* 533.

rules and regulations for the control and management of their business, subject to this restriction only, that the rules and regulations must not be unreasonable,¹ and that they must not conflict with any which may lawfully be prescribed by competent legislative authority. Competent authority would be that of the State, in the case of commerce entirely within the State, and that of the United States, in the case of foreign and inter-State traffic.

Among the regulations often established by carriers of passengers is one setting aside certain carriages for the exclusive use of women and their escorts. Such a regulation violates the right of no one who is excluded, and for whom accommodations are "elsewhere provided."² Another, not so plainly justifiable, is a rule setting aside certain carriages within which alone will persons of color be received and carried. Such a regulation has been sustained where the accommodations furnished were equal to those supplied for other passengers,³ but has been held invalid where no such impartial accommodations had been provided.⁴

Since the changes recently effected by the new amendments to the federal Constitution, and which have been brought about in the social condition of the country, it has been the policy alike of the nation and of the several States to legislate against certain discriminations which before were customary, and were seldom disputed. The act of Congress of 1875 is sufficiently important in this connection to be specially noticed. Its avowed purpose was to insure to all persons the benefits of the fourteenth amendment to the Constitution of the United States, which provides, among other things, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

¹ Day v. Owen, 5 Mich. 520; Westchester, etc., R. R. Co. v. Miles, 55 Penn. St. 209; State v. Overton, 24 N. J. 435.

² Chicago, &c., R. R. Co. v. Williams, 55 Ill. 185; S. C. 8 Am. Rep. 641. A colored woman cannot be excluded from such car because of her color. Gray v. Cincinnati, &c., Co., 11 Fed. Rep. 688; Logwood v.

Memphis, &c., R. R. Co., 23 Fed. Rep. 818. Nor can a prostitute, unless her conduct is offensive. Brown v. Memphis, &c., Co., 5 Fed. Rep. 499.

³ Westchester, &c., R. R. Co. v. Miles, 55 Penn. St. 209.

⁴ Chicago, &c., R. R. Co. v. Williams, 55 Ill. 185; S. C. 8 Am. Rep. 641; The Sue, 23 Fed. Rep. 843.

life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The regulations referred to are, "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land and water, theatres and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."¹ In 1883 these regulations were held unconstitutional as applied to the several States.*

In the absence of any such regulation, it is not very clear that inn-keepers and carriers of persons, by land or by water, would 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 person would be dangerous to others, or would be justly offensive to their sense of decency or [*285] propriety, or for other reason would *interfere with the proper enjoyment by others of the accommodations which the innkeeper or common carrier affords. As is said by Mr. Justice Scott, "A railroad company cannot capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs. Whatever discriminations are made must be on some principle, or for some reason, that the law recognizes as just and equitable, and founded in good public policy."²

Theaters and other places of public amusement exist wholly under the authority and protection of State laws; their managers are commonly licensed by the State, and in conferring the license

¹ Laws 1875, Ch. 114.

* Civil Rights Cases, 109 U. S. 3. The fourteenth amendment does not, says BRADLEY J., "invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action of the kinds referred to. It does not authorize Congress to

create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws and the action of State officers, executive and judicial, when these are subversive of the fundamental rights specified in the amendment."

² Chicago, &c., R. R. Co., v. Williams, 55 Ill. 185, 188.

it is no doubt competent for the State to impose the condition that the proprietors shall admit and accommodate all persons impartially. Therefore State regulations corresponding to those established by Congress must be clearly within the competency of the legislature, and might be established as suitable regulation of police.¹ And the power of the State to regulate the ^{business of innkeepers and common carriers would be} [*286] at least equally plain. But Congress has no corresponding police power to be exercised within the States.² And on the other hand, State regulations of the sort, so far as they assume to cover the transportation of passengers from State to State, are void as invasions of the constitutional power of Congress over commerce between the States.³

Right to Control one's Property and Actions. Every man controls his own property as he pleases, puts it to such use as he pleases, improves it or not, as he may choose, subject only to the obligation to perform, in respect to it, the duties he owes to the State and to his fellows. The State cannot substitute its judgment for his as to the use he should make of it for his own advantage.⁴ Neither can the State regulate his dress or his table,

¹The Mississippi legislation of 1873, the intent of which was, "that all persons may have equal accommodations in the vehicles of common carriers, at the inns, hotels, theatres, and other public places of amusement, upon the terms of paying the usual prices therefor," was fully sustained, against all the objections that could be suggested, in *Donnell v. State*, 48 *Mis.* 661. Where a skating rink may be kept without a license, a negro may be excluded at the pleasure of the owner. There is no duty to the public. *Bowlin v. Lyon*, 67 *Ia.* 536.

²*Slaughter House Cases*, 16 *Wall.* 36; *U. S. v. Cruikshank*, 92 *U. S.* 542. *Civil Rights Cases*, 109 *U. S.* 3.

³*Hall v. DeCuir*, 95 *U. S.* 485. The statute had been previously sustained in the State courts. *De Cuir v. Benson*, 27 *La. Ann.* 1. The suit was brought for refusal to permit the

plaintiff, a colored woman, to enter the ladies' cabin of defendant's steamboat, and compelling her to go into the "colored bureau," so called, and take her meals there. The case settles the point of State law, that no such discrimination is lawful within the State jurisdiction. An act abrogating the common law requirement of equal treatment by carriers is void so far as it affects inter-state commerce. *Brown v. Memphis, &c., R. R. Co.*, 5 *Fed. Rep.* 499. See, *The Sue*, 22 *Fed. Rep.* 843. And, see, *Coger v. North West Union Packet Co.*, 37 *Iowa*, 145, where the Congressional Civil Rights Act of 1866, forbidding similar discriminations, was sustained and enforced as against a company of common carriers navigating the Mississippi.

⁴*Gaines v. Buford*, 1 *Dana*, 479, 499; *Violett v. Violett*, 2 *Dana*, 323.

except so far as may be needful for the protection of morality and decency. State laws prohibiting the sale of liquors to be drunk on the dealer's premises have the public interest in view, and are justified on that ground. And laws prohibiting women to appear in public in the customary garb of men would be supported, not as regulation of fashion, but 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. Among the duties of imperfect obligation im- [*287] posed upon *parents is that of providing suitable education for their children. This duty is usually assumed by the State to this extent: That it places or intends to place the means of education within the reach of all, providing schools which all can attend, and in some cases making instruction in these schools perfectly free to all. But the right to an education at the expense of the public is not, as against the State, a legal right at all, unless made so by the Constitution. To furnish to its citizens the means of an education is a duty which the State, at its option, will assume or decline; and when the duty is assumed, the State, in the provision it makes, will go so far as its law makers shall think proper, and no further. The provision made to-day may, perhaps, be repealed to-morrow; and though the repeal may seem in the highest degree impolitic, those who may suffer from it cannot deny to it competent force. 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. Some constitutional provisions are self-executing, and if these measure out the State's bounty for education, the legislature cannot restrict it; others cannot have effect without legislation; and where that is the case, the bounty intended may possibly be withheld.¹

It may possibly be found, also, when the State has made provision for education, that it has done so with unlawful discriminations. So long as slavery existed, it was customary, in establishing and providing for the support of schools, to discriminate

¹ Respecting self-executing constitutional provisions, see Cooley, *Const. Lim.* 99-102.

in the advantages given, throwing open some schools to children generally, but denying admission to colored children. The right to do this was affirmed in Massachusetts, upon the broad ground that the State had undoubted right to select the objects of its bounty,¹ and was generally conceded elsewhere. Since then the fourteenth amendment to the federal Constitution has been adopted, and it is now held that when the provision is made for education, it must be impartial. The provision gives to the whole people certain rights, and to single out a certain portion by the arbitrary standard of color, and say that these shall not have rights which are possessed by others is said to deny to them **“the equal protection of the laws”* and is consequently forbidden.² 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 in each.³

A teacher may violate the right to instruction in the public schools by refusing to instruct those who lawfully come. Whether an action would lie against the teacher for such refusal, or whether the remedy would not be confined to an appeal to the governing board, is left in doubt on the authorities. It would seem, however, that the refusal was a plain violation of an individual right, and, as such, was actionable.⁴ The teacher

¹ *Roberts v. Boston*, 5 Cush. 198. See *Vau Camp v. Board of Education*, 9 Ohio, (N. S.) 406.

² *Ward v. Flood*, 48 Cal. 36. See *People v. Board of Education*, 18 Mich. 400; *Clark v. Board of Directors*, 24 Iowa, 266; *Smith v. Keokuk*, 40 Iowa, 518; *Dove v. School District*, 41 Iowa, 689. Children of Chinese parents who were born and have always lived in this country must be admitted. *Tape v. Harley*, 66 Cal. 473; *Bertonneau v. Directors*, 3 Woods, 177; *U. S. v. Buntin*, 10 Fed. Rep. 730; *People v. Gallagher*, 93 N. Y. 438. So an act providing that whites in a city shall be taxed for white schools, and blacks for black schools, which results in gross inequality of school

privileges, is unconstitutional. *Claybrook v. Owensboro*, 16 Fed. Rep. 297. In Illinois a school board has no power to set apart a single school in a city and oblige all colored children to attend it alone. *People v. Board of Education*, 101 Ill. 308. See *Board of Education v. Tinnon*, 26 Kan. 1.

³ *Cory v. Carter*, 48 Ind. 327; *State v. McCann*, 21 Ohio, (N. S.) 198; *County Court v. Robinson*, 27 Ark. 116. See *State v. Duffy*, 7 Nev. 342. Otherwise in New Jersey and Pennsylvania since 1881. *Pierce v. Un. Dist. Trustees*, 46 N. J. L. 76; *Kaine v. Com.* 101 Penn. St. 490.

⁴ In *Spear v. Cummings*, 23 Pick. 224, it was decided that no action would lie against a teacher by the

might also violate the right to instruction by inflicting punishment for something not within his jurisdiction;¹ or by arbitrarily subjecting the pupil to ridicule and disgrace; or by excluding him from school without justification. The teacher, as is said elsewhere,² is vested with judicial discretion in the management of his school, but he must not abuse this, or exceed his powers. He is a judge with limited authority, not an autocrat.

School committees or trustees may also deprive individuals of their rights in schools, through regulations which demand things in themselves unreasonable.³ Under the general authority usually conferred upon these boards to prescribe the rules and laws for the control of schools, their powers are no doubt very extensive, but in the nature of things there are some limits. The general principles of constitutional law undoubtedly govern their action, as they do the action of higher authorities; and whatever would violate those principles would be an excess of power on their part. It has sometimes been claimed that the principle of religious liberty was violated by regulations for the reading of the common version of the Bible in the public schools against the objections of the parents or guardians of some

parent whose child the former refused to receive into the school and instruct. His remedy, it was said, was to appeal to the school committee. It is intimated in the same case that no action would lie against the committee if the teacher were acting under their orders, their powers being judicial. To the same effect is *Donahoe v. Richards*, 38 Me. 376. And see *Learock v. Putnam*, 111 Mass. 499. In *Roe v. Deming*, 21 Ohio, (N. S.) 666, it is held that such an action by the father will lie; but in *Stephenson v. Hall*, 14 Barb. 222, it is said it should be brought by the child himself.

¹ In *Morrow v. Wood*, 35 Wis. 59, S. C. 17 Am. Rep. 471, the Supreme Court of Wisconsin declare that where a child attends school directed by his father to pursue certain studies only which are taught in the school, and the teacher punishes him because he will not take up others also, this is

a criminal assault; and that the duty of the child under the circumstances is to obey his father. This is good sense. See *Sewell v. Board of Education*, 29 Ohio, (N. S.) 89, in which it was decided that instruction in elocution might be made compulsory in schools, and a pupil expelled for failing to be prepared with a rhetorical exercise at a time designated; and *State v. Webber*, 108 Ind. 31, where a similar rule is laid down as to the study of music.

² See ante, p. 198. Also, *Anderson v. State*, 3 Head, 455; *Lander v. Scaver*, 32 Vt. 114.

³ Such reasonable rules must not be unreasonably enforced. Here as to tardiness. *Ferlich v. Michener*, 111 Ind. 472. Such rules cease to operate after parental control is resumed after school hours. Here a rule forbidding attending parties. *State v. Osborne*, 24 Mo. App. 809.

of the pupils; but regulations for that purpose have been sustained as not beyond the proper powers of such boards.¹ On the other hand, it is held equally competent for the governing board of a school to exclude the reading of the Bible therefrom: all sects and denominations of worshipers being equal before the law, none of them can demand as a right to have its sacred book read in the schools supported by the State, against the judgment of the governing board to whose direction the State has entrusted them.² It is unfortunate that it ever becomes necessary to make such decisions, or that the schools where those who are to govern their country receive their training should be exposed in any degree to sectarian controversy.³

Rights in the Learned Professions. No one has any right to practice law or medicine except under the regulations the State may prescribe. To practice in the courts or to practice medicine is not a privilege of citizenship, and is therefore neither given nor protected by or under the Civil Rights act of Congress or the new amendments to the Constitution.⁴ The privilege may be *given to one sex and denied to the other, and [*290] other discriminations equally arbitrary may doubtless be established. But with the right to officiate as religious teacher the State has no concern as long as the customary police regulations of the State are observed. It is a part of the religious liberty of the people that their religious teachers shall be chosen in their own mode, without State intervention, and that any one who can obtain hearers may teach in his own way. The mem-

¹ *Donahoe v. Richards*, 38 Me. 376. In this case pupils were required to read portions of the Scripture against the objection and protest of their parents. To like effect is *Spiller v. Woburn*, 12 Allen, 127.

² *Board of Education v. Minor*, 23 Ohio, (N. S.) 211.

³ Whatever authority the governing board of a school possess cannot be delegated to others; for example, they cannot empower a teacher to employ his assistant when the law vests the power in the board. *State v. Williams*, 29 Ohio, (N. S.) 161.

⁴ See *Bradwell v. State*, 55 Ill. 535; S. C. 16 Wall. 130; *Matter of Goodell*, 39 Wis. 232; *Ex parte Spinney*, 10 Nev. 323. As to State regulation of of the practice of medicine, see *Dogge v. State*, 17 Neb. 140; *State v. Deal*, 25 W. Va. 1. The right to practice cannot be refused without giving applicant an opportunity to be heard. *State v. State Med. Ex. Board*, 32 Minn. 324; *Gage v. Anson*, 63 N. H. 92. A woman may not practice law. *In re Leonard*, 12 Ore. 93; *Robinson's Case*, 131 Mass. 376; *Contra, in re Hall*, 50 Conn. 131.

bers of none of the learned professions have any special privileges the violation of which by individuals can well constitute an actionable wrong. The attorney has a certain privilege from arrest while attending court in the discharge of professional duty, but a disregard of this privilege would be remedied, not by suit, but by an application to the court for his discharge. The unnecessary execution of process against a clergyman while he was in the discharge of his duties in the pulpit or in any religious gathering, would be highly censurable, and possibly, in a gross case, subject the officer to an action, either at the suit of the clergymen or of the religious organization whose worship was needlessly disturbed.

Religious Liberty. Having in a previous chapter defined religious liberty,¹ nothing more seems requisite to indicate what would constitute invasions. Individual wrongs generally consist in disturbance of religious meetings, or in some other act which would be a wrong independent of any question of the liberty of conscience or of worship. If a clergyman is assaulted in the pulpit, this is but an assault, though the time and the place may aggravate the wrong; if a religious meeting is disturbed, the right of citizens to assemble for any lawful purpose is violated, and any civil redress would be the same with that which would be sought had the meeting been for political, business, or social purposes. 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.² But when formed they must be left to manage their own affairs in their own way, without the interference of the State to control them. The point at which the State may lawfully interfere is where these organizations disregard property rights of their members, or the rights acquired by contract; and when this occurs they become amenable, like all other organizations and individuals, to the ordinary State jurisdiction.³ And there is a disregard of rights when

¹ Ante, p. 33.

² *Silsby v. Barlow*, 16 Gray, 329; *Anderson v. Brock*, 3 Me. 243; *Meth. Ep. Church v. Sherman*, 36 Wis. 404; *Ferraria v. Vasconcelles*, 23 Ill. 456; *Hale v. Everett*, 53 N. H. 9; S. C. 16

Am. Rep. 82; *Robertson v. Bullions*, 11 N. Y. 243; *Atwater v. Woodbridge*, 6 Conn. 223; *Worrell v. First Presb. Ch.* 23 N. J. Eq. 96.

³ See *Harmon v. Dreher*, 1 Speers Eq. 87; *Dieffendorf v. Ref. Cal. Ch.*,

lawful members are expelled or refused participation in the privileges of the organization, for reasons which the rules or usages to which they have expressly, or by implication given assent would not recognize, or in disregard of forms which the rules or usages have made necessary, or when the purpose of the organization is perverted by radical changes without general consent.¹

Equality of Right. Every person is entitled to have his rights tested by the same general laws which govern the rest of the political society. The liberty of a pauper or supposed pauper cannot be entrusted to the discretion of an overseer of the poor or other ministerial or administrative officer;² the apprenticing of whites and blacks must be under the same general regulations;³ and the supposed insane must have the same right to a judicial hearing with all others.⁴ And no doubt any legislation which undertakes to regulate or abolish the evil of persons roaming about the country under a false pretence of seeking

90 *Johns*, 12; *Connitt v. R. P. D. Church*, 54 N. Y. 551; *Chase v. Cheney*, 53 Ill. 509; *Lawson v. Kolben-son*, 61 Ill. 405; *Smith v. Nelson*, 18 Vt. 511; *Harrison v. Hoyle*, 24 Ohio, (N. S.) 254; *Sohier v. Trinity Church*, 109 Mass. 1; *Fitzgerald v. Robinson*, 112 Mass. 371; *Gartin v. Penick*, 5 Bush, 110; *Kinhead v. McKee*, 9 Bush, 535; *Gass' Appeal*, 73 Penn. St. 39; *Hale v. Everett*, 53 N. H. 9; *Watson v. Jones*, 13 Wall. 679; *Sale v. First Reg. Bapt. Ch.*, 63 Ia. 26; *Att'y Gen. v. Geerlings*, 55 Mich. 562; *Livingston v. Rector, &c.*, 45 N. J. L. 230; *State v. Hebrew Cong.* 31 La. Ann. 205; *Bird v. St. Mark's Ch.*, 62 Ia. 567. In Michigan the legal corporation is not liable to an expelled member of the church, the ecclesiastical body, which has expelled him. *Hardin v. Bapt. Ch.* 51 Mich. 137.

¹ *Watson v. Jones*, 13 Wall. 679; *Hale v. Everett*, 53 N. H. 9; *Harmon v. Dreher*, 1 Speers Eq. 87; *John's Island Church*, 2 Rich. Eq. 192; *Den v. Bolton*, 12 N. J. 206; *German Re-*

formed Church v. Seibert, 3 Penn. St. 282; *McGinnis v. Watson*, 41 Penn. St. 9; *Gartin v. Penick*, 5 Bush, 110; *Lucas v. Case*, 9 Bush, 297; *Grosvenor v. United Society*, 118 Mass. 78; *People v. German, &c., Church*, 53 N. Y. 103; *Fitzgerald v. Robinson*, 112 Mass. 371. A man's profession is property. It is unlawful for a bishop to prohibit a priest from following his profession without accusation and opportunity for hearing and trial. *O'Hara v. Stack*, 90 Penn. St. 477. The trustees of a Methodist church have no right to close the church against the duly appointed pastor because a majority of the congregation do not wish him as pastor, and a mandatory injunction may issue to compel them to open it. *Whitecar v. Michenor*, 37 N. J. Eq. 6.

² *Portland v. Bangor*, 65 Me. 120; S. C. 20 Am. Rep. 681. See, for same principle, *Darst v. People*, 51 Ill. 236; S. C. 2 Am. Rep. 301.

³ *Matter of Turner*, 1 Abb. U. S. 84.

⁴ *Ante*, p. 204-7.

employment, must give them the same opportunity for trial as other persons accused of vagrancy are entitled to.

[*292] ***Exceptional Burdens.** One of the most important of civil rights is the right to require that public burdens shall be impartially distributed, and the right to resist those which touch the individual unequally and unfairly. Of unequal burdens, those of unequal taxation and unequal requirement of military service may furnish suitable illustrations. But on these subjects all that can be required is, that the laws be impartial and be fairly administered; inequality in their operation being unavoidable. An impartial law for military service will be likely to provide that all able-bodied male persons between certain ages shall be liable to be summoned for actual duty, and that from a list of these the number required shall be drawn by lot. Under such a law no one is wronged who has the fortune to be drawn while his neighbor escapes. In Great Britain, until recently, when recruits for the navy were needed, it was allowed by immemorial custom to send out a press-gang with authority to seize upon sailors wherever found, and by force to place them upon ships of war, where they would be compelled to perform military service. Such an authority is invidious and arbitrary, and wholly inadmissible in this country.¹

The right to be exempt from unequal taxation is, as between the States, one of the privileges and immunities of citizens of the several States.² It is incompetent, therefore, to assess and tax the property of a non-resident higher than that of residents. It is equally incompetent to discriminate between residents, either by overvaluing the property of the one or by undervaluing the property of the other, or by omitting the one or his property altogether from the roll, or by any other act of omission or commission which produces inequality. The principal in these cases is plain, but the application is sometimes difficult. Where taxation is based upon an assessment of property, the assessors have judicial functions to perform, and it is always presumed, that they have performed them honestly and to the best of their judgment. It is therefore generally held that they are not liable to a private action at the suit of an aggrieved party who complains

¹ Cooley, Const. Lim. 299.

627; Scott v. Watkins, 22 Ark. 556;

² Corfield v. Coryell, 4 Wash. C. C. 371, 380; Wiley v. Parmer, 14 Ala.

Oliver v. Washington Mills, 11 Allen, 268.

that he is overtaxed in consequence of their unequal assessment.¹ A remedy for the injustice in such a case [*293] must be sought in a suit to set aside the tax, or to reduce it to its proper proportions; and this may be done if it be made to appear that the assessors have been governed by improper motives, and not by their judgment, in making their valuations.² The tax-payer may hold the assessors liable only when they have acted without jurisdiction, or perhaps where, through neglect of duty, they have deprived the tax-payer of some important privilege; such, for instance, as the right to be heard on a review of the assessment.³ They act without jurisdiction if they assess persons or property not within the territorial limits for which they can act, or if they spread upon the roll a larger sum than has been lawfully voted or ordered.⁴ In these cases the tax-payer may either proceed against the officers responsible for the excess of jurisdiction, or, he may pay the tax under compulsion or protest, and then recover it back of the town, county, etc., to which it is subsequently paid over.⁵ He may also resist the collection of the tax, and hold the collector responsible as a trespasser if the want of authority appears in the list or warrant which constitutes the collector's authority, but not otherwise.

For any injustice which may be done to citizens through the selection by law of the objects of taxation, there can be no remedy whatever, except the political remedy, to be worked out through a repeal or modification of the law. Every system of taxation must be more or less arbitrary in its selection of methods, and of the objects upon or in respect to which burdens shall be laid, and the judiciary can give no relief from the incidental injus-

¹ *Weaver v. Devendorf*, 3 Denio, 117. The subject will be referred to in another chapter.

² *Lefferts v. Calumet*, 21 Wis. 688; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51; *Merrill v. Humphrey*, 24 Mich. 170; *Republic Life Ins. Co. v. Pollak*, 75 Ill. 292; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Wright v. Railroad Co.* 64 Geo. 783.

³ See *Thames Manuf. Co. v. Lathrop*, 7 Conn. 550.

⁴ *Mygatt v. Washburn*, 15 N. Y. 316; *Libby v. Burnham*, 15 Mass. 144;

Grafton Bank v. Kimball, 20 N. H. 107; *Cooley on Taxation*, 553, 554.

⁵ As to what is a compulsory payment of a tax, see *Boston, &c., Glass Co. v. Boston*, 4 Met. 181; *Atwell v. Zeluff*, 26 Mich. 118; *Baker v. Cincinnati*, 11 Ohio, (N. S.) 534; *Taylor v. Board of Health*, 31 Penn. St. 78; *Howard v. Augusta*, 74 Me. 79; *Ruggles v. Fond du Lac*, 53 Wis. 436; *Westlake v. St. Louis*, 77 Mo. 47; *Peyser v. Mayor of New York*, 70 N. Y. 497.

tice. Discriminations as between individuals, however, must rest upon some principle, or they will be illegal. In illustration, the case of a poll-tax upon adult male persons may be taken. These are sometimes levied, and they may be considered [*294] a compensation for the privilege of suffrage which males possess exclusively. But a discrimination between the sexes in the taxation of their property would be plainly inadmissible.

Unlawful Searches, Etc. An important civil right is intended to be secured by the provisions incorporated in the National and State Constitutions, which, in substance, declare that unreasonable searches and seizures shall be unlawful, and that all persons shall be secure in their persons, houses, papers, and effects against them. In their origin these provisions had in view the mischiefs of such oppressive action by the government or its officers, as the seizing of papers to obtain the evidence of intended crimes; but their protection goes much beyond such cases: it justly assumes that a man may have secrets of business, of friendship, or of more tender sentiments, to which his books, papers, or letters may bear testimony, but with which the public have no concern; that he may even have secrets of shame which are so exclusively his own concern that others have no right to pry into or to discuss them. An unlawful search and seizure is an aggravated trespass, and should be visited with corresponding damages. Many provisions of law are made to protect against it. Search warrants are allowed to be issued only after a showing of legal cause under oath to the satisfaction of a court or magistrate; it is made a criminal offense for one person wrongfully to open another's letters; the postmaster who detains or pries into letters is liable in damages for so doing; and the law might, with the utmost propriety, surround correspondence by telegraph by like securities. It has generally done so, to the extent of requiring of the persons through whose hands such correspondence may pass, the observance of secrecy; but it has been

¹ Such as seizing the papers of Algernon Sidney in order to find among his political speculations something which could be construed into treason; or those of John Wilkes to get possession of intended libels.

² 2 Hale, P. C. 113; Bishop, Cr. Proc. Ch. XVIII.; 3 Wharton, Cr. L., §§ 2937-2946; 1 Archbold, Cr. L. 143; Cooley, Const. L., 299-308.

held that they may be compelled to produce telegrams in evidence, and testify concerning them in courts and before legislative committees.¹

***Search Warrants.** The only lawful mode of mak- [*295] ing search upon one's premises is under the command of search warrants; and these are allowed to discover stolen or smuggled goods, or implements of gaming, and in a few other cases for which provision must be found in the statutes. The authority to issue them is liable to great abuses, and the law is justly strict regarding their requirements. They must be duly issued by a court or officer of competent jurisdiction, and if it does not appear by the warrant that a proper showing was made before it was issued, the warrant can afford no protection to the officer executing it.² The warrant must also describe particularly the place to be searched, and leave nothing to the discretion of the officer in this regard;³ and if property is to be searched for, it must describe particularly the property.⁴ The officer in executing the warrant must not go beyond its authority to search other buildings,⁵ or to seize other prop-

¹ *State v. Litchfield*, 58 Me. 267; *Hensler v. Freedman*, 2 Para. Sel. Cas. 274; *National Bank v. National Bank*, 7 W. Va. 544; *Woods v. Miller*, 55 Ia. 103; *U. S. v. Hunter*, 15 Fed. Rep. 712. *Ex parte Brown*, 72 Mo. 83; *Gray*, Com. by Telegraph, Ch. V.

² *Grumon v. Raymond*, 1 Conn. 40; *Commonwealth v. Lottery Tickets*, 5 Cush. 309; *State v. Staples*, 37 Me. 228; *State v. Carter*, 39 Me. 262; *Jones v. Fletcher*, 41 Me. 254.

³ *Humes v. Taber*, 1 R. I. 464; *Reed v. Rice*, 2 J. J. Marsh, 44; *Sandford v. Nichols*, 13 Mass. 286; *People v. Holcomb*, 3 Park Cr. R. 656; *State v. Robinson*, 33 Me. 564; *Ashley v. Peterson*, 25 Wis. 621. For instances in which the description was held insufficient, see *Meek v. Pierce*, 19 Wis. 300; *Commonwealth v. Dana*, 2 Met. 329; *Dwinnels v. Boynton*, 3 Allen, 810; *Commonwealth v. Intoxicating Liquors*, 6 Allen, 596. A warrant to search a building and outbuildings

does not cover a separate building in another enclosure but connected by a covered passage way. *Com. v. Int. Liquors*, 140 Mass. 287. "The house and premises of E. D. of G." is enough, there being but one E. D. in G., and he owning but one house there, which was searched. *Wright v. Dressel*, 140 Mass. 147.

⁴ *State v. Robinson*, 33 Me. 564; *Commonwealth v. Intoxicating Liquors*, 13 Allen, 52; *Downing v. Porter*, 8 Gray, 539. See, also, cases cited in last note. The warrant will be good if the description is sufficiently accurate to enable the officer to identify it. *Downing v. Porter*, 8 Gray, 539. If the description in the complaint is sufficient, and the warrant refers to that, it will be sufficient. *Dwinnels v. Boynton*, 3 Allen, 310.

⁵ *McGlinchy v. Barrows*, 41 Me. 74; *Jones v. Fletcher*, 41 Me. 254; *Downing v. Porter*, 8 Gray, 539.

erty; ¹ but he is no trespasser in seizing goods which answer the description, even though they prove not to be the goods intended.² Neither is he a trespasser in any case if the warrant is sufficient in its apparent requisites and he simply obeys its command.³

In respect to the disposition of property seized under [*296] a search *warrant, no more than in respect to where he shall search or what he shall search for, can the ministerial officer be vested with a judicial discretion. He cannot, therefore, be empowered to destroy property kept for an illegal purpose, without any judicial determination on that subject.⁴

Invasions of Political Rights. The citizen might 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. In the former case the means resorted to for the purpose of defeating the right would determine the nature of the remedy. Thus, persons might wrongfully and by force be removed from a place of meeting, or they might, by threats or other means of intimidation, be prevented from meeting; in the one case there would be an aggravated trespass, and in the other a wrong perhaps equal in degree, but which, being accomplished without force, must be redressed in an action on the case. When a meeting for any lawful purpose is actually called and held, one who goes there with the purpose to disturb and break it up, and commits disorder to that end, is a trespasser upon the rights of those who for the time have control of the place of meeting. If several unite in the disorder, it may be a criminal riot. It is difficult to indicate the particular methods in which the right

¹ Crozier v. Cundey, 6 B. & C. 232; Stone v. Dana, 5 Met. 98.

² Stone v. Dana, 5 Met. 98.

³ Humes v. Taber, 1 R. I. 464; Bell v. Clap, 10 Johns 263; Dwinells v. Boynton, 3 Allen, 310; Sandford v. Nichols, 13 Mass. 286. But case will lie against the complainant if he has obtained the warrant without probable cause, and from malicious motives. Beaty v. Perkins, 6 Wend. 382; Luddington v. Peck, 2 Conn. 700; Watson v. Watson, 9 Conn. 140.

⁴ Fisher v. McGirr, 1 Gray, 1; Greene v. Briggs, 1 Curt. 311; Hibbard v. People, 4 Mich. 125. In the recent case of McCoy v. Zane, 65 Mo. 11, the court avoid this point, but they hold that an officer is not protected in seizing and destroying, under a search warrant, gaming implements which were not in fact kept for gaming purposes; the law only authorizing the destruction of those so kept.

of petition may be violated, and every case will be likely to present new facts. Parties interested in and circulating petitions doubtless have a qualified property in them while in their possession, the disturbance of which may be redressed by suit. The disregard of petitions or remonstrances by the persons or bodies to whom they are addressed is of course only a political wrong.

Suffrage. The chief political right is that of suffrage. The ways in which this may be invaded are numerous, and while all of them are wrongs to the political society, and are or may be made punishable under the penal laws, only a portion of them can support a private right of action. The reason for this will *be apparent when the cases are enumerated. [*297] The following may be instanced as cases in which an individual entitled to suffrage is deprived of the right:

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.

In each of these cases it may be said the individual elector is wronged, but he is wronged only in the same manner and to the same degree with all others. There is a general injury to all, but no special and particular injury to any one. Consequently the injury is only to the public, and must be redressed in a criminal prosecution. Moreover, in the third case specified, the idea of individual injury is excluded if the elector has actually exercised his own right by depositing his ballot. All other interest is then general. In a legal sense one citizen has exactly the same interest with any other in having effect given to the will of the majority of the electors, as it has been expressed in legal ballots, and it would be contradictory to the theory of our institutions to assume that only those voting for the candidate receiving the highest number of legal votes were interested in his

receiving the office for which he is thus designated. An election is only a means of ascertaining, in a formal manner, what the will of the electors is, and when that will has been legally expressed, it is to be presumed that every citizen is desirous and interested to give it effect. No legal principle which assumed the contrary could for a moment be admitted.

In the following cases 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 the right.

3. Where officers or others wrongfully invade his right to secrecy.

[*298] *In the second of these cases it will be shown, in a subsequent chapter, under what circumstances an individual remedy may be had.¹ In the first, if force is employed, there is an aggravated trespass, and if it was not employed, the right of action, we take it, would be plain, if the terror excited by the threats were such that a reasonable man would have been deterred from the exercise of his right. In the third there would be more room for controversy.

An elector in this country has not only a right to vote, but he has a right to exclude others from a knowledge of how he votes. The purpose in establishing voting by ballot is to give him this right, in order that, in his action, he may be perfectly free, uninfluenced either by the fear of giving offense, or by the desire to please. His right is therefore invaded when his secrecy is uncovered.² But there are no cases in which it has judicially been determined what facts make out such an invasion, or at precisely at what point the rude indulgence of one's curiosity, which is always an impertinence and an incivility, becomes also an illegal act. To look over one's shoulder while he is preparing his ballot might be thought a rudeness merely, as would be a like act when one is writing a private letter. Besides, at this stage, the act is incomplete; the elector may change his ballot entirely; and if one only discovers how the elector at one time has contem-

¹ See Ch. xiv., p. *413, *et seq.*

² *People v. Pease*, 27 N. Y. 45; *People v. Cicott*, 16 Mich. 283; *State v.*

Hilmantel, 23 Wis. 422; *Williams v. Stein*, 38 Ind. 89; *McCrary's Law of Elections*, §§ 194, 195.

plated voting, his right to a secret ballot, afterward exercised, is not invaded at all. But where judges of election, when the ballot is received by them for deposit in the box, proceed first to open and inspect it, the violation of right is manifest, and the same law which gives an action for a mere nominal trespass on lands would doubtless give one here.

Exclusion from Office. One may be wronged in his right to hold office, if he possesses the necessary qualifications, and has been actually chosen to one. The qualifications must be prescribed by law; there is no such thing as a natural right to hold an office, any more than there is a natural right to vote.¹

But *when a qualified person, chosen to an office, is [*299] excluded from it, there is a wrong both to the State and to the individual; to the former, because it is thus deprived of its chosen officer, and to the latter, because he thus loses his office. If another has usurped the office, the suitable remedy to oust him is found in the proceeding by *quo warranto* or some analogous statutory process.² Meantime, until he is ousted, if he has color of office, and actually performs the functions without hindrance, he is officer *de facto*, and his acts, which concern the public and third persons, are upheld on grounds of public policy.³ But when the intruder is dispossessed, the money value of the

¹ The qualifications prescribed must of course be supported by some reason; they cannot be purely arbitrary, like the exclusion of members of a particular party. *Baltimore v. State*, 15 Md. 376, 476. See *People v. Hurlbut*, 24 Mich. 244.

² 3 Bl. Com. 362; High, *Extraordinary Remedies*, § 623 *et seq.*

³ *Parker v. Lett*, Ld. Raym. 658; *Commonwealth v. McCombs*, 56 Penn. St. 436; *Ray v. Murdock*, 36 Miss. 692; *State v. Carroll*, 38 Conn. 449; *Ex parte Strang*, 21 Ohio, (N. S.) 610; *Bucknam v. Ruggles*, 15 Mass. 180; *People v. Kane*, 23 Wend. 414; *Burke v. Elliott*, 4 Ired. 355; *Taylor v. Skrine*, 3 Brev. 516; *McGregor v. Balch*, 14 Vt. 428; *Rice v. Common-*

wealth, 3 Bush, 14; *Pritchett v. People*, 6 Ill. 525; *Jones v. Gibson*, 1 N. H. 266; *Cabot v. Given*, 45 Me. 144; *Auditors v. Benoit*, 20 Mich. 176; *McCormick v. Fitch*, 14 Minn. 252; *Leach v. Cassidy*, 23 Ind. 449; *State v. Tolan*, 33 N. J. 195; *Cary v. State*, 76 Ala. 78; *Johnson v. McGinly*, 76 Me. 432; *Gunn v. Tackett*, 67 Geo. 725; *Morton v. Lee*, 28 Kan. 236; *Golder v. Bressler*, 105 Ill. 419; *Ex parte Johnson*, 15 Neb. 512; *Carl v. Rhener*, 27 Minn. 292; *Bedford v. Rice*, 58 N. H. 446; *Yorty v. Paine*, 62 Wis. 154; *Campbell v. Com.*, 96 Penn. St. 344; *Adams v. Tator*, 43 Hun. 384; *Sheehan's Case*, 122 Mass. 445; *Com. v. Taber*, 123 Mass. 253.

office is recognized, and the party entitled is allowed to recover his damages.¹

Military Subordination. An important exemption is to be free from military control, except when it is exercised in strict conformity to law. In times of peace the military remains in strict subordination to the civil power, and in times of war also, except on the theater of warlike operations.² An exception would be made, in either peace or war, by the declaration of martial law.³ Where, therefore, the civil law is not suspended, either by the actual presence of warlike operations, or by declaration of martial law, whatever would be a wrong, if done by any [*300] other *citizen, would be a wrong if done by a person in the military service, whether officer or private, and would be punished in the same way.

Military officers have no general authority to seize property for the purposes of government, and their subordinates have no protection in obeying their orders in doing so.⁴ The seizures are trespasses.⁵ The necessities of the services are to be provided for by the civil law, and unless impressment be expressly allowed by

¹ *Lightly v. Clouston*, 1 Taunt. 112; *Allen v. McKeen*, 1 Sum. 276; *United States v. Addison*, 6 Wall. 291; *Glascock v. Lyons*, 20 Ind. 1; *People v. Miller*, 24 Mich. 458; *Howerton v. Tate*, 70 N. C. 161; *Sigur v. Crenshaw*, 10 La. Ann. 297; *Petit v. Rousseau*, 15 La. Ann. 239; *Dorsey v. Smyth*, 28 Cal. 21. It seems that the damages should be the amount of the emoluments of the office. *United States v. Addison*, 6 Wall. 291; *Glascock v. Lyons*, 20 Ind. 1; *Douglass v. State*, 31 Ind. 429; *People v. Miller*, 24 Mich. 458; *Nichols v. McLean*, 101 N. Y. 526; *Kessel v. Zeiser*, 102 Id. 114. See *People v. Nolan*, 101 Id. 539.

² *Ex parte Milligan*, 4 Wall. 2; *Milligan v. Hovey*, 3 Biss. 13; *Commonwealth v. Small*, 26 Penn. St. 81. Charges made against his superior by a militia officer not in connection with the service, but in his capacity as editor are cognizable by a civil court.

People v. Townsend, 10 Abb. N. C. 169.

³ *Luther v. Borden*, 7 How. 1. In time of war a default judgment was had in a court of a state in military occupancy against a general for the taking of property by his orders. In time of peace an action was brought on the judgment. *Held*, the court had no jurisdiction of the cause of action. *Dow v. Johnson*, 100 U. S. 153.

⁴ *Riggs v. State*, 3 Cold. 85.

⁵ *Mitchell v. Harmony*, 13 How. 115, 135; *Terrill v. Rankin*, 2 Bush, 453; *Bryan v. Walker*, 64 N. C. 141; *Koonce v. Davis*, 72 N. C. 218; *Merritt v. Nashville*, 5 Cold. 95. Where an officer cannot defend dispossessing A. and putting B. in possession of property on the ground of military necessity, he may defend against A. by showing B.'s title to the property to be better than A.'s. *Whalen v. Sheridan*, 17 Blatchf. 9.

law, what is taken must be paid for at the time, or its payment provided for.¹ There are exceptions to this rule, but they are of those cases only in which the necessities of the public service are urgent, and such as will not admit of delay; when the civil authority would be too late in providing the means required for the occasion.² If property was seized without such emergency no title would pass, and the owner might reclaim it in whose hands soever he might find it.³ Impressment in emergencies, belongs to the commander of the army, or of the district or post. The right cannot be exercised by officers of straggling squads of men.⁴

Courts martial, for the trial of military offenses, are strictly courts of inferior and limited jurisdiction, and to render their proceedings valid, and a protection to those acting under them, it must appear that they have kept within their jurisdiction.⁵ A citizen not in the military service, or lawfully summoned into it, is not amenable to court martial.⁶ But where such a court has proceeded within its jurisdiction, its action is as conclusive as the action of any court exercising its legitimate powers.⁷

*Military tribunals cannot be established for the trial of [*301] offenses against the general laws, when the civil courts are in the undisturbed exercise of their powers.⁸

Neither military nor civil law can take from the citizen the right to bear arms for the common defense. This is an inherited and traditionary right, guaranteed also by State and federal Constitutions. But it extends no further than to keep and bear those

¹ *Sellards v. Zomes*, 5 Bush, 90; *Wilson v. Franklin*, 63 N. C. 259; *Hogue v. Penn.* 3 Bush, 663.

² *Farmer v. Lewis*, 1 Bush, 66; *Sellards v. Zomes*, 5 Bush, 90; *Merritt v. Nashville*, 5 Cold. 95.

³ *Reeves v. Trigg*, 7 Bush, 385.

⁴ *Lewis v. McGuire*, 3 Bush, 202; *Hogue v. Penn.* 3 Bush, 663.

⁵ *Duffield v. Smith*, 3 Serg. & R. 590; *Barrett v. Crane*, 16 Vt. 246; *Brooks v. Adams*, 11 Pick. 440; *Brooks v. Davis*, 17 Pick. 148. *Commonwealth v. Small*, 26 Penn. St. 31.

⁶ *Smith v. Shaw*, 12 Johns. 257; *Merriman v. Bryant*, 14 Conn. 200. See, [23]

also, *Mallory v. Merritt*, 17 Conn. 178.

⁷ *State v. Stevens*, 2 McCord, 32; *State v. Wakely*, 2 N. & McC. 410; See *State v. Davis*, 4 N. J. 311; *Mower v. Allen*, 1 D. Chip. 381; *Commonwealth v. Small*, 26 Penn. St. 31; *Keyes v. U. S.*, 109 U. S. 336. Civil courts have no control over the trial of a soldier for desertion so long as the military courts are proceeding regularly within their jurisdiction. *In re White*, 17 Fed. Rep. 723; *In re Davison*, 21 Fed. Rep. 618.

⁸ *Ex parte Milligan*, 4 Wall. 2.

arms, which are suited and proper for the general defense of the community against invasion and oppression, and it does not include the carrying of such weapons as are specially suited for deadly individual encounters.¹ Therefore, the State laws which forbid the carrying of such weapons concealed are no invasion of the rights of citizenship.

¹ *Andrews v. State*, 3 Helsk. 165; S. C. 1 Green. Cr. Rep. 466 and note; *v. State*, 28 Ark. 99; S. C. 18 Am. Rep. 538; *Fife v. State*, 31 Ark. 453. S. C. 8 Am. Rep. 8, and note; *Carroll*

*CHAPTER X.

[*302]

INVASION OF RIGHTS IN REAL PROPERTY.

The ownership of lands is complete or partial; it is of present title or future title; it is several or joint. In this country most persons own their estate by absolute or fee simple title, corresponding to the old allodial titles, which were free from any feudal tenure. The characteristics are, that the owner has complete dominion, and may sell it as he would a chattel, and if he does not make a disposition of it to take effect in his life time, he may do so by testamentary conveyance, or leave it to pass to his heirs-at-law. His dominion is indeed subject to certain powers in the State, which pertain to sovereignty, and which consist in a right to appropriate it to the public use whenever 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. It is also, or may be, subject to certain easements and servitudes in favor of other parties, some of which are incident to ownership, while others, when they exist, arise from contract, express or implied.

In what follows, by real property is understood the thing itself; the land, and what pertains to it, and the right for the time being to possess and enjoy it. Particular estates in the land, some of which would be mere chattels real with the incidents of personal property, it does not often become important, when mere remedies are in question, to distinguish; the law looking to the right to present possession only, and defending that with its lawful incidents.

The chief characteristic of ownership is this right to complete dominion. The line of a man's private domain, like the boundary line between nations, is not to be crossed without permission. In law this permission is called a license.

[*303] *Lawful license to enter one's premises may be given either, 1. Impliedly by the owner; 2. Expressly by the owner; 3. By the law.

Implied Licenses. Every retail dealer impliedly invites the public to enter his shop for the examination of his goods, that they may purchase them if they see fit; the mechanic extends the like invitation to those who may have occasion to become his customers; the physician and the lawyer invite them to their respective offices, and so on.¹ But the invitation is limited by the purpose; it would be an abuse of the implied license, and a trespass, if one, instead of visiting a dealer's shop for the purposes 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. No doubt 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. So every man, by implication, invites others to come to his house as they may have proper occasion, either of business,² of courtesy, for information, etc. Custom must determine in these cases what the limit is of the implied invitation.³ In the case of young children and other persons not fully *sui juris* an implied license might sometimes arise when it would not in behalf of others. Thus, leaving a tempting thing for children to play with exposed, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it;⁴ and, perhaps, if one were to throw away upon his premises, near the common way, things tempting to children, the same

¹ *Gowen v. Phila. Exchange Co.*, 5 Watts & S. 141, 143.

² It is no trespass to enter upon a man's premises to obtain settlement of a debt, even though it be not yet due. *Lehman v. Shackleford*, 50 Ala. 437. Nor to enter to make a tender of a debt; but there is no license to stay to insist on an acceptance. *Breitenbach v. Trowbridge*, 31 N. W. Rep. 402 (Mich.) The servants of a wife who has been divorced from her husband for his fault may peaceably enter afterward to remove her goods

from the husband's premises. *Kallock v. Perry*, 61 Me. 273.

³ *Kay v. Pennsylvania R. R. Co.*, 65 Penn. St. 273. A husband has an implied license to come upon station grounds to meet his wife who is coming on a railroad train. *McKone v. Mich. Centr. R. R. Co.*, 51 Mich. 601.

⁴ *Keefe v. Milwaukee, &c., R. R. Co.*, 21 Minn. 207. Compare *Wood v. School District*, 44 Iowa, 27; *Mangan v. Atterton*, L. R. 1 Exch. 239; *Powers v. Harlow*, 53 Mich. 507, and see cases, p. *833 notes, *post*.

implication should arise. So dogs may be impliedly invited upon lands by exposing meat which is apparently abandoned.¹

*So one who has an easement in the lands of another is [*304] licensed to enter upon such lands whenever it becomes necessary to repair or protect it.² And in a previous chapter many cases are enumerated in which one, by implication of law, is licensed to enter upon the land of another to remove property which he purchased while it was there, or which was left there under express license, or taken there wrongfully, and in some other cases.³

Express License. Where one gives to another authority to enter upon his lands to do a certain act or succession of acts, without at the same time granting to him any interest in the land itself, this is a license, whether given by parol or in writing. It may be given on condition, in which case 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 reason-

¹ One who baits traps on his premises for dogs is liable to their owner for their value if they are killed in consequence. *Townsend v. Wathen*, 9 East, 277.

² See *Prescott v. Williams*, 5 Met. 429. So is the lessor of premises when by the lease it is his duty to repair. *Saner v. Bilton*, L. R. 7 Ch. D. 815.

³ See ante, p. 51. And as to license to enter burial lot to remove monument. *Fletcher v. Evans*, 140 Mass. 241. If one's beasts escape from him upon the adjoining premises, when he is driving along the highway with due care, he may lawfully enter to reclaim them. *Goodwin v. Chevelley*, 4 H. & N. 631. But he must take them out through the proper openings. If he lets down the fence for the purpose, when he might take them through a gate, he may be a trespasser. *Gardner v. Rowland*, 2 Ired. 247. If one marks what he

claims as his boundary he licenses his neighbor to cut timber or grass up to the line, though it be not the true one. *Parks v. Pratt*, 52 Vt. 449; *Clark v. Dustin*, 52 Vt. 568.

⁴ *Mumford v. Whitney*, 15 Wend. 380; *Freeman v. Headley*, 33 N. J. 523.

⁵ *Carleton v. Redington*, 21 N. H. 291; *Jackson v. Babcock*, 4 Johns. 418; *Ruggles v. Lesure*, 24 Pick. 187.

⁶ *Drake v. Wells*, 11 Allen, 141; *Houx v. Seat*, 26 Mo. 178; *Carter v. Harlan*, 6 Md. 20; *Groendyke v. Cramer*, 2 Ind. 382; *Mendenhall v. Klinck*, 51 N. Y. 246; *Estes v. China*, 56 Me. 407; *Dark v. Johnson*, 55 Penn. St. 164; *Prince v. Case*, 10 Conn. 382; *Winne v. Ulster Co. &c.*, Inst., 37 Hun, 349; *Maxwell v. Bay City, &c. Co.*, 41 Mich. 453; *Cox v. Leviston*, 63 N. H. 283; *Jenkins v. Lykes*, 19 Fla. 146. Perhaps it would be equally correct to say that the license had terminated by the hap-

able time it is presumptively recalled;¹ 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.² In general, the licensor assumes toward the licensee no duty, but to refrain from acts willfully injurious, except, perhaps, [*305] when he *had received a consideration for the license, or where his own business was such as to render the enjoyment of the license dangerous, in which case the license would impose upon him the obligation of additional care.³ A license is

pening of a contingency which, by implication of law, was in the understanding of the parties attached to the license at its creation. See *Cook v. Stearns*, 11 Mass. 588; *Bridges v. Purcell*, 1 Dev. & Bat. 492; *Sampson v. Burnside*, 13 N. H. 264; *Selden v. Delaware, &c., Canal Co.*, 29 N. Y. 634; *Wescott v. Delano*, 20 Wis. 514. A mere license to pipe a spring is revoked by a levy against the licensor on the land containing the spring. *Taylor v. Gerrish*, 59 N. H. 569; and by a sale of the water of the spring. *Eckerson v. Crippen*, 39 Hun, 419; and by bringing an action for damage suffered from acts done under it. *Lockhart v. Geir*, 54 Wis. 133. A license is revoked by the death of the licensor or of one of the licensees. *Estelle v. Peacock*, 48 Mich. 469; *Rust v. Conrad*, 47 Mich. 449. License to a partnership by one partner is revoked by a dissolution of the partnership where nothing has been done under it. *Barksdale v. Hairstone*, 81 Va. 764.

¹ *Hill v. Lord*, 48 Me. 83; *Parsons v. Camp*, 11 Conn. 525. A license to enter and cut and remove timber must, so far, at least as the cutting goes, be executed within a reasonable time, or it will be lost. *Holt v. Stratton Mills*, 54 N. H. 109; S. C. 20 Am. Rep. 119.

² *Eaton v. Winnie*, 20 Mich. 156.

³ A person giving a license to

others to enter his premises, especially where the entry is in part for his own interest, assumes to warn all who come of any danger in coming which he knows of and they are ignorant of. *Powers v. Harlow*, 53 Mich. 507. The owner of a lumber yard who permits children to pass through it does not assume toward them the obligation to see that the lumber is piled so as to be reasonably secure from falling. *Vanderbeck v. Hendry*, 84 N. J. 467, citing *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *Binks v. Sou. York, &c., R. Co.*, 3 B. & S. 244; *Gautret v. Egerton L. R.*, 2 C. B. 370; *Stone v. Jackson*, 16 C. B. 199. A licensee cannot recover for injury from fall of a bucket caused by a defective chain which licensor's servants were using upon the land. *Batchelor v. Fortescue*, L. R. 11 Q. B. D. 474. Tenants who have a license to use the roof of a building to dry clothes on cannot recover for falling off the roof by reason of a defective guard rail. *Ivay v. Hedges*, L. R. 9 Q. B. D. 80. A licensee of a way cannot recover unless there was in it some trap not discoverable by ordinary care. *Masner v. Carroll*, 46 Md. 193. The licensor of a way is not liable for mere non-repair. *Nugent v. Wann*, 1 McCrary, 438. But where a railroad company allow the public a way across their premises, they assume toward them, in the management of

not to be extended by construction, and therefore a license for the erection of a bridge will not extend to and license the rebuilding of the bridge after the original structure has passed away.¹ So a license is always subject to revocation before it has been executed, but not afterward. By this is meant that the license accompanies and justifies every act done under it, but is subject at any moment to be put an end to as to any act contemplated by it but not yet performed.² The exceptions to this general right to revoke a license embrace those cases where the licenses are coupled with an interest. By this is meant, not the interest the licensee has in doing the act permitted, but a legal interest conveyed to him in connection with the license, and to the enjoyment of which the license is essential.³ If, for example, one man sells to another cattle then depasturing on his grounds, the right transferred in the cattle *supports the [306] implied license to enter upon the grounds to take them

their road, an obligation of additional care. *Kay v. Pennsylvania R. R. Co.*, 65 Penn. St. 269; *Taylor v. Del., &c., R. R. Co.*, 118 Penn. St. 162; *Byrne v. New York, &c., R. R. Co.*, 104 N. Y. 362; *Davis v. Chicago, &c., Ry Co.*, 58 Wis. 646, and cases cited; *Virginia, &c., R. R. Co. v. White*, 5 S. E. Rep. 573 (Va.); *Troy v. Cape Fear, &c., Ry Co.*, 6 S. E. Rep. 77 (N. C.) But such permission does not amount to an invitation, and the company is liable only if the injury is wanton or willful. *Wright v. Boston, &c., R. R. Co.*, 142 Mass. 296.

¹ *Hall v. Boyd*, 14 Geo. 1; *Gilmore v. Wilbur*, 12 Pick. 120; *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102; *Gardner v. Rowland*, 2 Ired. 247. The same is true in the case of dams erected under license. See *Cook v. Stearns*, 11 Mass. 533.

² *Houston v. Laffee*, 46 N. H. 505; *Dodge v. McClintock*, 47 N. H. 383; *Batchelder v. Hibbard*, 58 N. H. 269; *Chynoweth v. Tenney*, 10 Wis. 397; *Kimball v. Yates*, 14 Ill. 464; *Allen v. Fiske*, 42 Vt. 462; *Woodward v.*

Seely, 11 Ill. 157; *Druse v. Wheeler*, 22 Mich. 439; *S. C. 26 Mich. 189*; *Randal v. Elder*, 12 Kan. 257; *Giles v. Simonds*, 15 Gray, 441; *Cook v. Stearns*, 11 Mass. 533; *Clute v. Carr*, 20 Wis. 531. It is a complete protection as to everything done under it before revocation. *Wood v. Leadbitter*, 13 M. & W. 838; *Rawson v. Morse*, 4 Pick. 127; *Giles v. Simonds*, 15 Gray, 441; *Marston v. Gale*, 24 N. H. 177; *Fuhr v. Dean*, 26 Mo. 116; *Owens v. Lewis*, 46 Ind. 489; *Van Deusen v. Young*, 29 N. Y. 9; *Freeman v. Headley*, 32 N. J. 225. Recovery may be had for injury suffered by licensor after a revocation. *Lockhart v. Geir*, 54 Wis. 133. An oral license to open a street may be revoked before it has been acted on. *Turner v. Stanton*, 42 Mich. 506.

³ See *Wood v. Manley*, 11 Ad. & El. 34; *Barnes v. Barnes*, 6 Vt. 388; *Parsons v. Camp*, 11 Conn. 525; *Whitmarsh v. Walker*, 1 Met. 313; *Giles v. Simons*, 15 Gray, 441; *White v. Ellwell*, 48 Me. 360; *Lewis v. McNatt*, 65 N. C. 63.

away, and makes it irrevocable.¹ But it is to be observed of this case that the license contemplates a temporary use of the land only; not to have any permanent enjoyment of it; if it contemplated anything further, it might be revoked, though no revocation could take from the purchaser his interest in the cattle, or preclude his right to remove them. So if one license another to erect and occupy a building upon his land, and he erects it accordingly, the law recognizes the license so far as to protect his right in the building; and though permission to occupy may be recalled, this will not preclude the licensee going upon the land afterwards to take the building away.² But a license cannot be coupled with an interest in the 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 flow lands permanently, or to carry water over or pipes under the land of another, are mere licenses, and revocable as such, unless created or made by deed.³ And so are

¹ One who has sold property by conditional sale, and who, when the condition is not complied with, enters peaceably the house of the vendee, with assistance, to take the property away, is not a trespasser for so doing, though the property is not found, it being furniture for use there. *Walsh v. Taylor*, 39 Md. 592.

² *Barnes v. Barnes*, 6 Vt. 388; *Smith v. Benson*, 1 Hill, 176; *Dubois v. Kelley*, 10 Barb. 496; *Ricker v. Kelly*, 1 Me. 117; *Schoonover v. Irwin*, 58 Ind. 287. But where one, without permission, has put up buildings on the land of another, whereby they become the property of the landowner, and he then obtains the landowner's parol consent to their removal, this consent is a mere license, and may be revoked before it has been carried out. *Foster v. Mabe*, 4 Ala. 402; *Gibbs v. Estey*, 15 Gray, 587; *Madigan v. McCarthy*, 108 Mass. 376; *Shell v. Haywood*, 16 Penn. St. 523.

³ See *Washb. Real Prop. B. 1, C. 12, § 2*. If a lessee of a parcel has by necessity a license to cross another

parcel of a lessor's land in order to reach the demised parcel, his license is coupled with an interest and is irrevocable while the lease is in force. *Powers v. Harlow*, 53 Mich. 507. Otherwise as to the use of way if there is access from a road, though it is less convenient. *Motes v. Bates*, 74 Ala. 374. As to license to drain, see *Wiseman v. Lucksinger*, 84 N. Y. 81; *Cronkhite v. Cronkhite*, 94 N. Y. 323; see also *Wilkins v. Irvine*, 83 Ohio, St. 138; to bury, *Rayner v. Nugent*, 60 Md. 515. A sale of growing trees may or may not be a sale of an interest in lands. If it is a sale of the trees, to be taken as they stand by the vendee, it is a sale of the realty; but if it is a sale of the timber when the trees are cut, it is a sale of personalty, and may be valid without deed. See cases collected, *Owens v. Lewis*, 46 Ind. 489; S. S. 15 Am. Rep. 295. A parol sale of standing timber operates as a license to protect purchaser as to anything done under it prior to its revocation, and the title to timber actually cut before revocation passes.

the licenses which are given by the sale of tickets to theatres and other places of public amusement.¹

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 he must *suffer by the license being withdrawn as to the [*307] future. The case of license to erect mill dams, and thereby flow the lands of proprietors above, is a suitable illustration; and in what we shall say further under this head we shall confine our attention to licenses of this sort. The hardship of permitting these to be revoked is so great in some cases that it is of great interest to know whether the licensee is not entitled to some protection against it.

The practical consequence of the withdrawal of such a license is this: that whereas 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. When the license to flow lands is withdrawn, the dam which causes the flow must be removed. But the right of the licensor to revoke in these cases is recognized very generally and very fully.² The statute of frauds does

Spalding v. Archibald, 52 Mich. 365; Jenkins v. Lykes, 19 Fla. 148; Heflin v. Bingham, 56 Ala. 566. If a third person cuts the trees before revocation, the licensee may recover from him for the conversion. Cool v. Peters, & Co., 87 Ind. 531. A railway company which, by consent of the owner, is put in possession of a way over his land, with a covenant from him for further assurance, has a license coupled with an interest, and one which is not subject to revocation. New Jersey, &c., R. Co. v. Van Syckle, 37 N. J. 496. A mere parol license to build a track, though acted upon, is revocable. Nat. Stock Yds. v. Wiggins, &c., Co., 112 Ill. 334. *Contra*, Texas, &c., Co. v. Jarrell, 60

Tex. 267; Campbell v. Ind. &c., R. Co., 110 Ind. 490.

¹ Wood v. Leadbitter, 13 M. & W. 838; Burton v. Scherpf, 1 Allen, 133. In this last case it was decided that a ticket to a concert was a mere license, and might be revoked after the party had taken his seat, and he be put out, if he refused to go. But it has been intimated that tickets for particular seats give more than a mere license. Drew v. Peer, 98 Penn. St. 234.

² See Wallis v. Harrison, 4 M. & W. 538; Cocker v. Cowper, 1 C. M. & R. 418; Mumford v. Whitney, 15 Wend. 380; Houston v. Laffee, 46 N. H. 505; Selden v. Delaware, &c., Co., 29 N. Y. 634; Foot v. New Haven, &c., Co., 23 Conn. 214; Morse v. Copeland,

not permit an interest in lands, except in a few cases—of which this is not one,—to pass without deed. But a right to flow lands is, beyond any question, an important interest in the lands, and directly within the contemplation of the statute.¹ Says SAVAGE, Ch. J.: “If A. agree with B. that B. may build a dam upon the land of A., if it is to be permanent, or anything more than a mere temporary erection, such an agreement is not technically a license. The object of A. is to grant and of B. to acquire an interest which shall be permanent: a right not to occupy for a short time, but as long as there shall be employment for the water-power to be thus created. Can such an interest, such a right, be created by parol? As Mr. SUGDEN says of the case of *Wood v. Lake*, ‘It appears to be in the very teeth of [*308] the statute, *which extends generally to all leases, *estates or interests*.’ To decide that a right to a permanent occupation of the plaintiff’s land may be acquired by parol, and by calling the agreement a license, would be in effect to repeal the statute.”²

What relief, then, if any, can be given to the licensee without acting in the teeth of the Statute of Frauds, is the problem to which the courts have directed much attention. If they abide by the strict letter of the statute, the licensee will be remediless when the permission is recalled; for it must be impossible to give him protection without assuring him without deed an interest in lands which the statute says shall pass by deed only. But the statute has been adopted from forcible considerations of public policy; and it lays down what was meant to be an inflexible rule. It is scarcely too much to say that if parties are guilty of the folly of disregarding its provisions it was the intent of the statute that they should be left without redress. Neverthe-

² Gray, 802; *Hall v. Chaffee*, 13 Vt. 150; *Kivett v. McKeithan*, 90 N. C. 106; *Johnsqn v. Skillman*, 29 Minn. 95.

¹ PARKER, Ch. J., in *Cook v. Stearns*, 11 Mass. 538. It is immaterial whether a license, *as such*, is in writing or oral: the protection is the same in each case, and the right to revoke the same where it is not coupled with an interest. It may also be inferred from

circumstances. See *Batchelder v. Sanborn*, 24 N. H. 474; *Lakin v. Ames*, 10 Cush. 198; *Harmon v. Harmon*, 61 Me. 222. A written agreement providing for perpetual flowage of lands is not a revocable license. Interest not permissive but absolute. *Fitch v. Constantine, &c., Co.*, 44 Mich. 74.

² *Mumford v. Whitney*, 15 Wend. 380.

less it is matter of every-day observation that parties do and will rely upon the word and honor of others in cases in which the statute admonishes them that nothing short of a formal instrument should be accepted; and that their confidence is frequently abused by those on whom they rely, who take advantage of the statute to shield themselves against responsibility for frauds and other wrongs. And the law, in detestation of such conduct, appears to have been quite ready in many cases to seize upon any circumstances which could seem to form an excuse for treating the case as taken out of the purview of the statute, so as to permit the courts to give relief. And so many cases have thus been treated as exceptional, and under such variety of circumstances, that the complaint sometimes made—that the statute has been repealed by judicial legislation—seems almost justified.

Some courts have been inclined to hold that, after the license has been acted upon and considerable expenditures made, it should not be revoked without making compensation to the licensee.¹ Other cases go still 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 [*309] be wholly or in great part lost to him if the license should be recalled, these facts are sufficient to create an *estoppel in pais* which will preclude him from revoking. They liken the case to that of a man who suffers his property to be sold as belonging to another without interposing his claim, or who, under any other circumstances, by keeping silence as to his own rights, induces another who is ignorant thereof, to take action which will be prejudicial if such rights are afterwards asserted.²

¹ See *Addison v. Hack*, 2 Gill, 221; *Rhodes v. Otis*, 33 Ala. 578; *Snowden v. Wilas*, 19 Ind. 10; *Woodbury v. Parshley*, 7 N. H. 237; *Ameriscoggin Bridge v. Bragg*, 11 N. H. 102; *Sampson v. Burnside*, 13 N. H. 264; *Hall v. Chaffee*, 13 Vt. 150.

² See *Swartz v. Swartz*, 4 Penn. St. 353; *Rerick v. Kern*, 14 S. & R. 267; *Lacy v. Arnett*, 33 Penn. St. 169; *Cumberland R. R. Co. v. McLanahan*, 59

Penn. St. 23; *Huff v. McCauley*, 53 Penn. St. 206; *Sheffield v. Collier*, 3 Kelly, 82; *Cook v. Pridgen*, 45 Geo. 331; *Snowden v. Wilas*, 19 Ind. 10; *Lane v. Miller*, 27 Ind. 534; *Wilson v. Chalfant*, 15 Ohio, 248; *Ricker v. Kelly*, 1 Me. 117; *Russell v. Hubbard*, 59 Ill. 335. Unless the licensee can be placed *in statu quo*, in Indiana the license is irrevocable. *Campbell v. Ind., &c., R. R. Co.*, 110 Ind. 490;

There is a class of cases which, at first view, may appear to resemble those under consideration, and to which the doctrine of estoppel may with great propriety be applied; such, for instance, as the erection of a partition-wall which parties are to enjoy in common,¹ or the altering the route of a water-course in which both parties are interested;² but these, we think, are to be looked upon as being not so much agreements which give interests in lands as arrangements for the suitable and convenient apportionment or improvement of separate rights which are so connected or related that neither party can properly and fully enjoy his own without some common understanding.

For all such cases the law prescribes for the conduct of the parties some regulations; but there are no reasons to preclude their consulting their own interests or convenience in adding to or modifying these; and if they shall do so, it may be supposed it will generally be done without any understanding that interests in lands are being given or required. Therefore, if their arrangements are merely verbal the courts should not be over-nice in technical classification for the benefit of a party seeking to repudiate them. As has been well said, the acquiescence and consent of the parties to such arrangements are in the nature [*310] of a *contract, which, when fulfilled by one party at his cost and charge, must be obligatory upon both.³

If, however, the doctrine of estoppel can be so applied 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, it must be through some extension of that doctrine not as yet fully accepted. Estoppel is applied to prevent fraud; the party

Simons v. Morehouse, 88 Ind. 391, *Burrow v. Terre Haute, &c., Co.*, 107 Ind. 432; *Nowlin v. Whipple*, 79 Ind. 481; but a license without consideration may be revoked before it is acted on. *Williamson v. Yingling*, 93 Ind. 42; *Parish v. Kaspere*, 109 Ind. 586. In Iowa, where money has been spent in making a mill race, the license is irrevocable. *Decorah, &c., Co., v. Greer*, 49 Ia. 490. Otherwise as to license to erect a building where

only the line stakes have been driven. *Kipp v. Coenen*, 55 Ia. 63.

¹ *Wickersham v. Orr*, 9 Iowa, 253; *Rawson v. Bell*, 46 Geo. 19; *Russell v. Hubbard*, 59 Ill. 335; *Wynn v. Garland*, 19 Ark. 23.

² *LeFevre v. LeFevre*, 4 S. & R. 241; *Rerick v. Kern*, 14 S. & R. 267; *Williams v. Earl of Jersey*, 1 Cr. & Ph. 92.

³ *MERRICK, J., in Pratt v. Lawson*, 2 Allen, 275.

who has neglected to speak when duty or good faith required him to do so, being denied the privilege of asserting his rights afterwards, when to do so would work a surprise and a damage to the party deceived and misled by his silence. But it is difficult to say that one is deceived who, with full knowledge of the facts, has seen fit to rely upon a promise which the law in advance notifies him is void. If one owning land were to say to another, "This is my land, but if you will go on and occupy it I will never assert title thereto," it would be a plain perversion of the doctrine of estoppel to hold that he was afterwards precluded from claiming the land. He has deceived no one regarding the facts, and there is nothing to distinguish the case in its legal bearings from any other in which a party refuses to hold himself bound by a void promise. If, therefore, his pledge can be enforced by estoppel, any other promise made void by the Statute of Frauds, it would seem, might be enforced in the same manner.¹ The doctrine of estoppel is a very salutary one, but it will not do to apply it in cases where, though the party may not be acting conscientiously, he is nevertheless only insisting upon the legal safeguards prescribed by law for the common protection of all. The rule is: "If one is silent when he *should* speak, justice will compel him to silence when he *would* speak."² It precludes the facts from being shown because not shown in season; but there is difficulty in applying it to cases where the action has been had with full knowledge.

There is also considerable support for the doctrine, that the permission to flow after it has been acted upon may be enforced in equity on the same ground on which the courts of equity enforce parol contracts for the sale of land after there has been *partial performance. Says Judge REDFIELD: "If [*311] such a license be given by parol, and expense incurred on the faith of it, so that the parties cannot now be placed *in statu quo*, there would seem to be the same reason why a court of equity should grant relief as in any other case of part performance of a parol contract for the sale of land or any interest therein, *i. e.*, to prevent fraud."³ In Pennsylvania it has been expli-

¹ See *Wright v. DeGroff*, 14 Mich. 164; *Hayes v. Livingston*, 84 Mich. 384.

Smith, 10 Ohio, 289, citing *Wendell v. Van Rensselaar*, 1 Johns. Ch. 353.

² *Hall v. Chaffee*, 13 Vt. 157, note.

³ *Wood, J., in Buckingham v.*

The execution of the license takes the

citly held that "expending money or labor in consequence of a license to divert a water-course, or use a water-power in a particular way, has the effect of turning such license into an agreement that will be enforced in equity;"¹ and the decision, as appears by the context, and also by subsequent cases, is not based upon any distinction between licenses which are to extinguish and those which are to create an easement or servitude, but is applicable to both.² The same doctrine is held in Indiana;³ and in both these States it is held that, inasmuch as they have no court with full equity powers, they will give the licensee the necessary protection when he is proceeded against at law.⁴

One serious difficulty encountered in putting these cases on the ground of specific performance, is that the right to the easement cannot be made complete without a grant, and the licensee has not stipulated for a grant, or understood that one was to be given. When the court undertakes to decree specific performance, it seeks to carry out the contract of the parties as nearly as may be possible; but to treat the license as a contract in these cases, it would seem to be necessary to add a new stipulation and then proceed to enforce it. With this exception the case does not differ from those in which equity is in the daily practice of administering this relief. But it may well be said that in any case of a parol contract relating to lands, it is the particular right or privilege promised that the parties have in view rather [*312] *than the means or instrument by which it is to be created or given, and the court will only be adapting the proper means to the end at which the parties aimed, if it shall direct a legal assurance to be executed.⁵ If relief be given by awarding a perpetual injunction against disturbing the enjoyment

case out of the statute. *Lee v. McLeod*, 12 Nev. 280. There can be no specific performance if the license is revoked before licensee's entry. *Ellsworth v. South. Minn., &c. Co.*, 31 Minn. 543.

¹ *Rerick v. Kern*, 14 S. & R. 267.

² Compare *Le Fevre v. Le Fevre*, 4 S. & R. 241; *Strickler v. Todd*, 10 S. & R. 63; *McKellip v. McIlhenny*, 4 Watts, 317; *Wheatley v. Chrisman*, 24 Penn. St. 298; *Campbell v. McCoy*, 31 Penn. St. 263; *Dark v. Johnston*,

33 Penn. St. 164; *Lacy v. Arnett*, 33 Penn. St. 169.

³ *Snowden v. Wilas*, 19 Ind. 10; *Lane v. Miller*, 27 Ind. 534.

⁴ See the cases above cited. Also, *Wetmore v. White*, 2 Caines' Cas. 87; and the *dictum* of GRIDLEY, J., in *Pierrepont v. Barnard*, 6 N. Y. 290, 304. Also, what is said by AMES, J., in *Foster v. Browning*, 4 R. L. 53; *Hall v. Chaffee*, 13 Vt. 150; *Prince v. Case*, 10 Conn. 375.

⁵ See *Stephens v. Benson*, 19 Ind. 367;

of the license, the same end would be reached and the licensor at the same time would only be held to the exact terms of his promise.¹

Assuming the case to stand on the same footing as a parol contract for the purchase of lands, the permission to flow must obviously be regarded as something more than a mere license. It could not properly 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. This is the view that has been taken in Pennsylvania and Indiana.² And the licensee, then, after moneys expended, would have all the rights of a purchaser in possession under a parol contract, among which would be the right to justify and defend his 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.

All that is above said is as applicable to a license for any other purpose as to a license for flowing lands.³

*3. The third class of licenses comprehends those cases [*313] in which the law gives permission to enter a man's premises. This permission has no necessary connection with the owner's interest, and is always given on public grounds. An in-

Huff v. McCauley, 53 Penn. St. 206; Prince v. Case, 10 Conn. 375. In Houston v. Laffee, 46 N. H. 505, which overrules the early New Hampshire cases—which held a license on which large expenditures had been made was not revocable—it seems to be plainly intimated that the licensee would be entitled to *some* equitable redress.

¹The right at law to revoke a license acted upon with expenditure of moneys is fully recognized in Owen v. Field, 12 Allen, 457; Clute v. Carr, 20 Wis. 559; Hetfield v. Cent. R. R. Co., 29 N. J. 571; Druse v. Wheeler, 29 Mich. 439; Selden v. Delaware, &c., Canal Co., 29 N. Y. 634; Foster v. Browning, 4 R. I. 47;

Houston v. Laffee, 46 N. H. 505; Carleton v. Redington, 21 N. H. 291; Kamphouse v. Gaffner, 73 Ill. 453; Miller v. Tobie, 41 N. H. 84; Marston v. Gale, 24 N. H. 176; Rugles v. Lesure, 24 Pick. 187. See Cobb v. Fisher, 121 Mass. 169.

²Lacy v. Arnett, 33 Penn. St. 169; Rerick v. Kerr, 14 S. & R 267; Thompson v. McElarney, 82 Penn. St. 174; Snowden v. Wilas, 19 Ind. 10. And see Mumford v. Whitney, 15 Wend. 380.

³See Kamphouse v. Gaffner, 73 Ill. 453. License to build a bridge whose abutments are on one's land is revocable. Maxwell v. Bay City, &c., Co., 41 Mich. 453; *contra*, Moses v. Sanford, 2 Lea, 655.

stance is where a fire breaks out in a city. Here the public authorities, and even private individuals, may enter upon adjacent premises as they may find it necessary or convenient in their efforts to extinguish or to arrest the spread of the flames. The law of overruling necessity licenses this, and will not suffer the owner of a lot to stand at its borders and exclude those who would use his premises as vantage ground in staying the conflagration. Indeed, it sometimes becomes necessary to destroy whole blocks of buildings to stop the spread of a fire, and the sufferer, instead of looking to the officials who command it or the parties who execute their commands, must seek redress at the hands of the State itself and accept what the State awards.¹ So, if 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 injury.² So the statutes which permit lands to be taken for public purposes may provide for preliminary surveys, in order to determine the necessity for any [*314] particular *appropriation, and in thus providing, they license an entry upon the lands for the purpose.³ So administrative officers are licensed by the law to enter upon private preinises when necessary in the discharge of their duties.

A more common instance of a license given by the law is where an officer has process, in the service of which it becomes neces-

¹ *Darlington v. New York*, 31 N. Y. 164; *New York v. Lord*, 18 Wend. 126; *Stone v. New York*, 25 Wend. 157; *Surocco v. Geary*, 8 Cal. 69; *American Print Works v. Lawrence*, 21 N. J. 257; S. C. 23 N. J. 9, 590; *McDonald v. Red Wing*, 13 Minn. 38. As to the right to enter to make defense against public enemies, see *British Cast Plate Co. v. Meredith*, 4 T. R. 797, per BULLER, J.; *Boulton v. Crowther*, 2 B. & C. 703.

² *Absor v. French*, 2 Show. 28; *Taylor v. Whitehead*, Doug. 749; *Bullard v. Harrison*, 4 M. & S. 387; *Campbell v. Race*, 7 Cush. 408; *Williams v. Safford*, 7 Barb. 309; *Hedgepeth v. Robertson*, 18 Tex. 858; *Morey v. Fitzgerald*, 56 Vt. 487; *Irwin v. Yeagar*, 37 N. W. Rep. 136 (Ia.). The rule is

not the same in the case of a private way. *Taylor v. Whitehead*, Doug. 749; *Williams v. Safford*, 7 Barb. 309; *Boyce v. Brown*, 7 Barb. 80; *Holmes v. Seeley*, 19 Wend. 506. Though if the private way is obstructed by the owner of the adjoining land, it would be justifiable to pass over his land to avoid the obstruction. *Kent v. Judkins*, 53 Me. 160. *Haley v. Colcord*, 59 N. H. 7; see *Carey v. Rae*, 58 Cal. 159; *Leonard v. Leonard*, 2 Allen, 543; *Farnum v. Platt*, 8 Pick 339.

³ *Walther v. Warner*, 25 Mo. 277; *Mercer v. McWilliams*, *Wright* (Ohio), 132; *Fox v. W. P. R. R. Co.*, 31 Cal. 538; *Bloodgood v. Mohawk, &c., R. R. Co.*, 14 Wend. 51; S. C. 18 Wend. 9.

sary to enter upon private grounds or into private buildings. In general an officer may go wherever a man is, in order to make service of process upon him. The limitation of the right is expressed in that familiar maxim of the law which recognizes every man's house as his castle. The meaning is, that every man's dwelling is sacred against any unlicensed intrusion, and he may close and defend it not against private persons merely, but against the ministers of the law also. The privilege of the castle, however, is in the outer walls only; if the outer door is found open, the officer may enter for any lawful purpose, and having entered, he may, if need be, break open inner doors to make or complete a service. Even the outer doors may be forced for the purposes of an arrest for treason, felony, or breach of the peace, or to serve a search warrant which particularly specifies the building entered as the one to be searched, or to dispossess the occupant when another, by the judgment of a competent court, has been awarded the possession.' In these cases the privilege must yield to the demands of public justice.

The privilege does not in any degree depend upon the character of the building except in this, that it must be the man's habitation. It may even be the part of a house only, as where one building was occupied by many persons who had their separate apartments opening into a common hall, those of the plaintiff communicating with the hall by several doors. Says MERRICK, J.: "The apartments occupied by the plaintiff constituted, in and of themselves, a complete habitation for himself and for his family. He had the sole and exclusive use and possession of them as completely as if they stood separate and apart from everything else, and were in any other distinct structure. The privilege which the law allows to a man's habitation clearly *ought to attach to apartments so situated. It [*315] arises from the great regard which the law has for every man's safety and quiet, and, therefore, it protects him from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect. And this reason shows that the principle of law which gives protection to dwelling houses has no reference whatever to their quality, construction, or magnitude, but is solely for the purpose of insuring the quiet, convenience and security of those who inhabit and dwell

¹ Semayne's Case, 5 Co. 91; Yelv. 29; S. C. Smith Lead. Cas. 213.

in them. Domestic security and peace would be equally disturbed by violence in breaking the doors and forcing an entrance into a dwelling, whether it should consist of the entire portions of the building or of separate and distinct apartments within it.

“Nor can the fact that there were several doors leading from the common passage-way into the different apartments occupied by the plaintiff lead to a different conclusion. For, although it was said by Lord Mansfield, in *Lee v. Gansel*,¹ that the having of four outer doors would lead to the grossest absurdity, since the greatest house in London has but one, that is not the manner in which, according to our prevailing habits and modes of living, our dwelling houses are here constructed. Many might, undoubtedly, be found here having four, and it would perhaps be difficult to find a house of any moderate degree of pretension which has less than two outer doors. While all the doors leading into any of the apartments occupied by the plaintiff are closed, each of them may be considered and must be treated as an outer door. They are all necessary to protect the habitation from the intrusion of those who have no license to enter it. Whether an officer who had lawfully passed through one of them might afterward, for the purpose of completing the service of his process, treat the others as inner doors, need not now be considered, because no such question arises upon the facts reported. The complaint against the defendant is confined to the breaking open of one of the doors before he had obtained an entrance to any of that portion of the building which was in the exclusive occupation of the plaintiff.

“The defendant contends that the door constructed and used for closing the entrance from the street or public high- [*316] way into *the common hall or entry of the building, is to be considered the only outer door of the plaintiff’s dwelling house; that is to say, that his house consisted of the apartments occupied by him, and of the hall and entry used by him as a passage way in common with the tenants of all the other parts of the building. But this latter fact is by no means shown. On the contrary, these appear to have constituted no part of his tenement. He had an easement in them only in common with others, who all equally enjoyed the like privilege for the purpose of gaining access to their respective tenements.”²

¹ Cowp. p. 1.

² Swain v. Mizner, 8 Gray, 188.

Another case of a license granted by the law is that to enter and abate a nuisance. We have spoken of these licenses elsewhere, and need not repeat what was there said. It has been seen that the property licensed must keep strictly within the privilege; he becomes a trespasser if unnecessary injury is done.¹

Abuse of License. A license, whether given by the owner himself, or by the law, may be lost by abusing it. Thus, one licensed to build an arch over a way abuses his authority if he obstructs the way in building it.² But, as respects the consequences of the abuse, a distinction which is of high importance is to be taken between the two classes of cases. The distinction is this: 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 not in good faith under his license. The wrong-doer is thereupon held responsible as a trespasser *ab initio*; a trespasser in the entry itself, as in everything done afterward. Thus, if parties enter a public inn and demand entertainment there—the landlord being obliged by law to receive them—and if, after having entered, they abuse the license by riotous conduct, they not only *become trespassers, but their trespass [*317] dates from their entry.³ So the officer who distrains property for taxes is a trespasser *ab initio* if, instead of proceeding to dispose of it as required by law, he misuses or misappro-

184, following *Ilsey v. Nichols*, 12 Pick. 270, in which, in an able opinion delivered by Chief Justice Shaw, a levy on chattels, which an officer broke into a dwelling-house to make, was held to be void. The same doctrine is laid down in *People v. Hubbard*, 24 Wend. 369, and *Bailey v. Wright*, 39 Mich. 96. See, also, *Attack v. Bramwell*, 3 Best & S. 520; *Oystead v. Shed*, 13 Mass. 520; *Snydacker v. Brossé*, 51 Ill. 357. Where rooms over a store are used as a dwelling, breaking the outer door of the store to serve civil process is not a breaking of the outer door of a house. The

dwelling in such case is to be considered as that portion of the building which is in fact occupied as a dwelling. *Stearns v. Vincent*, 50 Mich. 209. A room used as a dwelling and a store is a dwelling as to breaking door to serve civil process. *Welsh v. Wilson*, 34 Minn. 92. An officer may enter premises of one man to seize goods of another, the defendant in the writ. *Link v. Harrington*, 23 Mo. App. 429.

¹ Ante, p. 51.

² *Cushing v. Adams*, 18 Pick. 110.

³ *Six Carpenters' Case*, 8 Co. 290; *S. C. 1 Smith L. C. 216.*

priates it.¹ In these cases the law has given an authority which the owner cannot resist, and as no choice is allowed him in respect to the person who is to exercise it, it is but reasonable that the law which confers the authority should withdraw it wholly when it is abused. But when the party himself grants a license, which he might, at his option, have withheld, there is no reason why the remedy for an abuse should be broader than the abuse itself. The licensee is therefore not a trespasser in his entry, but he is liable on the special case for exceeding his license, or for any misconduct after entry.*

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.* Says [*318] PARSONS, *Ch. J.: "Every use to which the land may be applied, and all the profits which may be derived from

¹ The cases respecting trespass *ab initio* will be referred to hereafter, when protection by process is considered.

* Edelman v. Yeakel, 27 Penn. St. 26; Cushing v. Adams, 18 Pick. 110; Faulkner v. Alderson, Gilm. (Va.) 221; Jewell v. Mahood, 44 N. H. 474; Ballard v. Noaks, 2 Ark. 45; Dumont v. Smith, 4 Denio, 319; Van Brunt v. Schenck, 13 Johns. 414; Stone v. Knapp, 29 Vt. 501; Ferrin v. Symonds, 11 N. H. 363.

* Lade v. Sheperd, 2 Str. 1004; Goodtitle v. Alker, 1 Burr. 133; Grose v. West, 7 Taunt. 39; Doe v. Pearsey, 7 B. & C. 304; U. S. v. Harris, 1 Sumner, 21; Harris v. Elliott, 10 Pet. 25; Barclay v. Howell's Lessee, 6 Pet. 498; Cole v. Drew, 44 Vt. 49; Webber v. California, &c., R. R. Co., 51 Cal. 425; Watkins v. Lynch, 71 Cal. 21; Chatham v. Brainerd, 11 Conn. 60; Jackson v. Hathaway, 15 Johns. 447; Dean v. Lowell, 135 Mass. 55; Chadwick v. Davis, 143 Mass. 7; Transue v. Sill, 105 Penn. St. 604; Helmer v. Castle, 109 Ill. 664. Where land was

described to center of highway excepting "the roads laid out over the land," the fee to the center of the highway passed subject to the public easement. Wellman v. Dickey, 78 Me. 29. Lands described in a deed as bounded by a public highway or street will be considered as bounded by the center, unless it clearly appears that it was intended to make the side line of the street a boundary instead of the center. Moody v. Palmer, 50 Cal. 31. See Chicago v. Rumsey, 87 Ill. 348. If the land is bounded on "the side" of the highway, these words are presumed to exclude the highway. Hughes v. Providence, &c., R. R. Co., 2 R. I. 493; Hoboken Land Co. v. Kerrigan, 31 N. J. 13; Anderson v. James, 4 Robt. 85; Grand Rapids, &c., R. R. Co. v. Heisel, 38 Mich. 62; Severy v. Cent. Pac. R. R. Co., 51 Cal. 194; De Peyster v. Mall, 27 Hun. 439; Kings Co. Ins. Co. v. Stevens, 87 N. Y. 287. But see, Low v. Tibbetts, 72 Me. 92. A description as "a lot on the west side of M. street," carries title to the middle of the

it consistently with the continuance of the easement, the owner can lawfully claim."¹ The herbage in the highway is therefore his, and he may maintain trespass against one whose cattle graze upon it, unless by law the cattle are permitted to roam at large.² The growing trees in the highway also belong to the adjoining owner, except as they may be needed for the purpose of making the way or of repairing it;³ and if the highway officers sell trees thus standing in the road, and they are cut without necessity, they are liable in trespass for so doing.⁴ So it is a trespass on the adjoining owner for a person to deposit in the highway any thing not in any manner connected with the enjoyment of the easement,⁵ or to extend a structure on other lands out over it,⁶ or

street. *Greer v. New York, &c., Co.*, 87 Hun, 346. So a boundary described as extending "to the margin of the cove, thence westerly along the margin of the cove," etc., extends only to the margin, and does not include the flats. *Nickerson v. Crawford*, 16 Me. 245; *Montgomery v. Reed*, 69 Me. 510. So one "on the beach." *Litchfield v. Ferguson*, 141 Mass. 97. So a grant bounded by the shore. *Galveston, &c., Co. v. Heidenheimer*, 63 Tex. 559. See, also, *Rockwell v. Baldwin*, 53 Ill. 19. *People v. Board of Superv.*, 17 N. E. Rep. 147 (Ill.) If the "channel" of a river is the boundary, the line is the center of the navigable part of the river. *Warren v. Thomaston*, 75 Me. 329; *Rowe v. Smith*, 51 Conn. 266. The question whether the boundary is on the line of the street or along the center is always one of intent. *Mott v. Mott*, 68 N. Y. 246. See *Salter v. Jonas*, 39 N. J. 469; *S. C.* 23 Am. Rep. 229.

¹ *Perley v. Chandler*, 6 Mass. 454, 456. See *Lane v. Kennedy*, 13 Ohio, (N. S.) 42; *Phifer v. Cox*, 21 Ohio, (N. S.) 248; *Higgins v. Reynolds*, 31 N. Y. 151; *Holden v. Shattuck*, 34 Vt. 336; *Cole v. Drew*, 44 Vt. 49; *Graves v. Shattuck*, 35 N. H. 257; *Chamberlain v. Enfield*, 43 N. H. 356; *Wood-*

ring v. Forks Township, 28 Penn. St. 355, 361.

² *Stackpole v. Healy*, 16 Mass. 33; *Cool v. Crommet*, 13 Me. 250; *Avery v. Maxwell*, 4 N. H. 36; *Woodruff v. Neal*, 28 Conn. 165. So he may maintain ejectment against one who appropriates any part of his land within the highway limits. *Goodtitle v. Alker*, 1 Burr. 133.

³ *Adams v. Emerson*, 6 Pick. 56; *Sanderson v. Haverstick*, 8 Penn. St. 294; *Overman v. May*, 35 Iowa, 89; *Commissioners, etc., v. Beckwith*, 10 Kan. 603.

⁴ *Clark v. Dasso*, 34 Mich. 86; *Baker v. Shephard*, 24 N. H. 208; *Wellman v. Dickey*, 78 Me. 29. See, further, *Jackson v. Hathaway*, 15 Johns. 447; *Babcock v. Lamb*, 1 Cow. 238; *Williams v. N. Y. Cent. R. R. Co.*, 16 N. Y. 97; *Dubuque v. Maloney*, 9 Iowa, 450; *Dubuque v. Benson*, 23 Iowa, 248; *White v. Godfrey*, 97 Mass. 472; *Bliss v. Ball*, 99 Mass. 597; *Makepeace v. Worden*, 1 N. H. 16; *Sanderson v. Haverstick*, 8 Penn. St. 294; *Woodring v. Forks Town*, 28 Penn. St. 355; *Read v. Leeds*, 19 Conn. 183; *Kellogg v. Malin*, 50 Mo. 496; *West Covington v. Freking*, 8 Bush, 121.

⁵ *Lewis v. Jones*, 1 Penn. St. 336.

⁶ *Codman v. Evans*, 5 Allen, 308.

to take a stand in the highway for the purpose of blackguardism and abuse.¹

It is competent, however, in appropriating lands for a public way, to provide for taking, not an easement merely, but the fee simple title, and where that is done, doubtless the rights of the adjoining owner are considerably restricted. It has been decided in Iowa that under such an appropriation the complete ownership and dominion passed to the municipal corporation by which the appropriation was made, and that if a deposit of [*319] mineral *should exist beneath the surface, and be worked by the adjoining proprietor, the corporation might recover from him the value of the mineral taken out.² In Michigan a different view is taken; the appropriation of the fee being held to be only for the purposes of the easement, and for the other public purposes for which it is customary or proper to make use of land thus appropriated. Therefore, the earth in a city street, not needed for making or repairing it, belongs to the adjacent owner, and cannot be sold by the city.³

So *prima facie* the land bounded on a stream of water is bounded by the center of the stream.⁴ This rule has been applied

¹ Adams v. Rivers, 11 Barb. 390. So, to use without the consent of the adjoining owner the street as a hackstand in accordance with an ordinance. McCaffrey v. Smith, 41 Hun, 117.

² Des Moines v. Hall, 24 Iowa, 234. See, also, Milburn v. Cedar Rapids, &c. R. R. Co., 12 Iowa, 246. Compare Moses v. Pittsburgh, &c. R. R. Co., 21 Ill. 522; West v. Bancroft, 32 Vt. 367; Ohio, &c. R. R. Co. v. Applegate, 8 Dana, 289; Hinchman v. Paterson, &c. R. Co., 2 C. E. Green, 75; State v. Laverack, 34 N. J. 201; Jackson v. Hathaway, 15 Johns. 447, 453. It would be otherwise, it seems, if the land were dedicated for street purposes *only*. Dubuque v. Benson, 23 Iowa, 248.

³ Cumming v. Prang, 24 Mich. 514; Bissell v. Collins, 28 Mich. 277; Griswold v. Bay City, 35 Mich. 452. To the same effect. Robert v. Sadler,

104 N. Y. 229. In dedicating a street the owner cannot reserve the fee so as to prevent laying in it water pipes for public use. Wood v. National, &c. Co., 33 Kan. 500. Compare Delphi v. Evans, 36 Ind. 90; West Covington v. Freking, 8 Bush, 121; Stevenson v. Chattanooga, 20 Fed. Rep. 586.

⁴ Bickett v. Morris, L. R. 1 H. L. Sc. Ap. 47; Cate's Exrs. v. Wadlington, 1 McCord, 581; Hayes v. Bowman, 1 Rand. 417; Jackson v. Halstead, 5 Cow. 216; Walker v. Board of Public Works, 16 Ohio, 540; State v. Gilmanton, 9 N. H. 461; Nickerson v. Crawford, 16 Me. 245; Browne v. Kennedy, 5 H. & J. 195; Ross v. Faust, 54 Ind. 471; S. C. 28 Am. Rep. 655; Arnold v. Elmore, 16 Wis. 536; Piper v. Connelly, 108 Ill. 646; Norcross v. Griffiths, 65 Wis. 599. The owner of land on both sides of a stream owns the bed. Olson v.

to such large rivers as the Connecticut,¹ the Delaware,² the Mississippi,³ the Detroit,⁴ the Sandusky,⁵ the Milwaukee,⁶ the Sault *Ste. Marie,⁷ the Saginaw,⁸ etc.⁹ Where this [*320] 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. It has been held that the right to gather ice therefrom was exclusive, and that the owner might maintain an action against one who, by moving a raft in front of his grounds, prevented his gathering an ice crop.¹⁰ He may also rightfully carry out the shore by em-

Merrill, 42 Wis. 204. The river is the monument. The center of the monument is the boundary. **Sleeper v. Laconia**, 60 N. H. 203. The rule is the same in the case of boundary on a canal. **Agawam Canal Co. v. Edwards**, 88 Conn. 476, 501. A description of land by lot number on a plat carries riparian rights to center of boundary stream. **Fletcher v. Thunder Bay, &c. Co.**, 51 Mich. 277. See **Cole v. Wells**, 49 Mich. 450; **Richardson v. Prentiss**, 48 Mich. 88. See, also, **Holbert v. Edens**, 5 Lea, 204.

¹ **Adams v. Pease**, 2 Conn. 481. In this case, **Hosmer, J.**, speaking of the common law rule, which gives the owner of the bank the title *ad flum medium aquas*, and of the argument *ab inconvenienti*, as it applied to such large streams, says: "The argument from inconvenience must be very powerful to cast a shade on a long established principle. Here I discern no inconvenience. On the other hand, the doctrine of the common law * * promotes the grand ends of civil society by pursuing that wise and orderly maxim of assigning to everything capable of ownership a legal and determinate owner." Approved by **SPENCER, Ch. J.**, in **Hooker v. Cummings**, 20 Johns. 90, 101.

² **Rundle v. Delaware, &c. Canal**

Co., 1 Wall. Jr., 275, 294, **GRIER, J.**; **Hart v. Hill**, 1 Whart. 124.

³ **Morgan v. Reading**, 3 Sme. & Mar. 366; **S. B. Magnolia v. Marshall**, 89 Miss. 110; **Middleton v. Pritchard** 4 Ill. 510; **Houck v. Yates**, 82 Ill. 179.

⁴ **Lorman v. Benson**, 8 Mich. 18.

⁵ **Gavit's Admrs. v. Chambers**, 8 Ohio, 496; **June v. Purcell**, 36 Ohio St. 396.

⁶ **Arnold v. Elmore**, 16 Wis. 509.

⁷ **Ryan v. Brown**, 18 Mich. 196.

⁸ **Bay City Gas Light Co. v. Industrial Works**, 28 Mich. 182.

⁹ See **Stuart v. Clark's Lessee**, 2 Swan, 9, where the common law rule of private ownership was held applicable to all fresh water streams.

¹⁰ **Lorman v. Benson**, 8 Mich. 18. So may the lessee of the riparian rights. **People's Ice Co. v. The Excelsior**, 44 Mich. 229. But if the upland owner does not own the bed of the stream, he has not the exclusive right to cut the ice. **Wood v. Fowler**, 26 Kan. 692. The right of ice harvesting in a navigable stream like the Penobscot, below Bangor, is held superior from its importance to the right of traveling over the ice—though both are common rights. **Woodman v. Pitman**, 10 Atl. Rep. 321 (Me.) The owner of the bed of the stream alone has the right to take the ice formed over his land. **Washington Ice Co. v. Shortall**,

bankment, or otherwise, subject to two conditions, the first of which is, that he must not do that which diminishes or threatens the corresponding rights of other riparian proprietors;¹ [*321] and the second is, that he *must not abridge or obstruct the public easement, and must be subject always to State

101 Ill. 46; Piper v. Connelly, 108 Ill. 646. The owner of an easement to flow land does not own the ice formed over the land. Stevens v. Kelley, 78 Me. 444; Brookville, &c., Co. v. Butler, 91 Ind. 134. The land owner may take it unless thereby he materially injures the owner of the easement. Dodge v. Berry, 26 Hun, 246; Bigelow v. Shaw, 32 N. W. Rep. 800 (Mich.); Searle v. Gardner, 18 Atl. Rep. 835 (Penna).

¹ In Bickett v. Morris, L. R. 1 H.L. Cas. Sc. Ap. 47, 61. Lord WESTBURY says: "When, however, it is said that the proprietors of the bank of a running stream are entitled to the bed of the stream as their property *usque ad medium flum*, it does not by any means follow that that property is capable of being used in the ordinary way in which so much land uncovered by water might be used; but it must be used in such a manner as not to affect the interest of riparian proprietors in the stream. Now, the interest of a riparian proprietor in the stream is not only to the extent of preventing its being diverted or diminished, but it would extend also to prevent the course being interfered with or affected, so as to direct the current in any different way that might possibly be attended with damage at a future period to another proprietor.

"In the bed of a river there may, possibly, be a difference in the level of the ground, which, as we know, has the effect of directing the tide or current in a particular direction. Suppose the ordinary current flows

in a manner which has created for itself, by attrition, a bay, in a particular part of the bank; if that were obstructed by a building, the effect might be to alter the course of the current, so as to direct the flow with a greater degree of violence upon the opposite bank, or some other portion of the same bank; and then, if at that part of the bank to which the accelerated flow of the water in greater force is thus directed, there happens to be a building erected, the flow of the water thus produced by the artificial obstruction would have the effect, possibly, of wearing away the foundation of that building at some remote period, and would thereby be productive of very considerable damage.

"It is wise, therefore, to lay down the general rule, that even though immediate damage cannot be described, even though the actual loss cannot be predicated, yet, if an obstruction be made to the actual current of the stream, that obstruction is one that constitutes an injury which the courts will take notice of, as an encroachment which adjacent proprietors have a right to have removed. In this sense the maxim has been applied by the law of Scotland that *melior est conditio prohibentis*, that is to say, you have a right to preserve the state of things unimpaired and unprejudiced in which you have that existing interest." As to the right of the owner of land on navigable water to build out wharves, &c., provided navigation is not obstructed, see further, Delaplaine v. Chicago, &c.

police regulations. In Iowa, North Carolina, Missouri, Kansas, Minnesota, California, Nevada, Oregon and West Virginia, 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 And this view has the approval of the Federal Supreme Court.²

On the small streams which are highways only for rafting purposes, the title of the bank-owner is conceded on all hands to extend 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.³

Where land is bounded on a fresh-water lake, large or small,

Ry. Co. 42 Wis. 214; *Carli v. Still-water, &c., Co.*, 28 Minn. 373; *Williamsburg Boom Co. v. Smith*, 1 S. W. Rep. 765 (Ky.) As to protecting land from washing away, see *Diedrich v. Northw. &c., Ry. Co.*, 42 Wis. 248; *Barnes v. Marshall*, 68 Cal. 569.

¹ *McManus v. Carmichael*, 3 Iowa, 57; *Haight v. Keokuk*, 4 Iowa, 199; *Tomlin v. Railroad Co.*, 32 Iowa, 106; *Wilson v. Forbes*, 2 Dev. 30; *Collins v. Benbury*, 3 Ired. 277; S. C. 5 Ired. 118; *State v. Glen*, 7 Jones, (N. C.) 321; *Benson v. Morrow*, 61 Mo. 345; *Meyers v. St. Louis*, 8 Mo. App. 266; *Wood v. Fowler*, 26 Kan. 683; *Morrill v. St. Anthony, &c., Co.* 26 Minn. 222; *Un. Depot Co. v. Brunswick*, 31 Minn. 297; *Packer v. Bird*, 71 Cal. 134; *Shoemaker v. Hatch*, 18 Nev. 261; *Minto v. Delaney*, 7 Ore. 337; *Ravenswood v. Flemings*, 22 W. Va. 52. See *Bainbridge v. Sherlock*, 29 Ind. 364. If by act of congress such stream is declared non-navigable the owner's title is not carried to the center. *Wood v. Chicago, &c., Ry. Co.*, 60 Ia. 456.

² *Barney v. Keokuk*, 94 U. S. 334. In *Ryan v. Brown*, 18 Mich. 196, it was decided that the State could not build structures in a fresh water navigable stream without the consent of the proprietor of the

bank, or without first making compensation. The decision in *Barney v. Keokuk* is *contra*. Each State may determine the extent of the riparian owner's title; *Webber v. Pere Marq. &c., Co.*, 30 N. W. Rep. 469 (Mich.); *Barney v. Keokuk, supra*.

³ *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Middleton v. Flat River Booming Co.*, 27 Mich. 533. See *Brown v. Chadbourne*, 31 Me. 9; *Treat v. Lord*, 42 Me. 552; *Morgan v. King*, 35 N. Y. 454; *Weise v. Smith*, 3 Ore. 445; S. C. 8 Am. Rep. 621; *Hubbard v. Bell*, 54 Ill. 110; *Lawler v. Baring Boom Co.*, 56 Me. 443; *Weaver v. Miss. &c. Co.*, 28 Minn. 534; *Carter v. Thurston*, 58 N. H. 104; *Haines v. Welch*, 14 Ore. 319; *Anderson v. Thunder Bay &c., Co.*, 28 N. W. Rep. 518 (Mich.); *Field v. Apple River &c., Co.*, 67 Wis. 569. A stream not capable of use for rafting purposes in its natural condition cannot lawfully be made so by dams to the prejudice of land owners. *Thunder Bay Co. v. Speechly*, 31 Mich. 336. If there is a sufficient sluice in a lawful dam to allow unrafted logs to pass, there is no duty to so build that a raft can pass. *Foster v. Searsport, &c., Co.*, 11 Atl. Rep. 273 (Me).

the boundary line is perhaps low-water mark.¹ On waters where the tide ebbs and flows the line of high water is the limit of exclusive private ownership,² though this rule in the [*322] Atlantic States is much modified either by legislation or by customary law.³ And in respect to boundary on highways or fresh-water streams, the rules above given are rules of presumption merely,⁴ and in any grant of lands the words of conveyance may be such as to bound the lands on the exterior line of a highway, or on the bank of a stream, or on any other line sufficiently designated.⁵

¹ *Waterman v. Johnson*, 13 Pick. 261; *Bradley v. Rice*, 18 Me. 198; *Stevens v. King*, 76 Me. 197; *Champlain, &c., R. R. Co., v. Valentine*, 19 Barb. 484; *Canal Commissioners v. People*, 5 Wend. 423; *Wheeler v. Spinola*, 54 N. Y. 377; *Fletcher v. Phelps*, 28 Vt. 257; *Jakeway v. Barrett*, 38 Vt. 816; *Austin v. Rutland, &c., R. R. Co.*, 45 Vt. 215; *State v. Gilmanton*, 9 N. H. 461; *West Roxbury v. Stoddard*, 7 Allen, 158; *Trustees v. Schroll*, 120 Ill. 509, discussing what is a lake and what a stream. The line in Ohio as to Lake Erie and in Wisconsin as to large and small lakes is that where the water in its usual condition stands. *Sloan v. Biemiller*, 84 Ohio, St. 492; *Dela-
plaine v. Chicago, &c., Co.*, 42 Wis. 214; *Boorman v. Sunnuchs*, id. 233. Where private ownership extends only to low water mark, the owner of uplands cannot grant a submerged lot separate from the upland. The riparian rights cannot be thus conveyed. *Lake Sup. Land Co v. Emerson*, 38 N. W. Rep. 200 (Minn.) In *Rice v. Ruddiman*, 10 Mich. 125, the owner of the bank on Lake Muskegon, a small body of water through which the river Muskegon passes near its mouth, was held entitled to the soil under the water in front of his lands on the shore. Followed in *Pere Marq. Boom Co. v. Adams*, 44

Mich. 403, and applied to Lake Huron. *Lincoln v. Davis*, 53 Mich. 375. And, see *Cobb v. Davenport*, 32 N. J. 369. The owner of a government subdivision bounded by a pond does not own to the center when it is surveyed as part of another subdivision. *Edwards v. Ogle*, 76 Ind. 302. If one owns a fractional subdivision of land on a pond which lies partly in two subdivisions he owns the soil included by the lines of his fractional subdivision extended. *Clute v. Fisher*, 31 N. W. Rep. 614 (Mich).

² *Pollard's Lessee v. Hagan*, 3 How. 212; *Martin v. Waddell*, 16 Pet. 367; *East Hampton v. Kirk*, 68 N. Y. 459; *Storer v. Freeman*, 6 Mass. 436; *State v. Jersey City*, 25 N. J. 525. *Hoboken v. Penn. Ry. Co.* 16 Fed. Rep. 816; *Coburn v. Ames*, 52 Cal. 385. So in case of the Harlem river. *Mayor, &c., of N. Y. v. Hart*, 95 N. Y. 443.

³ See opinion of Chief Justice GREEN, in *Gough v. Bell* 22 N. J. 441; *Bell v. Gough*, 23 N. J. 624; *Commonwealth v. Vincent*, 108 Mass. 441; Opinion by GRAY, J.; *Parker v. Cutler Mill Dam Co.*, 20 Me. 353; *Nudd v. Hobbs*, 17 N. H. 524.

⁴ *Waterman v. Johnson*, 13 Pick. 261; *Mott v. Mott*, 63 N. Y. 246.

⁵ *Alden v. Murdoch*, 13 Mass. 256; *Pettingill v. Porter*, 3 Allen, 349; *Tyler v. Hammond*, 11 Pick. 193; *Smith*

Possession of Lands. Land, the ownership of which has passed from the sovereignty, in contemplation of law is always in the possession of some one. The possession may be rightful or wrongful, and if rightful, it may be by one who has only a temporary interest therein, as tenant for years or at will, or it may be by one having a freehold estate. Where one has actual possession, he does not lose it by temporary absences 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 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 possessions, and will recover if he makes out his title.² If possession has been taken from the owner, his method of recovering it will depend upon the circumstances. At the common law he might have retaken it by force, but as this often led to serious breaches of the public peace *the Statute, 5 Rich. II., C. 7, was enacted, [*323] which declared that "none henceforth make entry into any lands and tenements but in cases where entry is given by the law, and in that case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner." This

v. Slocomb, 9 Gray, 36; Howard v. Ingersoll, 18 How. 381; Hughes v. Providence, &c., R. R. Co., 2 R. I. 508; Hoboken Land Co. v. Kerrigan, 81 N. J. 13; Morrow v. Willard, 30 Vt. 118; Starr v. Child, 5 Denio, 599; Halsey v. McCormick, 13 N. Y. 296; Nickerson v. Crawford, 16 Me. 245; Rockwell v. Baldwin, 53 Ill. 19; Grand Rapids, &c., R. R. Co. v. Heisel, 38 Mich. 62.

¹ Achey v. Hull, 7 Mich. 423; Dobbs v. Gullidge, 4 Dev. & Bat. 68; Barber v. Trustees of Schools, 51 Ill. 396; Ste Collins v. Benbury, 5 Ired. 118; Ruggles v. Sands, 40 Mich. 559; Moore v. Douglas, 14 W. Va. 708; Parker v. Wallis, 60 Md. 15. The claim must be made before the trespass is com-

mitted. Hosford v. Whitcomb, 56 Vt. 651. In Wisconsin, where an injury is to the possession and not a permanent one to the freehold, plaintiff may maintain an action if he shows good title to a part and possession of the whole. Boyington v. Squires, 37 N. W. Rep. 227. Otherwise, if the injury is to the freehold and he fails to show good title. Winchester v. Stevens' Point, 58 Wis. 350; Reed v. Chicago, &c. Co., 37 N. W. Rep. 225.

² Miller v. Miller, 41 Md. 623; Griffin v. Creppin, 60 Me. 270; Tolles v. Duncombe, 34 Mich. 101; Appleby v. Qbert, 1 Harr. 336; Gunsolus v. Lormer, 54 Wis. 630; Storrs v. Feick, 24 W. Va. 606.

statute has been re-enacted in the several American States, or recognized as a part of the American common law. If, notwithstanding its prohibition, one shall forcibly seize possession of lands, or if, after having in any manner unlawfully obtained possession, he shall 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. And title is no defense to a complaint for a forcible entry.¹

There are several reasons why the law cannot suffer a forcible entry upon a peaceable possession, even though it be in the assertion of a valid title against a mere intruder. *First.* Whoever assumes to make such an entry makes himself judge in his own cause, and enforces his own judgment. *Second.* He does this by the employment of force against a peaceable party. *Third.* As the other party must have an equal right to judge in his own cause, and to employ force in giving effect to his judgment, a breach of the public peace would be invited, and 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.² The good of the State could not tolerate such proceedings, and therefore when forcible possession is taken, the law compels a restoration, and refuses to inquire into the title until it 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,³ and it is not unlawful for him to resort to such means, short of the employ-

¹ *Newton v. Harland*, 1 M. & Gr. 644; *Hillary v. Gay*, 6 C. & P. 284. See *Mugford v. Richardson*, 6 Allen, 76; *Gault v. Jenkins*, 12 Wend. 488; *Mussey v. Scott*, 32 Vt. 82; *Judy v. Citizen*, 101 Ind. 18; *Rawson v. Putnam*, 128 Mass. 552; *Sinclair v. Stanley*, 7 S. W. Rep. 511 (Tex.); *Coonradt v. Campbell*, 25 Kan. 227; *Spiers v. Duane*, 54 Cal. 176. There may be a forcible entry or detainer without use of personal violence. *Steinlein v. Halstead*, 42 Wis. 422; *Ely v. Yore*, 71 Cal. 130. But, see *Fort Dearborn*

Lodge v. Klein, 115 Ill. 177; *Johnson v. West*, 41 Ark. 535. A forcible entry and detainer statute covers the forcible seizure of a railroad. *Iron Mt., &c., Co. v. Johnson*, 119 U. S. 608.

² A mere right to possession can never justify the use of force in order to regain it. *Parsons v. Brown*, 15 Barb. 590; *Newkirk v. Sabler*, 9 Barb. 652; *State v. Yeaton*, 53 Me. 125; *Newcombe v. Irwin*, 55 Mich. 620.

³ *Esty v. Baker*, 50 Me. 825.

ment of force, as will render further occupation by the other impracticable.¹

*It is never unlawful, however, to expel by force an intruder upon lands, provided the party intruded upon is

¹The case of *Stearns v. Sampson*, 59 Me. 564, is so full upon this point, both in its discussion and citation of authorities, that we cannot do better than to copy freely from it. The case was one in which a tenancy had been properly terminated. The tenants not leaving, the landlord entered peaceably, requested them to quit and remove their furniture, and upon their refusal, burst open an inner door which the female servant had fastened and refused to open, took off the doors and windows on a cold day in winter, brought a blood-hound into the house, and refused to permit any food to be brought in for the woman for several days. *APPLETON, Ch. J.*, (p. 572), says: "Upon these facts the presiding judge instructed the jury as follows: 'There is no controversy that if he, the defendant, had obtained peaceable possession, he had a right to remain there, the property being his at the time. But what was the nature of his possession? Did he go there for the purpose of deception, merely to call as a friend on a visit, or did he go there with the intention, after making such an entry, to forcibly expel the inmates? If that was his design, then the entry would not be recognized, in law, to give him a peaceable possession.' As the defendant had a right to enter peaceably into his own house, and being there to remain, and to remove the tenant wrongfully remaining, it does not affect the rights of the parties whether he disclosed or concealed his intention to remove his tenant. Nor is it material whether he entered with such intention, or formed his intention after his entry, if his entry was peaceable

and without force. 'It is not necessary,' remarks Lord TENTERDEN, in *Butcher v. Butcher*, 7 B. & C. 899, 'that the party who makes the entry should declare that he enters to take possession; it is sufficient if he does any act to show his intention.' In the same case, *BAILEY, J.*, says: 'I think that a party, having a right to the land, acquires by entry the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of his entry, wrongfully continues upon the land.' The defendant might instantly bring trespass against the plaintiff, wrongfully remaining in his house, or he might remove her. As the law gave him a right to enter peaceably and remove his tenants and their goods, if it could be done without a breach of the peace, the intention to do what the law authorizes cannot make an entry with such intent wrongful.

"If there is any evidence to which the latter part of the instructions can apply, then the exceptions should be sustained; for a peaceable entry cannot be metamorphosed into a forcible one, by reason of an existing and concealed intention on the part of the party entering to do, after entry, what by law he was legally authorized to do.

"The court instructed the jury that the plaintiffs could not recover on the count for breaking and entering. But if he was not a trespasser for entering into his own house, whatever his purpose or intention, then, being there, he might remove doors or windows. If the plaintiffs could not maintain trespass *quare clausum* for

prompt in his action. 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, instead of treating this as a dispossession, may at once proceed to remove him. "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can, without delay, *reinstate himself in his former possession."¹ But instead of resorting to force, it is equally competent

his entry, neither could they for his acts after such entry. Meader v. Stone, 7 Met. 147. 'The right of the plaintiffs to the possession of the house had terminated by their failure to pay rent, and the notice given to them by the defendant to quit the same. In this state of facts,' observes DEWEY, J., in Mugford v. Richardson, 6 Allen, 76, 'the defendant had the right to enter upon the premises and take out the windows of the same. * * Being thus in peaceable possession of a portion of the tenement, the court properly instructed the jury that if the female plaintiff undertook to prevent him from taking out the windows, he had a right to use as much force as was necessary in order to overcome her resistance.' In Harris v. Gillingham, 6 N. H. 11, the owner of the land, after requesting his tenant to leave, upon his refusal entered, tore down the chimneys, and put the building in an uninhabitable condition, for doing which the tenant brought an action of trespass *quare clausum*. 'We are of opinion,' say the court, in delivering their opinion, 'that the disturbance done to her possession, by putting the house in a situation which compelled her to leave it, did not make them trespassers *ab initio*, because she had no right to be there against the will of D. Gillingham, the owner of the land. Erwin

v. Olmstead, 7 Cow. 229; Wilde v. Cantillon, 1 Johns. Cas. 123; Hyatt v. Wood, 4 Johns. 150; Ives v. Ives, 13 Johns. 235.'

The court further cite Taunton v. Costar, 7 T. R. 481; Newton v. Harland, 1 M. & G. 644; Harvey v. Brydges, 14 M. & W. 437; Pollen v. Brewer, 7 C. B. 371; Burling v. Read, 11 Q. B. (n. s.), 907; Ives v. Ives, 13 Johns. 235; Meader v. Stone, 7 Met. 147; Curtis v. Galvin, 1 Allen, 215; Whitney v. Swett, 22 N. H. 10; Moore v. Boyd, 24 Me. 242; Rollins v. Mooers, 25 Me. 192; Allen v. Bicknell, 36 Me. 436. The conclusion was that the acts of defendant constituted neither a trespass in respect to the realty, nor an assault upon the female plaintiff. See, further, Illinois, &c., Co. v. Cobb, 94 Ill. 55.

¹ Lord DENMAN, Ch. J., in Browne v. Dawson, 12 Ad. & El. 624, 628. See Hillary v. Gay, 6 C. & P. 284; Asher v. Whitlock, L. R. 1 Q. B. 1; Christy v. Scott, 14 How. 282; Ward v. McIntosh, 12 Ohio, (n. s.) 231; Harrington v. Scott, 1 Mich. 17; Nichols v. Todd, 2 Gray 568; Taylor v. Adams, 58 Mich. 187; Newton v. Doyle, 38 Mich. 645; Marsh v. Bristol, 32 N. W. Rep. 645 (Mich.); Wray v. Taylor, 56 Ala. 188. Plaintiff cut grass within the limits of a highway, the center line of which he claimed as his boundary. Defendants claimed to

for the person ejected to maintain trespass, provided he moves promptly and does not, by sleeping on his rights, acquiesce in his dispossession.¹

*From what has been said it appears that possession is [*326] 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.² A tenant's possession, while it continues, is as complete for all purposes of redress against wrong-doers as is the

own the land covered by the highway subject to the public use. They went peaceably upon the side of the way where the grass was lying, and when plaintiff strove to prevent their removing it, forcibly resisted him and claimed that they did him no unnecessary injury. The action was for assault. The court says: "But it does not appear that plaintiff had such possession at the time of the affray as to deprive defendants of the right to resist plaintiff's attempt to prevent their carrying away the hay, if defendants owned the fee of the road. The defendants entered upon the land during the plaintiff's absence, peaceably and without force, and from that time they were in actual possession, and the possession of the plaintiff was determined. An entry by a stranger without right, during the temporary absence of the plaintiff, would not have divested his possession, and he would have been justified in removing the intruder by force. But his prior possession gave him no such right as against the defendants. The true owner of land wrongfully held out of possession may watch his opportunity, and if he can regain possession peaceably may maintain it, and lawfully resist an attempt by the former occupant to take possession, nor will he be liable for forcible entry and detainer." The court, there-

fore, should have allowed defendants to give evidence as to the title of the highway. *Bliss v. Johnson*, 78 N. Y. 529.

¹ *Browne v. Dawson*, 12 Ad. & El. 624, 628. Where a disseizee acquiesces for the time in his dispossession, he cannot afterward bring trespass for injuries to the freehold while he was dispossessed. *Allen v. Thayer*, 17 Mass. 299; *Rowland v. Rowland*, 8 Ohio, 40; *Wood v. Lafayette*, 68 N. Y. 181. Nor can he maintain assumpsit for the value of timber or other things severed from the freehold and sold while the disseizin continued. *Bigelow v. Jones*, 10 Pick. 161. Occasional acts, such as an owner might perform on the premises, do not constitute possession. *Swift v. Gage*, 26 Vt. 224.

² *Kilbourn v. Rewer*, 8 Gray, 415; *Look v. Norton*, 55 Me. 103; *Black v. Grant*, 50 Me. 364; *Illinois, &c., Coal Co. v. Cobb*, 82 Ill. 183; *Austin v. Bailey*, 37 Vt. 219; *Van Auken v. Monroe*, 38 Mich. 725; *Bradshaw v. Emory*, 65 Ala. 208; *Hoffman v. Harrington*, 44 Mich. 183; *Duncan v. Yordy*, 27 Kan. 348; *Keith v. Tilford*, 12 Neb. 271. Not enough for defendant to show title in third person unless he connects himself with it. *Stratton v. Lyons*, 53 Vt. 641. But mere possession is not enough against one who has claim or color of title. *Dunn v. Miller*, 75 Mo. 260.

possession of an owner in fee simple. An injury to real estate, while the tenancy exists, may support two actions, one by the tenant, who, in any event, must suffer some legal injury, and one by the reversioner, when 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.¹ Thus, the destruction of buildings is an injury to both; so may be the flooding of lands, the cutting of timber, and the obstruction of a right of way under circumstances of injury to the reversion.² An act to the injury of the reversion is an act of waste, and whether committed by the tenant himself or by any third person, will support an action on the case by the reversioner.³

The entry of the landlord on the rightful possession of the tenant is as much a trespass as the entry of any third person;⁴ but if the tenant hold over after the expiration of his term, the landlord may rightfully make a peaceable entry,⁵ and [*327] though it *has been held in some cases, with much good reason, that he is not warranted in employing force to expel the tenant,⁶ he may, nevertheless, treat as trespassers all

¹ Gilbert v. Kennedy, 22 Mich. 5; Foster v. Elliott, 38 Iowa, 216; Parks v. Boston, 15 Pick. 198; Hosking v. Phillips, 3 Exch. 168. Life tenant and remainder man may join in action if interests of both are affected. McIntire v. Westmoreland, &c., Co., 11 Atl. Rep. 808 (Penn.) Any person is to be deemed a tenant who, for the time, has lawful possession of lands subordinate to the right of another, as, for example, one occupying under a contract of purchase. Smith v. Price, 42 Ill. 399; Ives v. Cress, 5 Penn. St. 118. The owner, in leasing lands, may reserve to himself the use of a building thereon, and then have trespass *quare clausum* for an entry and the carrying away of his property from that building. Jordan v. Staples, 57 Me. 353. If one is in possession of lands merely at the will of the owner, the latter is constructively in possession, and may sue trespassers. Starr v. Jackson, 11 Mass. 519.

² See Dobson v. Blackmore, 9 Q. B. 991; Higgins v. Farnsworth, 48 Vt. 512; George v. Norcross, 32 N. H. 33. The landlord cannot sue unless the reversion is injured. Bascom v. Dempsey, 143 Mass. 409. Putting up on poles on the demised land a boarding to obstruct a window is not such an injury. Cooper v. Crabtree, L. R. 19 Ch. D. 193, 20 *id.* 589.

³ Randall v. Cleveland, 8 Conn. 328; Lane v. Thompson, 43 N. H. 320. This subject, however, will be considered in another place.

⁴ Luther v. Arnold, 3 Rich. 24; Bryant v. Sparrow, 62 Me. 346; Crowell v. New Orleans &c., Co., 31 Miss. 631.

⁵ Taylor v. Cole, 8 T. R. 292; Taunton v. Costar, 7 T. R. 431.

⁶ Newton v. Harland, 1 M. & Gr. 644; Hillary v. Gay, 6 C. & P. 284. Moore v. Boyd, 24 Me. 242; Dustin v. Cowdry, 23 Vt. 631; Reeder v. Purdy, 41 Ill. 279; Meader v. Stone, 7 Met.

other persons who may then be there without authority, or who may afterward make entry.¹ His own peaceable entry gives him seizin, and the previous relation of landlord and tenant, and the possession of the tenant under it is sufficient evidence of his title as against one who shows no right in himself.²

Tenants in Common. The possession by one tenant in common is in law the possession of both, and, therefore, if one makes entry, he is presumed to do so in the right of both and to hold in their right afterward.³ But one tenant may disseize the other,

147. There is a dispute on this point, some courts holding that in a civil suit against the landlord who has, by force, put out a tenant at sufferance, his title is a complete protection, and that it is only when prosecuted criminally for the force that he is precluded from showing title. See *Stearns v. Sampson*, 59 Me. 568; *Sterling v. Warden*, 51 N. H. 217, 239; *Clark v. Keliher*, 107 Mass. 406; *Wood v. Phillips*, 43 N. Y. 152. In a late Illinois case it is held that "the paramount owner of a tract of land having a present right of immediate possession, may enter the same in a peaceable manner, though occupied by another," without becoming a trespasser. If sued in trespass for such entry the plea of *liberum tenementum* is good. The force meant in the forcible entry and detainer statute is "actual force." Distinguishing *Page v. DePuy*, 40 Ill. 506; *Reeder v. Purdy*, 41 Ill. 282; *Dustin v. Cowdrey*, 23 Vt. 635, because in each of them there was such "actual force." *Fort Dearborn Lodge v. Klein*, 115 Ill. 177. In a late English case the conclusion is reached by *Fry, J.*, from the cases that the tenant wrongfully in possession cannot recover damages in a civil action for the entry, but may for independent wrongful acts done in or after the entry. Therefore he cannot recover for the eviction but may for damage to his furniture in

the course of it. *Beddall v. Maitland*, L. R. 17 Ch. D. 174. See *Edwick v. Hawkes*, L. R. 18 Ch. D. 199; *Burgess v. Graffam*, 18 Fed. Rep. 251. In R. I. if he uses no more force than necessary, he is not civilly liable at all. *Souter v. Codman*, 14 R. I. 119. But if the tenant has gone away and locked up the house, leaving some of his furniture in it, this will not prevent the landlord taking possession, and if need be, he may break open doors for the purpose. *Turney v. Meymott*, 1 Bing. 158; *S. C. 7 Moore*, 574. If a landlord may not retain possession forcibly he may not peaceably enter in absence of tenant to repossess premises held over. *Mason v. Hawes*, 52 Conn. 12. Mere temporary absence, where one of the family remains, is not enough. *State v. Shepard*, 82 N. C. 614. If the entry is attended with display of force and destruction of property on the land, it may be forcible. *Ely v. Yore*, 71 Cal. 180. It is not forcible detainer to hold possession of a house before vacant and only constructively in plaintiff's possession. *Johnson v. West*, 41 Ark. 535.

¹ *Hey v. Moorhouse*, 6 Bing. (N. C.) 52; *Butcher v. Butcher*, 7 B. & C. 400; *S. C. 1 M. & Ry.* 220.

² *Jayne v. Price*, 5 Taunt. 826; *Daintry v. Brocklehurst*, 3 Exch. 207.

³ *Roberts v. Morgan*, 30 Vt. 319; *Dubois v. Campau*, 28 Mich. 301;

either by a forcible expulsion or exclusion, or by an exclusive receipt of the rents and profits, accompanied by a denial of all right in his co-tenant.¹ The ouster, however, must be by some decisive, unequivocal act or conduct, for, as the tenant in possession is rightfully there, the presumption must always be that he holds only as he rightfully may — in the interest of both — and not wrongfully to the other's exclusion.² Where [*328] there is an *actual ouster, the disseizee is put to his ejection, and his right may be barred by a continuous adverse possession of his co-tenant for the period prescribed by the statute of limitations.³ When the ousted tenant recovers, he may then maintain trespass for the mesne profits.⁴ For a dis-

Van Bibber *v.* Frazier, 17 Md. 436; McClung *v.* Ross, 5 Wheat. 116; Bishop *v.* Blair, 36 Ala. 80. See Terrell *v.* Martin, 64 Tex. 121.

¹ Bracket *v.* Norcross, 1 Me. 89; Abercrombie *v.* Baldwin, 15 Ala. 363; Larman *v.* Huey's Heirs, 13 B. Mon. 436. Disseizin is not to be presumed from the long continued possession of one, even though it be continued for twenty years. Northrup *v.* Wright, 24 Wend. 221; Van Bibber *v.* Frazier, 17 Md. 436. Compare Purcell *v.* Wilson, 4 Gratt. 16, and Dubois *v.* Campau, 28 Mich. 304, and numerous cases cited. The possession to constitute disseizin must be public and totally irreconcilable with that of a co-tenant. Long *v.* McDow, 87 Mo. 197. Presumption that the entry is not hostile ceases when the possession has been exclusive for nearly forty years. Campau *v.* Dubois, 39 Mich. 274.

² Forward *v.* Deetz, 32 Penn. St. 69; Bennett *v.* Bullock, 35 Penn. St. 364; Anders *v.* Anders, 9 Ired. 214; Newell *v.* Woodruff, 30 Conn. 492; Colburn *v.* Mason, 25 Me. 434; Hannon *v.* Hannah, 9 Grat. 146. Giving a deed of the whole does not alone make out an ouster. Roberts *v.* Morgan, 30 Vt. 319; Wilson *v.* Collishaw, 13 Penn. St. 276. It does, if followed by pos-

session of the grantee. Kinney *v.* Slattry, 51 Ia. 353. Giving by a co-tenant a quitclaim of his interest and a warranty deed of a part of the tract, does not. Hume *v.* Long, 53 Ia. 299.

³ Russell's Heirs *v.* Mark's Heirs, 3 Met. (Ky.) 37; Gill *v.* Fauntleroy's Heirs, 8 B. Mon. 177, 186; Dubois *v.* Campau, 28 Mich. 304; Hampton *v.* Wheeler, 6 S. E. Rep. 236 (N. C.) See, further, as to ejectionment. Elliott *v.* Frakes, 71 Ind. 412; Frakes *v.* Elliott, 102 Ind. 47; Norris *v.* Sullivan, 47 Conn. 474. For ouster in case of a partition wall, see Stedman *v.* Smith, 8 El. & Bl. 1. Tenants in common by agreement may apportion the land between them, and in that case each has the land he occupies and may sue the other in trespass for a disturbance of his possession. Keay *v.* Goodwin, 16 Mass. 1.

⁴ Goodtitle *v.* Tombs, 3 Wils. 118; Allen *v.* Carter, 8 Pick. 175; Critchfield *v.* Humbert, 39 Penn. St. 427; Tongue *v.* Nutwell, 31 Md. 302. It was held in McGill *v.* Ash, 7 Penn. St. 397, and Erwin *v.* Olmsted, 7 Cow. 229, that the ousted tenant in common might at once maintain trespass against his co-tenant, but the first case is overruled by Bennett *v.* Bullock, 35 Penn. St. 364. And, see,

tinct injury by one co-tenant to the joint estate, during the joint possession, the other may have the appropriate remedy against him, as where by negligence he burns down a house, or by means of a dam on his several estate floods the common property.¹ But in the use of the premises he has large liberty of judgment and is only responsible for a clear abuse.

Injuries to the possession of tenants in common are injuries to all, and, therefore, all should join in suits for trespasses, nuisances, etc.²

Trespasses in Hunting. The very general acquiescence of owners of lands in the pursuit by others of wild beasts and game upon them establishes no law, and is to be looked upon rather as *a waiver of a right to complain of a trespass [*329] than as a license to make use of their lands for this purpose. And whenever one goes upon the premises 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.³

Jones v. Chiles, 8 Dana, 168. If that which is the subject of the tenancy is actually destroyed by one co-tenant, no doubt the other may sue in trespass. *Wilkinson v. Haygarth*, 12 Q. B. 845; *Maddox v. Goddard*, 15 Me. 218; *Dubois v. Beaver*, 25 N. Y. 128.

¹ *Chesley v. Thompson*, 3 N. H. 9; *Blanchard v. Boher*, 8 Me. 253; *Odiorne v. Lyford*, 9 N. H. 502; *Jones v. Weatherbee*, 4 Strob. 50. See *Hutchinson v. Chase*, 39 Me. 508; *Guyther v. Pettijohn*, 6 Ired. 388; *McClellan v. Jenness*, 43 Vt. 183. If one co-tenant erects a structure, which excludes another from the possession of a part of the common property, without the latter's assent, the latter may take it down, doing no needless damage, without being liable in trespass. *Byam v. Bickford*, 140 Mass. 31.

² *Phillips v. Sherman*, 61 Me. 548; *Parke v. Kilham*, 8 Cal. 77; *Merrill v.*

Berkshire, 11 Pick. 269; *Austin v. Hall*, 13 Johns. 286. In Vermont, it seems one may recover in trespass for all. *Hibbard v. Foster*, 24 Vt. 543; *Bigelow v. Rising*, 43 Vt. 678. See *Allen v. Gibson*, 4 Rand. 468; *Wooley v. Campbell*, 37 N. J. 163.

³ *Beckwith v. Shordike*, 4 Burr. 2092; *Van Leuven v. Lyke*, 1 N. Y. 515. One has no legal right, when he starts game, to follow it upon another man's land. *Deane v. Clayton*, 7 Taunt. 489. Fox hunting with dogs and horses is a trespass. *Paul v. Summerhayes*, L. R. 4 Q. B. D. 9. When parties go together hunting, and commit a trespass in so doing, each is responsible for the whole damage. *Hume v. Oldacre*, 1 Stark. 351. Under a statute unauthorized shooting on land where a certain notice was posted was a misdemeanor. A man's boundary was the center of a naviga-

Trespasses in Fishing. The right to take fish in the fresh-water streams of the country, belongs to the owners of the soil under them, to the exclusion of the public.¹ As, however, the exercise of the right by one riparian proprietor might unduly encroach upon the rights of others, the case is one that properly calls for regulating legislation; and the authority to regulate has been very freely exercised, not only by forbidding the employment of seines and other means of taking fish otherwise than singly in certain waters, but also by prohibiting their being taken at all at certain seasons, and requiring a free passage to be kept open for the passage of fish in all streams in which rights of fishery are important.² In some States the power of regulation is conferred, either generally or in particular instances,

ble river. He had the notice posted on his land. Defendant shot from a boat on the river flying birds while they were over that part of the river whose bed belonged to the man. Defendant, while not a trespasser, because the river was a highway, was held guilty under the act. *State v. Shannon*, 36 Ohio St. 423. One who owns the fee of soil covered by navigable fresh water, over which the public has the right to pass, has the exclusive right to shoot wild fowl over the water. Shooting is not a public right appurtenant to the right to navigate. *Sterling v. Jackson*, 87 N. W. Rep. 845 (Mich.)

¹ *Browne v. Kennedy*, 5 H. & J. 195; *Waters v. Lilly*, 4 Pick. 145; *Cottrill v. Myrick*, 12 Me. 222; *Adams v. Pease*, 2 Conn. 481; *People v. Platt*, 17 Johns. 195; *Hooker v. Cummings*, 20 Johns. 90; *Trustees, &c., v. Strong*, 60 N. Y. 56; *Ingram v. Threadgill*, 3 Dev. 59; *Williams v. Buchanan*, 1 Ired. 535; *Beckman v. Kreamer*, 43 Ill. 447; *Cobb v. Davenport*, 32 N. J. 369; *Same v. Same* 33 N. J. 223. But, see *Burroughs v. Whitwam*, 59 Mich. 279. The right is, of course, not inseparable from ownership, but may be acquired distinct therefrom by a grant of the owner, or by pre-

scription. *Cobb v. Davenport*, 32 N. J. 369; 34 N. J. 223. But *prima facie* ownership in the bed of a stream determines the right to fish in it. *Mayor, &c., v. Graham*, L. R. 4 Exch. 361; *Trustees, &c., v. Strong*, 60 N. Y. 56. That the right to fish follows the stream where the latter gradually shifts its bed, see *Foster v. Wright*, L. R. 4 C. P. D. 438.

² *Randolph v. Braintree*, 4 Mass. 815; *Burnham v. Webster*, 5 Mass. 266; *Nickerson v. Brackett*, 10 Mass. 212; *Commonwealth v. Chapin*, 5 Pick. 199; *Vinton v. Welsh*, 9 Pick. 87; *Commonwealth v. Tiffany*, 119 Mass. 300; *Lunt v. Holland*, 14 Mass. 149; *Peables v. Hannaford*, 18 Me. 106; *State v. Skolfield*, 63 Me. 266; *Budd v. Sip*, 13 N. J. 348; *Haney v. Compton*, 36 N. J. 507; *Hart v. Hill*, 1 Whart. 124; *People v. Reed*, 47 Barb. 235; *State v. Hockett*, 29 Ind. 302; *State v. Boone*, 30 Ind. 225; *Stuttman v. State*, 57 Ind. 119; *Drew v. Hilliker*, 56 Vt. 641; *Doughty v. Conover*, 42 N. J. L. 193; *Weller v. Snover*, 42 N. J. L. 341; *Maney v. State*, 6 Lea, 218. State may forbid non-residents catching fish in navigable water for making oil and the making of oil from fish so caught. *Chambers v. Church*, 14 R. I. 398.

upon the *county or township authorities,¹ and in Massa- [*330] chusetts and Maine the 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 waters where, at the common law, the rights of the owners of the banks would have been exclusive.² Such regulations must, of course, take notice of and respect all other rights of the riparian owner, including his right to the exclusive possession of his land not covered with water; and if he has a mill-dam he cannot, under pretence of regulation, be compelled to remove it without compensation made therefor;³ though unquestionably, as regards any future constructions, it would be competent to require that they be made, leaving free passage for fish, according to established regulations.

The rule regarding fresh-water streams applies to the small lakes or ponds of the country.⁴ That it applies to the larger lakes is more than doubtful. In one well-considered case it has been declared that the right of fishery in Lake Winnipiseogee is a public and general right, and that incident to this was the right to protect the passage of the fish up and down the rivers which form its outlets to the sea. "If it be admitted," says the court, "that the right of fishing in the Winnipiseogee River belongs exclusively to the riparian proprietors, and that the wrong done to one of these riparian proprietors by the act of another in obstructing the passage of fish, is not of the nature which the law will redress by a criminal prosecution, it does not follow that the obstructions now complained of are not criminal. The ripa-

¹ See *Vinton v. Welsh*, 9 Pick. 87; *Cottrill v. Myrick*, 12 Me. 222.

² *Nickerson v. Brackett*, 10 Mass. 212; *Randolph v. Braintree*, 4 Mass. 315; *Cottrill v. Myrick*, 12 Me. 222; *Peables v. Hannaford*, 18 Me. 106. Since the first settlement of Massachusetts the riparian owners upon non-navigable streams have held their rights of fishing subject to legislative control and the paramount claims of the public are implied in all grants abutting on such streams. *Cole v. Eastham*, 133 Mass. 65. See *Cottrill v. Myrick*, 12 Me. 222.

³ *State v. Glen*, 7 Jones, (N. C.) 321, nor to put in chute after use of more than twenty years. *Woolever v. Stewart*, 36 Ohio St. 146. In the New England States the right of eminent domain is employed for the improvement of fisheries. See *Bristol v. Water Co.*, 42 Conn., 403; *Cole v. Eastham*, 133 Mass. 65.

⁴ *Cobb v. Davenport*, 32 N. J. 369; 8. C. 33 N. J. 223. This case examines the general subject very fully and carefully. See *State v. Roberts*, 59 N. H. 484; *Reynolds v. Com.*, 93 Penn. St. 458.

rian proprietors are not the only persons injured. The right of fishing in the lake is not limited to the proprietors of the shores, but is common to all citizens of the State, just as much [*331] as the "fishery in the tide-waters of the Piscataqua." It was therefore held that the maintenance of a dam without fishways was a common-law nuisance, punishable by indictment. This doctrine seems to be reasonable, but there may be some practical difficulties in determining what bodies of water do and what do not come within it.³

In tide-waters the right to take fish belongs to the public, and presumptively is common to all.⁴ In Massachusetts the towns have been allowed to appropriate the right to take fish within their limits;⁵ and private grants may be made by the State itself to individuals, and individuals may also obtain exclusive rights by prescription.⁶ The right of individuals to plant oyster-beds, and to be protected in the enjoyment of them, has been very generally recognized.⁶ But the right of fishery in tide-waters is al-

³ SMITH, J., in *State v. Franklin Falls Co.*, 49 N. H. 240; S. C. 6 Am. Rep. 513. State may regulate fishing in a small pond on land wholly owned by one man if it connects with other waters and is a breeding place for fish. *State v. Roberts*, 59 N. H. 484; see, *State v. Blount*, 85 Mo. 543. The right to fish in a bay of Lake Erie is in the public. *Sloan v. Biemiller*, 84 Ohio St. 492; see, *Lincoln v. Davis*, 53 Mich. 375.

⁴ See *West Roxbury v. Stoddard*, 7 Allen, 158.

⁵ *Crosby v. Wadsworth*, 6 East. 603; *Bagott v. Orr*, 2 B. & P. 472; *Martin v. Waddell*, 16 Pet. 367; *Lay v. King*, 5 Day, 72; *Parker v. Cutler Mill Dam Co.*, 20 Me. 353; *Moulton v. Libbey*, 37 Me. 472; *Preble v. Brown*, 47 Me. 284; *Coolidge v. Williams*, 4 Mass. 140; *Weston v. Sampson*, 8 Cush. 347; *Trustees, &c., v. Strong*, 60 N. Y. 56; *Proctor v. Wells*, 103 Mass. 216. *Brown v. DeGroff*, 14 Atl. Rep. 219 (N. J.) So in tidal river. *Pearce v. Scotcher*, L. R. 9 Q. B. D. 162. Or creek wholly within a man's farm.

Parsons v. Clark, 76 Me. 476. But the tide must ebb or flow at the spot ordinarily, not occasionally, in times of high tides below. *Reece v. Miller*, L. R. 8 Q. B. D. 636. Where upland owner has qualified ownership of the flats, the public may dig shell fish there or fish with the line. *Weston v. Sampson*, 8 Cush. 347; *Packard v. Ryder*, 144 Mass. 440; *Matthews v. Treat*, 75 Me. 594.

⁶ *Coolidge v. Williams*, 4 Mass. 140.

⁷ *Chalker v. Dickinson*, 1 Conn. 382; *Gould v. James*, 6 Cow. 369; *State v. Sutton*, 2 R. I. 434; *State v. Medbury*, 3 R. I. 138; *Paul v. Hazleton*, 37 N. J. 106; *Bennett v. Boggs*, *Baldw.* 60. See *Eastham v. Anderson*, 119 Mass. 526; *Trustees, &c., v. Strong*, 60 N. Y. 56; *Neill v. Duke of Devonshire*, L. R. 8 App. Cas. 158; *Malcolmson v. O'Dea*, 10 H. L. C. 593.

⁸ *Fleet v. Hegeman*, 14 Wend. 42; *Decker v. Fisher* 4 Barb. 592; *Lowndes v. Dickerson*, 34 Barb. 586; *Hand v. Newton*, 92 N. Y. 88; *McCarty v. Holman*, 22 Hun. 53; *Post v. Kreisler*, 32 Hun. 49; *Power v.*

ways subordinate to the public right of regulation and improvement for the benefit of navigation, and therefore a structure in front of one's premises bordering on tide-water, erected by State authority for the benefit of navigation, violates no right of the owner of the shore so long as his access to the water for the purposes of a highway is not obstructed.¹ Indeed, in all waters navigable in fact, the right of navigation is the paramount right,² but those engaged in navigation must respect rights of fishery, and they will be liable for any negligent injuries which their *vessels may cause to seines, oyster-beds, etc.³ In [*332] North Carolina, if fresh-water streams are navigable in fact, the right to take fish therein is held to be in the public and not in the owners of the banks.⁴ Whether the taking of fish in private waters, where the public have been accustomed to take them, should be regarded as a trespass is not clear. As the mere entry upon the water can cause no damage, there is not the same reason for treating it as a trespass which exists in the case of an entry upon lands, and if the owner himself does not make use of the fishery for purposes of profit, and is cognizant of the acts of others within it, it would seem that a license to enter might well be implied until in some manner the objection of the owner is manifested.⁵

Trespass by means of Inanimate Objects. It is a trespass to cast inanimate objects upon 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. It has accordingly been

Tazewells, 25 Gratt. 786; State v. Taylor, 27 N. J. 117; Haney v. Compton, 86 N. J. 507; Metzger v. Post, 44 N. J. L. 74; Birdsall v. Rose, 46 N. J. L. 361; Compare Brinkerhoff v. Starkins, 11 Barb. 248. There are statutes in some States for the protection of fishing rights acquired by improvement. See above cases. Also, Commonwealth v. Weatherhead, 110 Mass. 175. One may not take oysters planted by another and staked out in public water, although such planting is a public nuisance. Grace v. Willets, 14 Atl. Rep. 559 (N. J.)

¹ Tincum Fishing Co. v. Carter, 61 Penn. St. 21; Lincoln v. Davis, 53 Mich. 375.

² Moulton v. Libbey, 37 Me. 472.

³ Marshall v. Steam Nav. Co., 3 B. & S. 782; Cobb v. Bennett, 75 Penn. St. 326.

⁴ Wilson v. Forbes, 2 Dev. 30; Collins v. Benbury, 8 Ired. 277; S. C. 5 Ired. 118; State v. Glen, 7 Jones, (N. C.) 321.

⁵ See Marsh v. Colby, 39 Mich. 626.

held that, if where one is blasting rock, the fragments are thrown upon the land of another, this is an actionable trespass, and it is no defense that the party was guilty of no negligence.¹ So, if one, in cutting down trees, causes one to fall, though without meaning to do so, on the land of his neighbor.² 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 no trespass, and is to be regarded as an accident merely.³

Waste. Waste is an injury done or suffered by the owner of the present estate which tends to destroy or lessen the value of the inheritance. This is an injury to any person having an interest in the reversion, and it may be an injury to any person having a lien on the land. Waste differs from trespass in its being committed or suffered by the person actually or constructively in possession of the land, while trespass is an injury to the possession itself.⁴

[*333] *Waste is either voluntary or permissive. The first consists of some positively wrongful act which injures the inheritance; the other 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, because many things are injurious at some times and in some places which might be positively beneficial in others. A striking illustration is afforded in the case of the cutting of timber. The tenant of lands, whether for life or for any lesser estate, is entitled to take wood for ordinary uses thereon; for fuel, and for the repairs of buildings, fences and agricultural implements; ⁵ and in England,

¹ *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, 2 N. Y. 163; *St. Peter v. Denison*, 58 N. Y. 416; *Georgetown, &c., R. R. Co. v. Eagles*, 13 Pac. Rep. 696. (Col.) See *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 168. So, if in improving his own premises, one casts material upon another's he is liable, notwithstanding he has a license from municipal authorities. *Mairs v. Manh. Real Est. Assn.*, 89 N. Y. 498. The inundation of premises by a defective sewer is a trespass. *Seifert v. Brooklyn*,

101 N. Y. 136. So is throwing snow upon another's premises. *Barry v. Peterson*, 48 Mich. 268.

² *Newsom v. Anderson*, 2 Ired. 43.

³ *Snook v. Brantford*, 14 Up. Can. Q. B. 255.

⁴ One who, not being a tenant in possession, has a right to take ore from land is not guilty of waste, if he takes more than he ought. *Grubb's App.* 90 Penn. St. 228.

⁵ *Bl. Com.* 35; 1 Washb. *Real Prop.* 4th ed. 128.

and some parts of this country, he would be limited strictly to what was reasonable for these purposes, and would be liable for waste if he exceeded what was reasonable.¹ So he could only cut for use on the premises, and would not be at liberty even to exchange that which was growing upon the estate, but was unfit for his purposes, for suitable wood procured elsewhere.² But any such strictness would be manifestly unsuited to the condition of things in other parts of this country, because it could be of no service to the inheritance. In the newer States, where timber is abundant, it might, indeed, be beneficial to the inheritance, rather than wasteful, to permit the timber to be removed; and therefore what is waste elsewhere might, in these sections of the country, be permissible. It has been held in Ohio that a widow endowed of wild lands might not only take the common law estovers, but she might also cut wood upon the premises and sell the same to pay the taxes upon the estate and the expenses of overseeing the property and protecting it against trespasses and other injury.³ But she may, no doubt, go further than this, where her assignment of dower is wholly or mainly of wild lands, and clear off a reasonable proportion of them for the purposes of cultivation.⁴ That would be a reasonable use of the land, and not waste. So it might be a reasonable use of the premises to *cut and sell hoop poles from them, if [*334]

¹ Webster v. Webster, 33 N. H. 18; Lester v. Young, 14 R. I. 579. See Sarles v. Sarles, 3 Sandf. Ch. 601. So to cut timber merely for sale. Dorsey v. Moore, 6 S. E. Rep. 270 (N. C.) So as to cutting valuable forest trees, where there is little woodland on a farm. Powell v. Cheshire, 70 Geo. 357. See, Silva v. Garcia, 65 Cal. 591.

² White v. Cutler, 17 Pick. 248; Livingston v. Reynolds, 2 Hill, 157; Elliott v. Smith, 2 N. H. 430; Richardson v. York, 14 Me. 221; Phillips v. Allen, 7 Allen, 115.

³ Crockett v. Crockett, 2 Ohio, (N. a.) 180.

⁴ Parkins v. Coxe, 2 Hayw. 339; Owen v. Hyde, 6 Yerg. 334; Hastings v. Crunckleton, 3 Yeates, 261; Allen

v. McCoy, 8 Ohio, 418; Shine v. Wilcox, 1 Dev. & Bat. Eq. 631. For the Massachusetts rule see Conner v. Shepherd, 15 Mass. 164; White v. Cutler, 17 Pick. 248. It is not waste if the cutting does not damage or diminish the value of the inheritance and is conformable to the rules of good husbandry, even though the timber so cut is sold or used off the premises. Wilkinson v. Wilkinson, 59 Wis. 557. Moving cabins and cutting timber is not waste. But allowing fixtures—gin machinery—to be detached and sold, and the gin-house to be dismantled, and woodland to be sold for taxes payable by the tenant are severally, acts of waste. Cannon v. Barry, 59 Miss. 289.

that had been the customary use before the tenant's estate began.¹

For the tenant to do upon leasehold premises that for which the premises are leased can never be waste, provided it is done in a 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 the previous use. This is particularly true as regards buildings. It would be waste to turn a dwelling into a shop or a stable; or, on the other hand, to make over a shop or a stable into a dwelling; the right of the tenant is to use the buildings as they are, and not to force upon the reversioner something new or different in the place of them.² Slight changes may lawfully be made, provided they do not injure the inheritance, but preserve the estate substantially the same.³ So with respect to the land itself; it would be waste to cut up farming lands with excavations in search for minerals or to sell gravel or clay; though if such had been the previous use of the premises it would be different.⁴ In England, any essential change in the methods of cultivating farming lands might, perhaps, be waste; as by changing arable land into meadow, and the like; but this can now scarcely be a general rule in that country, and is not recognized in this.⁵

¹ *Clemence v. Steere*, 1 R. I. 272.

² *Huntley v. Russell*, 13 Q. B. 572.

³ See *Winship v. Pitts*, 8 Paige, 259. The general principle governing waste is, that the tenant shall not be permitted to do any act of permanent injury to the inheritance, except to take his reasonable estovers. *Webster v. Webster*, 33 N. H. 18, citing *Chase v. Haseltine*, 7 N. H. 171; *Pynchon v. Stearns*, 11 Met. 304. But decayed and worthless buildings may be taken down. *Clemence v. Steere*, 1 R. I. 272; *Beers v. St. John*, 16 Conn. 322. The right to alter a building does not include the right to tear down though a better one is erected. *Davenport v. Magoon*, 13 Oreg. 3. To build a chimney with-

out the landlord's consent is waste. *Brock v. Dole*, 66 Wis. 142.

⁴ Tenant for life of salt works may open new wells. *Findlay v. Smith*, 6 Munf. 134, relying upon *Clavering v. Clavering*, 2 P. Wms. 388. If coal has been mined for domestic use, the life tenant may not mine for sale. *Franklin Coal Co. v. McMillan*, 49 Md. 549. So, if mining has been abandoned for forty years by the owner a life tenant may not mine. *Gaines v. Green Pond, &c., Co.*, 32 N. J. Eq. 86. A tenant without impeachment of waste may not commit malicious waste to the injury of the remainder man. *Stevens v. Rose*, 37 N. W. Rep. 255 (Mich.)

⁵ See Washb. Real Prop. 4th ed. 145.

To sell manure made on the premises to be removed from it is waste in the case of agricultural lands, because it is implied in leasing such lands that the manure made is to be used thereon.¹

Permissive waste consists in suffering that to take place to the *injury of the inheritance, which ordinary [*335] care would prevent. In respect to buildings, a tenant, unless he has covenanted to make repairs, is under no obligation to do more than to exercise reasonable diligence for their preservation; but a duty to that extent is incident to the relation. A like duty arises to protect the remainder of the estate against negligent waste and decay, and this extends to protection against the acts of trespassers.² A tenant is liable for waste if a building is injured or destroyed by his negligence; but not for accidental fires occurring without his fault, unless upon covenants.³

While for waste actually committed, an action on the case for the recovery of damages is the common remedy, a more effectual protection for the interest of the reversioner is the preventive remedy by injunction, when the waste is merely begun or threatened. Where one has only a lien on the premises, he is entitled to the like preventive remedy, but it is not so clear what remedy he would have by action. In New York it has been decided that if the mortgagor, or one in privity with him, commits voluntary waste upon the mortgaged 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, provided the mortgagor is insolvent, or not personally liable for the debt.⁴ In Massachusetts the court goes further, and holds that the damage is not to be measured by proof of insufficiency of the remaining security. "The mortgagee," it is said, "is not obliged to accept what remains as satisfaction *pro tanto* of his debt, at any valuation whatever. He is entitled to the full benefit of the mortgaged

¹ Perry v. Carr, 44 N. H. 118; Hill v. De Rochemont, 48 N. H. 87; Lassell v. Reed, 6 Me. 222; Lewis v. Jones, 17 Penn. St. 262; Daniels v. Pond, 21 Pick. 367.

² Attersoll v. Stevens, 1 Taunt. 183;

Cook v. Champlain, &c., Co., 1 Denio, 91.

³ 4 Kent, 81, and note.

⁴ Shepard v. Little, 14 Johns. 210; Van Pelt v. McGraw, 4 N. Y. 110; Yates v. Joyce, 11 Johns. 136.

estate, for the full payment of his entire debt." ¹ But in Massachusetts, as well as in other New England States, the mortgage vests the legal estate in the mortgagee, who, after condition broken, may maintain trespass against the mortgagor for acts of waste, though the latter still retains possession; ² a state [*336] of ³the law quite different from the law of New York, where the mortgagee has a mere lien on the land, and is not even entitled to possession until foreclosure completed. In Rhode Island a mortgagee is held entitled to wood and timber cut upon the mortgaged premises in waste of the same, and in substantial diminution of his security, though he could not sue in trespass for the cutting; ⁴ and in New Jersey, the fact that the waste renders the security insufficient seems to be regarded as the ground for giving the mortgagee a remedy by injunction. ⁵ And in Pennsylvania the mortgagee if he recovers for waste committed before foreclosure, must account upon his debt for the amount received. ⁶ 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. ⁷ And a purchaser at execution sale would have a like right. ⁷

¹ *Byrom v. Chapin*, 113 Mass. 308, citing *Woodruff v. Halsey*, 8 Pick. 333; *Page v. Robinson*, 10 Cush. 99. And see *Gooding v. Shea*, 103 Mass. 360.

² *Page v. Robinson*, 10 Cush. 99, citing *Stowell v. Pike*, 2 Me. 387; *Smith v. Goodwin*, 2 Me. 173; *Pettengill v. Evans*, 5 N. H. 54; *Sanders v. Reed*, 12 N. H. 558, and other cases. And see *Gore v. Jenness*, 19 Me. 53; *Frothingham v. McKusick*, 24 Me. 403; *Leavitt v. Eastman*, 77 Me. 117; *Harris v. Haynes*, 34 Vt. 220; *Bellows v. Boston, &c., R. R.*, 59 N. H. 491.

³ *Waterman v. Matteson*, 4 R. L. 539.

⁴ *Coggsbill v. Millburn Land Co.*, 25 N. J. Eq. 87. In Minnesota the

owner of a mortgage, before foreclosure, is not entitled to timber cut from the mortgaged premises. *Adams v. Corriston* 7 Minn. 456. See *Cooper v. Davis*, 15 Conn. 556; *Wilson v. Maltby*, 59 N. Y. 126.

⁵ *Guthrie v. Kahle*, 46 Penn. St. 331.

⁶ *Phoenix v. Clark*, 6 N. J. Eq. 447. Waste by mortgagor in possession after foreclosure decree. *Malone v. Marriott*, 64 Ala. 486.

⁷ *Stout v. Keyes*, 2 Doug. (Mich.) 184. Under Michigan statutes not necessarily waste for debtor to take away ore after sale and before redemption expires, *Ward v. Carp River Iron Co.*, 47 Mich. 65.

* CHAPTER XL

[*337]

INJURIES BY ANIMALS.

The common law made it the duty of every man to keep his cattle within the limits of his own possessions. If he failed so to keep them, he failed in duty, and when they strayed upon the land of another, the owner was chargeable with a trespass. Nor did his liability for the mischief done by them depend in any degree upon his personal fault, since, if the cattle escaped from his custody, notwithstanding due care on his part, his responsibility for the injury actually committed by them was the same that it would have been had he voluntarily permitted them to roam at large. Nor did the common law impose upon the owner of lands the obligation to enclose them as a protection against the beasts of others; but he might, at his option, leave them entirely unenclosed, and it was then as unlawful for the beasts of a neighbor to cross the invisible boundary line as it would be to overleap or throw down the most substantial wall.¹ This rule became a part of the common law in most of the American States, and it still remains a part of it, except as legislation has modified or abolished it.² And it is upon this *ground that railway companies have in some [*338] cases been held not bound to fence their road for the pro-

¹ *Wells v. Howell*, 19 Johns. 385; *Stafford v. Ingersoll*, 3 Hill, 38; *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10; *S. C.* 11 Moak, 214; *French v. Creswell*, 13 Oreg. 418. It has been held that the owner of beasts is liable for their trespasses, even though a stranger turned them into the road, from whence they strayed. *Noyes v. Colby*, 30 N. H. 143.

² *Maine*: *Little v. Lathrop*, 5 Me. 856; *Lord v. Wormwood*, 29 Me. 282. *New Hampshire*: *Avery v. Maxwell*,

4 N. H. 86. *Massachusetts*: *Rust v. Low*, 6 Mass. 90; *Thayer v. Arnold*, 4 Met. 589; *Lyons v. Merrick*, 105 Mass. 71; *Boston, &c., R. R. Co. v. Briggs*, 132 Mass. 24. *New York*: *Wells v. Howell*, 19 Johns. 385; *Holladay v. Marsh*, 3 Wend. 142. *New Jersey*: *Angus v. Radin*, 5 N. J. 815; *Coxe v. Robbins*, 9 N. J. 384. *Pennsylvania*: *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298; *Dolph v. Ferris*, 7 Penn. St. 367; *Gregg v. Gregg*, 55 Penn. St. 227. *Maryland*: *Richard-*

tection of beasts that might otherwise stray upon their tracks, and be killed or injured; they being proprietors of their tracks, and having the same right to protection against trespasses as any other land owners. There have, nevertheless, been intimations in some of the newer States that the common law on this subject was never suited to their condition and circumstances, and was consequently never adopted;¹ but it can scarcely be said that the point was ever distinctly ruled. It has been repeatedly said, however, in particular States, that the common law on this subject was inconsistent with their legislation, and therefore not in force.² And in those States the owner of land is left to protect his lands against injuries by domestic animals as he may think is for his interest.

The statutes which, under some circumstances, or for some purposes, require lands to be fenced by their owners, are so various in the several States that it is not easy even to classify them. Some of them provide merely that unless the owner shall cause

son v. Milburn, 11 Md. 340. *Indiana*: Brady v. Ball, 14 Ind. 317. See Stone v. Kopka, 100 Ind. 453. *Michigan*: Williams v. Mich. Cent. R. R. Co., 2 Mich. 259. *Wisconsin*: Stone v. Donaldson, 1 Pinney, 393; Harrison v. Brown, 5 Wis. 27. *Minnesota*: Locke v. First Div. &c., R. 15 Minn. 350. *Kansas*: Union P. R. R. Co. v. Rollins, 5 Kan. 167. *Delaware*: Vandegrift v. Delaware, &c., R. R. Co., 2 Houst. 87. *Vermont*: Hurd v. Rutland, &c., R. R. Co. 25 Vt. 116.

¹ See Seeley v. Peters, 10 Ill. 130; Michigan, &c., R. R. Co. v. Fisher, 27 Ind. 96; Vicksburg, &c., R. R. Co. v. Patton, 31 Miss. 156; Walker v. Herron, 23 Tex. 55.

² Seeley v. Peters, 10 Ill. 130; Stoner v. Shugart, 45 Ill. 76; Waters v. Moss, 12 Cal. 535; Comerford v. Dupuy, 17 Cal. 308; Studwell v. Ritch, 14 Conn. 291; Hine v. Woodin, 37 Conn. 123; Campbell v. Bridwell, 5 Oreg. 211; Baylor v. Balt. & Ohio R. R. Co. 9 W. Va. 270; Blaine v. Chesap. & Ohio R. R. Co., 9 W. Va. 252; Wagner v. Bissell, 3 Iowa, 396; Smith v.

Chicago, &c., R. R. Co., 34 Iowa, 96; Kerwhacker v. Cleveland, &c., R. R. Co., 3 Ohio, (N. S.) 172; Cent. R. R. Co. v. Davis, 19 Geo. 437; Macon, &c., R. R. Co. v. Baber, 42 Geo. 300; Murray v. Sou. Car. R. R. Co., 10 Rich. 237; Laws v. Nor. Car. R. R. Co., 7 Jones, (N. C.) 468; Jones v. Witherpoon, 7 Jones, (N. C.) 555; Walker v. Herron, 23 Tex. 55; Ala., &c., R. R. Co. v. Harris, 25 Ala. 232; Mobile, &c., R. R. Co. v. Williams, 53 Ala. 595; South, &c., R. R. Co. v. Hagood, 53 Ala. 647; Joiner v. Winston, 63 Ala. 129. See Berry v. St. Louis, &c., R. R. Co., 65 Mo. 172; Chase v. Chase, 15 Nev. 259. So in Nebraska and Colorado. Delaney v. Errickson, 10 Neb. 492; Morris v. Fraker, 5 Col. 425. But close herded sheep may not negligently be allowed to trespass. Willard v. Matheson, 7 Col. 76. Nor may cattle be driven on prairie land against the owner's will. Delaney v. Errickson, 11 Neb. 533; if there are visible indications of possession. Otis v. Morgan, 61 Ia. 712.

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. These statutes are generally limited in their force to exterior fences, and are intended as a part of a system under which cattle are or may be allowed to depasture the highway.¹ *In some States, from the earliest days, beasts *339] have been allowed to roam at large in the highways and unenclosed lands, either by general law or on a vote of the township or county to that effect; a futile permission, if owners of lands are not required to fence against them.² A more common provision is one requiring the owners of adjoining premises to 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. A neglect of duty under these statutes would not only preclude the party in fault from maintaining suit for injuries suffered by himself in consequence thereof,³ but it would seem that if the domestic animals of his neighbor should wander upon his lands, invited by his own neglect, and should there fall into pits, or otherwise receive injury, he would be responsible for this injury, as one occurring proximately from his own default.⁴ The statutes which require the construction of partition fences do so for the benefit exclu-

¹ Johnson v. Wing, 3 Mich. 163; Brady v. Ball, 14 Ind. 317; Cook v. Morea, 33 Ind. 497; Herold v. Meyers, 20 Iowa, 378; Reddick v. Newburn, 76 Mo. 428.

² See Kerwhacker v. Cleveland, &c., R. R. Co., 3 Ohio (n. s.) 172. In New York, the authority to permit beasts to pasture in the streets is denied, unless, when the land was taken for the public easement, the existing laws allowed it, so that the appropriation can be said to be for the pasturage as well as the easement. Tonawanda R. R. Co. v. Munger, 5 Denio, 255; S. C. 4 N. Y. 349. See, also, Avery v. Maxwell, 4 N. H. 86. At the common law, pasturage in the streets belongs to the adjoining owner, and it is no wrong for him to leave his cattle in the streets to take it; and if an injury to another arises

in consequence, he is liable, if at all, only on some showing of negligence, such, for instance, as that the beast was vicious. Holden v. Shattuck, 34 Vt. 336.

³ Phelps v. Cousins, 29 Ohio St. 135, and cases cited pp. 62 and 63, ante.

⁴ See Lee v. Riley, 18 C. B. (n. s.) 722; Powell v. Salisbury, 2 Y. & Jer. 391; Sexton v. Bacon, 31 Vt. 540; Cate v. Cate, 50 N. H. 144; Gilman v. Noyes, 57 N. H. 629. But, if one, knowing that the part of the fence which his neighbor should keep up is insecure, and that on his neighbor's land there is an open quarry, turns his horse into his own field, he cannot recover if the horse falls into the quarry. Krum v. Anthony, 8 Atl. Rep. 598 (Penn).

sively of the adjoining proprietors. These proprietors may, at their option, by agreement, dispense with them, and even if they do not agree to do so, but fail to maintain them as the law contemplates, still, if the cattle of the third persons come wrongfully upon one man's lands, and from there enter the adjoining enclosure, it is no answer to an action of trespass brought by the owner of the latter that the partition fence provided for by the law was not maintained.¹

[*340] *Where beasts unlawfully enter upon the premises of another, and there commit mischief, because of some vicious propensity, the owner is liable for this injury, whether he had notice of the propensity or not. The particular injury might not of itself support an action, but it is a part of the damage suffered from the trespass, and goes to swell a recovery which the unlawful entry justifies.²

It has been held that if one's horse reaches over the division

¹ *Avery v. Maxwell*, 4 N. H. 36; *Lawrence v. Combs*, 87 N. H. 331; *Little v. Lathrop*, 5 Me. 356; *Lord v. Wormwood*, 29 Me. 282; *Eames v. Salem, &c., R. R. Co.*, 98 Mass. 560; *Lyons v. Merrick*, 105 Mass. 71; *Hurd v. Rutland, &c., R. R.* 25 Vt. 116; *Wilder v. Wilder*, 38 Vt. 678; *Chambers v. Mathews*, 18 N. J. 368; *Cook v. Morea*, 33 Ind. 497; *Aylesworth v. Herrington*, 17 Mich. 417. Where the owner is liable for all damage done by his cattle, one is not liable for trespass of other's stock upon his neighbor's land although they have reached that land through a defective fence which it is his duty to maintain. *Little v. McGuire*, 43 Ia. 447. As to fencing laws, see, further, *Wright v. Wright*, 21 Conn. 329; *New Orleans, &c., R. R. Co. v. Field*, 46 Miss. 573; *McManus v. Finan*, 4 Iowa, 283; *Cleveland, &c., R. R. Co. v. Elliott*, 4 Ohio, (n. s.) 474. The obligation to fence rests upon the occupier of lands. *Tewksbury v. Bucklin*, 7 N. H. 518.

Laws for fencing have no application to the case of animals not usually

domesticated. Therefore, if one undertakes to keep a buffalo bull, he must, at his peril, keep him within his enclosure; if he escapes, and does damage on the lands of another, he may be killed, whether the lands are fenced or not. *Canefox v. Crenshaw*, 24 Mo. 199.

As between adjoining proprietors, until the statutory assignment of what each shall build and keep in repair has been made to them respectively, each remains liable at the common law for injuries done by his beasts. *Coxe v. Robbins*, 9 N. J. 384; *Rust v. Low*, 6 Mass. 90; *Heath v. Ricker*, 2 Me. 72; *Little v. Lathrop*, 5 Me. 357; *Knox v. Tucker*, 48 Me. 373; *Bradbury v. Gilford*, 53 Me. 99; *Harlow v. Stinson*, 60 Me. 347. See *Aylesworth v. Herrington*, 17 Mich. 417.

² *Lyke v. Van Leuven*, 4 Denio, 127; *S. C. 1 N. Y.* 515; *Mason v. Morgan*, 24 Up. Can. Q. B. 328. If an animal is not wrongfully on land, the owner is not liable unless he had notice of the vicious propensity. *Scott v. Grover*, 56 Vt. 499.

fence, and bites and injures another horse, this is a trespass, which renders the owner liable, irrespective of any question of fault on his part.¹

The liability for the trespasses of animals is imposed, not because of ownership, but because of possession, and the duty to care for them. Therefore, if they are in the hands of an agister, or of any one who, by agreement with the owner, has the care and custody of them for the time being, and are suffered to escape and do mischief, he, and not the owner, is the party responsible.² But in Massachusetts it is held that either the general *owner or the agister may be proceeded against, [*341] at the election of the party trespassed upon.³

Cattle Escaping when being Driven. There is an exception in the common law to the rule that every man at his peril must keep his beasts from the lands of others. If one is driving his domestic animals along the public highway, he is bound to observe due care, and if, notwithstanding he is guilty of no negligence, they escape from him and go upon private grounds, he is not responsible, provided he removes them within a reasonable time. And what is a reasonable time must depend upon all the circumstances.⁴

¹Ellis v. Loftus Iron Co., L. R. 10 C. P. 10; S. C. 11 Moak, 214.

²Rossell v. Cottom, 81 Penn. St. 535; Ward v. Brown, 64 Ill. 307; S. C. 16 Am. Rep. 561; Reddick v. Newburn, 76 Mo. 423; Atwater v. Lowe, 39 Hun, 150. See, Tewksbury v. Bucklin, 7 N. H. 518; Moulton v. Moore, 56 Vt. 700; Weymouth v. Gile, 72 Me. 446.

³Sheridan v. Bean, 8 Met. 284. This case, though decided several years before Rossell v. Cottom, *supra*, is not there noticed. Possibly there may be a distinction between the cases, as in the Pennsylvania case it is said the beasts were "prone to do mischief," by which we understand that, to use the common phrase, they were unruly. Compare Stafford v. Ingersoll, 8 Hill, 88, and see Weymouth v. Gile, 72 Me. 446. An occupant of

land who holds the cattle as their owner's general agent is liable. Kennett v. Durgin, 59 N. H. 560; but if he is a mere bailee of them upon their owner's land the latter is. Blaisdell v. Stone, 60 N. H. 507, though it would seem from this case that either might be.

⁴Goodwin v. Chevely, 4 H. & N. 631. This was the rule while land owners were not required to fence their lands. Possibly when the statute provides for an exterior fence, and the land owner has constructed one along the road which meets the statutory requirement, but which fails to restrain cattle passing in the highway, a question may arise whether a fair construction of the statute would not give damages. Where an ox, carefully driven, ran into a shop, *held*, no liability. Tillet v. Ward, L.

Injuries by Vicious Animals. The reason why the common law makes the owner of domestic animals responsible for such injuries as have already been specified, is because, taking notice of their propensities, it is his duty to anticipate that they will commit them as opportunity offers, and to guard against it. The difference in the nature of animals requires precautions in one case which it does not require in another. Thus, a dog which has manifested no vicious propensity is not likely to commit 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.¹ But in the case of beasts whose [*342] subsistence is, wholly or in part, upon grass, grain, and vegetables, there was abundant reason for a different rule. If they break into enclosures where crops are being cultivated, some mischief is certain to be committed, and it may be of a very serious character. Indeed, a few cattle or swine allowed to run at large without any restraint might render profitable cultivation impossible in a whole township. Because of this destructive propensity, the common law requires every owner of cattle, horses,

R. 10 Q. B. D. 17. To make the owner of a bull responsible for an injury occurring by the animal's breaking away from a servant who was leading him in a public street, the owner must have knowledge of such propensities as cause it to be dangerous so to lead him, and the servant must be negligent in view of the propensities of such an animal. *Linnham v. Sampson*, 126 Mass. 506. See *Smith v. Matteson*, 41 Hun, 216. If one's horse escape from an enclosure and injure a child upon the highway the owner is not liable unless he was negligent in allowing it to escape or in not pursuing and recapturing it, though under the statute the fact that the horse was loose on the street was *prima facie* evidence of negligence. *Fallon v. O'Brien*, 12 R. I. 518.

¹ *Brown v. Giles*, 1 C. & P. 118. Not even if he kills the owner's dog there, when his master had no reason

to anticipate such result. *Buck v. Moore*, 85 Hun, 838. It would be different, however, if the owner himself were to take him there: it is then his trespass, and what mischief the dog may do is an aggravation of it. *Beckwith v. Shoredike*, Burr. 2092; even though he did not know the dog was likely to do the mischief. *Green v. Doyle*, 21 Ill. App. 205. So if he were to send his dogs upon another man's land to worry the latter's cattle. *Mitten v. Faudrye*, Pop. 161. And where a dog had a propensity for chasing and destroying game, of which his owner was aware, the owner was held responsible for a trespass and for the killing of pheasants by the dog. *Read v. Edwards*, 17 C. B. (N. S.) 245. In Wisconsin the owner is held liable without notice of the propensity if a dog enters and bites a cow. *Chunot v. Larson*, 43 Wis. 536.

sheep, swine, and other domestic animals which would naturally commit destruction in private enclosures, 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

But there are other mischiefs which may be committed by domestic animals that one is under no obligation to anticipate and guard against, because they are not the result of a general propensity, but are committed, if at all, by exceptionally vicious individuals of the particular species of animals. Thus, though every horse will roam into neighboring fields if not restrained from doing so, it is only in rare and exceptional cases that a horse will attack and injure those who come near him. Therefore, while the owner should anticipate and protect against trespasses on lands by his horses, he is under no moral obligation to anticipate that a horse in which no such disposition has been discovered will suddenly make an assault upon and kick and bite some passer-by who chances to come within his reach. For this reason 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.²

*But there are exceptional cases which rest upon sub- [*343]stantially the same reasons with those which sustain an action against the owner of straying beasts. 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, a duty is then imposed upon him to keep the animal secure, and he is

¹ Van Leuven v. Lyke, 1 N. Y. 515. Where one's cattle break into the enclosure of another, and there commit mischief of a kind not to be expected from them—such as one cow goring another—their owner is responsible for this as an aggravation of the trespass. Angus v. Radin, 5 N. J. 815; Dolph v. Ferris, 7 W. & S. 307. See, also, cases of injury by diseased sheep trespassing. Anderson v. Buckton,

Stra. 192; Barnum v. Vandusen, 16 Conn. 200.

² Vrooman v. Lawyer, 13 Johns. 339; Van Leuven v. Lyke, 1 N. Y. 515; Smith v. Causey, 22 Ala. 568; Wormley v. Gregg, 65 Ill. 251; Dearth v. Baker, 22 Wis. 73; Jackson v. Smithson, 15 M. & W. 563; Hudson v. Roberts, 6 Exch. 697; Cox v. Burbridge, 13 C. B. (N. S.) 430; Moss v. Pardridge, 9 Ill. App. 490.

responsible for the mischief done by the animal in consequence of the failure to observe this duty.¹ The special notice which the owner has that his beast is inclined to commit the particular injury stands in the place of the general notice that the natural propensity of cattle to roam gave in the case of trespasses by them upon lands, and imposes upon him a corresponding obligation to prevent the particular mischief which he now has reason to expect will be committed should the opportunity occur. Therefore, where the owner is notified that his dog has been accustomed to worry sheep or other animals, or to attack persons, if he still keeps him he becomes, from the time of such notice, responsible for all injuries of the sort he may thereafter commit;² and the fact that he endeavors to so keep the dog as to prevent the mischief will not protect him, but by keeping him he will take upon himself all risks.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 [*344] no precautions, he will be held responsible if such an *at-

¹ *Smith v. Pelah*, Stra. 1264. "The Chief Justice ruled that if a dog has once bit a man, and the owner having notice thereof keeps the dog, and lets him go about, or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes; for it was owing to his not hanging the dog on the first notice. And the safety of the King's subjects ought not afterwards to be endangered. The *scienter* is the *gist* of the action." Therefore there is no liability in such case if the master had no such notice. *State v. Donohue*, 10 Atl. Rep. 150 (N. J.) The gist of such an action is not the negligent keeping of a vicious animal, but the keeping him with knowledge of the vicious propensity. *Murray v. Young*, 12 Bush, 837; *Twigg v. Ryland*, 62 Md. 380; *Mann v. Weiland*, *81 Penn. St. 243; *Muller v. McKesson*, 73 N. Y. 195; *Brooks v. Taylor*,

81 N. W. Rep. 837 (Mich.); *Spring Co. v. Edgar*, 99 U. S. 645; *Bell v. Leslie*, 24 Mo. App. 661. But see *Worthen v. Love*, 14 Atl. Rep. 461 (Vt.)

² *Jones v. Perry*, 2 Esp. 482; *Sarch v. Blackburn*, 4 C. & P. 297; *Thomas v. Morgan*, 2 C. M. & R., 496; *Read v. Edwards*, 17 C. B. (n. s.) 245; *May v. Burdett*, 9 Q. B. (n. s.) 101; *Durden v. Barnett*, 7 Ala. 169; *Pickering v. Orange*, 2 Ill. 338; *Keightlinger v. Egan*, 65 Ill. 285, and 75 Ill. 141; *Wormley v. Gregg*, 65 Ill. 251; *Partlow v. Haggarty*, 35 Ind. 178; *Karr v. Parks*, 44 Cal. 46; *Marsh v. Jones*, 21 Vt. 878; *Dearth v. Baker*, 22 Wis. 73; *McCaskill v. Elliott*, 5 Strob. 196; *Murray v. Young*, 12 Bush, 837; *Buckley v. Leonard*, 4 Denio, 500; *Paff v. Slack*, 7 Penn. St. 254; *Campbell v. Brown*, 19 Penn. St. 359; *Montgomery v. Koester*, 35 La. Ann. 1091.

³ *Kelly v. Tilton*, 3 Keyes, 263; *Stumps v. Kelly*, 23 Ill. 140.

tack is made.¹ The same rule is applicable to all classes of domestic animals, and particulars need not be gone into here.²

The notice which charges the owner with the duty must be a notice that the animal was inclined to do the particular mischief that has been done. Notice that a dog is disposed to worry sheep is no notice that he will attack persons. Notice that a horse is unruly is no notice that he is likely to kick and bite.³ But notice that a bull attacks and gores other domestic animals is sufficient warning that he would attack persons in like manner.⁴ The question in each case is whether the notice was sufficient to put the owner on his guard, and to require him to anticipate the injury which has actually occurred.

The sufficiency of the notice is a question of what is sufficient to put a reasonable and prudent man on his guard. It is not necessary that it be notice of mischief actually committed; it is the propensity to commit the mischief that constitutes the danger.⁵ And if the mischief is of a sort that animals of the kind

¹ *Hudson v. Roberts*, 6 Exch. 697. See *Cockersham v. Nixon*, 11 Ired. 269; *Earhart v. Youngblood*, 27 Penn. St. 331; *Dolph v. Ferris*, 7 W. & S. 367; *Barnes v. Chapin*, 4 Allen, 444. So if one insecurely tethers a bull, known to be vicious, near a path, he is liable even to one using the path without right. *Glidden v. Moore*, 14 Neb. 84.

² Injuries by rams: *Jackson v. Smithson*, 15 M. & W. 563; *Oakes v. Spaulding*, 40 Vt. 347; *Spaulding v. Oakes*, 42 Vt. 343. Injuries by hogs: *Jenkins v. Turner*, Ld. Raym. 109; *Sherfey v. Bartley*, 4 Sneed, 58; *Morse v. Nixon*, 6 Jones, (N. C.) 293. Injuries by horses: *Cox v. Burbridge*, 13 C. B. (n. s.) 430; *Popplewell v. Pierce*, 10 Cush. 509; *Dickson v. McCoy*, 37 N. Y. 400; *Goodman v. Gay*, 15 Penn. St. 188; *Wales v. Ford*, 8 N. J. 267. Injuries by cows: *Hewes v. McNamara*, 106 Mass. 281; *Stumps v. Kelley*, 22 Ill. 140; *Cogswell v. Baldwin*, 15 Vt. 404. See, further, *Van Leuven v. Lyke*, 1 N. Y. 515; *Woolf v. Chalker*, 31 Conn. 121. Measure

of damage, for letting unpedigreed bull run at large, whereby a blooded cow is got with calf, see *Crawford v. Williams*, 48 Ia. 247.

³ See *Spray v. Ammerman*, 66 Ill. 309; *Keightlinger v. Egan*, 65 Ill. 235; *Cockersham v. Nixon*, 11 Ired. 269; *Hartley v. Halliwell*, 3 Stark. 212; *Twigg v. Ryland*, 62 Md. 380.

⁴ *Earhart v. Youngblood*, 27 Penn. St. 331; *Cockersham v. Nixon*, 11 Ired. 269.

⁵ *McCaskill v. Elliott*, 5 Strob. 196; *Worth v. Gilling*, L. R. 2 C. P. 1. Not necessary that notice be of acts precisely similar. Enough if it shows a disposition to commit a substantially similar injury, *Reynolds v. Hussey*, 5 Atl. Rep. 458 (N. H.); *Mann v. Weiland*, *81 Penn. St. 243. Not necessary that a dog known to be ferocious should have previously bitten a man. *Godeau v. Blood*, 52 Vt. 251. See *Flansburg v. Basin*, 3 Ill. App. 531. If owner has notice of a dog's propensity to bite, it makes no difference whether the biting is in sport or anger. *State v. McDermott*, 6 Atl.

are likely to commit at a certain season of the year — as [*345] in the *case of stallions—the owner should anticipate and guard against it without any special notice or warning.¹

The rules above laid down are applicable to the case of cattle which are accustomed to overleap or throw down the fences which are sufficient for cattle in general. The person having such cattle will be liable for injuries resulting from the indulgence of this propensity, even in the case of those whose duty it was to maintain the fence overleaped or thrown down. That duty is a duty to keep up only such fences as are sufficient to protect against cattle in general, and not such as vicious or unruly beasts make necessary.²

The duty to protect against vicious animals is imposed upon the keeper irrespective of ownership.³ If the injury committed was to a person, it is no defense to an action therefor that the party injured was at the time committing some trifling trespass upon the defendant's land, for the law will not suffer a man to defend his premises against mere trespasses by such dangerous means as ferocious animals,⁴ whose assault might be dangerous

Rep. 653 (N. J.) Notice to defendant of mischief on a single previous occasion seems to be sufficient. *Arnold v. Norton*, 25 Conn. 92; *Kittredge v. Elliott*, 16 N. H. 77, and cases cited. *Mann v. Weiland*, *81 Penn. St. 243; *Marsel v. Bowman*, 62 Ia. 57. Compare *Bulkley v. Leonard*, 4 Denio, 500; *Appleby v. Percy*, L. R. 9 C. P. 647; *Perkins v. Mossman*, 44 N. J. L. 579 Direct proof is not essential. Knowledge may be made out by circumstances without it. *Judge v. Cox*, 1 Stark. 285; *McCaskill v. Elliott*, 5 Strob. 196. May be presumed from his keeping dog tied during the day. *Goode v. Martin*, 57 Md. 606; *Brice v. Bauer*, 15 N. E. Rep. 695 (N. Y.) Notice to a servant who has charge of the beast is sufficient. *Baldwin v. Casella*, L. R. 7 Exch. 325; *S. C. 8 Moak*, 434. Or to a general agent in charge of a farm on which a dog is kept. *Curtiss v. Smith*, 53 Vt. 532.

¹ *Meredith v. Reed*, 26 Ind. 334. See *McIlvaine v. Lantz*, 100 Penn. St. 586.

² *Hine v. Wooding*, 37 Conn. 123; *Barnum v. Vandusen*, 16 Conn. 200.

³ *Frammell v. Little*, 16 Ind. 251; *Marsh v. Jones*, 21 Vt. 378; *Wilkinson v. Parrott*, 33 Cal. 103; *Marsel v. Bowman*, 62 Ia. 57; *Twigg v. Ryland*, 62 Md. 380; *Marsh v. Handy*, 40 Hun, 339. See *Weide v. Thiel*, 9 Ill. App. 223.

⁴ *Blackman v. Simmons*, 3 C. & P. 138; *Loomis v. Terry*, 17 Wend. 496; *Sherfey v. Bartley*, 4 Sneed, 58. Compare *Brock v. Copeland*, 1 Esp. 203. Whoever kills domestic animals because they are trespassing is liable for their value. *Wright v. Ramscot*, 1 Saund. 83; *Dodson v. Mock*, 4 Dev. & Bat. 140; *Tyner v. Cory*, 5 Ind. 216 (Dogs). *Ford v. Taggart*, 4 Tex. 492. See, *State v. Bates*, 93 N. C. 784; *Chappell v. State*, 35 Ark. 345 (Cattle). *Clark v. Keliher*, 107 Mass.

to life or limb, any more than it will by scattering poison about to kill animals that come upon them,¹ or by setting spring guns.² But doubtless a man might defend his house against burglars by the use of a ferocious dog, and might even defend against casual trespasses with a dog not likely to do serious injury.³

*The doctrine of contributory negligence applies to [*346] the case of injury by animals.⁴ If a man heedlessly places himself on the premises of another, in the way of a bull which he knows is fierce and dangerous, he has no lawful ground of complaint if he is gored.⁵ But where a child is injured by vicious animals, the party responsible for their keeping cannot escape liability because the child did not exhibit a thoughtfulness and prudence beyond his years.⁶

Sometimes a vicious animal may lawfully be killed, though the circumstances would not support an action against the owner. Thus, if a savage dog is actually found doing mischief,⁷ or if it

406; *Johnson v. Patterson*, 14 Conn. 1 (Hens). So he is liable for injury to the dog of another by spikes set in trees on his land for the purpose. *Dean v. Clayton*, 7 Taunt. 489. See *Hott v. Wilkes*, 3 B. & Ald. 304. In Maine, while a dog is recognized as property, it is not a domestic animal within a statute forbidding killing such animals. *State v. Harriman*, 75 Me 562.

¹ *Johnson v. Patterson*, 14 Conn. 1.

² See Ante, p. 194.

³ In *Sarch v. Blackburn*, 4 C. & P. 296, TINDALL, C. J., affirmed the right of a man to defend his premises by a dog, provided he had given notice, but held that a printed notice conspicuously displayed was not sufficient for the case of one who could not read. Compare *Curtis v. Mills*, 5 C. & P. 489; *Montgomery v. Koesler*, 35 La. Ann. 1091. According to *Laverone v. Mangianti*, 41 Cal. 138, one who keeps a vicious dog as a watch-dog is responsible to one who is bitten by him, though not at all in fault; an accident putting the party injured in his way.

One may use a dog in driving away domestic animals trespassing on his grounds, but he will be liable if the dog be fierce and worry the animals beyond what is needful to accomplish the purpose. See *Amick v. O'Hara*, 6 Blackf. 258; *Wood v. LaRue*, 9 Mich. 158; *Tift v. Tift*, 4 Denio, 175; *Davis v. Campbell*, 23 Vt. 236.

⁴ *Williams v. Moray*, 74 Ind. 25; *Eberhart v. Reister*, 96 Ind. 478; *Quimby v. Woodbury*, 63 N. H. 370; *Twigg v. Ryland*, 62 Md. 880; *Carpenter v. Latta*, 20 Kan. 591; *Weide v. Thiel*, 9 Ill. App. 223. See *Muller v. McKesson*, 73 N. Y. 195; *Lynch v. McNally*, *id.* 847.

⁵ But the mere fact that one is a trespasser does not preclude recovery. *Marble v. Ross*, 124 Mass. 44.

⁶ *Munn v. Reed*, 4 Allen, 431; *Plumley v. Birge*, 124 Mass. 57.

⁷ *Wadhurst v. Damme*, Cro. Jac. 45; *Vere v. Cawdor*, 11 East, 568; *Barrington v. Turner*, 2 Lev. 28; *Protheroe v. Mathews*, 5 C. & P. 581; *Putnam v. Payne*, 13 Johns. 312. But a man has no right to kill a dog found on his premises doing no mischief,

becomes necessary in order to protect property against him,' the dog may be killed, whether the owner has notice of his disposition or not. And a dog that is ferocious and accustomed to bite, or that has been bitten by a mad dog, may be killed as a common nuisance.² But animals that are property at the common law could not thus be destroyed. Before one could be justified in killing them, it would be necessary to show that protection to human beings, or to more valuable property, appeared to require it.³

[*347] *The liability of owners of dogs for injuries done by them has been greatly changed in some States by statutes.⁴

simply because he suspects him to have done mischief before. *Brent v. Kimball*, 60 Ill. 211. But if he has killed hens, and to prevent such killing at that time it is reasonably necessary to shoot him, he may be killed. *Anderson v. Smith*, 7 Ill. App. 354; *Marshall v. Blackshire*, 44 Ia. 475. See *Livermore v. Batchelder*, 141 Mass. 179. One has no right to enter the owner's dwelling to kill a dog not registered and collared. *Bishop v. Fahay*, 15 Gray, 61; *Uhlein v. Cromack*, 109 Mass. 273. Any one may kill an uncollared dog if in so doing he commit no trespass. *Morewood v. Wakefield*, 133 Mass. 240. See *Dinwiddie v. State*, 103 Ind. 101; *Lowell v. Gathright*, 97 Ind. 813. In Missouri a sheep-killing dog may be killed by any one at any time. *Carpenter v. Lippitt*, 77 Mo. 242.

¹ *Janson v. Brown*, 1 Camp. 41; *Wells v. Head*, 4 C. & P. 568. Or person when attacked on the highway, *Reynolds v. Phillips*, 13 Ill. App. 557.

² *Barrington v. Turner*, 2 Lev. 28; *Dodson v. Mock*, 4 Dev. & Bat. 146; *Perry v. Phelps*, 10 Ired. 261; *Brown v. Carpenter*, 26 Vt. 638; *Putnam v. Payne*, 13 Johns. 312; *Hinckley v. Emerson*, 4 Cow. 351; *Loomis v. Terry*, 17 Wend. 496; *Maxwell v. Palmerston*, 21 Wend. 406; *Brill v. Flag-*

ler, 23 Wend. 354; *Dunlap v. Snyder*, 17 Barb. 561; *Parker v. Mize*, 27 Ala. 480. As to when he may be killed as a trespasser, see *King v. Kline*, 6 Penn. St. 318.

³ See *Woolf v. Chalker*, 31 Conn. 121, and cases, p. 406 n. 4. The law of *dog fights* is ably expounded in *Wiley v. Slater*, 22 Barb. 506. Where a statute authorizes "any person" to kill any dog going at large and not licensed and collared as provided by the act, another dog cannot assume to be "any person," and proceed to execute the law upon a delinquent, and if he does so, his owner will be responsible. *Hiesrodt v. Hackett*, 34 Mich. 283. If one keep a vicious dog, duly licensed, collared and confined, for the protection of the family, he may recover its market value from one who kills it without being attacked by it. *Uhlein v. Cromack*, 109 Mass. 273. But if one suffers his dog to prowl around his neighbor's house at night and annoy the family by howling, he cannot complain if the dog is regarded as a private nuisance and abated as such. *Brill v. Flagler*, 23 Wend. 354. Minks may be killed for the protection of fowls even when the statute does not permit them to be hunted. *Aldrich v. Wright*, 53 N. H. 398.

⁴ To give these statutes would re-

*Where the domestic animals of different owners unite [*348] in committing an injury, the wrong is not a joint wrong of the owners, but each owner must be sued separately for the

quire too much space. The following decisions under them may be of interest: *Alabama*. Smith v. Causey, 23 Ala. 568. Suit under statute giving double damages for injury to stock by dogs. Statute is highly penal and must be strictly construed. Negligence of defendant's servant does not render defendant liable under it. *Connecticut*. Jones v. Sherwood, 37 Conn. 466. Injury to sheep by dogs. Questions of construction of statute. Woolf v. Chalker, 81 Conn. 121. The statute dispenses with proof of *scienter* by defendant of dog's evil disposition. *Maine*. Smith v. Montgomery, 52 Me. 178. Keeper of dog is to be deemed owner. Grant v. Ricker, 74 Me. 487. The member of a firm may be held as keeper of dog owned by firm. Prescott v. Knowles, 62 Me. 277. Action does not abate on death of plaintiff. *Massachusetts*. Le Forest v. Tolman, 117 Mass. 109. Statute giving action for injuries by dogs does not apply to injuries committed out of State. Buddington v. Shearer, 20 Pick. 477. Dogs of different owners united in injury, no joint action. McCarthy v. Guild, 12 Met. 291. Child injured by dog, parent may bring suit. Sherman v. Favour, 1 Allen, 191. Injury by dog frightening horse is within statute. Osborn v. Lenox, 2 Allen, 207. Remedy against town for injuries by dogs. Barrett v. Malden, &c., R. R. Co., 3 Allen, 101. Question who is to be deemed keeper of a dog. Pressey v. Wirth, 3 Allen, 191. Injury by dog; *scienter* need not be proved; computing double damages. Brewer v. Crosby, 11 Gray, 29. Remedy given for injury to any person includes injury to property. *Michigan*. Swift v. Applebone, 23 Mich. 252; Trompen

v. Verhage, 54 Mich. 304. Action for double damages for bite of dog; *scienter* need not be proved, but may be in aggravation of damages; computing double damages. Elliott v. Herz, 29 Mich. 202. Statute does not apply to injuries by mad dogs. Monroe v. Rose, 68 Mich. 347. Construction of statute; consequential injuries. *New Hampshire*. Orme v. Roberts, 51 N. H. 110. Action for double damages; proof of *scienter* dispensed with. Quimby v. Woodbury, 63 N. H. 370, but not proof of plaintiff's due care. *New York*. Fish v. Skut, 21 Barb. 333. Proof of *scienter* dispensed with in case of injury by dogs to sheep. Osincup v. Nichols, 49 Barb. 145. If the injury is anything besides killing or wounding the sheep, *scienter* must be proved. *New Jersey*. State v. Donohue, 10 Atl. Rep. 150. That dog is unmuzzled subjects owner to penalty, but is not a ground of action. *Pennsylvania*. Kerr v. O'Connor, 63 Penn. St. 341. Injury by dogs to sheep; *scienter* need not be proved; if dogs of different owners unite in killing sheep, each owner is liable for all damage. Under an earlier statute, *scienter* was required to be proven. Campbell v. Brown, 19 Penn. St. 359. *Ohio*. Gries v. Zeck, 24 Ohio, (N. S.) 329. Person bitten by dog; *scienter* need not be proved. McAdams v. Sutton, 24 Ohio, (N. S.) 333. Actions against owners of dogs, which had united in killing sheep, sustained. *Vermont*. Adams v. Hall, 2 Vt. 9. Similar action to the last; held not sustainable. Remele v. Donahue, 54 Vt. 555. But one owner may be held for double the whole damage. *Wisconsin*. Tenney v. Lenz, 16 Wis. 568. Remedy over against town. Kert-

damage done by his own beasts.¹ But in Ohio the ruling is otherwise.²

Injuries by Wild Beasts. Lord HALE says in respect to injuries by beasts that "these things seem to be agreeable to law :

"1. If the owner have notice of the quality of his beast, and it doth anybody hurt, he is chargeable with an action for it.

"2. Though he have no particular notice that he did any such thing before, yet if it be a beast that is *feræ naturæ*, as a lion, a bear, a wolf, yea, an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's Case*, whose child was bit by a monkey that broke its chain and got loose.

"3. And, therefore, in case of such a wild beast, or in case of a bull or cow that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm the owner is liable to answer damages."³

If this doctrine is good at law this day, it must be because the keeping of wild beasts accustomed to bite and worry mankind is unlawful. For, if the keeping of such beasts is not a

schacke v. Ludwig, 28 Wis. 430. Quere, whether statute dispenses with proof of *scienter* in other cases than those of injuries to sheep; repeal of statute puts an end to actions under it. *Schaller v. Connors*, 57 Wis. 321. Liable without *scienter* for damage to person or clothes.

¹ *Adams v. Hall*, 2 Vt. 9; *Buddington v. Shearer*, 20 Pick. 477; *Russell v. Tomlinson*, 2 Conn. 206; *Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Denio, 495; *Partenheimer v. Van Order*, 20 Barb. 479; *Wilbur v. Hubbard*, 35 Barb. 803; *Denny v. Correll*, 9 Ind. 72; *Powers v. Kindt*, 13 Kan. 74. *Cogswell v. Murphy*, 46 Ia. 44. The doctrine of these cases was approved in *Little Schuylkill Nav. Co. v. Rich-*

ards, 57 Penn. St. 142. It was there held that if several persons, by their individual action, without concert, throw rubbish into a stream, which is carried down and deposited on plaintiff's land, they cannot be united in an action brought for this nuisance.

² *McAdams v. Sutton*, 24 Ohio, (N.S.) 333; *Jack v. Hudnall*, 25 Ohio, (N. S.) 255; *Boyd v. Watt*, 27 Ohio, (N. S.) 259. If one allows another's cattle to be placed with his own on his part of a common enclosure, he is liable for their trespass. He is *pro hoc vice* their "owner" in such case. *Montgomery v. Handy*, 62 Miss. 16. As to injuries from diseased animals, see *post*, p. *481.

³ 1 Hale, P. O. 430, pt. 1, c. 83. See Bull. N. P. 77.

*wrong in itself, then no wrong can come from it until [*349] some wrongful circumstance intervenes; in other words, until there is negligence.

In *May v. Burdett*, an action for an injury by the bite of a monkey was sustained, though no negligence was charged in the declaration.¹ In Connecticut, this case has been cited as authority to the point that the keeping of a vicious dog, after notice of his evil disposition, is wrongful and at the peril of the owner, "and, therefore, *prima facie* the owner is liable to any person injured by such a dog, without any averment or proof of negligence in securing or taking care of it."² But admitting the *prima facie* case, may not the keeper show that the animal was kept by him with due care and for some commendable purpose, and that he escaped under circumstances free from fault in him? The keeping of wild animals for many purposes has come to be recognized as proper and useful; they are exhibited through the country with the public license and approval; governments and municipal corporations expend large sums in obtaining and providing for them; and the idea of legal wrong in keeping and exhibiting them is never indulged. It seems, therefore, safe to say 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. A very high degree of care is demanded of those who have them in charge, but if, notwithstanding such care, they are enabled to commit mischief, the case should be referred to the category of accidental injuries, for which a civil action will not lie.³

¹ *May v. Burdett* 9 Q. B. (N. S.) 101. The decision in this case seems to be that the keeper of such an animal is *prima facie* responsible for the injuries done by it, but it is not decided that he may not meet the case by showing that he observed in respect to it proper care. See *Rex v. Huggins*, *Ld. Raym.* 1583; *Besozzi v. Harris*, 1 F. & F. 92; *Van Leuven v. Lyke*, 1 N. Y. 515; *Laverone v. Mangianti*, 41 Cal. 138.

² *Woolf v. Chalker*, 31 Conn. 121, 130; *Laverone v. Mangianti*, 41 Cal. 138; *Brooks v. Taylor*, 31 N. W.

Rep. 837 (Mich.) So of a buck, kept in a park, which was not thoroughly tame. *Spring Co. v. Edgar*, 99 U. S. 645. And of a race horse. *Bell v. Leslie*, 24 Mo. App. 661, and cases p. 404 n. 1.

³ See, for some discussion of this subject, *Earl v. Van Alstine*, 8 Barb. 630, which was an action against the owner of bees for an injury inflicted by them upon plaintiff's horses as they were passing along the highway. It was held the defendant was not liable unless he had notice that the bees were accustomed to such mis-

chief. See, also, *Canefox v. Crenshaw*, 24 Mo. 199. It is no defense to claim for death by attack of a bear that he was partly tame, nor that he was provoked to attack by teasing of some person other than his victim. *Vredenburg v. Behan*. 83 La. Ann. 627.

As to the law respecting the keeping of wild beasts, we should say that the higher cultivation of the intellect of the mass of the people, as compared with two or three centuries ago, and the recognition of wants in human nature then ignored, must have worked some changes, and that we must take up the common law of

that period in this as in many other particulars more to locate accurately our point of departure than to fix definitely a stake to which we must tie and adhere. When wild animals are kept for some purpose recognized as not censurable, all we can demand of the keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him.

Where a horse is frightened by the mere appearance of an elephant, and mischief ensues, the owner of the elephant is not responsible. *Scribner v. Kelley*, 88 Barb. 14.

*CHAPTER XII.

[*351]

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. Thus, at the common law offices, dignities, franchises, pensions and annuities may all be inheritable, and so may be the right to rents, and the right in the owner of one estate to pass and repass over the estate of his neighbor for the convenient enjoyment of his own. All these rights, it is perceived, are intangible rights; the right to rents is not a right in certain pieces of money, but it is a right to receive periodically a certain sum of money; and it is the satisfaction of the right to rents that creates the right in the money received thereby. All such rights have or may have a money value, and they are therefore, with entire propriety, considered as property rights.]

Rights corresponding to these may exist which are only personal property, since they are neither inheritable, nor are they in any manner connected with the realty. Among the chief of these is the right which one has to the productions of his intellect.

Copyrights and Patents. The governments of civilized countries have deemed it wise to make provision whereby the interests of authors and inventors may be subserved by securing to them for a certain length of time a monopoly in the publication or reproduction of that which they have produced, invented, or designed. This is done by copyright and patent laws,

all of which name certain conditions, which, when complied with, will *entitle the author, inventor, or designer to remedies by means of which he may protect himself in his monopoly during the period to which by law it is limited. The conditions in the case of a book, writing, or design are:

That the applicant for a monopoly be the author or designer, or the assignee thereof, and that he shall have applied for copyright in due form of law, and conformed to the requirements made for the application, one of which usually is, the payment of a small fee, and another the delivery of a copy to some national institution or library. In general, also, it is required that the applicant be a citizen, or at least a resident of the country.

The conditions in the case of an inventor are:

That the invention be new; that it be useful, and that, as in the case of books, writings, etc., all legal formalities be complied with.

When these appear, the proper certificate or patent is issued as evidence of the right, and the violation of the monopoly becomes a legal wrong, which is punished by penalties, or by the recovery of damages, or, perhaps, by both. But the legal protection will fail if it shall turn out that the book, design, etc., purporting to be original was not so in fact, or that the invention was not new. Such a monopoly, of course, cannot extend beyond the limits of the sovereignty granting it, though other countries, if they see fit, as they sometimes do, in consideration of reciprocity, may give a similar monopoly within their own limits.

Inventions not Patented. It may be, however, that the author or inventor will apply for no monopoly, and it then becomes important to know whether the common law recognizes in him any property in the productions of his intellect, and whether it affords him any redress in case his rights therein are disregarded. In touching upon this subject, it will be advisable to consider separately the case of inventions, because, as between these and the others mentioned, the law appears to have made distinctions, and there are grounds on which distinctions may very justly be supported. It seems to be proved, by observation, that the most

striking and valuable inventions are approached gradually, and that often the merit of the inventor consists only in this: That he has first discovered and brought into use what, had he never lived, would only a little later have been discovered and brought *into use by some one else. Often, indeed, [*353] the very greatest difficulty is encountered in determining with accuracy who is entitled to the merit of an invention, and a controversy arises which is contested before juries upon disputed facts. The difficulty of reaching a correct conclusion is very greatly increased if an invention is suffered to come into use before the title to it is claimed and passed upon by the proper authorities. Therefore the law refuses to 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 an exclusive property therein.¹ In so doing it certainly escapes many difficulties, without at the same time imposing upon the inventor any unreasonable hardship. If he desires to secure and retain a property in the production of his genius or skill, it is not unreasonable to require that he shall formally claim it; and if, instead of doing so, he voluntarily allows his invention to come into use, he cannot complain of the presumption the law then makes that his purpose has been to make a gift of his invention to the world.² Where, however, he has simply delayed applying for letters patent until another has made the discovery known, or even brought it into use, this will not prevent the first discoverer securing his monopoly afterwards; for even if there be two independent discoverers, only the first is entitled to take out letters patent which shall protect him.³ But there is no monopoly until the letters are obtained.

Literary and Artistic Productions. With writings, pictures, etchings, etc., it is different.⁴ The author of a particular book

¹ *Bedford v. Hunt*, 1 *Mason*, 302; *Shaw v. Cooper*, 7 *Pet.* 292.

² *Whittemore v. Cutter*, 1 *Gall.* 478; *Pennock v. Dialogue*, 2 *Pet.* 1; *Wyeth v. Stone*, 1 *Story*, 273; 2 *Kent*, 369, note.

³ *Woodcock v. Parker*, 1 *Gall.* 438; *Bedford v. Hunt*, 1 *Mason*, 302; 2 *Kent*, 369, note.

⁴ A photograph may be copyrighted if it represents an original intellectual conception. *Lithographic Co. v. Sarony*, 111 *U. S.* 53. The man who takes it is the author. His employer cannot copyright it. *Nottage v. Jackson*, L.R. 11 *Q. B. D.* 627. So a painting which might readily be lithographed may be copyrighted. *Schu-*

does not anticipate any one else when he produces it. Of any important original work, it may confidently be affirmed that if the author had not produced it no one else would have done so. The author may have made use of ideas that would have occurred to and perhaps been used by others, but persons working independently would never produce the same identical book or picture, though they might, perhaps, reach the same identical discovery, and apply it in useful machinery. Moreover, disputes [*354] respecting *the authorship of contemporary literary productions can seldom arise, or be troublesome when they do, and therefore no special embarrassment is experienced when a common law right in literary productions and works of art is recognized.

Still here, as in the case of inventions, no monopoly in publications is secured, except by compliance with the statute. But an author may keep his production by him indefinitely, and though others may see it, or hear it, or become familiar with it, they are not at liberty to publish it without his consent. As was said in the leading case of *Wheaton v. Peters*, "That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or, by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted."¹ He has no occasion to take out a copyright until publication, and he may therefore control his own productions and publish them or not, at his option; while an inventor, if he declines to take out a patent, cannot prevent others, who may have knowledge of his invention, from making use of it.

macher v. Schwenke, 25 Fed. Rep. 466. But if an artist sells his picture absolutely, the purchaser may reproduce it by lithography. *Parton v. Prang*, 8 Cliff 537. One who has made an electrotype copy of an important, substantial and material part of an illustrated copyrighted newspaper, and sold the plate to the proprietor of another paper published in the same city, knowing that it would be published therein, is liable as joint tortfeasor just as if he had published it himself. *Harper v. Shoppell*, 28 Fed. Rep. 613. As to what is a de-

sign under Statutes 46 and 47 Vic. c. 57, see *LeMay v. Welch*, L. R. 28 Ch. D. 24. As to protection of plates and engravings in copyrighted books, see cases in brief printed in the report and the opinion, *Maple v. Junior, &c.*, Stores L. R. 21 Ch. D. 369.

¹ *McLEAN, J.*, *Wheaton v. Peters*, 8 Pet. 591, 657. See *Bartlett v. Crittenden*, 5 McLean, 32; *Ibid.*, 4 McLean, 800; *Boucicault v. Fox*, 5 Blatch. 87, 97; *Keene v. Clarke*, 5 Rob. (N. Y.) 38; *Palmer v. De Witt*, 40 How. Pr. 293.

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. The word publication, it should be remarked, is here employed in a somewhat narrow sense; certainly not in the broad sense which it bears in the law of libel and slander. A letter written by one person and delivered to another to be read, is publication of a libelous charge contained in it; but one may exhibit his literary productions to one person or many, without abandoning his rights therein as author, where such has not been his intention. A publication, to constitute an abandonment, must be literally one which puts the production before the general public. A teacher does not publish an original work in his department of study by instructing his pupils in its principles.¹ Neither does a photographer publish his photograph by loaning a copy to a friend;² nor an author abandon his play to the public by allowing it to *be publicly acted.*³ In short, the writer of any [*355] literary, dramatic, or musical composition or work of art

¹ *Bartlett v. Crittenden*, 4 McLean, 300; *S. C. 5 McLean*, 82. While one may take notes at a public lecture he may not publish the lecture from them for profit. *Nicols v. Pitman*, L. R. 26 Ch. D., 374.

² *Mayall v. Higbey*, 1 H. & C. 148.

³ *Macklin v. Richardson*, Amb. 694; *Boucicault v. Fox*, 5 Blatch. 87; *Palmer v. De Witt*, 40 How. Pr. 293. See *Thomas v. Lennon*, 14 Fed. Rep. 849; *Goldmark v. Krelling*, 25 Fed. Rep. 849. If an owner does not intend to dedicate the whole of a literary production the public may use only what he does dedicate. *Aronson v. Baker*, 12 Atl. Rep. 177 (N. J.) Publication, as a book, of songs and music before a public representation does not deprive the author of his sole right to perform the composition publicly. *Chappell v. Boosey*, L. R. 21 Ch. D. 232. But, see, *The "Iolanthe" Case*, 15 Fed. Rep. 439. One infringes the right of the owner of an unpublished play if he attends a rep-

resentation, commits it to memory, and afterwards writes it out and presents it. *Tompkins v. Halleck*, 133 Mass. 82. Overruling *Keene v. Kimball*, 16 Gray, 545. If all of an opera but the orchestral score and a piano score is published, no part of the dramatic properties remains, and another may write an orchestral score for it and produce the opera, provided it is not produced as having the original orchestration. *The "Mikado" Case*, 25 Fed. Rep. 183. *The "Iolanthe" Case*, 15 Fed. Rep. 439, disapproving *Thomas v. Lennon*, 14 Fed. Rep. 849. See, further, *Aronson v. Fleckenstein*, 28 Fed. Rep. 75; *Carte v. Evans*, 27 Fed. Rep. 861; *Fairlie v. Boosey*, L. R. 4 App. Cas. 711. The free representation of a dramatic composition for the entertainment of nurses, &c., in a hospital is not a public representation and is no infringement of copyright. *Duck v. Bates*, L. R. 13 Q. B. D. 843.

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. The right to the first general publication belongs to him; he may enjoin any attempt to take it from him; and if he see fit to do so, he may refuse any publication whatever. Nor is his death an abandonment of the right to publish, but his representatives may exercise and control it afterwards. Moreover, this common law right is not local, but would be protected in any country where the common law prevails, and probably wherever the civil law prevails also.

If the author elects to publish, and secures his copyright, this 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.¹ In some cases it is a very nice question what amounts to a piracy of a work. "Thus, if large extracts are made therefrom in a review, it might be a question whether those extracts were designed to be *bona fide* for the mere purpose of criticism, or were designed to supersede the original work under pretense of a review, by giving its substance in a fugitive form. The same difficulty may arise in relation to an abridgment of an original work. The question in such a case must be compounded of various considerations; whether it be a *bona fide* abridgment, or only an evasion by the omission of some unimportant parts; whether it will, in its present form,

¹ Curtis on Copyrights, 238. To constitute infringement there must be a substantial copy of the whole or a part of a production. A map of Philadelphia made on the same plan as a map of New York does not infringe a copyright of the latter. *Perris v. Hexamer*, 99 U. S. 674. The copyright of a work on book-keeping confers no exclusive right to make, sell, and use blank account books prepared on the plan set forth in such book. *Baker v. Selden*, 101 U. S. 99. An author has in the title or particular marks which designate his

book a property like a trade mark and a court will protect him from infringement, and if the title and general appearance of another book is likely to mislead, its publication may be restrained. *Metzler v. Wood*, L. R. 8 Ch. D. 606; *Robertson v. Berry*, 50 Md. 591; *Estes v. Leslie*, 27 Fed. Rep. 23. But after publication without copyright the author cannot restrain republication on the ground that he published under a *nom de plume*, which is entitled to protection like a trade mark. *Mark Twain Case*, 14 Fed. Rep. 728.

prejudice or supersede the original work; whether it will be adapted to the same class of readers; and many other considerations of the same sort which may enter as elements in ascertaining whether there has been a piracy or not. Although the doctrine is often laid down in the books that an abridgment is not a piracy of the original copyright, yet this proposition must be received with many qualifications. In many cases the question may naturally turn upon the point, not so much of the quantity as of the value of the selected materials."¹ But a new plan, *arrangement and illustration of old materials [*356] may not only be no piracy, but may entitle the author thereof to a copyright, as in the case of scientific works.² So may the translation of an original work.³

An author's rights in his publications may be injured in other ways than by pirating them. Thus, he may be libelled in respect to them, or the books themselves may be libelled by false statements⁴ and suggestions regarding their purpose or tendency,

¹ Gray v. Russell, 1 Story, 11, 19, citing Bramwell v. Halcomb, 8 Myl. & Cr. 737; Saunders v. Smith, 8 Myl. & Cr. 711; Wheaton v. Peters, 8 Pet. 591. And, see Folsom v. Marsh, 2 Story, 100. An abridgment in which there is a substantial condensation of the original requiring intellectual labor and judgment is not an infringement. A mere selection or different arrangement of facts is not such abridgment, nor is a reprint of the text with notes by a new editor. Lawrence v. Dana, 4 Cliff. 1. One infringes a copyright who incorporates in a key material parts of a text book although the key may not be intended to supersede the book. Reed v. Holliday, 19 Fed. Rep. 325. Compiling from a telegraph cipher code a new one for private use is an infringement if most of the words are used, though with new meanings attached. Ager v. Penin. & Co., L. R. 26 Ch. D. 637.

² Emerson v. Davies, 8 Story, 768, citing Lewis v. Fullarton, 2 Beav. 6.

So as to dramatic works. Aronson v. Baker, 12 Atl. Rep. 177, (N. J.) A compiler of statutes may be entitled to copyright on account of his skill in combination and analysis, but not for the publication of the laws merely. Davidson v. Wheelock, 27 Fed. Rep. 61. Law reporters have no copyright in portions of reports prepared by judges. Chase v. Sanborn, 4 Cliff. 306; Banks v. Manchester, 23 Fed. Rep. 143. Cannot prevent advance publication of reports. Banks v. West Pub. Co., 27 Fed. Rep. 50.

³ Stowe v. Thomas, 2 Wall. Jr., 547. See Shook v. Rankin, 6 Biss. 477.

⁴ The plaintiff sold his copyright to defendant. The latter brought out a new edition, not edited by plaintiff, though purchasers would naturally suppose it was. The edition contained mistakes and errors. Such a publication, calculated to injure the reputation of the author, is actionable. Archibold v. Sweet, 5 C. & P. 219.

their originality or truthfulness, or by garbled extracts or perversions of language or meaning in criticism. To publish, for example, that a work purporting to be original was, in fact, a translation, or was largely made up of plagiarisms, would, if false, be libelous, because it would not only be likely to affect injuriously the sale of the book, but would injure the reputation of the author also. So would an insinuation based on unfair deductions or garbled extracts, that its purpose or tendency was to inculcate bad morals.¹ Fair criticism is allowable, but the author is entitled to substantial redress when malice inspires unjust and untruthful comments.²

Private Letters: Private letters often have a value for publication, and the question who, as between the writer and receiver, has the right to control their publication is sometimes the subject of litigation. For the purpose of an examination of the questions which may come up in such cases, letters may be classified as having value, pecuniarily or otherwise, as follows:

1. As literary productions.
2. As historical documents.
3. As evidence of facts important to individuals.
4. As a means of personal vindication to the writer or receiver.

[*357] *5. As a means of inflicting injury on the writer or receiver.

6. As autographs.

Under the head of letters valuable as literary productions should be classed all those letters which, from their intrinsic literary merits, it might be deemed desirable to publish under an expectation of profit. Such were the letters of Horace Walpole, of Lord Chesterfield to his son, and many others. As regards the right to make use of such letters, the rule of law appears to be well settled. The literary property in them and the right to determine their publication is in the writer, not the receiver. This is so unless they are transmitted to the party addressed under circumstances from which may fairly be implied an understanding that he is to be at liberty to make use of them for pub-

¹ See *Reade v. Sweetzer*, 6 Abb. Pr. Cooper v. Stone, 24 Wend. 434; S. C. (N. S.) 9, note. in error, 2 Denio, 293; *Macleod v.*

² *Cooper v. Greely*, 1 Denio, 347; *Wakley*, 3 C. & P. 311.

lication: in other words, that they are given to him for that purpose.¹

But though the property is in the writer, it is not clear how, under all circumstances, he is to avail himself of it. The decision in *Pope v. Curl* was that he might enjoin the publication by the receiver, but it was not said that he might recall the letters from the receiver for the purpose of publishing himself. Nor could such a doctrine be sanctioned. When one writes and sends a letter, he at least parts with the property in the paper on which the letter is written, and there is no implied reservation of a liberty to recall it. If the writer has retained copies, he has the means of making his literary property available; but if not, he would be powerless to obtain them by any legal process.

Where letters have a value as historical documents, they are likely also to possess what must be considered a literary value; that is, a value for publication with a view to profit. As such, they of course come under the preceding head. But it is not believed the literary property of the writer in them would prevent the receiver making use of them as historical evidence, or allowing others to make use of them for that purpose.

Where letters are of value only as they give evidence of private transactions which may become the subject of a legal controversy, the writer cannot be regarded as having in them any property whatever. He may compel their production as evidence in court whenever they will assist him in his suits, but so may *any other person upon whose business transac- [*358] tions they may throw light. The property in such letters so far as there is any, must be in the receiver; the writer having only a contingent interest in them for the purposes of his litigation, but not a right that would prevent any disposition the receiver might see fit to make of them.

If the value of the letter consists in the means it may afford for the vindication of the writer against any unfounded charge, he is also without the power to make it available, except as the preservation of a copy may aid him. But the receiver may make use of them for his own vindication, subject, however, to the ordinary responsibility for libel in case he shall publish what shall prove untrue and defamatory respecting others.

As is intimated above, the method of protecting literary prop-

¹ *Pope v. Curl*, 2 Atk. 312.

erty in letters is usually by enjoining their publication by the receiver. This, it is true, is an imperfect remedy; it prevents others from making profit from their publication, but it does not enable the writer himself to obtain possession of them. It has been decided in New York that chancery will not enjoin the publication of private letters unless they possess a literary value.¹ It was also held that if the contents of the letter were such that it could not be supposed the writer would consent to its publication, the conclusion must be that the letter has no value as a literary production.² But this seems a remarkable *non sequitur*, especially as in the very case in which the decision was made the defendant had published the plaintiff's letters, surreptitiously obtained, expecting to derive a profit therefrom.³ Mr. [*359] Justice *STORY has strongly contended for the jurisdiction of equity to restrain the publication of private letters on the ground of violation of confidence and injury to the feelings;⁴ and this seems much the more sensible doctrine, and it receives countenance from cases cited in the margin.⁵

¹ *Wetmore v. Scovel*, 3 Edw. Ch. 515; *Hoyt v. Mackenzie*, 3 Barb. Ch. 320.

² *Hoyt v. Mackenzie*, 3 Barb. Ch. 320.

³ The diary of PEPYS, so interesting and of such historical value, was carefully written down in a cipher supposed to be unintelligible to others, in order that the presentation of weaknesses and foibles there made might be concealed from the world; but its value is increased by the very circumstances that then induced the secrecy.

The doctrine of Chancellor WALWORTH, in *Hoyt v. Mackenzie*, involves the following conclusions as regards letters surreptitiously obtained, and which the purloiner proposes to publish:

1. The writer cannot restrain their publication where, from an inspection of their contents, it satisfactorily appears that the writer himself would not voluntarily have published them.

2. The receiver cannot restrain it, because his property is only in the paper on which the letters are written, and publication of copies will not affect that.

3. Third persons who might be injured cannot restrain it, because the only interest they can have is to be protected against defamation, and it is settled that courts will not enjoin the publication of defamatory matter, but will leave that to be dealt with after it is published. See *Gee v. Pritchard*, 2 Swanst. 402; *Brandreth v. Lance*, 8 Paige, 24. Therefore nobody can restrain the lawless action of one who purloins the private letters of others and proposes to publish them.

For a case in which the publication of libelous matter was enjoined, see *Dixon v. Holden*, L. R. 7 Eq. 488.

⁴ 2 Story, Eq. Juris. §§ 946-948.

⁵ *Woolsey v. Judd*, 4 Duer, 379; *Eyre v. Higbee*, 35 Barb. 502; *Grigsby v. Breckinridge*, 2 Bush, 480.

Where a letter is valuable only as a curiosity or as an autograph, the property must be in the receiver. But we should say the receiver was under no obligation to treat such letters as a part of his general estate. They are to be made use of as property only at his option; they cannot be taken from him on execution, or demanded from him by an assignee in bankruptcy.¹ Nobody can be compelled to make market wares of his private letters merely because they would sell in market. At his death they would be family papers which his administrator could not of right demand.² But it should be different with autographs which have been bought for a collection. If one has put his money in them, and no matter of personal confidence as between himself and the writer is involved, they ought to be regarded, as any other collection of curiosities might be, as constituting a part of the owner's general estate, and as being subject to all the incidents of personal property in general.

Wrongs in respect to Trade Marks. Persons engaged in a reputable business, and who purpose to build up a good will therein which shall be valuable, usually carry on their business under some particular name or designation that soon becomes *known, and constitutes an assurance to the pub- [*360] lic that those making use of the name or designation in that business continue to carry it on in the customary way. So a manufacturer adopts a device or label for his wares, intending thereby to distinguish them from all others, and the public who have been accustomed to deal with him purchase the article with this device or label, understanding that in doing so they are purchasing the same article to which the device or label has before been affixed. So a newspaper or magazine has its title, and a coach may be painted and named for a particular route, upon which the public will understand it is to run, and will not after a time need to have the fact otherwise advertised.

Whatever name, designation, label, or device has thus in any

¹ See *Thompson v. Stanhope*, Amb. 737; *Gee v. Pritchard*, 2 Swanst. 402; *Earl of Grannard v. Dunkin*, 1 Ball & B. 207.

² See the case of *Tobias Lear's Letters*, *Eyre v. Higbee*, 35 Barb. 502. It is held in this case that the adminis-

trator has no right to take possession of and sell the private letters of his intestate. Also, that as between the heir and the widow, long possession of the letters by the latter after the husband's death will justify a presumption that they were given to her.

manner been appropriated by a person or association of persons engaged in any lawful business becomes a trade mark, in the use of which he or they are entitled to be protected. The right to protection springs from two circumstances: *First*. That by adopting and making use of the trade mark a property right has been acquired therein which is valuable; and, *Second*. That 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 or proprietors 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.¹ Therefore the law will protect the proprietor of a trade mark, not only by enjoining the use of it by another, but by giving damages for the violation of the right to its exclusive use.²

¹ *Davis v. Kendall*, 2 R. L. 556; *Walton v. Crowley*, 8 Blatch. 440; *McCartney v. Garnhart*, 45 Mo. 593; *Filley v. Fassett*, 44 Mo. 168; *Amoskeag Manuf. Co. v. Spear*, 2 Sandf. 599; *Apollinaris Co., v. Scherer*, 27 Fed. Rep. 18.

² High on Injunctions, 673; *Hirst v. Denham*, L. R. 14 Eq. Cas. 542; *S. C. 3 Moak*, 833; *Coffeen v. Brunton*, 4 McLean, 516; *Congress, &c., Spring Co. v. Highrock, &c., Spring Co.*, 45 N. Y. 291; *S. C. 6 Am. Rep.* 82; *Stonebreaker v. Stonebreaker*, 33 Md. 252; *Perry v. Truefitt*, 6 Beav. 66. The general principles governing the protection of trade marks cannot be better stated than in the language of an English decision: "The principle upon which relief is given in these cases is that one man cannot offer his goods for sale, representing them to be the manufacture of a rival trader. Supposing the rival to have obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price which the public are

willing to give for them, rather than for goods of other manufacturers whose reputation is not so high. Where, therefore, a manufacturer has been in the habit of stamping the goods which he has manufactured with a particular mark or brand, so that thereby persons purchasing goods of that description know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp. By so doing he would be substantially representing the goods to be the manufacture of the manufacturer who had previously adopted the stamp or mark in question, and so would or might be depriving him of the profit he might have made by the sale of the goods which, *ex hypothesi*, the purchaser intended to buy.

"The law considers this to be wrong towards the person whose mark is thus assumed, for which wrong he has a right of action, or, which is the more effectual remedy, a right to restrain by injunction the wrongful use of the mark thus pirated.

"It is obvious that, in these cases, questions of considerable nicety may

***What may be a Trade Mark.** In general, a man may [*361] adopt for a trade mark whatever he chooses ; but when he asserts and seeks to enforce exclusive right therein, it becomes necessary to ascertain whether it is just to others that this be permitted. If the name, device, or designation is purely arbitrary or fanciful *and has been first brought into use [*362] by him, his right to the exclusive use of it is unquestionable.' But the mere designation of a quality, as "nourishing,"

arise as to whether the mark adopted by one trader is or is not the same as that previously used by another trader complaining of its illegal use, and it is hardly necessary to say that, in order to entitle a party to relief, it is by no means necessary that there should be absolute identity.

"What degree of resemblance is necessary from the nature of things, is a matter incapable of definition *à priori*. All that courts of justice can do is to say that no trader can adopt a trade mark so resembling that of a rival as that ordinary purchasers, purchasing with ordinary caution, are likely to be misled.

"It would be a mistake, however, to suppose that the resemblance must be such as would deceive persons who should see the two marks placed side by side. The rule so restricted would be of no practical use." *Seixo v. Provezende*, L. R. 1 Ch. App. 191, 195. See, also, *McLean v. Fleming*, 96 U. S. 245.

For further cases, reference is made to *Wolfe v. Barnett*, 24 La. Ann. 97; S. C. 13 Am. Rep. 111; *Gillott v. Esterbrook*, 48 N. Y. 374; S. C. 8 Am. Rep. 553; *Meriden Britannia Co. v. Parker*, 39 Conn. 450; S. C. 12 Am. Rep. 401; *Boardman v. Meriden, &c., Co.*, 36 Conn. 207; *Morrison v. Case*, 9 Blatchf. 548; *Stonebraker v. Stonebraker*, 33 Md. 252; *New Haven, &c., Co. v. Farren*, 51 Conn. 324.

To constitute piracy of a trade mark, the resemblance need not be

exact: it is sufficient if a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief. *Seixo v. Provezende*, L. R. 1 Ch. App. 191, 196; *Burke v. Cassin*, 45 Cal. 467; S. C. 13 Am. Rep. 204.

In the United States trade marks may be patented, and to take out letters patent may be a convenient way of avoiding difficulties. For the law, and decisions under the same, see *Bump. on Patents, etc.*, 343.

Congress has no general power over trade marks as it has over patents. Its power is limited to marks as used in foreign or inter-state commerce or that with Indian tribes. *Trade Mark Cases*, 100 U. S. 82; *Schumacher v. Schwenke*, 26 Fed. Rep. 818.

¹ As the "*New Era*" newspaper; *Bell v. Locke*, 8 Paige, 75. See, also, *Hogg v. Kirby*, 8 Ves. 215; *Maxwell v. Hogg*, L. R. 2 Ch. App. 307; "Dr. Johnson's Yellow Ointment," *Singleton v. Bolton*, 3 Doug. 293; The "Vegetable Pain Killer," *Davis v. Kendall*, 2 R. I. 566; "Congress Spring," *Congress, &c., Spring Co. v. High Rock, &c., Spring Co.*, 45 N. Y. 291; "Eureka Shirt," *Ford v. Foster*, L. R. 7 Ch. App. 611; "What Cheer House," *Woodward v. Lazar*, 21 Cal. 448; "Revere House," as the designation of a coach to run to that house; *Marsh v. Billings*, 7 Cush. 322; "Roger Williams Long Cloth,"

applied to an article of drink, cannot be appropriated as a trade mark;¹ neither can any general description, by words in common use, of a kind of article, or of its nature by qualities.² Nor, as a general thing, can a man 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;³ though if the latter

Barrows v. Knight, 6 R. I. 434, "Sliced Animals," as applied to toys; *Selchow v. Baker*, 93 N. Y. 59, "Alpine," as applied to textile fabrics; *In re Trade Mark "Alpine,"* L. R. 27 Ch. D. 879, "Pride," to cigars; *Hier v. Abrahams*, 82 N. Y. 519, "Anti-Washboard," to soap; *O'Rourke v. Centr. City Soap Co.*, 26 Fed. Rep. 576; Number "523" in connection with other devices to show origin of goods; *Lawrence, & Co., v. Lowell & Co., Mills*, 129 Mass. 325; Appropriation of "Samaritan" in one combination of words applicable to a medicine does not prevent its use in all other combinations; *Desmond's App.* 103 Penn. St. 126. "The mere idea represented by some figures on an article sold for polishing purposes, that it will make things bright enough to be used as mirrors, cannot be appropriated as a trade mark," said of a face reflected in a pan on a package of sapolio. *Enoch Morgans, & Co., v. Troxell*, 89 N. Y. 292. And, see *Taylor v. Carpenter*, 3 Story, 458; *S. C. 2 Wood & M. 1*; *Burnett v. Phalon*, 3 Keyes, 594; *McAndrews v. Bassett*, 10 Jurist, (N. S.) 550; *S. C. 12 W. R. 777*.

¹ *Raggett v. Findlater*, L. R. 17 Eq. Cas. 29; *S. C. 7 Moak*, 653. See *Taylor v. Gillies*, 59 N. Y. 331; *S. C. 17 Am. Rep. 333*; *Stokes v. Landgraff*, 17 Barb. 608; *Caswell v. Davis*, 58 N. Y. 223; *S. C. 17 Am. Rep. 233*; *Candee v. Deere*, 54 Ill. 439; *S. C. 5 Am. Rep. 125*; *Burke v. Cassin*, 45 Cal. 467; *S. C. 13 Am. Rep. 204*. Nor may the designation "A. C. A." to

denote quality, be appropriated; *Mfg. Co. v. Trainer*, 101 U. S. 51, nor "Royal;" *Royal, & Co. v. Sherrell*, 93 N. Y. 331, nor "National Sperm," *In re Price* L. R. 27 Ch. D. 681; nor "Health Preserving;" *Ball v. Siegel*, 116 Ill. 137. See *Larrabee v. Lewis*, 67 Geo. 561; *Carbolic Soap Co. v. Thompson*, 25 Fed. Rep. 625.

² *Gilman v. Hunnewell*, 122 Mass. 139; *Wolfe v. Goulard*, 18 How. Pr. 64; *Amoskeag Manuf. Co. v. Spear 2 Sandf.* Ch. 599; *Dunbar v. Glenn*, 42 Wis. 118; *Choynski v. Cohen*, 39 Cal. 501; *S. C. 2 Am. Rep. 476*; *Burke v. Cassin*, 45 Cal. 467; *S. C. 13 Am. Rep. 204*; *Taylor v. Gillies*, 59 N. Y. 331; *Caswell v. Davis*, 58 N. Y. 223; *S. C. 17 Am. Rep. 233*. So of "Worcestershire," as applied to sauce; *Lea v. Dakin*, 11 Biss. 23; see *Connell v. Reed*, 123 Mass. 477. So of the word "tin;" *Lorillard v. Pride*, 28 Fed. Rep. 434. There can be no trade mark in the color of a label; *Fleischmann v. Starkey*, 25 Fed. Rep. 127, nor in the method of wrapping goods; *Davis v. Davis*, 27 Fed. Rep. 490, nor in the form of a package; *Enoch Morgan's, & Co. v. Troxell*, 89 N. Y. 292.

³ *Rogers v. Taintor*, 97 Mass. 291; *Emerson v. Badger*, 101 Mass. 82; *Gilman v. Hunnewell*, 122 Mass. 139; *Clark v. Clark*, 25 Barb. 79; *Faber v. Faber*, 49 Barb. 357; *Meneely v. Meneely*, 62 N. Y. 427; *S. C. 20 Am. Rep. 489*; *Rogers v. Rogers*, 53 Conn. 121, but see, *Rogers, & Co., v. Rogers Mfg. Co.*, 11 Fed. Rep. 495. But he will be protected in his exclu-

resort to any such artifice or device, in connection with a use of the name, as shall be calculated to mislead the public, they may be restrained from such use; for it cannot be tolerated that one shall take advantage of the accidental circumstance of an identity of names to withdraw trade from a rival by practicing a deception upon the public.¹ Nor can the name of a place be appropriated as a trade mark as against others who may see fit to engage in the same *business at the same place,* though [*363] it may be as against one who, at a different place, under-

sive use of it as against another of a different name. *Millington v. Fox*, 3 Myl. & Cr. 338; *Burke v. Cassin*, 45 Cal. 467; S. C. 13 Am. Rep. 204. A name alone is not a trade mark when it is understood to signify not the particular manufacture of a proprietor but the kind of thing manufactured. *Hastetter v. Fries*, 17 Fed. Rep. 620.

¹ *Croft v. Day*, 7 Beav. 84; *Rodgers v. Nowill*, 5 M. G. & S. 109; *Burgess v. Burgess*, 3 De G. M. & G. 896; *Calladay v. Baird*, 4 Phil. 141; *Sykes v. Sykes*, 3 B. & C. 541; *Meriden Britannia Co. v. Parker*, 39 Conn. 450; S. C. 12 Am. Rep. 401; *Holmes v. Holmes, &c., Co.*, 37 Conn. 278; S. C. 9 Am. Rep. 324. As where the plaintiff was proprietor of "Holloway's Pills," and the defendant commenced selling pills as "H. Holloway's Pills," but put up in boxes and pots, and with labels similar to the plaintiff's. Lord LANGDALE: "I think this as plain and as clearly avowed a fraud as I ever knew. I do not mean to say that I have any sort of respect for this sort of medicines; I have none. But the law protects persons from fraudulent misrepresentations, and this is a species of property which the law does allow, and so long as the law recognizes it, it must be protected, and persons in the situation of the defendant will not be allowed to practice a fraud like that here complained of." *Holloway v. Holloway*,

13 Beav. 209, 213. Compare *Seixo v. Provezende*, L. R. 1 Ch. App. 191. In all such cases the vital question is, whether that which is done by the defendant is calculated to deceive and defraud. *Leather Cloth Co. v. Am. Leather Cloth Co.*, 11 H. L. Cas. 523; *Singer Manuf. Co. v. Wilson*, 2 Ch. Div. 434; S. C. 16 Moak, 827; *James v. James*, L. R. 13 Eq. 421; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416; *Candee v. Deere*, 54 Ill. 439; S. C. 5 Am. Rep. 125; *Gilman v. Hunnewell*, 122 Mass. 139; *Delaware, &c., Canal Co. v. Clark*, 13 Wall. 311; *Williams v. Brooks*, 50 Conn. 278; *Landreth v. Landreth*, 22 Fed. Rep. 41; *Shaver v. Shaver*, 54 Ia. 208; *Marshall v. Pinkham*, 52 Wis. 572; *Drummond Tob. Co. v. Randle*, 114 Ill. 412; *Massam v. Thorley's, &c., Co.*, L. R. 14 Ch. D. 748. A corporation will be protected in its name as a trade mark. *Newby v. Oregon, &c., R. R. Co.*, 1 Deady, 609. A corporation may acquire a property right to the use of another than its corporate name as a trade mark. *Goodyear Rubber Co. v. Goodyear's, &c., Co.*, 21 Fed. Rep. 276.

² *Glendon Iron Co. v. Uhler*, 75 Penn. St. 467; S. C. 15 Am. Rep. 599; *Candee v. Deere*, 54 Ill. 439; S. C. 5 Am. Rep. 125; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416; *Dunbar v. Glenn*, 42 Wis. 118; *Canal Co. v. Clark*, 13 Wall. 311.

takes to appropriate it; as where parties at Syracuse proposed to sell cement under the designation of "Akron," which was the name under which the cement produced at Akron had been previously sold.¹

The trade mark may be applied to a natural product as well as to a manufacture, as in the case of the celebrated "Congress" water,² the "Bethesda" water,³ etc. The right to it may be sold with the business, but not without.⁴ And it may be [*364] lost by being *suffered, without objection, to come into common use in the trade.⁵ An official inspector, who brands the packages packed by him in his business with his official brand, cannot thereby acquire a private right in the brand as a trade mark.⁶

¹ Newman v. Alvord, 49 Barb. 588; S. C. on Appeal, 51 N. Y. 189; S. C. 10 Am. Rep. 588. See Glen, &c., Manuf. Co. v. Hall, 61 N. Y. 226; S. C. 19 Am. Rep. 278. A St. Louis dentist may acquire right to use words "New York" in phrase "New York Dental Rooms," Sanders v. Utt, 16 Mo. App. 322; and use of "Newark Dental Rooms" may be restrained. Sanders v. Jacob, 20 Mo. App. 96. But where the name is made use of, even by a resident, in a way calculated to mislead, the deceptive use may be enjoined. Lee v. Haley, L. R. 5 Ch. App. 155; Radde v. Norman, L. R. 14 Eq. Cas. 348; S. C. 3 Moak, 776; Wotherspoon v. Currie, L. R. 5 H. L. 508; McAndrew v. Bassett, 4 De G. J. & S. 380. See the subject examined in Del. & Hud. Canal Co. v. Clark, 13 Wall. 311.

² Congress, &c., Spring Co. v. High Rock, &c., Spring Co., 45 N. Y. 291; S. C. 6 Am. Rep. 82. And, see Lee v. Haley, L. R. 5 Ch. App. 155.

³ Dunbar v. Glenn, 42 Wis. 118. The subject of trade marks is carefully and fully considered in this case, as it is also in McLean v. Fleming, 96 U. S. 245.

⁴ Banks v. Gibson, 34 Beav. 566; Leather Cloth Co. v. Am. Leather Cloth Co., 11 H. L. 523.

⁵ Ford v. Foster, L. R. 7 Ch. App. 611; S. C. 3 Moak, 538; Caswell v. Davis, 58 N. Y. 223; S. C. 17 Am. Rep. 238. There must be evidence of intent to abandon to warrant user on ground of loss of right by non-user. Mouson v. Boehm, L. R. 26 Ch. D. 298. See *In re* Heaton, L. R. 27 Ch. D. 570; *In re* Anderson, L. R. 26 Ch. D. 409. A mere trespasser upon the original appropriation cannot enjoin the subsequent use by a third person. O'Rourke v. Centr. City, &c. Co., 26 Fed. Rep. 576. After the expiration of a patent the patentee has no trademark in the name of the patented article. Singer Mfg. Co. v. Larsen 8 Biss. 151; Linoleum, &c., Co. v. Nairn, L. R. 7 Ch. D. 834; Bull v. Singer Mfg. Co., 41 Ohio St. 127; Wilcox &c., Co. v. Gibbens Frame, 17 Fed. Rep. 623. But see Singer, &c., Co. v. Loog, L. R. 8 App. Cas. 15; Singer, &c. Co. v. Wilson L. R. 3 App. Cas. 376.

⁶ Chase v. Mayo, 121 Mass. 343. For further cases of more or less interest, reference is made to Filley v. Fassett, 44 Mo. 169; Marsh v. Billings, 7 Cush. 322; Gorham v. Plate, 40 Cal. 593; S. C. 6 Am. Rep. 639.

What is an Infringement. In order to constitute an infringement it is not necessary that the imitation should be exact. It is sufficient that there is such a substantial similarity that the public would be likely to be deceived.¹ Thus a change from "Hostetter's Celebrated Stomach Bitters" to "Holsteter's Celebrated Stomach Bitters" is manifestly merely colorable;² and changes much more considerable might, nevertheless, leave the similarity sufficient to mislead. It has been said that when ordinary attention on the part of customers will enable them to discriminate between the trade marks of different parties the court will not interfere;³ but where the evident purpose is to mislead, this is a rule that courts would not be likely to apply with much liberality in favor of a party attempting an unfair advantage.⁴

Aliens resident in the country will be given protection in their trade marks, as well as citizens;⁵ but a trade mark that in itself is fraudulent and deceptive cannot be the subject of property, and will not be protected. Thus, where the trade mark in Spanish, of cigars made in New York, contained the representation that they were made in Havana, a bill to restrain the use of an imitation was dismissed. "The maxim which is generally expressed, 'He who comes into equity must come with clean hands,' but sometimes in stronger language, 'He that hath committed iniquity *shall not have equity,' has been often applied [*365]

¹ Bradley v. Norton, 83 Conn. 157; Coffeen v. Brunton, 4 McLean, 516; Taylor v. Carpenter, 2 Sandf. Ch. 603; Partridge v. Menck, 2 Sandf. Ch. 622; Popham v. Cole, 66 N. Y. 69; S. C. 23 Am. Rep. 22. Royal, &c., Co. v. Davis, 26 Fed. Rep. 293, Anheuser, &c., Co. v. Clarke, 26 Fed. Rep. 410; Southern, &c., Co., v. Cary, 25 Fed. Rep. 123; see Siegert v. Findlater, L. R. 7 Ch. D. 801; Alexander v. Morse, 14 R. L. 153. If goods have acquired a name from a part of a trademark, another may not attach to his goods a device likely to lead to giving the same name to his goods, even though the name is not the only one by which the first goods have been

known. Orr Ewing v. Johnston, L. R. 18 Ch. D. 434, and though no one has actually been misled. Johnston v. Orr Ewing, L. R. 7 App. Cas. 219.

² Hostetter v. Vowinkle, 1 Dill. 329.

³ Popham v. Cole, 66 N. Y. 69; S. C. 23 Am. Rep. 22. Ball v. Siegel, 116 Ill. 137.

⁴ Boardman v. Meriden, &c., Co., 85 Conn. 402; Caswell v. Davis, 58 N. Y. 223; S. C. 17 Am. Rep. 233; Gorham Co. v. White, 14 Wall. 511, 528.

⁵ State v. Gibbs, 56 Mo. 133; Taylor v. Carpenter, 3 Story, 458. La Croix v. May, 15 Fed. Rep. 236. See La Croix v. Escobal, 37 La. Ann. 533.

to bills to restrain by injunction the counterfeiting of trade marks. The ground on which the jurisdiction of equity in such cases is rested is the promotion of honesty and fair dealing, because no one has a right to sell his own goods as the goods of another.¹ 'It is perfectly manifest,' said Lord LANGDALE, 'that to do this is a fraud, and a very gross fraud.' It is plain that there is no class of cases in which the maxim referred to can be more properly applied. The party who attempts to deceive the public by the use of a trade mark which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market, is guilty of the same fraud of which he complains in the defendant. He certainly can have no claim to the extraordinary interposition of a tribunal constituted to administer equity, for the purpose of securing to him the profits arising from his fraudulent act."²

Good Will of a Business. What has been said about the infringement of rights in 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. The good will of a business is often very valuable property,³ and the use of

¹ Citing *Croft v. Day*, 7 Beav. 84.

² SHARWOOD, J., in *Palmer v. Harris*, 60 Penn. St. 156, 160, citing *Pidding v. How*, 8 Sim. 477; *Flavel v. Harrison*, 1 Hare, 467; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas. 523; *Manhattan Med. Co. v. Wood*, 108 U. S. 218; *Siegert v. Abbott*, 61 Md. 276; *Connell v. Reed*, 128 Mass. 477; *Buckland v. Rice*, 46 Ohio St. 526; *Seabury v. Grosvenor*, 14 Blatchf. 262; *New York, &c., Co. v. Union, &c., Co.*, 39 Hun, 611. But see, *Funke v. Dreyfus*, 34 La. Ann. 80; *Ins. &c., Co., v. Scott*, 33 La. Ann. 946; *Laird v. Wilder*, 9 Bush, 131; S. C. 15 Am. Rep. 707. See, also, as to deceptive trade marks, *Perry v. Truefitt*, 6 Beav. 66.

³ Questions concerning property in the good will of a business were considered in the following cases: Brad-

ford v. Peckham, 9 R. I. 250; *Crues v. Fessler*, 39 Cal. 336; *Senter v. Davis*, 38 Cal. 451; *Musselman v. Clarkson*, 62 Penn. St. 81; *Elliott's Appeal*, 60 Penn. St. 161; *Rupp v. Over*, 3 Brewster, 138; *Succession of Journe*, 21 La. Ann. 391; *Spier v. Lambdin*, 45 Geo. 319. As to use of similar trade name, see *Boulnois v. Peake*, L. R. 13 Ch. D. 513, note, where "New Carriage Bazaar" as a sign was restrained at suit of one who for years had near by used a sign "Carriage Bazaar." *Civil Service, &c., Ass. v. Dean*, Id. 215; *Myers v. Kal. Buggy Co.*, 54 Mich. 215; *Braham v. Beachim*, L. R. 7 Ch. D. 848. So selling goods under the false, fraudulent representation, by means of deceptive imitations of label and packing, that they are those of another to the latter's damage, is an actionable injury to the latter

a trade mark is only one method of building it up. Other deceptions besides the piracy of a trade mark may be equally effectual in destroying its value in some cases; and here, as in other cases of fraud, it is not the means the law regards so much as the end which the deception is intended to accomplish. To steal or to injure the good will of a business by any species of deception is a wrong which will be redressed by remedies appropriate to the circumstances.

***Rights of Common.** A right of common consists in [*366] 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. Belonging to the lord of the manor were, perhaps, pasture lands, on which, from time immemorial, the inhabitants had been accustomed to pasture their beasts in common, or wood lands, from which they had in common taken wood for domestic purposes, or turf beds, from which they had taken fuel, or there were waters, from which in common they had taken fish; and the immemorial custom to enjoy this privilege had fixed their right, not only as against each other, but as against the lord of the manor also. To exclude one of them, or disturb him in the equal enjoyment of the right, was an actionable wrong, and an excessive appropriation was a wrong to all, and might be enjoined as such. Of late the policy of English legislation has been in the direction of diminishing the number and extent of these rights; but we have no occasion to examine it here.

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 were indeed granted in common to those who planted a new town, and some of these lands, under a town proprietorship, were for a considerable period made use of in common by the inhabitants. Perhaps, also, such rights of property as existed within the limits of a town were properly to be regarded as rights of common participation in that of which the body of the inhabitants constituting the town

apart from question of a trade mark in the name used in the label. *Miller &c., Mfrs. v. Commerce*, 45 N. J. L.

18, and may be enjoined. *Avery v. Meikle*, 81 Ky. 73. See *Trask Fish Co. v. Wooster*, 28 Mo. App. 408.

were proprietors. So the taking of shell-fish along the shores of tidewater, between high and low water mark, was and is of common right to the people, except where by colonial ordinance, the riparian proprietorship was extended to low water mark.¹ The same may be said of the taking of sea weed thrown up by the sea and deposited between high and low water mark,² with the same exception, that where the shore proprietorship [*367] is *extended to low water mark, an entry by any other than the proprietor for the purpose of gathering it would be a trespass.³

It is important, however, to distinguish between what are properly rights in common and the right to participate with the general public in the enjoyment of those rights which pertain to the sovereignty. The latter are not rights of common, and the idea of ownership has no place when they are in question; their enjoyment is only a part of the civil rights of the people. Of these are the right to make use of the public highways, commons, parks and boulevards, the right to take fish in public waters, the right to visit and have the customary benefit of public offices, records, etc. These emanate from the sovereignty, and their equal enjoyment by all will be protected by it.⁴ No doubt where they are susceptible of being made available for profit, as in these case of fisheries, exclusive rights may be granted in them by the State, if that shall seem the best method of making them available for the common benefit; but that 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; as if one were to have his fishing nets torn up

¹ Even then they may be taken if no trespass is committed in going upon the flats. *Weston v. Sampson*, 8 Cush. 347. See *Packard v. Ryder*, 144 Mass. 440 and cases cited.

² *Emans v. Turnbull*, 2 Johns. 813; *Mather v. Chapman*, 40 Conn. 882; S. C. 16 Am. Rep. 46; *Peck v. Lockwood*, 5 Day, 22. But not where it is cast above the high water mark. *Church v. Meeker*, 34 Conn. 421. See *Barker v. Bates*, 13 Pick. 255; *Anthony v. Gifford*, 2 Allen 549.

³ *Phillips v. Rhodes*, 7 Met. 322; *Hill v. Lord*, 48 Me. 83; *Nudd v. Hobbs*, 17 N. H. 527. See *Blundell v. Catterall*, 5 B. & Ald. 268; *Kenyon v. Nichols*, 1 R. I. 106; *Hall v. Lawrence*, 2 R. I. 218; *Parker v. Cutler Mill Dam Co.*, 20 Me. 353; *Weston v. Sampson*, 8 Cush. 347; *Packard v. Ryder*, 144 Mass. 440, as to rights between high and low water mark.

⁴ *Crandall v. Nevada*, 6 Wall. 85.

through another's malice or carelessness.¹ But it would be difficult to plant an action against another for a merely excessive appropriation of that which was common to the use of all; as, for example, if one, by his enterprise and energy, should appropriate the chief benefits of a fishery, without at the same time interfering with the operations of others.² In the absence of legislation limiting his operations, the limit would only be found where they obstructed others.

One's right to the use of highways might be invaded by excluding him from it, or rendering access to it difficult, as where a railroad company constructs a high embankment, or makes a deep excavation in the highway in front of one's premises;³

¹ See ante, p. 391.

² See *Goodman v. Mayor &c.*, Saltash, L. R. 7 App. Cas. 646.

³ *Haynes v. Thomas*, 7 Ind. 88; *Protzman v. Indianapolis, &c.*, R. R. Co., 9 Ind. 467; *New Albany, &c.*, R. R. Co., *v.* O'Dailey, 13 Ind. 353; *Crawford v. Delaware*, 7 Ohio, (N. S.) 459; *Street Railway v. Cumminsville*, 14 Ohio, (N. S.) 523. In Illinois it is held that where a city grants permission to a railroad company to occupy one of its streets, and the privilege is so exercised as to interfere with the convenient access of a lot owner to his lot, the city is liable to him for this injury. Some reliance is placed on the peculiar wording of the constitutional provision that "private property should not be taken or damaged for public use without just compensation." *Pekin v. Brereton*, 67 Ill. 477, 480; *Stack v. East St. Louis*, 85 Ill. 377. In *Haynes v. Thomas*, 7 Ind. 88, 43, it is said: "The right to use a street in a town adjoining a lot abutting on it, is as much property as the lot itself, and the legislature has as little power to take away one as the other. Whether the act of dedication transfers the fee from the donor to the public is not a material inquiry."

So in *Elizabethtown, &c.*, R. R. Co. *v.* Combs, 10 Bush, 382, S. C. 19 Am. Rep. 67, it is said: "It is * * well settled, both here and elsewhere, that the owners of lots 'have a peculiar interest in the adjacent street, which neither the local nor general public can pretend to claim—a private right, in the nature of an incorporeal hereditament, legally attached to their contiguous ground—an incidental title to certain facilities and franchises assured to them by contract and by law,' and which are as inviolable as the property in the lots themselves." Citing *Lexington, &c.*, R. R. Co. *v.* Applegate, 8 Dana, 294; *Haynes v. Thomas*, 7 Ind. 88; *Rowan v. Portland*, 8 B. Mon. 232; *Le Clercq v. Gallipolis*, 7 Ohio, 217; *Cincinnati v. White*, 6 Pet. 431. See, further, *Tate v. Ohio, &c.*, R. R. Co., 7 Ind. 479; *Hutton v. Indiana Cent. R. R. Co.*, 7 Ind. 522; *Stetson v. Chicago, &c.*, R. R. Co., 75 Ill. 74; *Stone v. Fairbury, &c.*, R. R. Co., 68 Ill. 394; *Mix v. Lafayette, &c.*, R. R. Co., 67 Ill. 319. The access of light to an adjoining owner who does not own the fee of the street may not be cut off by an elevated railroad without compensation. *Story v. New York &c., Co.*, 90 N. Y. 122.

[*368] or *where it occupies a street with its cars unreasonably, or annoys adjoining proprietors by unnecessarily sounding its whistles or bells. But these cases will more properly be referred to when nuisances are under consideration.

In order that there may be equal enjoyment of the public highway, it is usual to provide by law that when two persons meet they shall turn to the right of the middle of the main traveled path; and in the absence of any statute, perhaps this requirement may be considered a part of the common law of the land. If one is injured by reason of the failure of another to observe this rule, he has his action for the recovery of the damages suffered, provided he was himself free from fault. But one who finds that another whom he is about to meet is not turning out as he should, must endeavor to avoid collision, and if he takes no pains to do so and a collision occurs, he may lose his remedy through his contributory negligence.¹

[*369] ***Injuries to Rights in Easements.** Easements owe their increase, variety, and importance to modern civilization: they have become so numerous that it is difficult even to classify them. A few of the more important will be named.

Where adjoining or neighboring lands might be affected in value by the use that may be made of a particular lot, or by the manner in which it is built upon, contracts are sometimes entered into which control the building or the use. Such contracts establish rights in the nature of easements, which may be enforced in equity at the instance of the owners of the lands for the benefit of which they are established, and which, in respect to them, may be called the dominant tenements.² So the proprietor

¹ Baker v. Portland, 58 Me. 199; S. C. 4 Am. Rep. 274; Daniels v. Clegg, 28 Mich. 32. The middle of the road means the middle of the wrought part of the road. Clark v. Commonwealth, 4 Pick. 125; Daniels v. Clegg, *supra*. Compare Commonwealth v. Allen, 11 Met. 403, and see cases, p. 182 n. 1, *supra*.

² Hills v. Miller, 3 Paige, 254; Gilbert v. Peteler, 28 Barb. 488; Trustees, &c., v. Cowen, 4 Paige, 510. If during the joint ownership of two

parcels a service is imposed on one of permanent character and the discontinuance of such service would obviously involve a substantial rearrangement of that part of the estate in whose favor the service was imposed in order to its use as comfortably as before, then the implication is that the use is to be continuous. So where house is partly on another lot from that covered by a mortgage, upon foreclosure the mortgagee has a perpetual easement in the other lot.

of a town plat may, in the deeds he gives, insert a provision respecting the use of the premises, or the character of the buildings that may be erected thereon, or the location of buildings; such as that a business regarded as offensive shall never be permitted on the premises,¹ or that the buildings shall be constructed a certain distance from the streets.² In contemplation of equity, all the purchasers from such a proprietor, and their privies, acquire rights in such stipulations, and may enforce them by injunction should their violation be attempted or threatened.³ There would be difficulty in maintaining actions at law in such cases—indeed the relief in equity is awarded in part because the law can afford none.⁴

A more common easement is that of right to pass or repass over the land of another. This may come into existence by grant, in which case it is necessary that the way 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 Or it may be established by prescription; and in such case the user itself must determine the loca- [*370] tion. An indefinite right of passage cannot be thus acquired.⁶ Or the way may come into existence as a way of necessity. This happens 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; or where he grants lands so

John Hancock, &c., Co. v. Patterson, 103 Ind. 582.

¹ Kemp v. Sober, 1 Sim. (n. s.) 517; Barrow v. Richard, 8 Paige, 351. If an owner sells by a plat showing a part of his land a park, he will be enjoined from selling the park for building sites. Lennig v. Ocean City Ass. 41 N. J. Eq. 606. So if one has bought a lot abutting on a public square, as platted by a former owner of the tract, and with the public has used the square as a highway, he may enjoy a railway from laying its track through the square without compensating him. Pratt v. Buffalo, &c., Co. 19 Hun. 80.

² Hubbell v. Warren, 8 Allen. 173. See Gillis v. Bailey, 21 N. H. 149;

Tulk v. Moxhay, 2 Phil. 774; Mann v. Stephens, 15 Sim. 377; Coles v. Sims, 5 DeG. M'N. & G. 1; Western v. McDermott, L. R. 1 Eq. 469; S. C. L. R. 2 Ch. App. 72; Whatman v. Gibson, 9 Sim. 196; Brewer v. Marshall, 19 N. J. Eq. 537; Greene v. Creighton, 7 R. I. 1; Tallmadge v. East River Bank, 26 N. Y. 105; Coleman v. Coleman, 19 Penn. St. 100.

³ Mann v. Stephens, 15 Sim. 377; High on Injunctions, § 547.

⁴ Brewer v. Marshall, 19 N. J. Eq. 539, 543.

⁵ Hart v. Connor, 25 Conn. 331.

⁶ Jones v. Percival, 5 Pick. 485. See Atwater v. Bodfish, 11 Gray, 150; Haag v. Delorme, 30 Wis. 591; Belknap v. Trimble, 3 Paige, 577.

surrounding a parcel retained by himself that the latter is practically inaccessible except over that he has granted. In the former case, by implication he grants a right of way over his own lands to that he has sold, and in the latter he reserves such a right.¹ In either case the owner of the tenement over which the way must extend may locate it, but he must exercise the right reasonably and with due regard to the other's convenience. If he refuses, on request, to locate the way, or locates it unfairly, the party entitled to the easement may locate it himself. In any case when a way is once located, it is fixed permanently and for all purposes, and neither party can change it except by mutual consent.²

Besides the right of way for the passage of persons, beasts, and vehicles, there may be a right of way for pipes to carry water, gas, steam, etc., or for drains, and for any purpose whatsoever, for which one might have occasion to make use of a passage across his neighbors land for the greater or more convenient enjoyment of his own. These also may be acquired by grant or prescription, under the rules already given, but they 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 contemplated them.³ An illustration is where the owner

¹ But the necessity must be positive; it is not enough that a way over the land granted would be more convenient than some other. *Turnbull v. Rivers*, 8 McCord, 131; *McDonald v. Lindall*, 8 Rawle, 492; *Gayetty v. Bethune*, 14 Mass. 49; *Suffield v. Brown*, 4 DeG. J. & S. 185; *Burns v. Gallagher*, 62 Md. 462; *Outerbridge v. Phelps*, 13 Abb. N. C. 117; *Francies' App.* 98 Penn. St. 200. So of an easement to use a chimney in common. *Buss v. Dyer*, 125 Mass. 287. A right to pass to a well held not thus necessary when it did not appear that the person claiming the right had not, or with moderate cost, could not have, a well on his own land. *O'Rorke v. Smith*, 11 R. I. 259. The fact that the only way to reach the second story of one's building is over stairs outside the bounds of his lot,

does not give a right of way of necessity over the stairs. *Stillwell v. Foster*, 14 Atl. Rep. 731 (Me.). Similar facts held to create a way by necessity, in *Galloway v. Bonesteel*, 65 Wis. 79.

² *Holmes v. Seely*, 19 Wend. 507; *Brice v. Randall* 7 Gill & J. 349. See *Powers v. Harlow*, 53 Mich. 507. The easement of a right of way of necessity ceases when the party acquires, by subsequent purchase, a convenient way over his own lands. *Holmes v. Goring*, 2 Bing. 76.

³ Where one grants lands bounding them on a highway where there is none, he thereby conveys to the grantee a private right of way along the supposed street, if he is owner of the soil. See *Wyman v. New York*, 11 Wend. 487; *Smith v. Lock*, 18 Mich. 56.

of two *estates conveys one of them, over which a drain [*371] has been constructed and is then in existence for the benefit of the other. If this drain is known to the grantee at the time he receives his conveyance, and is essential to the reasonable enjoyment of the estate retained, an easement may arise by implication, because the presumption that the parties understood it was to exist will be reasonable.¹ Easements of light and air, and for the support of buildings, frequently come into existence by implication from grants in the same way.

Grants of right of way are to be so construed as not needlessly to restrict the enjoyment of his estate by the owner of the servient tenement. The owner of the easement is entitled to the fair enjoyment of his privilege, but nothing more,² and therefore the owner of the servient tenement may erect gates at the termini of a private way, when it is not unreasonable to do so.³

Any obstruction to an easement, any encroachment upon it, or any disturbance of the soil, or of that by means of which the easement is enjoyed, is an actionable wrong, provided damage is caused by it. It is to be observed in respect to easements that possession of the lands over which they are enjoyed, or which are subject to them, is in the owner of the land, and not in the party who has the easement, and therefore the latter cannot bring ejectment against a disturber; and those acts which would constitute trespasses on lands are not trespasses in respect to his easement. Therefore, any intermeddling with the lands to which the easement attaches is not a wrong to him unless in some manner it affects him injuriously in the enjoyment of the easement. But if the act be one which, if persisted in, may at length ripen into an adverse right, an injury will be presumed. Thus, if a drain be stopped, or

¹ *Carbrey v. Willis*, 7 Allen, 364; *Rome Gaslight Co. v. Meyerhardt*, 61 Geo. 287. See *Sanderlin v. Baxter*, 76 Va. 299; *McPherson v. Ackee*, 4 Mac Arth. 150. The doctrine that if an owner sells part of a tract he impliedly includes such easements in what he keeps as are necessary for the enjoyment of the grant, applies to flow of water in an irrigating canal. *Cave v. Crafts*, 53 Cal. 135. As to right to change location or enlarge

size of water pipes. *Chandler v. Jamaica Pond Aq. 125 Mass. 544*; *Onthank v. Lake Shore, &c., Co.*, 71 N. Y. 194.

² *Atkins v. Bordman*, 2 Met. 457.

³ *Maxwell v. McAtee*, 9 B. Mon. 20; *Garland v. Furber*, 47 N. H. 301. He may change form of cover of a reservoir if no harm is done to the owner of the aqueduct. *Olcott v. Thompson*, 59 N. H. 154. See *Matthews v. Del. &c., Canal Co.*, 20 Hun, 427.

a fence be erected across a private way, or a water-course be diverted, and the like, an injury is presumed, because these, if persisted in, may extinguish the easement.¹ But where the easement is for a special and temporary purpose only, as a right of way to repair a house, there could not, in contemplation [*372] of law, *be an obstruction, except at such time as there was occasion to make use of the way,² and therefore nothing done at other times could support an adverse claim.

Whoever is owner of the dominant tenement at the time an easement is disturbed, or has any interest therein which entitles him to the enjoyment of the easement, may maintain an action for the injury;³ and where the dominant tenement is under lease, the reversioner may also sue, if the injury is one that affects his rights as reversioner.⁴ Suit may be brought against the owner of the servient tenement if the 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 the title, the latter may be held responsible if he fails to remove it within a reasonable time after notice.⁵ As an obstruction or encroachment would constitute a private nuisance, the owner of the easement may, wherever it is practicable, and under the rules applicable to the abatement of nuisances in general, proceed to abate it.⁶ But

¹ Wood v. Waud, 3 Exch. 748; Nicklin v. Williams, 10 Exch. 259; Elliott v. Fitchburg R. R. Co., 10 Cush. 191; Roundtree v. Brantley, 34 Ala. 544; Welton v. Martin, 7 Mo. 307; Clifford v. Hoare, 7 L. R. 9 C. P. 362; S. C. 9 Moak. 449; Ante, pp. 68-73.

² Phipps v. Johnson, 99 Mass. 26. See Noyes v. Hemphill, 58 N. H. 536.

³ Hastings v. Livermore, 7 Gray, 194.

⁴ Kidgill v. Moor, 9 C. B. 364; Queen's College v. Hallett, 14 East, 489; Battishill v. Reed, 18 C. B. 696; Brown v. Bowen, 30 N. Y. 519; Tinsman v. Belvidere R. R. Co., 25 N. J. 255. The grantee of the original grantee of the dominant tenement may restrain acts of the grantee of the original owner of the servient tene-

ment. McConnell v. Rathbun, 46 Mich. 303. As to what would be an injury to the reversioner, see Dobson v. Blackmore, 9 Q. B. 991; Metropolitan Association v. Petch, 5 C. B. (N. S.) 504.

⁵ Woodman v. Tufts, 9 N. H. 88; Thornton v. Smith, 11 Minn. 15; Grigsby v. Clear Lake, 40 Cal. 396; Dodge v. Stacy, 39 Vt. 558; Caldwell v. Gale, 11 Mich. 77.

⁶ Amick v. Tharp, 13 Grat. 564; Great Falls Co. v. Worster, 15 N. H. 412; Hutchinson v. Granger, 13 Vt. 336; Adams v. Barney, 25 Vt. 225; Ballard v. Butler, 30 Me. 94; Jewell v. Gardiner, 12 Mass. 312; Rhea v. Forsyth, 37 Penn. St. 503. Superintendent of streets may abate an obstruction to public easement. Gordon v. Taunton, 126 Mass. 349. May enter

if in doing this, or in the enjoyment of the easement, he exceeds his right, he thereby becomes a trespasser.¹ So in abating the nuisance he must, at his peril, see that he causes no injury to a third person, for the wrong of one man cannot justify visiting upon an innocent person the consequences.²

Party Walls. 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, unless the contrary is *shown.³ At the common law no person was [*373] 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. The inconveniences of the common law rule have been obviated to some extent by statutes which permit a 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. These statutes establish the rule of the civil law.

Where a party wall is built by agreement, the strict rule of law requires a deed, but if the agreement was by parol only, the case would be a very strong one for the application of the doctrine of equitable estoppel, and no doubt a dissatisfied proprietor would be enjoined from repudiating the arrangement and interfering with his neighbor's enjoyment of the wall as a party wall afterwards.⁴ If one erects a block of houses or shops, and then conveys them separately to purchasers, the walls between them

upon adjoining land to remove obstruction which throws back water upon highway. *Johnson v. Dunn*, 134 Mass. 522.

¹ *Ganley v. Looney*, 14 Allen, 40. See *Dyer v. Depui*, 5 Whart. 584; *Wright v. Moore*, 38 Ala. 593; *Heath v. Williams*, 25 Me. 209.

² *Amick v. Tharp*, 18 Grat. 564.

³ *Campbell v. Mesier*, 4 Johns. Ch. 834; *Matts v. Hawkins*, 5 Taunt. 20.

⁴ See *Bell v. Rawson*, 30 Geo. 712.

If one abutter in such case by digging causes it to fall, he is liable. *Hammond v. Schiff*, 6 S. E. Rep. 753 (N. C.)

become party walls for the mutual benefit.¹ Where a party wall exists, each proprietor has an easement in the land of the other for its use, repair and support; but the extent of his rights may be limited by the contract between them with respect to the wall, or by the user or the statute under which it was built or is owned.² Rights in party walls pass with the land to heirs or assignees without being specially mentioned in the conveyance.³ Each proprietor owes to the other the duty to do nothing that shall weaken or endanger it,⁴ and though each may rightfully, when he finds it for his interest to do so, increase its [*374] height, sink *the foundations deeper, or on his own side add to it,⁵ yet it seems that in doing so he is insurer against damages to the other proprietor.⁶ If the wall becomes ruinous, and ceases to answer the purposes of support, the ease-

¹ *Matts v. Hawkins*, 5 Taunt. 20; *Richards v. Rose*, 9 Exch. 218; *Webster v. Stevens*, 5 Duer, 553; *Wheeler v. Clark*, 58 N. Y. 267. The owner may not enlarge such party wall to make a dwelling house into a family hotel. *Musgrave v. Sherwood*, 60 How. Pr. 339.

² *Brooks v. Curtis*, 4 Lansing, 283; *Brooks v. Curtis*, 50 N. Y. 639; S. C. 10 Am. Rep. 545. A flue in a party wall is presumably for common use, though mainly on one side of the wall. *Weil v. Baker*, 8 South. Rep. 361 (La).

³ See *Standish v. Lawrence*, 111 Mass. 111; *Brooks v. Curtis*, 4 Lansing, 283. See *Warner v. Rogers*, 23 Minn. 34.

⁴ *Eno v. Del Vecchio*, 6 Duer, 17; *Brooks v. Curtis*, 50 N. Y. 639; S. C. 10 Am. Rep. 545; *Dowling v. Hennings*, 20 Md. 179; *Hieatt v. Morris*, 10 Ohio (N. S.) 523. *Hammond v. Schiff*, 6 S. E. Rep. 753 (N. C.) One may not tear down such wall because it turns out to be wholly on his own ground. *Henry v. Koch*, 80 Ky. 391; *Schile v. Brockhahus*, 80 N. Y. 614; *Miller v. Brown*, 33 Ohio St. 547. See *West. Nat. Bank's App.* 102 Penn. St.

171. One who has erected a wall under an agreement that it is to be used as a party wall is liable to adjoining owner for damage done him by its fall before he has used it. *Gorham v. Gross*, 125 Mass. 232.

⁵ *Matts v. Hawkins*, 5 Taunt. 20; *Partridge v. Gilbert*, 15 N. Y. 601; *Brooks v. Curtis*, 50 N. Y. 639; S. C. 10 Am. Rep. 545; *Price v. McConnell*, 27 Ill. 255. He may increase its thickness and height if he does not impair the other's right. *Andrae v. Haseltine*, 58 Wis. 295. If he builds it up it must be of the same kind as below, e. g. it may have no windows above if none below. *Dauenhauer v. Devine*, 51 Tex. 480. If he builds a structure on top of the wall the other joint owner may knock the structure down. *Watson v. Gray*, L. R. 14 Ch. D. 192.

⁶ *Webster v. Stevens*, 5 Duer, 553; *Eno v. Del Vecchio*, 4 Duer, 53. See *Phillips v. Bordman*, 4 Allen, 147; *Potter v. White*, 6 Bosw. 644; *Hieatt v. Morris*, 10 Ohio, (N. S.) 523; *Dowling v. Hennings*, 20 Md. 179; *Bradbee v. Christ's Hospital*, 4 M. & G. 714.

ment is at an end, and each proprietor may build as he pleases upon his own land without any obligation to accommodate the other.¹

¹ Partridge v. Gilbert, 15 N. Y. 601; Sherrill v. Cisco, 4 Sandf. 480; Campbell v. Mesier, 4 Johns. Ch. 384; Orman v. Day, 5 Fla. 385. So if the wall is destroyed by fire. Antomachi v. Russell, 63 Ala. 356. Or if the building is destroyed but the wall left standing. Hoffman v. Kuhn, 57 Miss. 746

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* CHAPTER XIII

NEGLECTS OF OFFICIAL DUTY.

Offices are Trusts. Although the incumbent of a public office has a property right in it, yet the office itself is a public trust, and is conferred, not for his benefit, but for the benefit of the political society.¹ It is therefore 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 supposed to be susceptible of classification under the three heads of legislative, executive and judicial, corresponding to the three departments of government bearing the same designations; but the classification cannot be very exact and there are many officers whose duties cannot properly, or, at least, exclusively, be arranged under either of these heads. A single case may suffice as an illustration. The officers chosen to levy and apportion taxes for the inferior municipal subdivisions of the State, are in some cases authorized: 1, to determine what taxes shall be levied within the municipality for the year, 2, to value the property which is to be assessed for these taxes, 3, to apportion the taxes as between the several items of property assessed; and 4, to receive from their superior officers the statements of taxes to be assessed for more general purposes, and to apportion these in the same way. The first of these duties partakes of the legislative, the second of the judicial, the third and fourth of the executive; but in strictness, none of them can be classed as belonging specially to either department of the government, and the officers who perform them are usually designated administrative officers. Those officers, on the [*376] other *hand, who merely execute the commands of superiors, are properly denominated ministerial.

¹ Beebe v. Robinson, 52 Ala. 66; *Ex parte Lambert*, 53 Ala. 79.

Classification of Duties. While offices are established and filled on public reasons, the incumbents of some are required to perform duties which specially concern individuals, and only indirectly concern the public. The case of the sheriff will furnish us with an apt illustration here. This officer serves criminal process, arrests and confines persons accused of crime, preserves order in court, and is conservator of the public peace, but he serves civil process also. The nature of the duty in any case suggests the remedy in case of neglect. If the duty he has failed to perform is a duty to the State, he is amenable to the State for his fault; while for the neglect of duties to individuals, only the person who is injured may maintain suit. It is, however, as a general thing, only against ministerial officers that an action will lie for neglect of official duty. The reason generally assigned is, that in the case of other officers, it is inconsistent with the nature of their functions that they should be made to respond in damages for failure in satisfactory performance. In many cases this is a sufficient reason, but in others it is inadequate.

If we take the case of legislative officers, their rightful exemption from liability is very plain. Let it be supposed that an individual has a just claim against the State which the legislature ought to allow, but neglects or refuses to allow. In such a case there may be a moral wrong, but there can be no legal wrong. The legislature has full discretionary authority in all matters of legislation, and it is not consistent with this 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; 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 remark is not true, exclusively, of legislative bodies proper, but it applies also to inferior legislative bodies, such as boards of supervisors, county commissioners, city councils, and the like.¹ When such bodies neglect and refuse to proceed to the discharge of their duties, the courts may interpose to set them in motion; but they cannot require them to reach *particular conclusions, nor, for their failure to do [*377] so, impose the payment of damages upon them, or upon the municipality they represent.²

¹ Baker v. State, 27 Ind. 485. See Morris v. People, 3 Denio, 381.

² Wells v. Atlanta, 43 Geo. 67. Even the allegation of fraud cannot

It is only when some particular duty of a ministerial character is imposed upon a legislative body, in the performance of which its members severally are required to act—no liberty of action being allowed, and no discretion—that there can be a private action for neglect. Such ministerial duties are sometimes imposed upon the members of subordinate boards, like supervisors and county commissioners, and when they are, if they are imposed for the benefit of individuals, the members may be personally responsible for failure in performance.

If we take next the case of executive officers, the rule will be found to be the same. The governor of the State is vested with a power to grant pardons and reprieves, to command the militia, to refuse his assent to laws, and to take the steps necessary for the proper enforcement of the laws; but neglect of none of these can make him responsible in damages to the party suffering therefrom. No one has any legal right to be pardoned, or to have any particular law signed by the governor, or to have any definite step taken by the governor in the enforcement of the laws. The executive, in these particulars, exercises his discretion, and he is not responsible to the courts for the manner in which his duties are performed. Moreover, 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 republican institutions. Each department, within its province, is and must be independent.

Taking next the case of the judicial department, the same rule still applies. For mere neglect in judicial duties no action can lie. A judge cannot be sued because of delaying his judgments, or because he fails to bring to his duties all the care, prudence and diligence that he ought to bring, or because he decides on partial views and without sufficient information. His selection for his office implies that he is to be governed in it by his own judgment; and it is always to

be listened to for the purpose of establishing such a liability. *Wilson v. New York*, 1 Denio, 595. *Freeport v. Marks*, 59 Penn. St. 253; *Buell v. Ball*, 20 Iowa, 282. The motives of councilmen in passing an ordinance cannot be inquired into. *Jones v. Lov-*

ing, 55 Miss. 109. A penalty is sometimes imposed on members of such boards for neglect to perform specific duties, even when they seem to partake of the judicial. See *Morris v. People*, 8 Denio, 381.

be assumed that that judgment has been honestly exercised and applied.

Ministerial Action by Judicial Officers. Nevertheless, all judges may have duties imposed upon them which are purely ministerial, and where any discretionary action is not permitted.¹ An illustration is to be found in the *habeas corpus* acts. These, generally, 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 the 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 of the peace refuses to issue a summons to one who lawfully demands it, or an execution on a judgment he has rendered,² or to enter up a judgment he has determined upon,³ or to perform any other official act which in its nature is purely ministerial;⁴ 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*.⁵

¹ The principle was very fully examined and discussed in *Ferguson v. Earl of Kinnoull*, 9 Cl. & Fin. 251. The action was brought against a member of a Scotch Presbytery for the refusal of the Presbytery to take the plaintiff, who was presentee to a church, on his trials. The court sustained the action, holding that the Presbytery acted ministerially in respect to the particular duty, and had no discretion to refuse. Also, that the members were liable individually and collectively for the refusal.

² *Place v. Taylor*, 23 Ohio, (N. S.) 817; *Gaylor v. Hunt*, 23 Ohio, (N. S.) 255. For the general rule see *Wilson v. New York*, 1 Denio, 595; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Noxon v. Hill*, 2 Allen, 215; *Way v. Townsend*, 4 Allen, 114. If the justice issues an invalid execution, he is liable to plaintiff for nominal damages, but not for the costs of a levy or of an attempt to collect, those being too remote. *Noxon v. Hill*, 2 Allen, 215.

³ *Fairchild v. Keith*, 29 Ohio, (N. S.) 156.

⁴ Such as to return in due time the papers on an appeal taken from his judgment. *Peters v. Land*, 5 Blackf. 12. Or to take security on issuing a writ of replevin. *Smith v. Trawl*, 1 Root, 165. Or security on an appeal. *Tompkins v. Sands*, 8 Wend. 462. The general rule is, that when judicial officers are required to perform ministerial acts, they may be sued for neglect to do so. *Ferguson v. Earl of Kinnoull*, 9 Cl. & Fin. 251; *Noxon v. Hill*, 2 Allen, 215. The justice who issues an attachment without the statutory prerequisites is a trespasser. *Vosburgh v. Welch*, 11 Johns. 174. For the refusal of a probate judge to issue a liquor license when all the requirements of law have been complied with, his bondsmen are liable. *Grider v. Tally*, 77 Ala. 422.

⁵ *Pangburn v. Ramsay*, 11 Johns. 141, or an appeal. *Brooks v. St. John*, 25 Hun, 540. So highway com-

[*379] ***But, while in cases of merely discretionary powers it is sufficiently manifest that there can be no responsibility to individuals for the manner in which they are performed, there are many cases of powers not discretionary, in which the right to exemption from liability is equally plain. The sheriff, for example, in the execution of a convict, is allowed no discretion; but the idea of responsibility to individuals for any neglect of duty in respect to the execution, or for any improper conduct, would be a manifest absurdity. It is not, then, solely because the duties are discretionary that officers are exempt from civil suits in respect to their performance, and some further reason must be sought for. The reason in the case instanced is plain enough; for the duty neglected or improperly performed is a public duty exclusively, and no single individual of the public can be in any degree legally concerned with the manner of its performance. Now, no man can have any ground for a private action until some duty owing to him has been neglected; and if the officer owed him no duty, no foundation can exist upon which to support his action. But had the sheriff received from him for service an execution against the goods and chattels of his debtor, the case would have been different. The sheriff's duty would have been the same in nature—that is, it would still have been ministerial—but it would have been a duty owing to the individual, and for a failure in performance the individual must be entitled to appropriate redress.**

When Officers Liable to Private Suits. The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution.¹ On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages.²

missioners for such return to a certiorari. *Rector v. Clark*, 78 N. Y. 21.

¹ For a supervisor to assess in defiance of a statutory regulation all the property in his township is not a private wrong. *Moss v. Cummings*,

44 Mich. 359. Persons directed by law to establish a penitentiary are not liable to one injured in working therein. *Alamango v. Supervisors*, 25 Hun, 551.

² Persons chargeable with the duty

The case of discretionary powers may be brought under this rule as well as all others, for these are only conferred where the duties to be performed are public duties; concerning the public primarily and specially, and individuals only incidentally. This is readily perceived in the case of powers conferred upon legislative *bodies. Members of these bodies are not chosen [*380] to perform duties to individuals, but duties to the State. The performance of these may benefit individuals, and the failure to perform them may prejudice individuals, but this is only incidental. The State expends moneys in draining extensive tracts of low lands; this benefits the land owner living near the land drained, but it was not in his interest that the improvement was provided for, but for the general benefit. The State relieves a certain class of property from taxation; this may prejudice those who own no such property, but it violates no duties which the legislators owed to any individual. In any such legislation, the citizen can be supposed to have no individual rights whatsoever; and it will be made, amended, or repealed without the necessity of considering in any manner his private interest. It is the same when a private claim is allowed and its payment ordered: this benefits the claimant, but the allowance is made in the interest of the State at large, and because it is for the public good that all just claims upon the State should be recognized and provided for. If the claim should be rejected instead of being allowed, there would still be the same presumption that the public interest had been consulted, and that the claim was rejected because it had no just foundation. In either case the duty which was imposed on the members of the legislature—which was a duty to the public only—is supposed to have been performed.

The case of the judge is not essentially different. His doing justice as between particular individuals, when they have a con-

in such case are liable for misfeasance. *Bennett v. Whitney*, 94 N. Y. 302. Whether they are for mere nonfeasance, as in case of repair of roads, has been much questioned. In *Lampert v. LaCledde Gaslight Co.*, 14 Mo. App. 376, the cases are fully discussed by THOMPSON, J. There defendant was under a contract to keep the city lamp posts in repair,

and from neglect so to do a citizen was injured. The court says: "The defendant being thus charged with a public duty for the benefit of the city's inhabitants distributively, the citizen specially injured may proceed on the ground of the non-performance of such duty, and set up the contract by way of inducement;" and see, *Piercy v. Averill*, 37 Hun, 360.

troverſy before him, is not the end and object which were in view when his court was created, and he was ſelected to preſide over or ſit in it. Courts are created on public grounds; they are to do juſtice as 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: the individual advantage or loſs reſults from the proper and thorough or improper and imperfect performance of a duty for which his controverſy is only the occaſion. The judge performs his duty to the public by doing juſtice between individuals, or, if he fails to do juſtice as between individuals, he may be called to account by the State in ſuch form and before ſuch tribunal as the law may have provided. But as the duty neglected is not a duty to the individual, civil redreſs, [*381] as for an individual injury, is not admiſſible. This, as we ſhall ſee hereafter, is not the ſole reaſon for judicial exemption from individual ſuits, but it is one reaſon, and a very concluſive one.

The dignity of the office is ſometimes ſuppoſed to have ſomething to do with this immunity from private ſuits; but this is a miſtake. The rule ſtated does not depend at all on the grade of the office, but excluſively upon the nature of the duty. This may be ſhown by taking as an illuſtration the caſe of the policeman; one of the loweſt in grade of public officers. His duty is to ſerve criminal warrants; to arreſt perſons who commit offences in his view, to bring night-walkers to account, and to perform various offices of ſimilar nature. Within his beat he ſhould watch the premises of individuals, and protect them againſt burglaries and arſons. But ſuppoſe he goes to ſleep on his beat, and while thus off duty a robbery is committed or a houſe burned down, either of which might have been prevented had he been vigilant,—who ſhall bring him to account for this neglect of duty? Not the individual who has ſuffered from the crime, certainly, for the officer was not his policeman; was not hired by him, paid by him, or controlled by him; and conſequently owed to him no legal duty.¹ The duty impoſed upon the officer was a

¹ In *Butler v. Kent*, 19 Johns. 223, a public lottery commiſſioner was ſued by one who had purchaſed ſeveral lottery tickets to ſell again, and

who complained that by the careleſſneſs and miſmanagement of the commiſſioner public confidence in the fairneſs of the drawing was de-

duty to the public—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 policeman fails to guard the premises of a citizen with due vigilance, the neglect is a breach of duty of exactly the same sort as when, finding the same citizen indulging in riotous conduct, he fails to arrest him; and if the citizen could sue him for the one neglect, he could also for the other. And here it will be noted that the duty neglected in either case is in no proper sense discretionary.

*What has been said is true also of officers to whom [*382] is entrusted the power to lay out, alter, or discontinue highways. They may decline to lay out a road which an individual desires, or they may conclude to discontinue one which it is for his interest to be retained. There is in such a case a damage to him but no wrong to him. In performing or failing to perform a public duty, the officer has touched his interest to his prejudice. But the officer owed no duty to him as an individual: the duty performed or neglected 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 suffers, and damage alone does not constitute a wrong.¹

It may be said that the case of the highway commissioner who improperly opens or discontinues a road, to the prejudice of an individual, is like that of one who commits a public nuisance to the injury of an individual. In each case there is a public wrong and also a private damage. But the two cases differ in this: 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 and discontinuing roads, are only that he shall faithfully serve the public. If it shall be found that in his official action he has failed

stroyed, and the market value of the tickets diminished. The court held that the action would not lie. The plaintiff showed no loss peculiar to himself; the duty neglected was a public duty; besides the allegation of damage was vague and indefinite; it was like a general averment in *Iveson*

v. Moore, 1 Salk. 16, that plaintiff lost customers by reason of a bad name being applied to his wife—no particulars being given to show the loss.

¹ *Waterer v. Freeman*, Hob. 266. See ante, p. 66.

to regard sufficiently the interests of individuals, proof of the fact does not make out a right of action, because, there being no duty to the individual, there would be nothing of which the injured party could complain except of the breach of public duty. But the State must complain of this, not individuals.¹ The road officer, however, owes to every individual the duty not to proceed illegally to his prejudice; and, therefore, if the steps taken for laying out a highway are not in accordance with the law, the officer becomes a trespasser if he relies upon them in entering upon the lands of individuals.

Another illustration of the general rule is that of the quarantine officer. His duty requires him to take the proper steps to prevent the spread of contagion, and he will be culpable in a very high degree if he neglects to do so, because the duty is a public duty of the very highest importance and value. Let it

be supposed that a neglect occurs, and that a great number of persons *are infected in consequence. Not one of these persons can demand of the officer a personal redress. The reason is obvious: the duty was laid on the officer as a public duty—a duty to protect the general public—but the office did not charge the incumbent with any individual duty to any particular person. If one rather than another was injured by the neglect, it was only that the consequences of the public wrong chanced to fall upon him rather than upon another; just as the ravages of war may chance to reach one and spare another, though the purpose of the government is to protect all equally.*

Recorder of Deeds. On the other hand there are offices, which, though created for the public benefit, have duties devolved upon their incumbents which are duties to individuals exclusively. In other words, in these cases, 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.

¹ Sage v. Laurain, 19 Mich. 137.

* See White v. Marshfield, 48 Vt. 20; Brinkmeyer v. Evansville, 29 Ind. 187; Ogg v. Lansing, 35 Iowa, 495; Western College, &c., v. Cleveland, 12 Ohio, (N. S.) 375; Hill v. Charlotte, 72 N. C. 55; S. C. 21 Am. Rep. 451;

Freeport v. Isbell, 83 Ill. 440; Pontiac v. Carter, 82 Mich. 164. For an unauthorized fumigation of a fruit-laden vessel damaging the cargo, a health officer is liable to the shipper. Beers v. Board of Health, 85 La. Ann. 1132.

One conspicuous illustration is that of the recorder of deeds. The office may be said to be created because it is for the general public good that all titles should appear of record, and that all purchasers should have some record upon which they may rely for accurate information. But although a public officer is chosen to keep such a record, the duties imposed upon him are for the most part duties only to the persons who have occasion for his official services. He is simply required to record for those who apply to him their individual conveyances, and to give to them abstracts or copies from the record if they request them and tender the legal fees. All these are duties to individuals, to be performed for a consideration; the State is not expected to enforce the performance, nor does it generally provide for punishing as a breach of the public duty the failure in performance. But the right to a private action on breach of the duty follows as of course.¹ The breach is an individual wrong, and resulting *damage must be presumed, whether it is or is [*384] not susceptible of proof.

An actionable wrong may be committed by the recorder by refusing to receive and record a conveyance when it is tendered to him for recording accompanied with the proper fees. He may also be chargeable with a like wrong if, in undertaking to record a deed, he commits an error which makes the conveyance appear of record to be something different from what it is; for his duty is to record it accurately. In this last case the question of difficulty would concern, not so much the existence of a right of action, as the person entitled to maintain it; in other words, who the party is who is wronged by the recorder's mistake.

The authorities are not agreed on the question who should sustain the loss when the grantee in a deed has duly left it for record, and the recorder has failed to record it correctly. The question in such a case would commonly arise between the grantee in such a deed and some person claiming under a subsequent

¹ A ministerial officer charged by statute with an absolute and certain duty, in the performance of which an individual has a special interest, is liable to an action if he refuse to perform it, notwithstanding his disobedience may be prompted by an honest belief that the statute is unconstitu-

tional. *Clark v. Miller*, 54 N. Y. 528. His motive, whether honest or malicious, is immaterial. *Keith v. Howard*, 24 Pick. 292. An action as at common law accrues on breach of the duty, if the statute fails to prescribe the remedy. *Commissioners v. Duckett*, 20 Md. 468.

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. The reason has been given in one case as follows: The person seeking to take advantage of the error, it is said, "is, in effect, claiming to enforce a statute penalty imposed upon the grantee in the deed by reason of his having omitted to do something the law required him to do to protect himself and preserve his rights. The law never intended a grantee should suffer this forfeiture if he has conformed to its provisions. The plaintiff claiming the benefit of this statute, being, as it is, in derogation of the common law, and conferring a right before unknown, he must find in the provisions of the statute itself the letter which gives him that right. To the statute alone we must look for a purely statutory right. All that this law required of the grantee in the deed was, that he should file his deed for record in the recorder's office, in order to secure his rights under the deed. When he does that, the requirements of the law are satisfied, and no right to claim this [*385] *forfeiture can be set up by a subsequent purchaser. The statute does not give to the subsequent purchaser the right to have the first deed postponed to his, if the deed is not actually recorded, but only if it is not filed for record." ¹ Here, it is perceived, the court finds that the grantee has brought himself strictly within the letter of the statute, and has performed all that the statute in terms makes requisite for his protection. He has duly filed his deed for record, and the statute required no more. A like decision was made in Alabama under a statute which made the deed "operative as a record" from the time it was delivered by the grantee for the purpose.²

¹ BREESE, J., in *Merrick v. Wallace*, 19 Ill. 486, 497. The same view, in effect, is taken by Judge DRUMMOND in *Polk v. Cosgrove*, 4 Biss. 437, and *Riggs v. Boylan*, *Ibid.* 445. See, also, *Garrard v. Davis*, 53 Mo. 322. The statute under which the Illinois decisions were made provided that "all deeds and other title papers which are required by law to be recorded, shall take effect and be in force from and after the time of filing

the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall have been filed for record in the county where the said lands may lie."

² *Mims v. Mims*, 35 Ala. 23. See *M'Gregor v. Hall*, 8 Stew. & Port. 397.

Where such is the rule of law, it would seem that the recorder could hardly be responsible in damages to the grantee for failing correctly to record his deed,¹ unless, in consequence of something which subsequently takes place, an actual damage is suffered which can be shown. Such damage might befall, if afterwards he should negotiate a sale, and find the erroneous record to stand in the way of its completion; but as the deed, if still in existence, could be recorded over again on payment of the statutory fees, it may reasonably be said that the cost of a new record would be the measure of recovery, provided that, in the meantime, nothing else had occurred to endanger the title by reason of the error. If, however, the deed were lost or destroyed, a second recording would be impossible, and the question of remedy might then be more serious. As the inconvenience the grantee would suffer in such a case, and the danger to his title would result from the conjunction of the two circumstances — first, the error in the record, and second, the loss of the deed — *the question of remote and proximate cause [*386] would be involved, and it is not easy to say what damage can be said to have followed, as a natural consequence, directly and proximately from the recorder's fault.

On the other hand, there are many cases in which it has been decided that every one has a right to rely upon the record actually made as being correct, and that, if it is erroneous, the peril is upon him whose deed has been incorrectly recorded. These cases, like those previously given, are planted upon the statute. The leading case was one in which a mortgage of three thousand dollars was recorded as one for three hundred dollars only. The statute provided that "no mortgage should defeat or prejudice the title of any *bona fide* purchaser, unless the same shall have been duly registered." Said Chancellor KENT: "The true construction of the act appears to be that the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage any further than they may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee; and if a mistake occurs to his

¹ Except, of course, to the extent of what had been paid to him for making a record which he has failed to make.

prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. The act, in providing that all persons might have recourse to the registry, intended *that* as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase without hunting out and inspecting the original mortgage, a task of great toil and difficulty. I am satisfied that this was not the intention, as it certainly is not the sound policy of the statute."¹ Many decisions to the same effect have been made in other States.²

[*387] *Sometimes the error of the recorder consists in not indexing the conveyance, or in indexing it incorrectly. Here, also the effect of error must depend upon the statute, and the purpose it has in view in requiring an index to be made. In general, the purpose probably is to facilitate the examination of the records by the officer; not to protect the interests of those whose conveyances are recorded;³ 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.⁴ But some statutes require the index to give information of the contents of the deed, and particularly what land is conveyed by it; and where this is the case, the record is not constructive notice of the conveyance of anything which the index does not indicate.⁵

¹ Frost v. Beekman, 1 Johns. Ch. 288, 298. The case was reversed on another ground. Beekman v. Frost, 18 Johns. 544. See, also, N. Y. Life Ins. Co. v. White, 17 N. Y. 469.

² Sanger v. Craigie, 10 Vt. 555; Baldwin v. Marshall, 2 Humph. 116; Heister's Lessee v. Fortner, 2 Binn. 40; Lally v. Holland, 1 Swan, 396; Shepherd v. Burkhalter, 13 Geo. 444; Miller v. Bradford, 12 Iowa, 14; Chamberlain v. Bell, 7 Cal. 292; Parrett v. Shaubhut, 5 Minn. 323; Barnard v. Campau, 29 Mich. 162; Terrell v. Andrew County, 44 Mo. 309; Brydon v. Campbell, 40 Md. 331;

Jenning's Lessee v. Wood, 20 Ohio, 261. The defects in these cases were various. In the Ohio case the name of the grantor was incorrectly given, and in the Minnesota case the name of one of the witnesses was not copied into the record.

³ See Schell v. Stein, 76 Penn. St. 398.

⁴ Curtis v. Lyman, 24 Vt. 338; Commissioners v. Babcock, 5 Oreg. 472; Schell v. Stein, 76 Penn. St. 398; Bishop v. Schneider, 46 Mo. 472; 8 C. 2 Am. Rep. 533.

⁵ Scoles v. Wilsey, 11 Iowa, 261; Breed v. Conley, 14 Iowa, 269; Gwynn

In order to understand what rights of action might arise from errors in records, we may suppose a case arising in a State where the statute puts upon the grantee himself the responsibility to see that his deed is correctly recorded. Suppose the deed to be so recorded, that the record fails to describe the land actually conveyed, and the grantor then sells the land a second time to one having no knowledge of the prior conveyance, thereby cutting off the first conveyance. There would be under such circumstances, a direct loss to the first grantee of the whole value of the land, and it is plain that he must be entitled to a remedy against some one for the recovery of compensation. That he might treat the second conveyance by the grantor as one made in his interest, and sue and recover from him the amount received from the second grantee, we should say would be clear. This would be only the ordinary case of one affirming a sale, wrongfully made by another, of his property, and recovering the proceeds thereof; the familiar case of waiving a tort and suing in *assumpsit* for the *money received. But in many cases such redress [*388] might be inadequate, because less than the value of the land would be likely to be received on a second sale made, as it would be, with knowledge on the part of the vendor that he had no title; and no reason is perceived why the real owner might not sue in tort for the value of that which he has lost, if that should promise more satisfactory redress.¹ 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 of which the latter has been defrauded.² But the question of a remedy against the recorder would, in this case as well as that before suggested, be complicated as a question

v. Turner, 18 Iowa, 1. Recorder is liable for failure to index to one injured thereby. Reeder v. Harlan, 98 Ind. 114.

¹ See Hanold v. Bacon, 36 Mich. 1.

² Andrews v. Blakeslee, 12 Iowa, 577. The second grantee would of course get no title if he took his deed with notice of the first; and in that case he might be liable to the first grantee if he should sell to a *bona fide*

purchaser, and thereby defeat the real owner. The principle may be stated as follows: That when one is placed in circumstances which put it into his power wrongfully to convey another man's estate away from him, the law imposes upon him the duty to abstain from doing so; and for a breach of this duty an action lies to recover the value of what is lost.

of proximate and remote cause, and would require a consideration which, up to this time, it has never, so far as we are aware, received. Does the loss of the estate result from the error of the recorder? or does that merely furnish the opportunity for another event, to which the loss is in fact attributable as the proximate cause? The question would be still further complicated if, before the second conveyance by the original grantor, the first grantee had himself disposed of the land, so that the loss would fall, not upon the party whose deed was defectively recorded, but upon one claiming under him. Here the damage, instead of following directly the recorder's misfeasance, follows it only after two intermediate steps; a conveyance by the first grantee, and another by the first grantor which has the effect to defeat it.

The recorder of deeds may also injure some person by giving him an erroneous certificate. The liability for this is clear if the giving of the certificate was an official act; otherwise not. It was an official act if it was something the person obtaining it had

a right to, and which it was the recorder's duty to give.¹ [*389] Thus *one has a right to call for copies to be made from the records, and for official statements of what appears thereon; and he is entitled to have these certified to him correctly. But he is not entitled to call upon the recorder for a certificate that a particular title is good or bad; and such certificate, if given, would not be official. The reason for this is that a certificate to that effect must necessarily cover facts which the record cannot show; and a title may be good or be defective for reasons which cannot, under any recording laws, appear of record. Therefore, if the register certifies that a title is good, he only expresses an opinion on facts, some of which he may officially know, but others of which he cannot know as recorder, and to which, therefore, he cannot officially certify.

But suppose the register's certificate to cover nothing he might not be required to certify officially, and, therefore, to be properly and strictly an official act, but incorrect, and suppose the person who applies for and receives it is not injured by it, but a subsequent purchaser, to whom he has delivered it with his title deeds, is injured — has such subsequent purchaser a right of action

¹ Liable for search certified by his abstracting under contract. *Smith v. clerk. Van Schaick v. Sigel*, 60 How. Holmes, 54 Mich. 104.
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against the recorder? In other words, if it be conceded that it is a duty the recorder owes to every one who may have occasion to rely upon his records, to see that they are correctly made, is it also his duty to every one who may have occasion to rely upon his certificates to see that they are correct also?

The difference between the two cases may be said to be this: That the records are for public and general 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 knows that his records are to be seen, and titles to be made in reliance upon them; he is not bound to know that his certificate is for the use or reliance of any one but the person who receives it, nor can it be assumed that he gives it for any other use. He contracts with the person who requests it 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, and if another relies upon it to his injury, he cannot have redress from the recorder, because the recorder assumed no duty for his protection. It has, therefore, *been decided that the recorder is responsible [*390] only to the party procuring his certificate, though another may have acted in reliance upon it and been injured by his error.¹

The recorder may also be responsible for recording papers not entitled to record, provided the record, when made, may cause legal injury, and, provided further, he is aware that the record is unauthorized. Thus, a paper he knows to be forged he has no right to record, and if he puts it upon record to the damage of any one, the misfeasance is actionable.² So it would seem the recorder should be liable if he were knowingly to put upon record a deed purporting to be acknowledged before a proper officer, when in fact the person purporting to take the acknowledgment was not an officer at all.³ But the case is one which has never yet, so far as we are aware, been the subject of judicial decision.

¹ *Housman v. Girard Building, &c., Association*, 81 Penn. St. 256. Compare *Ware v. Brown*, 2 Bond, 267. If, however, the certificates were purposely and knowingly made false with fraudulent intent, no doubt the

recorder might be liable to one defrauded by it. *Wood v. Ruland*, 10 Mo. 143.

² *Ramsey v. Riley*, 13 Ohio, 157.

³ In many, perhaps most, of the States the recorder is to take notice

Inspectors. The case of inspector of provisions is also one in which duties are imposed in respect to the public and also in respect to individuals. The requirement of inspection is an important sanitary regulation, and to some extent the public depend upon it for protection against the diseases that might be engendered or disseminated by the sale of unwholesome food. But it is also important to individual purchasers; they have a right to rely upon it, and if they are betrayed by such reliance they may have their action.¹ Other officers performing similar services come under the same liability.

[*391] ***Postmasters.** The case of the postmaster affords a similar illustration. It was decided at an early day that the duties of the Postmaster General were exclusively public; that the post office was an institution of the government, established and regulated by law; that all of its officers and agents were officers and agents of the government and not of the Postmaster General; that as between the Postmaster General or any officer or agent of the post office on the one hand, and the public accommodated by it on the other, there were no implied contract relations; and that while each officer and agent might be liable in a proper form of action to any individual who suffered from his neglect of duty, no one of them was liable for the default of another and therefore the Postmaster General could not be held responsible for the loss of a letter containing exchequer bills which was opened and the bills taken out in the London post office.² But

of the official character and signature of those assuming to have authority to take acknowledgment of deeds. If he records a deed the acknowledgment of which is certified by some one not such officer as he represents himself to be, a purchaser under it may buy a worthless title. Is the recorder liable in such a case? Probably not, unless he knew the want of official character. *Ramsey v. Riley*, 18 Ohio, 157. But the question suggests the absurdity and danger of requiring an officer to act upon an assumption of facts in respect to which he will often have no knowl-

edge, and where to him personally it is matter of indifference whether the facts are or are not as he assumes them to be.

¹ *Hayes v. Porter*, 22 Me. 371; *Nickerson v. Thompson*, 33 Me. 433; *Tardos v. Bozant*, 1 La. Ann. 199. In *Seaman v. Patten*, 2 Caines, 312, it is held that the inspector is only liable when malice or corruption is alleged and proved. The fact that the statute imposes a penalty on the officer for neglect of duty will not preclude a private action. *Hayes v. Porter*, 22 Me. 371.

² *Lane v. Cotton*, 1 Ld. Raym. 646;

the local postmaster unquestionably has imposed upon him duties to individuals as well as to the public. He is to receive and forward mail to other offices; to keep correct accounts with the department, and perhaps with contractors; to draw money orders, etc. But 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 is there for delivery, the postmaster must deliver it, and his refusal to do so is a tort.¹ 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 letter or other mail matter which shall have come to his official custody.² But it has been held in several cases that the postmaster is not liable for the loss or abstraction of a letter by one of his sworn assistants, whose appointment must be approved and can *at any time be terminated [*392] by the department.³ Neither is a mail carrier responsible for the loss of mail matter through the carelessness or dishonesty of one of his sworn assistants;⁴ but he is liable if the loss is attributable to his own servant, or to any unsworn assistant.⁵

Clerks of Courts, etc. The clerk of a court may be liable to the party damnified for neglecting to put a case on the docket when his duty required it;⁶ for failure to enter up a judgment

S. C. 12 Mod. 471, 1 Salk. 17. See *Smith v. Powditch*, Cowp. 182; *Rowning v. Goodchild*, 2 W. Bl. 906; *Whitfield v. Le DeSpencer*, Cowp. 754, 765; *Hutchins v. Brackett*, 22 N. H. 252.

¹ *Teall v. Felton*, 1 N. Y., 537; S. C. in error, 12 How. 284.

² *Bishop v. Williamson*, 11 Me. 495; *Bolan v. Williamson*, 1 Brev. 181; *Coleman v. Frazier*, 4 Rich. 146; *Christy v. Smith*, 23 Vt. 663; *Ford v. Parker*, 4 Ohio, (N. S.) 576.

³ *Schroyer v. Lynch*, 8 Watts, 453; *Wiggins v. Hathaway*, 6 Barb. 632; *Bolan v. Williamson*, 2 Bay, 551.

⁴ *Hutchens v. Brackett*, 22 N. H.

252; *Conwell v. Voorhees*, 18 Ohio, 523.

⁵ *Sawyer v. Corse*, 17 Grat. 230. Where there is a city delivery if a carrier loses or misappropriates a letter, doubtless he may be held responsible; but he could not be considered the servant of the postmaster so as to make the latter liable. The postmaster would be liable, however, if he gave orders which were obeyed, that delivery should not be made until some inadmissible condition was complied with; as, for instance, payment for making delivery. *Barnes v. Foley*, 1 W. Bl. 643; S. C. Burr. 2149.

⁶ *Brown v. Lester*, 21 Miss. 392.

upon the roll;¹ for taking upon himself without the sanction of the court to issue an order for the release of a judgment debtor;² for wrongfully approving of an appeal bond, the penalty in which was less than that required by law;³ and for any similar misfeasance or nonfeasance.⁴ So a highway commissioner is liable who willfully neglects to return as paid a highway tax which has been paid in labor.⁵ So a commissioner of customs is liable to an importer for refusal to sign a bill of entry except upon payment of excessive fees.⁶ So an action will lie against a supervisor who, being required by law to report a claim to the county board for allowance, neglects to do so.⁷ So an election inspector may be liable for refusal to receive the vote for an elector; but the circumstances which create such liability will be considered in the next chapter.

Sheriffs. The case of a sheriff is also that of an officer upon whom the law imposes duties to individuals as well as to [*393] the *public. In so far as he acts as a peace officer, and in the service of criminal process, individuals are concerned only that he shall commit no trespass upon them or their property. In the service of 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;⁸ for the escape of a defendant

¹ *Douglass v. Yallop*, Burr. 722. To certify and send up record on appeal. *Collins v. McDaniel*, 66 Geo. 203.

² *Robinson v. Gell*, 12 C. B. 191.

³ *Billings v. Lafferty*, 31 Ill. 318; or stay bond. *Hubbard v. Switzer*, 47 Ia. 681.

⁴ See, further, *Wright v. Wheeler*, 8 Ired, 184; *Anderson v. Johett*, 14 La. Ann. 614. A father may not recover from a clerk for issuing without his assent a license for the marriage of his daughter under 18. *Holland v. Beard*, 59 Miss. 161. For a deputy's filing a paper, properly indorsed, in the wrong place, whereby a creditor lost a dividend from an insolvent estate, the clerk is liable. *Rosenthal v. Davenport*, 38 N. W. Rep. 618 (Minn.)

⁵ *Strickfaden v. Zipprick*, 49 Ill. 286.

⁶ *Barry v. Arnaud*, 10 Ad. & El. 646, citing and relying upon *Schinotti v. Bumsted*, 6 T. R. 646; *Lacon v. Hooper*, 6 T. R. 224.

⁷ *Clark v. Miller*, 54 N. Y. 528.

⁸ *Howe v. White*, 49 Cal. 658; *State v. Lawrence*, 64 N. C. 433; *State v. Porter*, 1 Harr. 126; *Hinman v. Borden*, 10 Wend. 367; *Bank of Rome v. Curtiss*, 1 Hill, 275; *Todd v. Hoagland*, 36 N. J. 352; *Hoagland v. Todd*, 37 N. J. 544; *Kearney v. Fenn*, 87 Mo. 310; *Adams v. Spangler*, 17 Fed. Rep. 133. If the officer cannot serve process, he can only excuse himself by turning it over to another officer for service. *Freudenstein v. McNier*, 81 Ill. 208.

who was lawfully arrested on civil process, either mesne or final;¹ for neglect or *refusal to return pro- [*394]

A sheriff or constable, having a *feri facias*, is compelled to act at his peril. If the property seized is not that of the defendant, he incurs liability by levying and taking the property. On the other hand, if the property is that of the defendant, and he knows of it, or can know it by reasonable effort, and is required by the plaintiff to levy on it, and he fails or refuses to do so, he becomes liable to the plaintiff in the execution. *Pike v. Colvin*, 67 Ill. 227. See *Harris v. Kirkpatrick*, 85 N. J. 392.

As to the liability of the sheriff for failure to proceed with due diligence to collect a judgment, see *Kimbro v. Edmondson*, 46 Geo. 130; *Noble v. Whetstone*, 45 Ala. 361; *Lowe v. Ownby* 49 Mo. 71. He must exercise reasonable skill and diligence under the circumstances of the case. *Crosby v. Hungerford*, 59 Ia. 712; *Elmore v. Hill*, 51 Wis. 365; *Farwell v. Leland*, 82 Mo. 260; *State v. Blanch*, 70 Ind. 204. Not liable for not levying on an interest in land not of record, defendant not being in possession. *Force v. Gardiner*, 48 N. J. L. 417. Nor if plaintiff's attorney, when asked, withholds information. *Batte v. Chandler*, 53 Tex. 613. As to his right to demand indemnity in cases of doubt, see *Bonnell v. Bowman*, 53 Ill. 460; *Smith v. Cicotte*, 11 Mich. 383. If an officer returns process long before the return day, to protect him it must appear that he failed after using due diligence to find any property. *Henry v. Com.* 107 Penn. St. 361. Fact that after levy the property is taken by United States Marshal against his protest will not exonerate him nor will ignorance of the law. *Ansonia Brass Co. v. Babbitt*, 74 N. Y. 395.

¹ *Farnsworth v. Tilton*, 1 D. Chip. 297; *Middlebury v. Haight*, 1 Vt. 423; *Wait v. Dana*, *Brayt.* 37; *Crary v. Turner*, 6 Johns. 51; *Kellogg v. Gilbert*, 10 Johns. 220; *Currie v. Worthy*, 8 Jones, (N. C.) 315; *Lash v. Ziglar*, 5 Ired. 702; *Faulkner v. State*, 6 Ark. 150; *Hopkinson v. Leeds*, 78 Penn. St. 396; *Lantz v. Lutz*, 8 Penn. St. 405; *Browning v. Rittenhouse*, 38 N. J. 279; *Crane v. Stone*, 15 Kan. 94; *Brown Co. v. Butt*, 2 Ohio, 348; *Hootman v. Shriner*, 15 Ohio, (n. s.) 43; *State v. Mullen*, 50 Ind. 598; *Pease v. Hubbard*, 37 Ill. 257. Every liberty given to a prisoner, not authorized by law, is an escape. *Colby v. Sampson*, 5 Mass. 310. So is a removal of the prisoner out of the county without authority. *McGruder v. Russell*, 2 Blackf. 18. Only the act of God or of the public enemy can excuse an escape. *Saxon v. Boyce*, 1 Bailey, 66; *Cook v. Irving*, 4 Strob. 204; *Smith v. Hart*, 2 Bay, 395; *Shattuck v. State*. 51 Miss. 575. The sheriff need not go behind a writ fair on its face to inquire into the regularity of the judgment. *Watson v. Watson*, 9 Conn. 140; *Webber v. Gay*, 24 Wend. 485; *Wilmarth v. Burt*, 7 Met. 257. But in an action for an escape he may show that the prisoner was privileged from arrest. *Bissell v. Kip*, 5 Johns. 89; *Scott v. Shaw*, 13 Johns. 378. And it is of course a defense that the process was void. *Contant v. Chapman*, 2 Q. B. 771; *Albee v. Ward*, 8 Mass. 79; *Howard v. Crawford*, 15 Geo. 423; *Ray v. Hogeboom*, 11 Johns. 433; *Phelps v. Barton*, 13 Wend. 68; *Carpenter v. Willett*, 31 N. Y. 90. And for the purposes of any such action the process is to be considered void, even though good on its face, if in fact it was unlawfully issued.

cess;¹ for making a false return;² for negligently caring for goods, whereby some of them are lost;³ for neglect to pay over moneys collected,⁴ and the like. The rules applicable to the case of a constable are the same, and need not be separately examined.⁵

The same act or neglect of a sheriff may sometimes afford ground for an action on behalf of each party to the writ; as where, having levied upon property, he suffers it to be lost or destroyed through his negligence. In such a case the plaintiff may be wronged, because he is prevented from collecting his debt, and the defendant may be wronged because a surplus that would have remained after satisfying the debt is lost to him. The officer owed to each the duty to keep the property with

Therefore the sheriff is not liable who suffers a prisoner arrested on a warrant to escape, though the warrant is fair on its face, if it issued without the preliminary showing required by statute. *Housh v. People*, 75 Ill. 487. Of course whatever shows that the plaintiff has suffered no damage, or damage only to a nominal amount, will limit the recovery; as, that the prisoner was insolvent. *Hootman v. Shriner*, 15 Ohio, (N. S.) 43; *State v. Mullen*, 50 Ind. 598. See *Williams v. Mostyn*, 4 M. & W. 145; *Smith v. Hart*, 2 Bay, 395; *Lovell v. Bellows*, 7 N. H. 875; *Burrell v. Lithgow*, 2 Mass. 526; *Crane v. Stone*, 15 Kan. 94.

For a discussion of the liability of the sheriff for making an insufficient levy, see *French v. Snyder*, 30 Ill. 339.

¹ *State v. Schar*, 50 Mo. 393. Not liable in Missouri for failure to return unless damage is shown. *State v. Case*, 77 Mo. 247. But to the contrary see *Bachman v. Fenstermacher*, 112 Penn. St. 331; *Atkinson v. Heer*, 44 Ark. 174. Consent of plaintiff to his retaining execution after return day does not exonerate. *Ansonia Brass Co. v. Babbitt*, 74 N. Y. 395. But the sheriff can only be liable to the person to whom the particular duty

was owing: "the party to whom he is bound by the duty of his office." *Harrington v. Ward*, 9 Mass. 251.

² *Duncan v. Webb*, 7 Geo. 178; *Kearney v. Fenn*, 87 Mo. 310, even though no damage is shown; *State v. Case*, 77 Mo. 247.

³ *Jenner v. Joliffe*, 9 Johns. 331; *Conover v. Gatewood*, 2 A. K. Marsh. 568; *Cresswell v. Burt*, 61 La. 590; *Burns v. Lane*, 138 Mass. 350.

⁴ *Norton v. Nye*, 56 Me. 211. Even if collected after the return of the writ. *Nash v. Muldoon*, 16 Nev. 404. If he delivers the goods, he is liable for the price whether he has received money or not. *Robinson v. Brennan*, 90 N. Y. 208; *Disston v. Strauck*, 42 N. J. L. 546, and although plaintiff's attorney consents to a delay in payment. *Disston v. Strauck*, 42 N. J. L. 546; see, *State v. Spencer*, 74 Mo. 314.

⁵ The following cases consider the liability of a jailor for escapes: *Alsept v. Eyles*, 2 H. Bl. 108; *Elliott v. Norfolk*, 4 T. R. 789; *Fuller v. Davis*, 1 Gray, 612; *Way v. Wright*, 5 Metc. 380; *Wilckins v. Willet*, 1 Keyes, 521; *Shattuck v. State*, 51 Miss. 575. The sheriff in this country is generally the jailer, either in person or by deputy.

reasonable care ; and there is a breach of duty to each when he fails to do so.¹

*Wrongs to the defendant in the process are committed [*395] 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. The case of void process has been referred to in another place. All the provisions which are made by law in regulation of the officer's proceedings on civil process, which can be of importance to the defendant's interest, are supposed to be made for his benefit, and they establish duties in his behalf. One of the most important provisions made in his interest is that which sets apart certain specified property of which he may be owner, and wholly exempts it from levy on execution or attachment. In some States this exemption is a mere privilege, and will be waived if not claimed; but in others the law absolutely, and of its own force, wholly 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 debtor remains passive.* So a defendant when under arrest is generally entitled to certain privileges in the law, among which, in the cases in which it is given by statute, is the privilege of jail limits. But in any case he is entitled 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 property should himself become purchaser of goods

¹ *Jenner v. Joliffe*, 9 Johns. 381, 385; *Bank of Rome v. Mott*, 17 Wend. 554; *Bond v. Ward*, 7 Mass. 123, 129; *Purrington v. Loring*, 7 Mass. 388; *Barrett v. White*, 3 N. H. 210, 224; *Weld v. Green*, 10 Me. 20; *Franklin Bank v. Small*, 24 Me. 53; *Mitchell v. Commonwealth*, 37 Penn. St. 187; *Hartleib v. McLane*, 44 Penn. St. 510; *Gilmore v. Moore*, 30 Geo. 623; *Banker v. Caldwell*, 3 Minn. 94; *Tudor v. Lewis*, 3 Met. (Ky.) 878; *Abbott v. Kimball*, 19 Vt. 551; *Fay v. Munson*, 40 Vt. 468; *Cresswell v. Burt*, 61 Ia. 590; *Burns v. Lane*, 138 Mass. 350.

If a bailee of the officer misuses the property the officer is liable. *Briggs v. Gleason*, 29 Vt. 78; *Gilbert v. Crandall*, 34 Vt. 188; *Austin v. Burlington*, 34 Vt. 506.

* The statutes on this subject are so different that space cannot be allowed here for presenting their peculiar features and pointing out the different consequences when their provisions are disregarded by the officer. They are collected, and cases in the several States referred to, in *Smyth on Homestead and Exemptions*, Ch. XIV.

sold under it;¹ or if he should make sale without giving the notice required by law, the purpose of notice being to attract the attention and invite the presence of parties desiring to purchase.² Or if he sells more than is sufficient to satisfy the demand and costs.³

[*396] *Wrongs by a sheriff to others than the parties to suits are generally a consequence of his mistakes or his carelessness. Thus, he may on an execution against one person by mistake seize the goods of another. He must at his peril make no mistakes here.⁴ It might be urged that, in such cases, the sheriff should have the ordinary protection of judicial officers; for he must inquire into the facts, and he must decide upon the facts who the owner is. But this does not render the functions of the sheriff judicial. Ownership is matter of fact, and the officer is supposed capable of ascertaining who is the owner of goods, just as any one may learn who is proprietor of a particular shop, or member of a specified corporation or partnership, or alderman of a city, etc.

¹ *Giberson v. Wilber*, 2 N. J. 410, though it is through a dummy. *Downey v. Lyford*, 57 Vt. 507.

² *Carrier v. Esbaugh*, 70 Penn St. 239; *Hayes v. Buzzell*, 60 Me. 205; *Sawyer v. Wilson* 61 Me. 529. The plaintiff may hold him for such sale. *Sheehy v. Graves*, 58 Cal. 449. Or should he sell at a different time from that stated in the notice. *Smith v. Gates*, 21 Pick. 55; *Pierce v. Benjamin*, 14 Pick. 356. Or at a different place. *Hall v. Ray*, 40 Vt. 576. See *Ross v. Philbrick*, 39 Me. 29; *Blake v. Johnson*, 1 N. H. 91.

³ *Aldred v. Constable*, 6 Q. B. 370, 381; *Stead v. Gascoigne*, 8 Taunt. 526. The sheriff is liable in trover for the excessive sale in such case, but cannot be treated as trespasser *ab initio*. *Shorland v. Govett*, 5 B. & C. 485.

⁴ *Davies v. Jenkins*, 11 M. & W. 745; *Screws v. Watson*, 48 Ala. 628; *Duke v. Vincent*, 29 Iowa, 308; *Wintringham v. Lafoy*, 7 Cow. 735; *Wellman v. English*, 38 Cal. 583; *Jones v. People*, 19 Ill. App. 300. He is liable for the error, though the names are the

same. *Jarman v. Hooper*, 6 M. & G. 827. He is not relieved by showing that he only sold the interest in the goods of the judgment debtor. *Ran-kin v. Ekcl*, 64 Cal. 446. Nor does he reduce damages by releasing the levy without returning the goods. *Kreher v. Mason*, 20 Mo. App. 29. Trespass lies for seizing the goods of a stranger to the writ, notwithstanding they are so intermingled with the goods of the debtor that the officer cannot distinguish them, if the owner is present and offers to select his own. *Yates v. Wormell*, 60 Me. 495. But if the sheriff attaches the goods of the wrong person, and while they are in his hands attaches them on a subsequent writ, the last attachment is no trespass; the goods at the time having been in the custody of the law. *Gins-berg v. Pohl*, 35 Md. 505. Not liable for going upon premises of third person to seize goods of debtor if he enters without needless force and remains no longer than necessary. *Link v. Har-lington*, 23 Mo. App. 429.

It is difficult to name any subject in respect to which questions may not be raised; and if the existence of a question could be the test between judicial and ministerial action, there would be very little that could be classed as ministerial. Judicial action implies not merely a question, but a question referred for solution to the judgment or discretion of the officer himself. If the sheriff is commanded to levy upon the goods of a named person, the fact of his obedience is determined by ascertaining whether or not he has done so; if a magistrate is required to decide justly the controversy between two named persons, or if the assessor is required to value in just proportion the property of two named persons, no one can know whether or not the requirement has been obeyed unless he can look into the officer's mind and by thus ascertaining what was his real judgment, determine whether he has actually obeyed it in giving decision or in making the assessment. The difference is that the sheriff is to obey an exact *command, but the judicial officer is to follow [*397] his judgment. Even when the sheriff is embarrassed by the fact that the name of the defendant in the writ is the same with that of others in the neighborhood, he must at his peril ascertain who the real defendant is, and make service upon him.¹

The sheriff in seizing property upon his writ must always respect the liens of third persons. Thus, if he be authorized on a writ against a mortgagor, to levy upon the goods mortgaged, he can only take them subject to the superior rights of the mortgagee, and all his subsequent proceedings must be in subordination to such right.² So, where mechanics' or any other liens exist, he must recognize and take in subordination to them, and whatever he may do that prejudices the lien is wrongful.

It has been stated in another place that a sheriff is responsible for the misfeasance and nonfeasance of his deputies. This is the general rule. Where, however, the deputy is employed to do something not connected with his office although he may be employed because of the office, he must be regarded as a mere

¹ *Jarmain v. Hooper*, 6 M. & G. 827, 847.

² *Hobart v. Frisbie*, 5 Conn. 592; *O'Neal v. Wilson*, 21 Ala. 588; *Merritt v. Niles*, 25 Ill. 283; *Worthington*

v. Hanna, 23 Mich. 530; *Saxton v. Williams*, 15 Wis. 292; *Schrader v. Wolfen*, 21 Ind. 238; *Wootton v. Wheeler*, 23 Tex. 338.

private agent, and the sheriff is not responsible for his conduct. An illustration is where a chattel mortgage is delivered to the deputy to foreclose by seizing the property mortgaged. As any agent might do this, it is plainly not an official act.¹ The same is true of a deputy serving a distress warrant,² or doing any other act which the law does not require the sheriff officially to perform.³

Nor is the sheriff liable where, by consent of the plaintiff in the writ, the deputy does something not within his official authority, such as giving credit on an execution sale;⁴ or accepting in payment something besides money;⁵ nor in any case is he liable to the plaintiff for acts of the deputy which the plaintiff himself, or his attorney, directed or advised,⁶ or in [*398] respect *to which they gave discretionary authority to the deputy, within which he confined his action.⁷

Notaries Public. A notary public, by assuming to perform any official duty on request of a party concerned, impliedly undertakes to discharge it faithfully, and is liable to the extent of any resulting injury if he fails to do so. An illustration is, where commercial paper is delivered to him for protest and notice to the endorsers;⁸ or where he undertakes to certify to the acknowledgment of a conveyance.⁹

¹ Dorr v. Mickle, 16 Minn. 20.

² Moulton v. Norton, 5 Barb. 286.

³ Harrington v. Fuller, 18 Me. 277, citing Knowlton v. Bartlett, 1 Pick. 271; Cook v. Palmer, 6 B. & C. 739.

⁴ Gorham v. Gale, 7 Cow. 739; Armstrong v. Garrow, 6 Cow. 465.

⁵ Moore v. Jarrett, 10 Tex. 210.

⁶ Cook v. Palmer, 6 B. & C. 739; Marshall v. Hosmer, 4 Mass. 60; Tobey v. Leonard, 15 Mass. 200; Smith v. Berry, 37 Me. 298; Acker v. Ledyard, 8 Barb. 514; Humphrey v. Hathorn, 24 Barb. 278; Stevens v. Colby, 46 N. H. 103. Eastman v. Judkins, 59 N. H. 576; Odom v. Gill, 59 Geo. 180.

⁷ DeMoranda v. Dunkin, 4 T. R. 120; Strong v. Bradley, 14 Vt. 55.

⁸ Bank of Mobile v. Marston, 7 Ala. 108; Bowling v. Arthur, 34 Miss. 41.

But the notary is not liable if he obeys directions, even though they prove erroneous. Commercial Bank v. Varnum, 49 N. Y. 269. Nor where by the neglect of the holder of the note to keep good his rights as they then existed, the notary lost a valuable right of subrogation. Emmerling v. Graham, 14 La. Ann. 389. Nor where the endorser has voluntarily made payment after the neglect of the notary to fix his liability. Warren Bank v. Parker, 8 Gray, 221. Nor where, independent of the notice which the notary has failed to give to the endorser, the holder of the paper can hold the endorser on other grounds. Franklin v. Smith, 31 Wend. 623.

⁹ Notary held responsible for not certifying to the facts requisite to

Taxing Officers. Officers whose duty requires them to levy a tax to satisfy a judgment, and who refuse or neglect to do so, though commanded to proceed by competent judicial authority, are liable to the judgment creditor for their failure. "The rule," it is said, in such a case, "is well settled, that 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 may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty, and honest intentions, will not excuse the offender." ¹

***Want of Means to Perform a Duty.** Where a min- [*399]isterial 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.² But when the funds are at his command, and the duty is still neglected, there is no reason why he should not be held responsible to parties injured. In New York, on this ground, the superintendent of canal repairs, who neglected to perform his duty, was held liable to parties who

make out a sufficient acknowledgment. *Fogarty v. Finlay*, 10 Cal. 239. See *Bank v. Murfey*, 68 Cal. 455. No recovery under California statute, when if no mistake had been made the deed would have been worthless because the land was. *McAllister v. Clement*, 16 Pac. Rep. 775. None in Iowa, unless he acted knowingly as well as negligently. *Scotten v. Fegan*, 63 Ia. 236. Intentional dereliction must appear, the act is a judicial one. *Com. v. Haines*, 97 Penn. St. 228. His motive must have been malicious or corrupt. *Henderson v. Smith*, 26 W. Va. 829. The notary who gives a false certificate of acknowledgment is liable to the grantees only; not to a subsequent purchaser under him, who may find his title defective in consequence. *Ware v. Brown*, 2 Bond, 267.

¹ *SWAYNE, J.*, in *Amy v. Supervisors*, 11 Wall. 136, 138. *St. Joseph, & Co. v. Leland*, 90 Mo. 177. In the case of an official neglect, the delinquent officer could only be liable for the actual damages. *Tracy v. Swartwout*, 10 Pet. 80. And if the duty consisted in giving credit for moneys, he would not be chargeable in damages beyond the interest on the moneys. *Kendall v. Stokes*, 8 How. 87.

Where an officer fails to perform a plain duty imposed upon him by law, no question of contributory negligence can arise, because it is impossible that the party concerned can contribute to his neglect. *Strickfaden v. Zipprick*, 49 Ill. 286.

² See *Threadgill v. Board of Comrs*, 6 S. E. Rep. 89 (N. C.)

were prevented from making use of the canal, or delayed in its use in consequence.¹ So commissioners who have charge of cutting and keeping open public drains, while they could not be liable to individuals for any neglect to cause drains to be cut, inasmuch as they could not be chargeable with a duty to any particular individual in respect thereto, yet when the drains are actually cut, they are chargeable with a duty to every person who would be injured by neglect to keep them open; and 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, the right of action against them is complete.²

Highway Officers. There seems to be a little difficulty in determining whether, where an officer is charged with the duty of making and repairing highways and public bridges, this duty can be regarded as a duty to individuals who may have occasion to use the public way, or whether, on the other hand, it is to be considered a duty to the public only. In New York it was decided in an early case, that an action would not lie against an overseer of highways, at the suit of a party injured in [*400] *consequence of a bridge within his jurisdiction being out of repair. The decision was grounded in part upon the fact that the declaration did not show that the overseer had in his hands or under his control the means for performing the duty of repair, and in part upon a doubt whether the superior officers, the commissioners of highways, were not the parties in fault; but the reasoning goes to the full extent, that the duty of repair was a duty to the public, not to individuals.³ The doctrine of that case has been fully approved in South Carolina,⁴ Indi-

¹ *Adsit v. Brady*, 4 Hill, 630; *Shepherd v. Lincoln*, 17 Wend. 250; *Griffith v. Follett*, 20 Barb. 620; *Robinson v. Chamberlain*, 34 N. Y. 389; *Insurance Co. v. Baldwin*, 37 N. Y. 648.

² See *Child v. Boston*, 4 Allen, 41; *Parker v. Lowell*, 11 Gray, 353; *Barton v. Syracuse*, 37 Barb. 292; *Hover v. Barkhoof*, 44 N. Y. 113; *Wallace v. Muscatine*, 4 Greene, (Iowa.) 373; *Phillips v. Commonwealth*, 44 Penn. St. 197.

³ *Bartlett v. Crozier*, 17 Johns. 439, reversing same case, 15 Johns. 250.

⁴ *M'Kenzie v. Chovin*, 1 McMul. 223. In this case, as in *Bartlett v. Crozier*, importance was attached to the fact that the duties of the officer were compulsory and uncompensated. "The duty of keeping the roads and bridges in repair is prescribed and regulated by the statute, a duty imposed on the commissioners under a penalty for refusing to serve,

ana,¹ Ohio,² and Nebraska.³ Later New York cases, where suits have been brought against commissioners of highways, lay down a different doctrine, and hold them responsible for injuries caused by their neglect to keep the public ways in repair, provided they have the means of doing so.⁴ The rule of law on the subject in that State, as it is now settled, is very tersely stated in a leading case: "That commissioners of highways, having the requisite funds in hand, or under their control, are bound to repair bridges which are out of repair, they having notice of their condition; and they are bound to repair them with reasonable and ordinary care and diligence, and if they omit this duty, they are liable to individuals who sustain special damages from such neglect. I do not mean to limit the rule to cases where they have actual notice of the *condition of the bridges, because there may [*401] be cases where their ignorance of their condition would be culpable. And public policy favors this rule. 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. The burden imposed upon these officers by this rule is not too great. All it requires of them is, that they shall, with reasonable care and fidelity, discharge the duties which they have solemnly sworn to perform."⁵ A similar

as well as for not repairing, recoverable by indictment; and it would be against every principle of justice and right to hold them responsible, out of their private estates, for every injury that an individual may sustain, as well as liable to be indicted for every neglect of duty; to compel them to serve, and then subject them to a liability from which their constituents and employers are exempt. We cannot suppose such was the intention of the legislature." See, also, the previous case of *Young v. Commissioners*, 2 Nott & McCord, 537.

¹ *Lynn v. Adams*, 2 Ind. 143. The reasoning in this case was similar to that in the cases above noted, and the

same remark may be made of the two which follow.

² *Dunlap v. Knapp*, 14 Ohio, (π. s.) 64.

³ *McConnell v. Dewey*, 5 Neb. 385.

⁴ *Smith v. Wright*, 24 Barb. 170. This case was disapproved in *Garlinghouse v. Jacobs*, 29 N. Y. 297; but the principle was affirmed as sound in *Hover v. Barkhoof*, 44 N. Y. 113.

⁵ *Hover v. Barkhoof*, 44 N. Y. 113; 125 per Earl, Comr. A judgment against a commissioner is not a town charge. *People v. Town Aud.*, 74 N. Y. 310; 75 N. Y. 316. To be exempt the commissioners must have tried in vain to raise funds. *Warren v.*

liability is recognized as being imposed by statute in North Carolina.¹

De facto Officers. What has been said respecting the liability of officers will apply to those who are such *de facto* only, as well as to those who hold the office of right.² Indeed so far [*402] as one *has actually exercised the functions of a public officer, he would be estopped to deny that he was prop-

Clement, 24 Hun, 472. Where a bridge crosses a stream on the dividing line between towns, the commissioners of the two towns may be joined as defendants in a suit for injury caused by neglect to keep the bridge in repair. Bryan v. Landon, 8 Hun, 500. That a commissioner who constructs a bridge is liable for negligently leaving it in a dangerous condition, see Rector v. Pierce, 3 N. Y. Sup. Ct. (T. & C.) 416.

¹ Hathaway v. Hinton, 1 Jones, (N. C.) 243. In Huffman v. San Joaquin Co., 21 Cal. 426, the county was sued for such an injury. FIELD, Ch. J., says: "If any remedy exists for injuries resulting from neglecting to keep such bridges in repair, it must be sought either against the road overseers or supervisors personally." See, also, Sutton v. Board of Police, 41 Miss. 236. In Maryland it was decided, in County Commissioners v. Duckett, 20 Md. 468, that the county commissioners, being clothed in their corporate capacity with charge of and control over the property owned by the county, and over the county roads and bridges, with power to levy the needful taxes to keep them in repair, and with such power and control over the road supervisors as was sufficient to render the supervisors, in the eye of the law, their agents, were liable for damages resulting from the defective condition of the public roads. Subsequently a statute was passed making the supervisors liable,

and requiring them to give bond, which might be sued for the benefit of any person suffering for the supervisor's neglect. This statute did not relieve the county commissioners of their previous liability. County Commissioners v. Gibson, 36 Md. 229.

² A *de facto* officer cannot be compelled to act, and incurs no liability by refusing to act. Olmstead v. Dennis, 77 N. Y. 378. As to who are officers *de facto*, see O'Brian v. Knivan, Cro. Jac. 552; Harris v. Jays, Cro. Eliz. 699; Parker v. Kett, Ld. Raym. 658; Cocke v. Halsey, 16 Pet. 71; Fowler v. Beebee, 9 Mass. 281; Taylor v. Skrie, 3 Brev. 516; Parker v. Baker, 8 Paige, 428; Wilcox v. Smith, 5 Wend. 231; People v. Kane, 23 Wend. 414; People v. White, 24 Wend. 520; Burke v. Elliott, 4 Ired. 355; Brown v. Lunt, 37 Me. 423; State v. Bloom, 17 Wis. 521; People v. Bangs, 24 Ill. 184; Munson v. Minor, 22 Ill. 594; Barlow v. Standford, 82 Ill. 298; Clark v. Commonwealth, 29 Penn. St. 129; Commonwealth v. McCombs, 56 Penn. St. 436; Kimball v. Alcorn, 45 Miss. 151; Plymouth v. Painter, 17 Conn. 585; State v. Carroll, 83 Conn. 449; S. C. 9 Am. Rep. 409; State v. McFarland, 25 La. Ann. 547; Keeler v. Newbern, 1 Phil. (N. C.) 505; Kreidler v. State, 24 Ohio, (N. S.) 25; Johns v. People, 25 Mich. 499; Darrow v. People, 8 Col. 417; Cary v. State, 76 Ala. 78; Campbell v. Com., 96 Penn. St. 344; Nashville v. Thompson, 12 Lea, 344; Yorty v. Paine, 62 Wis. 154. There can be

erly filling it, for the purpose of escaping liability:¹ though doubtless he might abandon the office into which he had intruded at any time, on claim being made by the rightful party entitled, or even without such claim, unless he had given bonds to perform the duties. Such abandonment, however, could not excuse him from liabilities already incurred.²

none when the office has been abolished and there is none to fill. *In re Hinkle*, 81 Kan. 712. The acts of such officers within the authority of the office are perfectly good, so far as the public and third persons are concerned, and can only be questioned in a direct proceeding to try their title, or in some suit in which they seek to establish in their own favor some right growing out of or dependent upon the official character. See cases above cited. Also, *Bucknan v. Ruggles*, 15 Mass. 180; *Attorney General v. Lothrop*, 24 Mich. 235; *Blackstone v. Taft*, 4 Gray, 250; *Samis v. King*, 40 Conn. 298; *Downer v. Woodbury*, 19 Vt. 329; *Ex parte Strang*, 21 Ohio, (n. s.) 610; *Gregg v. Jamison*, 55 Penn. St. 468; *Cabot v. Given*, 45 Me. 144; *State v. Tolan*, 33 N. J. 195; *Leach v. Cassidy*, 23 Ind. 449; *McCormick v. Fitch*, 14 Minn. 252, and cases, p. 351, n. 8, *supra*.

¹ *Longacre v. State*, 8 Miss. 637; *Marshall v. Hamilton*, 41 Miss. 229;

Borden v. Houston, 2 Texas, 594; *Billingsley v. State*, 14 Md. 369. The principle has often been applied to persons who have assumed the functions of collectors of the public revenue. *Sandwich v. Fish*, 2 Gray, 298, 301; *Williamstown v. Willis*, 15 Gray, 427; *Johnston v. Wilson*, 2 N. H. 202, 206; *Horn v. Whittaker*, 6 N. H. 88; *Jones v. Scanland*, 6 Humph. 195; *Trescott v. Moan*, 50 Me. 347; *Wentworth v. Gove*, 45 N. H. 160.

² Persons undertaking to act as assessors of a town, without having been legally elected as such, are personally liable for the acts of a collector to whom they have issued a warrant for the collection of taxes assessed by them. *Allen v. Archer*, 49 Me. 346. Same rule applied to fish commissioners. *Bearce v. Fossett*, 34 Me. 575. So a justice is personally liable who issues process without having taken the oath of office. *Courser v. Powers*, 84 Vt. 517.

[*403]

*CHAPTER XIV.

IMMUNITY OF JUDICIAL OFFICERS FROM PRIVATE SUITS.

In the last chapter it was shown that where an officer is charged with a duty to an individual which he fails to perform, an action will lie against him on behalf of the person to whom the duty was owing. It was also shown that where a duty is only imposed as a duty to the public, no individual action will lie, though the consequence of a breach may happen to fall exclusively upon one or more individuals. It was admitted at the same time that it is not always easy to determine whether a particular office is charged with duties to individuals, and that the question must usually be decided on a consideration of the nature of the duty, and whether it contemplates only general protection and benefit, or the protection and benefit of such individuals as are liable to be specially affected. When the latter is the case, the duty is distributive, and arises in behalf of any one who is exposed to the injury meant to be guarded against whenever the exposure takes place.

The general subject requires further examination, as it concerns a class of official duties which are public in their nature, though in their discharge specially affecting individuals; but the time, manner and extent of the performance of which are left to the wisdom, integrity and judgment of the officer himself. In these cases it is conceded that, as a general rule, 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

[*404] with *responsibility in damages for the manner of its exercise, since to hold the officer to such responsibility

would be to confer a discretion and then make its exercise a wrong. Lord Chief Justice NORTH expressed the idea very tersely in the following language: "If a jury will find a special verdict, if a judge will advise and take time to consider, if a bishop will delay a patron and impanel a jury to inquire of the right of patronage, you cannot bring an action for these delays, though you suppose it to be done maliciously and on purpose to put you to charges; though you suppose it to be done *scienter*, knowing the law to be clear; for they take but the liberty the law has provided for their safety, and there can be no demonstration that they have not real doubts, for these are within their own breasts; it would be very mischievous that a man might not have leave to doubt without so great peril."¹

When it is said there can be no demonstration that there were not real doubts, or what were the real motives within the official breast, it is not meant that it is impossible for the law to investigate the fact. In many cases suits are allowed where a bad motive must be the gravamen of the complaint, and the motive is arrived at by showing that while the defendant has done one thing, all honest inducements, so far as they can be presented in evidence, should have inclined him to do something different. An inspection of his motives is thus invited in the light of the exposure which the facts known by or accessible to him makes: and though he asserts one motive, it may satisfactorily appear that he must have indulged another, because these facts, with the motive he pretends to, should have impelled him in a direction the opposite of that he took. And in the case of officials of even the highest station, when the State calls them to account for misconduct, they do not 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; the State rejects such an answer, and does not hesitate to inflict very serious punishment when it is satisfactorily shown that the discretion was abused through malice, or the judgment *perverted through favoritism or other im- [*405] proper motive. It is not, therefore, the mere difficulty of an inquiry into the facts that precludes civil liability to the

¹Barnardiston v. Soame, 6 State Trials, 1063, 1099. And, see Taaffe v. Downes, 3 Moore, P. C. C. 36; Randall v. Brigham, 7 Wall. 523.

party who has been injured by a neglect of judicial duty or an abuse of discretion.

If, however, we select the case of any judicial officer and endeavor to satisfy ourselves what would be the practical working of the opposite doctrine, we shall not be long in doubt that reasons abundant exist why the judge should be exempt from individual responsibility to those interested in the discharge of his duties. We shall also be able to perceive that while the upright judge may have reasons for desiring to be shielded against harassing litigation at the suit of those who may be displeased with his action, the general public has interests still more important which demand for him this immunity.

First, as regards the interest of the judge: Whoever brings his controversy before the courts may be assumed to believe that his case is sound both on the law and on the facts, and that if justice is done him, judgment will pass in his favor. Whoever defends a suit brought against him, may also be supposed to believe that he ought to succeed in his defense. One of the two must fail, and when he fails he can generally attribute it to some ruling of the judge which either conclusively determined the case, or gave such direction to the deliberations of the jury as required the result which they reached. The reasons assigned by the judge for his rulings may or may not be satisfactory to parties, and necessarily in the case of the defeated party, they are received by a mind prepared in advance not to agree to them. If, now, the judge can be held responsible to the defeated party for his action, it must be on the ground either, *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 action. One or the other of these is the only conceivable ground on which an action against the judge can be supported.

If an action were maintained on the first ground, it would be apparent that 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
 [*406] *summoned by a dissatisfied litigant to review them, it would be presumptuous for any man to place himself in

that position. Nor would the protection be sensibly greater if his liability were to depend upon a showing of bad motive. And here we cannot do better than to reproduce the language of an important decision. "Controversies involving not merely great pecuniary interests, but the liability and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in the courts, in which there is great conflict in the evidence, and great doubt as to the law which should govern their decision. It is this class of cases that impose upon the judge the severest labor, and often create in his mind a fearful sense of responsibility. Yet it is in precisely this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his conviction of the correctness of his own view of the case is he 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. Few persons, sufficiently irritated to institute an action against a judge for his judicial acts, would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."¹

Turning, now, to the public aspect which such a suit would present, the following may be assigned as reasons why the public interest 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 [*407] his own interests, when he should be giving them up

¹ FIELD, J., in *Bradley v. Fisher*, 13 Wall. 348. To the same effect is *Fray v. Blackburn*, 3 Best & S. 576. And, see *Le Caux v. Eden*, Doug. 594.

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 defence 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. This of itself is a serious evil, affecting the whole community; for the confidence and 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 the judiciary is unjustly assailed in the public press, the wise judge refuses to put himself in position of defendant by responding, but he leaves the tempest to rage until an awakened public sentiment silences his detractors. But if he is forced upon his defense, as was well said in an early case, 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 prejudices, 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 specially 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. Of what avail, for example, could the civil liability of the judge have been to the victims of the brutality of Jeffries, if, while he was at the height of his power and influence, and was wreaking his brutal passions upon them amidst the applause of crowded court rooms, these victims had demanded redress against him at the hands of any other court and jury of the realm?

4. Such civil responsibility would constitute a serious [*408] *obstruction to justice, in that it would render essential a large increase in the judicial force, not only as it would

¹ *Floyd v. Barker*, 12 Co. 25; quoted in 13 Wall. 349.

multiply litigation, but as it would open each case to endless controversy. This of itself would be an incalculable evil. The interest of the public in general rules and in settled order is vastly greater than in any results which only affect 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. And it is to be borne in mind that if one judge can be tried for his judgment, the one who presides on the trial may also be tried for his, and thus the process may go on until it becomes intolerable.

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. A want of integrity, a failure to apply his judgment to the case before him, a reckless or malicious disposition to delay or defeat justice may exist and 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 require the facts of many cases to establish the fault; it may be necessary to show the official action for years. Where an officer is impeached, the whole official career is or may be gone into; in that case one delinquency after another is perhaps shown—each tends to characterize the other, and the whole will enable the triers to form a just opinion of the official integrity. But in a private suit the party would be confined to the facts of his own case: it is against inflexible rules that one man should be allowed to base his recovery for his own benefit on a wrong done to another, and could it be permitted, the person first wronged, and whose right to redress would be as complete as any, would lose this advantage by the very fact that he stood first in the line of injured persons.

Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the State says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the State, and the peace and [*409]

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 is what the State, speaking by the mouth of the common law, says to the judicial officer.

The rule thus laid down applies to large classes of offices, embracing some the powers attached to which are very extensive, and others whose authority is exceedingly limited. It applies to the highest judge in the State or nation,¹ but it also applies to the lowest officer who sits as a court and tries petty causes.²

¹ *Dicas v. Lord Brougham*, 6 C. & P. 249; *Fray v. Blackburn*, 3 Best & S. 576; *Yates v. Lansing*, 5 Johns. 282; S. C. 9 Johns. 394; *Lining v. Bentham*, 2 Bay, 1; *Bradley v. Fisher*, 13 Wall. 335. *Lange v. Benedict*, 73 N. Y. 12.

² *Floyd v. Barker*, 12 Co. 25; *Mos-
tyn v. Fabrigas*, Cowp. 161; *Lowther
v. Earl of Radnor*, 8 East, 113; *Pike
v. Carter*, 3 Bing. 78; *Basten v. Carew*,
3 B. & C. 653; *Mills v. Collett*, 6 Bing.
85; *Holroyd v. Breare*, 2 B. & Ald.
773; *Fawcett v. Fowlis*, 7 B. & C. 394;
Brodie v. Rutledge, 2 Bay, 69; *Evans
v. Foster*, 1 N. H. 374; *Green v. Mead*,
18 N. H. 505; *Burnham v. Stevens*,
33 N. H. 247; *Jordan v. Hanson*, 49
N. H. 199; *Pratt v. Gardner*, 2 Cush.
63; *Kelly v. Bemis*, 4 Gray, 83; *Am-
bler v. Church*, 1 Root, 211; *Moore v.
Ames*, 3 Caines, 170; *McDowell v.
Van Deusen*, 12 Johns. 356; *Cunning-
ham v. Bucklin*, 8 Cow. 178; *Stewart
v. Hawley*, 21 Wend. 552; *Ramsey v.
Riley*, 13 Ohio, 157; *Stewart v. South-
ard*, 17 Ohio, 402; *Stone v. Graves*, 8
Mo. 148; *Lenox v. Grant*, 8 Mo. 254;
Taylor v. Doremus, 16 N. J. 473;
Morris v. Carey, 27 N. J. 377; *Man-
gold v. Thorpe*, 33 N. J. 134; *Little v.
Moore*, 4 N. J. 74; *Hamilton v. Wil-
liams*, 26 Ala. 527; *Walker v. Halleck*,
32 Ind. 239; *Deal v. Harris*, 8 Md. 40;

Morrison v. McDonald, 21 Me. 550;
Downing v. Herrick, 47 Me. 462;
Bailey v. Wiggins, 5 Harr. 462; *Reid
v. Hood*, 2 N. & McCord, 471; *Wasson
v. Mitchell*, 18 Iowa, 153; *Londegan
v. Hammer*, 80 Iowa, 508; *Fuller v.
Gould*, 20 Vt. 643; *Kibling v. Clark*,
53 Vt. 379; *Trammell v. Russellville*,
34 Ark. 105; *Ely v. Thompson*, 3
A. K. Marsh. 70. If in the exercise of
judicial functions upon a matter with-
in his jurisdiction he acts corruptly
or fraudulently, he is not liable civilly.
Irton v. Lewis, 56 Ala. 190; *Kress v.
State*, 65 Ind. 106. But see, *Knell v.
Briscoe*, 49 Md. 414; *Hitch v. Lam-
bright*, 66 G. O. 228. In *Phelps v.
Sill*, 1 Day, 315, it is held that an ac-
tion will not lie against a judge of pro-
bate for neglecting to take security
from the guardian of an infant, al-
though such an infant had personal
estate and the guardian was a bank-
rupt. Though a judge mistakes, it
was said, it is sufficient for him that
he acted judicially. For a remarka-
ble case in which a justice was held
not responsible, though he seems to
have acted very improperly and in
defiance of law, see *Raymond v.
Bolles*, 11 Cush. 315. The case of
Stone v. Graves, 8 Mo. 148, was also
one of great apparent misbehavior.

There are *dicta* in some cases that

and *it applies not in respect to their judgments merely, [*410] but to all process awarded by them for carrying their judgments into effect.¹

Nor is this rule of judicial immunity restricted in its protection to the judges proper, but it 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.² It extends also to grand and petit jurors in the discharge of their duties as such; ³ to assessors upon whom is imposed the duty of valuing property for the purpose of a levy of taxes; ⁴ to commissioners appointed to appraise damages when property is taken under the right of eminent domain; ⁵ to officers empowered to lay out, alter, and discontinue highways; ⁶ to highway officers in deciding that a *person claiming exemption from a road tax is not [*411]

a justice is civilly responsible when he acts maliciously or corruptly, but they are not well founded, and the express decisions are against them, as the authorities above collected abundantly show. It is said in *Garfield v. Douglass*, 22 Ill. 100, that if a justice corruptly, or from improper motives, alters his docket, he will be liable both civilly and criminally; but such an act would not be judicial, but purely unofficial and wrongful.

A justice exercises a judicial discretion in determining to exclude persons from his court room while a trial is in progress. *State v. Copp*, 15 N. H. 212. In determining upon the authority of one person to appear for another; *Morton v. Crane*, 39 Mich. 520; In taxing an attorney fee; *State v. Jackson*, 63 Ind. 58.

¹ *Hammond v. Howell*, 1 Mod. 184; *Dicas v. Lord Brougham*, 6 C. & P. 249. And, see cases cited in last note generally. While for illegally issuing an execution a justice may be liable. *Sullivan v. Jones*, 2 Gray 570, he is not for issuing one on his judgment, not appealed from though erroneous,

at demand of judgment creditor. *White v. Morse*, 139 Mass. 162.

² *Sutton v. Johnstone*, 1 T. R. 493; *Grear v. Marshall*, 4 Fost. & F. 485; *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94; S. C. 9 Best & S. 768; *Dawkins v. Lord Rokeby*, 4 Fost. & F. 806, where the subject was largely examined. Coroners, in holding inquests, are judges, and are not liable for excluding persons they think should not be present. *Garnett v. Ferrand*, 6 B. & C. 611.

³ *Hunter v. Mathis*, 40 Ind. 356; *Turpen v. Booth*, 56 Cal. 65.

⁴ *Weaver v. Devendorf*, 3 Denio, 117. See *Auditor v. Atchison, &c.*, R. R. Co., 6 Kan. 500, and a full discussion of the subject, with citation of numerous cases, in *Cooley on Taxation*, pp. 551 to 557.

⁵ *Van Steenbergh v. Bigelow*, 3 Wend. 42.

⁶ *Sage v. Laurain*, 19 Mich. 137. The case of *Turnpike Road v. Champney*, 2 N. H. 199, is *contra*. The action in that case was for laying out a highway merely for the purpose of enabling passengers to avoid the

in fact exempt,¹ or that one arrested is in default for not having worked out the assessment;² to members of a township board is deciding upon the allowance of claims;³ to arbitrators,⁴ and to the collector of customs in exercising his authority to sell perishable property, and in fixing upon the time for notice of sale.⁵

But it is an interesting and very important question whether, in the case of that class of officers who do not hold courts, but exercise what may be and often is called power *quasi* judicial, like assessors of lands for taxation, the immunity is not after all only partial and limited by good faith and honest purpose. There

plaintiff's toll-gate. RICHARDSON, Ch. J., says: "The powers given to selectmen by the statutes are to be exercised for purposes of public and private convenience and accommodation, and when honestly and properly exercised, the statute will be a sufficient warrant for the doings of selectmen. But if unmindful of the true objects of these statutes, selectmen lay out public or private ways for purposes of wrong and injury to individuals, they are not to be protected by these statutes, but, like other wrong-doers, must be held answerable for the damages that flow from their unlawful acts. There is nothing in the nature of the powers conferred in this instance that can protect selectmen from an action. They seem to stand in the situation of a moderator of a town meeting, who is unquestionably answerable for maliciously rejecting the vote of one who has a right to vote. If the selectmen should lay out a road around a turnpike-gate merely for the purpose of enabling travelers to evade the payment of toll, it is impossible to doubt that an action might be maintained for the injury. For the law affords no other remedy for the injury. On the other hand, should the public convenience require a road to be laid out [parallel] to a turnpike,

it might, without doubt be lawfully done, although it might enable passengers to evade the payment of toll. The public convenience and accommodation are in no case to be sacrificed to the local situation of a turnpike gate.

"In this case, the petition, upon which the defendant acted, stated as a reason why the road should be laid out, that the petitioners were grievously burthened with paying toll at the gate. If for this cause only the defendants proceeded to lay out the road, their proceedings were most manifestly illegal. Such a grievance it was not their province to redress. They had no right to interfere. If the corporation have abused their privileges granted by the charter by erecting a gate at this place, there is, without doubt, a remedy; but it is not to be given by the selectmen in this manner."

¹ Harrington v. Commissioners, &c., 2 McCord, 400.

² Freeman v. Cornwall, 10 Johns. 470.

³ Wall v. Trumbull, 16 Mich. 223.

⁴ Pappa v. Rose, L. R. 7 C. P. 32; Jones v. Brown, 54 Ia. 74.

⁵ Gould v. Hammond, 1 McAllister, 235. He is not liable, it is said, except for acting from corrupt motive.

are certainly many cases which hold, and more which assume, that the law will hold such officers liable if they act maliciously to the prejudice of individuals.¹ Thus, it is said that the *members of a school board may be held responsible for [*412] the dismissal of a teacher, if they act maliciously and without cause;² and a county clerk, for willfully and maliciously approving an insufficient appeal bond;³ and a wharfmaster, for the removal of a ship from a certain dock, where it can be shown that the order was given maliciously, and with the purpose to cause injury.⁴ It has also been assumed that the selectmen of a

¹ See *Hoggatt v. Bigley*, 6 *Humph.* 236; *Baker v. State*, 27 *Ind.* 485; *Chickering v. Robinson*, 8 *Cush.* 543; *Gregory v. Brooks*, 37 *Conn.* 365; *Wall v. Trumbull*, 16 *Mich.* 228; *Seaman v. Patten*, 2 *Caines*, 312; *Tompkins v. Sands*, 8 *Wend.* 462; *Reed v. Conway*, 20 *Mo.* 22; *Lillenthal v. Campbell*, 22 *La. Ann.* 600; *Williams v. Weaver*, 75 *N. Y.* 30; *McDaniel v. Tebbetts*, 60 *N. H.* 497. In *Harman v. Tappenden*, 1 *East*, 555, it is assumed that an action will lie against officers of corporation if, in disfranchising members, they act maliciously or on purpose to deprive the plaintiff of that particular advantage which resulted to him from his corporate character. Some of these cases assume that a justice of the peace is liable where he acts maliciously; but the authorities will not justify this assumption. See *Lenox v. Grant*, 8 *Mo.* 254; *Stone v. Graves*, 8 *Mo.* 148; *Morrison v. McDonald*, 21 *Me.* 550; *Taylor v. Doremus*, 16 *N. J.* 473; *Way v. Townsend*, 4 *Allen*, 114; *Bailey v. Wiggins*, 5 *Harr.* 462; *Little v. Moore*, 4 *N. J.* 74.

² *Bennett v. Fulmer*, 49 *Penn. St.* 157. A school committee is not liable for expelling children from school if they act in good faith. *Donahoe v. Richards*, 38 *Me.* 379; *Stewart v. Southard*, 17 *Ohio*, 402; *Stephenson v. Hall*, 14 *Barb.* 222. See *Spear v.*

Cummings, 23 *Pick.* 224. See *Ferrier v. Tyler*, 48 *Vt.* 444; *S. C.* 21 *Am. Rep.* 183.

³ *Billings v. Lafferty*, 31 *Ill.* 318. In *Reed v. Conway*, 20 *Mo.* 22, there is an important negative pregnant in the holding that a surveyor general is not liable to an action for revoking the commission of a deputy surveyor, annulling a surveying contract, and refusing to receive and examine the field notes, where, without malice, and in good faith, he exercises his judgment. Following this case, see *Edwards v. Ferguson*, 73 *Mo.* 686, where officers with discretionary powers are held not liable except for their malicious acts. Here a board of school regents refused to pay a balance due a contractor for building a school. See, also, *Chamberlain v. Clayton*, 56 *Ia.* 331. So a highway officer who acts in good faith is not personally liable for so cutting a ditch as to flow land of an adjoining owner. *Spitznogle v. Ward*, 64 *Ind.* 30; *McOsker v. Burrell*, 55 *Ind.* 425. A duty imposed upon aldermen to award a contract to the lowest responsible bidder is a judicial duty, for the erroneous or even corrupt performance of which they are not civilly liable. *East River Gas Light Co. v. Donnelly*, 25 *Hun.* 614.

⁴ *Gregory v. Brooks*, 37 *Conn.* 365. See *Brown v. Lester*, 21 *Miss.* 392.

town may be held liable to one for whom they appoint an overseer as an incompetent person, provided they act from malice and without probable cause.¹ Also, that members of a court martial may be liable to parties maliciously convicted by them of delinquency in the performance of military duty.²

[*413] *In respect to these last cases, though they seem out of harmony with the general rule above laid down, and the reasons on which it rests, yet we may perhaps, safely concede that there are various duties lying along the borders between those of a ministerial and those of a judicial nature, which are usually intrusted to inferior officers, and in the performance of which it is highly important that they be kept as closely as possible within strict rules. If courts lean against recognizing in them full discretionary powers, and hold them strictly within the limits of good faith, it is probably a leaning that, in most cases, will be found to harmonize with public policy.³

Whether 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*,⁴

Also, *Wasson v. Mitchell*, 18 Iowa, 153 (case of supervisors); *Walker v. Halleck*, 32 Ind, 239 (members of common council); *Culver v. Avery*, 7 Wend. 380 (loan officer); *Downing v. McFadden*, 18 Penn. St. 334 (canal commissioner); *Gregory v. Brown*, 4 Bibb, 28 (justice of the peace.)

¹ *Parmalee v. Baldwin*, 1 Conn. 313.

² *Shoemaker v. Nesbit*, 2 Rawle, 201. *Macon v. Cook*, 2 N. & McCord, 379. This seems to be going a great way, but certainly no further than the case of *Stewart v. Cooley*, 23 Minn. 347; 8 C.23 Am Rep. 690. The action in that case was against the judge of a municipal court and others, charging that they conspired to institute a malicious prosecution against the plaintiff, and that one of the defendants made complaint against the plaintiff for perjury, upon which the judge and clerk issued a warrant for his

arrest, which was served, and the plaintiff brought into court for examination, whereupon he was discharged for the failure of the complainant to appear. This complaint was held to set forth a good cause of action. The wrongful act on the part of the judge here must have consisted in the issuing of process; and as to that he could have had no discretion if the complaint was sufficient, or if he had, it was a judicial discretion, and to hold him liable by charging some bad motive lying back of it seems to come directly within the condemnation of *Bradley v. Fisher*, 13 Wall. 335, above referred to.

³ See *Pike v. Megoun*, 44 Mo. 491.

⁴ *Ld. Raym.* 938; 1 *Salk.* 19; 8 *State Trials*, 89. Compare *Drew v. Coulton*, 1 *East*, 563, note.

the returning officer who refused to admit a qualified elector to vote was held liable in damages at his suit.¹ This ruling was followed in Massachusetts at an early day, Chief Justice PARKER setting forth the reasons with great clearness and cogency: "The selectmen of a town," he says, "cannot be proceeded against criminally for depriving a citizen of his vote, unless their conduct is the effect of corruption or some wicked and base motive. If, then, a civil action does not lie against them, the party is deprived of his franchise without any relief, and has no way of establishing his right to any future suffrage. Thus a man may be prevented for his life from exercising a constitutional privilege, by the incapacity or inattention of those who are appointed to regulate elections. The decision of the selectmen is necessarily final and conclusive as to the existing election. No means are *known by which the rejected vote may be [*414] counted by any other tribunal, so as to have its influence upon the election; or, at least, no practice of that kind has ever been adopted in this State. There is, therefore, not only an injury to the individual, but to the whole community, the theory of our government requiring that each elective officer shall be appointed by the majority of votes of all the qualified citizens who choose to exercise their privilege. Now if a party duly qualified is unjustly prevented from voting, and yet can maintain no action for so important an injury, unless he is able to prove an ill design in those who obstruct him, he is entirely shut out from a judicial investigation of his right; and succeeding injuries may be founded on one originally committed by mistake. He may thus be perpetually excluded from the common privilege of citizens, without any lawful means of asserting his rights and restoring himself to the rank of an active citizen. Such a doctrine would be inconsistent with the principles and provisions of our free constitution, and must give way to the necessity of main-

¹ It is proper to say that this decision has been qualified by later cases, and the election officer is now held not liable for an erroneous rejection of a vote, provided he acted *bona fide*. See *Cullen v. Morris*, 2 Stark. 577. The same rule applied to

a church warden as officer of a parish election. *Tozer v. Child*, 6 El. & Bl. 289; S. C. in Exchequer Chamber, 7 El. & Bl. 377, 381, where the question is made whether Lord Holt did not insist on malice as essential to the action.

taining the people in their rights, secured to them by the form of their government.”¹

It will be seen from the foregoing that the learned judge plants his conclusion on the ground of State necessity and the preservation of free institutions. Our institutions rest upon the ballot, and must be preserved by protecting the liberty of casting it. If any officer denies or obstructs this liberty, he takes away a privilege valuable to the possessor and necessary to the country, and if he does this by mistake, and not of malice, the consequences should nevertheless fall upon him. The same rule has been laid down in Ohio.²

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, but are made to respond in damages when they maliciously deny the voter's right. Says BARTOL, Ch. J., referring to the Massachusetts and Ohio decisions: “The decisions in those States [*415] rest upon *the principle that a party who, like the plaintiff, has been deprived of a right, is thereby injured, and must have a remedy. It seems to us that the error in the application of that principle to this case consists in a misapplication of what is the right of a citizen under our election laws. In one sense, if he is a legal voter, he has the right to vote, and is injured if deprived of it; but the law has appointed a means whereby his right to vote is decided, and for that purpose has provided judges to determine that question, and has also provided the most careful guarantees for a proper discharge of their duties by the judges, by the mode of their selection and their oaths 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 *willfully*, fraudulently, or corruptly. If they do so act, they are liable both civilly and

¹ *Lincoln v. Haggood*, 11 Mass. 350, 855. See, also, *Gardner v. Ward*, 2 Mass. 244, note; *Kilham v. Ward*, 2 Mass. 236; *Henshaw v. Foster*, 9 Pick. 312; *Capen v. Foster*, 12 Pick. 485; *Keith v. Howard*, 24 Pick. 292; *Blanchard v. Stearns*, 5 Met. 298.

² *Jeffries v. Ankenny*, 11 Ohio, 372; *Anderson v. Milliken*, 9 Ohio, (N. S.) 568; *Monroe v. Collins*, 17 Ohio, (N. S.) 665. See *Long v. Long*, 57 Ia. 497.

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 Like reasoning has led to the same conclusion in other States.² And the principle applies as well to the officers who have charge of the registration of voters preliminary to an election as to the judges or inspectors who receive the ballots.³

¹ *Bevard v. Hoffman*, 18 Md. 479, 482. And, see *Elbin v. Wilson*, 33 Md. 135; *Anderson v. Baker*, 23 Md. 531; *Friend v. Hamill*, 34 Md. 298.

² *New York*: *Jenkins v. Waldron*, 11 Johns. 114; *Goetcheus v. Matthewson*, 61 N. Y. 420 (where DWIGHT, Commissioner, examines the subject with fullness and ability). See *People v. Boas*, 29 Hun, 377. *Pennsylvania*: *Weckerly v. Geyer*, 11 S. & R. 35. *Kentucky*: *Caulfield v. Bullock*, 18 B. Mon. 495; *Morgan v. Dudley*, 18 B. Mon. 693; *Chrisman v. Bruce*, 1 Duv. 63; *Miller v. Rucker*, 1 Bush, 135. *Indiana*: *Carter v. Harrison*, 5 Blackf. 138. *Michigan*: *Gordon v. Farrar*, 3 Doug. (Mich.) 411. *New Hampshire*: *Wheeler v. Patterson*, 1 N. H. 88; *Turnpike Co. v. Champney*, 2 N. H. 199. *North Carolina*: *Peavey v. Robbins*, 8 Jones, 339. *Tennessee*: *Rail v. Potts*, 8 Humph. 225. *West Virginia*: *Fausler v. Parsons*, 6 W. Va. 486; S. C. 20 Am. Rep. 431. *Delaware*: *State v. McDonald*, 4 Harr. 555; *State v. Porter*, 4 Harr. 556. *Louisiana*: *Dwight v. Rice*, 5 La. Ann. 590; *Bridge v. Oakey*, 3 La. Ann. 968; *Patterson v. D'Auterive*, 6 La. Ann. 467. *Rhode Island*: *Keenan v. Cook*, 12 R. I. 52. And, see *Sanders v. Getchell*, 76 Me. 158, as to what is "unreasonable" intrusion under a statute limiting liability of officers to unreasonable, cor-

rupt and willfully oppressive conduct. The above doctrine has been applied to officers whose duty was to qualify and induct into office an elective officer, and who refused to qualify him. *Hannan v. Grizzard*, 6 S. E. Rep. 93 (N. C.)

³ *Fausler v. Parsons*, 6 W. Va. 486; *Pike v. Megoun*, 44 Mo. 492; *Murphy v. Ramsey*, 114 U. S. 15; *Larned v. Wheeler*, 140 Mass. 390. If registration officers refuse to register a voter, but afterwards, and before the election reconsider their action, and place his name on the list, so that he may vote if he shall present himself at the polls, which he fails to do, they are not liable. *Bacon v. Benchley* 2 Cush. 100.

Judges of election are not liable if, in good faith, they reject the vote of one who is an elector in fact, but whose actions at the time of presenting his ballot, led them to believe he was not. *Humphrey v. Kingman*, 5 Met. 162. See *Gates v. Neal*, 23 Pick. 808.

For the evidence receivable to show improper motives in the election officers in rejecting votes, see *Elbin v. Wilson*, 33 Md. 135; *Friend v. Hamill*, 34 Md. 298.

Where one's right to vote depends upon payment of a tax, an assessor is not liable to one upon whom he fails to assess a tax, unless it be shown

[*416] *In some States it has been deemed wise to make the voter himself the conclusive judge of his right to vote. If his right is questioned, an oath which embraces the several requisites of qualification is tendered to him, 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. This legislation assumes that the course marked out by it is safer and less liable to abuses than leaving the decision to any tribunal. The oath is taken with the penalties of perjury in view, and these penalties are thought to be a better protection to the privilege of suffrage than any conclusion of judges or inspectors, whose means of information must often be defective, and who may not only act under honest mistakes, but also, when called upon to act in the excitement of an election which calls up and intensifies the party passions, be influenced by partisan or other improper feelings or prejudices. Whenever the law thus makes a man the final judge of his own right, the election officers have only a ministerial duty to perform; they must receive the vote if the oath is taken, and they are responsible as in other cases of ministerial duties if they refuse.¹

Jurisdiction Essential. Every judicial officer, whether the grade be high or low, must take care, before acting, to inform himself whether the circumstances justify his exercise of the judicial function. A judge is not such at all times and [*417] for all *purposes: when he acts he must be clothed with jurisdiction; and acting without this, he is but the individual falsely assuming an authority he does not possess. The officer is judge in the cases in which the law has empowered him to act, and in respect to persons lawfully brought 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. Neither is he exercising the judicial function

that the omission was willful and malicious. *Griffin v. Rising*, 11 Met. 839.

¹ See *Spragins v. Houghton*, 8 Ill. 377; *State v. Robb*, 17 Ind. 536; *Gil-*

lespie v. Palmer, 20 Wis. 544; *People v. Pease*, 30 Barb. 588; *Chrisman v. Bruce*, 1 Duv. 63; *People v. Gordon*, 5 Cal. 235.

when, being empowered to enter one judgment or make one order, he enters or makes one wholly different in nature. When he does this he steps over the boundary of his judicial authority, and is as much out of the protection of the law in respect to the particular act as if he held no office at all. This is a general rule.¹

Jurisdiction in a judge may be defined as the authority of law to act officially in the matter then in hand. One set of facts under the law confers it in the case of the assessor of taxes, and another set of facts confers it in the case of the commissioner of highways or the sewer commissioner. 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 neither in their case nor in the case of the inferior courts will any intendment of law be made in favor of jurisdiction when their action is called in question, but they must show by 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

¹ Case of the Marshalsea, 10 Co. 68; Groenvelt v. Burwell, 1 Ld. Raym. 454; Yates v. Lansing, 5 Johns. 282; Phelps v. Sill, 1 Day, 315; Palmer v. Carroll, 24 N. H. 314; Rowe v. Addison, 84 N. H. 306; Craig v. Burnett, 33 Ala. 728; Clarke v. May, 2 Gray, 410; Piper v. Pearson, 2 Gray, 120; State v. Nerland, 7 S. C. (N. S.) 241.

² The rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so, while nothing shall be intended to be within the jurisdiction of an inferior court but that which is specially so alleged. 1 Saund. 74. And, see The Brewers' Case, 1 Roll. Rep. 184; Parsons v. Loyd, 8 Wils. 841; Estopinal v. Peyroux, 37 La. Ann. 477.

³ "The chief distinction between judgments pronounced by courts of record and those pronounced by

courts not of record, arises from the presumption of law that the former courts act within their jurisdiction, while, so far as jurisdiction is concerned, no presumption is indulged in favor of the latter. Whoever relies upon the judgment of a court of special jurisdiction must establish every fact necessary to confer jurisdiction upon the court. The proceedings of all courts not of record must be shown to be within the powers granted to them by law, or such proceedings will be entirely disregarded. The acts of these two classes of courts have been properly likened to the acts of general agents and the acts of special agents. The former are to be regarded as valid in all cases to the extent that all persons relying upon them need show nothing beyond the general grant of authority; while the latter, to be binding, must first be

[*418] *When it is said that the jurisdiction of an inferior court must appear, what is meant is, that it must appear by the record itself; it cannot be supplied by intendment, or rest in the mere knowledge of witnesses to be brought out when the authority is questioned. Therefore, a warrant of commitment which does not in its recitals show authority in the magistrate to issue it cannot be upheld.¹ Neither can a warrant issued by a magistrate for a seizure of goods, in which the same infirmity is manifest.² Nor a justice's commitment of a witness for [*419] contempt, issued after *the case in which he was called had been disposed of.³ But where the facts alleged before a magistrate are sufficient to give him jurisdiction, and he pro-

shown to fall within the limits of a special or restricted grant. *Clark v. Holmes*, 1 Doug. (Mich.) 390; *Sears v. Terry*, 26 Conn. 273; *Shufeldt v. Buckley*, 45 Ill. 223; *Stanton v. Styles*, 5 Exch. 578; *Gray v. McNeal*, 12 Geo. 424; *Harrington v. People*, 6 Barb. 607; *Taylor v. Bruscup*, 27 Md. 219; *O. & M. R. R. Co. v. Shultz*, 31 Ind. 150; *Thompson v. Multnomah Co.*, 2 Or. 34. There is a further distinction in regard to the proceedings of these two classes of courts, arising from the fact that courts of special jurisdiction have no record, and therefore no unimpeachable memorial of their transactions. Any statement in relation to jurisdiction found among the papers, minutes, or other written matter kept by these courts, seems to be but *prima facie* evidence; in opposition to which it may be shown by any satisfactory means of proof that the authority of the court did not extend over the matter in controversy, nor over the parties to the suit." *Freeman on Judgments*, § 517, citing many cases.

It has been held, however, that this rule does not go so far as to permit the contradiction, in actions against a justice, of the returns of officers of the service of process by them by means of which suits were instituted; *Lightsey v. Harris*, 20 Ala. 409; nor

the recital of a justice in his docket that the parties appeared and went to trial before him. *Facey v. Fuller*, 13 Mich. 527. See *Gray v. Cookson*, 16 East, 13. Not even on a charge that the record was made up falsely and corruptly can the record of the justice be impeached in a suit against him. *Kelly v. Dresser*, 11 Allen, 31.

¹ *Wickes v. Clutterbuck*, 2 Bing. 483. See *Hill v. Pride*, 4 Call, 107; nor if commitment is for failure of officer to obey an order if there is no judgment on which to base it. *Lanpher v. Dewell*, 56 Ia. 153.

² *Newman v. Earl of Hardwicke*, 8 A. & E. 123; *McClure v. Hill*, 36 Ark. 263. So his mistaken belief as to his jurisdiction in case of criminal process will not protect. *Truesdell v. Combs*, 33 Ohio St. 186.

³ *Clark v. May*, 2 Gray. 410. In Louisiana it has been decided that a justice empowered to issue a warrant on proofs being made, though he issues one without proofs, is not liable; this being only an error in judgment. *Maguire v. Hughes*, 13 La. Ann. 281. But *quere* of this. In *Ackerley v. Parkinson*, 3 M. & S. 411, it is held that if a judicial officer has jurisdiction of the subject-matter, he is not liable for proceeding upon a citation, though the citation is void.

ceeds upon them to judgment and execution, his right to exemption from liability cannot be affected by the truth or falsity of those facts, or the sufficiency or insufficiency of the evidence adduced for the purpose of establishing them.¹

In the case of some officers the jurisdiction does not and cannot depend upon record. Thus, the jurisdiction of an assessor to impose a personal tax may depend upon the fact of residence, of which no record exists; and, therefore, the fact must always rest in the knowledge of witnesses. 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.²

It is universally conceded that when inferior courts or judicial officers act without jurisdiction the law can give them no protection whatever. The rule has been held to be otherwise, however, in the case of judges of the superior courts where the error has consisted in exceeding their authority. The particular case was one in which the judge, sitting in one court, ordered the name of an attorney to be stricken from the rolls for a contempt of authority committed in another court, of which the judge was also a member. It was held by the Federal Supreme Court that he was not responsible in a civil action for this error.³ Had it

¹ *Cave v. Mountain*, 1 M. & G. 257. The same principle was applied in the case of a court-martial, in *Shoemaker v. Nesbit*, 2 Rawle, 201, assuming that the members acted *bona fide*. On the general subject, see notes to *Creps v. Durden*, 1 Smith Lead. Cas. 971. See, also, *Olliet v. Bessey*, 2 W. Jones, 214; *Houlden v. Smith*, 14 Q. B. 841. Not liable for issuing an attachment upon an affidavit sufficient on its face, but false as to a jurisdictional fact. *Connelly v. Woods*, 31 Kan. 359. Nor a search warrant under an ordinance afterwards held invalid. *Henke v. McCord*, 55 Ia. 378. See *McCall v. Cohen*, 16 S. C. 445. But having jurisdiction to examine and commit, he is liable if he assumes to try a criminal. *Patzack v. Von Gerichten*, 10 Mo. App. 424.

² *Cardigan v. Paige*, 6 N. H. 182, 191; *Moser v. White*, 29 Mich. 59, 60; *People v. Highway Comrs.*, 14 Mich. 528.

³ *Bradley v. Fisher*, 13 Wall. 335. A plaintiff was convicted of an offense before a United States Circuit Court. The judge sentenced the plaintiff to suffer fine and be imprisoned. After the payment of the fine he set aside the sentence and re-sentenced the plaintiff to imprisonment. The United States Supreme Court adjudged the re-sentence to have been without authority, and discharged the plaintiff. Thereupon, plaintiff brought an action of false imprisonment against the judge. The court held that the judge had jurisdiction of the person and the subject matter. To adjudge that a second sentence

been a justice of the peace who had committed a like error, an action would have been supported, however honest might [*420] have been his *motives, and however plain it might have appeared that he was intending to keep within his powers.

could be pronounced, says FOLGER, C. J., "Is a judicial act done as a judge, as a court, though the adjudication was erroneous and the act based upon it was without authority and void. Where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other involved in the case; although upon the correctness of his determination in these particulars the validity of his judgment must depend. For such an act, a person acting as judge therein is not liable to civil or criminal action. The power to decide protects though the decision be erroneous." The court further holds, that while the Circuit Court in a sense is a court of limited and special jurisdiction, it is not an inferior court, and that the rule as to judges of superior courts here applied, and that for those reasons the defendant in this case was protected by his judicial character from the action brought against him by the plaintiff. *Lange v. Benedict*, 78 N. Y. 12.

A like question has received full consideration from the Court of Appeals of New Jersey, and BEASLEY, C. J., states the conclusion of the court as follows: "The true general rule with respect to the actionable responsibility of a judicial officer having the right to exercise general powers, is, that he is so responsible in any given case belonging to a class over which he has cognizance, unless such case is by complaint or other proceed-

ing put at *least colorably* under his jurisdiction. Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial act, and such officer is not liable in a suit to the person affected by his decision, whether such decision be right or wrong. But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an unofficial wrong. This criterion seems to be a reasonable one; it protects the judge against the consequences of every error of judgment, but it leaves him answerable for the commission of wrong that was practically willful; such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression.

"The application of the above stated rule to this case must, obviously, result in a judgment affirming the decision of the circuit judge. There was a complaint, under oath, before this justice, presenting for his consideration a set of facts to which it became his duty to apply the law. The essential things there stated were, that the plaintiff, in combination with two other persons, 'with force and arms,' entered upon certain lands, and 'with force and arms did unlawfully carry away about four hundred bundles of corn-stalks, of the value,' &c., and were

Why the law should protect the one judge and not the other, and why if it protects one only, it should be the very one who, from his higher position and presumed superior learning and ability ought to be most free from error, are questions of which the following may be suggested as the solution :

The inferior judicial officer is not excused for exceeding his jurisdiction because, a limited authority only having been conferred upon him, 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. The rule of law, therefore, which compels him to keep within his jurisdiction at his peril, cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so. Moreover, in doing so he keeps within the presumptions of law, for these are always against the rightfulness of any authority in an inferior court which, under the law, appears doubtful.¹ On the other hand, when a grant of general jurisdiction is made, a presumption accompanies it that it is to be exercised generally until an exception appears which is clearly beyond its intent : its very nature is such as to confer upon the officer entrusted with it more liberty of action in deciding upon his powers than could arise from a grant expressly confined within narrow limits, and the law would be inconsistent with itself if it

engaged in carrying other cornstalks from said lands. By a statute of this State, (Rev., p. 244, § 99), it is declared to be an indictable offense, 'if any person shall willfully, unlawfully and maliciously' set fire to or burn, *carry off* or destroy any barrack, cock, crib, rick or stack of hay, *corn*, wheat, rye, barley, oats, or grain of any kind, * * * or any trees, herbage, growing grass, hay or other vegetables, etc. Now, although the misconduct described in the complaint is not the misconduct described in this act, nevertheless, the question of their identity was *colorably* before

the magistrate, and it was his duty to decide it; and under the rule above formulated, he is not answerable to the person injured for his erroneous application of the law to the case that was before him." *Grove v. Van Duyn*, 44 N. J. L. 654. See, further, *Ross v. Griffin*, 53 Mich. 5; *Busteed v. Parsons*, 54 Ala. 393; *Bocock v. Cochran*, 32 Hun, 521.

¹ It is no protection that the inferior court in good faith decides that the law confers jurisdiction. *Wingate v. Waite*, 6 M. & W. 739; *Houlden v. Smith*, 14 Q. B. 841; *Piper v. Pearson*, 2 Gray, 120.

were not to protect him in the exercise of this judgment. Moreover, for him to decline to exercise an authority because of the existence of a question, when his own judgment favored it, would be to that extent to decline the performance of duty, and measurably to defeat the purpose of the law creating his office; for it cannot be supposed that this contemplated that the judge should act officially as though all presumptions opposed his authority when the fact was directly the contrary.

[*421] ***Judge Interested.** The magistrate or officer cannot protect himself behind his judicial or discretionary action, if it shall turn out that he was interested, 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. His action under such circumstances is a mere nullity.¹ So, in general, if he is complainant or moving party in a prosecution or proceeding, he cannot act in deciding it.² But there are some apparent exceptions to this general rule. The following are cases: 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, though he occupies the apparently inconsistent positions of accuser and judge; if a felony or a 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 boards will be strictly construed, and power to adjudge upon their own claims will not be held included, unless it is very clearly conferred. "In legal reasoning, and in the construction of constitutions and statutes, we are often compelled to content ourselves with conclusions

¹ Hall v. Thayer, 105 Mass. 219, citing Davis v. Allen, 11 Pick. 466; Wolcott v. Ely, 2 Allen, 338; McGough v. Wellington, 6 Allen, 505; Fox v. Hazelton, 10 Pick. 275; Strong v. Strong, 9 Cush. 560, 574. And, see Dimes v. Proprietors, &c., 8 H. L. Cas. 787; Stockwell v. White Lake, 22 Mich. 341. See Scanlan v. Turner, 1 Bailey,

421; Bedell v. Bailey, 58 N. H. 63. In Matter of Ryers, 72 N. Y. 1, the rule is laid down as to what interest in a judge will prevent the validity of the action taken, apart from the question of his liability.

² Rex v. Great Yarmouth, 6 B. & C. 646; Rex v. Hoseason, 14 East. 603, 608.

somewhat less certain than those involved in mathematical axioms; because neither conventions nor legislatures always use language with mathematical accuracy, and neither the human mind nor human affairs will always submit to merely mathematical rule. For various reasons, and upon various grounds, exceptions or qualifications are sometimes implied, though not expressed. An act or constitution which should give to justices of the peace, or to a certain court, the right to try all cases involving certain amounts, or of a general character, would give neither the justice nor the judge the right to try his own cause, *or to give final judgment in his own favor, though [*422] the case, in every other respect, should fall within the class he was expressly authorized to try. An exception of such cases would be implied, and the exception would be just as valid and just as readily recognized by all courts as if it had been expressed.”¹

Legislative action cannot be held invalid because of the interest of legislators in the subject matter upon which they have acted. This rule applies to legislative bodies of all grades. Administrative officers, also, such as assessors of taxes, sometimes act from the necessity of the case, where their own interests are involved; but where the law admits of any other course, it would seem plain that this was inadmissible. Thus, one is not at liberty to sit in forming a quorum of a board to decide upon some matter in which he is concerned, if the law provides for a quorum without him.²

It is proper to say here that the judicial function can never be delegated by officers of any grade. Whoever, therefore, shall assumé to act by delegation can perform only nugatory acts.³

Contempts of Authority. The jurisdiction to punish for con-

¹ CHRISTIANCY, J., in *Kennedy v. Gies*, 25 Mich. 83. The constitutional provisions under controversy empowered the county auditors to adjust and allow finally all claims against the county. *Held*, that this did not preclude the salaries of the auditors themselves being fixed by law, though they were payable by the county.

² *Regina v. Justices, &c.*, 6 Q. B.

753; *Stockwell v. White Lake*, 23 Mich. 341.

³ *Andrews v. Marris*, 1 Q. B. 8; *Whitelegg v. Richards*, 2 B. & C. 45; *Dews v. Riley*, 11 C. B. 434; *Van Slyke v. Insurance Co.*, 39 Wis. 390; S. C. 20 Am. Rep. 50; *State v. Jefferson*, 66 N. C. 309; *Cohen v. Hoff*, 3 Brev. 500. A court cannot delegate to one of its members the power to punish for contempt. *Vau Sandau v. Turner*, 6 Q. B. 773.

tempts of authority is a very delicate one, and requires to be exercised with great care and caution. The reason has already been hinted at: The judge occupies the position of accuser also, 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. The power to inflict summary punishment for such contempts is inherent in each house [*423] of the *legislative department,¹ but it is a power which must be exercised by the house itself, and cannot be delegated to committees.² Imprisonment may be imposed as a punishment, but when it is, it must terminate with the session at which it is imposed, and the party is then entitled to his discharge.³ The warrant of the presiding officer reciting the fact of conviction is sufficient authority for the commitment, even though it fails to show in what the contempt consisted.⁴ This is upon the ground that the same presumptions support the action of the supreme legislative authority which uphold that of the superior courts. Inferior bodies, with limited legislative powers, such as municipal councils, boards of supervisors, etc., cannot punish for contempts. In this country even the legislature cannot confer the power upon them.⁵

The power to punish for contempts is granted as a necessary incident in establishing a tribunal as a court.⁶ It is therefore

¹ *Shaftsbury's Case*, 1 Mod. 144; *Murray's Case*, 1 Wils. 299; *Flower's Case*, 8 T. R. 314; *Crosby's Case*, 3 Wils. 188; *Burdette v. Abbot*, 14 East, 1; *Gosset v. Howard*, 10 Q. B. 411; *Anderson v. Dunn*, 6 Wheat. 204; *State v. Mathews*, 37 N. H. 450; *Burnham v. Morrissey*, 14 Gray. 226. There is no power to punish a witness for refusing to testify before a committee if the investigation is not one the body has power to institute. *Kilbourn v. Thompson*, 103 U. S. 163. See *People v. Keeler*, 99 N. Y. 463.

² *Brown v. Davidson*, 59 Ia. 461.

³ *Jefferson's Manual*, § 18; *Rich-*

ard's Case, 1 Lev. 165; 1 Sid. 245; L. Raym. 120

⁴ *Anderson v. Dunn*, 6 Wheat. 204; See *Burdett v. Abbot*, 14 East, 1; *Gosset v. Howard*, 10 Q. B. 411.

⁵ *Whitcomb's Case*, 120 Mass. 113, in which the subject is carefully examined by Mr. Justice GRAY. *Re Hammel*, 9 R. I. 248, was a case of punishment for contempt by a town council, but this point was not raised.

⁶ *United States v. New Bedford Bridge Co.*, 1 Wood & M. 401; *United States v. Hudson*, 7 Cranch. 32; *Robinson ex parte*, 19 Wall. 505; *Respublica v. Oswald*, 1 Dall. 319;

possessed by the courts of justices of the peace.¹ But court commissioners have no such powers.²

The necessity that jurisdiction should exist in the punishment *for contempts is the same as in all other cases; [*424] but where the punishment is imposed by a court of general jurisdiction, the rule applies that it must be presumed to have acted within the limits of its authority, and that its judgment is warranted by the law and by the facts.³ It is otherwise in the case of a court of special or limited jurisdiction, for in that case the record of the court must show that the party is convicted of conduct which in law constituted a contempt of court,⁴ and the process issued in execution of the judgment of the court will be void if it fails to show by its recitals that misconduct was charged which *prima facie* constituted a contempt.⁵ 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,⁶ and the judge will not be liable for an erroneous commitment where he had jurisdiction.⁷

States v. White, 1 T. U. P. Charl. 136; *Yates v. Lansing*, 9 Johns. 395; *Sanders v. Metcalf*, 1 Tenn. Ch. R. 419, 428; *Middlebrook v. State*, 43 Conn. 257; *People v. Wilson*, 64 Ill. 195; *Cossart v. State*, 14 Ark. 538; *Clark v. People*, Breese, 266; *Oswald's Case*, 1 Dall. 319; *Neel v. State*, 9 Ark. 263; *State v. Morrill*, 16 Ark. 384; *Gorham v. Lockett*, 6 B. Mon. 638; *State v. Woodfin*, 5 Ired. 199; *Ex parte Adams*, 25 Miss. 883; *Morrison v. McDonald*, 21 Me. 550; *State v. Tipton*, 1 Blackf. 166; *People v. Turner*, 1 Cal. 152; *McDermott v. Judges, &c.*, L. R. 2 Pr. C. Cas. 341; *Picket v. Wallace*, 57 Cal. 555; *Hughes v. People*, 5 Col. 436. Although the contempt is committed in another State. *Chafee v. Quidnick Co.* 13 R. I. 442. Imprisonment as punishment for failure to pay over money as ordered is not imprisonment for debt. *Smith v. McLendon*, 59 Geo. 523.

¹ *Rex v. Revel*, 1 Stra. 420; *Regina v. Rogers*, 7 Mod. 28; *Lining v. Bentham*, 2 Bay, 1, 8; *Onderdonk v. Ran-*

lett, 3 Hill, 323; *Re Cooper*, 82 Vt. 253. Denied after full discussion. *Rhinehart v. Lance*, 43 N. J. L. 311. A surrogate's court has the power only as given by statute. *Watson v. Nelson*, 69 N. Y. 536.

² *In re Remington*, 7 Wis. 643; *Haight v. Lucia*, 36 Wis. 355. A notary taking depositions has no such power in Indiana, but has in Missouri. *Burt v. Pyle*, 39 Ind. 398; *Ex parte Krieger*, 7 Mo. App. 367.

³ *Yates v. People*, 8 Johns. 337; *Yates v. Lansing*, 9 Johns. 395; *Fernandez ex parte*, 10 C. B. (N. S.) 3.

⁴ *Lining v. Bentham*, 2 Bay, 1; *People v. Turner*, 1 Cal. 152; *Batchelder v. Moore*, 42 Cal. 412; *Turner v. Commonwealth*, 2 Met. (Ky.) 619; *People v. Conner*, 15 Abb. Pr. (N. S.) 430; *Ex parte Krieger*, 7 Mo. App. 367.

⁵ *Thatcher ex parte*, 7 Ill. 167.

⁶ *In re Cooper*, 32 Vt. 253. See *Middlebrook v. State*, 43 Conn. 257; *Ex parte Smith*, 53 Cal. 204; *Tyler v. Hamersley*, 44 Conn. 393.

⁷ *Morrison v. McDonald*, 21 Me.

To specify in detail the conduct that might constitute contempt of court would be to enumerate the ways in which misbehavior might obstruct the courts of justice. Assaults in the presence of the court, disorders of any description which interrupt its proceedings, abuse of the court, refusal of one called as a witness to testify, neglect of official duty, or other misbehavior by an officer of the court, neglect to obey the orders or process of the court, etc., may all be punished as contempts.¹ So might be any acts of violence and disorder calculated and designed to prevent the court convening. It has also been held in many cases that the publication of an article in a newspaper commenting on proceedings in court then pending and undetermined, or upon the court in its relation thereto, made at a time and under circumstances calculated to affect the course of justice in such proceedings, and obviously intended for that purpose, may be punished as a contempt, even though the court was not in session

when the publication was made.² Such a publication, [*425] when *made, however, is a continuous wrong, as much as would be something of a physical nature, planned in advance, and so arranged as that its natural and necessary results should be to throw the court into disorder and confusion when its sitting should commence.

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.³

550. See *Watson v. Bodell*, 14 M. & W. 57. 69; *Cook v. Bangs*, 21 Fed. Rep. 640.

¹ It is a contempt if strikers interfere with the receiver of a railroad appointed by a court. *In re Higgins*, 27 Fed. Rep. 443; *In re Doolittle*, 23 Fed. Rep. 544; *U. S. v. Kane*, 23 Fed. Rep. 748. So is it to attempt to create a belief that jurors in a pending case could be bribed. *Little v. State*, 90 Ind. 338.

² *Matter of Sturoc*, 48 N. H. 428; *Respublica v. Passmore*, 3 Yeates, 438; *Respublica v. Oswald*, 1 Dall. 319; *Daw v. Eley*, L. R. 7 Eq. Cas. 49; *Re*

Cheltenham, &c., Co. L. R. 8 Eq. Cas. 580; *People v. Wilson*, 64 Ill. 195; *State v. Frew*, 24 W. Va. 416. *In ex parte Hickey*, 12 Miss. 751, this authority was denied, and in *Storey v. People*, 79 Ill. 45, it is decided that under the present constitution of Illinois a person charged with such misconduct can only be punished on indictment, and is entitled to jury trial.

³ *Ex parte Bradley*, 7 Wall. 364; *Lowe v. State*, 9 Ohio, (n. a.) 337; *Ex parte Pollard*, L. R. 3 Pr. C. Cas. 106. See *Bachelder v. Moore*, 42 Cal. 412; *Turner v. Commonwealth*, 2 Met. (Ky.) 619; *Ex parte Kilgore*, 3 Tex.

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.¹ Attorneys, solicitors, etc., for misconduct as such, may be punished by having their names stricken from the rolls;² 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.³

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.⁴

The 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.

App. 247. In this last case the point is considered fully. See also *State v. Judges*, 32 La. Ann. 1256; *Russell v. French*, 67 Ia. 102. If a contempt is not covered by statute and is not committed in the court's presence, the offense must be proved, the court cannot act on its own knowledge. *Huntington v. McMahon*, 48 Conn. 174; *Welch v. Barber*, 53 Conn. 147.

¹ *Clarke v. May*, 2 Gray, 410

² *Ex parte Moore*, 63 N. C. 397, and cases cited; *Ex parte Bradley*, 7 Wall. 364.

³ *Re Wallace*, L. R. 1 Pr. C. Cas. 283.

⁴ *Rex v. James*, 5 B. & Ald. 894, *Re Hammel*, 9 R. I. 248. See *Crawford's Case*, 13 Q. B. 613.

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*CHAPTER XV.

WRONGS IN RESPECT TO PERSONAL PROPERTY.

The classification of property as real and personal is extremely artificial, and is governed more by circumstances than by the nature or inherent qualities of things. The common law idea of real estate comes from a time and a condition of things when nearly all that was valued highly, and upon which families were built up and sustained, was to be found in the freehold estate, and in those things in the nature of heir looms which, in legal contemplation, attached themselves to it and passed with it to the heir. The estate held by feudal tenure of the feudal superior, with the castle and mansion house upon it, the deer in the park, the family pictures, the family jewels, the charters of nobility or of precedence, if any, perhaps the ancestral carriage; anything, in short, which distinctively pertained to the family as such, and gained importance and imparted importance as it was preserved with and held inseparable from that which gave the family its chief prominence, that is to say, the landed estate; these were the matters of consequence, and these were, in fact as well as in legal designation, the real property until modern times. There might be temporary interests in land, held perhaps at the will of the owner of the freehold, or even for terms of years; there were beasts raised for the market, and wares in which traders dealt; but such property was not property of that dignified importance and character upon which families were based; it had not connected with it the same idea of permanence; it was for temporary support or for trade, and not to be kept and perpetuated in families; it was property, but it pertained rather to the person who for the time owned and controlled it, and who might dispose of it to-morrow or himself pass away, than to the family which, in legal contemplation, was perpetual. It was, therefore, not improperly designated personal property in contradistinction to the real property which was before mentioned.

*In thus classifying certain property as real property [*427] the prominent idea doubtless is that of permanence in interest and ownership. But the representative of this permanency was the land, and the other things which constituted real property connected themselves with the land, and were real only because of the association. The deer in the park were real property only as they were a part of the great estate; the family pictures were chiefly important as they were kept as heir-looms; even the castle and mansion house would lose its value and become a mere temporary shelter if it could be supposed to be set down upon the land of another and subject to be ordered off at the will of the owner of the freehold. Thus a small piece of land, insignificant in value in itself, might give incalculable value to the structure erected upon it, since it would give local habitation and a permanent abiding place to the family which the building alone, unconnected with an ownership in the land, could not afford. Therefore, when traders and others erected buildings on land in which they had no freehold, the owner of the freehold was looked upon as having property of the substantial and real class, and the owner of the building as having that of the less substantial nature. The land was consequently real property, though it might be of little money value, and the building was personal property, a mere chattel, though its money value might be much greater than the value of that upon which it stood. The distinction still exists; the building constitutes a part of the freehold in the one case; in the other it is a removable fixture, and is personalty.

The actual or presumed intent on the part of the party attaching a chattel to the realty, that it shall constitute a part of the realty, or on the other hand, that it shall remain a chattel, is usually the most important circumstance to be considered in determining the fact;¹ *and if no one were concerned with [*428] the question but the party by whom the annexation was

¹Mr. Ewell well says that, "The weight of modern authority and of reason, keeping in mind the exceptions as to constructive annexation admitted by all the authorities to exist, seems to establish the doctrine that the true criterion of an irremovable fixture consists in the united application of several tests:

"1. Real or constructive annexation of the article in question to the realty.

"2. Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected.

"3. The intention of the party making the annexation to make the article a permanent accession to the

made, it might well be suffered to be controlling in all cases. But as the question of ownership often depends on the question whether a fixture is removable or not, and men make purchases and accept liens upon property, supposing it to be of that nature, either real or personal, that appearances would indicate, it would be not only impolitic, but in many cases unjust, to suffer a secret intent to control where appearances would indicate the existence of an intent of a different nature. The law, therefore, usually acts upon the presumed rather than upon any actual intent, and the general rules which govern the question of the removability of fixtures are few and simple.

If a building is erected by the owner of the freehold by way of improvement thereof, and apparently for permanent use and enjoyment with it, or if machinery is put up and attached to a building apparently for like permanent use, in the place where it is put, or if a pump is put in the well, or fence constructed to divide off fields, or any erection whatsoever made which apparently is calculated to increase the permanent value of the estate for use and enjoyment, a reasonable presumption arises that the owner intended to make them a part of the realty, and the law accepts this intent as conclusive, and considers them real estate from the time they are constructed or affixed. The owner's 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. Nor is the particular manner of annexation to the freehold specially important;¹ though structures evidently put up

freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made.

"Of these three tests, the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and others seem to derive their chief value as evidence of such intention." Ewell on Fixtures, p. 21, 23. See

McConnell v. Blood, 123 Mass. 47; State Savings Bank v. Kercheval, 6 Mo. 682, 686; Wheeler v. Bedell, 49 Mich. 693; Jenkins v. McCurdy, 48 Wis. 623; Manwaring v. Jenison, 27 N. W. Rep. 899 (Mich.) and cases cited.

¹ Whether the rolling stock of railroads is to be considered a part of the realty, is a point on which the authorities are greatly at variance. See Minnesota v. St. Paul, &c., R. R. Co., 2 Wall. 609; Williamson v. N. J. Sou. R. R. Co., 29 N. J. Eq. 311; Ewell on Fixtures, 34, and cases cited. As to need of actual annexation; Patton

for a mere temporary purpose, and affixed to the realty in a manner indicating no intent that they should be permanent, will of course remain personalty.

On the other hand, a similar erection or attachment by one not *the owner of the freehold might well be pre- [*429]sumed to be made with the intent of removing it as a chattel. This presumption would be reasonable in most cases, because, if he intended it as a permanent annexation, he would lose title to it immediately, since if he made it a part of the realty, the ownership must pass to the owner of the realty. Therefore, the person making the annexation under such circumstances is allowed to retain his ownership in it as a chattel, wherever no principle of justice or public policy is contravened by doing so.

Annexations made by a tenant for the more convenient and profitable enjoyment of his estate for the term, or even by way of ornament, if not inconsistent with the purpose for which the estate is leased to him, remain his, and of course remain personal property. This is the general rule.¹ So when a building is erected under a mere license given by the owner of the freehold, and which is subject to be recalled at any time, a like presumption arises that the licensee intended to preserve his property in the structure, and it will remain personal property accordingly.²

v. Moore, 16 W. Va. 428; Spruhen v. Stout, 52 Wis. 517; Ege v. Kille, 84 Penn. St. 333; Early v. Burtis, 40 N. J. Eq. 501. As to removal of mining fixtures; Conrad v. Sag. Ming. Co., 54 Mich. 249; Wake v. Hull, L. R. 8 App. Cas. 195.

¹ Elwes v. Maw, 3 East, 38; S. C. 2 Smith Lead. Cas. 228; Lancaster v. Eve, 5 C. B. (N. S.) 717; Van Ness v. Pacard, 2 Pet. 137; Holmes v. Tremper, 20 Johns. 29; Meigs' Appeal, 62 Penn. St. 28; O'Donnell v. Hitchcock, 118 Mass. 401; Thomas v. Crout, 5 Bush, 87; Teaff v. Hewitt, 1 Ohio, (N. S.) 511; Kimball v. Grand Lodge, 131 Mass. 59; Cooper v. Johnson, 143 Mass. 108; Cubbins v. Ayres, 4 Lea, 329; Robertson v. Corsett, 39 Mich.

777 Stout v. Stoppel, 30 Minn. 56; Deane v. Hutchison, 40 N. J. Eq. 83. Tenant's trade fixture do not pass on sale of land under mortgage given before the term began. Sanders v. Davis, L. R. 15 Q. B. D. 218. As to the effect of the tenants buying the reversion subject to a mortgage, see Jones v. Detroit Chair Co., 38 Mich. 92; Globe Marble, &c., Co. v. Quinn, 76 N. Y. 23.

² Cowin v. Cowan, 12 Ohio. (N. S.) 629; Wagner v. Cleveland, &c., R. R. Co., 22 Ohio, (N. S.) 563; Ricker v. Kelly, 1 Me. 117; Hinckley v. Baxter, 13 Allen, 139; Noble v. Sylvester, 42 Vt. 146; Wilgus v. Gettings, 21 Iowa, 177; Weathersby v. Sleeper, 42 Miss.

But there are some cases in which, though the erection is made by one not the owner of the freehold, an intent to retain a property in the fixtures as a chattel could not be presumed, and others in which the policy of the law could not suffer effect to be given to it if it actually existed. Thus, if one, though not the owner, is in possession under an executory contract of purchase, it is a reasonable presumption that he expects to complete the purchase, and that whatever he attaches to the realty in such a manner that if it were so attached by the owner of the freehold it would become a part of it, he intends shall be a part of it.¹ So, if one, without license, express or implied, on the part of the owner of the freehold, shall enter and make permanent erections thereon, the law will not reward his conduct or encourage [*430] others *in that of like character, by allowing him to remove what he has thus unlawfully attached.* So, if any 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, the law will not suffer him to reserve a right of removal to the prejudice of the owner of the inheritance.²

On the other hand, for similar reasons, if one, without the consent of the owner, shall take the building of another and

732; *Fenlason v. Rackliff*, 50 Me. 362; *Nor. Cent. R. Co., v. Canton Co.*, 30 Md. 347. See *Pope v. Skinkle*, 47 N. J. L. 39; *Griffin v. Ransdell*, 71 Ind. 440

¹ See *Crane v. Dwyer*, 9 Mich. 350; *Lapham v. Norton*, 71 Me. 83; *Taylor v. Collins*, 51 Wis. 123; *Westgate v. Wixon*, 128 Mass. 304. But see *Comr's Rush Co. v. Stubbs*, 25 Kan. 322.

² Mr. Ewell collects the cases of this nature in his treatise on the Law of Fixtures, Ch. 2. *Doscher v. Blackstone*, 7 Oreg. 143. Even if the entry is in good faith. *Honzik v. Delaglise*, 65 Wis. 494; *Kimball v. Adams*, 52 Wis. 554. See, also, *Morrison v. Berry*, 42 Mich. 389. So where a depot was built on condemned land and the proceedings were afterward set

aside. *Hunt v. Miss. &c., Ry. Co.*, 76 Mo. 115. But see *Railroad Co. v. Deal*, 90 N. C. 110. If a railroad is constructed without right on land, the iron and material do not pass to the land owner. *Preston v. Sabine, &c., Ry. Co.*, 7 S. W. Rep. 825 (Tex.) and cases cited. This rule, in *McKiernan v. Hesse*, 51 Cal. 594, was applied to erections made without permission, on the lands of the United States. Compare *Pennybecker v. McDougal*, 48 Cal. 160.

³ The injury, however, which will preclude removal, when the structure is erected or attached by a tenant or licensee, must be something more than merely nominal. See *Avery v. Cheslyn*, 3 Ad. & El. 75; *Whiting v. Brastow*, 4 Pick. 310; *Seeger v. Pettit*, 77 Penn. St. 437.

remove it upon and attach it to his own realty, or shall take another's machinery and put it up in a permanent way in his own mill, he cannot by such unauthorized act, make the personal property of another his own real estate, but the qualities of real and personal property will still be preserved, and the separate ownership will remain.¹

It should be added to the foregoing 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. Thus, a house constituting a part of the realty may be mortgaged separate from the land, or sold separate from it, and the mortgage or sale will be perfectly valid, if made in such form as to be sufficient under the Statute of Frauds as a transfer of an interest in lands.* But here the

¹ *Cochran v. Flint*, 57 N. H. 514, 544. LADD, J.: "The rule is, and this is elementary, that the movable must be affixed by the owner of it, and affixed in the course of his general use and occupation of the immovable; and I venture the remark that not a case can be found where it is held that the owner would be divested of his title if the movable thing is affixed without his consent, either express or implied. *D'Eyncourt v. Gregory*, L. R. 3 Eq. 892, 894." *Central, &c., R. R. Co. v. Fritz*, 20 Kan. 430.

² See *Sampson v. Graham*, 96 Penn. St. 405; *Docking v. Frazell*, 34 Kan. 20; 17 Pac. Rep. 160; *Aldrich v. Husband*, 131 Mass. 480; *Dudley v. Foote*, 63 N. H. 57; *Lacustrine &c., Co. v. Lake, &c., Co.*, 82 N. Y. 476. The following are recent cases where the question of fixtures has arisen between vendor and vendee: *Smyth v. Sturges*, 15 N. E. Rep. 544 (N. Y.); *Snow v. Perkins*, 60 N. H. 493; *Jenkins v. McCurdy*, 48 Wis. 628; *Leonard v. Stickney*, 131 Mass. 541; *Lacustrine, &c., Co. v. Lake, &c., Co.*, 82

N. Y. 476; *Fullington v. Goodwin*, 57 Vt. 641; between mortgagor or one claiming in his right and mortgagee of the land; *Morris' App.* 88 Penn. St. 368; *Harmony Bldg. Ass. v. Berger*, 99 Penn. St. 320; *Stafford v. Adair*, 57 Vt. 63; *Wolford v. Baxter*, 33 Minn. 12; *Farmers &c., Co. v. Minn. &c., Co.*, 35 Minn. 543; *Corcoran v. Webster*, 50 Wis. 125; *McKeage v. Hanover Ins. Co.* 81 N. Y. 38; *Ward v. Kilpatrick*, 85 N. Y. 413; *Scheiffe v. Schmitz*, 42 N. J. Eq. 700, 11 Atl. Rep. 257; *Tillman v. DeLacy*, 80 Ala. 103; *Foote v. Gooch*, 1 S. E. Rep. 525 (N. C.); *Clore v. Lambert*, 78 Ky. 224; *Sheffield, &c., Soc. v. Harrison*, L. R. 15 Q. B. D. 358; *Ex parte Punnett*, L. R. 16 Ch. D. 226. In Massachusetts, if the article is only adapted for use where it is, it is a fixture. *Smith Paper Co. v. Servin*, 130 Mass. 511; not if removable and adapted to use anywhere. *Maguire v. Park*, 140 Mass. 21; *Carpenter v. Walker*, 140 Mass. 416. Cases between chattel mortgagee of the property and mortgagee of the land. *Keeler v. Keeler*, 31 N. J. Eq. 181; *Campbell v. Roddy*,

rights of third persons might possibly intervene; for if the owner of the land were to sell it to one ignorant of what had been done respecting the fixture, and without implied notice of it, [*431] the *purchaser would take the land with the house as a part of it, because he would have a right to suppose it constituted a part.¹ The owner of machinery may consent that it be put up in the mill of another under a contract of conditional sale, and with the understanding that his title therein as personalty shall be retained; and this understanding will also be enforced as against the owner of the land, or any other person who has not been deceived by appearances into a purchase of the land or taking a mortgage upon it, on the supposition that his deed or mortgage covered the machinery as well as the land and building.² Landlord and tenant may also, by the lease or other

14 Atl. Rep. 279 (N. J.) *Wheeler v. Bedell*, 40 Mich. 698; *Henkle v. Dillon*, 17 Pac. Rep. 148 (Oreg.); *Miller v. Wilson*, 33 N. W. Rep. 128 (Ia.); *Adams v. Beadle*, 47 Ia. 489. See *Duffus v. Bangs*, 43 Hun, 52.

¹ *Burk v. Hollis*, 98 Mass. 55; *Poor v. Oakman*, 104 Mass. 309; *Gibbs v. Estey*, 15 Gray, 587; *Richardson v. Copeland*, 6 Gray, 536. Drawers in a house: *Connor v. Squires*, 50 Vt. 680; Fences: *Rowland v. Anderson*, 33 Kan. 264; Machinery in a mill: *Knowlton v. Johnson*, 87 Mich. 47; *Hamilton v. Huntley*, 78 Ind. 521; so as to purchaser on mortgage foreclosure though the thing was personalty as between parties to the mortgage. *Lyle v. Palmer*, 42 Mich. 314; *Stillman v. Flenneken*, 58 Ia. 450.

² *Crippen v. Morrison*, 13 Mich. 23, and cases cited; *Shell v. Haywood*, 16 Penn. St. 523; *Piper v. Martin*, 8 Penn. St. 206; *Ford v. Cobb*, 20 N. Y. 344; *Mott v. Palmer*, 1 N. Y. 564; *Cross v. Marston*, 17 Vt. 533; *Russell v. Richards*, 10 Me. 429; *Hilborne v. Brown*, 12 Me. 162; *Smith v. Benson*, 1 Hill, 176; *Pierce v. Emery*, 33 N. H. 485; *Haven v. Emery*, 33 N. H. 66; *Wood v. Hewett*, 8 Q. B. 913;

Walker v. Grd. Rapids & Co., Co., 35 N. W. Rep. 332 (Wis.); *Ingersoll v. Barnes*, 47 Mich. 104; *Walker v. Schindel*, 58 Md. 360; *Priestley v. Johnson*, 67 Mo. 632. In Ohio it is held that between the conditional vendor of flouring machinery placed in a mill and a subsequent mortgagee of the realty without notice the machinery is personal. Otherwise as to motive machinery covered by unrecorded chattel mortgage. *Case Mfg. Co. v. Garver*, 13 N. E. Rep. 493. Where plaintiff leased machinery to one in possession under contract of purchase without notice of stipulation in the contract that on forfeiture fixtures should pass to land owner, he is not bound by contract, and between him and the land owner the machinery is a chattel. *Hendy v. Denkerhoff*, 57 Cal. 3. In Massachusetts the strict rule is applied, that whatever the understanding between the mortgagor and one who attaches to the realty fixtures which, if attached by the mortgagor himself, would become a part of it, they will, when so attached, become realty, so as to be covered by the lien of an existing mortgage. *Hunt v. Bay, & Co., Co.*, 97

agreement, control the whole subject of fixtures as they may see fit.

When a licensee has a right to remove fixtures, he will lose them unless he removes them within a reasonable time, to be determined by the circumstances, after his license has been revoked.¹ A tenant must take away his removable fixtures at or before the expiration of his term, or at least within such reasonable time thereafter as he may, by consent or otherwise, lawfully continue in possession.² But if the tenancy is for an uncertain period, as where it is for life or at will, fixtures may be removed within a reasonable time after the tenancy is ended. If the tenant commits an act of forfeiture, this is a forfeiture of his interest in the land only;³ but when enforced against him, and possession obtained, by ejectment or other proceeding, his right *to such fixtures as are not already removed, is [*432] gone.⁴ It has been held, in some cases, 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;⁵ but this seems unreasonable, and has been questioned.⁶

All removable fixtures, being personalty, are subject to all the rules of law which govern that species of property, even though

Mass. 279; *Clary v. Owen*, 15 Gray, 522; *Bartholomew v. Hamilton*, 105 Mass. 239; *Southbridge Bank v. Stevens, &c., Co.*, 130 Mass. 547. See also *Bass, &c., Works v. Gallentine*, 99 Ind. 525; *Roddy v. Brick*, 42 N. J. Eq. 218.

¹ *Antoni v. Belknap*, 102 Mass. 193; *Ombony v. Jones*, 19 N. Y. 234, 238. See *Overton v. Williston*, 81 Penn. St. 155; *Sullivan v. Carberry*, 67 Me. 531.

² *Penton v. Robart*, 2 East, 88; *Weeton v. Woodcock*, 7 M. & W. 14; *Lyde v. Russell*, 1 B. & Ad. 394; *Ombony v. Jones*, 19 N. Y. 234; *Conner v. Coffin*, 22 N. H. 533, 541; *Stokoe v. Upton*, 40 Mich. 581; *Griffin v. Ransdell*, 71 Ind. 440; *Smith v. Park*, 31 Minn. 70; *Youngblood v. Eubank*, 68 Geo. 630; *Darrah v. Baird*, 101 Penn. St. 265. So if a removable building

is put up after foreclosure by mortgagor. *Guernsey v. Wilson*, 134 Mass. 482.

³ See *Davis v. Eyton*, 7 Bing. 154.

⁴ *Weeton v. Woodcock*, 7 M. & W. 14; *Minshall v. Lloyd*, 2 M. & W. 450; *Pugh v. Arton*, L. R. 8 Eq. Cas. 626; *Whipley v. Dewey*, 8 Cal. 36; *Kutter v. Smith*, 2 Wall. 491. See *Keogh v. Daniell*, 12 Wis. 163.

⁵ *Merritt v. Judd*, 14 Cal. 59; *Marks v. Ryan*, 63 Cal. 107; *Loughran v. Ross*, 45 N. Y. 792. So where the second lease contains different terms. *Watriss v. Natn. Bank*, 124 Mass. 571; *McIver v. Estabrook*, 134 Mass. 550. See *Hedderich v. Smith*, 103 Ind. 203. So if a lease for years succeeds a letting from year to year. *Carlin v. Ritter*, 13 Atl. Rep. 370. (Md.)

⁶ *Kerr v. Kingsbury*, 39 Mich. 150.

they still continue attached to the freehold. Still, if the owner is injured in respect to his rights therein, while this annexation continues and while he is still in possession of the land, the wrong should be considered an injury in respect to his possession of the realty, and trover for the fixture will not lie.¹ But all fixtures become personalty when severed, whether the act of severance is rightful or wrongful.²

¹ *Minshall v. Lloyd*, 2 M. & W. 450; *Mackintosh v. Trotter*, 8 M. & W. 184. Where ice already formed is sold by the land owner, the buyer may have trover against a third person who takes it away. The ice, in such case, is to be regarded as personalty. *Higgins v. Kusterer*, 41 Mich. 318; see *Richards v. Gauffret*, 14 N. E. Rep. 535 (Mass.)

² In the rules respecting fixtures we note the gradual departure from notions which had their origin in a system which had little in common with modern enterprise and thrift. As has already been said, land formerly was of chief importance; commerce was subordinate to martial prowess. The Jew, who best represented the movable property of the country, prudently hid his jewels and his gold in his unpretending and mean habitation, or secreted them upon his person sewed into the old clothes which appeared to express misery and poverty. His wealth did not make him respected, but he was despised for the qualities which produced it, and when the master of the sword found his debt to the Jew usurer falling due, it might be a question whether he should be paid in coin or in blows; whether he should be robbed and driven from the land, or spared as a necessary but hated convenience. The idea grew up very slowly that the non-landowner, who would make his industry available by the improvement of lands, should be encouraged to do so

by saving to him an ownership in the buildings he attached to the soil. The old idea recognized but faintly a distinct ownership in the shop which the tenant put upon the land, and if it was at all of a substantial nature, the landlord would be likely to claim it as having become a part of the soil by being affixed to it. A hundred years ago it was scarcely settled that an agricultural tenant might remove his fixtures at the end of his term, and the idea was still prevalent that to entitle any tenant to retain as personalty the structure he put up for use in connection with the realty, he should abstain from putting it on foundations that seemed to be permanent. With the vast increase in personal property which has taken place within a century, the artificial distinctions between realty and personalty are being gradually put aside or modified, and those only are strictly adhered to which have solid grounds for their support. Cities grow upon leased grounds, and substantial structures for houses and shops are, as between landlord and tenant, the personal estate of the latter. The house becomes a part of the land if affixed to the land by the owner, because then the inference of intent to make it so is irresistible, but it does not become a part of it when affixed by the tenant, because the difference in ownership of house and land will prevent the merger which is necessary to their becoming one in contemplation of law. The tenant's sup-

***Betterments.** The laws known as betterment or occupying claimant laws, establish a peculiar species of property in those entitled to the benefit of their provisions. The purpose of these laws is to do equity as between the party who has erected buildings of a permanent character, or made other improvements, upon lands which at the time he supposed were his own, but which are recovered by another on claim of paramount title. At the common law the owner, in recovering the land, would become entitled to the improvements also. The laws mentioned have changed this by requiring the owner, after establishing his title, to pay for the improvements as a condition of being put in possession, and by confirming the occupant in possession, if payment is declined. While the right of election remains, the right of the occupant has some of the qualities of a lien and some of a conditional title; but his remedies for wrongs would obviously be those of an occupant of the realty.

Sidewalks, etc. Sidewalks constructed by the owner of urban property in front of his lot, or curbstones, etc., planted there by him, are his property, whether the title to the soil in the street is in him or not. While a sidewalk remains it is a part of the realty;¹ but when any such structure is taken up, the materials become personalty, and trespass *de bonis* or trover will lie if the city authorities, or individuals, unlawfully appropriate them.²

Right to Crops. Growing crops are presumptively the property of the owner of the soil; but this is only a presumption, and often proves to be unfounded. A more general rule is that *growing crops are the property of the person who [*434] rightfully has planted and grown them. Therefore, crops grown by a tenant are his property. He may sell or mortgage them as such while they are growing, and he may harvest and appropriate them when ripened.³ The exception to this general statement is this: that if the tenant shall sow or plant

posed intent to keep separate as personal chattels the boards, the bricks, etc., which he builds into the house, is respected and is conclusive.

¹ Rogers v. Randall, 29 Mich. 41.

² Muzzey v. Davis, 54 Me. 361. See Rogers v. Randall, 29 Mich. 41.

³ Doremus v. Howard, 23 N. J. 390; Brown v. Turner, 60 Mo. 21; Clark v. Harvey, 54 Penn. St. 142; Fobes v. Shattuck, 22 Barb. 568. If tenant surrenders possession during term, the crops pass to the landlord. Shahan v. Herzberg, 73 Ala. 59.

crops which, in the ordinary course of nature, will not ripen during his term, he will lose them. If the rule were otherwise, he would be enabled, by his own act and without the consent of the lessor, to prolong beyond the duration of his term his possession of the land planted.¹ But where the duration of the lease is uncertain, as where it is a lease at will, or for the life of some person designated, or its duration depends upon some contingency, and it is terminated otherwise than by the voluntary act of the tenant himself, the tenant or his personal representative is entitled to the growing crops as emblements,² and may enter upon the land to cultivate them and to remove them when ready for harvest. The landlord, if he refuses to recognize this right and excludes him, is liable on the special case; and if he harvests the crop and appropriates it to his own use, he may be sued either in trespass or trover for the value.³ So one who sows crops on the land of another under a license has rights after the license is revoked corresponding to those of a tenant at will whose estate has been terminated by the landlord.⁴ Where crops are raised "on shares," the owner of the land and the person raising them are tenants in common of the crop until it [*435] has been harvested and divided.⁵ Trees, *plants and

¹ *Bain v. Clark*, 10 Johns. 424; *Harris v. Carson*, 7 Leigh, 632; *Kingsbury v. Collins*, 4 Bing. 202. So if tenant is bound to know that his landlord's title will be lost under execution sale before ripening. *Wheeler v. Kirkendall*, 67 Ia. 612. But see *Hecht v. Dettman*, 56 Ia. 679. It makes no difference that lease was for a year with privilege of three if tenant abandons within first year. *Dircks v. Brant*, 56 Md. 500. In Pennsylvania the outgoing tenant owns the way-going crop. *Shaw v. Bowman*, 91 Penn St. 414.

² *Bevans v. Briscoe*, 4 Har & J. 139; *Davis v. Thompson*, 13 Me. 209; *Davis v. Brocklebank*, 9 N. H. 73; *Orland's Case*, 5 Co., 116. See *Towne v. Bowers*, 81 Mo. 491; *Dobbins v. Lusch*, 53 Ia. 304; *King v. Foscue*, 91 N. C. 116; *Hendrixson v. Cardwell*, 9 Bax.

389; *Felch v. Harriman*, 13 Atl. Rep. 418 (N. H.)

³ *Stewart v. Doughty*, 9 Johns. 108; *Forsythe v. Price*, 8 Watts, 282; *Robinson v. Kruse*, 29 Ark. 575; *Harris v. Frink*, 49 N. Y. 24.

⁴ *Smith v. Jenks*, 1 Denio, 580; *Jencks v. Smith*, 1 N. Y. 90. *Harris v. Frink*, 49 N. Y. 24.

⁵ *Daniels v. Daniels*, 7 Mass. 136; *Delaney v. Root*, 98 Mass. 546; *Footo v. Colvin*, 3 Johns. 216; *Bradish v. Schenck*, 8 Johns. 151; *Carter v. Jarvis*, 9 Johns. 143; *Putnam v. Wise*, 1 Hill, 234; *Taylor v. Bradley*, 39 N. Y. 129; *Harris v. Frink*, 49 N. Y. 24; *Moulton v. Robinson*, 27 N. H. 550; *Daniels v. Brown*, 34 N. H. 454; *Hatch v. Hart*, 40 N. H. 93; *Carr v. Dodge*, 40 N. H. 403; *Hurd v. Darling*, 14 Vt. 214; *Betts v. Ratliff*, 50 Miss. 561; *Doty v. Heth*, 52 Miss. 530;

crops sowed or planted on land by a stranger to the title, and without authority, belong to the owner of the soil.¹

Wild Animals. There is no property in wild animals until they have been subjected to the control of man. If one secures and tames them, they are his property; if he does not tame them, they are still his so long as they are kept confined and under his control.² In the case of wild bees, these rules are somewhat qualified. Bees have a local habitation, more often in a tree than elsewhere, and while there they may be said to be within control, because the tree may at any time be felled. But the right to cut it is in the owner of the soil, and, therefore, such property as the wild bees are susceptible of is in him also. A hunter's custom may recognize a right to the tree in the first finder, but the law of the land knows nothing of this, and he will be a trespasser if, without permission, he enters upon the land to cut it.³ Even a license given by the owner of the soil to enter and cut the tree may be revoked at any time before it has been acted on.⁴ But if the bees have once been domesticated

Briggs v. Thompson, 9 Penn. St. 338; *Alwood v. Ruckman*, 21 Ill. 200. But the relation of landlord and tenant may exist, although the rent is to be paid by a portion of the crop, in which case the parties are not tenants in common of the crop raised. *Dixon v. Nicolls*, 39 Ill. 372. See, further, on what relation is created by such arrangement. *Walworth v. Jenness*, 58 Vt. 670; *Chicago, &c., Co. v. Linard*, 94 Ind. 319; *Frout v. Hardin*, 56 Ind. 165; *Texas, &c., Ry Co. v. Bavliss*, 62 Tex. 570; *Yates v. Kinney*, 19 Neb. 275; *Atkins v. Womeldorf*, 53 Ia. 150. In Massachusetts it is held that it cannot be said as a matter of law that the land owner has a mortgageable interest in such crop. Each case depends on the intent of the parties as shown in the contract. *Orcutt v. Moore*, 134 Mass. 48.

¹ *Ewell on Fixtures*, 64; *Simpkins v. Rogers*, 15 Ill. 397; *Mitchell v. Billingsley*, 17 Ala. 391; *Reid v. Kirk*, 12 Rich. 54; *Madigan v. McCarthy*, 108

Mass. 376; S. C. 11 Am. Rep. 371. Even if the trespasser remains and harvests them. *Freeman v. McLennan*, 26 Kan. 151; *contra*, *Adams v. Leip*, 71 Mo. 597. If one holds a farm by fraudulent conveyance, title to crops raised while conveyance is unimpeached is in him, unless raised for his grantor. *Hartman v. Weiland*, 36 Minn. 223.

² *Amory v. Flynn*, 10 Johns. 102; *Rex v. Brooks*, 4 C. & P. 131; *Regina v. Shickle*, L. R. 1 C. C. 158; S. C. 11 Cox, C. C. 189; *Commonwealth v. Chace*, 9 Pick. 15; *Manning v. Mitcherson*, 69 Geo. 447. See *State v. Krider*, 78 N. C. 481.

³ *Merrill v. Goodwin*, 1 Root, 209; *Pierson v. Post*, 3 Caines, 175; *Gillet v. Mason*, 7 Johns. 16; *Buster v. Newkirk*, 20 Johns. 75; *Ferguson v. Miller*, 1 Cow. 243; *Idol v. Jones*, 1 Dev. 162; *Cock v. Weatherby*, 5 S. & M. 333.

⁴ *Ferguson v. Miller*, 1 Cow. 243. See *Adams v. Benton*, 43 Vt. 30.

and have then escaped, the loser retains his property therein, and may reclaim them if he pursues after them with reasonable promptness.¹

As regards beasts of the chase, the English rule is that if the hunter starts and captures a beast on the land of another, [*436] the *property in him is in the owner of the land.*

Under the civil law the property passed to the captor,² and such is believed to be the recognized rule in America even when the capture has been effected by means of a trespass on another's land.³

How Wrongs may be Done. The methods in which one may be wronged in respect to his ownership of personal estate are the following:

1. By the direct application of force, injuring or destroying it, or disturbing the owner in his possession.

2. By indirect injuries, whether through negligence or of intent.

3. By converting the property to the use of the wrong-doer.

4. By failure to respond to any obligation of bailment in respect to it.

5. By neglect to restore possession to the owner when 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.

Trespass to Personalty. The first of these wrongs is techni-

¹ Goff v. Kilts, 15 Wend. 550. The right, however, might be of little value if they were found on the land of another who should refuse to permit the pursuer to enter and reclaim them. Possibly it might be held—as we think it certainly ought to be—that the owner of the bees might enter and retake them if he could do so without doing an injury to the land; but the law would give no implied license to cut a tree for the purpose.

² Rigg v. Earl of Lonsdale, 1 H. & N. 923; Blades v. Higgs, 12 C. B. (N. s.) 501; 13 C. B. (N. s.) 844; S. C. in Error, 11 H. L. Cas. 621.

³ Justinian, Inst. Lib. 2, t. 1, § 12.

⁴ Fish are the property of those who take them, and a whale belongs to the captors. Taber v. Jenny, 1 Sprague, 315. That there is no property in fish swimming in tide water, see Matthews v. Treat, 75 Me. 594, nor in a fresh water pond unless so enclosed as to be entirely within control of the owner of surrounding land. State v. Roberts, 59 N. H. 484. See also Lincoln v. Davis, 53 Mich. 375. One who owns the fee of soil covered by navigable fresh water, has the exclusive right to shoot wild fowl flying over the water. Sterling v. Jackson, 37 N. W. Rep. 45 (Mich.)

cally known as a trespass. A trespass to property consists in the unlawful disturbance by force of another's possession. Therefore, that is not a trespass which consists merely in some wrong done to property by one to whom, for any purpose, the possession has been transferred by the owner, and who at the time of the wrong was lawfully holding it.¹ But a possession obtained by fraud and for the very purpose of the wrong, is not a lawful possession, and an injury by force, while it continues, must be deemed a trespass on the possession of the owner.²

The possession disturbed by a trespass may be either, 1, that of a general owner of the property; or, 2, that of one having a special property therein as mortgagee, bailee, or officer;³ or, *3, that of a mere possessor, by which is meant [*437] one who has a peaceable possession, but who shows in himself no other right. This mere possession is sufficient as against one who disturbs it without right in himself, and who, therefore, occupies the position of an intermeddler in that in which he has no interest. Thus, though an heir as such is not entitled to the possession of the personality of his ancestor, yet if he have actual possession, he may sue in respect thereof any intruder.⁴ So an agister of cattle, though having no lien, may maintain trespass against a stranger for taking them away;⁵ and so may one who is simply intrusted with goods for safe keeping without compen-

¹ Furlong v. Bartlett, 21 Pick. 401; Bradley v. Davis, 14 Me. 44; Henderson v. Marx, 57 Ala. 169. If a land owner allows logs of another to be put on his land upon agreement that they shall be removed by a certain time, and such logs are, after reasonable notice, not so removed, he may remove them himself without being a trespasser as to the log owner. Knapp v. Hortung, 103 Penn. St. 400. But if one puts chattels on another's land without his consent, the latter is liable in trespass if he ships them to a distant place instead of removing them to some reasonable spot. Rich v. Johnson, 61 Ind. 246.

² Butler v. Collins, 12 Cal. 457.

³ Brownell v. Manchester, 1 Pick. 232; Casher v. Peterson, 4 N. J. 817;

Browning v. Skillman, 24 N. J. 351; Taylor v. Manderson, 1 Ashm. 130; Whitney v. Ladd, 10 Vt. 165; Sewell v. Harrington, 11 Vt. 141.

⁴ Hyde v. Stone, 7 Wend. 354; Beecher v. Crouse, 19 Wend. 306. See Webb v. Fox, 7 T. R. 391; Carter v. Bennett, 4 Fla. 283, cases of trover. See also Miller v. Clay, 57 Ala. 162; Wustland v. Potterfield, 9 W. Va. 438. Trespass will not lie against one whose property, in the hands of a bailee, has been taken with the latter's consent. Marshall v. Davis, 1 Wend. 109. But trover will lie if the property is not restored on demand, or is disposed of. See Terry v. Bamberger, 44 Conn. 558.

⁵ Bass v. Pierce, 16 Barb. 595.

sation.' Says SAVAGE, Ch. J.: "It would be monstrously inconvenient if a wrong-doer could come and take things out of the possession of him who had the possession under the rightful owner.' 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." But possession may be either actual or constructive. The right to the possession of chattels draws to it, in contemplation of law, the possession itself, so that one party may sometimes be entitled to sue on his actual possession, while another may sue on his constructive possession. Thus, though a bailee or a mortgagor of chattels who is left in possession thereof may bring trespass against one who disturbs his possession, still if the mortgagee or bailee is of right entitled to demand and take possession at any time, this right draws to it the possession, and the wrong-doer is a trespasser upon him

also.⁴ So, if one cut wood on the land of another, he [*438] has, as to all third persons, the possession of the wood cut, and may bring suits as possessor against intermeddlers; but if he has cut without right, the wood belongs to the owner of the land, and is deemed to be in his possession.⁵ So the finder of a chattel has rightful possession of what he finds, except as against the owner; but the latter has constructive possession, and if the finder intentionally or carelessly abuses or injures it, he becomes himself a trespasser, and cannot, in a suit by the owner, justify even the original taking.⁶

A trespass may be intentional or unintentional. A mere

¹ *Faulkner v. Brown*, 13 Wend. 63; *Cowing v. Snow*, 11 Mass. 415.

² Citing *Sutton v. Buck*, 2 Taunt. 309, per CHAMBERE, Justice.

³ *Faulkner v. Brown*, 13 Wend. 63, 64, citing cases. That a servant cannot bring trespass on the possession he holds for his master is held in *Tuthill v. Wheeler*, 6 Barb. 362.

⁴ *White v. Brantley*, 37 Ala. 430; *Overby v. McGee*, 15 Ark. 459; *Staples v. Smith*, 48 Me. 470; *Strong v. Adams*, 30 Vt. 221; *White v. Webb*, 15 Conn. 302.

⁵ *Ward v. Andrews*, 2 Chit. 636;

Bulkley v. Dolbeare, 7 Conn. 232. One who so cut and stacked hay cannot recover from a railroad company through whose negligence it is burnt. *Murphy v. Sioux City, &c., Co.*, 55 Ia. 473.

⁶ *Oxley v. Watts*, 1 T. R. 12. A horse was taken up as an estray and afterwards worked. Held to constitute the party taking him up a trespasser *ab initio*. See *Clark v. Moloney*, 3 Harr. 68; *Brandon v. Huntsville Bank*, 1 Stew. (Ala.) 320; *McLaughlin v. Waite*, 9 Cow. 670.

accident — which, as has already been said, is an event happening without fault¹ — can never be a trespass; and, therefore, if one, in hurriedly removing goods from a burning building, should injure another without being chargeable with negligence, he would not be liable for the injury; while, if carelessly or recklessly, he were to throw the goods into the street, where many persons were congregated or were passing, he would justly be held a trespasser upon any one injured. That, however, which is done purposely, though by mistake, is not to be deemed accidental. Therefore, if one goes upon the land of another to take away his own sheep, and by mistake takes some which do not belong to him, his mistake cannot excuse the trespass.² So if *one is sent to take property, and does so in good [*439] faith, believing it to belong to his employer, this is trespass in him if the belief proves unfounded.³ But an employment of force to which the plaintiff assents is no trespass upon his rights unless the assent was in itself illegal, as we have seen it is in some cases of personal injury.⁴

The force that constitutes trespass may be applied either, 1, by the party himself who is responsible for it; or, 2, by some other person for whose conduct, as servant or otherwise, he is accountable; or, 3, by his domestic animals. The principle on

¹ Ante, p. 91-2.

² *Dexter v. Cole*, 6 Wis. 319. COLE, J.: "We have no doubt but the action of trespass would lie in this case. In driving off the sheep the defendant in error, without doubt, unlawfully interfered with the property of Dexter, and it has been frequently decided that to maintain trespass *de bonis asportatis* it was not necessary to prove actual forcible dispossession of property; but that evidence of any unlawful interference with, or exercise of acts of ownership over property, to the exclusion of the owner, would sustain the action. *Gibbs v. Chase*, 10 Mass. 125; *Miller v. Baker*, 1 Met. 27; *Phillips v. Hall*, 8 Wend. 310; *Morgan v. Varick*, 8 Wend. 587; *Wintringham*

v. Lafoy, 7 Cow. 735; *Reynolds v. Shuler*, 5 Cow. 323; 1 Chit. Pl. 11 Am. Ed. 170, and cases cited in the notes. Neither is it necessary to prove that the act was done with a wrongful intent, it being sufficient if it was without a justifiable cause or purpose, though it were done accidentally or by mistake. 2 Greenl. Ev. § 622; *Guille v. Swan*, 19 Johns. 381. There is nothing inconsistent with these authorities in the case of *Parker v. Walrod*, 13 Wend. 296." See a similar case in *Hobart v. Hagget*, 12 Me. 67.

³ *Higginson v. York*, 5 Mass. 341. See *Basely v. Clarkson*, 3 Lev. 37.

⁴ See ante, p. 187-8. Also, for the general principle, *Cadwell v. Farrell*, 28 Ill. 438.

which the party is held responsible in the second and third cases is explained elsewhere.

The force may be express or implied. Thus false or illegal imprisonment is a trespass to the person imprisoned, though it is sometimes effected by threats or by otherwise exciting the person's fears. So setting a fire which directly communicates with the property of another and destroys it, has been held to be a trespass in respect to such property.¹ But this seems questionable.

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, however near;² but one may justify unhitching a horse from his own fence or shade tree, and removing him, provided it is to a place of safety.³

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, there seems to be no better test than this: That 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. *C. v. C.*

Thus, where one was injured by the throwing of a lighted squib into 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 [*440] of the unlawful act, and before its force was spent.⁴ So it is a trespass if one injure another in the careless handling of fire-arms.⁵ So, "a man throws a log into the highway, and in that act it hits me, I may maintain trespass, because it is an immediate 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

¹ *Jordan v. Wyatt*, 4 Grat. 151. A leasehold being a chattel interest in realty a sale of it with the fixtures on it does not make the sheriff liable in trespass to a prior vendee of the fixtures, inasmuch as the fixtures are not severed or actually seized as per-

sonalty. *Kyle v. Giebner*, 114 Penn. St. 381.

² *Burch v. Carter*, 32 N. J. 554.

³ *Gilman v. Emery*, 54 Me. 460.

⁴ *Scott v. Shepherd*, 3 Wils. 403.

⁵ *Underwood v. Hewson*, Stra 596; *Weaver v. Ward*, Hob. 134; *Taylor v. Rainbow*, 2 H. & N. 423.

originally I could have no action at all." ¹ So it is a trespass if one turn a stream upon his neighbor's land by carrying a ditch over the line; but if he only set up a spout on other lands, which may carry water there when it rains, or a dam which may turn it there, the injury, when it comes, will arise on the special case.² So if one carelessly drives against another, this is a trespass;³ but if his servant is guilty of the like want of care, the action should be case.⁴ So, though one of several stage proprietors, who is himself driving the coach, might be sued in trespass for carelessly driving against the plaintiff and injuring him; yet if other proprietors are sued with him who were not personally connected with the force, the action must be case.⁵

A disturbance of an incorporeal hereditament, such, for example, as a right of way, is not a trespass, because the right, being intangible, is not the subject of force. Neither is a forcible injury to property, in which the plaintiff has only a reversionary *interest, a trespass, since he can have in such [*441] property no constructive possession.⁶

Anything is the subject of trespass in which the law recognizes

¹ PARKER, Ch. J., in *Reynolds v. Clarke*, Stra. 634, 636.

² *Reynolds v. Clarke*, Stra. 634.

³ *Leame v. Bray*, 3 East, 593. See, to same effect, *Sheldrick v. Aberly*, 1 Esp. 55; *Day v. Edwards*, 5 T. R. 648; *Savignac v. Roome*, 6 T. R. 125.

⁴ *Haggett v. Montgomery*, 5 Esp. (2 N. R.) 446. Compare *Williams v. Holland*, 6 C. & P. 23, and *Ogle v. Barnes*, 8 T. R. 187, explained in *Leame v. Bray*, 3 East, 593, 595. So if the servant strikes plaintiff's wife. *Drew v. Peer*, 93 Penn. St. 234. See *Allegheny, &c., R. R. Co. v. McLain*, 91 Penn. St. 442. An action of trespass does not lie against a railroad company for the destruction or injury of animals run over by its cars or engines, unless the wrongful act was done by its direction, or with its assent. The conductor, engineer, or other subordinate agent who has charge of the train at the time of the accident is not, for this purpose, the

representative of the corporation. *Selma, Rome & Dalton R. R. Co. v. Webb*, 49 Ala. 240, citing *Phil., G. & N. R. R. Co. v. Wilt*, 4 Whart. 143.

⁵ *Moreton v. Hardern*, 4 B. & C. 223; *S. C. 6 D. & Ry.* 275. Perhaps, however, where negligence is the gist of the action, case may at all times be brought, even though the injury may be direct.

⁶ *Hall v. Pickard*, 8 Camp. 187. The case was one in which horses had been let by the plaintiff for a certain time, and one of them was run against and killed before the time had expired. And see *Lunt v. Brown*, 13 Me. 236. But a landlord may maintain trespass against the vendee of crop of a sub-lessee for injury to landlord's shrubbery and to cornstalks which under original lease were to be the landlord's, although the entry was with consent of tenant. *Babley v. Vyse*, 43 Ia. 481.

any property, complete or partial. Therefore, to kill one's dog or cat, or even a wild beast kept in confinement, is a trespass, unless it can be justified.¹

The remedies for a trespass are either, 1, an action for the recovery of damages, which will lie in all cases, 2, recaption of the goods, when the trespasser has taken them into his possession, and they can be retaken without breach of the peace; and, 3, replevin or recapture of the goods by legal process.² A trespass may also generally be treated as a conversion.

Indirect Injuries. These are generally injuries of negligence, and are committed by a failure to observe that care in respect to the rights of others which is their due. But they may be injuries intended, and differing from trespasses only in this: that they are secondary, and not a direct result of the unlawful act. Thus, if one shoot a gun into a crowd and injure 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 likely to handle it, he will be equally liable when an injury occurs, but the action must be on the special case, because the injury is indirect, and does not happen until some secondary agency has intervened.³

TROVER.

The injury which is redressed in an action of trover is technically called conversion, and the declaration counts upon [*442] the real *or supposed fact that the plaintiff casually 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

¹ Parker v. Mize, 27 Ala. 480; Dodson v. Mock, 4 Dev. & Bat. 146; Wheatley v. Harris, 4 Sneed, 468; Dunlap v. Snyder, 17 Barb. 561; Woolf v. Chalker, 31 Conn. 121; Perry v. Phipps, 10 Ired. 259; Lentz v. Stroh, 6 S. & R. 34.

² A citizen, whose horse was taken and carried off by the army, and was

finally found in private hands, may lawfully retake it, and if the party in possession claims it, he is called upon to show how the owner lost his title. Hawkins v. Nelson, 40 Ala. 553.

³ Dixon v. Bell, 5 M. & S. 198. See Welch v. Durand, 36 Conn. 182; S. C. 4 Am. Rep. 55; Tancred v. Allgood, 4 H. & N. 438.

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."¹ 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, and he might formerly have brought the now nearly obsolete action of detinue.²

There are two principal differences between the actions of trespass and trover for personalty appropriated by defendant; the first of which is, that in trespass there is always either an original wrongful taking, or a taking made wrongful *ab initio* by subsequent misconduct,³ while in trover, the original taking is supposed or assumed to be lawful, and often the only wrongs consists in a refusal to surrender a possession which was originally rightful, but the right to which has terminated. The second is, 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. Thus, if one take up the beast of another, in order to prevent his straying away, and afterwards turn him out again, he may be liable in trespass for so doing, but his act is no conversion, because the owner's dominion is not disputed, and the intent to make a wrongful appropriation is absent.⁴

Who may bring Trover. It is commonly said that "to sustain trover, the plaintiff must show a legal title; he must have *property, general or special, or actual possession or the [*443] right to immediate possession at the time of the conver-

¹ Lord MANSFIELD, Ch. J., in *Cooper v. Chitty*, Burr. 3. See the nature of the action explained in *Burroughes v. Bayne*, 5 H. & N. 296, 309.

² There are statutes in some States which permit the plaintiff in an action of replevin to proceed in it as in trover, and recover the value of the property in case the officer fails to find it to return to him on the writ.

³ *Van Brunt v. Schenck*, 11 Johns,

877; *Parker v. Walrod*, 18 Wend. 296; S. C. in error, 16 Wend. 514.

⁴ *Wilson v. McLaughlin*, 107 Mass. 587. But see *Tobin v. Deal*, 60 Wis. 87. No conversion if a lot owner removes from one part of it to another goods there by his permission if no ownership claimed or dominion assumed. *Shea v. Milford*, 14 N. E. Rep. 769 (Mass.)

sion ;”¹ and in some cases the defendant has been allowed to defeat a recovery by merely showing property in a third person, without at all connecting himself with the right of such person. Thus, in *Rotan v. Fletcher*, the suit was trover for a cow taken from the possession of the plaintiff, and which he had bought of the wife of one Heminway, the owner, who had absconded. There was some evidence of an attachment of the cow for a debt of Heminway, but the court, without relying upon this, held the action not maintainable. “The action was trover, and it was competent for the defendant to prove property in a third person. The pretended sale from Mrs. Heminway did not transfer the property to the plaintiff below. She had no authority to sell the cow ; and besides, it was offered to be proved that even this sale was fraudulent.”² So in *Tuthill v. Wheeler*, it was decided that one in possession of a canal boat for the season, under a contract with the owner to navigate it, and to be accountable for any injury to it, could not bring trover against one who had taken it from his possession, because he had at the time in the boat neither a special nor a general ownership.³ The reason is thus given by the Supreme Court of Maine : “The defendant in an action of trover, may prove that the title to the property claimed was, when the suit was commenced, in a third person, and thus defeat the action. If he could not, he might subsequently be compelled to pay for the same property again to such third person, he being a stranger to the first suit.”⁴ But as the liability is also incurred where trespass is brought on a mere possession, it is manifest that it cannot constitute any sufficient reason for holding that a party may sue in one form of action but not in the other.

[*441] *In the foregoing cases the general doctrine is so stated as to render it misleading. It has often been decided

¹ *Drury v. Mutual, &c., Ins. Co.*, 88 Md. 242, 249, per MILLER, J.; *Stephenson v. Little*, 10 Mich. 433, 439, per MANNING, J.; *Owens v. Weedman*, 82 Ill. 409, 417, per DICKEY, J. Of course the husband cannot bring trover for the conversion of the wife's property. *Taylor v. Jones*, 52 Ala. 78.

² *Rotan v. Fletcher*, 15 Johns. 206. See *Sheldon v. Soper*, 14 Johns. 352;

Grady v. Newby, 6 Blackf. 442; *Glenn v. Garrison*, 17 N. J. 1, 4.

³ *Tuthill v. Wheeler*, 6 Barb. 363.

⁴ *Clapp v. Glidden*, 39 Me. 448, 451. It has been held in the same State, however, that the existence of a lien on goods in favor of a common carrier was no defense to a wrong-doer sued by the owner for a conversion of the goods. *Ames v. Palmer*, 43 Me. 197.

that possession alone is sufficient to enable one to maintain the action of trover, and in a leading case, always since recognized as authority, the finder of a jewel was held entitled to bring trover against one who, having taken the jewel for examination, refused to restore it.¹ It may, indeed, be said of this case that here was something more than a bare possession, for a finder of goods has a special property therein which is good against all the world but the real owner; but other cases go further, and hold, in the language of Lord CAMPBELL, that "the law is, that a 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. The law is so stated by the very learned annotator in note to *Wilbraham v. Snow*,² and I think it most reasonable law, and essential for the interests of society, that peaceable possession should not be disturbed by wrong-doers. * * * It is not disputed that the *jus tertii* cannot be set up as a defense to an action of trespass for disturbing the possession. In this respect I see no difference between trespass and trover; for, in truth, the presumption of law is that the person who has the possession has the property. Can that presumption be rebutted by evidence that the property was in a third person, when offered as a defense by one who admits that he himself had no title and was a wrong-doer when he converted the goods? I am of opinion that this cannot be done."³

So, in New York, it has been held that trover will lie "on a bare possession" against a stranger,⁴ and that a defendant in trover cannot set up property in a third person without showing some claim, title or interest in himself derived from such person.⁵ *In Vermont the same doctrine is asserted, [*445]

¹ *Armory v. Delamirie*, Stra. 505; *McLaughlin v. Waite*, 9 Cow. 670; *Brandon v. Planters, &c., Bank*, 1 Stew. 320; *Clark v. Maloney*, 3 Harr. 63. See *McAvoy v. Medina*, 11 Allen, 548.

² *Wms. Saunders*, 47 f.

³ *Jefferies v. Great Western R. Co.*, 5 El. & Bl. 803. The defendant having failed to make out any right in himself sought to show that by an act

of bankruptcy the title had passed to assignees. *Held*, inadmissible.

⁴ *Daniels v. Ball*, 11 Wend. 57, note. *Lyon v. Sellew*, 34 Hun, 124.

⁵ *Duncan v. Spear*, 11 Wend. 54, approved in *Harker v. Dement*, 9 Gill, 9, 12. Sheriff cannot defend by showing title in third person without connecting himself with it. *Wheeler v. Lawson*, 103 N. Y. 40.

though it is conceded that if one have a bare possession only, which he voluntarily surrenders to another, he cannot afterward rely upon it as evidence of ownership.¹ In New Hampshire it is said, in one case, "The plaintiff had possession, and that is sufficient in trover against a wrong-doer. It is enough until the defendant shows a better title."² Other cases are to the same effect.³

When, therefore, it is said that the plaintiff in trover must have had, at the time of the conversion, the right to the property, and also a right of possession, nothing more can be intended than this: that the right of which he complains 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.⁴ If then the plaintiff shows that property in his

¹ Knapp v. Winchester, 11 Vt. 351.

² Bartlett v. Hoyt, 29 N. H. 317, citing Sutton v. Buck, 2 Taunt. 302.

³ Carter v. Bennett, 4 Fla. 283, 355; Burke v. Savage, 13 Allen, 408; Hubbard v. Lyman, 8 Allen, 520; Magee v. Scott, 9 Cush. 148; Cook v. Patterson, 35 Ala. 102; Vining v. Baker, 53 Me. 544; Coffin v. Anderson, 4 Blackf. 395. A mortgagee must connect himself with the third person's title as against one claiming in the right of the mortgagor. Marks v. Robinson, 82 Ala. 69. But an officer may show that the person in actual possession of goods seized had no possession in his own right, otherwise he might be subjected to double litigation. Stearns v. Vincent, 50 Mich. 209. So one may rely on a third person's title without connecting himself with it where his own claim is in good faith under color of right. Ribble v. Lawrence, 51 Mich. 569. See Seymour v. Peters, 35 N. W. Rep. 62 (Mich). In Boyce v. Williams, 84 N. C. 275, title in a third person is held a complete defense, although defendant does not connect himself with it.

⁴ See Wilson v. Wilson, 37 Md. 1;

Dudley v. Abner, 52 Ala. 572. There must be possession, or right to it, immediately. Stevenson v. Fitzgerald, 47 Mich. 166; Edwards v. Frank, 40 Mich. 616. If the right arises under a contract void as against public policy, no action lies. Clements v. Yturria, 81 N. Y. 285. Cutting by one's agents under claim of right of timber is possession sufficient to bring trover for its conversion. Putnam v. Lewis, 133 Mass. 264. If the legal title and right to possession is in a trustee, the beneficiary cannot bring the action. Myers v. Hale, 17 Mo. App. 204. The transferee of a bill of lading may bring the action against the carrier for unauthorized delivery. Forbes v. Boston, &c., R. R. Co., 133 Mass. 154. So may the assignee of a pledgor against the pledgee refusing to deliver upon tender. Southworth Co. v. Lamb, 83 Mo. 242. But after consigning goods a consignor must show in an action against another than the carrier, something more than his prior possession and consigning. Benjamin v. Levy, 83 N. W. Rep. 700 (Minn.)

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 immediate possession, that it can be important for him to go further.¹

In illustration of cases in which a showing of title is not sufficient, those may be instanced in which the owner has parted with the right of possession for a time under some contract of lease or bailment. In such a case, if the term has not expired or the bailment been terminated at the time conversion takes place, the owner cannot sue in trover,² because not having had the right to possession his only injury is in his reversionary interest, and in suing for that he must count on the special case and not on a conversion.³ So, if one purchases property to be paid for on delivery, and pays in part only, he cannot bring *trover* against a subsequent vendee from his vendor, since his part payment did not invest him with the right of possession.⁴ [*446]

In a certain sense, however, one always shows a right of property when he shows that he has gained an apparently rightful possession. Such a possession is evidence of property, and whoever, by force or fraud, intercepts it without being able to show any right in himself, is liable to this action. Indeed, the possession gained is not only evidence of right as against such a person, but it is conclusive evidence, 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, if one has a bare possession, and this is taken from him by one having no

¹ See *Foster v. Chamberlain*, 41 Ala. 158, and cases cited.

² *Gordon v. Harper*, 7 T. R. 9; *Wheeler v. Train*, 3 Pick. 255, 258; *Fairbank v. Phelps*, 22 Pick. 535; *Caldwell v. Cowan*, 9 Yerg. 262; *Clark v. Draper*, 19 N. H. 419; *Forth v. Pursley*, 82 Ill. 152; *Winship v. Neale* 10 Gray, 383.

³ *McGowan v. Chapen*, 2 Murph. 61; *Hilliard v. Dortch*, 8 Hawks, 246; *Ayer v. Bartlett*, 9 Pick. 156; *Marshall v. Davis*, 1 Wend. 109; *Arthur v. Gayle*, 38 Ala. 259.

⁴ *Owens v. Weedman*, 82 Ill. 409,

citing *Bloxam v. Sanders*, 4 B. & C. 941; *Wilmshurst v. Bowker*, 5 Bing. (N. C.) 541. If vendor delivers chattel to vendee, retaining title till a certain date, when it is to be paid for, he cannot maintain trover meantime against a third person who seizes it as vendee's. *Newhall v. Kingsbury*, 131 Mass. 445. Nor can one who consigns goods to another to be paid for as sold by him. *Hardy v. Munroe*, 127 Mass. 64. Nor can consignees who have not agreed to accept goods. *Gibbons v. Farwell*, 58 Mich. 233.

right, the latter may defend against an action of trover by showing that he had been notified by the owner to retain the property for him.¹ And 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 There must also be many cases in which a mere showing of the wrongful character of the plaintiff's possession would defeat his action, as where a thief sues the officer for the stolen property taken from him in making the arrest, or a trespasser brings suit against one who stops him while carrying off the goods he has wrongfully taken. These are cases in which it cannot be said that in law a possession has been gained; and one who disturbs this wrongful manual possession may defend in the right of the owner, whether expressly authorized to do so or not.³

On the principle that where one has the right of property this draws to it the right of possession, 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 vendor in a void sale to a married woman may bring trover against a sheriff who levies on the goods as the property of the woman's husband.⁵ So a mortgagee of chattels who, under his mortgage, is entitled to immediate possession, may sue in trover for a conversion while they remained in the hands of the mortgagor;⁶ but a servant cannot

¹ A warehouseman, being bailee of the goods from the plaintiff, may show in defense to an action of trover that the goods are a part of the estate of a deceased person and were bailed to him before administration granted thereon, but that since the taking out of letters the administrator had notified him not to deliver them to the plaintiff. *Thorne v. Tilbury*, 3 H. & N. 534.

² *Ogle v. Atkinson*, 5 Taunt. 759; *King v. Richards*, 6 Whart. 418.

³ See *Laclouch v. Towle*, 3 Esp. 114; *Cheesman v. Exall*, 6 Exch. 841.

⁴ *Clark v. Rideout*, 39 N. H. 239; *Eggleston v. Mundy*, 4 Mich. 295; *Carter v. Kingman*, 103 Mass. 519.

⁵ *Smith v. Plomer*, 15 East, 607.

The distinction between these cases and those in which it has been held that a lessor cannot bring suit in trover for the conversion of the goods leased, is that in these the conversion took away the plaintiff's present right, but in the case of goods leased it is the termor, not the lessor, whose present right is taken, and who, consequently, is wronged by the conversion. The termor may bring suit in trover and recover the whole value of the property, being himself liable over to the lessor when his term is ended. *Gordon v. Harper*, 7 T. R. 9.

⁶ *McConeghy v. McCaw*, 31 Ala. 447; *Robinson v. Kruse*, 29 Ark. 575; *Coles v. Clark*, 8 Cush. 399; *Chamberlain v. Clemence*, 8 Gray, 389; *Bel-*

bring trover for the conversion of his master's goods, since his possession is the possession of his master.¹ A factor, on the other hand, or a bailee, or any other person with a right of his own, however special or trivial, has a property sufficient for the purposes of this action, and as against a mere wrong-doer may recover the whole value of the property, being accountable over to the general owner.²

What may be Converted. 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. The maker of a note who has paid it, may maintain trover against the payee, who, instead of surrendering it, wrongfully disposes of it, whereby the maker is compelled to make payment a second time.³ Even a refusal to surrender a paid note to the payee *is a conversion, he being entitled to its possession [*448] as evidence of payment; but the damages in such case would only be nominal.⁴ So trover will lie by the maker of a note which has never been delivered, against the payee, who

June v. Wallace, 2 Rich. 80; *Spriggs v. Camp*, 2 Speers, 181; *Badger v. Batavia Manuf. Co.*, 70 Ill. 302; *Melody v. Chandler*, 12 Me. 282; *Jones v. Webster*, 48 Ala. 109; *Broughton v. Atchison*, 52 Ala. 62; *Grove v. Wise*, 39 Mich. 161. See *Buddington v. Mastbrook*, 17 Mo. App. 577; *Rhea v. Deaver*, 85 N. C. 337; *Howe v. Wadsworth*, 59 N. H. 397. Otherwise where he has not right to immediate possession. *Elmore v. Simon*, 67 Ala. 526; *Heflin v. Slay*, 78 Ala. 180. Where the mortgagee is not entitled to possession the mortgagor may sue in case for the injury to his reversionary interest. *Googins v. Gilmore*, 47 Me. 9; *Forbes v. Parker*, 16 Pick. 462; *Manning v. Monaghan*, 23 N. Y. 539.

¹ *Lehigh Co. v. Field*, 8 W. & S. 283; *Farmers' Bank v. McKee*, 2 Penn. St. 818.

² *Beyer v. Bush*, 50 Ala. 19. See *Hollenback v. Todd*, 19 Ill. App. 452;

Chamberlain v. West, 83 N. W. Rep. 114 (Minn.); *Taber v. Lawrence*, 134 Mass. 94. Case, not trover, is the proper form of action to be brought against one who takes possession of a crop grown by a tenant on which the landlord has a statutory lien. *Hussey v. Peebles*, 53 Ala. 432; *Corbitt v. Reynolds*, 68 Ala. 378; *Bush v. Garner*, 78 Ala. 162; *Anderson v. Bowles*, 44 Ark. 108.

³ *Buck v. Kent*, 3 Vt. 99; *Pierce v. Gilson*, 9 Vt. 216; *Murray v. Burling*, 10 Johns. 172; *Otisfield v. Mayberry*, 63 Me. 197. Compare *Platt v. Potts*, 11 Ired. 266; *Besherer v. Swisher*, 3 N. J. 748.

⁴ *Pierce v. Gilson*, 9 Vt. 216; *Spencer v. Dearth*, 43 Vt. 98; *Stone v. Clough*, 41 N. H. 290. In New York and Alabama it has been held that trover will not lie under such circumstances. *Todd v. Crookshanks*, 3 Johns. 432; *Lowremore v. Berry*, 19 Ala. 180.

wrongfully obtains possession, and refuses to give it up on demand.¹ But it will not lie against a magistrate for papers used in evidence by the plaintiff, before him, and placed on file.²

One may bring 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.³

What Constitutes Conversion. Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion. "The action of trover being founded on a conjoint right of property and possession, any act of the defendant which negatives or is inconsistent with such right, amounts, in law, to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should 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."⁴ While, therefore, it is a conversion

¹ *Groggerley v. Cuthbert*, 5 B. & P. 170; *Evens v. Kymer*, 1 B. & Ad. 528; *Neal v. Hanson*, 60 Me. 84. For a chattel note, *Hicks v. Lyle*, 46 Mich. 498. For certificate of stock, *Daggett v. Davis*, 53 Mich. 35. For shares of stock, *Payne v. Elliott*, 54 Cal. 339; *Budd v. Mult. & Co.*, 12 Oreg. 271. For special deposit of bonds, *First Nat. Bank v. Dunbar*, 19 Ill. App. 558.

² *Greene v. Mead*, 18 N. H. 505. Trover for parish records has been sustained. *Baker v. Fales*, 16 Mass. 487; *Stebbins v. Jennings*, 10 Pick. 172; *Sawyer v. Baldwin*, 11 Pick. 492.

³ *Osgood v. Howard*, 6 Me. 452; *Russell v. Richards*, 11 Me. 371; *Hilborn v. Brown*, 12 Me. 162; *Smith v. Benson*, 1 Hill, 176; *Dame v. Dame*, 38 N. H. 429; *Crippen v. Morrison*, 13 Mich. 23. Compare *Overton v. Wiliston*, 31 Penn. 155; *Prescott v. Wells*, 3 Nev. 82; *Korbe v. Barbour*, 130 Mass. 255. So if one detaches a fixture and sets it up on his own

land. *Woods v. McCall*, 67 Ga. 506. But not if the vendee of land wrongfully attaches to the land a chattel of the vendor which he finds there. *Thweat v. Stamps*, 67 Ala. 96.

⁴ *WARNER, J.*, in *Liptrot v. Holmes*, 1 Kelly, 381, 391. See *Hare v. Pearson*, 4 Ired. 76; *Gilman v. Hill*, 36 N. H. 311; *Boyce v. Brockway*, 31 N. Y. 490; *Reid v. Colcock*, 1 Nott & McC. 592; *West Jersey R. R. Co. v. Trenton, & Co.*, 32 N. J. 517; *Webber v. Davis*, 44 Me. 147; *Roe v. Campbell*, 40 Hun, 49; *Gordon v. Stockdale*, 89 Ind. 240; *Dodge v. Myer*, 61 Cal. 405; *Burnham v. Marshall*, 56 Vt. 365; *Johnson v. Farr*, 60 N. H. 426; *Haddix v. Einstman*, 14 Ill. App. 443. See as illustrating, *Baker v. Beers*, 6 Atl. Rep. 35 (N. H.); *Donahue v. Shippee*, 8 Atl. Rep. 511 (R. L.) The indorsement and delivery of an elevator receipt may be a conversion of the wheat described in it. *Hamlin v. Carruthers*, 19 Mo. App. 567.

where one takes the plaintiff's property and sells or otherwise disposes of it,¹ it is equally a conversion if he takes it for a temporary purpose only, if in disregard of the plaintiff's right. *Therefore, if one hire a horse to go to one place, [*449] and drive him to another, this is a conversion, though he return him to the owner." "The word conversion, by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them."² "Any asportation of a chattel for the use of a defendant or a third person amounts to a conversion, for this simple reason: that it is an act inconsistent with the general right 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. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion."³ The act must, indeed, be intended, and not merely accidental or negligent;⁴ but it is not 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

¹ *Thompson v. Currier*, 24 N. H. 237; *Pickering v. Coleman*, 12 N. H. 148; *Slaw v. Peckett*, 25 Vt. 423; *Blood v. Sayre*, 17 Vt. 609. So is a second sale by a vendor in possession after the first sale. *Philbrook v. Eaton*, 134 Mass. 398.

² *Homer v. Thwing*, 3 Pick. 492; *Rotch v. Hawes*, 12 Pick. 136; *Horsely v. Branch*, 1 Humph. 199; *Crocker v. Gullifer*, 41 Me. 491; *Fisher v. Kyle*, 27 Mich. 454; *Hall v. Corcoran*, 107 Mass. 251. A short delay on the way is not. *Evans v. Mason*, 5 Atl. Rep. 766 (N. H.) Nor is delay caused by missing the road. *Spooner v. Manchester*, 133 Mass. 270.

³ *MARTIN, B.*, in *Burroughes v. Bayne*, 5 H. & N. 296, 303. For one to put another's cow in his own pasture without authority is proof of a conversion. *Ireland v. Horseman*, 65 Mo. 511. So if having turned an-

other's cattle from his own land one finding them still in the highway knowingly drives them in the other direction from their owner's premises and they are lost. *Tobin v. Deal*, 60 Wis. 87. So it is conversion for one to take goods from a seizing officer on a defective writ of replevin. *Adams v. McGlinchy*, 62 Me. 533.

⁴ *ALDERSON, B.*, in *Fouldes v. Willoughby*, 8 M. & W. 540.

⁵ *Simmons v. Lillystone*, 8 Exch. 431. See *Bowlin v. Nye*, 10 Cush. 416; *Rembaugh v. Phipps*, 75 Mo. 422. If one, supposing B to own it, borrows A's plow from B, who has no right to lend it, and returns it to B, he is not liable to A for its conversion. *Frome v. Dennis*, 45 N. J. L. 515. A mere delay to deliver property by a carrier is no conversion. *Briggs v. New York, &c., R. R. Co.*, 28 Barb. 515.

so, but appropriated the proceeds.¹ Here was a distinct wrongful act in the agent, and not a mere negligent failure in the performance of a duty confided to him. So one having property entrusted to him to sell, is liable in trover if he exchanges it for other property, this being beyond his authority.² So is the vendee in a conditional sale, if he disposes of the article [*450] before he has acquired any property by *making payment.³ So, if one obtains property by fraudulently pretending to have a lien upon it when he has not, the owner, though he delivered possession when the fraudulent claim was made, may bring trover for the value, the taking from him being wrongful.⁴ So if an officer levies upon property which is exempt from execution, and proceeds to a sale of the same, the owner may treat this as a conversion.⁵ But a bailee will not be liable in trover for a loss of the property through larceny or negligence, though he might be, perhaps, on his implied contract of bailment.⁶ And where a bank was entrusted with bonds for safe

¹ *Laverty v. Snethen*, 68 N. Y. 522. The court cite and rely upon *Syeds v. Hay*, 4 T. R. 260; *Spencer v. Blackman*, 9 Wend. 167; *McMorris v. Simpson*, 21 Wend. 610, and distinguish the case from those in which the agent did nothing he was not authorized to do, but disobeyed instructions in doing it. *Dufresne v. Hutchinson*, 3 Taunt. 117; *Sarjeant v. Blunt*, 16 Johns. 74; *Palmer v. Jarmain*, 2 M. & W. 283; *Cairnes v. Bleecker*, 12 Johns. 300. And, see *Dean v. Turner*, 31 Md. 52. It is a conversion to apply to another use notes executed for a specified purpose. *Hynes v. Patterson*, 95 N. Y. 1; *Badger v. Hatch*, 71 Me. 563. So for administrator wrongfully to pledge a note of the estate. *State v. Berning*, 74 Mo. 87.

² *Hass v. Damon*, 9 Iowa. 589. The agent to loan on good real estate converts money if he retains it and procures the transfer to his principal of a security which he knows to be worthless. *King v. Mackellar*, 16 N. E. Rep. 201 (N. Y.)

³ *Sargent v. Gile*, 8 N. H. 325; *Grace v. McKissack*, 49 Ala. 163. So is the purchaser from him. *Eaton v. Munroe*, 52 Me. 63.

⁴ *Dudley v. Abner*, 52 Ala. 573.

⁵ *Sanborn v. Hamilton*, 18 Vt. 590. So if he seize A's goods on a writ against B although they are not removed. *Johnson v. Farr*, 60 N. H. 426. See *Scudder v. Anderson*, 54 Mich. 123; so when A has warned him that his wheat is mingled with B's in a bin. *Behler v. Drury*, 51 Mich. 111. A conversion is complete at the sale when a proper levy has been made on growing crops. *Howard v. Rugland*, 35 Minn. 388. See *Molm v. Barton*, 27 Minn. 530. If an officer of his own motive retains after a trial a drum of the prisoner to prevent future disturbance it is a conversion. *Thatcher v. Weeks*, 11 Atl. Rep. 599 (Me).

⁶ *Hawkins v. Hoffman*, 6 Hill, 586; *Packard v. Getman*, 4 Wend. 613. A mere negligent injury is no conversion. *Nelson v. Whetmore*, 1 Rich.

keeping, which, when called for, were found to be gone, and the evidence tended equally to show that they had been lost, stolen, or misdelivered, it was held trover would not lie, since it could only be for a misdelivery that the bank, under the circumstances, could be liable, and the misdelivery was not established.¹ In any case, the act of a bailee that 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 fact, is not guilty of conversion, but is liable only for an accounting.²

When the mortgagor of chattels is left in possession, he has not only such a special property as will enable him to maintain trover against a wrong-doer, but he has also, in his right of redemption, a property which is or may be valuable, and which he may lawfully sell in recognition of the right of the mortgagee. Such a sale is therefore no conversion of the mortgagee's interest.³ But a sale in denial of the mortgagee's right would be a conversion in him, and, perhaps, in the purchaser also. It would certainly be a conversion in the purchaser, if he took the

318. Nor does the larceny of the goods from an officer render him liable in trover. *Dorman v. Kane*, 5 Allen, 38.

¹*Dearbourn v. Union Nat. Bank*, 58 Me. 273. If a bank treats a special deposit as general assets it is a conversion. *First Nat. Bk. v. Dunbar*, 19 Ill. App. 558; so if it collects and surrenders drafts with forged indorsements. *People v. Bank*, 75 N. Y. 547. If one lets another have securities to help him start in business and creates the relation of debtor and creditor, trover will not lie to recover the securities. *Borland v. Stokes*, 14 Atl. Rep. 61 (Penn.)

²*Jones v. Hodgkins*, 61 Me. 480. See, for the same principle, *Fifield v. Maine Cent. R. R. Co.*, 62 Me. 77. If a commission merchant sells B's goods supposing them to be A's, and pays over the proceeds to the latter, he is liable for conversion. *Cerkel v.*

Waterman, 63 Cal. 84. Deposit as collateral by a partner for his individual debt of bonds loaned to the firm for a temporary purpose is a conversion. *Birdsall v. Davenport*, 48 Hun, 552. See *Nichols v. Gage*, 10 Ore. 82; *Union, &c., Bank v. Farrington*, 13 Lea, 333. So is an unauthorized sale by a broker. *Caswell v. Putnam*, 41 Hun, 521, or a refusal to sell when ordered. *Coleman v. Pearce*, 26 Minn. 123. See further as to conversion by bailees. *Goell v. Smith*, 128 Mass. 238; *Thacher v. Moors*, 134 Mass. 156; *Rosenweig v. Frazer*, 82 Ind. 342; *Loveless v. Fowler*, 4 S. E. Rep. 103 (Geo.); *Dodge v. Myer*, 61 Cal. 405; *Allgear v. Walsh*, 24 Mo. App. 134; *Seton v. Lafone*, L. R. 18 Q. B. D. 139, 19 Id. 68; *Donlin v. McQuade*, 28 N. W. Rep. 114 (Mich).

³*White v. Phelps*, 12 N. H. 382.

[*451] property *on a purchase of the whole interest, and persisted in a denial of the mortgagee's rights afterwards.¹

Neither the first mortgagee, nor one to whom he has sold the property, is liable in trover to the second mortgagee. Having the right of possession defeasable only on performance of the condition of the mortgage, he 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.² But it seems that he cannot sell out the property in parcels, and if he should, trover would lie, as this would impair, and perhaps defeat the right to redeem.³

One who buys property must, at his peril, ascertain the ownership, and if he buys of one who has no authority to sell, his taking possession, in denial of the owner's right, is a conversion.⁴ The

¹ See this discussed in *Millar v. Allen*, 10 R. I. 49, where DURFEE, J., cites and comments upon *Ashmead v. Kellogg*, 23 Conn. 70, and *Coles v. Clark*, 3 Cush. 399, with approval, and refers also to *White v. Phelps*, 12 N. H. 382; *Bellune v. Wallace*, 2 Rich. 80; *Spriggs v. Camp*, 2 Speers, 181. The sale of a chattel which, when bought, is subject to a recorded chattel mortgage, is a conversion as against the mortgagee. *Church v. McLeod*, 58 Vt. 541. So of wheat sold to an elevator company. *Phillip Best, &c., Co. v. Pillsbury*, 37 N. W. Rep. 763 (Dak). So is the refusal to deliver the chattel to the mortgagee after the mortgage is due. *Mattingly v. Paul*, 88 Ind. 95. So is the refusal of a mortgagee to accept a tender and his sale of the chattel. *Rice v. Kahn*, 85 N. W. Rep. 465 (Wis.); or, of a pledgee to deliver stock upon tender of the debt. *McIntire v. Blakely*, 12 Atl. Rep. 325 (Penn).

² *Landon v. Emmons*, 97 Mass. 37, citing *Homes v. Crane*, 2 Pick. 610. He may be liable if he assumes to sell the complete title. *Ashmead v. Kellogg*, 23 Conn. 70.

³ *Spaulding v. Barnes*, 4 Gray, 330.

It would seem, however, that if the mortgage was past due, this should be regarded as foreclosure and satisfaction to the extent of the sales. Trover will lie against mortgagee who sells before condition broken. *Eslow v. Mitchell*, 26 Mich. 500.

It is a conversion to draw off part of a cask of liquor and fill it up with water. *Richardson v. Atkinson*, 1 Stra. 576. And while one, the identity of whose property is lost, by being commingled with something different, may claim the whole, so he may treat the commingling as a conversion, at his election. See, *Martin v. Mason*, 78 Me. 452; *Morningstar v. Cunningham*, 110 Ind. 323.

⁴ *Miller v. Thompson*, 60 Me. 322. Another who contributes to the purchase price, and gets the vessel insured in his own name, will be jointly liable with him. *Id.* See *Hyde v. Noble*, 13 N. H. 494; *Clark v. Rideout*, 39 N. H. 238; *Williams v. Merle*, 11 Wend. 80; *Abbott v. May*, 50 Ala. 97; *Parish v. Morey*, 40 Mich. 417. If a seller parts with goods to a buyer who represents himself to be some reputable third person, so that no *de facto* contract arises, an innocent pur-

vendor is equally liable, whether he sells the property as his own or as officer or agent; and so is the party for whom he acts, if he assists in or advises the sale.¹ So it is no protection to one who has received property and disposed of it in the usual course of trade, that he did so in good faith, and in the belief that the *person from whom he took it was owner, if in fact [*452] the possession of the latter was tortious.² But merely receiving property from the wrongful possessor, and returning it before notice of his want of title, is no conversion.³ Nor is it a conversion merely to assist a mortgagor to remove the goods from one place to another, the mortgagor being left in possession.⁴ But one who assists in a wrongful taking of goods is liable, though he acted as agent merely, for agency cannot be recognized as a protection in wrongs.⁵ So if one hires a horse for another, who drives it to death, while the hirer drives another beside it, the

chaser from this buyer is liable to the seller. *Cundy v. Lindsay*, L. R. 3 App. Cas. 459. So if the buyer falsely represents himself as the agent of a reputable firm. *Hamet v. Letcher*, 37 Ohio St. 356. So if the innocent purchaser sells instead of using the goods. *Alexander v. Swackhamer*, 105 Ind. 81. In *Cundy v. Lindsay*, it is stated that the rule would be otherwise if there was a *de facto* contract, though voidable for fraud, which passed the title to the goods. If the vendor thinks, without reason, that he is selling to a third person, he cannot hold such person, who buys of the vendee, upon the latter's failing to pay. *Stoddard v. Ham*, 129 Mass. 333. See, also, *Samuel v. Cheney*, 135 Mass. 278; *Edmunds v. Merch. & Co.*, Id. 283.

¹ *Billiter v. Young*, 6 El. & Bl. 1; *Cooper v. Chitty*, Burr. 3; *Garland v. Carlisle*, 4 Cl. & F. 693; *Moore v. Eldred*, 42 Vt. 13; *Calkins v. Lockwood*, 17 Conn. 155. A town officer who removes a quantity of fence from the land of its owner, mistakenly supposing it to belong to the town, is liable

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for the value in trover. *Smith v. Colby*, 67 Me. 169.

² *Hardman v. Booth*, 1 H. & C. 803; *Hollins v. Fowler*, L. R. 7 H. L. Cas. 757; S. C. 14 Moak, 138; S. C. in Ex. Ch. L. R. 7 Q. B. 616; S. C. 8 Moak, 232; *Levi v. Booth*, 58 Md. 805; *Shearer v. Evans*, 89 Ind. 400; *Smith v. Clews*, 33 Hun, 501. See *Warren v. Bennett*, 3 South Rep. 609 (Ala.).

³ *Hill v. Hayes* 38 Conn. 532. The assignee of one who holds goods for sale, with a lien upon them for a certain amount in his own favor, is liable in trover if he proceeds to sell them. For, though he has a right to retain them until the lien is satisfied, the authority to sell is a personal trust, and cannot be assigned. *Terry v. Bamberger*, 44 Conn. 558.

⁴ *Strickland v. Barrett*, 20 Pick. 415. See *Sparks v. Purdy*, 11 Mo. 219; *Nelson v. Whetmore*, 1 Rich. 318; *Bushel v. Miller*, Stra. 128.

⁵ *McPartland v. Read*, 11 Allen, 231; *Edgerly v. Whalan*, 106 Mass. 307. It is a conversion to buy from trespassers fruit stolen from the plaintiff's land. *Freeman v. Underwood*, 66 Me. 229.

two are jointly liable to the owner in trover.¹ But it is no conversion to find a purchaser for one who wrongfully sells the goods, even though defendant also receives the proceeds of the sale, applying them on a demand against the owner.²

Demand of Possession and Refusal to Deliver. Where the defendant has come into the possession of property lawfully or without fault, it is in general necessary to make demand of possession of him before suit will lie. "What is meant by one coming lawfully into possession of the property is, where [*453] he *finds it and retains it for the true owner, or where he obtains the possession of the property by the permission or consent of the plaintiff, as where the relation of bailor and bailee exists. In this latter class of cases a demand and refusal would be necessary, unless it could be shown the defendant had appropriated the article so found to his own use, or had disposed of the property bailed contrary to the terms and stipulations of the contract of bailment."³ An instance has been given of an abuse of the contract of bailment in the case of

¹ Banfield v. Whipple, 10 Allen, 27.

² Presley v. Powers, 83 Ill. 125. The case was peculiar. A married woman bought the goods on credit, and died before paying for them. The creditor called on the husband for payment, finding him in possession. The husband offered to sell back the goods, but the creditor declined to purchase, offering, however, to find a purchaser, which he did. The husband sold to the purchaser, handing the proceeds over to the creditor. On suit being subsequently brought by the administrator of the wife against the creditor, *held*, no conversion by him.

Where the horses of one man were taken for government use as the property of another, and the latter was allowed and paid the price therefor, *held*, to be a conversion by him. Thomas v. Sternheimer, 29 Md. 268.

³ WARNER, J., in Liptrot v. Jones, 1 Kelly, 381, 391-2. See Dean v.

Turner, 31 Md. 53. And, further, instances where disregard of contract of bailment relieves of need of demand. Scott v. Hodges, 63 Ala. 337; Haas v. Taylor, 3 South Rep. 638 (Ala); Bunger v. Roddy, 70 Ind. 26; Rodick v. Coburn, 68 Me. 170. If there is an actual conversion, as a sale, no demand need be made. Howitt v. Estelle, 92 Ill. 218; Buntin v. Pritchett, 85 Ind. 247; Kenrick v. Rogers, 26 Minn. 344; even upon vendee; Hake v. Buell, 59 Mich. 89; see Velzian v. Lewis, 10 Pac. Rep. 631 (Oreg.) and cases cited. If possession is obtained fraudulently no demand is needed. Warner v. Vallily, 13 R. I. 483; Powell v. Powell, 71 N. Y. 71; Moody v. Drown, 58 N. H. 45. But if before contract is avoided goods have passed to vendee's assignee in insolvency, demand must be made of him. Goodwin v. Wertheimer, 99 N. Y. 149.

property hired for one purpose and appropriated or used for another. In such a case the abuse terminates the bailment, and the owner may retake his property without demand, or sue for its value. It has been made a question whether the pledgee of property repledging it without authority before the debt is paid for which he held it, does not thereby terminate the bailment so as to render him liable for a conversion; but it is settled that he does not.¹ Neither would he had the pledge been sold instead of repledged.² This, it will be observed, was a case in which the plaintiff was not, according to the contract of bailment, entitled to have the property restored to him until his debt was paid. Had the pledgee held the property subject to the owner's order, a sale³ or a mere delivery to another, without right,⁴ would have constituted a conversion and rendered demand of possession unnecessary. And he would have held it subject to the owner's order had he purchased it of one who had no authority to sell it.⁵

A man acquires rightful possession of chattels if they 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.⁶ There need, [*454] however, be no formal demand in such a case, for if the owner attempts to remove his property, and is not suffered to do so, his attempt is equivalent to a demand.⁷

¹ Donald v. Suckling, L. R. 1 Q. B. 585.

² Halliday v. Holgate, L. R. 3 Exch. 299. Compare Bulkeley v. Welch, 31 Conn. 839; Baltimore, &c., Co. v. Dalrymple, 25 Md. 269; Lawrence v. Maxwell, 53 N. Y. 19.

³ Bloxam v. Hubbard, 5 East, 407. See Rosenweig v. Frazer, 82 Ind. 342.

⁴ Syeds v. Hay, 4 T. R. 260.

⁵ Kimball v. Billings, 55 Me. 147, citing Coles v. Clark, 3 Cush. 399.

The property was government bonds, received and sold by the defendant in good faith, but of course his good faith could not protect him when sued by the owner for the conversion. It was held in Gilmore v. Newton, 9 Allen, 171, that one who receives possession from another who had no

right, and treats the property as his own, is not entitled to a demand. See, also, Trudo v. Anderson, 10 Mich. 357; Prime v. Cobb, 63 Me. 200.

⁶ Thorogood v. Robinson, 6 Q. B. 769. See Witherspoon v. Blewett, 47 Miss. 570.

⁷ Badger v. Batavia Paper Co., 70 Ill. 302. See, also, Woodis v. Jordan, 62 Me. 490. Merely selling and giving a deed of land by the landlord is no conversion of the tenant's fixtures; the tenant's right to take them away is not affected by the conveyance. Davis v. Buffum, 51 Me. 160, citing Burnside v. Twitchell, 43 N. H. 890. If a refusal is based on a claim of title, a demand for a building is sufficient though demandant has not at hand means to take it

The refusal to surrender possession in response to a demand is not of itself a conversion; it is only evidence of a conversion, and like other inconclusive acts is open to explanation.¹ It may, for instance, be shown that the property has perished, or been lost without the bailee's fault, and that he does not surrender possession simply because it has become impossible.² In any case where at the time of the demand the defendant has neither the actual nor constructive possession, and, therefore, cannot deliver the property in response to the demand, his liability is in no manner affected by the demand and refusal; for if he had been guilty of a conversion before, the demand was unnecessary, and if he had not been, a failure to do what for any reason he was unable to do, could not render him so. Still the demand may, even under such circumstances, have this importance: it may put the defendant apparently in the wrong, and throw upon him the burden of showing why he fails to surrender the property.³

away. *Edmundson v. Bric*, 136 Mass. 189.

¹ *Thompson v. Rose*, 16 Conn. 71; *Sturges v. Keith*, 57 Ill. 451; *Coffin v. Anderson*, 4 Blackf. 395; *Beckman v. McKay*, 14 Cal. 250; *Dietus v. Fuss*, 8 Md. 148; *Gordon v. Stockdale*, 89 Ind. 240. But it is sufficient evidence if one holds wrongfully. *Weston v. Carr*, 71 Me. 356.

² *Dearbourn v. Union National Bank*, 58 Me. 273; *Jefferson v. Hale*, 31 Ark. 286. As where it was taken from him by an armed force without his fault. *Abraham v. Nunn*, 42 Ala. 51. See *Griffith v. Zippenwick*, 28 Ohio, (N. S.) 388.

³ *Davis v. Buffum*, 51 Me. 160. See *Hill v. Belasco*, 17 Ill. App. 194. A refusal must be shown. *Taylor v. Hanlon*, 103 Penn. St. 504. Refusal to comply with a premature demand is no evidence of conversion. *Hagar v. Randall*, 62 Me. 439. If demand is made by an agent, and is not complied with because the agent gives no evidence of authority, this does not make out a conversion. *Watt v.*

Potter, 2 Mason, 77. Compare *Igalls v. Bulkley*, 15 Ill. 224; *Robinson v. Burleigh*, 5 N. H. 225. So, if demand is made on an agent for property held by him for his principal, his refusal to deliver does not render him liable in trover. *Carey v. Bright*, 58 Penn. St. 70. If at the time of demand the property is present, and no objection is made to its being taken, and the only refusal is a refusal to carry and deliver it to the owner at his home, this is no conversion, even though defendant ought to have so carried it. *Farrar v. Rollins*, 37 Vt. 295. There must be a definite demand and refusal. *Ware v. First Cong. Soc.*, 125 Mass. 584. Instances: *Richards v. Pitts Ag'l Wks*, 37 Hun. 1; *Ingersoll v. Barnes*, 47 Mich. 104; *Wykoff v. Stevenson*, 46 N. J. L. 326. A qualified reasonable refusal for the purpose of ascertaining ownership is not enough. *Buffington v. Clarke*, 8 Atl. Rep. 247 (R. L.); *Flannery v. Brewer*, 33 N. W. Rep. 523 (Mich.); *Butler v. Jones*, 80 Ala. 436.

***Conversion by Tenant in Common.** The authorities [*455] are irreconcilably at variance as to what may constitute a conversion by one tenant in common of his co-tenant's interest, agreeing only in this, that a culpable loss or destruction by one will render him liable.¹ The rule in England is that neither a claim to exclusive ownership by one, nor the exclusion of the other from possession, nor even the sale of the whole, can be treated in the law as the equivalent of loss or destruction, or be considered a conversion;² and this rule is adopted in some cases in Vermont,³ and in North Carolina it is also followed, but with this qualification, that a sale of the property out of the State may be treated as a loss or destruction.⁴ But in other cases any sale of the whole interest by one tenant in common has been held a conversion.⁵ And in still others it has been held that even a sale is not necessary to make out a conversion; 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, applies only to things in their nature so far indivisible that the share of one cannot be distinguished from that of the other. It can have no reasonable application to such com-

¹ *Mayhew v. Herrick*, 7 C. B. 229; *Hyde v. Stone*, 9 Cow. 230; *White v. Brooks*, 43 N. H. 402.

² *Mayhew v. Herrick*, 7 C. B. 229; *See Barnardistone v. Chapman*, Bull. N. P. 34.

³ *Tubbs v. Richardson*, 6 Vt. 442; *Sanborn v. Morrill*, 15 Vt. 700; *Barton v. Burton*, 27 Vt. 93; *Lewis v. Clark*, 59 Vt. 363. So levy of attachment where possession is not changed. *Spaulding v. Orcutt*, 56 Vt. 218. In Maine, the mere claim to the exclusive ownership of a horse is held to be no conversion. *Dain v. Cowing*, 22 Me. 347. See *Symonds v. Harris*, 51 Me. 14. See *Osborn v. Schenck*, 83 N. Y. 201. But if one distinctly appropriates the whole to his own use, it is. *Needham v. Hill*, 127 Mass. 133. See *Baylis v. Cronkbite*, 89 Mich. 413. And in *Gilbert v. Dickerson*, 7 Wend. 449, the same ruling was made where the property was not only de-

tained from the co-tenant, but locked up. Mere detention is not enough. *Heller v. Hufsmith*, 102 Penn. St. 533.

⁴ *Pitt v. Petwey*, 12 Ired. 69. Or if perishable, has so acted that the other cannot recover it. *Grim v. Wicker*, 80 N. C. 343. See *Shearin v. Rigsbee*, 1 S. E. Rep. 770 (N. C.).

⁵ *Wilson v. Reed*, 3 Johns. 175; *Hyke v. Stone*, 9 Cow. 230; *Gilbert v. Dickerson*, 7 Wend. 449; *Mumford v. McKay*, 8 Wend. 442; *Dyckman v. Valiente*, 42 N. Y. 549; *Weld v. Oliver*, 21 Pick. 559; *White v. Brooks*, 43 N. H. 402; *Neilson v. Slade*, 49 Ala. 253; *Courts v. Happle*, 49 Ala. 254; *Green v. Edick*, 66 Barb. 564; *Wheeler v. Wheeler*, 33 Me. 347; *Sullivan v. Lawler*, 72 Ala. 74; *Goell v. Morse*, 126 Mass. 480; *Person v. Wilson*, 25 Minn. 189; *Shepard v. Pettit*, 30 Minn. 119.

modities as are readily divisible, by tale or measure, into portions absolutely alike in quality, such as grain or money. Thus, if one is entitled to the half of a certain number of bushels of wheat, he is entitled to the half in severalty; and if his co-tenant in actual possession refuse to surrender the half on demand, and deny his right, this is a conversion, because it deprives [*456] him of his right as effectually as *would a sale.¹ In a subsequent case this doctrine was applied to an interest in a machine which one of the tenants in common had taken and annexed to the freehold, denying the right of the other.²

Bailees. It is no conversion by a common carrier or other bailee who has received property from one not rightfully entitled to possession, to deliver it in pursuance of the bailment, if this is done before notice of the rights of the real owner.³ After such notice he acts at his peril. 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.⁴

¹ CAMPBELL, J., in *Fiquet v. Allison*, 12 Mich. 328, 331. See *Ripley v. Davis*, 15 Mich. 75. And see *Clark v. Griffith*, 24 N. Y. 595. Refusal to sever a share where the property is easily separable is a conversion. *Stall v. Wilbur*, 77 N. Y. 158; *Burns v. Winchell*, 44 Hun, 261. Of course trover will not lie where one has only a right to have an undistinguished portion of a greater quantity set out to him, but the title to which has never passed. *Morrison v. Dingley*, 63 Me. 553. See *Browning v. Hamilton*, 42 Ala. 484; *Lehr v. Taylor*, 90 Penn. St. 381. Nor where property is not susceptible of exact division in quality, and has not been sold, lost or destroyed. *Balch v. Jones*, 61 Cal. 234.

² *Grove v. Wise*, 39 Mich. 161. See, also, *Strickland v. Parker*, 54 Me. 263. It is a conversion of a joint owner's interest in a note if the other joint owner takes it for collection and surrenders it to the maker for cancellation. *Winner v. Penniman*, 35 Md.

163. If one tenant in common takes the joint property and disposes of it to a third person for uses not justified by the joint holding, the other co-tenant may maintain trover against the purchaser. *Agnew v. Johnson*, 17 Penn. St. 373. See *Collins v. Ayres*, 57 Ind. 239.

³ *Nelson v. Iverson*, 17 Ala. 216; *Burditt v. Hunt*, 25 Me. 419. See *Nelson v. Anderson*, 1 B. & Ad. 450; *Morris v. Hall*, 41 Ala. 510; *Nanson v. Jacob*, 6 S. W. Rep. 246 (Mo.)

⁴ *Sheridan v. New Quay Co.*, 4 C. B. (N. S.) 619; *Ogle v. Atkinson*, 5 Taunt. 759; *Thorne v. Tilbury*, 3 H. & N. 534; *Biddle v. Bond*, 6 Best & S. 225; *Hardman v. Willcock*, 9 Bing. 382; *King v. Richards*, 6 Whart. 418; *Bates v. Stanton*, 1 Duer, 79; *Bliven v. Hudson R. R. Co.*, 36 N. Y. 403; *Young v. East Ala. & Co.*, 80 Ala. 100. See *Dusky v. Rudder*, 80 Mo. 400. It is a defense to the bailee if goods are taken from him on legal process. *Bliven v. Hudson R. R. Co.*, 35 Barb. 188, and 36 N. Y. 403;

Extent of Injury. Trover is most commonly brought when a complete conversion of the property has taken place, but as it lies in all cases where one makes an unlawful use of another's personalty, the injury is sometimes very small.¹ Thus, if one *hires a horse for one journey, and starts with him [*457] in an opposite direction on another, a conversion has then taken place, and the owner may bring suit. But here, if the bailee returns the horse before the trial, as he may, the owner is not injured to the extent of his value, since the horse has only temporarily been converted to the wrong-doer's use, and the injury is likely to be small, perhaps nominal. But where the conversion is complete, the injury suffered, of course, is the value of what is converted.² Even this *statement does [*458] not fully cover the ground, for the value may depend largely on the time when the conversion is deemed to have taken

Wells v. Thornton, 45 Barb. 390; *Van Winkle v. Mail, &c., Co.*, 37 Barb. 122; *Burton v. Wilkinson*, 18 Vt. 186; *Pingree v. Detroit, &c., Co.*, 83 N. W. Rep. 298 (Mich). See *Stiles v. Davis*, 1 Black, 101. Compare *Kiff v. Old Colony, &c., Co.*, 117 Mass. 591.

¹ Where an actual conversion has taken place, but the property still exists, and the wrong-doer offers to return it, the owner is under no obligation to take it back. *Higgins v. Whitney*, 24 Wend. 379; *Otis v. Jones*, 21 Wend. 394; *Hanmer v. Wilsey*, 17 Wend. 91; *Brewster v. Silliman*, 38 N. Y. 423. If he does take it back, this does not bar his right of action, but goes in mitigation of damages. *Gibbs v. Chase*, 10 Mass. 125; *Brewster v. Silliman*, 38 N. Y. 423.

² Although the consideration of damages more properly belongs to a work specially devoted to the remedies for torts, it may not be inappropriate here to say, that in respect to actions of trover, the rule of damages has always been more or less unsettled. When the conversion was complete, it has been held in some cases that

the plaintiff should be entitled to the highest market price between the time of conversion and the time of trial. *Markham v. Jaudon*, 41 N. Y. 235; *Burt v. Dutcher*, 34 N. Y. 493; *Romaine v. Van Allen*, 26 N. Y. 309; *Morgan v. Gregg*, 46 Barb. 183; *Wilson v. Matthews*, 24 Barb. 295; *Carter v. DuPre*, 18 S. C. 179. At least, that the jury might award this in their discretion. *Greening v. Wilkinson*, 1 C. & P. 625; *Ewing v. Blount*, 20 Ala. 694; *Jenkins v. McConico*, 26 Ala. 213; *Loeb v. Flash*, 65 Ala. 526. Especially if the property was subject to considerable fluctuations in value. *Doughlass v. Kraft*, 9 Cal. 563; *Hamer v. Hathaway*, 33 Cal. 117. Now allowed by code. *Fromm v. Sierra, &c., Co.*, 61 Cal. 629. But a more just rule obviously is that which gives just indemnity to the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of; and this, where the article converted was always in market, may, perhaps, be the market value at the time of the conversion, and any advance thereon that may have taken place within a

place. If, for example, one has received property to be returned on demand, and declines to return it, the property is not changed by the demand and refusal, but the owner may still replevy the goods; and if, in the meantime they have largely increased in value, it would seem that he should be entitled to that increase, if he fails to recover the goods. The rule seems to be, however, that if he treats the demand and refusal as a conversion, his injury is measured by the value at that time;¹ but he might, no doubt, make a subsequent demand, and rely upon a failure to respond to that as his grievance.²

reasonable time thereafter for replacing it. *Baker v. Drake*, 53 N. Y. 211; *Mathews v. Coe*, 49 N. Y. 57; *Devlin v. Pike*, 5 Daly, 85; *Page v. Fowler*, 39 Cal. 412. See *Weymouth v. Chicago, &c., R. R. Co.*, 17 Wis. 567; *Meixell v. Kirkpatrick*, 33 Kan. 282; *Seymour v. Ives*, 46 Conn. 109. But in most cases where the circumstances are not such as to warrant exemplary damages, a just indemnity will consist in the value of the property at the time of the conversion, with interest thereon to the time of trial. *Greeley v. Stilson*, 27 Mich. 153; *Winchester v. Craig*, 33 Mich. 205; *Ripley v. Davis*, 15 Mich. 75; *Dalton v. Laudahn*, 27 Mich. 529; *Allen v. Kinyon*, 41 Mich. 281. See *Brink v. Freoff*, 40 Mich. 610; *Yater v. Mullen*, 24 Ind. 277; *Keaggy v. Hite*, 12 Ill. 99; *Otter v. Williams*, 21 Ill. 118; *Turner v. Retter*, 58 Ill. 264; *Jefferson v. Hale*, 31 Ark. 286; *Ryburn v. Pryor*, 14 Ark. 505; *Sledge v. Reid*, 73 N. C. 440; *Thomas v. Sternheimer*, 29 Md. 263; *Herzberg v. Adams*, 39 Md. 309; *Polk's Admr. v. Allen*, 19 Mo. 467; *Kennedy v. Whitwell*, 4 Pick. 466; *Fowler v. Gilman*, 13 Met. 267; *Greenfield Bank v. Leavitt*, 17 Pick. 1; *Pierce v. Benjamin*, 14 Pick. 356; *Sargeant v. Franklin Ins. Co.*, 8 Pick. 90; *Johnson v. Sumner*, 1 Met. 172; *Barry v. Bennett*, 7 Met. 354; *Hurd v. Hubbell*,

26 Conn. 389; *Cook v. Loomis*, 26 Conn. 483; *Robinson v. Hartridge*, 13 Fla. 501; *Vaughan v. Webster*, 5 Harr. 256; *Lillard v. Whittaker*, 3 Bibb, 93; *Thrall v. Lathrop*, 30 Vt. 307; *Hayden v. Bartlett*, 35 Me. 203; *Tenney v. State Bank*, 20 Wis. 152; *Carlyon v. Lannan*, 4 Nev. 156; *Neiler v. Kelley*, 69 Penn. St. 403; *Whitfield v. Whitfield*, 40 Miss. 352; *Newton, &c., Co. v. White*, 53 Geo. 395; *Sturges v. Keith*, 57 Ill. 451; *Bloch v. Sweeney*, 63 Tex. 419. Cases of conversion of notes, or choses in action. *Benjamin, &c., Co. v. Merch. Bank*, 63 Wis. 470; *Powell v. Powell*, 71 N. Y. 71; *State v. Berning*, 74 Mo. 87; *Ray v. Light*, 34 Ark. 421; *Penniman v. Winner*, 54 Md. 127; *Moody v. Drown*, 58 N. H. 45. See *Daggett v. Davis*, 53 Mich. 35, as to stock certificate without indorsement. Cases of mortgaged chattels, or chattels in which one has a special property. *Becker v. Dunham*, 27 Minn. 32; *Fowler v. Haynes*, 91 N. Y. 346; *White v. Allen*, 133 Mass. 423; *Rosenweig v. Frazer*, 82 Ind. 342; *Cole v. Dalziel*, 13 Ill. App. 23.

¹ *Burk v. Webb*, 32 Mich. 173. See *Third National Bank v. Boyd*, 44 Md. 47.

² If the property is largely increased in value by the action of the wrongdoer himself, as, for instance, where he takes heavy articles a long distance

Effect of Judgment. It was decided in *Adams v. Broughton*¹ that judgment in trover or trespass for the value of the property vested the title in the defendant; and this decision has been followed in this country to some extent.² But the present English rule is, that it is not the judgment alone, but judgment and the satisfaction thereof, that passes the title to the defendant;³ and this may be said to be the accepted doctrine in this country at the present time.⁴ The title by relation vests as of the time when the conversion took place; but this relation is not effectual for all purposes; it could not render a third party a trespasser *upon the rights of the defendant for anything [*459] done by him intermediate the conversion and the judgment;⁵ and if, after conversion, the plaintiff has sold his interest in the property, the purchaser will not be affected by the suit, and the plaintiff will be entitled to recover nominal damages only, since, by the sale, he has disabled himself from passing title to the defendant.⁶ And in neither trover nor trespass will the title be changed if the recovery was only for an injury to the property, or for a temporary use, and not for the value.

Justification under Process. When an interference with the property of another is justified under legal proceedings, it is

to market, it seems he should be charged only with the value at the time of the wrongful taking, and interest thereon, unless there were bad faith or circumstances of aggravation. *Winchester v. Craig*, 33 Mich. 205. See *Barton Coal Co. v. Cox*, 39 Md. 1; *Hinman v. Heyderstadt*, 32 Minn. 250; *Whitney v. Huntington*, 33 N. W. Rep. 561 (Minn.); *Tuttle v. Wilson*, 52 Wis. 643. If the trespasser acted willfully no deduction is to be made for his labor. *Woodenware Co. v. U. S.* 106 U. S. 432; *Everson v. Sellar*, 106 Ind. 266; *Tuttle v. White*, 46 Mich. 485; *Skinner v. Pinney*, 19 Fla. 42; *Aita & Co. v. Benson, & Co.*, 16 Pac. Rep. 565 (Ariz.) But see *Railroad Co. v. Hutchins*, 37 Ohio St. 282.

¹ Stra. 1078; S. C. Andrews, 18.

² *Carlisle v. Burley*, 3 Mo. 250; *Rog-*

ers v. Moore, Rice, (S. C.) 90; *Bogan v. Wilburn*, 1 Speers, 179; *Floyd v. Browne*, 1 Rawle, 121; *Marsh v. Pier*, 4 Rawle, 273; *Fox v. Northern Liberties*, 8 Watts & S. 103; *Merrick's Estate*, 5 W. & S. 9; *Curtis v. Groat*, 6 Johns. 168; *Fox v. Prickett*, 34 N. J. 13.

³ *Brinsmead v. Harrison*, L. R. 6 C. P. 584.

⁴ *Lovejoy v. Murray*, 3 Wall. 1; *Elliott v. Hayden*, 104 Mass. 180; *United Society v. Underwood*, 11 Bush, 265; S. C. 21 Am. Rep. 214; *Smith v. Smith*, 51 N. H. 571; *Hyde v. Noble*, 13 N. H. 494; *Bell v. Perry*, 43 Iowa, 368; *Bacon v. Kimmell*, 14 Mich. 201; *Atwater v. Tupper*, 45 Conn. 144; *Thayer v. Manley*, 73 N. Y. 305.

⁵ *Bacon v. Kimmel*, 14 Mich. 201. See ante, 95, 96.

⁶ *Brady v. Whitney*, 24 Mich. 154.

important to know the position the party justifying occupies in respect to them. In some particulars the rules of protection are somewhat different as respects the several cases of magistrate, ministerial officer and party, or complainant, and they will therefore be given separately.

The Officer. 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. There may be a few special cases in which this would not be necessary to his justification. Such a case would be that of a thief caught *flagrante delicto*, with the stolen property in his possession. No doubt the officer might take the thief without warrant, and he might also take the stolen property, and retain it for identification and evidence of ownership. So, in making arrest for a supposed felony, the officer might take from the person arrested whatever was supposed to have been the instrument in committing the crime, or whatever would probably be important to be used in evidence on the trial. So, doubtless, under proper statute or municipal by-law, implements of gaming found in actual use in violation of law, might be seized. These cases suggest others, but they cannot be numerous. In general, the officer must seek protection behind process.

The process that shall protect an officer must, to use the customary legal expression, be *fair on its face*. By this is not meant that it shall appear to be perfectly regular, and in [*460] all *respects in accord with proper practice, and after the most approved form; but what is intended is, that it shall apparently be process lawfully issued, and such as the officer might lawfully serve. More precisely, 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 is issued without authority.¹ When such appears to be the process, the officer is protected in making service, and he is not concerned with any illegalities that may exist back of it.²

¹ Cooley on Taxation, 559, 562.

² Parsons v. Lloyd, 3 Wils. 341; Ives v. Lucas, 1 C. & P. 7; Erskine v. Hohnbach, 14 Wall. 613; Lott v. Hub-

bard, 44 Ala. 593; Grumon v. Raymond, 1 Conn. 40; Thames Manufg. Co. v. Lathrop, 7 Conn. 550; Watson v. Watson, 9 Conn. 140; Neth v. Cro-

The word process is made use of in this rule in a very *comprehensive sense, and will include any writ, warrant, [*461] order, or other authority which purports to empower a ministerial officer to arrest the person, or to seize or enter upon the property of an individual, or to do any act in respect to such person or property which, if not justified, would constitute a tres-

pass, 30 Conn. 580; *Brother v. Cannon*, 2 Ill. 200; *Shaw v. Dennis*, 10 Ill. 405; *Allen v. Scott*, 13 Ill. 80; *Hill v. Figley*, 25 Ill. 156; *Gott v. Mitchell*, 7 Blackf. 270; *Noland v. Busby*, 28 Ind. 154; *Brainard v. Head*, 15 La. Ann. 489; *Ford v. Clough*, 8 Me. 334; *Keller v. Savage*, 20 Me. 199; *Tremont v. Clark*, 33 Me. 482; *State v. McNally*, 34 Me. 210; *Caldwell v. Hawkins*, 40 Me. 526; *Judkins v. Reed*, 48 Me. 386; *Bethel v. Mason*, 55 Me. 501; *Nowell v. Tripp*, 61 Me. 429; *Seekins v. Goodale*, 61 Me. 400; *Colman v. Anderson*, 10 Mass. 105; *Holden v. Eaton*, 8 Pick. 436; *Sprague v. Bailey*, 19 Pick. 436; *Upton v. Holden*, 5 Met. 860; *Aldrich v. Aldrich*, 8 Met. 102; *Lincoln v. Worcester*, 8 Cush. 55; *Hayes v. Drake*, 6 Gray. 387; *Howard v. Proctor*, 7 Gray. 128; *Williamson v. Willis*, 15 Gray. 427; *Cheever v. Merritt*, 5 Allen, 563; *Underwood v. Robinson*, 106 Mass. 296; *Le Roy v. East Saginaw Railroad Co.*, 18 Mich. 233; *Bird v. Perkins*, 33 Mich. 28; *Wood v. Thomas*, 38 Mich. 686; *Turner v. Franklin*, 29 Mo. 285; *Glasgow v. Rowse*, 43 Mo. 479; *St. Louis Building, &c., Assn. v. Lightner*, 47 Mo. 393; *State v. Dulle*, 48 Mo. 282; *Walden v. Dudley*, 49 Mo. 419; *Blanchard v. Goss*, 2 N. H. 491; *Henry v. Sargeant*, 13 N. H. 321; *State v. Weed*, 21 N. H. 262; *Rice v. Wadsworth*, 27 N. H. 104; *Keniston v. Little*, 30 N. H. 318; *Kelley v. Noyes*, 43 N. H. 209; *Beach v. Furman*, 9 Johns. 228; *Warner v. Shed*, 10 Johns. 138; *Savacool v. Boughton*, 5 Wend. 171; *Wilcox v.*

Smith, 5 Wend. 231; *McGuinty v. Herrick*, 5 Wend. 240; *Alexander v. Hoyt*, 7 Wend. 89; *Reynolds v. Moore*, 9 Wend. 85, 86; *Coon v. Congdon*, 12 Wend. 496, 499; *Webber v. Gay*, 24 Wend. 485; *People v. Warren*, 5 Hill, 440; *Cornell v. Barnes*, 7 Hill, 35; *Bennett v. Burch*, 1 Denio, 141; *Abbott v. Yost*, 2 Denio, 86; *Dunlap v. Hunting*, 2 Denio, 643; *Patchin v. Ritter*, 27 Barb. 34; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Chegaray v. Jenkins*, 5 N. Y. 376; *State v. Lutz*, 65 N. C. 503; *Gore v. Martin*, 66 N. C. 371; *Loomis v. Spencer*, 1 Ohio, (N. S.) 153; *Moore v. Alleghany City*, 18 Penn. St. 55; *Billings v. Russell*, 23 Penn. St. 189; *Burton v. Fulton*, 49 Penn. St. 151; *Cunningham v. Mitchell*, 67 Penn. St. 78; *State v. Jervy*, 4 Strob. 304; *McLean v. Cook*, 23 Wis. 364; *Orr v. Box*, 22 Minn. 485. Such a writ, though based on a defective affidavit, issued by a court of general jurisdiction, within which are parties and subject matter, protects the officer serving it properly from action by a third person, claiming the goods, if the goods were liable to attachment in that suit. *Matthews v. Densmore*, 109 U. S. 216. See *Philips v. Spotts*, 14 Neb. 139. So where eight tax warrants were levied at once, and the taxes called for by three had been paid and those by the other five were illegal. *Woolsey v. Morris*, 96 N. Y. 811. So prima facie if the officer seizes property in the hands of a third person. *Brichman v. Ross*, 67 Cal. 601. The result of the suit does not affect the officer who has attached

pass.¹ Thus, a *capias ad respondendum*, or any warrant of arrest, is process; ² so is a writ of possession; ³ so is any execution which authorizes a levy upon property; ⁴ and so is any authority which is issued to a collector of taxes and which purports to empower him to collect the tax by distress of goods.⁵ These are only illustrations of a class too numerous to be specified in detail.

But the writ being found to be a lawful one, it next becomes necessary to the officer's protection that he proceed upon it according as the law directs. He cannot demand and secure the protection of the law while disregarding the commands laid upon him for the protection of the rights of others. By this is not meant that he shall obey to the letter every direction of the law, whether important or unimportant, and whether or not beneficial to any of the parties concerned. Many directions are given in legal proceedings which do not have specially in view the interests of parties; and where these fail of observance it is generally

property under valid process. *Lashus v. Matthews*, 75 Me. 446; *Grady v. Bowe*, 11 Daly, 259. See *Chipstead v. Porter*, 63 Geo. 210. Nor the reversal of a judgment in case of seizure under execution. *Smith v. People*, 99 Ill. 445.

In Vermont an exception to this rule seems to be made in tax cases, it being held that the tax bill and warrant in due form do not constitute protection to the collector without a showing that the antecedent proceedings were legal. *Hathaway v. Goodrich*, 5 Vt. 65; *Collamer v. Drury*, 16 Vt. 574; *Downing v. Roberts*, 21 Vt. 441; *Spear v. Tilson*, 24 Vt. 420; *Shaw v. Peckett*, 25 Vt. 423; *Wheelock v. Archer*, 26 Vt. 380.

If an officer seizes goods of third persons on the ground that their title is fraudulent, he must show plaintiff to be a judgment creditor. *Howard v. Manderfield*, 31 Minn. 337; *State v. Rucker*, 19 Mo. App. 587. It is a trespass *per se* to seize A's goods on a writ against B without regard to

probable cause. *Holton v. Taylor*, 6 S. E. Rep. 15 (Geo.)

¹ See *McGuinty v. Herrick*, 5 Wend. 240; *Loomis v. Spencer*, 1 Ohio, (N. S.) 153.

² *Parsons v. Lloyd*, 3 Wils. 341; *Neth v. Crofut*, 30 Conn. 580; *Brother v. Cannon*, 2 Ill. 200; *Brainard v. Head*, 15 La. Ann. 489; *State v. McNally*, 34 Me. 210; *State v. Weed*, 21 N. H. 262; *Warner v. Shed*, 10 Johns. 133; *Underwood v. Robinson*, 106 Mass. 296.

³ *Lombard v. Atwater*, 43 Iowa, 599. Or a writ of right. *Colman v. Anderson*, 10 Mass. 105.

⁴ *Thames Manuf. Co. v. Lathrop*, 7 Conn. 550; *Ives v. Lucas*, 1 C. & P. 7; *Hill v. Figley*, 25 Ill. 156; *Gott v. Mitchell*, 7 Blackf. 270; *Watkins v. Wallace*, 19 Mich. 57.

⁵ *Erskin v. Hohnbach*, 14 Vall. 613; *Shaw v. Dennis*, 10 Ill. 405; *Noland v. Bushby*, 28 Ind. 154; *Kelley v. Savage*, 20 Me. 199; *Caldwell v. Hawkins*, 40 Me. 526; *Nowell v. Tripp*, 61 Me. 426; *Clark v. Axford*, 5 Mich. 182.

said of them that they are merely directory, and that a *failure to comply with them does not constitute an in- [*462] validity, but an irregularity only. But provisions which are made for the very purpose of protecting individual interests cannot be disregarded with impunity. A suitable illustration is found in the case of one distraining cattle *damage feasant*, and proceeding to impound them before having his damages appraised. Where the appraisement is made by the statute a necessary preliminary to the impounding, and has in view a benefit to the owner of the beast, that he may know precisely what his liability is, the failure to obtain it will render the distrainer a trespasser *ab initio*.¹ So, as notice of the time and place of sale of chattels on execution is of high importance to the parties, an officer who fails to give it when the statute requires him to do so, and, nevertheless, proceeds to a sale, becomes trespasser *ab initio*, for the law will impute to him the indulgence of a purpose to sell thus wrongfully at the time he made the levy.² So the officer is liable in like manner if he sells on his process more property than is necessary to satisfy the demand ;³ or if he proceeds to sell before the time when under the statute he is at liberty to do so ;⁴ or if he makes a levy on household goods by handling them in a rough and improper manner, and then carries them away exposed to a severe rain ;⁵ or if, having levied on the interest of one tenant in common, he proceeds to sell the whole title,⁶ or in any manner misuses or misappropriates the property attached by him.⁷

¹ Pratt v. Petrie, 2 Johns. 191; Hopkins v. Hopkins, 10 Johns. 369; Sack-rider v. McDonald, 10 Johns. 252; Merritt v. O'Neil, 13 Johns. 477; Smith v. Gates, 21 Pick. 55.

² Blake v. Johnson, 1 N. H. 91; Purrington v. Loring, 7 Mass. 388.

³ Williamson v. Dow, 32 Me. 559. See Ross v. Philbrick, 30 Me. 29; Davis v. Webster, 59 N. H. 471. Where an officer seizes without allowing an exemption he is a trespasser *ab initio* as to such excess seized. Wentworth v. Sawyer, 76 Me. 434; Cone v. Forest, 126 Mass. 97. But not if in selling several articles to make the amount the last article sold is indivi-

sible and goes for more than enough to make the balance. Wheeler v. Raymond, 130 Mass. 247.

⁴ Wallis v. Truesdell, 6 Pick. 455. See Smith v. Gates, 21 Pick. 55; Knight v. Herrin, 48 Me. 533.

⁵ Suydacker v. Brosse, 51 Ill. 357.

⁶ Melville v. Brown, 15 Mass. 81.

⁷ Brackett v. Vining, 49 Me. 356. See Sawyer v. Wilson, 61 Me. 529; Ash v. Dawnay, 8 Exch. 237; Playfair v. Musgrove, 14 M. & W. 239; Attack v. Bramwell, 3 Best & S. 520, and cases cited.

To render one a trespasser *ab initio* the facts should warrant the conclusion that the officer intended from the

For a mere non-feasance an officer does not become a [*463] trespasser *ab initio*. As where he fails to keep safely property taken in execution by him;¹ or to proceed to a sale as in duty bound to do;² or to restore property attached after the debt has been satisfied.³ But in each of these cases he will be liable on the special case; but not in trespass, because in none of his conduct has there been any wrongful force.⁴

Extent of the Protection. The protection the officer receives from the apparent validity of the process is personal to the officer and those called in by him to assist in the service;⁵ that is to say, it protects them against being made liable as trespassers in obeying its command. But if the officer has taken property under it, and the fact that he acquired a special property in the goods by the seizure comes in question, it is not sufficient for him to show merely an apparently valid writ, but he must go

first to abuse his lawful authority. *Griel v. Hunter*, 40 Ala. 542, citing *Taylor v. Jones*, 42 N. H. 25. The wrongful act must be done to the property itself, and not to the fund realized from a legal sale, as by returning it to the wrong officer. *Bentley v. White*, 54 Vt. 564. It is not enough that he threshes and elevates grain levied on in the stack. *Ladd v. Newell*, 84 Minn. 107. But any obviously unnecessary and oppressive action may render the officer liable in case, as where a collector of taxes makes distress which is greatly and obviously excessive. *Jewell v. Swain*, 57 N. H. 506; *Davis v. Webster*, 59 N. H. 471.

The officer is liable if he makes defective service on the person after seizing goods, so that jurisdiction is not obtained. *Fairbanks v. Bennett*, 52 Mich. 61. So if he serves by mistake valid process on the wrong person. *Formwalt v. Hylton*, 66 Tex. 288; or on the property of such person: *Meadow v. Wise*, 41 Ark. 285.

¹ *Waterbury v. Lockwood*, 4 Day, 257; *Stoughton v. Mott*, 25 Vt. 668.

² *Bell v. North*, 4 Lit. (Ky.) 133.

³ *Gardner v. Campbell*, 15 Johns. 401. See *Baker v. Fales*, 16 Mass. 147, 153; *Hale v. Clark*, 19 Wend. 498; *Stoughton v. Mott*, 25 Vt. 668.

⁴ Where an act is lawfully done, it cannot be made unlawful *ab initio* unless by some positive act incompatible with the exercise of the legal right to do the first act. *Gates v. Lounsbury*, 20 Johns. 427. An officer cannot defend trover under a replevin unless he has returned it into court. *Wright v. Marvin*, 59 Vt. 437.

⁵ That whoever assists the officer at his request is protected as he is, see *Payne v. Green*, 18 Miss. 507; *Killpatrick v. Frost*, 2 Grant, 168; *Goodwine v. Stephens*, 63 Ind. 112. In Michigan one called to aid a sheriff in an arrest is justified, if he follows the officer's orders and does nothing wantonly, even though from lack of a warrant the sheriff himself is not justified in making the arrest. *Firestone v. Rice*, 88 N. W. Rep. 886 (Mich.) Protection does not extend to volunteers. *Kirbie v. State*, 5 Tex. App. 60.

further and show 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, then 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.¹ Such is the case where the officer, for any reason, finds himself under the necessity of bringing replevin for the goods,² or where he is sued for taking them by a third person who claims them by assignment from the defendant in the process, and whose title would consequently be valid as against any levy that could not be supported by valid anterior proceedings.³ And here it may be well to say, what it may be necessary to repeat hereafter, that mere irregularities in either the writ or what precedes it are not fatal defects.

***What Process is not Fair on its Face.** Some old cases [*464] made a distinction between process issuing from courts of general jurisdiction and that issued by other and inferior tribunals, and required an officer in the last case to take notice of whatever might appear, or not appear, in all the proceedings on which the right to issue the process might depend. But since the thorough examination the whole subject received in *Savacool v. Boughton*,⁴ it has generally been conceded that the distinction is unwarranted, so far as it concerns the personal protection of the officer. It is not unimportant, however, as it may bear 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. This is a general rule.

The following are illustrative instances of process not fair on its face: A warrant of arrest issued by a justice in a case of which its recitals showed he had no jurisdiction;⁵ a writ of *habeas*

¹ *Earle v. Camp*, 16 Wend. 562.

² *Spafford v. Beach*, 2 Doug. (Mich.) 199; *Leroy v. East Saginaw*, 18 Mich. 233.

³ *Parker v. Walrod*, 16 Wend. 514, 517, and cases cited.

⁴ 5 Wend. 170. See, also, *Ressler v. Peats*, 86 Ill. 275; *Barr v. Boyles*, 96 Penn. St. 31.

⁵ *Shergold v. Holloway*, Star. 1003; *Rosen v. Fischel*, 44 Conn. 371; *Pooler v. Reid*, 75 Me. 438; *Elsemore v.*

corpus issued by and returnable before an officer not by law having authority over that writ;¹ a tax warrant the verification to which was made prematurely;² a warrant for the collection of a personal tax where one on real estate only could be levied;³ an order made by a commissioner in bankruptcy to detain a debtor until he should pay certain costs, the law giving him no authority to make such an order;⁴ a conviction which showed on its face that the party had been convicted on default in responding to a summons returnable less than ten days from date, the statute requiring ten days "at least";⁵ process of contempt issued by a judge of a court when only the court as a body had authority to issue it;⁶ process issued under [*465] an *unconstitutional law;⁷ a warrant for taxes which directed the collection of costs when the law allowed none;⁸ an order of a military officer for the seizure of the property of a citizen not in the military service;⁹ a conviction by a military commission for an offense only triable in the regular courts,¹⁰ etc. In all these cases the rule prevails that 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.

Whether, where an officer knows that back of process fair on its face are facts which render it void, he is nevertheless protected in serving it, is a point upon which the authorities are not

Longfellow, 76 Me. 128. So a warrant for a "person whose name is unknown, &c., of V." *Harwood v. Siphers*, 70 Me. 464. See as to warrant of commitment; *Patzack v. Von Gerichten*, 10 Mo. App. 424.

¹ *Cable v. Cooper*, 15 Johns. 152. See *Chalker v. Ives*, 55 Penn. St. 81; *Hilbish v. Hower*, 58 Penn. St. 93.

² *Westfall v. Preston*, 49 N. Y. 349. For other illustrations in tax cases, see *Eames v. Johnson*, 4 Allen, 382; *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Nat. Bank of Chemung v. Elmira*, 53 N. Y. 49; *Gale v. Mead*, 4 Hill, 109.

³ *American Bank v. Mumford*, 4 R. I. 478.

⁴ *Watson v. Bodell*, 14 M. & W. 58.

⁵ *Mitchell v. Foster*, 12 A. & E. 472. If a special drainage proceeding is jurisdictionally void as against a defendant, an officer is not protected by his writ in enforcing the judgment. *Cottingham v. Fortville, &c., Co.*, 14 N. E. Rep. 479 (Ind).

⁶ *Van Sandau v. Turner*, 6 Q. B. 773.

⁷ *Ely v. Thompson*, 3 A. K. Marsh. 70; *Kelly v. Bemis*, 4 Gray, 83. Process from a State court in an admiralty case would be of this sort. *Campbell v. Sherman*, 35 Wis. 103.

⁸ *Clark v. Woods*, 2 Exch. 395.

⁹ *Mitchell v. Harmony*, 13 How. 115.

¹⁰ *Milligan v. Hovey*, 3 Biss. 13.

agreed. In Illinois there are *dicta* in a number of cases,¹ followed at length by an authoritative decision,² that where an officer 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. This doctrine is approved in Wisconsin,³ but it has not met with general acceptance. It was expressly denied in New York, in a case in which jurisdiction to issue the particular process depended on the defendant's residence within the jurisdiction of the court, and the officer knew him to be a non-resident.⁴ In Massachusetts, also, it was decided that an officer was not liable for serving process by the arrest of a person who had been discharged under the insolvent laws, though he knew of the discharge.⁵ A case in Connecticut is very pointed and clear. The officer was sued in trespass for executing a writ of replevin issued for a horse as having been distrained or impounded. Says HOSMER, Ch. J.: "The writ was put in his hands, as an officer, to serve, and he accordingly served the same by replevying the before mentioned horse. The first objection to this act of his is founded on a fact proved at the trial of the *cause, to-wit: that he knew the said horse had not [*466] been distrained or impounded. From this the plaintiff infers that he ought not to have served the replevin; and that in thus doing he became a trespasser. I reply to this objection, that the defendant, Phelps, being a legal officer, it became his duty, regardless of any knowledge or supposed knowledge of his own, that there existed no cause of action, to serve the writ committed to him promptly, unhesitatingly, and without restraint from the above mentioned cause. This I consider so firmly established as to render the proposition self evident. The facts on the face of the writ constitute his justification, because he was obliged to obey its mandate; nor was it any part of his duty to determine whether the allegations contained in the replevin were true. The proof of these positions results, incontrovertibly, from his relative condition. He was an executive officer, whose sole duty it

¹ Barnes v. Barber, 6 Ill. 401; Guyer v. Anderson, 11 Ill. 494; McDonald v. Wilkie, 13 Ill. 22.

² Leachman v. Dougherty, 81 Ill. 324.

³ Sprague v. Birchard, 1 Wis. 457,

404; Grace v. Mitchell, 31 Wis. 533, 539.

⁴ Webber v. Gay, 24 Wend. 485. See, also, People v. Warren, 5 Hill, 440.

⁵ Wilmarth v. Burt, 7 Met. 257. See Twitchell v. Shaw, 10 Cush. 46.

was to execute, and not to decide on, the truth or sufficiency of the process committed to him for service. He has no portion of judicial authority, nor the means of inquiring into the causes of action contained in the writs and declarations put into his hands for service. Obedience to all precepts committed to him to be served is the first, second and third part of his duty; and hence, if they issue from competent authority, and with legal regularity, and so appear on their face, he is justified for every action of his within the scope of their command." "The ground of these principles is simply this: That to the magistrate is confided the issuing of writs, and to the sheriff and other executive officers is confided the duty of serving them. It is easy to see what widespread mischief might result from permitting an executive officer to decide, on his own knowledge, that he ought not to serve a precept or warrant put into his hands for service, and to consider what justly must follow from such doctrine; that is, that his return of the fact would be a justification for his omission. In short, 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 mandates he by law is subjected." *

[*467] *A doctrine precisely identical has been laid down in Louisiana³ and in Michigan.⁴ The cases decided are specially significant in this: that in each case the fact which made the process illegal was within the official knowledge of the officer claiming the protection. It seems to us therefore that the weight of authority and of reason is clearly in favor of the proposition, that the officer may safely obey all 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. But when it is settled that an officer may safely execute process, though he may know of facts to invalidate it, it does not of necessity follow that he cannot safely refuse to do so. It is, indeed, intimated by Chief Justice

³ Citing *Belk v. Broadbent*, 3 T. R. 183, 185; *Grumon v. Raymond*, 1 Conn. 40; *Miller v. Davis*, Comyn, 590.

⁴ *Watson v. Watson*, 9 Conn. 140, 146. See *Cunningham v. Mitchell*, 67 Penn. St. 78.

⁵ *Brainard v. Head*, 15 La. Ann. 489.

⁶ *Wall v. Trumbull*, 16 Mich. 223; *Bird v. Perkins*, 33 Mich. 28. See, also, *Richards v. Nye*, 5 Oreg. 382. The same rule obtains in Texas. *Tierney v. Frazier*, 57 Tex. 437; *Rainey v. State*, 20 Tex. App. 455.

HOSMER, in the citation above given, that duty requires him to proceed and serve the process; but the courts in New York have held otherwise.¹ And, indeed, it would seem an anomaly that a plaintiff should be at liberty to hold an officer responsible for refusing to serve a writ, the service of which would render the plaintiff himself liable as a trespasser. Says WALKER, J., "As a general rule, an officer may justify, under a writ regular on its face, whether the court had jurisdiction or not, although the writ may be void. Or he may, if he chooses, refuse to execute such a writ."²

Magistrate, when Liable. The rule of judicial irresponsibility, where the magistrate has acted within his jurisdiction, is given, with the authorities which support it, in another place. The converse of the rule is true, that if he acts without jurisdiction he is liable, even though his process is perfectly valid on its face, and he has acted with proper motive. The principle is illustrated by 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.³ So assessors are liable who impose taxes on persons not taxable *within their districts, and issue process for their col- [*468] lection,⁴ or spread upon the tax roll a sum never lawfully voted, or in excess of that which the law allows to be levied,⁵ or a sum which has been levied for an unauthorized purpose,⁶ or issue a warrant for the collection of sums which have not been

¹ Horton v. Hendershot, 1 Hill, 118; Cornell v. Barnes, 7 Hill, 35; Dunlap v. Hunting, 2 Denio, 643; Earl v. Camp, 16 Wend. 562. See, however, Clearwater v. Brill, 11 N. Y. Sup. Ct. (4 Hun.) 728.

² Davis v. Wilson, 61 Ill. 527, 529. See, also, Hill v. Wait, 5 Vt. 124.

³ Miller v. Grice, 2 Rich. 27; Piper v. Pearson, 2 Gray, 120; People v. Jarrett, 7 Ill. App. 566. So if complaint shows the offense barred by lapse of time. Vaughn v. Congdon, 56 Vt. 111. So if having power to bind over, he convicts and sentences. Patzack v. Von Gerichten, 10 Mo. App. 424.

⁴ Mygatt v. Washburn, 15 N. Y. 316; Bennett v. Buffalo, 17 N. Y. 383; Clark v. Norton, 49 N. Y. 243; Dorwin v. Strickland, 57 N. Y. 492; Suydam v. Keys, 13 Johns. 444; Martin v. Mansfield, 3 Mass. 419; Agry v. Young, 11 Mass. 220; Gage v. Currier, 4 Pick. 399; Lyman v. Fiske, 17 Pick. 231; Fairbanks v. Kittredge, 24 Vt. 9; Harriman v. Stevens, 43 Me. 497; Ware v. Percival, 61 Me. 391.

⁵ Grafton Bank v. Kimball, 20 N. H. 107; Cooley on Taxation, 554, and numerous cases cited.

⁶ Stetson v. Kempton, 13 Mass. 271; Drew v. Davis, 10 Vt. 506.

properly reported to them as allowed by the competent authority,¹ or alter the assessment after, by law, it has passed from their control, so that the alteration is wholly an unofficial act.²

Liability of Party. 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;³ and perhaps to this rule there is no exception but this: that 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 decision protects not the officer merely, but the party also.⁴ But every party has a right to assume that the

¹ Clark v. Axford, 5 Mich. 182.

² Bristol Manuf. Co. v. Gridley, 28 Conn. 201; Ferton v. Feller, 33 Mich. 199. See Garfield v. Douglass, 22 Ill. 100.

³ Stetson v. Goldsmith, 30 Ala. 602; S. C. 31 Ala. 649; Connelly v. Woods, 31 Kan. 359. *Ex parte* Thompson, 1 Flipp. 507. An execution which will protect an officer may not a party. Collins v. Mann, 15 W. Va. 171.

⁴ West v. Smallwood, 3 M. & W. 418. "Where a magistrate has a general jurisdiction over the subject matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously." Lord ABINGER, Ch. B. But it was agreed in the same case that the party would have been liable if he had participated with the officer in the service of the warrant. An order of arrest made by a judge having jurisdiction protects the party "unless there is entire lack of evidence of some essential

fact required to be shown." Dusy v. Helm, 59 Cal. 188. See Goodwine v. Stephens, 63 Ind. 112; Ogg v. Murdock, 25 W. Va. 139. But if the party draws up the complaint and warrant and orders arrest at any cost, he may be liable. Loomis v. Render, 41 Hun, 268. If a party has caused a seizure under a valid writ he is not liable, because the magistrate, by his own error, afterwards loses jurisdiction and enters a void judgment. Grafton v. Carmichael, 48 Wis. 630. If one presents an application to a court of competent jurisdiction and the court, adjudicating upon the law and facts, orders an arrest which is afterwards vacated as erroneous, the applicant is not liable in trespass. Fischer v. Langbein, 62 How. Pr. 238, 103 N. Y. 84; Bamberg v. Kahn, 43 Hun, 411; Marks v. Townsend, 97 N. Y. 590. So, if after execution, the judgment is reversed. Field v. Anderson, 103 Ill. 403. In Day v. Bach, 87 N. Y. 56, where an attachment was vacated, it is said that a void writ furnishes no justification and an action may be brought for what is done under it without setting it aside; an irregular writ must be set aside before it ceases to protect; if the pro-

officer will proceed to execute lawful process in a lawful manner, and if, instead of doing so, the officer proceeds illegally, the party is not responsible, unless he participated in or advised the abuse.¹

***Protection of Purchaser under Execution.** One who [*469] becomes purchaser of personal property at an execution sale is concerned only with the judgment, the levy, the execution and the sale; if these are apparently valid, he need look no further.² To say that if the court rendering the judgment had no jurisdiction all proceedings upon the execution are merely void, is stating a proposition that should be self evident.³ But the rule is the same if, for any other reason, the judgment was void,⁴ or had been satisfied,⁵ or if, the judgment being valid, the execution for any reason was void,⁶ or was issued when none was allowed by law.⁷ The sale would also be void if made privately,

cess is regularly issued in a case where the court has jurisdiction, there is no liability in trespass, even when it has been set aside, but property taken under it must be restored.

¹ *Perrin v. Clafin*, 11 Mo. 13; *Princeton Bank v. Gibson*, 20 N. J. 138; *Snively v. Fahnestock*, 18 Md. 891; *Averill v. Williams*, 1 Denio, 501; *Clay v. Sandefer*, 12 B. Mon. 334; *Michels v. Stork*, 44 Mich. 2; *Bartlett v. Hawley*, 37 N. W. Rep. 580 (Minn.); *Corner v. Mackintosh*, 48 Md. 374. If a third person's goods are seized, the burden is on the party seizing to show that he did not procure, direct or ratify the act. *Peterson v. Foli*, 67 Ia. 402. A party is liable for an arrest caused by his attorney. *Guilleaume v. Rowe*, 94 N. Y. 268. One not a party is liable if he causes the officer's wrongful seizure. *Fish v. Street*, 27 Kan. 270.

² *Wheaton v. Sexton*, 4 Wheat. 503; *Lenox v. Clark*, 52 Mo. 115. So where judgment was after service on a lunatic. *Heard v. Sack*, 81 Mo. 610. And where goods of a third person were sold. *Gloss v. Black*, 91 Penn. St. 418.

³ *Falkner v. Guild*, 10 Wis. 563; *Wilson v. Arnold*, 5 Mich. 98; *Gray*

v. Hawes, 8 Cal. 562; *Miller v. Handy*, 40 Ill. 448; *Mulvey v. Carpenter*, 78 Ill. 580; *Borders v. Murphy*, 78 Ill. 81; *Abbott v. Sheppard*, 44 Mo. 273; *Clark v. Fowler*, 5 Allen, 45.

⁴ *Conrad v. McGee*, 9 Yerg. 428; *Welch v. Butter*, 24 Geo. 445; *Hollingsworth v. Bagley*, 35 Tex. 345; *Harshey v. Blackmarr*, 20 Iowa, 161; *Sanders v. Rains*, 10 Mo. 770; *Higgins v. Peltzer*, 49 Mo. 152. Title acquired through sale on such judgment may be collaterally attacked. *Collins v. Miller*, 64 Tex. 118.

⁵ *Jackson v. Morse*, 18 Johns. 441; *Cameron v. Irwin*, 5 Hill, 272; *King v. Goodwin*, 16 Mass. 63; *Loomis v. Storrs*, 4 Conn. 440; *Kennedy v. Duncklee*, 1 Gray, 65; *Laval v. Rowley*, 17 Ind. 36.

⁶ *Woodcock v. Bennett*, 1 Cow. 711; *Palmer v. Palmer*, 2 Conn. 462; *Boal's Lessee v. King*, 6 Ohio, 11; *French v. Eaton*, 11 N. H. 337; *Brem v. Jamieson*, 70 N. C. 566.

⁷ *Sheetz v. Wynkoop*, 74 Penn. St. 198; *Cadmus v. Jackson*, 52 Penn. St. 295. The case would of course be still plainer, if possible, if no judgment at all had been rendered. *Crawford v. Dalrymple*, 70 N. C. 156;

because the officer has no authority to sell in that manner, and the purchaser must take notice of such an illegality.¹ The same would be true if the property was not present, or within view of the bidders.²

The rule of protection, moreover, is not so broad when the plaintiff in the process, or his attorney, or anyone fully [*470] cognizant *of all the proceedings, becomes purchaser, as it is when the purchaser is one technically known as a purchaser in good faith; that is to say, a purchaser who has paid the purchase price without notice of defects in the proceedings. For example, if the officer sells without giving the proper notice of sale, the title of a purchaser in good faith would not thereby be affected;³ 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. So a purchase by one in good faith would be protected, even though the judgment under which it was made should subsequently be set aside for errors;⁴ but it would be otherwise if the purchase were made by one who

Craft v. Merrill, 14 N. Y. 456; *Vastine v. Fury*, 2 S. & R. 432.

¹ *Ricketts v. Unangst*, 15 Penn. St. 90; *Hutchinson v. Cassidy*, 46 Mo. 431.

² *Carson v. Stout*, 17 Johns. 123; *Linendoll v. Dok*, 14 Johns. 223; *Ray v. Harcourt*, 19 Wend. 497; *Lowry v. Coulter*, 9 Penn. St. 349; *Carey v. Bright*, 58 Penn. St. 70, 84; *Kennedy v. Clayton*, 29 Ark. 270; *Rowan v. Refeld*, 31 Ark. 648; *Winfield v. Adams*, 34 Mich. 437. In Missouri it seems that such a sale is only voidable on motion. *Eads v. Stephens*, 63 Mo. 90. In Mississippi a sale made after the return day of the execution is void. *Williamson v. Williamson*, 52 Miss. 725. In other States, however, this will be found provided for by statute in many cases.

³ *Whittaker v. Sumner*, 7 Pick. 551; *White v. Cronkhite*, 35 Ind. 483; *Hobbein v. Murphy*, 20 Mo. 447; *Curd v. Lachland*, 49 Mo. 451; *Hanks v. Neal*, 44 Miss. 212; *Osgood v. Blackmore*, 59 Ill. 261; *Pollard v. King*, 63 Ill.

36; *Wallace v. Trustees*, 52 Geo. 164; *Wade v. Saunders*, 70 N. C. 270; *Lee v. Howes*, 30 Up. Can. Q. B. 292. So it is held even if the attorney buys, the title may not be attacked collaterally. *Barton v. Spiers*, 92 N. C. 503. The innocent purchaser is not affected by subsequent acts or omissions of the officer. *Millis v. Lombard*, 32 Minn. 259; *Caldwell v. Blake*, 69 Me. 458. The plaintiff is not such purchaser as to irregularities in the proceedings, but is as to all prior equities. *Bole v. Newberger*, 81 Ind. 274; *Vitito v. Hamilton*, 86 Ind. 137. But see *Humphrey v. McGill*, 59 Geo. 649.

⁴ *Clark v. Pinney*, 6 Cow. 297; *Woodcock v. Bennett*, 1 Cow. 711; *Dorsey v. Thompson*, 37 Md. 25; *Vogler v. Montgomery*, 54 Mo. 577; *Stinson v. Ross* 51 Me. 556; *Guiteau v. Wisely*, 47 Ill. 433; *Goodwin v. Mix*, 38 Ill. 115; *Hubbell v. Broadwell*, 8 Ohio, 120; *Keene v. Sallenbech*, 15 Neb. 200; see *Shultz v. Sanders* 38 N. J. Eq. 154.

had charge of the proceedings, actually or by implication of law.¹

Locality of Wrongs. It is a general rule that for the purpose of redress it is immaterial where a wrong was committed; in other words, a wrong being personal, redress may be sought for it wherever the wrong-doer may be found. To this there are a few exceptions, in which actions are said to be local, and must, therefore, be brought not only within the country, but also *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. Therefore, while an action of trespass to the person or for the conversion of goods is transitory, action for flowing lands is local, because they can 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*, 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.² In a later case it is held to be unimportant whether the foreign tort was or was not committed within territory subject to the British crown;³

¹ *Corwith v. State Bank*, 15 Wis. 289; *S. C.* 18 Wis. 560; *Buchanan v. Clarke*, 10 Gratt. 164; *Reynolds v. Harris*, 14 Cal. 667; *Hays v. Cassell*, 70 Ill. 669; *Holland v. Adair*, 55 Mo. 40; *Two good v. Franklin*, 27 Iowa, 239; *Bank of U. S. v. Bank of Washington*, 6 Pet. 8. The general rule that the purchaser *bona fide* is not concerned with mere irregularities is laid down in so many cases that no attempt will be made to give them. They are collected in Rorer on Judicial Sales, with industry and discrimination, and also in Freeman on Executions. The following may be mentioned: *Hamilton v. Shrewsbury*, 4 Rand. 427; *Jackson v. Roosevelt*, 13

Johns, 97; *Dowdell v. Neal*, 10 Geo. 148; *Dingledine v. Hershman*, 53 Ill. 280; *Boles v. Johnson*, 23 Cal. 226; *Sabin v. Austin*, 19 Wis. 421; *Cooper v. Borrall* 10 Penn. St. 491; *Reid v. Largent*, 4 Jones (N. C.) 454; *Mordecai v. Speight*, 3 Dev. 429; *Doe v. Myers*, 9 Up. Can. Q. B. 465. If the plaintiff's assignee is purchaser, he gets no better title than the plaintiff would. *McJilton v. Love*, 13 Ill. 486; *Reynolds v. Hosmer*, 45 Cal. 616.

² *Mostyn v. Fabrigas*, Cowp. 161. See *Buron v. Denman*, 2 Exch. 167.

³ *Scott v. Lord Seymour*, 1 H. & C. 219. In *Wilson v. McKenzie*, 7 Hill, 95, it was decided that an action

but it is agreed that to support an action the act must have been wrongful or punishable where it took place, and that whatever would be a good defense to the action, if brought there, must be a good defense everywhere.¹

That actions for trespasses on lands in a foreign country cannot be sustained, is the settled law in England² and in this country. The decision of Chief Justice MARSHALL to that effect in the suit brought by Mr. Edward Livingston against Mr. Jefferson, for having forcibly dispossessed him of the batture in New Orleans, has been often followed without question.³ But if by means of the trespass anything is severed from the realty so as to become personal property, and this is afterward converted [*472] *by the trespasser to his own use, it seems that for the conversion he may be sued anywhere.⁴

It has been made a question whether, if by a wrongful act committed in one State, real property is injured in another, action may not be brought in the former for that injury; and in one case Mr. Justice GRIER, at the circuit, held that it might.⁵ In

would lie against an officer of the navy for illegally assaulting and imprisoning one of his subordinates on the high seas, though the act was done under color of naval discipline. NELSON, Ch. J., cites in his opinion, among other cases, *Warden v. Bailey*, 4 Taunt. 67; *S. C. 4 Maule & S.* 400; *Hanneford v. Hunn*, 2 C. & P. 148.

¹ *Phillips v. Eyre*, L. R. 4 Q. B. 225; *S. C. in Exch. Ch.* L. R. 6 Q. B. 1; *The China*, 7 Wall. 53, 64; *Smith v. Condry*, 1 How. 28; *Stout v. Wood*, 1 Blackf. 71; *Wall v. Hoskins*, 5 Ired. 177; *Mahler v. New York*, etc., *Trans. Co.*, 35 N. Y. 352.

² *Doulson v. Mathews*, 4 T. R. 503, overruling some early *nisi prius* cases.

³ *Livingston v. Jefferson*, 1 Brock. 203. And see *Watts' Adm. v. Kinney*, 23 Wend. 484; *S. C. 6 Hill*, 82; *Champion v. Doughty*, 18 N. J. 3; *Ham v. Rogers*, 6 Blackf. 559; *Prichard v. Campbell*, 5 Ind. 494; *Chapman v. Morgan*, 2 Green, (Iowa), 374. See *Niles v. Howe*, 57 Vt. 388,

where the trespass was in Mass.; *Am. Un. Tel. Co. v. Middleton*, 80 N. Y. 408, in N. J.; *Dodge v. Colby*, 15 N. E. Rep. 703 (N. Y.) in Geo. But a bill to set aside a conveyance as fraudulent, is not local. *Johnson v. Gibson*, 116 Ill. 294. Nor an action for negligently burning fences. *Railroad Co. v. Weeks*, 13 Lea, 148.

⁴ *Tyson v. McGuineas*, 25 Wis. 656. Sand was severed in Missouri, and carried to Kansas. Trespass *de bon. asp.* or trover will lie in Kansas. *McGonigle v. Atchison*, 33 Kan. 726. In Louisiana, actions for injuries to real estate are transitory, and on that ground an action for an injury to real estate in Illinois was sustained. *Holmes v. Barclay*, 4 La. Ann. 63.

⁵ *Rundle v. Del. & Rar. Canal*, 1 Wall. Jr. 275. The conclusion of the learned judge was that the plaintiff might elect to sue in either jurisdiction, the act done being in one and the injury accomplished in the other.

New Hampshire, however, it is held that suit can be brought only in the jurisdiction where the land lies.¹

Where a new right of action is given by statute for that for which an action at common law would not lie, the courts are not agreed as to where such action must be brought. The question has often arisen under statutes giving an action for causing death by wrongful act, neglect or default and as has been stated in a former chapter, some cases hold that the action can only be brought within the State or country whose statute gives the right and for wrongs there suffered, while others allow the action to be brought in any state which has substantially similar statutes.² And where a further remedy is given for that which is an actionable wrong at the common law, it can be enforced only by the courts of the jurisdiction giving it, and for wrongs there suffered.³

In Ohio an action was sustained for the diversion of water in Pennsylvania to the injury of lands in the former State. *Thayer v. Brooks*, 17 Ohio, 489.

¹ *Worster v. Winnipiseogee Lake Co.*, 25 N. H. 525. Compare *Sutton v. Clarke*, 6 Taunt. 29; *Thompson v. Crocker*, 9 Pick. 59.

² See cases cited on pages 811-18, *supra*. An action will lie in Vermont, for injury suffered in the Province of Quebec, from failure of defendant to comply with a statute of the Province. *McLeod v. Railroad Co.*, 58 Vt. 727. An action which lies in Iowa under a

statute changing the common law rule as to the non-liability of the master to the servant for a fellow servant's negligence, may, if the injury is suffered in Iowa, be brought against the master in Minnesota, though there the common law rule is followed. *Herrick v. Minn., &c. R. Co.*, 31 Minn. 11.

³ One cannot sue in Massachusetts under its statutes for an injury done by a dog in New Hampshire, though the dog is owned and kept in the former State, and strayed away to commit the injury. *Le Forest v. Tolman*, 117 Mass. 109.

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* CHAPTER XVI.

FRAUDS, OR WRONGS ACCOMPLISHED BY DECEPTION.

The maxim which underlies the law of negligence is, as will be more fully shown hereafter, that every man must so use and enjoy his own as not to impede a corresponding use and enjoyment of their own by others. This is the legal duty of every man in respect to his neighbor, and this is the rule of good neighborhood which the law prescribes. The rule of morals is higher, and requires selfishness to be put aside, and every man to do by others what he would have them do by him. The remark has already been made that it would be futile for the law to attempt the enforcement of such a rule,¹ and it must be content with the regulation of selfishness as the best that is practicable.

The remark has special application in the law of frauds. There must be a legal standard by which the existence of actionable frauds can be determined, and this must be one capable of being practically applied, and by which the ordinary dealings of men with each other can be judged for the purposes of legal redress.

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. Of the first class the following are illustrations: Making a voluntary conveyance of so much of one's property as to leave insufficient for the payment of his debts; or giving secret liens on property, the possession of which is retained, and thereby misleading those dealings with [*474] the *person giving them. These frauds are either re-

¹ Ante, p. 3.

dressed in equity, or at law by the transfers being treated as void on the principle that whatever fraud creates justice will destroy.¹ Of the second class, the chief illustrations 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 [*475] which had previously existed, and which were material

¹ See cases in illustration of this maxim collected in *Vreeland v. N. J. Stone Co.*, 29 N. J. Eq. 188.

² Definition approved. *Alexander v. Church*, 53 Conn. 561. Sir John Romily, in *Green v. Nixon*, 23 Beav. 530, 535, says: "Fraud implies a willful act on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled to." "Fraud," it is said in another case, "consists in a person being induced to act to his prejudice by untruthful statements made by another, upon whom he had a right to rely, and whose duty it was to state the case truly." *Detroit v. Weber*, 26 Mich. 284, 288; *Tong v. Marvin*, 15 Mich. 60. A fraud is sometimes said to be a *gross* fraud; but this merely indicates how the transaction affects the moral sensibilities; the epithet passes it into no new category of legal wrongs, and gives for it no additional remedy.

Whether or not the fraudulent actor expected to make any personal gain to himself in the transaction is of no importance. *Haycraft v. Creasy*, 2 East, 92. Fraud in equity, it is said, "properly includes all acts, omissions and concealments by which an undue and unconscientious advantage is taken of another." *Story Eq. Juris.*, § 187; 1 *Fonb. Eq. b. 1, c. 263*; *Belcher v. Belcher*, 10 *Yerg.* 121;

Story v. Norwich, &c., R. R. Co., 24 Conn. 94. Still fraud, it is apprehended, is the same at law and in equity, though many frauds are redressed in the courts of equity for which the legal remedies are not adequate, or to which they are not adapted.

A definition of fraud often met with in law books, is the following: The unlawful appropriation of another's property, with knowledge, by design, and without criminal intent. This definition is both inadequate and erroneous. In the first place an appropriation of one's property unlawfully, with knowledge and by design, is not always a fraud; it may be made openly and without deception, and so be a mere trespass or a conversion. The definition does not at all distinguish between an appropriation through fraud and a conversion without fraud, and therefore fails to indicate what it assumes to define. In the second place, fraud is not limited to cases in which property is obtained. Every invasion of the right of another by a fraudulent act or omission is a legal fraud, though to obtain property be not the object. In the third place, the design to commit fraud is not essential in all cases, and it may be accomplished sometimes, though the party chargeable with it is ignorant that his statements or devices do not

to the dealings between the parties in which the deception was employed. In order to render it actionable, the following facts 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 a 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 this damage followed proximately the deception.¹

Burden of Proof. Fraud is never presumed, and the party alleging and relying upon it must prove it.² This, however, is one of those rules of law which is to be applied with caution and circumspection. "So far as it goes, it is based on a principle which has no more application to frauds than any other subject of judicial inquiry. It amounts but to 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 is therefore as properly made out by marshaling the circumstances surrounding the transaction, and deducing therefrom the fraudulent purpose, when it manifestly appears, as by presenting the more positive and direct testimony of actual purpose to deceive;⁴ and, indeed, circumstantial

present the real facts. And in the fourth place, deception by which an individual is wronged, is no less a fraud because of its having been accomplished with criminal intent. The criminal intent only adds a new characteristic, and makes that which is a private wrong a public wrong also. Therefore the definition given is faulty in every one of its particulars.

¹ *Sellar v. Clelland*, 2 Colorado, 532, 544; *Byard v. Holmes*, 34 N. J. 293; *Lummis v. Stratton*, 1 Pen. & W. 245; *Tryon v. Whitmarsh*, 1 Met. 1.

² *Hill v. Reif-nider*, 46 Md. 555; *Tompkins v. Nichols*, 53 Ala. 197; *Baldwin v. Buckland*, 11 Mich. 89; *Bowden v. Bowden*, 75 Ill. 143; *Far-*

mer v. Calvert, 44 Ind. 209; *London*, etc., *Bank v. Lempriere*, L. R. 4 P. C. 572; S. C. 5 Moak, 137. If the representations are proved false the burden is cast upon the defendant to show they were not relied on. *Fishback v. Miller*, 15 Nev. 428.

³ *BLACK*, Ch. J., in *Kaine v. Weigley*, 22 Penn. St. 179, 182. See *O'Donnell v. Segar*, 25 Mich. 367. It is not enough that the facts are ambiguous, and as consistent with innocence as guilt. *Shultz v. Hoagland*, 85 N. Y. 404. The plaintiff must show that he understood ambiguous words to mean what was false and had thereby incurred loss. *Smith v. Chadwick*, L. R. 9 App. Cas 187.

⁴ *Kaine v. Weigley*, 22 Penn. St.

proof in most cases can alone bring the fraud to light, for 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.¹ And while it is often said that to justify [*476] the imputation of fraud, the facts must be such as are not explicable on any other hypothesis,² yet this can mean no more than this, that the court or jury should be cautious in deducing the fraudulent purpose; for whatever satisfies the mind and conscience that fraud has been practiced is sufficient.³

What is not Deception. In general mere silence, a mere failure to apprise the party with whom one is dealing of facts important for him to know for the protection of his own interest in the particular transaction, is no fraud. *Caveat emptor* is the motto of commercial law, and in other dealings, as well as in sales, every person is expected to look after his own interest, and is not at liberty to rely upon the other party to protect him against the consequences of his own blunders or heedlessness. Therefore, where the sources of information are equally open to both parties to any dealings, and the one obtains an advantage of the other without resort to any trick or artifice of concealment calculated to throw the other off his guard, or to any false presentation of facts, the advantage he gains is deemed legitimate, and the losing party must bear such loss as has resulted from his own want of vigilance or prudence.⁴ Nor is this the rule as regards

179; *Watkins v. Wallace*, 19 Mich. 57; *McDaniel v. Baca*, 2 Cal. 326; *Waddingham v. Loker*, 44 Mo. 132; *Bauk of Orange County v. Fink*, 7 Paige, 87.

¹ *Hopkins v. Sievert*, 58 Mo. 201; *Vance v. Phillips*, 6 Hill 433; *Hennequin v. Naylor*, 24 N. Y. 139.

² *The Alabama, etc., Co. v. Pettway*, 24 Ala. 544; *Buck v. Sherman*, 2 Doug. (Mich.) 176; *McConnell v. Wilcox*, 2 Ill. 343. In Ala. it is now denied that this is a correct statement of the law. "Fraud requires no higher measure of proof" in civil proceedings "than is required in many other cases where the presumption of honesty, etc. is to be

overcome." *Adams v. Thornton*, 78 Ala. 489.

³ *Kaine v. Weigley*, 23 Penn. St. 179; *Hildreth v. Sands*, 2 Johns. Ch. 35; *S. C. in error*, 14 Johns, 493; *Devoe v. Brandt*, 53 N. Y. 462, 465. It need not be shown "conclusively." *Sparks v. Dawson*, 47 Tex. 138.

⁴ *Mooney v. Miller*, 102 Mass. 217; *Starr v. Bennett*, 5 Hill, 303; *Brown v. Leach*, 107 Mass. 364; *Hobbs v. Parker*, 31 Me. 143; *Williams v. Spurr*, 24 Mich. 335; *Law v. Grant*, 37 Wis. 548; *Mitchell v. McDougall*, 62 Ill. 498. See *Jordan v. Pickett*, 78 Ala. 331 for statement of what circumstances make silence fraudulent and

[*477] merely the *quality or value of that which is the subject of negotiation, but it extends to all those facts and circumstances which would be likely to influence the minds of the contracting party if they were known to him when the contract was entered into. Therefore, 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 misrepresentation or artifice, there is in law no fraud, although the vendor when he sold, fully believed the vendee to be responsible and entitled to credit.¹

What is Deception. In order to make out deception, it is not essential that false assertions should be 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.² So one may accomplish a fraud by encouraging and taking advantage of a delusion known to exist in the mind of the other, though nothing is directly asserted which is calculated to keep it up.³ So it is a

what do not. It is no fraud in a purchaser to fail to disclose special circumstances giving great value to the land he is buying, such as the existence of a mine, of which he knows the vendor is ignorant. *Harris v. Tyson*, 24 Penn. St. 317; *Williams v. Spurr*, 24 Mich. 335.

In Missouri it is said that if there is a defect not open to observation, which the vendor knows, but the vendee does not, the former is bound to disclose it. "Common honesty in such a case requires a man to speak out." *McAdams v. Cates*, 24 Mo. 223. See *Barron v. Alexander*, 27 Mo. 530; *Cecil v. Spurger*, 32 Mo. 463. But unless the defect is one which artifice has been employed to conceal, there can be no such general rule. Artifice with the concealment, may make out fraud. *Singleton v. Kennedy*, 9 B. Mon. 222. As to the general rule, see, further, *Smith v. Countryman*, 80 N.

Y. 655; *Hanson v. Edgerly*, 29 N. H. 343. A failure of the vendor to correct the vendee's erroneous views of what he is buying is no fraud. *Law v. Grant*, 37 Wis. 548. Compare *Williams v. Beazley*, 3 J. J. Marsh. 573.

But it is said if the vendor knows a horse he is selling has an internal and secret malady, rendering him worthless, he must disclose it. *Paddock v. Strobbridge*, 29 Vt. 470; *Lunn v. Shermer*, 93 N. C. 164. But, see *Hill v. Balls*, 2 H. & N. 299.

¹ *Nichols v. Pinner*, 18 N. Y. 295; *Rodman v. Thalheimer*, 75 Penn. St. 232; *Cross v. Peters*, 1 Me. 376. There is if the insolvent buyer practices some deceit. *Des Farges v. Pugh*, 93 N. C. 31.

² *Walters v. Morgan*, 3 De G., F. & J. 718.

³ *Hill v. Gray*, 1 Stark. 434; *Trigg v. Read*, 5 Humph. 529.

gross deception and fraud to pass off a note as duly endorsed upon a person who cannot read, when in fact the endorsement is one made without recourse.¹ And a familiar case of fraud, often redressed by means of the application of the doctrine of estoppel, is where one keeps silence when he sees his own property sold as the property of another, or property sold upon which he has a lien, and fails in either case to disclose the facts.²

***When Silence is Fraudulent.** There are a few other [*478] cases in which silence itself is fraudulent, because the silence amounts to an affirmation that a state of things exists which does not, and the party is deceived to the same extent that he would have been by positive assertion. Thus, one who sells goods on credit has a right to suppose his vendee intends to pay for them; and although an insolvent may lawfully buy on credit, even though his insolvency is not known to the seller, yet if he makes the purchase intending at the time to take advantage of his insolvency and not pay for them, the concealment of this intention is a gross fraud, and the title to the goods will not pass.³

¹ *Decker v. Hardin*, 5 N. J. 579. If a mortgagee of goods which have been attached by a creditor of the mortgagor demands payment of his mortgage, knowing that his claim is false and fraudulent, and the attaching creditor, supposing the claim valid, releases his attachment, the latter may recover of the mortgagee the amounts of his debt thereby lost in an action on the case. *Brown v. Castles*, 11 Cush. 348.

² *Tomlin v. Den*, 19 N. J. 76; *Aortson v. Ridgeway*, 18 Ill. 23; *Gray v. Bartlett*, 20 Pick. 186; *Dann v. Cudney*, 18 Mich. 239. Where one, in the course of negotiations for a marriage, let the woman have money, in order to make her fortune apparently equal to what was insisted upon on the other side, taking her obligation for payment, this obligation was set aside for fraud. *Gale v. Lindo*, 1 Vern. 475. So a creditor who, under like circumstances, conceals and denies the fact

of indebtedness, may be enjoined from enforcing it. *Neville v. Wilkinson*, 1 Bro. C. C. 543. And, see *Bell v. Clarke*, 25 Beav. 437. So if one allows his money to stand to the credit of a company to give it a fictitious credit, he cannot claim it when the company is wound up. *In re Grt. Berlin etc. Co.*, L. R. 26 Ch. D. 616.

³ *Ferguson v. Carrington*, 9 B. & C. 59; *Load v. Green*, 15 M. & W. 216; *Ex parte Whittaker*, L. R. 10 Ch. App. 446; *S. C. 14 Moak*, 722; *Congers v. Ennis*, 2 Mar. 236; *Donaldson v. Farwell*, 93 U. S. 631; *Nichols v. Michael*, 23 N. Y. 264; *Heanequin v. Naylor*, 24 N. Y. 139; *Devoe v. Brandt*, 53 N. Y. 462; *Wright v. Brown*, 67 N. Y. 1; *Thompson v. Rose*, 16 Conn. 71; *Ayres v. French*, 41 Conn. 142; *Dow v. Sanborn*, 3 Allen, 181; *Stewart v. Emerson*, 52 N. H. 301; *Bishop v. Small*, 63 Me. 12; *Holbrook v. Connor*, 60 Me. 578; *Powell v. Bradlee*, 9 Gill. & J. 220; *Shipman v. Seymour*, 40

A still plainer case is where one makes a purchase of goods and gives his own bank check in payment. The giving of a bank check is universally understood in commercial circles as an affirmation that there are funds on deposit to meet it, and the payee receives it on that understanding. But if in fact the check is drawn on a bank where the drawer had no funds, and without any reasonable expectations on his part that it will be paid, the fraud is manifest.¹ So, if negotiations are had [479] 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 of 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.² 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 defect not manifest, it is his duty to make known to the purchaser that fact.³ Thus, if one were to apply to a

Mich. 274; *Oswego &c. Co. v. Lencrum*, 57 Ia. 573; *Houghtaling v. Hills*, 59 Ia. 287. See *Elsass v. Harrington*, 28 Mo. App. 300.

There are cases to the contrary. *Smith v. Smith*, 21 Penn. St. 367; *Backentos v. Speicher*, 31 Penn. St. 324; *Rodman v. Thalheimer*, 75 Penn. St. 232; *Bell v. Ellis*, 33 Cal. 620, 630. There must be a preconceived intention never to pay for the goods. *Burrill v. Stevens*, 73 Me. 395. Mere absence of purpose to pay is not enough. *Catlin v. Warren*, 16 Ill. App. 413; *Flower v. Farwell*, 18 Id. 254. But if the intent is not to pay and to avoid payment by mortgaging the goods, it is a fraud although there were no false representations. *Ross v. Miner*, 35 N. W. Rep. 60 (Mich.)

If one seeking to buy on credit is required to state his condition, his failure to state his indebtedness is more than passive non-disclosure, if his statement, though literally true, is calculated to convey a false impres-

sion. *Newell v. Randall*, 32 Minn. 171.

¹ *Harner v. Fisher*, 58 Penn. St. 453; *Mizner v. Kussell*, 29 Mich. 229; *True v. Thomas*, 16 Me. 36; *Earl of Bristol v. Wilsmore*, 1 B. & C. 514. It is a fraud knowingly to make payment in worthless bank bills, the other party supposing them to be good; and an understanding that the payment should be conclusive unless the bills were returned within a certain number of days, would not be binding under such circumstances. *Smith v. Click*, 4 Humph. 186. So, knowingly, to give in payment a note of one man supposed by the seller to be that of another of like name. *Parrish v. Thurston*, 87 Ind. 437.

² *Traill v. Baring*, 4 DeG., J. & S. 818; *Underhill v. Harwood*, 10 Ves. 225; *Nichols v. Pinner*, 18 N. Y. 295. And see, for the same principle, *Lancaster Co. Bank v. Albright*, 21 Penn. St. 228; *Reynell v. Sprye*, 1 DeG., M. & G. 669, 679.

³ As where a bull was bargained for

dealer for grain for seed, and should be shown that which to all appearance was suitable, but the germinating power of which the dealer knew had in some manner been destroyed, and if the applicant were to be suffered to buy this, supposing it was suitable for the purpose, the fraud would be as gross, if no words were uttered, as it would be if the sale were accompanied by the most positive assertions of its adaptability to the purchaser's wants.

A case of this sort is where one having diseased meats or other unwholesome provisions, and knowing the fact, nevertheless exposes them for sale as provisions to those who will be expected to take them for consumption into their own households. The offer of provisions to consumers is of itself a warranty that they are fit for consumption as such;¹ but if the seller *knows they are unfit, it is a gross fraud to offer [*480] them, for purchasers are not expected to inquire; indeed, the inquiry of a respectable dealer whether he did not know that the provisions he was offering to his customers were poisonous or otherwise unfit for use, might well be taken as an insult. The sale without disclosing the facts is of itself a fraud, because the offer is of itself a representation of suitability for use.²

to put with cows, and the vendor knew that he was without power of propagation. *Maynard v. Maynard*, 49 Vt. 297. See *Paddock v. Strobbridge*, 29 Vt. 470; *Van Bracklin v. Fonda*, 12 Johns. 468; *French v. Vining*, 102 Mass. 132. An insurance is void if obtained when the applicant knows that because of something which has already occurred the event insured against must happen. *Bigelow on Fraud*, 39. But if one buys with full opportunity for inspection and without disclosing the specific purpose of the purchase from one not the manufacturer of the article there is no implied warranty of fitness. *Hight v. Bacon*, 126 Mass. 10.

¹ It has always been held that while there is no implied warranty that provisions disposed of by wholesale dealers for resale are fit for use—*Emerson v. Brigham*, 10 Mass. 196; *Moses v. Mead*, 1 Denio, 378; *Hart v.*

Wright, 17 Wend. 267; *Goldrich v. Ryan*, 3 E. D. Smith, 324; *Hyland v. Sherman*, 2 E. D. Smith, 234; *Hargous v. Stone*, 5 N. Y. 73; *Rinschler v. Jelfiffe*, 9 Daly 469; *Ryder v. Neitge*, 21 Minn. 70, (but see *contra* where vendee has no chance to inspect. *Best v. Flint*, 58 Vt. 543)—yet that there was such a warranty when they were sold by a retail dealer for consumption. *Van Brocklin v. Fonda*, 12 Johns. 468; *Moses v. Mead*, 1 Denio, 378; *Hoe v. Sanborn*, 21 N. Y. 552. See *Bishop v. Weber*, 139 Mass. 411. And it is said that a warranty arises whether the vendor is a dealer or not, if he knows the article is purchased for immediate consumption. *Hoover v. Peters*, 18 Mich. 51. As to which see *Goad v. Johnson*, 6 Heisk. 340; *Burnby v. Bollett*, 16 M. & W. 644.

² *Emerson v. Brigham*, 10 Mass. 196; *Peckham v. Holman*, 11 Pick.

This doctrine has recently and with entire justice been applied to the sale of food for domestic animals. The case was one of the sale of hay upon which a poisonous fluid had been accidentally spilled. The hay was fed to a cow which was poisoned from eating it. "It is perfectly well settled," say the court, "that there is an implied warranty in regard to manufactured articles purchased for a particular use, which is made known at the time of the sale to the vendor, that they are reasonably fit for the use for which they are purchased. It may, perhaps, be more accurate to say that, independently of any express and formal stipulation, the relation of the buyer to the seller may be of such a character as to impose a duty upon the seller differing very little from a warranty. The circumstances attending the sale may be equivalent to a distinct affirmation on his part as to the quality of the thing sold. A grocer, for instance, who sells at retail may be presumed to have some general notion of the uses which his customers will probably make of the articles which they buy of him. If they purchase flour or sugar, or other articles of daily domestic use for their families, or grain or meal for their cattle, the act of selling to them under such circumstances is equivalent to an affirmation that the things are at least wholesome and reasonably fit for use; and proof that he knew, at the time of the sale, that they were not wholesome and reasonably fit for use, would be enough to sustain an action against him for deceit, if he had not disclosed the true state of the facts. The buyer has a right to suppose that the thing which he buys under such circumstances is what it appears to be, and such purchases are usually made with a reliance upon the supposed skill or [*481] actual *knowledge of the vendor. In the case at bar 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

484; *Van Brocklin v. Fonda*, 12 Johns. 468; *Devine v. McCormick*, 50 Barb. 116. And see *Winsor v. Lombard*, 18 Pick. 57, 62. There is an implied warranty of fitness in sale by manufacturer to retailer of a piano. *Snow v. Schomacher, &c., Co.*, 69 Ala. 111; in sale of article as Paris green to kill

worms. *Jones v. George*, 61 Tex. 845. So where sale was of leather by one who did not manufacture it to a shoe manufacturer and a latent defect was not seen by latter on examination though known by the former. *Downing v. Dearborn*, 77 Me. 457.

hay was suitable for such use. If he knew that the hay had a defect about it, or had met with an accident that rendered it not only unsuitable for that use, but dangerous or 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

On the same reasons it would seem that the sale of animals which the seller knows, but the purchaser does not, have a contagious disease, should be regarded as a fraud when the fact of disease is not disclosed; and so it has been held in New York.² So infecting the grass and 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 that the fraud would not only be more censurable, but more clearly actionable, if that which is exposed to injury by the concealment is the health—perhaps the life—of human

¹ AMES, J., in *French v. Vining*, 103 Mass. 133; S. C. 3 Am. Rep. 440, citing *Langridge v. Levy*, 2 M. & W. 519; *Thomas v. Winchester*, 6 N. Y. 397; *McDonald v. Snelling*, 14 Allen, 290, 295. But where there were copper clasps in bran sold by dealers, which killed a cow, held no liability, that the rule as to food sold for human use did not apply. *Lukens v. Freund*, 27 Kan. 644.

² *Jeffery v. Bigelow*, 13 Wend. 518. *Caveat emptor* does not apply to sale of cattle with Texas fever. *Grigsby v. Stapleton*, 7 S. W. Rep. 421 (Mo.) A different view was taken in *Hill v. Balls*, 2 H. & N. 299. It was there said that as the law does not require the vendor of a horse who is guilty of no fraud or deception, and makes no warranty, to disclose defects, if he sells a diseased horse without informing the purchaser of the facts, the subsequent communications of the disease to other animals will not convert the lawful sale into a tort. The conclusion certainly follows if the sale is lawful, but if the sale is fraudulent, the seller will be responsible

for all consequences. *Mullett v. Mason*, L. R. 1 C. P. 559; *Fultz v. Wycoff*, 25 Ind. 321.

In Illinois there is a statute making persons responsible for the communication of disease by Texas cattle brought into the State by them. See *Frazee v. Milk*, 56 Ill. 435; *Yeazel v. Alexander*, 58 Ill. 254; *Somerville v. Marks*, 58 Ill. 371; *Sangamon, etc., Co. v. Young*, 77 Ill. 197. So in Kansas a railway company which after an accident drives infected animals along a highway acts at its peril. *Miss., etc. Ry. Co. v. Finley*, 16 Pac. Rep. 951.

³ *Eaton v. Winnie*, 20 Mich. 156. Unless the owner knows his cattle are diseased, he is not liable for their infecting cattle on a common range. *Bradford v. Floyd*, 80 Mo. 207, nor in another's enclosure, if he would not be for the entry of sound cattle. *Hawks v. Locke*, 139 Mass. 205. Otherwise, if knowing their condition he allows his cattle to run on a common range. *Kemmish v. Ball*, 30 Fed. Rep. 759.

beings, as might be the case 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.

[*482] *Cases not different in principle sometimes arise in the law of suretyship, where the surety is induced to assume his obligation by the concealment of facts which, under the circumstances he had a right to have disclosed to him by the obligor or creditor. A surety, it may generally be supposed, is the friend of his principal rather than of the party the principal proposes to secure, and he is expected to apply to his principal for the facts likely to affect his liability, or to inquire them out independently. Therefore, the creditor, or party to be secured, is not in general under any obligation to disclose the facts within his knowledge, but he may deal with the principal exclusively, and accept and rely upon such security as the latter brings him. But there may be circumstances under which his duty to speak would be very plain. Thus, where a bank was in good credit, and its published reports showed it to be well managed, when, in fact, its cashier was a defaulter, and the fact should have been known to the directors, and might have been known to them by the exercise of very slight care, it was very properly held that if one, under these circumstances became surety to the bank on the official bond of the cashier, without the defalcation being made known to him, the bond was tainted with fraud and could not be enforced.¹ What facts the directors knew, or by the exercise of ordinary care ought to have known, in the dealings of the cashier with the corporation, and which were not accessible except through the corporation itself, it was their duty to make known.² So, if a creditor, knowing that his debtor is in failing circumstances, after obtaining from him for a part of his claim a mortgage substantially covering all his property, induces the debtor to obtain the endorsement of a third person for another part, without

¹ Graves v. Lebanon Nat. Bank, 10 Bush, 23, S. C. 19 Am. Rep. 50. See, also, Lee v. Jones, 17 C. B. (N. S.) 386. If the surety applies for information to the person guaranteed the latter must make full disclosure. Remington, & Co. v. Kezertee, 49 Wis. 409. But the surety cannot defend against

the creditor on the debtor's false representations to him. Kingsland v. Pryor, 33 Ohio St. 19.

² Graves v. Lebanon Nat. Bank, 10 Bush, 23. See Lee v. Jones, 17 C. B. (N. S.) 386; Ætna Fire Ins. Co. v. Mabbett, 18 Wis. 667; State v. Bates, 36 Vt. 387.

revealing the fact of the mortgage, this is such a fraud upon the endorser as relieves him from liability.¹ So if the 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 mortgage is to be old indebtedness of the husband, this secret arrangement is a *fraud, and the mortgage, to that extent, inoperative.* [*483] And so wherever the creditor has any secret arrangement with his debtor, which would increase the surety's liability, or which, if known, would be likely to prevent one assuming the obligation of suretyship, the accepting of the surety's obligation without disclosure is a fraud.² These were cases in which the ordinary rule which requires every man to protect his interests by his own inquiries had no application; for the facts were such as suspicion would not be likely to seize upon or prudence look for, and on the face of the transaction a state of things was assumed which was directly the opposite of the real facts.

Matters of Opinion. Mere expressions of matters of opinion, however strongly or positively made, though they are false, are no fraud, because, as is said in one case, these are matters in respect to which many men will be of many minds, and judgments are often governed by whim and caprice.⁴ Therefore, for

¹ Lancaster Co. Bank v. Albright, 21 Penn. St. 228.

² Smith v. Osborn, 33 Mich. 410.

³ Booth v. Storrs, 75 Ill. 438. See Franklin Bank v. Cooper, 36 Me. 179.

⁴ Pasley v. Freeman, 3 T. R. 51. See Ross v. Estates Investment Co., L. R. 3 Eq. 122; Payne v. Smith, 20 Geo. 654; Fish v. Cleland, 33 Ill. 238; Lehman v. Shackelford, 50 Ala. 437; Reed v. Sidener, 32 Ind. 373; Ellis v. Andrews, 56 N. Y. 83; S. C. 15 Am. Rep. 379; Bristol v. Braidwood, 28 Mich. 191; Fulton v. Hood, 34 Penn. St. 365; Tuck v. Downing, 70 Ill. 71; Bellairs v. Tucker, L. R. 13 Q. B. D. 562; Anderson v. McPike, 86 Mo. 293; Crown v. Carriger, 66 Ala. 590. A mistaken estimate upon one's best

judgment of the value of land gives no action. Gordon v. Butler, 105 U. S. 553. See Silverthorne v. Hunter, 5 Ont. App. 157. But a false and dishonest representation does though the person making it gets no benefit from it. Buserud v. Farrington, 36 Minn. 320. In Haycraft v. Creasy, 2 East, 92, it is said that the assertions must be considered in the light of the subject-matter, and that a statement that another is entitled to credit upon one's own knowledge, is to be understood as being only a strong expression of one's belief on the subject. Such representations, if known to be false, are actionable. Endsley v. Johns, 120 Ill. 469; McKoun v. Furgason, 47 Ia. 636. See Cowley v.

a vendor to assert that the lands he is negotiating to sell are of a particular value, greatly above their real worth, or to exaggerate their good qualities and productiveness, is [*484] no fraud.¹ Neither is *it a fraud to assert that shares in an incorporated company which the party is selling are worth a certain sum, when, in fact, they are worth very much less,² or to make exaggerated statements of the profits and prospects of the company;³ nor, it seems, to assert that the vendor paid more for what he is selling than

Smyth, 46 N. J. L. 381; *Potts v. Chapin*, 133 Mass. 276; *Babcock v. Libbey*, 82 N. Y. 144. So if made recklessly though ignorantly. *Einstein v. Marshall*, 58 Ala. 153. But if made by the buyer himself they are not. *Lyons v. Briggs*, 14 R. I. 222. At least, if made on an honest belief in their truth. *Dilworth v. Bradner* 85 Penn. St. 238. See, further, *Fenton v. Browne*, 14 Ves. 144; *White v. Cuddon*, 8 Cl. & Fin. 766; *Colby v. Gadsden*, 84 Beav. 416. If the vendor of a tenement represents the rent of it to be £30 when it is only £20, this is a fraud. *Dimmock v. Hallett*, L. R. 2 Ch. App. 21.

¹ *Mooney v. Miller*, 102 Mass. 217; *Manning v. Albee*, 11 Allen, 520; *Gordon v. Parmelee*, 2 Allen, 212; *Sherwood v. Salmon*, 2 Day, 128; *Credle v. Swindell*, 63 N. C. 305. Compare *Simar v. Canaday*, 53 N. Y. 298; S. C. 13 Am. Rep. 523; *Wise v. Fuller*, 29 N. J. Eq. 257; *Holbrook v. Connor*, 60 Me. 578; *Wilkinson v. Clauson*, 29 Minn. 91; *Hartman v. Flaherty*, 80 Ind. 472; *Shade v. Creston*, 93 Ind. 591. It is no fraud to aver strongly that the purchaser would make a good and profitable purchase by the trade. *Sieveking v. Litzler*, 81 Ind. 13. It might be otherwise if the parties stood to each other in confidential relations. *Fisher v. Budlong*, 10 R. I. 525. Or if in connection with the expression of opin-

ion there were false assertions of fact calculated, if true, to give a basis for the opinion. *McAleer v. Horsey*, 35 Md. 439. "The rule is well settled that a naked assertion by a vendor of the value of the property offered for sale, even although untrue of itself and known to be such by him, unless there is a want of knowledge by the vendee, and the sale is made in entire reliance upon the representations made, or unless some artifice is employed to prevent inquiry, or the obtaining of knowledge by the vendee, will not render the vendor responsible to the vendee for damages sustained by him." *MILLER, J. Chrysler v. Canaday*, 90 N. Y. 272.

² *Ellis v. Andrews*, 56 N. Y. 83; S. C. 15 Am. Rep. 379. See *Cronk v. Cole*, 10 Ind. 485. But if false quotations of value in a newspaper are exhibited at the same time, this is a plain fraud. *Manning v. Albee*, 11 Allen, 520. And see *McAleer v. Horsey*, 35 Md. 439.

³ *New Brunswick R. Co. v. Conybeare*, 9 H. L. Cas. 711; *Kisch v. R. Co.*, 3 DeG., J. & S. 122. So, an exaggerated estimate of the value of a patented invention is no fraud. *Hunter v. McLaughlin*, 43 Ind. 38. Or of the value of lands, or probable profits of a proposed railroad. *Walker v. Mobile, &c., R. R. Co.* 34 Miss. 245. See *Markel v. Moody*, 11 Neb. 213.

he actually did;¹ but upon this point there are cases to the contrary.²

There are some cases, however, in which even a false assertion of opinion will amount to a fraud, the reason being that, under the circumstances, the other party has a right to rely upon it without bringing his own judgment to bear. 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.³ The same rule has been applied where a dealer in patent rights sold certain territory to one who was ignorant of its value, representing it to be very valuable, when he knew it *was not;⁴ and, also, to a vendor of a saltpetre [*485]

¹Holbrook v. Conner, 60 Me. 578; S. C. 11 Am. Rep. 212; Cooper v. Lovering, 106 Mass. 77; Hemmer v. Cooper, 8 Allen, 334; Medbury v. Watson, 6 Met. 246, 260; Mooney v. Miller, 102 Mass. 217; Bishop v. Small, 63 Me. 12. This last case holds that an action for deceit will not lie upon false representations either as to what a patent right cost the vendor or was sold for by him; or as to offers made for it; or profits that could be derived from it; or for any mere expressions of opinion of any kind about the property sold. PETERS, J.: "None of them are representations of facts affecting the quality of the article sold, known to the vendor, but unknown to the vendee, and such as a vendee using common care would be deceived by. They are only "dealer's talk." This is the well settled doctrine in this State and Massachusetts. Long v. Woodman, 58 Me. 49; Holbrook v. Connor, 60 Me. 578." See, further, Tuck v. Downing, 76 Ill. 71; Banta v. Palmer, 47 Ill. 99. So as to statement of valuation placed by appraisers on property. Bourn v. Davis, 76 Me. 223. Representation of price paid is not actionable if parties are dealing at

arms length; otherwise if confidential relations exist. Hauk v. Brownell, 120 Ill. 161.

²Ives v. Carter, 24 Conn. 392. Somers v. Richards, 46 Vt. 170; Green v. Bryant, 2 Kelly, 66; Van Epps v. Harrison, 5 Hill, 63; McFadden v. Robison, 35 Ind. 24; McAleer v. Horsey, 35 Md. 439.

³Picard v. McCormick, 11 Mich. 68; Kost v. Bender, 25 Mich. 515; Pike v. Fay, 101 Mass. 134. If the buyer has not equal means of knowledge, or having such is induced to forego inquiry and relies on seller's statement of value, they are binding. Stewart v. Stearns, 63 N. H. 99; Bradbury v. Haines, 60 N. H. 123; Hanger v. Evins, 38 Ark. 334; Weidner v. Phillips, 39 Hun, 1; Grim v. Byrd, 32 Grat. 293. See Collins v. Jackson, 54 Mich. 186.

⁴Allen v. Hart, 72 Ill. 104. See Peffley v. Noland, 80 Ind. 164; McKee v. Eaton, 26 Kan. 226. The purchaser of a mill who is ignorant of the business has a right to rely upon the positive assertions of the seller as to the business the mill is capable of performing. Faribault v. Sater, 13 Minn. 223. See Wise v. Fuller, 29 N. J. Eq. 257.

cave making false assertions as to the quantity of saltpetre which a certain quantity of nitrous earth would produce.¹ So, it is held the vendee of lands has a right to rely upon the representations of his vendor respecting the quantity of land contained in a parcel he is buying,² and respecting its boundaries.³

Matters of Law. Misrepresentation as to the legal effect or consequence of a proposed transaction or contract cannot, in general, be looked upon as a cheat. Thus, where the agent procuring subscriptions to the stock of a corporation represented that the subscribers would only be liable to a certain percentage, when the law made them responsible for the whole amount, a subscriber was held not entitled to defend a suit upon his subscription on the ground of fraud. Says Mr. Justice HUNT: "There was here no error, mistake, or misrepresentation of any [*486] fact. The *defendant made the subscription he intended to make, and received the certificate he had stipulated for; * * but in law the defendant incurred a larger liability than he anticipated."⁴

¹ Perkins v. Rice, Lit. Sel. Cas. 218. See, as to representations of the value of oil lands, Kost v. Bender, 25 Mich. 515; Holbrook v. Connor, 60 Me. 578.

² Pringle v. Samuel, 1 Litt. 44; Earl v. Bryan, Phill. Eq. (n. s.) 278; Cullum v. Branch Bank, 4 Ala. 21; Whitney v. Allaire, 1 N. Y. 305; Beardsley v. Duntley, 69 N. Y. 577; Starkweather v. Benjamin, 32 Mich. 305; Hill v. Brower, 76 N. C. 124; Coon v. Atwell, 46 N. H. 510; Sangster v. Prather, 34 Ind. 504. In Gordon v. Parmelee, 2 Allen, 212, 214, it is held that an action will not lie on such representations. "The vendors pointed out to the vendees the true boundaries of the land which they sold. The defendants had, therefore, the means of ascertaining the precise quantity of land included in the boundaries. They omitted to measure it or to cause it to be surveyed. By the use of ordinary vigilance and attention they might have ascertained that the statement concerning the

number of acres, on which they placed reliance, was false. They cannot now seek a remedy for placing confidence in affirmations which, at the time they were made, they had the means and opportunity to verify or disprove." BIGELOW, Ch. J.

In general, it is probably true that a statement by the vendor that the piece of land he is selling contains so many acres, would not be relied upon as a statement of exact fact. Most deeds of land are given as so many acres, "more or less," and statements of quantity are regarded as approximations only. And where land is sold for a gross sum, and not by quantity, the statement that it contains so much is not even a warranty. Johnson v. Taber, 10 N. Y. 319; Martin v. Hamlin, 18 Mich. 354.

³ Clark v. Baird, 9 N. Y. 183; Weatherford v. Fishback, 4 Ill. 170; Sanford v. Handy, 23 Wend. 260.

⁴ Upton v. Tribilcock, 91 U. S. 45, 49. See, to the same effect, Rash-

Fraudulent Promises. If deceit, in order to be actionable, must relate to existing or past facts, it is evident that the fact that a promise, made in the course of negotiations, is never performed, is not of itself either a fraud, or the evidence of a fraud.¹ *Nevertheless, a promise is sometimes the very [*487]

dall v. Ford, L. R. 2 Eq. 750; Starr v. Bennett, 5 Hill, 303; Lewis v. Jones, 4 B. & C. 506; Steamboat Belfast v. Boon Co., 41 Ala. 50; Cowles v. Townsend, 37 Ala. 77; Townsend v. Cowles, 31 Ala. 428; Clem v. Newcastle, &c. R. R. Co., 9 Ind. 488; Russell v. Branham, 8 Blackf. 277; People v. Supervisors of San Francisco, 27 Cal. 655; Rogers v. Place, 29 Ind. 577; Gormeley v. Gym. Ass., 55 Wis. 350; Burt v. Bowles, 69 Ind. 1; Lexow v. Julian, 21 Hun, 577; Ins. Co. v. Reed, 83 Ohio St 283; Jagger v. Winslow, 30 Minn. 263. A representation of what the law will or will not permit to be done is one upon which the party to whom it is made has no right to rely; and if he does so, it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such. Fish v. Cleland, 33 Ill. 238. But when the heir-at-law of a shareholder in a company, the shares in which were personal estate, being ignorant of that circumstance, and supposing himself to be liable in respect of the ancestor's shares, executed a deed of indemnity to the trustees of the company, held, that he was entitled in equity to have his execution of the deed cancelled, as having been obtained under a mistake of law and fact. Broughton v. Hutt, 3 De Gex & Jones, 501. So there is deceit in both fact and law, if the holder of a note, the remedy upon which is barred by

the statute, goes to the administrator of one of the two makers, and, by representing it to be unpaid, and valid, and in full force in the law, procures a bond for the payment of one-half thereof. Brown v. Rice's Admr., 26 Grat. 467.

So a party has been held entitled to relief who had been induced to execute bills of exchange on the misrepresentation that they were ordinary promissory notes. Ross v. Drinkard's Admr., 35 Ala. 434; and in the case the following citation from Townsend v. Cowles, 31 Ala., 428, is approved: "If the defendant was in fact ignorant of the law, and the other party, knowing him to be so and knowing the law, took advantage of such ignorance to mislead him by a false statement of the law, it would constitute a fraud."

¹ Fenwick v. Grimes, 5 Cranch, C. C. 439; Farrar v. Bridges, 8 Humph. 566; Murray v. Beckwith, 48 Ill. 391; Sieveking v. Litzler, 31 Ind. 13; Long v. Woodman, 53 Me. 49; Jordan v. Money, 5 H. L. Cas. 185; Burt v. Bowles, 69 Ind. 1; Lexow v. Julian, 21 Hun, 577. A warranty does not become a fraud by being broken. Loupe v. Wood, 51 Cal. 586. A lease does not become void by reason of the lessee putting the premises to a different use from that which he represented he was about to carry on when he obtained it. Feret v. Hill, 15 C. B. 207. It is not a fraud in law that one obtains a release of a recognizance on a promise to pay the amount shortly, which he fails to do. Commonwealth v. Brenneman, 1

device resorted to for the purpose of accomplishing the fraud, and the most apt and effectual means to that end. Such is the case already mentioned of the purchase of goods with an intention not to pay for them. It is the fraudulent promise to pay that accomplishes the wrong. So if one promises to take up encumbrances on the title of another, and, by means of the promise, throws the promisee off his guard while he secures the title for himself, it would be a singular defense for him to make that he had only failed to perform his promise. The promise was merely his false token, by means of which he effected his cheat.¹ So if the beneficiary in a will, when the maker thereof is on his deathbed, and is about to make a codicil to give a certain benefit to another, shall say to him he need not trouble himself, for he, the beneficiary, will make conveyance according to the wishes expressed, he may be held to this promise as a fraud if he did not intend to perform it.²

Duty of Self-Protection: Where ordinary care and prudence are sufficient for full protection, it is the duty of the party to make use of them. Therefore, if false representations are made regarding matters of fact, and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest it is to mislead him, the law, in general, will leave him where he has been placed by his own imprudent confidence.³ It is for this reason that redress is often refused where fraud is alleged in the sale of property which was at hand, and might have been inspected, and where the alleged defect was one which

Rawle, 311. So if one gives a note on a purchase of land, relying on the vendor's oral promise to make a certain improvement which would increase the value of the land, he cannot make the failure to keep this promise a defense to the note. *Miller v. Howell*, 2 Ill. 499. See, further, *Ex parte Fisher*, 18 Wend. 608.

¹ *Wilson v. Eggleston*, 27 Mich. 257; *Laing v. McKee*, 13 Mich. 124. Evidence of a false promise to buy articles, which should be constructed, made as an inducement to the sale of

an invention is admissible. *Goodwin v. Horne*, 60 N. H. 485.

² *Dowd v. Tucker*, 41 Conn. 197. See, further, *Kinard v. Hiers*, 3 Rich. Eq. 423; *Thynn v. Thynn*, 1 Vern. 296; *Richardson v. Adams*, 10 Yerg. 273; *Gross v. McKee*, 53 Miss. 536.

³ *Slaughter v. Gerson*, 13 Wall. 379; *Rockafellow v. Baker*, 41 Penn. St. 319; *Hobbs v. Parker*, 81 Me. 143; *Brown v. Leach*, 107 Mass. 364; *Schwabacker v. Riddle*, 99 Ill. 343; *Collins v. Jackson*, 54 Mich. 186.

ordinary prudence would have disclosed.¹ The case of the purchase *of property at a distance involves very [*488] different considerations, for there a degree of trust is not only usual, but often unavoidable. In the leading case of *Smith v. Richards*, it was held that whenever a sale is made of property not present, but 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 representation, in effect, must be deemed to amount to a warranty; at least, that the seller is legally bound to make it good.² The case was one of a sale made in New York of lands in Virginia, represented as containing a valuable mine, and the decision has often been followed.³ Upon similar reasons to those which support this case, it has been held that when one buys land which at the time is covered with snow, rendering an examination of the soil impracticable, he is entitled to rely upon the representations of the vendor respecting its productiveness.⁴

Representations which Disarm Vigilance. Redress has often been refused to a party who claimed to have been induced by fraud to sign a contract or other paper whose contents were mis-

¹ See *Long v. Warren*, 68 N. Y. 426. Case of a sale of lands near at hand. *Cagney v. Cuson*, 77 Ind. 494. Compare *Harris v. McMurray*, 23 Ind. 9. But see *Porter v. Fletcher*, 25 Minn. 493; *Olson v. Orton*, 28 Minn. 36, where actions were sustained though accessible records would have shown the facts.

² *Smith v. Richards*, 13 Pet. 26, 42. See *Maggart v. Freeman*, 27 Ind. 531, *Lester v. Mahan*, 25 Ala. 445. It has been held that the purchaser may even be entitled to hold the seller upon his assertions as to value in such cases, if the latter persuaded the purchaser not to go and see for himself. *Harris v. McMurray*, 23 Ind. 9.

³ *Fulton's Exrs. v. Roosevelt*, 5 Johns. Ch. 174; *Bean v. Herrick*, 12 Me. 262; *Webster v. Bailey*, 31 Mich. 36; *Nowlin v. Snow*, 40 Mich. 699; *Ladd v. Pigott*, 114 Ill. 647; *Cahn v.*

Reid, 18 Mo. App. 115; *Griffin v. Farrier*, 32 Minn. 474. See *Savage v. Stevens*, 126 Mass. 207, where buyer's negligence was held a question for the jury.

The above rule has been applied where the land is but a few miles away. *Nolte v. Reichelm*, 96 Ill. 425; *Caldwell v. Henry*, 76 Mo. 254. And to the condition of a mine. *Arbuckle v. Biederman*, 94 Ind. 168; *Fishback v. Miller*, 15 Nev. 428.

⁴ *Martin v. Jordan*, 60 Me. 531. So where a cursory survey was made of flooded land, and the representation was that it could be drained. *Jackson v. Armstrong*, 50 Mich. 65. See *Rhoda v. Annis*, 75 Me. 17, where it is said to be a question for the jury whether one buying with snow on the ground used due care in trusting representations as to amount of rocks on the land.

read or misrepresented to him. The reasons for refusing relief in such cases are, *First*, that it invites perjury and subordination of perjury, if parties are allowed to set aside their contracts on parol evidence of having been misled into signing them. *Second*, it encourages negligence when relief is given against that which ordinary prudence would have protected against at the outset. Therefore, when 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 were antagonistic to his own, the court is likely to say to him that what he complains of is his own folly, and against this the law cannot protect him.¹ But there is no inflexible rule to this effect, [*489] and *it would be a reproach to the law if there were.

The ways of fraud are infinite in their diversity, and if into any one of them all the law refuses to follow for the rescue of victims, it will be in the direction of that one that fraudulent devices will specially tend. It can never be either wise or safe to mark out specific boundaries within which deceits shall be dealt with, but beyond which they shall have impunity; but each case must be considered on its own facts, and every case will have peculiarities of its own, by which it may be judged.

When the complaint is of the nature above indicated, the question, to a large extent is one of negligence, and a man grossly negligent may sometimes be justly refused relief. Especially if that to which his signature was procured was negotiable paper, which has passed into the hands of a *bona fide* holder before maturity, so that if he escapes responsibility a perfectly innocent party must suffer, it may be reasonable and just to refuse to give him relief. It is entirely reasonable, that if the situation is such that 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 shall bear the loss.

In *Douglass v. Matting*, decided in Iowa, it was held that if one, "through his own culpable carelessness, while dealing with a stranger," allows himself to be deceived into signing a nego-

¹ *Maine, &c., Ins. Co. v. Hodgkins*, 66 Me. 109. *New Albany, &c. R. R. Co. v. Fields*, 10 Ind. 187; *Hawkins v. Hawkins*, 50 Cal. 558; *Taylor v.*

Atchison, 54 Ill. 196; *Elliott v. Levins*, 54 Ill. 213. See *Cummins v. Hurlbutt*, 92 Penn. St. 165.

tiable note, which he believes is something entirely different, he can make no defense to it in the hands of a *bona fide* holder.¹ So in New York, it has been held that if one is defrauded into signing negotiable paper, which he is made to believe is something else, he has no defense as against a *bona fide* holder, provided he was chargeable with negligence in not ascertaining the character of the paper.² On the other hand, it is held, in Michigan, that if the party whose signature was procured under such circumstances was guilty of no negligence, the paper is void for all purposes;³ and the same conclusion is reached in several other States.⁴ These cases are not antagonistic, as they *have sometimes been assumed to be, and they may all [*490] be said to recognize the maxim regarding the responsibility for negligence which is given above.⁵ There can be no doubt, we suppose, that 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 is obtained by trick or artifice, and the party supposes he is signing something different.⁶ It is difficult to understand how, except upon the ground of such negligence as should estop the party from making the defense of invalidity, such contracts could have any more force than if the party's signature, written in blank, had been taken without authority, and a contract written over it.⁷ But negligence is always an impor-

¹ *Douglass v. Matting*, 29 Iowa, 498; S. C. 4 Am. Rep. 238.

² *Chapman v. Rose*, 56 N. Y. 137; S. C. 15 Am. Rep. 401.

³ *Gibbs v. Linabury*, 22 Mich. 479; S. C. 7 Am. Rep. 675.

⁴ *Briggs v. Ewart*, 51 Mo. 245; S. C. 11 Am. Rep. 445; *Walker v. Ebert*, 29 Wis. 194; *Kellogg v. Steiner*, 29 Wis. 626; *Butler v. Carns*, 37 Wis. 61; *Taylor v. Atchison*, 54 Ill. 196; S. C. 5 Am. Rep. 118. See *Foster v. McKinnon*, L. R. 4 C. P. 704.

⁵ See, further, as to this rule, *Craig v. Hobbs*, 44 Ind. 363; *McDonald v. Muscatine Bank*, 27 Iowa, 319; *Holmes v. Trumper*, 22 Mich. 427; *Shirts v. Overjohn*, 70 Mo. 305; *Clarke v. Johnson*, 54 Ill. 296; *Leach v. Nichols*, 55 Ill. 273; *Mead v. Munson*, 60 Ill. 49; *Putnam v. Sullivan*, 4

Mass. 45; *Brahan v. Ragland*, 3 Stew. 247. As to when the alteration of a note, by filling a blank carelessly left therein, will avoid it in the hand of a *bona fide* holder, see *Ivory v. Michall*, 33 Mo. 398; *Washington Savings Bank v. Ecky*, 51 Mo. 272; *Rainbolt v. Eddy*, 34 Iowa, 440; S. C. 11 Am. Rep. 152, and cases cited.

⁶ See *Foster v. McKinnon*, L. R. 4 C. P. 704; *Gibbs v. Linabury*, 23 Mich. 479; *Anderson v. Walter*, 34 Mich. 113; *Sims v. Bice*, 67 Ill. 88; *Munson v. Nichols*, 62 Ill. 111; *Byers v. Daugherty*, 40 Ind. 198; *Laidla v. Loveless*, 40 Ind. 211; *Louchheim v. Gill*, 17 Ind. 139; *Martin v. Smylee*, 55 Mo. 577; *Corby v. Weddle*, 57 Mo. 452; *Jones v. Austin*, 17 Ark. 498.

⁷ *Nance v. Lary*, 5 Ala. 370; *Stacy v. Ross*, 27 Tex. 3.

tant consideration, even when the question arises as between the parties to the contract; for no doubt that rule is safest, as a general fact, which refuses relief to parties who have seen fit not to protect themselves by observing ordinary prudence. But ordinary prudence does not always protect, even against the simplest devices, when strong and plausible protestations have captured confidence, especially as the very facility of detection will of itself do something to disarm vigilance by making it seem incredible that one would attempt fraud under the circumstances. And even where property is sold which is present and may be examined, if false assertions are made to prevent examination, and which are calculated to have that effect, and do have it, the purchaser has a right to rely upon them, and to hold the seller responsible if they turn out to be false and fraudulent.¹

[*491] *The very strong assertion has been made in one case that "every contracting party has an absolute right to rely on the express statement 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 the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith."² In the case then under consider-

¹ Chamberlain v. Rankin, 49 Vt. 133, a sale of wool rolled in fleeces, and represented to be ordinary fleece wool, when in fact there was pulled wool, taglocks, &c., rolled inside. See Arthur v. Wheeler, &c., Co., 12 Mo. App. 335.

It is no defense to paper which a bank has been induced to discount as business paper, when it was not, that the officers might, by careful and minute inquiries, have ascertained the real facts. Bank of North America v. Sturdy, 7 R. I. 109, citing Brown v. Castles, 11 Cush. 348. And, see Roberts v. Plaisted, 63 Me. 335.

² PORTER, J., in Mead v. Bunn, 32 N. Y. 275, 280. In Eaton v. Winnie, 20 Mich. 156, 166, the same idea is expressed as follows: "Where one assumes to have knowledge upon a

subject of which another may well be ignorant, and knowingly makes false statements regarding it, upon which the other relies, to his injury, we do not think it lies with him to say that the party who took his word and relied upon it as that of an honest and truthful man, was guilty of negligence in so doing, so as to be precluded from recovering compensation for the injury which was inflicted upon him under cover of the falsehood. If a party's own wrongful act has brought another into peril, he is not at liberty to impute the consequences of his act to a want of vigilance in the injured party, when his own conduct and untruthful assertions have deprived the other of that quality and produced a false sense of security." Citing Penn. R. R. Co. v. Ogier, 35 Penn. St. 73;

ation the parties seeking relief had entered into a compromise of an unfounded claim, induced thereto by the fraudulent assertion that papers previously executed by themselves contained a certain provision, which they did not. The want of vigilance here was very manifest and very gross, but it would be still more so if a blind person, or one who could not read, were to sign a paper presented for the purpose by the party having an antagonistic interest, without calling in a disinterested party to read it for him. Yet relief has often been given where illiterate persons have been deceived into signing contracts which were misread or misrepresented to them by the other contracting party.¹

Like any other case involving a *question of negligence, [*492] such a case is to be considered on all its facts; it cannot be disposed of on a consideration of one fact alone, 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* it was

Gordon v. Grand St. R. R. Co., 40 Barb. 550; *Ernst v. Hudson Riv. R. Co.*, 35 N. Y. 28. To same effect, see *McBeth v. Craddock*, 28 Mo. App. 380. "Where the statements are material facts, essentially connected with the substance of the transaction and not merely general commendations or expressions of opinion, and are concerning matters which from their nature or situation are peculiarly within the knowledge of the vendor, the purchaser is justified in relying on them; and in the absence of any knowledge of his own, or of any facts which should excite suspicion, he is not bound to make inquiries and examine for himself. Under such circumstances it does not lie in the mouth of the vendor to complain that the vendee took him at his word." *Stewart v. Stearns*, 63 N. H. 99. See, also, *Walsh v. Hall*, 66 N. C. 233; *Oswald v. McGehee*, 28 Miss. 340; *McClellan v. Scott*, 24 Wis. 81; *Starkweather v. Benjamin*, 33 Mich. 305; *Caldwell v.*

Henry, 76 Mo. 254; *Alexander v. Church*, 53 Conn. 561; *Porter v. Fletcher*, 25 Minn. 493; *Olson v. Orton*, 28 Minn. 36.

¹ *Selden v. Myers*, 20 How. 506; *Sims v. Bice*, 67 Ill. 88; *Keller v. Equitable Ins. Co.*, 28 Ind. 170; *Rockford, &c., R. R. Co. v. Shunick*, 65 Ill. 223; *Richardson v. Schirtz*, 59 Ill. 313; *Jones v. Austin*, 17 Ark. 498; *Stacy v. Ross*, 27 Tex. 3; *Hobbs v. Solis*, 37 Mich. 357; *Davis v. Snider*, 70 Ala. 315. The evidence of fraud should be very clear. *Estes v. Furlong*, 59 Ill. 298. As to what is sufficient proof of, see *Taylor v. Atchison*, 54 Ill. 196; *Woods v. Hynes*, 2 Ill. 103; *Mulford v. Shepard*, 2 Ill. 583.

In *Selden v. Myers*, 20 How. 506, 508, it is said by TANEY, Ch. J., that a person relying upon papers which he has procured to be executed by one who cannot read, is bound to show, "past doubt, that he fully understood the object and import of the writings."

decided that one who had been induced to make a 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, might maintain an action for the fraud. "If," said the court, "no representation had been made on the subject by the defendant, both parties would have been equally chargeable with a knowledge of the law and the public records of the State. But according to the declaration the defendant knowingly and falsely misrepresented the fact with respect to the situation of the land under the water, and if so, he is chargeable with all the damages resulting from such false representation."¹ The obvious answer to any such action is suggested by this decision, namely, that the records are open to public inspection and are notice of what the real title is; and it is the party's own folly if instead of inspecting them he chooses to accept and rely upon the word of the vendor. But where that answer was made in a recent case, in which a vendee 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, the court declared that, under such a state of facts, there was a relation of trust and confidence between the parties, and the seller was bound to exhibit the truth of the case as it stood.² It is to be noted that here were positive and distinct assertions of matters of fact as within his own knowledge, made by the one who of all [*493] persons *should know what the real facts were, and relied upon by the other as undoubtedly correct. It has been said elsewhere that where one seeks authority that should be the best upon the particular subject, to ascertain the real facts, and is there misled, the person misleading him is not to be allowed to support rights by insisting that his assertions ought to have been verified from other sources.³ False representations of the sort are very different from mere silence respecting defects known to

¹ *Monell v. Colden*, 13 Johns. 395, 402, per THOMPSON, J.

² THOMPSON, Ch. J., in *Babcock v. Case*, 61 Penn. St. 427, 430. Com-

pare *Hume v. Pocock*, L. R. 1 Ch. App. 379, 385.

³ *Converse v. Blumrich*, 14 Mich. 109, 121. See *Eaton v. Winnie*, 20 Mich. 156, 166.

the vendor, and which it is very properly held he is under no obligation to disclose.¹

The doctrine of *Monell v. Colden*, has been followed in other cases noted in the margin.² And these authorities hold that an action will lie for the fraud notwithstanding the deed of conveyance contains covenants of title.³

Who may rely upon the Misrepresentations. No one has a right to accept and rely upon the representations of others but those to influence whose action they were made. If everyone might take up and act upon any assertion he heard made or saw in print as one made for him to act upon, and the truth of which was warranted by the assessor, the ordinary conversation of business and of society would become unsafe, and the customary publication of current news, or supposed news, would only be made under the most serious pecuniary responsibility. When statements are made for the express purpose of influencing the action of another, it is to be assumed they are made deliberately and after due inquiry, and it is no hardship to hold the party making them to their truth. But he is morally accountable to no person whomsoever but the very person he seeks to influence, *and whoever may overhear the statements and [*494] go away and act upon them can reasonably set up no claim to having been defrauded if they prove false. Fraud implies a wrongful actor and one wrongfully acted upon; but in the case supposed there is no privity whatever. Therefore, one may even be the person to whom the false representations are made, and yet be entitled to no remedy, if they were made to him

¹ *Kerr v. Kitchen*, 7 Penn. St. 486; *Kintzing v. McElrath*, 5 Penn. St. 467.

² *Wardell v. Fosdick*, 18 Johns. 325; *Culver v. Avery*, 7 Wend. 380; *Ward v. Wiman*, 17 Wend. 193; *Updike v. Abel*, 60 Barb. 15; *Eames v. Morgan*, 37 Ill. 260; *Watson v. Atwood*, 25 Conn. 313; *Claggett v. Crall*, 12 Kan. 393; *Bristol v. Braidwood*, 28 Mich. 191; *Wade v. Thurman*, 2 Bibb, 583; *Upshaw v. Debow*, 7 Bush, 442; *Hays v. Bonner*, 14 Tex. 629; *Rhode v. Alley*, 27 Tex. 443; *More-*

land v. Atchison, 19 Tex. 303; *Holland v. Anderson*, 38 Mo. 55; *Bailey v. Smock*, 61 Mo. 213; *Kiefer v. Rogers*, 19 Minn. 32; *Parham v. Randolph*, 5 Miss. 435; *Gilpin v. Smith*, 19 Miss. 109; *West v. Wright*, 98 Ind. 335. See also *Porter v. Fletcher*, 25 Minn. 493; *Olson v. Orton*, 28 Minn. 86.

³ To represent that there are no incumbrances, so far as the party knows, is no fraud, if he really knows of none. *Bristol v. Braidwood*, 28 Mich. 191.

as agent for another and to affect the action of the other, and were not intended to influence his own action.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, in fact, does 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 Cases of the sort are those in which the projectors of corporate undertakings publish prospectuses containing misrepresentations calculated to influence others to invest moneys in their project. The cases are numerous in which the courts—sometimes of equity and sometimes of law—have given relief to parties defrauded by such misrepresentations.³ So, if after a corporation is formed the [*495] managers make false reports, declare fictitious *dividends, or resort to any fraudulent devices whatever, whereby

¹ *Wells v. Cook*, 16 Ohio, (n. s.) 67. In this case an agent bought for his principal some diseased sheep under false representations by the vendor that they were sound. He afterward purchased them of his principal and suffered damage in consequence of the spread of the disease. *Held*, entitled to no redress against the first vendor. See *Longmeid v. Holliday*, 6 Exch. 761. If a letter of recommendation is addressed to one person, but presented to and relied upon by another, the latter has no redress against the writer. *M'Cracken v. West*, 17 Ohio, 16.

² *Carvill v. Jacks*, 43 Ark. 454. If the representations are made to one with the intent that he repeat them to another, the latter acting upon them may hold the person making them. *Watson v. Crandall*, 78 Mo. 583. Otherwise if the repetition is unauthorized. *Rawlings v. Bean*, 80 Mo. 614. Representations to a commercial agency as to one's pecuniary responsibility fall within the above rule. *Genesee, &c., Bank v. Mich. Barge Co.*, 52 Mich. 164; *Eaton, &c.*

Co. v. Avery, 83 N. Y. 31. But the statement must be made as the basis of credit. *Macullar v. McKinley*, 99 N. Y. 353. If credit is not given till six months after the statement no action lies. *Id.* The statement of the person and not the report of the agency apart from it must have formed a material inducement to the sale. *Holmes v. Harrington*, 20 Mo. App. 661. See also *Lindauer v. Hay*, 61 Ia. 663.

³ See *Johnson v. Goslett*, 3 C. B. (n. s.) 569; *Clarke v. Dickson*, 6 C. B. (n. s.) 453; *Gerhard v. Bates*, 2 El. & Bl. 476; *Taylor v. Ashton*, 11 M. & W. 401; *Henderson's Case*, L. R. 5 Eq. 249; *Kent v. Freehold, &c., Co.*, L. R. 4 Eq. 538; reversed, L. R. 3 Ch. Ap. 493; *Reese River, &c., Co. v. Smith*, L. R. 4 E. & I. App. 64; *Central R. Co. v. Kisch*, L. R. 2 E. & I. App. 99; *Oakes v. Turquand*, L. R. 2 E. & I. App. 325; *Peek v. Gurney*, L. R. 13 Eq. Cas. 79; *S. C. 1 Moak*, 567; *L. R. 2 Ch. App. 412*; *Terwilliger v. Gt. West. Tel. Co.*, 59 Ill. 249; *Booth v. Wonderley*, 36 N. J. 250; *Edgington v. Fitzmaurice*, L. R. 29 Ch. D. 459.

they induce individuals to take stock in the corporation, they are liable to the parties thus defrauded in an action for the deceit.¹

One who is induced by false and fraudulent representations made by the promoters of a proposed corporation to pay money for shares, may recover damages for the deceit against the persons by whom it was practiced, notwithstanding they did not convert the money to their own use. *Paddock v. Fletcher*, 42 Vt. 389. Persons may be liable for acting as officers of a corporation and issuing stock, knowing that the corporation has no legal existence. *Fenn v. Curtis*, 23 Hun, 384.

¹ *Huntingford v. Massey*, 1 Fost. & Fin. 600; *Morgan v. Skiddy*, 62 N. Y. 319; *Cross v. Sackett*, 6 Abb. Pr. 247; *Clarke v. Dickson*, 6 C. B. (n. s.) 453; *Un. Nat. Bank v. Hunt*, 76 Mo. 439. It is sufficient that the false statement was one of the inducements to investing money in the concern; it need not be the sole inducement. *Morgan v. Skiddy*, 62 N. Y. 319. Cases where subscribers recovered back in equity money they were deceived into paying in for stock. *Colt v. Woollaston*, 2 P. Wms. 153; *Green v. Barrett*, 1 Sim. 45. The president and cashier of a bank, in making and publishing the quarterly report of resources and liabilities, made false statements under oath, knowing them to be false. Plaintiff, relying upon the statements, purchased shares of the stock of the bank at par value, when, in fact, the capital of the bank was impaired and the stock worth thirty per cent. only. The officers held personally liable to the plaintiff. *Morse v. Swits*, 19 How. Pr. 275.

The company may, also, in proper cases, be held liable for the fraudulent reports of its officers. Thus, where one was led by the false reports of the managers, showing the com-

pany to be in a flourishing condition, when, in fact, it was insolvent, to borrow money from the company and invest it in buying shares of its stock, the fraud was held a defense to a suit for the money loaned. *Nat. Ex. Co. v. Drew*, 32 Eng. L. & Eq. 1. So where there is a fraudulent overissue of stock by a corporation officer, to whom the business of issuing certificates of stock is entrusted by the corporation, the parties defrauded by purchasing it have their remedy against the corporation. *N. Y., &c., R. R. Co. v. Schuyler*, 34 N. Y. 80; *Bruff v. Mall*, 36 N. Y. 200; *Cazeaux v. Mall*, 25 Barb. 578; *Shotwell v. Mall*, 38 Barb. 445. Their assignees, however, have no such remedy. *Seizer v. Mall*, 32 Barb. 76. If without express instructions, for his own benefit and not for that of the company, an officer makes a false report, the company is not liable. *Brit. Mut. B'k'g Co v. Charnwood*, L. R. 18 Q. B. D. 714. To an action by a company against a shareholder for calls, the defendant pleaded that he was induced to become a shareholder by the fraud of plaintiffs; that he had never recognized, since notice of the fraud, any rights or liabilities as shareholder, nor received any benefits from shares, and had repudiated the shares and given plaintiffs notice. *Held*, a good plea. *Bwlch-y-Plwm Lead Mining Co. v. Baynes*, L. R. 2 Exch. 324; *McCright v. Stevens*, 1 H. & C. 454. See, also, *Bell's Case*, 22 Beav. 35; *Duranty's Case*, 26 Beav. 268; *Ayre's Case*, 25 Beav. 513. The rule of Stock Exchange required that not less than two-thirds of the scrip of a company should be paid up and the subscription list be full, except special reservations, before the company

So the officer of an insurance company who issued a false [*496] prospectus whereby one was induced to take out insurance in the company has been held liable for this fraud to the person so insuring.¹ So the president of a corporation who pretends to assist a 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.²

Materiality of Representations. "If false and fraudulent representation be alleged as the groundwork for avoiding a bargain, it must be shown that, like poison, it entered into it, tainted and destroyed it. That must be proved by a just inference from what took place at or about the time of contracting, and is not to be supplied by surmises or things so equivocal in themselves as to be proof or not, as the fancy might dictate."³ The representations must be of a decided and apparently reliable character, holding out inducements to 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 the representations.⁴

could be inserted in the official list. Defendant, a director, and others of a mining company fraudulently caused representations to be made to a committee of Stock Exchange, so that the shares were quoted. Plaintiff knowing the rules and seeing the company in the list, bought shares. The shares turned out to be valueless and the defendant was held liable for the fraud. *Bedford v. Bagshaw*, 4 H. & N. 538. See *Bagshaw v. Seymour*, 4 C. B. (N. S.) 873.

A director in a corporation is not so far chargeable with notice of the condition of its affairs as to be precluded from complaining of a fraud practiced upon him by one of the officers in selling him its shares. *Lefever v. Lefever*, 30 N. Y. 27.

But a *bona fide* sale of stock that

has a speculative value cannot be set aside, because the officers had been guilty of a fraudulent deception which affected the price, the seller being in no way privy to it. *Moffat v. Window*, 7 Paige, 124.

¹ *Pontifex v. Bignold*, 3 M. & G. 63.

² *Fisher v. Budlong*, 10 R. I. 525.

³ THOMPSON, J., in *Clark v. Everhart*, 63 Penn. St. 347, 349.

⁴ *Yeates v. Pryor*, 11 Ark. 59; *Hill v. Rush*, 19 Ark. 522. The representations must be material. *Jordan v. Pickett*, 78 Ala. 331; *Hull v. Johnson*, 41 Mich. 286; *Schwabacker v. Riddle*, 99 Ill. 343. A false statement by a director to a proposed purchaser that corporate bonds were as good as government bonds is a material misrepresentation, where the purchaser relies on it. *Drake v. Grant*, 36 Hun. 464.

"Fraud does not consist in mere intention, but in intention carried out by hurtful acts. It consists of conduct that operates prejudicially on the rights of others."¹

To determine whether the representations were material, every case is to be examined on its own facts. A slight difference in the circumstances may arrange cases apparently alike under different principles. Thus, though a false assertion of an opinion is no fraud, yet to assert that a certain piece of land, bordering *on or near a river, when a certain levee was [*497] repaired would be free from overflow, except that in very high and long continued floods a few acres of the lowest land would be overflowed, may be a fraud, if made to a stranger by one whose familiarity with the lands in former seasons must have convinced him that the opinion he was expressing was baseless.* So to misrepresent the crops raised the previous year on a farm which is sold,² or the amount of business done at a certain stand,³ is material, as these facts have a bearing on the question of value.

Deceiving Third Persons. An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff; the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it.⁴ But if the third person was induced to break his contract by deception, it may be different. If, for example, one were to personate a vendee of goods, and receive and pay for them as on a sale to himself, the vendee would have his action

So a statement that all purchasers of stock had paid par when in fact they had paid but one third of that amount. *Coolidge v. Goddard*, 77 Me. 578. Representation that horse is not afraid of the cars may be material. *Allen v. Truesdell*, 135 Mass. 75.

¹ *WILLIAMS, J.*, in *Williams v. Davis*, 69 Penn. St. 21, 28, citing *Bunn v. Ahl*, 29 Penn. St. 390. And, see *Fuller v. Hodgdon*, 25 Me. 243; *Sievekling v. Litzler*, 81 Ind. 13; *Halls v. Thompson*, 10 Miss. 443; *Ayrs v. Mitchell*, 11 Miss. 683; *Coon v. Atwell*, 46 N. H. 510.

² *Estell v. Myers*, 54 Miss. 174; a valuable case.

³ *Martin v. Jordan*, 60 Me. 531. So misrepresentations as to quantity of crop, quality of hay, number of rocks, amount of pasturage. *Messer v. Smyth*, 59 N. H. 41; *Rhoda v. Annis*, 75 Me. 17.

⁴ *Taylor v. Green*, 8 C. & P. 316.

⁵ *Kimball v. Harman*, 34 Md. 407; *S. C. 6 Am. Rep. 340*. To induce one to break a contract if there is neither malice or fraud, is not actionable. *McCann v. Wolff*, 28 Mo. App. 447.

against the vendor; but he might also pursue the party who, by deceiving one, had defrauded both.¹ 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.²

Knowledge by the Wrong-doer of the Falsity. It is often said that, in order to render false representations fraudulent in law, it must be made to appear that the party making [*498] them knew *at the time that they were untrue. But this rule has so many exceptions that it is difficult to affirm, with any confidence, that it is a general rule at all. It is certain that courts of equity do not limit their action to it in giving relief, when representations prove to be untrue in fact. Says Mr. Justice STORY: "Whether the party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false; and even if the party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party."³ Accordingly, where either of the two parties to a negotiation for the purchase of property makes material representations of matters which he avers or assumes to be within his own knowledge, with intent that the other party shall act upon them, and these representations are actually relied upon by the other party in completing the negotiation, and they prove to be false, to his injury, a court of equity will treat the

¹ Where one was induced to break his contract for the delivery of certain property to the plaintiff, by the false and malicious setting up by defendant of an unfounded lien thereon, an action was sustained for this deception. *Green v. Button*, 2 C. M. & R. 707. But for merely setting up a false claim against the plaintiff's debtor, or making a fraudulent levy on his property, no action will lie.

Smith v. Blake, 1 Day, 253; *Green v. Kimble*, 6 Blackf. 552.

² *Benton v. Pratt*, 2 Wend. 385; *Rice v. Manley*, 66 N. Y. 82; S. C. 23 Am. Rep. 30. This case distinguishes *Dung v. Parker*, 52 N. Y. 494, in which it was held that no action would lie against one who, falsely pretending authority as agent, induced another to accept a void lease from him.

³ *Story Eq. Juris.* § 193.

case as one of fraud, and give the proper relief, although the party making the representations was not aware at the time of their falsity.¹

No doubt, however, there is some difference in the aspect *which such a case presents in a court of equity [*499] and in a court of law, growing out of the difference in jurisdiction in the two courts and in the modes of giving relief. A court of equity gives relief from unconscionable contracts on the ground of mistake as well as of fraud, and if the facts are set out which are supposed to show fraud, it may happen that, though they do not fully establish this, they at least show that the complainant has acted to his prejudice under such a mistake of fact as shall justify the court in giving him relief. In a court of law, on the other hand, when the plaintiff counts upon a fraud, he must establish it by his evidence; and if he fails in doing so, he must go out of court, even though it is manifest that upon the facts he is entitled to substantial redress in another forum.

Where one, in selling personal property, makes positive representations of material facts, upon which the other relies, the vendor is held to the truth of these representations, in a suit at law, as much as he would have been in a suit in equity. But this is upon the ground that they constitute a warranty. It is familiar law, that no particular form of words is necessary to

¹ *Thompson v. Lee*, 31 Ala. 292; *Indianapolis, &c., R. R. Co. v. Tyng*, 63 N. Y. 653; *Foard v. McComb*, 12 Bush, 723; *Elder v. Allison*, 45 Geo. 13; *Bankhead v. Alloway*, 6 Cold. 56; *Converse v. Blumrich*, 14 Mich. 109; *Bristol v. Braidwood*, 28 Mich. 191; *Wilcox v. Iowa Wes. Univ.*, 82 Iowa, 367; *Twitchell v. Bridge*, 42 Vt. 68; *Frenzel v. Miller*, 37 Ind. 1.

Where the representations relate to facts which must be supposed within defendant's knowledge, proof of their falsity is a sufficient showing of his knowledge that they were false. *Morse v. Dearborn*, 109 Mass. 593; *Morgan v. Skiddy*, 62 N. Y. 319.

Any misrepresentation not an expression of opinion, by a person confided in, in relation to a material

matter constituting an inducement or motive to the act of another, by which an undue advantage is taken of him, though innocently made, and in belief of its truth, is regarded as a fraud, relievable in equity. *Davis v. Heard*, 44 Miss. 50; *Rimer v. Dugan*, 39 Miss. 477.

A party selling property is presumed to know whether the representation he makes of it is true or false; if he know it to be false, it is a positive fraud. If he does not know it to be true, it is culpable negligence, which in equity amounts to fraud. *Miner v. Medbury*, 6 Wis. 295; *Smith v. Richards*, 13 Peters, 26; *McFerran v. Taylor*, 3 Cranch, 270; *Glasscock v. Minor*, 11 Mo. 655.

charge a vendor with a warranty. The word warranty, or any equivalent expression, need not be used. It is enough that there be a positive assertion respecting something that affects the value of that which is sold, and which is not intended as a mere expression or statement of opinion, but as an affirmation upon which the purchaser may rely, and upon which he does rely.¹ On the other hand, if what is asserted be matter of opinion or fancy merely, such as the value of a horse, or the relative convenience and usefulness of competing articles of machinery, or the like, there is no warranty,² unless the vendor assumed the peculiar knowledge of an expert, which enabled him to judge of such matters when the other could not.³ But such a warranty, although the facts prove to be different from what they [*500] were asserted to be, is not necessarily a fraud, any more than is a warranty in a conveyance of lands, which proves to be broken as soon as made. Indeed, there is no necessary assumption, when one takes a warranty for his own protection, that the facts are as the covenant or promise of warranty asserts. He takes it on the understanding merely that, if they are otherwise, the warrantor will protect him. Therefore, on a broken warranty, the action is on the contract, and does not assume a tort has been committed.

Nevertheless, a warranty may be a fraud, because it may be made with knowledge that the facts asserted are untrue, and with intent to deceive by the false statement. Therefore, if one sells a horse which he avers is sound, when it is not, there is upon these facts only a warranty; but if he knows the horse is unsound, and nevertheless sells it with the like positive assertion that it is sound, this is a false warranty, and the *scienter* makes it a fraud.⁴

¹ Carondelet Iron works v. Moore, 78 Ill. 65; Wheeler v. Reed, 36 Ill. 81; Hawkins v. Pemberton, 51 N. Y. 198; Chapman v. Murch, 19 Johns. 290; Duffee v. Mason, 8 Cow. 25; Hillman v. Wilcox, 30 Me. 170; Morrill v. Wallace, 9 N. H. 111; Beebe v. Knapp, 29 Mich. 53; Stone v. Covell, 29 Mich. 359; Richardson v. Mason, 53 Barb. 601; Burge v. Stroberg, 42 Geo. 88; Tewkesbury v. Bennett, 31

Iowa 83; Henshaw v. Robins, 9 Met. 83; McGregor v. Penn, 9 Yerg 74; McLennan v. Ohmen, 17 Pac. Rep. 687 (Cal.)

² Reed v. Hastings, 61 Ill. 266; Hawkins v. Pemberton, 51 N. Y. 198.

³ Picard v. McCormick, 11 Mich. 68.

⁴ Cunningham v. Smith, 19 Grat. 255; Frenzel v. Miller, 37 Ind. 1;

There is no doubt that an action on the case will lie, founded on representations made by the defendant, whenever it can be made to appear that he believed or had reason to believe the representations were false, and that the plaintiff relied upon them, to his injury.¹ But the question is, whether this remedy is confined to cases in which the defendant knew or had reason to believe he was deceiving by untruths; and it is certain, we think, that it is not. There are numerous cases in which it has been held that if a person makes a material representation in relation to a matter susceptible of knowledge, in such a manner as to import positive knowledge, but conscious that he has no knowledge of its truth or falsity, with intent that another should rely upon such representation, this is sufficient to establish against him a legal fraud, if the other does rely upon it and it proves untrue.² The *fraud here consists in the reckless assertion that that is true of which the party knows nothing, and in deceiving the other party thereby;³ and even the actual belief of the party in the truth of what he asserts is immaterial,⁴ unless he had some apparently good reason for

Stitt v. Little, 63 N. Y. 427; Brown v. Castles, 11 Cush. 348; Stone v. Covell, 29 Mich. 360. In an action of tort on a false warranty the *scienter* need not be averred or proved. Shippen v. Bowen, 122 U. S. 575; Carter v. Glass, 44 Mich. 154. Counts for deceit may be joined and recovery had on the false warranty or on the deceit. Schuchardt v. Allens, 1 Wall, 359; Shippen v. Bowen, *supra*.

¹ Pasley v. Freeman, 8 T. R. 51; Tryon v. Whitmarsh, 1 Met. 1; Medbury v. Watson, 6 Met. 246; Hartford Ins. Co. v. Matthews, 102 Mass. 221; Cross v. Peters, 1 Me. 378; Oberlander v. Spiess, 45 N. Y. 175; Griswold v. Sabine, 51 N. H. 167; S. C. 12 Am. Rep. 76; Nauman v. Oberle, 90 Mo. 666. In such case the intent to deceive is conclusively presumed. Hudson v. Gardner, 59 Mich. 341; Cowley v. Smyth, 46 N. J. L. 380.

² Monroe v. Pritchett, 16 Ala. 785; Hazard v. Irwin, 18 Pick. 95; Page v.

Bent, 2 Met. 371; Stone v. Denny, 4 Met. 151; Fisher v. Mellen, 103 Mass. 503; Litchfield v. Hutchinson, 117 Mass. 195; Bennett v. Judson, 21 N. Y. 238; Meyer v. Amidon, 45 N. Y. 169; Wakeman v. Dalley, 51 N. Y. 27; McDonald v. Trafton, 15 Me. 225; Hammatt v. Emerson, 27 Me. 308; Frenzel v. Miller, 37 Ind. 1; West v. Wright, 98 Ind. 335; Cole v. Cassidy, 138 Mass. 437; Hanger v. Evins, 38 Ark. 334; Brown v. Freeman, 79 Ala. 406; Caldwell v. Henry, 76 Mo. 254; Anstee v. Ober, 26 Mo. App. 665; Nauman v. Oberle, 90 Mo. 666.

³ Taylor v. Ashton, 11 M. & W. 401; Beebe v. Knapp, 28 Mich. 53, 76; Indianapolis, &c., R. R. Co. v. Tyng, 63 N. Y. 653; Einstein v. Marshall, 58 Ala. 153.

⁴ Allen v. Hart, 72 Ill. 104; Cabot v. Christie, 42 Vt. 121; Fisher v. Mellen, 103 Mass. 503; Litchfield v. Hutchinson, 117 Mass. 195; Cole v. Cassidy, 138 Mass. 437. If one ought to have

his belief, such, for example, as the positive statements of others in whom he confided, and was innocent of any attempt to mislead,¹ or unless his representations related to matters of opinion.² It would seem, therefore, that it must be sufficient in an action for the fraud to allege that the representations were not true and that the defendant made them with intent to deceive, having no knowledge respecting the facts, and no reason to believe them to be true;³ and that the same facts would be sufficient to make out a defense when the defendant was the party defrauded.⁴

It seems from the foregoing, that one who has been induced, by misrepresentations of material facts, to enter into a contract, may have redress as for a fraud—

1. When the representations were made by the other party, with knowledge of their falsity, and with intent to deceive.

2. When the party making them had no knowledge and no belief on the subject, and recklessly made them with the like intent.

3. When the party supposed his representations to be true, but had no reason for any such belief, and nevertheless made them

known his statement false, it is immaterial whether it is made willfully or not. *Cotzhausen v. Simon*, 47 Wis. 103. To state as a fact that as to which one has no well-founded belief, is to state falsely. *Sims v. Eiland*, 57 Miss. 607. But, see *Holdom v. Ayer*, 110 Ill. 448, citing other Illinois cases, where a promoter of a company was held not liable for his statements unless he knew them to be false.

¹ *Haycraft v. Creasy*, 2 East, 92; *Omrod v. Hurth*, 14 M. & W. 652; *Taylor v. Ashton*, 11 M. & W. 401; *Lord v. Goddard*, 13 How. 198; *Sone v. Denny*, 4 Met. 151; *Marsh v. Falker*, 40 N. Y. 562; *Hubbard v. Briggs*, 31 N. Y. 518; *Chester v. Comstock*, 40 N. Y. 575. If one honestly states what he believes, and does not misstate the source of his information, he is not liable. *Humphrey v. Mer-*

riam, 32 Minn. 197. See *Petrie v. Guelph, &c., Co.*, 11 Ont. App. 336.

² *Page v. Bent*, 2 Met. 371; *Marsh v. Falker*, 40 N. Y. 562. For representations as to another's credit one is not liable unless they are known to be false. *Avery v. Chapman*, 63 Ia. 144; *McKown v. Ferguson*, 47 Ia. 636; *Endsley v. Johns*, 120 Ill. 469. In such case it is held in a careful opinion in New Jersey, distinguishing from statement of a specific fact, that the question is wholly one of good faith. *Cowley v. Smyth*, 46 N. J. L. 380. That one may be if such representations are made recklessly and without knowledge; see *Einstein v. Marshall*, 59 Ala. 153; *Sims v. Eiland*, 57 Miss. 607.

³ *Omrod v. Hurth*, 14 M. & W. 652; *Hammett v. Einerson*, 27 Me. 308; *Weed v. Case*, 55 Barb. 534.

⁴ See *Graves v. Lebanon Nat. Bank*, 10 Bush. 23; S. C. 19 Am. Rep. 50.

positively as of known facts, and induced the other to act upon them.

The ground of recovery is substantially the same in each of these cases, and 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 [*502] the representations are acted on, the deception has not accomplished its purpose, and an action will not lie. It is not essential, however, that they should have formed the sole inducement to a contract; it is enough that they formed a material inducement.¹ If, on the other hand, it appears that the defendant did not at all rely upon the representations, either because he did not believe them, or because he chose to investigate and act upon his own judgment, it is plain that no action can be maintained.* So, though the representations may have been trusted at first, yet if before the negotiations were completed the party ascertained their falsity, or if after they were completed he affirmed the bargain unconditionally with full knowledge of the facts, the bargain must be treated in the same manner as though it was originally made under the same state of knowledge.² "A mis-

¹ *Mathews v. Bliss*, 23 Pick. 48; *Safford v. Grout*, 120 Mass. 20; *Shaw v. Stine*, 8 Bosw. 157; *Addington v. Allen*, 11 Wend. 374; *Winter v. Bandel*, 30 Ark. 363; *Clarke v. Dickson*, 6 C. B. (N. S.) 453; *Hale v. Philbrick*, 47 Ia. 217; *Lebby v. Ahrens*, 2 S. E. Rep. 387 (S. C.) *Fishback v. Miller*, 15 Nev. 428. If a warranty as to the improvements on land is part of the contract of sale and part of the consideration, the law will imply that it was relied on. *Norris v. Kipp*, 38 N. W. Rep. 152 (Ia.)

² *Hagee v. Grossman*, 31 Ind. 223; *Nye v. Merriam*, 35 Vt. 438. *Humphrey v. Merriam*, 32 Minn. 197; *Proctor v. McCoid*, 60 Ia. 153. If the buyer acts on his own examination and the advice of a third person, no recovery. *Poland v. Brownell*, 131 Mass. 188. There must be both de-

ception and damage. *Ming v. Woolfolk*, 116 U. S. 599; *Danforth v. Cushing*, 77 Me. 182; *Runge v. Brown*, 37 N. W. Rep. 660 (Neb.) and cases; *Freeman v. McDaniel*, 23 Geo. 354; *Bowman v. Carithers*, 40 Ind. 90; *Byard v. Holmes*, 34 N. J. 296; *Ely v. Stewart*, 2 Md. 408; *Anderson v. Burnett*, 6 Miss. 165; *Selma, &c., R. R. Co. v. Anderson*, 51 Miss. 829; *Boyce v. Watson*, 20 Geo. 517; *Jennings v. Broughton*, 5 De G., M. & G. 126; *Garrow v. Davis*, 15 How. 272; *Fuller v. Hodgden*, 25 Me. 243; *Abbey v. Dewey*, 25 Penn. 413.

³ *Pratt v. Philbrook*, 41 Me. 132. See *Tuck v. Downing*, 76 Ill. 71; *Whiting v. Hill*, 23 Mich. 399. So if he relied on the seller's guaranty and not on his false representations. *Holdom v. Ayer*, 110 Ill. 448.

representation can be of no avail unless it serves to deceive the party at the time he becomes fixed by the treaty, and he cannot claim to have confided in a statement as true which at the same time he knew to be false. Hence, however fraudulent and wicked a statement may be, if the innocent party, before being tied and while in a situation to retreat without prejudice, in any manner becomes acquainted with the truth, the misrepresentation will not be a ground of defense against the contract."¹ And it can certainly be no fraud if the party, instead of believing the representations, believed directly the opposite.²

[*503] *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, provided the vendor interposes no obstacles to a full investigation, and does nothing to mislead while it is in progress.³ Even in such a case, however, he might possibly be entitled to relief, if the subject-matter of the representation respected some quality of the thing sold which was not susceptible of being accurately determined except by experts, and the investigation made was not by persons competent to develop the facts.⁴

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.⁵

¹ GRAVES, J., in *Whiting v. Hill*, 23 Mich. 399, 405, citing *Irvine v. Kirkpatrick*, 3 Eng. L. & Eq. 17; S. C. 17 L. T. Rep. 32; *Veerol v. Veerol*, 63 N. Y. 45; *Fulton v. Hood*, 34 Penn. St. 365; *Halls v. Thompson*, 1 S. & M. 443; *Ely v. Stewart*, 2 Md. 408.

² *Bowman v. Carithers*, 40 Ind. 90. And see *Stitt v. Little*, 63 N. Y. 427. A false statement of a very material fact will not overthrow a bargain unless it was the means of procuring it. *Phipps v. Buckman*, 30 Penn. St. 401.

³ *Halls v. Thompson*, 1 S. & M. 443. As to what amounts to a device to mislead, see *Roseman v. Canovan*, 43

Cal. 110; *Webster v. Bailey*, 31 Mich. 36.

⁴ *Perkins v. Rice*, Lit. Sel. Cas. 218.

⁵ *Davis v. Henry*, 4 W. Va. 571. Acts of confirmation of a contract by the defrauded party will not bind him, unless he was fully apprised of the fraud and of his rights. *Shackelford v. Handley*, 1 A. K. Marsh. 495; *Johnson v. Johnson*, 5 Ala. 90; *Crowe v. Ballard*, 1 Ves. 215. He may rescind, though he affirmed after the fraud was disclosed to him in part, if afterwards, he discovers the falsity of other material representations. *Pierce v. Wilson*, 34 Ala. 596.

Rescinding Contract for Fraud. It is a general rule that a party defrauded in a bargain may, on discovering the fraud, either rescind the contract and demand back what has been received under it, or he may affirm the bargain and sue and recover damages for the fraud.¹ If he elects the former course, he must not sleep on his rights, but must move promptly.² No rule is better settled than this, that equity will refuse relief where the delay in seeking redress has been so considerable that laches is fairly imputable,³ and both at law and in equity long *acquiescence with full knowledge of the fraud will be [*504] deemed a waiver of the right to rescind.⁴ Even a gift presumably obtained by undue influence operating upon overweening confidence may be affirmed by great delay in rescinding

¹Bringing an action for the price is not a binding election unless it was with knowledge of the fraud. *Eq. &c., Foundry Co., v. Hersee*, 103 N. Y. 25; *Hays v. Midas*, 104 N. Y. 603. If after discovering a shortage in goods the price is paid, the contract may not be disaffirmed but an action lies for fraud. *Nauman v. Oberle*, 90 Mo. 666. Replevin pending is not a bar to an action for damages. *Lenox v. Fuller*, 39 Mich. 264. Replevin with partial satisfaction is not a bar to a claim for the value of the rest of the goods converted against the bankrupt estate of the tortfeasor; *Benedict v. Powers*, 88 N. Y. 605. But he may prove against the estate as upon contract. *Moller v. Tuska*, 87 N. Y. 166. See *Farwell v. Myers*, 26 N. W. Rep. 328 (Mich.). *McBean v. Fox*, 1 Ill. App. 177.

²*Masson v. Bovel*, 1 Denio, 69; *Pearson v. Chapin*, 44 Penn. St. 9; *Herrin v. Libbey*, 36 Me. 350; *Cook v. Gilman*, 84 N. H. 556; *Wright v. Peet*, 86 Mich. 213; *Hammond v. Stanton* 4 R. I. 65; *Hanger v. Evins*, 38 Ark. 334. But the wrong doer cannot insist on extreme promptitude. He cannot complain of a delay, un-

accompanied by acts of ownership, by which he has not been affected. *Pence v. Langdon*, 99 U. S. 578.

³*Hercy v. Dinwoody*, 2 Ves. 87; *Jones v. Turberville*, 2 Ves. 11; *Lupton v. Janney*, 13 Pet. 381; *McKnight v. Taylor*, 1 How. 161; *Badger v. Badger*, 2 Wall. 87; *McLean v. Barton*, Har. Ch. 279; *Banks v. Judah*, 8 Conn. 145; *Purlard v. Martin*, 1 Smedes & M. 126; *Hawley v. Cramer*, 4 Cow. 717; *Coleman v. Lyne*, 4 Rand. 454; *Graham v. Davidson*, 2 Dev. & Bat. Eq. 155.

⁴*Michoud v. Girod*, 4 How. 503; *Randall v. Errington*, 10 Ves. 423; *Spackman's Case*, 34 L. J. Ch. 329; *Stewart's Case*, L. R. 1 Ch. App. 512; *Campbell v. Fleming*, 1 Ad. & El. 40; *R. R. Co. v. Row*, 24 Wend. 74; *Sanger v. Wood*, 3 Johns. Ch. 416; *McCulloch v. Scott*, 13 B. Mon. 172; *Collier v. Thompson*, 4 T. B. Mon. 81; *Finley v. Lynch*, 2 Bibb, 566; *Dill v. Camp*, 22 Ala. 249; *De Armand v. Phillips*, Wal. Ch. 186; *Crawley v. Timberlake*, 2 Ire. Eq. 460; *Campau v. Van Dyke*, 15 Mich. 371; *Wright v. Peet*, 36 Mich. 213; *Strong v. Lord*, 107 Ill. 25; *Cahn v. Reed*, 18 Mo. App. 115; *Sharp v. Ponce*, 76 Me. 350.

the transaction; such a delay as under the circumstances is unreasonable.¹ So, dealing with what has been acquired by the contract in a manner inconsistent with an intention to rescind will be deemed a waiver of the right; as where corporation shares which the party finds have been fraudulently sold to him, are afterward put by him upon the market.²

The party electing to rescind must also place the other party as nearly as possible in *statu quo*. To do this, if he has received anything under the contract, whether it be property or securities, he must restore it.³ To this general rule there may be an excep-

¹ *Turner v. Collins*, L. R. 7 Ch. App. 329; *S. C. 2 Moak*, 290. For a case in which relief was given after a great lapse of time, see *Hatch v. Hatch*, 9 Ves. 293.

² *Ex parte Briggs*, L. R. 1 Eq. Cas. 483.

³ *Byard v. Homes*, 33 N. J. 120; *Babcock v. Case*, 61 Penn. St. 427; *Thayer v. Turner*, 8 Met. 550; *Cushing v. Wyman*, 38 Me. 589; *Goelth v. White*, 35 Barb. 76; *Wheaton v. Baker*, 14 Barb. 594; *Moyer v. Shoemaker*, 5 Barb. 319; *Voorhees v. Earl*, 2 Hill, 288; *Jewett v. Petit*, 4 Mich. 508; *Wilbur v. Flood*, 16 Mich. 40; *Coghill v. Boring*, 15 Cal. 213; *Downer v. Smith*, 32 Vt. 1. In equity it would not be necessary to make restoration before bringing suit. *Martin v. Martin*, 35 Ala. 560; *Abbott v. Allen*, 2 Johns. Ch. 519. And at law, if what he received was only the other party's obligations, or worthless notes, which he has not disposed of, it will be sufficient to tender them back at the trial. *Coghill v. Boring*, 15 Cal. 213; *Thurston v. Blanchard*, 22 Pick. 18; *Nichols v. Michael*, 28 N. Y. 264; *Fraschieris v. Henriques*, 36 Barb. 276; *Pequeno v. Taylor*, 38 Barb. 375; *Dayton v. Monroe*, 47 Mich. 193; *Green v. Smith*, 29 Hun, 166; *Wood v. Garland*, 58 N. H. 154. As against a third person, to whom a fraudulent vendee has transferred the property, it would not be essential to

make an offer to return the vendee's paper received on the sale, provided the vendor makes no claim under it. *Kinney v. Kiernan*, 49 N. Y. 164. If before delivery possession is obtained by fraud, replevin will lie without tender back of earnest money. *Bush v. Bender*, 113 Penn. St. 94. If an illiterate is fraudulently induced to sign a release for a claim, believing it to be of some other purport, he may sue on the claim without returning the money received by him at the time of signing. *Mullen v. Old Colony R. R. Co.*, 127 Mass. 86. So if buyer has absconded one may attach without tender. *Johnson v. Frew*, 33 Hun, 193.

Where one has received money under a compromise which he claims was fraudulent, he cannot bring suit on this basis without returning the money. *Potter v. Monmouth Ins. Co.* 63 Me. 440. The reception of money and of a note with warranty being independent contracts as to the same subject matter, if the warranty fails the receiver may return the note alone and sue for the part of the price represented by it. *Gilman v. Berry*, 59 N. H. 63. If one sues for the fraud without rescission there need be no tender. *Walsh v. Sisson*, 49 Mich. 423; *Carter v. Glass*, 44 Mich. 154; *Krumm v. Beach*, 25 Hun, 293. See *Cain v. Dickenson*, 60 N. H. 371.

tion of the case where that which was received was absolutely *worthless; but the burden to show this would be [*505] on the party who had failed to restore it.¹

More conclusive than mere delay against the right to rescind is the fact that 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*. Except in very peculiar cases, a suit at law for damages will then be found to be the sole remedy.²

Affirming the Contract. The 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, clearly manifested his intention to abide by the contract, and waive any remedy he might have had for the deception.³

If 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. One method of suppressing fraud is by denying relief to one of two culpable parties when the other has defrauded him. If they are *in pari delicto* the court will not listen to their complaints. Therefore, if in attempting

¹ Babcock v. Case, 61 Penn. St. 427; Smith v. Smith, 30 Vt. 139.

² Downer v. Smith, 32 Vt. 1; Poor v. Woodburn, 25 Vt. 234; Kinney v. Kiernan, 2 Lans. 492; McCormick v. Malin, 5 Blackf. 509; Buchenau v. Horney, 12 Ill. 336; Blen v. Bear River Co., 20 Cal. 603; Jemison v. Woodruff, 34 Ala. 143; Pierce v. Wilson, 34 Ala. 596; Shaw v. Barnhart, 17 Ind. 183; Clarke v. Dickson, El. Bl. & El. 148. See Miller v. Barber, 66 N. Y. 558; Freeman v. Reagan, 26 Ark. 373.

³ Bradley v. Chase, 23 Me. 511; Kinney v. Kierman, 2 Lans. 492; Parson v. Hughes, 9 Paige, 591; Roberts v. Barrow, 53 Geo. 315; Pearsoll v. Chapin, 44 Penn. 9; Negley v. Lind-

say, 67 Penn. St. 217; Cumberland Coal Co. v. Sherman, 20 Md. 117; Hoffman Steam Coal Co. v. Cumberland Coal Co., 16 Md. 456; Butler v. Haskell, 4 Dessaus. 651; Lyon v. Waldo, 36 Mich. 345; Williams v. Reed, 3 Mason, 405; Edwards v. Roberts, 7 Sm. & Mar. 544; Cherry v. Newson, 8 Yerg. 369; Broddus v. Call, 3 McCall, 472; Boyd v. Hawkins, 2 Dev. Eq. 195; Cann v. Cann, 1 P. Wms. 723; Cole v. Gibbons, 3 P. Wms. 290; Moxon v. Payne, 7 Moak, 442; Lindsay Petroleum Co. v. Hurd, 8 Moak, 180; *Ex parte* Briggs, L. R. 1 Eq. Cas. 483. See St. John v. Hendrickson, 81 Ind. 350; Thompson v. Libby, 36 Minn. 287.

a fraud on a third person one of them obtains an advantage, relief will be refused.¹ But this rule will not be enforced [*506] against *a party actually or presumably under the influence of the other, and who was induced to engage in the illegal or dishonest transaction by means of this influence. Thus, if an attorney leads his client into a fraud, in order to make use of it for his own purposes, the court will take notice where the blame properly rests and give relief against the attorney as the party chiefly responsible.²

Duress is a species of fraud in which compulsion, in some form, takes the place of deception in accomplishing the injury.

Duress 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.³

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.⁴ 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.⁵ Threats constitute duress where they cause rea-

¹ *Nellis v. Clark*, 4 Hill, 424; *Roman v. Mali*, 42 Md. 513.

² *Ford v. Harrington*, 16 N. Y. 285; *Freelove v. Cole*, 41 Barb. 318; *Barnes v. Brown*, 32 Mich. 146.

If the parties have mutually defrauded each other, the trade will be left to stand. *Price v. Polluck*, 87 N. J. 44.

If one is defrauded in a trade illegal because made on Sunday, an action will not lie. *Plaisted v. Palmer*, 63 Me. 576; *Robeson v. French*, 12 Met. 24; *Caroaze v. Swift*, 113 Mass. 250.

³ To constitute duress the act must have been done under pressure of actual or threatened personal restraint or harm, or of an actual or threatened seizure or interference with property of serious import to the person and it must have appeared to him

that he could escape from or prevent the injury only by doing the act. *Kraemer v. Deustermann*, 35 N. W. Rep. 276 (Minn).

⁴ *Thompson v. Lockwood*, 15 Johns. 256; *Foshay v. Ferguson*, 5 Hill, 154; *Richards v. Vanderpoel*, 1 Daly, 71; *Strong v. Grannis*, 26 Barb. 122; *Eadie v. Slimmon*, 26 N. Y. 9; *Osborn v. Robbins*, 36 N. Y. 365; *Bane v. Detrick*, 52 Ill. 19; *Belote v. Henderson*, 5 Cold. 471; *Durr v. Howard*, 6 Ark. 461; *Bassett v. Bassett*, 9 Bush, 696.

⁵ *Richardson v. Duncan*, 3 N. H. 508; *Severance v. Kimball*, 8 N. H. 386; *Breck v. Blanchard*, 23 N. H. 303; *Watkins v. Baird*, 6 Mass. 506; *Fisher v. Shattuck*, 17 Pick. 252; *Whitefield v. Longfellow*, 13 Me. 146; *Eddy v. Herrin*, 17 Me. 338; *Bowker v. Lowell*, 49 Me. 429; *Phelps v. Zuschlag*, 34 Tex. 371; *Thurman v. Burt*, 53

sonable apprehension of loss of life, or of some great bodily harm,' or of imprisonment.' And the order of a military *commander, where martial law prevails, requiring [*507] an act to be performed by the citizen which is contrary to his inclination, establishes a condition of duress, though no demonstrations of violence or threats are employed; the command itself being an exhibition of force apparently irresistible.* 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 the condition for its release,* 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.*

Ill. 129; *Stouffer v. Latshaw*, 2 Watts, 165; *Meek v. Atkinson*, 1 Bailey, 84; *Taylor v. Blake*, 11 Minn. 255; *Work's Appeal*, 59 Penn. St. 444. A release executed to get out of prison is void. *Guillaume v. Rowe*, 94 N. Y. 268. But not a free and voluntary settlement executed in prison followed by discharge. *Prichard v. Sharp*, 51 Mich. 432; *Clark v. Turnbull*, 47 N. J. L. 265.

* *Baker v. Morton*, 12 Wall. 150. See *Bosley v. Shanner*, 26 Ark. 280; *Bogle v. Hammons*, 2 Heisk. 136. See also *Reynolds v. Copeland*, 71 Ind. 422; *Hildebrand v. McCrum*, 101 Ind. 61.

* *Clinton v. Strong*, 9 Johns. 370; *Harmon v. Harmon*, 61 Me. 227; S. C. 14 Am. Rep. 556; *Feller v. Green*, 26 Mich. 70; *Bane v. Detrich*, 52 Ill. 19. Mere threat of prosecution is not duress. *Buchanan v. Sahlein*, 9 Mo. App. 552; *Higgins v. Brown*, 78 Me. 473. Nor of civil action. *Hilborn v. Bucknam*, 78 Me. 482; *Dunham v. Griswold*, 100 N. Y. 224. But see *Haynes v. Budd*, 80 Hun, 237. A mortgage obtained from a woman under threat of imprisoning her husband then under restraint is void. *First Nat. Bank v. Bryan*, 62 Ia. 42. See *Lowerson v. Johnson*, 13 Atl. Rep.

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8 (N. J.) and note. Threats against a weak-minded person may constitute duress which would not against a man of ordinarily firm mind. *Parmentier v. Pater*, 18 Oreg. 121. If the threats fail to cause apprehension of harm there is no duress. *Harmon v. Harmon*, 61 Me. 227; S. C. 14 Am. Rep. 556; *State v. Sluder*, 70 N. C. 55; *Feller v. Green*, 26 Mich. 70; *Flanigan v. Minneapolis*, 86 Minn. 406.

* *Olivari v. Menger*, 39 Tex. 76.

* *Crawford v. Cato*, 22 Geo. 594; *Spalds v. Barrett*, 57 Ill. 289; S. C. 11 Am. Rep. 10; *Tutt v. Ide*, 8 Blatch. 249; *Sasportas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 Bay, 211; *Nelson v. Suddarth*, 1 H. & M. 350; *White v. Heylman*, 34 Penn. St. 142; *Radick v. Hutchins*, 95 U. S. 210; *Chandler v. Sanger*, 114 Mass. 346; S. C. 19 Am. Rep. 367; *Shaw v. Woodcock*, 7 B. & C. 73. Refusing to honor checks till an act is done is duress. *Adams v. Schiffer* 17 Pac. Rep. 21 (Col.) What is and what is not duress of goods fully discussed. *Hackley v. Headley*, 45 Mich. 569.

* *First Nat. Bank v. Watkins*, 21 Mich. 483; *Beckwith v. Frisbie*, 32 Vt. 559; *Adams v. Reeves*, 68 N. C. 134; S. C. 12 Am. Rep. 627. A threat

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 remedies as in other cases where his property has been taken from him wrongfully.¹

to attach property for a demand not yet due is not duress. *Latham v. Shackleford*, 50 Ala. 437.

¹ If by the process the party only obtains what he is lawfully entitled

to, an action will not lie to recover it back, though it might lie for any distinct wrongful act under the process. *Skeate v. Beale*, 11 Ad. & El. 983.

* CHAPTER XVII

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WRONGS IN CONFIDENTIAL RELATIONS.

By confidential relations are here meant those relations formed by convention or by 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. Such relations exist between agent and principal, between partner and partner, between corporator and officer of the corporation, and between *cestui que trust* and trustee. They may also exist between parent and child, where circumstances raise an implication of trust or agency, and between husband and wife in the same way, and sometimes by contract. In case of the domestic relations there is likely to be, in addition to the confidence springing from intimate business trust, a further trust, born of affection and great personal intimacy, that may easily grow into or pave the way for undue influence. This is the chief coadjutor of fraud in all these relations.

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 free will he would not do. It differs wholly from persuasion in which falsehood does not mingle, for that merely leads the will, while undue influence coerces it.¹ The manner in which the control is obtained is not important.

Husband and Wife. The most confidential of all the relations of life is that of husband and wife. For reasons which are interwoven with the whole framework of civilized society, the law is specially careful and vigilant in guarding and protecting the confidence which this relation invites and inspires. It will not *suffer this confidence to be invaded or exposed, even [*509]

¹ "It must be a control intentionally exercised by one mind over the will of another, so as to deprive the

latter of the free agency of option." BUTLER, J., in *Martin v. Teague*, 2 Speers, 260.

though the facts which might thereby be brought to light should be supposed important to the interests of others. In general, where the statute law has cut away all barriers to the giving of evidence, and allowed even the party accused of crime to testify in his own behalf, it has not gone so far as to permit either husband or wife to testify against the other, except by mutual consent, deeming it better that justice should sometimes fail for want of evidence, than that the family confidences should be laid bare to the public, or the conscience of the spouse be exposed to the temptation to conceal or prevaricate where the truth might be damaging. Nevertheless, the law does not undertake to enforce the observance of the marital confidence as between the parties themselves, but trusts it to their own sense of what is decent and proper. If this does not in all cases afford protection against the exposure to public gaze and derision of those confidences which should be held sacred, no legal redress is possible that would not introduce greater evils than it could cure.

The common law supposed the wife to be largely under the coercion of the husband; and though this, so far as her property interests are concerned, is no longer a legal presumption, still the existence of some degree of marital influence may always be supposed; and if the husband is inclined to deal unfairly with his wife, this influence, and the confidence begotten of the relation, will give him special facilities for the purpose. This relation is consequently of high importance when fraud or unfair dealing by the husband with the wife's interests is alleged, and may justly call upon the courts to criticise closely their negotiations.¹ "The law certainly does not prevent persons in this confidential relation from doing, without urgency, of their own accord, and under the natural impulses of kindness and affection, such generous acts as are the results of mutual confidence and good will. But the same principle which encourages confidence protects it by preventing any profit to be gained from abusing it. The law recognizes the fact that a married woman is easily subjected to a species of coercion, very much more effectual than any ordinary operation of fear or fraud from strangers. It has always

¹ "They will not be upheld where there is even slight evidence of fraud or undue influence." Reagan's Admr. v. Hollimau, 34 Tex. 403, 410. Same

effect. Hon v. Hon, 70 Ind. 135; Darlington's Appeal 86 Penn.St. 512; Boyd v. De La Montagnie, 73 N. Y. 493.

been *found necessary to examine jealously into all transactions whereby the husband gets an advantage over his wife, not plainly spontaneous on her part. 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 And where the statutes permit the wife to bring suit at law against the husband, she may seek a remedy in that forum when the facts will justify it. But as the remedy in equity would commonly be more complete and suitable, we need say only, what has been said in another connection, that when the wife sues her husband for an injury to her property, she makes out her right of action on the principles 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.² It often happens that the husband, by the acquiescence, rather than by the express employment, of the wife, becomes her agent for the management of her property, and he acquires a knowledge of its condition, circumstances and value greater than she is likely to possess, and which in many cases he might easily use for his own advantage if dishonestly inclined. Such a case is one where he may justly be held under strictest obligation not to abuse the confidence reposed.³

Parties Engaged to Marry. The contract of marriage establishes a confidential relation between the parties but little less intimate than that of marriage itself, and almost equally susceptible of being taken advantage of for the purposes of fraud. The most serious fraud accomplished in this relation is that of seduction. In *Morton v. Fenn* it was urged, before Lord Mansfield, that the woman was entitled to no redress for this wrong, because the parties were *in pari delicto*; but he very justly said that if the woman's consent was obtained by means of the promise

¹ *Witbeck v. Witbeck*, 25 Mich. 439, 442. In *Tapley v. Tapley*, 10 Minn. 448, it was held that threats by the husband to separate from his wife, accompanied by general abusive treatment, constitute such duress as will avoid a deed executed by her under an apprehension that they will be carried into effect. On the other

hand a transfer by the husband of all his property to his adulterous wife has been set aside in favor of his heirs. *Warlick v. White*, 86 N. C. 139.

² Schoul, *Dom. Rel.* 286; 2 Bishop, *Law of Married Women*, Ch. 35.

³ In such case gifts by the wife to the husband are closely scrutinized. *Farmer v. Farmer*, 39 N. J. Eq. 211.

of marriage, which the man did not intend to fulfill, "this was a cheat on the part of the man."¹ So it was said in an [*511] early *case by Chief Justice PARSONS, that "damages are recoverable for breach of a promise of marriage, and if seduction has been practiced under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages."² The same doctrine has since been more authoritatively declared in that State, and also in several others.³

Says CAMPBELL, J.: "The seduction which is allowed to be proven in these cases is brought about in reliance upon the contract, and is itself in no very indirect way a breach of its implied conditions. Such an engagement brings the parties necessarily into very intimate and confidential relations, and the advantage taken of those relations by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee or guardian or confidential adviser, who cheats a confiding ward or beneficiary or client into a losing bargain. It only differs from ordinary breaches of trust in being more heinous. A subsequent refusal to marry the person whose confidence has been thus deceived cannot fail to be aggravated in fact by the seduction. The contract is twice broken. The result of an ordinary breach of promise is the loss of the alliance and the mortification and pain consequent on the 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 bro-

¹ Morton v. Fenn, 8 Doug. 211. There was no decision of the case by the court in bank.

² Paul v. Frazier, 8 Mass. 71, 73. See Boynton v. Kellogg, 3 Mass. 189; Sherman v. Rawson, 102 Mass. 395.

³ Kelly v. Riley, 106 Mass. 339; S. C. 8 Am. Rep. 336; Conn v. Wilson, 2 Overton, 233; Goodall v. Thurman, 1 Head, 209; Williams v. Hollingsworth, 6 Bax. 12; Whalen v. Layman, 2 Blackf. 194; King v. Kersey, 2 Ind. 402; Wilds v. Bogan, 57 Ind. 483; Kurtz v. Frank, 76 Ind. 594; Green v. Spencer, 3 Mo. 225; Matthews v. Cribbitt, 11 Ohio, (N. S.) 330;

Wells v. Padgett, 8 Barb. 323; Sheahan v. Barry, 27 Mich. 217; Bennett v. Beam, 42 Mich. 346; Giese v. Schultz, 53 Wis. 462. An infant is not liable for breach of promise though the woman is seduced under it. Leichtweiss v. Treskow, 21 Hun. 487. The action will lie, though the defendant, the plaintiff not knowing the fact, was married at the time. Kelly v. Riley, supra. An action for fraud will lie against a married man for engaging himself as unmarried although there is no seduction. Pollock v. Sullivan, 53 Vt. 507.

ken obligation. The contract involves protection and respect, as well as affection, and is violated by the seduction, as it is by the refusal to marry. A subsequent marriage condones the first wrong, but a refusal to marry makes the seduction a very grievous element of injury that cannot be lost sight of in any view of justice."¹

In Kentucky and Pennsylvania this doctrine has not found favor, and the woman's complaint of the seduction is put aside "on the ground that she was *in pari delicto*." "II- [*512] llicit intercourse," it is said, "is an act of mutual imprudence, and the law makes no distinction between the sexes as to the comparative infirmity of their common nature. A woman is not seduced against her consent, however basely it be obtained, and the maxim *volenti non fit injuria* is as applicable to her as to a husband, whose consent to his own dishonor bars his action for criminal conversation."² But between the case of a husband consenting to the dishonor of his bed and that of a woman cheated by a deceptive engagement to marry into a surrender of her chastity there does not seem to be any such analogy as to make the legal rules which should govern the one throw light upon the other. The one instinctively excites disgust, and the other compassion. One party assents from motives that can only be low and vile, the other is the victim of perfidy. It is true there is consent, but so there is in other cases of fraud; for it is by obtaining consent that frauds are accomplished.⁴

¹ Sheahan v. Barry, 27 Mich. 217, 220.

² Burks v. Shain, 2 Bibb, 341; Weaver v. Bachert, 2 Penn. St. 80.

³ GIBSON, Ch. J., in Weaver v. Bachert, 2 Penn. St. 80 And, see Baldy v. Stratton, 11 Penn. St. 316. If the promise is to marry if the woman yields she cannot recover for seduction. Hanks v. Naglee, 54 Cal. 51.

⁴ The bad character of the plaintiff, following the seduction in such a case, is no defense, either total or partial. Boynton v. Kellogg, 3 Mass. 189; Conn v. Wilson, 2 Overt. 233.

Where the statute gives the woman an action for the seduction, she cannot

give this in evidence in an action for breach of promise to marry, unless it is set up in the declaration. Cates v. McKinney, 48 Ind. 562; Perkins v. Hersey, 1 R. I. 493.

If the seduction preceded the promise of marriage instead of following it, it cannot be given in evidence by way of aggravation. Espy v. Jones, 37 Ala. 379. If after seducing a woman one fraudulently conveys his property, marries and deserts her, she is entitled in divorce proceedings to have the conveyance set aside as a fraudulent attempt to prevent recovery for the seduction. Bishop v. Redmond, 83 Ind. 157.

The confidence of this relation may also be abused through such secret conveyances of one of the parties as would materially diminish the rights in property which the other had reason to expect he or she would acquire by the marriage. While neither of the parties has any claim to have all the business transactions of the other made known, they are both entitled to a fair disclosure of such dealings as are expressly designed to affect their own interests. The rule of law on the subject may be stated as follows: Where either party to the contract of marriage secretly conveys away his or her property, or any considerable portion thereof, with intent to defraud the other of such rights therein as, but for the conveyance, would be acquired by the marriage, this, if not discovered until after the marriage takes place, [*513] 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.¹ The suitable relief will be that which gives to the party defrauded an equivalent for that which is lost;² but this must vary as the cases differ. If, however the intended deceit is discovered before the marriage takes place, the party is put to an election, either to withdraw from the engagement because of the fraudulent change in circumstances, or to consummate the marriage, thereby waiving the objection.³ There can, of course, be no fraud if the facts are discovered in season to withdraw from the contemplated relation.⁴

¹ *England v. Downs*, 2 Beav. 522; *Strathmore v. Bowes*, 1 Ves. 22; *Linker v. Smith*, 4 Wash. C. C. 224; *Tucker v. Andrews*, 13 Me. 124; *Logan v. Simmons*, 3 Ired. Eq. 487; *Johnson v. Peterson*, 6 Jones' Eq. 12; *Poston v. Gillespie*, 5 Jones' Eq. 258; *Spencer v. Spencer*, 3 Jones' Eq. 404; *Duncan's Appeal*, 43 Penn. St. 67; *Robinson v. Buck*, 71 Penn. St. 386; *Ramsay v. Joyce*, 1 McMul. Eq. 236; *Manes v. Durant*, 2 Rich. Eq. 404; *Waller v. Armistead*, 2 Leigh, 11; *Hobbs v. Blandford*, 7 T. B. Mon. 469; *Leach v. Duvall*, 8 Bush, 201; *Williams v. Carle*, 2 Stock. Ch. 543; *McAfee v. Ferguson*, 9 B. Mon. 475; *Green v. Green*, 34 Kan. 740.

² See *Smith v. Hines* 10 Fla. 258. In *Stratton v. Stratton*, 59 N. H. 478, it was held that the wife's grantee could not eject the husband where the arrangement was that the husband was to have a share of the produce for his life and he had improved the farm.

³ *St. George v. Wake*, 1 Myl. & K. 610.

⁴ *St. George v. Wake*, 1 Myl. & K. 610; *Fletcher v. Ashley*, 6 Grat. 333; *Cheshire v. Payne*, 16 B. Mon. 613; *McClure v. Miller*, Bailey Eq. 104; *Terry v. Hopkins*, Hill Eq. 1; *Jordan v. Black*, Meigs 142. If the conveyance had been made before the engagement to marry, though then un-

Another fraud, by no means so uncommon as to make its mention unnecessary, is where one of the parties makes use of the confidence and affection of the relation to obtain the other's property, employing some plausible but fraudulent pretense for the purpose. What has been said regarding the facility for fraud which the marriage relation affords will apply with great force here, with this difference: that whereas, after marriage, the woman's interest needs specially to be guarded, before marriage one party is perhaps as liable to be betrayed by over confidence as the other.¹

*It is a strong, if not conclusive, badge of fraud if, [*514] after a conveyance of property has been obtained as a gift or for an inadequate consideration, the donee or grantee refuses to complete the marriage.²

Parent and Child. This relation is peculiarly exposed to undue influence at first on the part of the parent over the child, and afterwards, possibly, on the part of the child over the parent. During the period of minority the parent is the natural guardian of the child's person, with authority to require and enforce obedience, and this authority, coupled with the natural affection, may be expected, in a great degree, to subordinate the child's will to the parent's while the period of minority continues. Moreover, if the child has an independent estate, it often happens that its management is allowed to be taken charge of by the parent, and though this is irregular, unless he is legally appointed guardian

known, it would be no fraud. *Strathmore v. Bowes*, 1 Ves. 23. Nor would it be a fraud in any case if what was conveyed was property in which, by the marriage, the other party would have acquired no interest, present or contingent. Nor if what was conveyed away was only a reasonable provision for the children of a former marriage, or for others having a claim upon the party for a support. See *Tucker v. Andrews*, 13 Me. 124; *Green v. Goodall*, 1 Coldw. 404; *Blanchett v. Foster*, 2 Ves. Sr. 264. Every case must stand on its own facts. *Richards v. Lewis*, 11 C. B. 1035; *Terry v. Hopkins*, 1 Hill, Ch.

(S. C.) 1; *Taylor v. Pugh*, 1 Hare, 608.

¹ If goods are obtained fraudulently by a man under promise to marry, the woman may have an action against the man's estate. *Frazer v. Boss*, 66 Ind. 1. If the provision secured to the wife in an ante-nuptial contract is unreasonable and disproportionate to the man's means, it raises a presumption of concealment, and throws on him the burden of proof. *Bierer's Appeal*, 92 Penn. St. 265.

² *Coulson v. Allison*, 2 De G., F. & J. 521; *Rockafellow v. Newcomb*, 57 Ill. 186.

of the estate, it may nevertheless answer all purposes when no one raises questions. Where this irregular or *quasi* guardianship exists, it is likely still further to increase the parental influence.¹

If the parent is disposed to take any undue advantage of this influence, he will be likely to do so soon after the child comes of age, while the influence is still unimpaired, and before the child has become accustomed to independent management. There is no legal impediment to an adult child making gifts to his parent at that or any other period, but all dealings which then take place are justly looked upon with some degree of jealousy, and if they are gifts the donee would be required to show that they were spontaneous acts of the child, made with full understanding of what, in respect to the property, were his position and [*515] rights.² *But family arrangements, not unfairly brought about, and which from their nature do not suggest undue influence, will not be disturbed.³

There is no occasion for any corresponding jealousy for the protection of the parent's interests against the overreaching of the child, unless the parent, from the imbecility of extreme old age, or other cause, has come to be dependent, in some degree at least, upon the child, for guidance and direction. So long as he is in the 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 the 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

¹ Revett v. Hawvey, 1 Sim. & S. 502; Findley v. Patterson, 2 B. Mon. 76; Sears v. Shafer, 1 Barb. 408; S. C. 6 N. Y. 268.

² Turner v. Collins, 7 L. R. Ch. App. 329; S. C. 2 Moak, 290; Savery v. King, 5 H. L. Cas. 626; Wright v. Vanderplank, 2 Kay & J. 1; S. C. 8 De G. M. & G. 133. Cuninghame v. Anstruther, 2 Scotch App. 223; S. C. 3 Moak, 169; Taylor v. Taylor, 8 How. 183; Baldock v. Johnson, 14 Oreg. 546. The doctrine is not confined to parents strictly. Thus, where

the uncle of a young man who was estranged from his father, and greatly pressed by debts, took from him, for £7,000, a conveyance which he had first ascertained was worth £20,000, the conveyance was set aside on the same reasons above given. Tate v. Williamson, L. R. 2 Ch. App. 56.

³ Taylor v. Taylor, 8 How. 183.

⁴ Millican v. Millican, 24 Tex. 426; Beanland v. Bradley, 3 Sm. & G. 339. See State v. True, 20 Mo. App. 176.

⁵ Especially where the wish of the child had become the will of the pa-

Illegal Sexual Relations. Where a transaction is brought about while the parties are living in illegal sexual relations, it is always open to suspicion of fraud or undue influence; and if it is a gift, or a sale for an inadequate consideration, or if it is specially 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.¹

Persons of Weak Intellect. While the contracts of persons not idiotic and not mentally diseased are not void because of weakness of understanding, yet when one undertakes to deal with such a person, he is very justly held to be 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.² It has been said of gifts by such *persons, that "when a gift is disproportionate to the [*516] means of the giver, and the giver is a person of weak mind, of easy temper, yielding disposition, liable to be imposed upon, the court will look upon such a gift with a jealous eye, and strictly examine the conduct and behavior of the person in whose favor it is made; and if it can discover that any acts or stratagems, or any undue means have been used to procure such gift, if it can

rent. *Higberger v. Stiffler*, 21 Md. 338, 353; *White v. Smith*, 51 Ala. 405. The doctrine applied to the case of a niece. *Gore v. Somersall*, 5 T. B. Mon. 504; *Griffiths v. Robins*, 3 Madd. 191. In *Cowee v. Cornell*, 75 N. Y. 91, it is said that where the parties do not stand on an equality but "either on the one side from superior knowledge derived from a fiduciary relation or from overmastering influence or on the other from weakness, dependence, or trust unjustifiably reposed," unfair advantage is rendered probable, fraud in dealings is presumed. In that case a gift by an old man to his grandson who was his agent was sustained as the facts

were held not to raise this presumption.

¹ *Dean v. Negley*, 41 Penn. St. 312; *Coulson v. Allison*, 2 De G., F. & J. 521; *Hargreave v. Everard*, 6 Ir. Ch. 278. See, also, *Farmer v. Farmer*, 1 H. L. Cas. 724; *Bayliss v. Williams*, 6 Cold. 440.

² *Baker v. Monk*, 4 De G., J. & S. 388; *Selden v. Myers*, 20 How. 505; *Sprague v. Duel*, Clark's Ch. 90; *Wiest v. Garman*, 4 Houst. 119; *Seeley v. Price*, 14 Mich. 541; *Wirttemberg v. Spiegel*, 31 Mich. 400; *Perkins v. Scott*, 23 Iowa, 237; *Ellis v. Mathews*, 19 Tex. 300; *Tally v. Smith*, 1 Cold. 290; *Cadwallader v. West*, 48 Mo. 483; *Henderson v. McGregor*, 30 Wis. 78.

see the least speck of imposition, or that the donor is in such a situation in respect to the donee as may naturally give him an undue influence over him ; in a word, 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

Whoever takes advantage of a state of intoxication to deal with another, must do so with a presumption against his good faith proportioned to the depth of mental obscurity caused by the condition.³ And the presumption is greatly strengthened if he himself brought about or encouraged the intoxication.⁴

Corporate Officers. The officer of a corporation is its agent within the scope of the powers conferred upon him, and the rules of liability which are applicable to agents he also comes under. As such agent he stands in confidential relations to all the stockholders ; he holds a place of trust, and by accepting it, obligates himself to execute it with fidelity, not for his [*517] own *benefit, but for the common benefit of his associates.⁵ The following may be said to be the duties he assumes :

¹ *Sears v. Sbafer*, 1 Barb. 408, 413, per BARCULO, J. See *Gartside v. Isherwood*, 1 Bro. C. C. 558; *Bennett v. Vade*, 2 Atk. 324; *Lewis v. Pead*, 1 Ves. 19; *Harding v. Handy*, 11 Wheat. 103, 125; *Brooke v. Berry*, 2 Gill, 83; *Baker v. Monk*, 4 DeG., J. & S. 388.

² *Brooke v. Berry*, 2 Gill, 83; *Free-love v. Cole*, 41 Barb. 318.

³ *Peck v. Cary*, 27 N. Y. 9; *Hutchinson v. Brown, Clarke*, Ch. 403; *Burns v. O'Rourke*, 5 Rob. 649; *Freeman v. Dwiggin*, 2 Jones' Eq. 162; *Mansfield v. Watson*, 2 Iowa, 111.

⁴ *Johnson v. Meddlcott*, 3 P. Wms. 130, note a; *Say v. Barwick*, 1 Ves. & B. 195; *Cooke v. Clayworth*, 18 Ves. 12; *Curtis v. Hall*, 4 N. J. 361;

Whitesides v. Greenlee, 2 Dev. Eq. 152; *Dunn v. Amos*, 14 Wis. 109; *Mansfield v. Watson*, 2 Iowa, 111.

⁵ *Charitable Corporation v. Sutton*, 2 Atk. 400; *Great Luxembourg R. Co. v. Magney*, 25 Beav. 586; *Koehler v. Black River, &c., Co.*, 2 Black, 715; *Jackson v. Ludeling*, 21 Wall. 616; *Bedford Railroad Co. v. Bowser*, 48 Penn. St. 29; *Austin v. Daniels*, 4 Denio, 299; *Hoffman Steam Coal Co. v. Cumberland Coal &c., Co.*, 16 Md. 456; *March v. Eastern R. R. Co.*, 43 N. H. 515; *Bliss v. Matteson*, 45 N. Y. 22; *European. &c., R. R. Co. v. Poor*, 59 Me. 277; *Gratz v. Redd*, 4 B. Mon. 178; *Paine v. Lake Erie, &c., R. R. Co.*, 31 Ind. 283; *Hodges v. N. E. Screw Co.*, 1 R. I. 312.

1. In his own action to confine his operations within the limits of the corporate authority.

2. 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.

3. To take no advantage of his own position to the prejudice of his associates.

4. To give no advantage to one associate over another; and

5. To employ his efforts faithfully in advancing the common interest.

Of the wrongs which may result from a disregard of any of these obligations, it is to be said generally that where they affect the body of the corporators alike they cannot be treated as wrongs to the members severally. Thus, if the managing officers are guilty of an intentional abuse of corporate powers, by exercising powers not within the scope of their charter, this is such a violation of good faith to their associates as in a proper case might charge the officers personally with all the consequences. It is to be observed, however, that as the management of the corporate business is intrusted to their judgment, a mere error in deciding upon their powers could not justly be made the ground of legal liability. As was forcibly stated in one case, "While directors are personally liable to stockholders for any losses resulting from fraud, embezzlement, or willful misconduct or breach of trust, for their own benefit and not for the benefit of the stockholders, for gross inattention and negligence by which such fraud or misconduct has been perpetrated by agents, officers or co-directors, yet 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 [*518] the powers and discretion confided to the managing body."¹ This is only applying to these officers the rules generally applied where discretionary powers are to be exercised.

¹ Springs Appeal, 71 Penn. St. 11, 20; Watt's Appeal, 78 Penn. St. 370; Flagg v. Manhattan Ry. Co. 20 Blatchf. 142; Park v. Grant & c. Works, 40 N. J. Eq. 114. An act within the

scope of the director's authority will not be enjoined at the suit of the holder of a majority of the stock unless it is clear that the directors were controlled by a dishonest purpose, and

The wrong committed by the officer of a corporation which affects the stockholders generally, through their interests in the corporation, is not a wrong to them as individuals, but to the corporate entity. To illustrate this, the case may be instanced of the treasurer of a corporation embezzling its funds. Here every shareholder may suffer, but one of them individually cannot sue, for the money was not his; it belonged to the corporation. The interest the shareholder had which was affected was not in the money itself, but it consisted in a right to an accounting by the corporation in respect to it, and nothing could come to him from it except through the corporation, and as dividends, or by division on the final winding up of the corporate concerns. The case mentioned in the note was an action in case by a stockholder in a printing and publishing corporation against persons who were alleged to have conspired with two of its directors to suspend and destroy the business and franchises of the company, and to have induced such directors to suspend the publication of their daily and weekly newspapers for the benefit of a rival establishment, thereby rendering the plaintiff's interest in the corporation valueless. The conclusive answer to this claim was that the wrong alleged was a corporate wrong, in which all the stockholders were proportionally interested; and the corporation should represent all for the purposes of legal remedy.¹ There is a want of legal privity between the stockholder and the directors whose action is complained of; the latter are not his agents and bailees, but the agents and bailees of the body politic, whose officers they are.² It is true that this principle may sometimes prove embarrassing, when the officers charged with wrong are the governing board of the corporation, and the very parties who should represent its interests in the redress of its [*519] wrongs; *but the remedies in equity are ample for such a case, and a single shareholder may there bring to account the delinquent or fraudulent officer, or obtain redress

that complainant is injured. *Elkins v. Camden &c., R. R. Co.*, 36 N. J. Eq., 241.

¹ *Talbot v. Scripps*, 31 Mich. 263. See *Robinson v. Smith*, 3 Paige, 223; *Hodges v. N. E. Screw Co.*, 1 R. I. 312. The point is forcibly and clearly discussed and presented in the leading

case of *Smith v. Hurd*, 12 Met. 371. And see *Craig v. Gregg*, 83 Penn. St. 19.

² *Smith v. Hurd*, 12 Met. 371; *Gorham v. Gilson*, 28 Cal. 479; *Butts v. Wood*, 37 N. Y. 317; *Abbott v. Merriam*, 8 Cush. 588.

from others who have wronged the corporation, but against whom the directors refuse to proceed.¹ Such a suit, however, is instituted not on behalf of the complainant alone, but of all other stockholders, and stands as a substitute for a suit by the corporation itself.²

Recurring to the duties which it has been said above, the officers owe to the stockholders, some illustrations may be given of the acts which constitute breaches thereof:

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 the appropriate relief in equity. No doubt they might be enjoined from persistence in such action, on the application of individual corporators, and be called to account for what had already been done. So an individual corporator might perhaps obtain relief from his obligations 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.³

2. The obligation to furnish accurate information is particularly forcible, as it applies to the regular reports which are required of the managing board and perhaps of other principal

¹ *Hodges v. New England Screw Co.*, 1 R. L. 312; 3 R. L. 9; *Brown v. Van Dyke*, 4 Halst. Ch. 795; *Taylor v. Miami, &c., Co.*, 5 Ohio 182; *Pratt v. Pratt*, 33 Conn. 446; *Butts v. Wood*, 37 N. Y. 317; *March v. Eastern R. R. Co.* 43 N. H. 515; *Rogers v. Lafayette Ag. Works*, 52 Ind 296; *Watts' Appeal*, 78 Penn. St. 370; *Peabody v. Flint*, 6 Allen, 52, *Brewer v. Boston Theater*, 104 Mass. 378; *Allen v. Curtis* 26 Conn. 456; *Wright v. Oroville, &c., Co.* 40 Cal., 20; *Goodin v. Cincinnati, &c., Co.* 18 Ohio (N. S.) 169; *Dodge v. Woolsey*, 18 How. 331; *Bronson v. LaCrosse R. Co.*, 2 Wall. 283; *Memphis v. Dean*, 8 Wall. 64; *Barr v. New York, &c. Co.* 96 N. Y. 444. See *La Grange v. State Treasurer*, 24 Mich. 468; *Blain v. Agar*, 1 Sim. 37; *Hichens v. Congreve*, 4 Russ. 562; *DuPont v. Nor. Pac. R. Co.*, 18 Fed. Rep. 467. The

question as to what circumstances will warrant the bringing of such action is fully considered and the rule laid down in *Hawes v. Oakland*, 104 U. S. 450, followed in *Dimpfell v. Ohio &c. Co. Ry. Co.* 110 U. S. 209. The stockholder must have exhausted all means within his reach to obtain redress within the corporation. But it is said that he need not demand corporate action before suit, if all the officers are committing a wrong upon him. *Kelsey v. Sargent*, 40 Hun, 150.

² *Robinson v. Smith*, 3 Paige, 222; *Dodge v. Woolsey*, 18 How. 331; *Heath v. Erie R. R. Co.*, 8 Blatch. 347; *Mason v. Harris*, L. R. 11 Ch. D. 97.

³ *Ship' Case*, 2 De G., J. & S. 544. If the stockholder has assented to the illegal act, he cannot be heard to complain. *Weed v. Little Falls &c. Co.*, 31 Minn. 154.

officers. These are supposed to state facts upon which not only may the associates act in their corporate meetings but also in individual transactions; and a statement of important facts, purposely made untrue, is a fraud when acted upon.¹ But [*520] the cases *must be so peculiar that would give rise to an action to charge the directors personally that it can hardly be useful to undertake to suggest what facts might suffice to render them liable.

A corporator at all reasonable times is entitled to an inspection of the books of the corporation, and if this is denied him, he may, by mandamus, obtain it. But as this proceeding might not be 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. And here the right which is denied is plainly an individual right, and does not in a legal sense concern other corporators.

3. Under the third head of duties above stated, the general principle is that whatever a 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 the others is a fraud. Therefore where directors of a corporation instructed their treasurer to purchase of a certain ferry company a steamboat owned by it, at the cost of the boat and repairs, and it turned out that the directors constituted the ferry company, and that the price that company demanded and received for the steamboat was a sum much above the cost of the boat and repairs, this was adjudged a fraud for which the purchasing company might hold them responsible.² So if the directors of an embarrassed railroad 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

¹ When false reports of the financial condition of the corporation are published it will not be presumed for the purpose of charging a director with fraud that he had knowledge of all the affairs of the company, but

there must be evidence that he knew the report was false or had reason to believe it was. *Wakeman v. Dalley*, 51 N. Y. 27.

² *Parker v. Nickerson*, 112 Mass. 195.

sale is a fraud upon their trust, and may be vacated on that ground.¹ So where shares in a corporation are placed in the hands of directors to sell for the company, and they are enabled to sell at a premium, this premium belongs to the corporation, and it is a fraud in them to appropriate it.² So if a director of ^a railway company contract in his own name [*521] for iron for the road, any pecuniary advantage derived from the contract belongs to the company.³ So it is not competent for a director in a railway company to become contractor with the company for constructing the road; the two positions he would occupy as member of the board of directors letting the contract, and as contractor taking it, being inconsistent.⁴ Nor does it make any difference that no actual fraud was intended in the transaction, or that it can be shown that the corporation suffered no loss; 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 *cestuis que trust* would stand opposed to interest.⁵ So direct-

¹ Jackson v. Ludeling, 21 Wall. 616. See the general subject fully and carefully examined in Hoffman, &c., Co. v. Cumberland, &c., Co., 16 Md. 456, where a like conclusion is reached. An officer may not sell to himself property of the corporation. First Nat. Bank v. Drake, 29 Kan. 311. But if there is no bad faith a corporation may give its whole capital stock in exchange for property of one of its trustees. Knowles v. Duffy, 40 Hun, 485.

² York, &c., R. Co. v. Hudson, 16 Beav. 495. Where a director has loaned the bank's money with an agreement to share in the profits of the enterprise for which it was borrowed, the share belongs to the bank. Farmers', &c., Bank v. Downey, 53 Cal. 466. A promoter is liable for secret profits from the sale to the company of a mine. Emma Silver Min. Co. v. Lewis, L. R. 4 C. P. D. 396. See *in re* West Jewell, &c., Co., L. R. 10 Ch. D. 579. Directors may not vote themselves additional pay

after receiving pay for the time covered. State v. People's, &c., Ass., 42 Ohio St. 579; Bennett v. St. Louis, &c., Co., 19 Mo. App. 349.

³ See Benson v. Heathorn, 1 Y. & Coll. 326.

⁴ Flint, &c., R. R. Co. v. Dewey, 14 Mich. 477; European, &c., R. Co. v. Poor, 59 Me. 277; Thomas v. Brownville, &c., R. R. Co. 110 U. S. 522. An assignment to him of an interest in such a contract is voidable at the election of the corporation. Barnes v. Brown, 80 N. Y. 527. So railroad directors may not buy up land for station grounds. Cook v. Sherman, 20 Fed. Rep. 167. See Blair Town, &c., Co. v. Walker, 50 Ia. 376. Nor become interested in a company formed to mine coal to be sold to the railroad company. Wardell v. Railroad Co., 103 U. S. 651.

⁵ Flint, &c., R. R. Co. v. Dewey, 14 Mich. 477. A member of a board of directors who presents a bill on his own behalf for extra compensation cannot act as director on the question

ors will not be permitted to avail themselves of a mortgage which they cause to be made by the corporation to themselves, and by which they obtain an undue advantage.¹ So payments made by the directors to the company, in property at more than its value, will not be suffered to stand.² These cases illustrate the general principle.³

Nevertheless there is nothing in the relation of managing officer and stockholder that shall preclude the former dealing with the latter in respect to his shares and becoming purchaser thereof, provided that in their negotiations there is no deception and no concealment of facts which the purchaser 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 negotiation, any further than would be required of his position by his duty to the stockholders generally, irrespective of the negotiation. His duty may require of him regular reports, but further information which a stockholder may desire he will be expected to call for. No doubt a director has the same right as other persons to buy and sell stock in market, and in New York it has been

of its allowance. *Butts v. Wood*, 37 N. Y. 317. See *Gilman R. R. Co. v. Kelly*, 77 Ill. 426.

¹*Koehler v. Black River Falls Iron Co.*, 2 Black, 715. See *Davis v. Rock Creek, &c., Co.*, 55 Cal. 359; *Chouteau v. Allen*, 70 Mo. 290. But a director may become a creditor of and enforce a mortgage against the corporation if the transaction is fair. *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Hallam v. Ind. Hotel Co.*, 56 Ia. 178. If to secure an honest debt a director takes bonds, the company cannot repudiate the transaction without restoring what it has received. *Duncomb v. New York, &c., Co.*, 84 N. Y. 190; 88 N. Y. 1.

²*Osgood v. King*, 42 Iowa, 478.

³See, also, for other illustrations, *Bartholomew v. Bentley*, 15 Ohio, 659; S. C. 1 Ohio, (N. S.) 37, and cases in notes to *Duncomb v. Housatonic, &c., R. R. Co.*, 4 A. & E. R.

R. Cas. 306; *Cook v. Sherman*, 20 Fed. Rep. 175. Every contract entered into by a director with his corporation may be avoided by the latter within a reasonable time and so of a contract between two corporations, some of the directors holding that office in each. *Metrop. &c., Co. v. Manhattan, &c., Co.*, 11 Daly, 373, where VAN BRUNT, J. discusses these questions elaborately with full citation of authorities. *A contract between a corporation and its directors is only voidable and the right to avoid may be waived by acquiescence. *Kelly v. Newburyport, &c., Co.*, 141 Mass. 496. See, further, as to dealings between corporations when the same persons act as directors of each. *Pearson v. Concord R. R. Co.*, 62 N. H., 13 A. & E. R. R. Cas. 102; *Rolling Stock Co. v. Railroad Co.*, 34 Ohio St. 465; *Munson v. Syracuse, &c., Co.*, 103 N. Y. 53.

decided *that a director may buy of a stockholder his [*522] shares without any such obligation to disclose important facts as would rest upon an agent dealing with his principal. The director, it was said, was not trustee for the sale of the shareholder's stock. This stock was not the subject of trust between them, nor had the trust relation between them any connection with the vendor's stock, except so far as the good or bad management of the general affairs of the corporation by its directors indirectly affects the value of its stock.¹ A like decision has been made in Indiana.²

4. Where directors or managing officers perpetrate frauds on the 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. Thus, where under a secret arrangement made prior to his subscription a stockholder is permitted by the directors to surrender his stock and withdraw what he has paid upon it, this being in fraud of the other stockholders, they or any of them may, by bill in equity, have the money thus withdrawn refunded.³ So 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.⁴

5. It has been decided in Alabama 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.⁵ It would no doubt also be a fraud on any stockholder not privy to the unlawful arrangement. So, where the president of a bank makes loans of the bank 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

¹ *Carpenter v. Danforth*, 53 Barb. 581.

² *Tippecanoe Co. v. Reynolds*, 44 Ind. 509. So in Tenn. *Deaderick v. Wilson*, 8 Bax. 108.

³ *Melvin v. Lamar Ins. Co.*, 80 Ill. 446. A secret arrangement with one subscriber, that in certain contingencies he need not pay his subscription,

being in fraud of the others, is void and cannot constitute a defense to the subscription. *Foy v. Blackstone*, 31 Ill. 538. See *New London Inst. v. Prescott*, 40 N. H. 330.

⁴ *New Albany, &c., R. R. Co. v. Fields*, 10 Ind. 187.

⁵ *Bank of St. Mary's v. St. John*, 25 Ala. 566.

[*523] *the amount in a suit at law.' So, for any fraudulent sale of the corporate property by the directors, they may be called to account by stockholders.¹

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—whether by the party itself, by some donor for his benefit, or by judicial action—he is chosen because of the confidence felt and the trust reposed; and while the office continues the beneficiary has usually no choice but to leave his interests where they have been confided, unless such dishonesty or unfitness is disclosed as will justify proceedings to have the trustee removed. Under these circumstances the law imposes upon the trustee 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 the trust fund for his own interest. The *cestui que trust* may or may not be a person in law *sui juris*; if he is, there is no absolute impediment to dealings between himself and the trustee in respect to the trust property, or to the trustee's duties; and if for the time being, by fair understanding between them, the character of trustee is laid aside, and they deal with each other as strangers might, it is not impossible for their bargains to be upheld. But in all such cases the trustee will be likely to be possessed of decided advantages in the negotiations, not only because he will most probably have more complete information than the other will possess, but also because it will be difficult, if not impossible, for the *cestui que trust* to relieve himself entirely from the influence of the trustee, so as to deal with him on an equal footing. Such cases, therefore, must always afford unusual facilities for deception and fraud.

It has been said that to sustain a purchase by trustee [*524] from *cestui que trust* "the trustee must have acted in entire good faith. He must show that he made to the

¹ First Nat. Bk. of Sturgis v. Reed, 36 Mich. 263, citing Austin v. Daniels, 4 Denio, 299; Commercial Bank v. Ten Eyck, 48 N. Y. 305.

² Gray v. Steamship Co., 3 Hun,

383; Crook v. Jewett, 12 How. Pr. 19; Talbot v. Scripps, 31 Mich. 268. See Attorney General v. Fishmonger's Co., 1 Cr. & Ph. 1.

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 But where the trustee himself makes sale of the trust property under the authority vested in him as such — whether the sale be made under judicial direction or otherwise — 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 the payment of a 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 any one who takes it with knowledge or notice of the facts. ³ The rule in such cases is,

¹ *Spencer and Newbold's Appeal*, 80 Penn. St. 817. See *Gibson v. Jeyes*, 6 Ves. 266, where a rule nearly the same is laid down; *Todd v. Grove*, 33 Md. 188.

² *Coles v. Trecothick*, 9 Ves. 234; *McCants v. Bee*, 1 McCord Eq. 383; *Pugh v. Bell*, 1 J. J. Marsh. 399; *Richardson v. Spencer*, 18 B. Mon. 450; *Schwarz v. Wendell*, Wal. Ch. 267; *Farnam v. Brooks*, 9 Pick. 212; *Brown v. Cowell*, 116 Mass. 461; *Jones v. Smith*, 33 Miss. 215; *Sallee v. Chandler*, 26 Mo. 124; *Marshall v. Stephens*, 8 Humph. 159; *Graves v. Waterman*, 63 N. Y. 657; *Parshall's Appeal*, 65 Penn. St. 224; *Lathrop v. Pollard*, 6 Cal. 424. All contracts made by the trustee in which he is personally interested are voidable at the election of the beneficiary. *Munson v. Syracuse, &c., R. R. Co.*, 103 N. Y. 58.

³ *Lowther v. Lowther*, 13 Ves. 95; *Morse v. Royal*, 12 Ves. 355; *Whelpdale v. Cookson*, 1 Ves. Sr. 9; *Campbell v. Walker*, 5 Ves. 678; *Ex parte Lacey*, 6 Ves. 625; *Ex parte Hughes*, 6 Ves. 617; *Ex parte James*, 8 Ves. 337; *Coles v. Trecothick*, 9 Ves. 234;

Ex parte Bennett, 10 Ves. 381; *Fox v. Mackreth*, 2 Bro. C. C. 400; *Downes v. Grazebrook*, 3 Meriv. 200; *Michaud v. Girod*, 4 How. 503; *Campbell v. Penn. L. Ins. Co.*, 2 Whart. 53; *Boyd v. Hawkins*, 2 Dev. Eq. 329; *Davis v. Simpson*, 5 Harr. & J. 147; *Perry v. Dixon*, 4 Dessaus. Eq. 504, n.; *Butlers v. Haskill*, 2 Dessaus. Eq. 651; *Brackenridge v. Holland*, 2 Blackf. 377; *Wade v. Pettibone*, 11 Ohio, 57; *Mills v. Goodsell*, 5 Conn. 475; *Lovell v. Briggs*, 2 N. H. 218; *Currier v. Green*, 2 N. H. 225; *Farnam v. Brooks*, 9 Pick. 212; *Saeger v. Wilson*, 4 Watts & S. 501; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Rogers v. Rogers*, 3 Wend. 503; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Terwilliger v. Brown*, 44 N. Y. 237; *Beaubien v. Poupard*, Har. Ch. 206; *Dwight v. Blackmar*, 2 Mich. 330; *Moore v. Mandelbaum*, 8 Mich. 433; *Sheldon v. Rice*, 30 Mich. 296; *Nor. Balt. Ass'n v. Caldwell*, 25 Md. 420; *Brothers v. Brothers*, 7 Ired. Eq. 150; *Freeman v. Hardwood*, 49 Me. 195; *Ogden v. Larrabee*, 57 Ill. 389; *Hammond v. Stanton*, 4 R. I. 65. See *Carson v. Marshall*, 37 N. J. Eq. 213.

[*525] that the *cestui que trust*, *when the facts come to his knowledge, 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, however, with full knowledge of the facts, may of itself amount to an affirmation.¹

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. The same reasons apply to both cases.²

The above rules apply to executors and administrators, guardians, 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. It therefore applies to the case of an agent empowered to sell property for his principal; he cannot become purchaser directly³ nor by indirection through another.⁴ "This is a rule of public policy, necessary to preserve honesty and fidelity in the administration of trusts, and is too well settled to be departed from."⁵ So a trustee is liable as for a fraud if he knowingly sells trust property for less than it would bring in the market, even though such a sale is within a minimum fixed by his instructions.⁶

¹ *Marsh v. Whitmore*, 21 Wall. 178; *Miles v. Wheeler*, 43 Ill. 124. See *Campau v. Van Dyke*, 15 Mich. 371.

² If a partner sells his own goods to the partnership without the knowledge of his associates, he must account to them for the profits. *Bentley v. Craven*, 18 Beav. 75. See *Kimber v. Barber*, L. R. 8 Ch. App. 56.

³ *Brooke v. Berry*, 2 Gill, 83; *Dobson v. Racey*, 8 N. Y. 216; *Ames v. Port Huron, &c., Co.*, 11 Mich. 139; *Kerfoot v. Hyman*, 52 Ill. 512. At least, without the principal's knowledge and assent. *Ruckman v. Bergholz*, 37 N. J. L. 437; *Peckham Iron Co. v. Harper*, 41 Ohio St. 100; *Adams v. Sayre*, 70 Ala. 318. And a mere formal surrender of the agency before buying is not enough.

Fountain, &c., Co. v. Phelps, 95 Ind. 271.

⁴ Story on Agency, §§ 210, 211; *Dwight v. Blackmar*, 2 Mich. 330; *Porter v. Woodruff*, 36 N. J. Eq. 174. A trustee in a mortgage cannot indirectly buy in the property for the benefit of one bondholder, a bank of which he is cashier. *People v. Merch. Bank*, 35 Hun. 97. See *Toole v. McKiernan*, 48 N. Y. Sup. Ct. 163.

⁵ *Fisher's Appeal*, 34 Penn. St. 29, 31; *Moseley's Admr. v. Buck*, 3 Munf. 232; *Farnam v. Brooks*, 9 Pick. 212; *Casey v. Casey*, 14 Ill. 112; *Moore v. Mandlebaum*, 8 Mich. 433; *Hunter v. Hunter*, 50 Mo. 445; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Norris v. Taylor*, 49 Ill. 18.

⁶ *Price v. Keyes*, 62 N. Y. 373; *Mer-*

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 was taken before entering into them.¹

***Principal and Agent.** In pointing out what may be [*526] wrongs by trustees, the ground of agency has to a certain extent been covered. The agent owes to his principal the like fidelity which the trustee owes to the *cestui que trust*. There is this important difference in the cases; that as the supervision of trusts belongs to equity, wrongs by trustees must generally be redressed in that court, while wrongs by agents will be redressed at law, unless the case is such that some peculiar relief which only equity can give is required. Thus, if an agent employed to investigate a title by one proposing to buy, should take advantage of the information thereby acquired to purchase for himself, the principal might doubtless call him to account, either by suit in equity to take the benefit of the purchase, or by suit at law for recovery of damages.²

The principal and agent also assume towards each other certain duties of due care. The agent must not be negligent in the performance of his trust, and the principal must not negligently

ryman v. David, 31 Ill. 404; Greenfield Sav. Bank v. Simons, 133 Mass. 415. He cannot derive a profit from the estate for himself. Coltrane v. Worrell, 30 Gratt. 434; Baugh v. Walker, 77 Va. 99.

¹ Revett v. Harvey, 1 Sim. & Stu. 502; Hatch v. Hatch, 9 Ves. 292.

A guardian will not be suffered to acquire advantages for himself in dealings with the ward soon after the relation has terminated. Schoul. Dom. Rel. 515, 516; 3 Redf. on Wills, 2d Ed. 443; Story Eq. Juris. §§ 316-320. Nor to procure from the ward conveyances for third persons; his influence being supposed still too great for equal dealing. Ranken v. Patton, 65 Mo. 378, 418.

² See Reid v. Stanley, 6 Watts & S. 309; Kimber v. Barber, L. R. 8 Ch. App. 56. See McMahon v. McGraw, 26 Wis. 614; Ely v. Hanford, 65 Ill. 267; Moore v. Mandlebaum, 8 Mich. 433. He cannot buy for himself a tax title on the principal's property. Bowman v. Officer, 53 Ia. 640. Nor, knowing that the principal desires to renew a lease, can he lease the property himself. Davis v. Hamlin, 108 Ill. 39. Nor can he appropriate any of his principal's property. Weaver v. Fisher, 110 Ill. 146. Nor deal in the business of the agency for his own benefit. Whitesides v. Cook, 20 Ill. App. 574.

lead the agent into danger. As an example, the principal no doubt assumes the obligation to warn the agent of any risks in his business of which the agent would not be likely to be aware, and which would not be open to observation; such as dangerous defects in buildings or machinery, peculiar exposure to disease, etc. For a consideration of such cases we must refer to the discussion of negligence in another place, only remarking that as the relation imposes the obligation, conduct may sometimes be negligence in the case of a principal which would not be in the case of a third party not charged with any similar duty.¹ Duty is the measure of the required care, as is stated elsewhere.

Partners are agents for each other within the scope of the partnership business, and are charged with all the obligations [*527] 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.² Their duty embraces a full disclosure to each other of all facts relating to their joint dealings; and it is a fraud for one to withhold this, even when they are proceeding to close up their affairs by arbitration.³

Attorney and Client. Elsewhere the obligation the attorney, solicitor, proctor or counsel assumes towards his client is spoken of, and his liability for negligence in performing it is stated. It has been held that if the 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

¹ As to the right of the agent to indemnity for liabilities incurred in the principal's service, see *Adamson v. Jarvis*, 4 Bing. 66; *D'Arcy v. Lyle*, 5 Binn. 441; *Yeatman v. Corder*, 38 Mo. 337; ante, 168-9.

² *Getty v. Devlin*, 54 N. Y. 403. In general a partner is entitled to no pay for his services in the business beyond his share in the profits. *Mann v. Flanagan*, 9 Oreg. 425; *Frazier v. Frazier*, 77 Va. 775. *Heath v. Waters*, 40 Mich. 457; *Godfrey v. White*, 43 Mich. 171. Otherwise, if by a course of dealing an agreement to that effect

is fairly implied. *Emerson v. Durand*, 64 Wis. 111. See *Belcher v. Whittemore*, 134 Mass. 330; *Hamper's Appeal* 51 Mich. 71. By purchasing a firm note he cannot become the owner of it against the firm. *Easton v. Strother*, 57 Ia. 506.

³ *Beam v. Macomber*, 33 Mich. 127; See *Maddeford v. Austwick*, 1 Sim. 89; *King v. Wise*, 43 Cal. 629. Upon like principle a fraud by an executor upon his female co-executor who confides in him, is remediable in equity. *Tompkins v. Hollister*, 60 Mich. 470.

aside for the presumed undue influence. "It is the policy of the law to scrutinize gifts, conveyances, and securities, given by a client to his attorney pending the relation, more especially when they are connected with the subject matter of litigation; as then the necessities of the client, and the confidence reposed, place the client most in the power of his attorney. The relation and the confidence it implies, which confidence is absolutely necessary, in some cases, to promote the prosecution or defense of a suit, are frequently not so much matter of choice with the client, as of necessity. Hence the reason and justice of the rule of law, that will not permit them to be turned to the profit of the attorney at the expense of the client."¹ So close is the confidence which this relation demands² that the client is expected and invited by the law to lay open to his adviser all that he may know, believe or suspect—all in fact, that may be in his mind *which it can possibly be important for the adviser [*528] to know in order to prepare him to render valuable services; and the confidence thus invited the law protects, and it 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.³ Still less will the law justify

¹ Gray v. Emmons, 7 Mich. 533. "Where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess; and that the solicitor has done as much to protect his client's interest as he would have done in the case of a client dealing with a stranger." LORD CRANWORTH in Savery v. King, 5 H. L. Cas. 655. And see Pisani v. Attorney General, L. R. 5 P. C. Cas. 516; S. C. 10 Moak, 78; Yeamans v. James, 27 Kan. 195; Merryman v. Euler, 59 Md. 588; Whipple v. Barton, 63 N. H. 613. If while acting as an attorney, one buys property sold in the course of litigation he holds as

trustee for the client. Taylor v. Young, 56 Mich. 285; Pearce v. Gamble, 72 Ala. 341. See Byington v. Moore, 62 Ia. 470. See Cameron v. Lewis, 56 Miss. 601; Bowers v. Vir- den, Id. 595 as to his rights under a tax title upon his client's land.

² The attorney cannot act professionally for the other party even in procuring a compromise, and demand compensation therefor. Her- rick v. Catley, 1 Daly, 512.

³ 1 Greenl. Ev. § 237; Whart. Ev. § 576; Cromack v. Heathcote, 2 B. & B. 4; Chant v. Brown, 9 Hare, 790; Greenough v. Gaskell, 1 Myl. & K. 98; Jenkinson v. State, 5 Blackf. 465; Scranton v. Stewart, 52 Ind. 68; Max- ham v. Place, 46 Vt. 434; Williams v. Fitch, 18 N. Y. 546; Britton v. Lorenz, 45 N. Y. 51; Chaboon v. Commonwealth, 21 Grat. 822; Sar-

him in a voluntary disclosure. It was said by Lord Chief Justice TINDALL in one case, that a member of the legal profession was "to consider his lips sealed with a sacred silence";¹ and it is said in Comyn that "if a man, being intrusted in his profession, deceive him who intrusted him, * * or discover [disclose] the evidence or secrets of the cause," he is liable in an action on the case.² This is good sense and should be good law. The courts have the power, and no doubt would exercise it, to deal with such a case summarily when it should arise, but this would not preclude private actions. The courts may also take notice even without their attention being specially called to it by 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.³

geant v. Hampden, 38 Me. 581; State v. Hazleton, 15 La. Ann. 72; Higbee v. Dresser, 103 Mass. 523; Orton v. McCord, 33 Wis. 205; Alderman v. People, 4 Mich. 414; Bacon v. Frisbie, 80 N. Y. 394, Kaut v. Kessler, 114 Penn. St. 603; see Root v. Wright, 84 N. Y. 72; Brigham v. McDowell, 27 N. W. Rep. 384 (Neb.) The privilege extends to communication by other means than words. State v. Dawson, 90 Mo. 149. But the party may call his attorney as his witness. French v. Hall, 119 U. S. 152. The privilege does not cover communications made by or to the attorney where acting for both parties. Goodwin, &c., Co's. App. 12 Atl. Rep. 736 (Penn.); Gulick v. Gulick, 39 N. J. Eq. 516; Hanlon v. Doherty, 109 Ind. 37. Nor to communications made in the presence of a third person. Moffatt v. Hardin, 22 S. C. 9, or of the other party. Cady v. Walker, 28 N. W. Rep. 805 (Mich.) Nor to communications to a lawyer if he acts as a mere scrivener and is asked for no advice. Smith v. Long, 106 Ill. 485; Todd v. Munson, 53 Conn. 579. See, further,

Hebbard v. Haughian, 70 N. Y. 54; Althouse v. Wells, 40 Hun. 3-6; Plano Mfg. Co. v. Frawley, 68 Wis. 577; Johnson v. Patterson, 13 Lea, 626; Henderson v. Terry, 63 Tex. 281; House v. House, 27 N. W. Rep. 858 (Mich); Chipman v. Peebles, 4 South. Rep. 273 (Ala.)

¹ Taylor v. Blacklow, 3 Bing. (N.C.) 235.

² Com. Dig. Action upon the case for a Deceit, 5.

³ Valentine v. Stewart, 15 Cal. 337. As to frauds by attorneys upon clients, by means of which property is obtained or sold, see Matter of Wool, 36 Mich. 299; Ford v. Harrington, 16 N. Y. 285; Evans v. Ellis, 5 Denio, 640; Ellis v. Messervie, 11 Paige, 467; Howell v. Ransom, 11 Paige, 538; Poillon v. Martin, 1 Sandf. Ch. 569; Edwards v. Meyrick, 2 Hare, 60; Newman v. Payne, 2 Ves. 199; Gresley v. Mousley, 4 DeG. & J. 78; Lyddon v. Moss, 4 DeG. & J. 104; Holman v. Loynes, 4 DeG., M. & G. 270; Carter v. Palmer, 8 Cl. & Fin. 657; Charter v. Trevelyan, 11 Cl. & Fin. 714; Gibson v. Jeyes, 6 Ves. 266;

The rules above stated are applicable 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 [*529] attorney's privilege as the abuse of a confidence which has been bestowed upon him.¹

Scriveners. When one trusts another with the drawing of contracts between them — as is sometimes done when attorneys have dealings of bargain and sale with other persons — the draftsman accepts obligations which are even more strict than those which spring from the ordinary professional relations. Here the draftsman undertakes to act with entire impartiality for two parties,² one of whom is himself; and he 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. This principle is applicable to insurance agents who draw contracts of indemnity. It is a familiar rule of law that their principal shall not take advantage of their errors or mistakes to the prejudice of those they have undertaken to insure. 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.³

Physicians and Clergymen. The common law did not extend to the confidence which one might bestow upon his physician or his spiritual adviser the same protection which it gives in the case of the legal counsellor.⁴ Yet the reasons in support of it

Pisani v. Attorney General, L. R. 5 P. C. 516; S. C. 10 Moak, 78.

¹ Story Eq. Juris. §§ 307-309; *Free-love v. Cole*, 41 Barb. 318; *Sears v. Shafer*, 1 Barb. 408; S. C. 6 N. Y. 263; *Ladd v. Rice*, 57 N. H. 374.

² One who drafts a will under which he is to be a beneficiary does so under suspicions which he must remove by proof of entire fairness, and that the testator fully understood the instrument prepared for him. *Breed v. Pratt*, 18 Pick. 115; *Downey v. Murphey*, 1 Dev. & Bat. 82; *Duffield v. Robeson*, 2 Harr. 375; *Hill v.*

Baye, 12 Ala. 687; *Adair v. Adair*, 30 Geo. 102.

³ *Bidwell v. Northwestern Ins. Co.*, 24 N. Y. 802; *Clark v. Union, &c., Ins. Co.*, 40 N. H. 333; *Howard Fire Ins. Co. v. Bruner*, 23 Penn. 50; *Hartford, &c., Ins. Co. v. Harmer*, 2 Ohio, (N. S.) 452; *Peoria, &c., Ins. Co. v. Hall*, 12 Mich. 202.

⁴ *Duchess of Kingston's Case*, 20 State Trials, 573; *Rex v. Gibbons*, 1 C. & P. 97; *Wilson v. Rastall*, 4 T. R. 753; *Anonymous*, 2 Skin. 404; *Rex v. Gilham*, Ry. & M. 165; *State v. Bostick*, 4 Harr. 564; *Simon v. Gratz*,

are largely the same, and ought to have been recognized as sufficient. The disclosure made to any of the three may [*530] in a measure be compulsory, and what is extorted can never rightfully be made use of except for the very purpose for which it is obtained. The competent physician does not undertake to make cures where he knows nothing of causes; and he may need to know the history of an ailment before he is able to determine the family to which it belongs, or the remedies likely to be available for its cure. He demands this; and in the mind of the patient the alternative to disclosure may be that he will be wrongly and prejudicially treated. But the disclosure that may be useful for treatment may be damaging otherwise if placed before the public, and if the lips of the physician are not sealed, the patient may elect to deceive him rather than to have his body cured at the expense of his liberty or his reputation. Nor in the case of spiritual advisers is it believed that any public interest would be prejudiced by the adoption of a rule which should render strictly confidential in all cases, whatever a man might communicate in order to obtain spiritual assistance and counsel. Especially if the usages and discipline of a church require or even counsel full confidence in this relation, it should be regarded as a part of the religious freedom of its members to be at liberty to indulge it with safety and under legal protection. In some of the States the legislature has recognized the propriety of such protection, not only in the case of religious advisers, but of physicians also.¹

The law takes notice of the influence likely to be acquired by the physician over his patient, and scrutinizes with jealousy

2 Pen. & Watts, 412; Commonwealth v. Drake, 15 Mass. 161.

¹ Cases under such statutes as to physicians. Pierson v. People, 79 N. Y. 424; Grattan v. Metr. Life Ins. Co., 80 N. Y. 281; Renihan v. Dennin, 103 N. Y. 573; McKinney v. Grand St. R. R. Co., 104 N. Y. 353; Scripps v. Foster, 41 Mich. 742; Fraser v. Jenison, 42 Mich. 206; Guptill v. Verback, 58 Ia. 98; Excelsior, &c., Ass. v. Riddle, 91 Ind. 84; Masonic, &c., Ass. v. Beck, 77 Ind. 203; Penn. Mut.,

&c., Co. v. Wiler, 100 Ind. 92; Heuston v. Simpson, 17 N. E. Rep. 261 (Ind.); Gartside v. Conn. Mut. &c., Co., 76 Mo. 446. If the examination is made upon the order of a prosecuting attorney, there is no privilege as no confidential relation exists. People v. Glover, 33 N. W. Rep. 874 (Mich.) As to clergymen in Indiana, the communication must be penitential or made in obedience to religious duty. Knight v. Lee, 80 Ind. 201.

their dealings while the relation continues.¹ As the control of spiritual advisers is likely to be even greater and more controlling, especially in the last illness, the reasons for such jealousy are powerful in proportion, and 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 the fears or the hopes, or by taking advantage of spiritual or bodily weakness.²

¹ See *Ashwell v. Lomi*, L. R. 2. P. 278; *In re Welsh*, 1 Redf. Sur. Rep. & D. 477; S. C. 4 Moak, 700; *Bilage* 238; *Lyon v. Home*, L. R. 6 Eq. Cas. v. Southee, 9 Hare, 534. 655; *Dent v. Bennett*, 4 Myl. & Cr.

² See *Huguenin v. Baseley*, 14 Ves. 269, 277.

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*CHAPTER XVIII.

RESPONSIBILITY OF THE MASTER FOR THE WRONGS DONE OR SUFFERED BY PERSONS IN HIS EMPLOYMENT.

In a previous chapter it has been shown that when several persons participate in wrongful and injurious action, they are jointly and severally responsible for all legal consequences, and the extent of their participation, or the degree of fault attributable to each, is immaterial. The rules regulating the responsibility of the husband for the torts of the wife have also been given, and it has been seen that the law supposes her to be under his control, and does not suffer him to exonerate himself from responsibility by showing the contrary. The rule of presumption is adopted for this case, because it is believed the well-being of society is best subserved thereby. It has also been seen that while a corporation is responsible for its torts, those who act for it in committing them may, at the election of the party injured, be held to accountability, either as the principals or as joint wrongdoers.

Attention is now directed to 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. The cases embraced in this class are those in which one person occupies toward another the relation of master to servant.

Who is a Servant. A preliminary remark is essential regarding the employment, in the law, of the words master and servant. The common understanding of the words and the legal understanding is not the same; the latter is broader, and comprehends some cases in which the parties are master and servant only in a peculiar sense, and for certain purposes; perhaps only for a single purpose. In strictness, a servant is one who, for a valuable consideration, engages in the service of another, and

[*532] *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. The case of an apprentice may be embraced under this head; for although he does not always bargain in respect to the service on his own behalf, some one whom the law authorizes to speak for him does so, and the relation established is strictly one resting on an agreement for services in return for a consideration of some sort which the master is to render.

But only as between the two parties to it does the contract establish their relations 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. If one is injured by the servant of another, and the injury is in any manner connected with the fact of service, it would be immaterial to the injured party 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. The liability of the master, if any, cannot depend upon circumstances with which the public has no concern; it must come from the fact that one person has placed himself under another's direction and control, in a manner that should impose on the latter the obligation to protect third persons against injuries from the acts or omissions of his subordinate. It could not at all depend on whether the master was to pay anything, nor whether the service was permanent or temporary. His control of the action of the other is the important circumstance, and the particulars of his arrangement are immaterial.

Accordingly, it has been determined that 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

¹ *Hill v. Morey*, 26 Vt. 178; *Potter v. Faulkner*, 1 B. & Smith, 800. In *Althorf v. Wolfe*, 22 N. Y. 355, where one had directed his servant to re-

move snow and ice from the roof of his house, and another person went up with the servant as a volunteer to assist him, and, by the carelessness

[*533] For *convenience, rather than because anything depends on an actual contract of service, he is called a servant, when the remedy of the third person is being pursued. So as a child is by the law placed under the dominion of the parent, he is, while employed by the latter about his affairs, to be regarded as a servant; and so is a mere volunteer.¹ And it follows, from what has been said above, that the agent in one's business, whether general or special, is in law a servant, and so is the officer of a private corporation.² The officer of a public corporation in the discharge of the proper duties of his office, is not, in general, to be deemed the servant of the corporation; neither is any person who is employed in any capacity in the execution of its police regulations.³ But in the management of its own property

of the latter in throwing the snow and ice into the street, a passer-by was injured, the master was held responsible. See, also, *Booth v. Mister*, 7 C. & P. 66.

The relation of superintendent and inmate of a hospital does not make the latter the servant of the former. *Schrubbe v. Connell*, 34 N. W. Rep. 503 (Wis.). But if a penitentiary keeper puts a convict in charge of his premises, he makes him his servant. *Ward v. Young*, 42 Ark. 542. If a railroad has its trains made up in the depot of another company by the latter's servants, it is liable to its passengers for the negligence of the servants. *Hannibal, &c., R. R. Co. v. Martin*, 11 Ill. App. 386.

Where one lets his team and driver to another, who asks for the particular driver, if in the course of the hirer's business, the servant injures a third person by a collision, the master is liable. *Joslin v. Grand Rapids Ice Co.*, 50 Mich. 516 and cases; *Huff v. Ford*, 126 Mass. 24. See *Ames v. Jordan*, 71 Me. 540; *Hofer v. Hodge*, 52 Mich. 372; *DeVoin v. Mich. Lumber Co.*, 64 Wis. 616.

¹ *Schouler, Dom. Rel.* 544-5; *Shearm. and Redf. on Neg.* § 106; *Johnson v. Ashland Water Co.*, 37 N. W. Rep.

823 (Wis.); *Everhart v. Terre Haute, &c., R. R. Co.*, 78 Ind. 290; *Barstow v. Old Colony R. R. Co.*, 143 Mass. 535; *Mayton v. Texas, &c., R. R. Co.*, 63 Tex. 77; *Blair v. Grand Rapids, &c., Co.*, 60 Mich. 124. Compare *Enson v. S. & E. T. Ry. Co.*, 65 Tex. 577. See *Sherman v. Hannibal, &c., R. R. Co.*, 72 Mo. 62; *Pittsburgh, &c., Co. v. Adams*, 105 Ind. 151; *Osborn v. Knox, &c., Co.*, 68 Me. 49.

² A purely charitable society, having no capital stock, nor provision for making dividends or profits, is not responsible to one of its patients for the negligence of a servant selected with due care, nor for the unauthorized assumption of an attendant to act as surgeon. *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432; *S. C.* 21 Am. Rep. 529. Nor for an assault by an officer upon an inmate. *Perry v. House of Refuge*, 63 Md. 20. See *Benton v. Trustees of Boston City Hosp.*, 140 Mass. 13.

³ See post, p. *621. The doctrine of *respondent superior* does not apply to public agents charged with a duty which can be exercised only through the services of others. They are liable only for their own misconduct. *Walsh v. Trustees, &c.*, 96 N. Y. 427; *Donovan v. McAlpin*, 85 N. Y. 151.

a public corporation comes under the same rules with all others, and its agents are its servants.

The Master's Liability in General. When the relation is found to exist, the question of the master's liability next presents itself. And it will readily occur to every mind that the master cannot, in reason, be held responsible generally for whatever wrongful conduct the servant may be guilty of. A liability so extensive would make him guarantor of the servant's good conduct, and would put him under a responsibility which prudent men would hesitate to assume, except under the stress of necessity. Even the parent is not made chargeable generally for the torts of his child; and if he cannot justly be held responsible for the conduct of one whom the law submits to his general direction and discipline, much less could another be held liable, generally, for the acts of a servant over whom his control is comparatively slight, and who is not submitted to his disciplinary authority.

The maxim applied here is the familiar one: *Qui facit per alium facit per se*. That which the superior has [*534] 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 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. It is not, limited therefore, to the cases in which the injurious conduct was directed by the master himself; for so restricted it would be of little moment. A tort which one directs or advises another to commit he is always responsible for, jointly with the guilty agent, and his liability does not depend upon the subordination of the agent, but upon the direct connection of the adviser with the wrong. A master must be responsible further, or the relation would be immaterial in the law of legal wrongs. In brief, the rules of his liability are as stated in the following pages:

A municipality is not liable for its officer's trespass without color of authority, though in his official business. *Kiernan v. Jersey City*, 13 Atl. Rep. 170 (N. J.). But it is for its officers' negligence in performing minis-

terial as distinguished from judicial duties. *Toledo v. Cone*, 41 Ohio St. 149; *Mulcairns v. Janesville*, 67 Wis. 24: But see *McCarthy v. Boston*, 135 Mass. 197.

1. 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. When, therefore, a merchant places a clerk in his store to sell his goods, and the clerk disposes of them with false representations of their qualities, the purchaser who brings suit for the fraud need not concern himself with the question whether the fraud was directed or not. His injury does not depend upon that, and it neither affects his equity to compensation, nor the moral obligation of the merchant to respond.¹ So when a railway company puts a conductor in charge of its train, and he purposely and wrongfully ejects a passenger from the cars, the railway company must bear the blame and pay the damages. In this case the company chooses its servant and puts him in charge of its business, and the injury is done while performing it, and in the exercise of the power conferred. If the corporate authorities did not direct the act to be done, they nevertheless put a person of their own selection in a position requiring the exercise of discretionary [*535] authority, *and by entrusting him with the authority and with the means of doing the injury, have, through his agency, caused it to be done. As between the company and the passenger, the right of the latter to compensation is unquestionable.²

¹ *Griswold v. Haven*, 25 N. Y. 595.

² *Eastern Counties R. Co. v. Broom*, 6 Exch. 314, 327; *Goff v. Great Nor. R. R. Co.*, 3 E. & E. 672; *Seymour v. Greenwood*, 7 H. & N. 355; *Bayley v. M. S. & L. R. Co.*, L. R. 7 C. P. 415; S. C. on Appeal, L. R. 8 C. P. 148; *Moore v. Met. R. Co.*, L. R. 8 Q. B. 36; *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 463; *Chamberlain v. Chandler*, 3 Mason, 242; *Baltimore &c., R. R. Co. v. Blocher*, 27 Md. 277; *Goddard v. Grand Trunk R. R. Co.*, 57 Me. 202; S. C. 2 Am. Rep. 89; *Moore v. Fitchburg R. R.*

Co., 4 Gray 465; *Ramsden v. Boston, &c., R. R. Co.*, 104 Mass. 117; S. C. 6 Am. Rep. 200; *Drew v. Sixth Ave. R. R. Co.*, 26 N. Y. 49; *Passenger R. R. Co. v. Young*, 21 Ohio, (N. S.) 518; S. C. 8 Am. Rep. 78; *Penn. R. R. Co. v. Vandiver*, 42 Penn. St. 365; *Pittsburgh, &c., R. Co. v. Donahue*, 70 Penn. St. 119; *Healey v. City R. R. Co.* 28 Ohio, (N. S.) 23. See, further, cases of assault: *Springer Tr. Co. v. Smith*, 16 Lea, 498; *Coggins v. Chicago &c., R. R. Co.*, 18 Ill. App. 620; *Stewart v. Brooklyn &c., Co.* 90 N. Y. 588. False imprisonment

2. Intentional Acts: When Master not Liable. But the liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise where the servant has stepped aside from his employment to commit a tort which the master neither directed in fact, nor could be supposed, from the nature of his employment, to have authorized or expected the servant to do. To illustrate again with the case of the merchant: While he may justly be held responsible for a fraudulent sale by his clerk of the merchandise entrusted to him for sale, there could be neither reason nor justice in compelling the merchant to respond if the fraud were practiced by the

for failure to obey an unreasonable rule. *Corbett v. Twenty-Third St. Ry. Co.*, 43 Hun, 587. So for the willful misconduct of a brakeman, although he has no authority to eject passengers. *Wabash Ry. Co. v. Savage*, 110 Ind. 156; *Chicago &c., R. R. Co. v. Flexman*, 103 Ill. 546. See *Terre Haute &c., R. R. Co. v. Jackson*, 81 Ind. 19; *McKinley v. Chicago &c. R. R. Co.*, 44 Ia. 814. *Contra*, *Marion v. Chicago, &c., Ry. Co.* 59 Ia. 428. In *Townsend v. N. Y. Central, &c., R. R. Co.*, 56 N. Y. 295; S. C. 15 Am. Rep. 419, following *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25, it is decided that when the conductor, acting in the line of what he believes his duty, removes from the cars a man who refuses to pay his fare or show his ticket, the company cannot be held responsible for more than the actual damages. So *Hays v. Houston &c., R. R. Co.* 46 Tex. 272. And see *Hagan v. Providence, &c., R. R. Co.*, 3 R. I. 88; *Frederick v. Marquette &c., R. R. Co.*, 37 Mich. 342. A trespass done or suffered by a servant on the land of a third person, without the master's authority, cannot render the master liable, though the servant, in what he did, had in view the master's interest, and supposed he was furthering it. *Horner*

v. Lawrence, 37 N. J. 46. But when a servant took another's hay to feed his master's horses for lack of other food, the master was held liable. *Potulni v. Saunders*, 35 N. W. Rep. 379 (Minn.)

A railroad company is liable for the acts of its conductor in ejecting with excessive force an intruder on the car. *Higgins v. Watervliet, &c.*, Co. 46 N. Y. 23; S. C. 7 Am. Rep. 293; *Sanford v. Eighth Av. R. R. Co.*, 23 N. Y. 343; *Coleman v. New York, &c., R. R. Co.*, 106 Mass. 160; *Seymour v. Greenwood*, 7 H. & N. 854; *New York, &c., Ry. Co. v. Haring*, 47 N. J. L. 137. See *Kansas Pacific R. R. Co. v. Kessler*, 18 Kan. 523. So for a station agent's ejecting a man from a station. *Johnson v. Chicago &c., Ry. Co.*, 58 Ia. 848. So where a servant removes a passenger from a part of a boat where he has no right to be. *Steamboat Co. v. Brockett*, 121 U. S. 637. A policeman called by a railroad company to remove a passenger for refusing to pay fare makes the company liable if he uses excessive force, but if the man and his friends resist and the officer to quell the riot acts as a peace officer, the company is not liable. *Jardine v. Cornell*, 14 Atl. Rep. 590 (N. J.) And see cases *post* p. 630 note.

[*536] clerk in *a sale not of the merchandise, but of his own horse or watch. So if the conductor of a train of cars leaves his train to beat a personal enemy, or from mere wantonness to inflict any injury, the difference between his case and that in which the passenger is removed from the cars is obvious. The one trespass is the individual trespass of the conductor, which he has stepped aside from his employment to commit; the other is a trespass committed in the course of the employment, in the execution of orders the master has given, and apparently has the sanction of the master, and contemplates the furtherance of his interests.¹ In determining whether or not the master shall be held responsible, the motive of the servant in committing the act is important; for if he supposes he is acting in furtherance of the master's interest under a discretionary authority, which the master has conferred upon him, the case will generally have an aspect quite different from what it would present if it were manifest that malice were being indulged, irrespective of the master's interest.² But the motive is not conclusive. A man may purposely defraud another

¹ In *Crocker v. New London, &c.*, R. R. Co., 24 Conn. 249, the servant of the defendant, after a person had been put off the cars, kicked him in the face when he attempted to get on again. *Held*, to be the tort of the servant only. See, also, *Evansville, &c., R. R. Co. v. Baum*, 26 Ind. 70; *Molloy v. New York, &c., R. R. Co.*, 10 Daly 453; *Smith v. Memphis, &c., Co.*, 1 S. W. Rep. 104 (Tenn). So where one employed to guard property shoots one retreating from it. *Golden v. Newbrand*, 52 Ia. 59. So where a conductor stops his train, chases and seizes a boy and puts him on the train. *Gilliam v. South, &c., R. R. Co.*, 70 Ala. 268, and where an agent issues false shipping receipts for the benefit of a firm of which he is a member and to the injury of plaintiff. *Erb v. Grt. West. Ry. Co.*, 5 Can. S. C. R. 179. In *Wright v. Wilcox*, 19 Wend. 343, the master was held not liable where the servant willfully drove over another person and in-

jured him. This doctrine was applied in *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill, 480; S. C. in error, 2 N. Y. 479, to a case where the master of a vessel purposely ran into and injured another, and in *Illinois Cent. R. R. Co. v. Downey*, 18 Ill. 259, to one where the conductor of a train of cars purposely increased his speed to run into stock on the track. But the master is held liable for the willful act of his servant in driving by a team so as to hit it. *Schaefer v. Osterbrink*, 67 Wis. 495, and compare *Fick v. Chicago, &c., Co.*, 68 Wis. 469. Compare, also, *Toledo, &c., R. R. Co. v. Harmon*, 47 Ill. 298; *Chicago, &c., R. R. Co. v. Dickson*, 63 Ill. 151; S. C. 14 Am. Rep. 114; *Howe v. Newmarch*, 12 Allen, 49; *Duggins v. Watson*, 15 Ark. 118.

² In case of doubt the test may well be whether he was acting *bona fide* in furtherance of the master's interest. *Birmingham Water Works Co. v. Hubbard*, 4 South. Rep. 607 (Ala.)

in selling his master's goods, that he may gratify his private malice against the purchaser; but if the master had empowered him to make the sale, he must take the responsibility of any wrong committed in making it. The test of the master's responsibility is not the motive of the servant, but whether that which he did was something his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name.¹

*Says HOAR, J.: "If the servant, wholly for a purpose [*537] of his own, disregarding the object for which he is 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." *

¹ "If one of the defendants, while engaged in the prosecution of the business of the other, carelessly or negligently set fire to the prairie, or even purposely, with a view to benefit or protect the interests of the employer, the latter would be liable for the consequences." TREAT, Ch. J., in *Johnson v. Barber*, 10 Ill. 425. If the servant is not acting within the scope of his employment, his purpose to serve the master will not make the latter liable. *Marion v. Chicago, &c., Ry. Co.*, 59 Ia. 428. A boy willfully struck by a car driver cannot recover of the railway company for the injury. *Pittsburgh, &c. R. R. Co. v. Donahue*, 70 Penn. St. 119. See *Williams v. Pullman, &c., Co.*, 3 South. Rep. 631 (N. C.) A bank is not liable for a theft by the cashier of moneys left in his charge. *Foster v. Essex Bank*, 17 Mass. 479, 510. See *Isaacs v. Third Ave. R. R. Co.*, 47 N. 122; *Jackson v. Second Ave. R. R. Co.*, 47 N. Y. 274; S. C. 7 Am. Rep. 448; *Moore v. Sanborne*, 2 Mich. 520. Nor for the false report of its officer made without express directions, solely for his own benefit. *Brit. Mut. Bkg Co. v. Charnwood*, L. R. 18 Q. B. D. 714, and cases pp. 138-141 *ante*. If a baggageman, in the

execution of his orders to keep intruders out of his car, throws an intruder off, the company is *prima facie* liable; but if he acts willfully and maliciously in doing so, outside and in excess of his duty, he alone is responsible. *Rounds v. Delaware, &c., R. R. Co.*, 64 N. Y. 129; S. C. 21 Am. Rep. 597.

² *Howe v. Newmarch*, 12 Allen, 49, 57. See *Little Miami R. R. Co. v. Wetmore*, 19 Ohio, (N. a.) 110; S. C. 2 Am. Rep. 373; *Evansville, &c., R. R. Co. v. Baum*, 26 Ind. 70; *Fraser v. Freeman*, 43 N. Y. 566; S. C. 3 Am. Rep. 740. In *Mali v. Lord*, 39 N. Y. 381, a merchant was sued for the wrongful act of his superintendent in having the plaintiff arrested and searched on a charge of stealing goods from the merchant. It was held that the merchant was not liable and the general doctrine is stated that the master is not liable for acts of the servant not directed by him, and which the master himself, if present, would not be authorized to do. See, also, *Mallach v. Ridley*, 43 Hun, 336. But this rule is a little vague, and cannot always be true. No one is authorized, in the exercise of his rights, to employ unnecessary force; but in *Rounds v. Delaware, &c., R.*

[*538] *But "it is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged, when the wrong was committed, and that the act complained of was done in the course of his employment. The master, in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. 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

R. Co., 64 N. Y. 129; S. C. 21 Am. Rep. 597, it was held that the master was liable where the servant, in pursuance of a general authority, made use of unnecessary force to eject a trespasser. Compare *Hibbard v. N. Y. & Erie R. R. Co.*, 15 N. Y. 456. The removal of trespassers being within the implied authority of a brakeman, if he kicks one off a moving train recklessly, the master is liable. *Hoffman v. New York, &c., R. R. Co.*, 87 N. Y. 25. See *Kansas City, &c., Co. v. Kelley*, 14 Pac. Rep. 172 (Kan.); *Carter v. Louisville, &c., Co.*, 98 Ind. 552. And see cases *ante* p. 627 note. So a farmer is liable for his servant's killing a trespassing cow in driving it out of his field. *Evans v. Danielson*, 53 Md. 245. It is, as is said in the leading case of *McManus v. Crickett*, 1 East, 106, "where a servant quits sight of the object for which he was employed, and without having in view his master's orders, pursues that which his own malice suggests," that the master will not be liable for his acts. See *Southwick v. Estes*, 7 Cush. 385; *Higgins v. Watervliet, &c., Co.*, 46 N. Y. 23; *Philadelphia, &c., R. R. Co. v. Derby*, 14 How. 468; *Wood v. Detroit, &c., Co.*, 52 Mich. 403; *Marion v. Chicago, &c., Ry. Co.*, 59 Ia. 428; *Centr.*

Ry. Co. v. Peacock, 14 Atl. Rep. 709 (Md.) In *Redding v. Sou. Car. R. R. Co.*, 3 S. C., (N. S.) 1; S. C. 16 Am. Rep. 681, the defendant was held responsible for an assault upon a passenger committed by a servant without any warrant in his instructions therefor. In *Toledo, &c., R. R. Co. v. Harmon*, 47 Ill. 298, a railroad company was made to pay damages for the lawless act of an engineer in frightening horses by blowing off steam. To the same effect is *Chicago, &c., R. R. Co. v. Dickson*, 63 Ill. 151; S. C. 14 Am. Rep. 114. It requires some care and caution to distinguish the three cases last mentioned from *Wright v. Wilcox*, 19 Wend. 343, and other cases which have followed it. Persons who sent servants to the house of another to remove certain chattels if a sum due them was not paid, were held liable for willful assaults of the servants, it appearing that "such assaults were committed in the execution of the authority given them by the defendants, and for the purpose and as a means of carrying out their orders." *Levi v. Brooks*, 121 Mass. 501. And, see *Croft v. Alison*, 4 B. & Ald. 590. Compare *Oxford v. Peter*, 28 Ill. 434; *Ramsden v. Boston, &c., R. R. Co.*, 104 Mass. 117; S. C. 6 Am. Rep. 200.

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 duty or authority, and inflicts an unjustifiable injury upon another."¹

3. Unintentional Wrongs. The wrong for which the master shall respond need not be an intentional wrong; indeed the liability is commonly all the plainer if it is not. When the servant, in the course of this employment, so negligently or with such want of skill conducts himself in or manages the business that an injury to some third person results in consequence, the master is responsible for his negligence or want of skill. Every man owes to every other the duty of due care to avoid injury; and whether he manages his business in person or entrusts it to others, he must, at his peril, see that this obligation is observed. If another has suffered an injury through the negligent or improper management of the business, the right of action arises irrespective of the agency by which the business was conducted.²

¹ *Rounds v. Delaware, &c., R. R. Co.* 64 N. Y. 129, 134; *S. C.* 21 Am. Rep. 597. Compare *Horner v. Lawrence*, 37 N. J. 46. See, also, *Cohen v. Dry Dock, &c., Co.*, 69 N. Y. 170. If the acts were done in the course and within the scope of the employment and with a view to further the master's interests, even though they were willful, the master is liable. *Mott v. Consumers Ice Co.*, 73 N. Y. 543. So where an engineer, within the scope of his power but negligently, puts off his engine one riding thereon at his invitation in violation of master's rules, although the invitation was beyond his authority. *Chicago, &c., Ry. Co. v. West*, 17 N. E. Rep. 788 (Ill.) So where a servant willfully tested a boiler for a higher pressure than the master indicated and it exploded. *Ochsenbein v. Shapley*, 85 N. Y. 214. For reckless acts the master is liable but not for malicious and

intentional injuries. *Penn. Co. v. Toomey*, 91 Penn. St. 256; *Cleveland v. Newsom*, 45 Mich. 62; *Wood v. Detroit, &c., Co.*, 52 Mich. 402. See *Marion v. Chicago, &c., Ry. Co.*, 59 Ia. 428; *Deihl v. Ottenville*, 14 Lea, 191.

² *Shearm. & Redf. on Neg.* § 59; *O'Connell v. Strong*, *Dudley*, 265; *Puryear v. Thompson*, 5 *Humph.* 397; *Luttrell v. Hazen*, 3 *Sneed*, 20; *Campbell v. Staiert*, 2 *Murph.* 389; *Harris v. Mabry*, 1 *Ired.* 240; *Brasher v. Kennedy*, 10 *B. Mon.* 28; *Morgan v. Bowman*, 22 *Mo.* 538; *Brackett v. Lubke*, 4 *Allen*, 138; *McDonald v. Snelling*, 14 *Allen*, 290; *Andrus v. Howard*, 36 *Vt.* 248; *Tuel v. Weston*, 47 *Vt.* 634; *Sanford v. Eighth Ave. R. R. Co.*, 23 *N. Y.* 843; *Quinn v. Power*, 87 *N. Y.* 535; *Toledo, &c., R. R. Co. v. Harmon*, 47 *Ill.* 293; *Hays v. Miller*, 77 *Penn. St.* 233; *S. C.* 18 *Am. Rep.* 445; *Smith v. Web-*

[*539] *The term *business*, as here employed, is not restricted in its meaning to business in the ordinary sense, but embraces everything the servant may do for the master, with his express or implied sanction.

4. **Disobedience of Orders.** It is immaterial to the master's responsibility that the servant at the time was neglecting some rule of caution which the master had prescribed, or was exceeding his master's instructions, or was disregarding them in some particular, and that the injury which actually resulted is attributable to the servant's failure to observe the directions given him. In other words, it is not sufficient for the master to give proper directions; he must also see that they are obeyed.¹

ster, 23 Mich. 298; *Corrigan v. Union Sugar Refinery*, 98 Mass. 577; *Reynolds v. Hanrahan*, 100 Mass. 313; *Pickens v. Diecker*, 21 Ohio, (N. S.) 212; S. C. 8 Am. Rep. 55; *Cincinnati, &c. R. R. Co. v. Smith*, 22 Ohio, (N. S.) 227; S. C. 10 Am. Rep. 729; *Evansville, &c., R. R. Co. v. Baum*, 26 Ind. 70; *Evansville, &c., R. R. Co. v. Duncan*, 28 Ind. 441; *Mahoney v. Mahoney*, 51 Cal. 118; *Pittsburgh, &c., R. R. Co. v. Kirk*, 102 Ind. 399. If one directs his vendee's servant to do certain work in getting out the goods sold in the usual manner, he is not liable, as master, if the servant injures a third person by doing the work carelessly. *McCullough v. Shoneman*, 105 Penn. St. 169. The negligence must arise in the course of the employment. If the servant depart from the employment for purposes of his own, the master is not responsible for his negligence, even though he may at the time be making use of the master's implements or vehicles which have been entrusted to him in the business. See *Mitchell v. Crassweller*, 13 C. B. 237; *Ay-crigg v. New York & Erie R. R. Co.*, 30 N. J. 460; *Bard v. Yohn*, 26 Penn. St. 482; *Wiltse v. State, &c., Co.*, 30 N. W. Rep. 370 (Mich.); *McCann v.*

Tillinghast, 140 Mass. 327. So where a porter for his own convenience threw a bundle of soiled linen out of a moving car and hit a person. *Walton v. New York, &c., Co.*, 139 Mass. 556. Section men kindled a fire on the right of way to warm their dinners and left it burning. It spread to adjoining property. The master not liable. *Morier v. St. Paul, &c., Ry. Co.*, 81 Minn. 351. So where a village officer for his own advantage piled tile upon a city lot and it fell and injured a woman on an adjacent lot. *Palmer v. St. Albans*, 13 Atl. Rep. 569 (Vt.). But where a man was allowed to use another's wagon on their joint account and after delivering an article in the course of such employment was bringing back a load for himself and ran over plaintiff, the owner was held liable. *Mulvehill v. Bates*, 31 Minn. 364, and see to same effect, *Rahn v. Singer Mfg. Co.*, 26 Fed. Rep. 912. A druggist's liability for his clerk's mistake in putting up a prescription depends on the want of ordinary care in the clerk. *Beckwith v. Oatman*, 43 Hun, 265.

¹ *Philadelphia, &c., R. R. Co. v. Derby*, 14 How. 468; *Duggins v. Watson*, 15 Ark. 118; *Southwick v. Estee*,

Recurring once more to the case of the conductor of a rail way train: Let it be supposed that the company has given the most careful and exact directions for a cautious management, and that, amongst other things, it has directed that no train shall leave a station until orders to that effect are received by telegraph from the managing office; but that, notwithstanding these directions, the conductor, confident of his ability to reach the next station without injury, puts his train in motion, and a collision occurs. The case supposed is one in which no moral wrong is attributable to the managing officers; but the fact *remains that in the management of their own busi- [*540] ness through agents an injury has been inflicted on others. That they trusted a servant who has ventured to disobey instructions is their misfortune, but it ought not also to be the misfortune of others who had no voice in his selection, and who had no concern in the question who should manage the company's business beyond the common concern of all the public that it should not be managed to their injury.¹

The negligence of a farm servant may afford another apt illustration. The farmer directs his servant to burn over his fallow, but to do so when the wind is in the east, because the adjoining premises on the east would be especially exposed to damage if any other time were chosen. The servant thoughtlessly or recklessly sets the fire when the wind is blowing from the west, and the calamity the farmer had intended to guard against befalls the neighbor. The disobedience is culpable in the servant, and the master, having taken those precautions which, if observed, would have prevented the injury, is free from fault, but, nevertheless, his duty to his neighbor to so use his own as

7 Cush. 385; Garretzen v. Duencel, 50 Mo. 104; S. C. 11 Am. Rep. 405; Higgins v. Watervliet, P. R. Co., 46 N. Y. 23; S. C. 7 Am. Rep. 293; Paulmier v. Erie R. Co. 34 N. J. 151; Johnson v. Centr. Vt. R. R. Co., 56 Vt. 707; Mound City, &c., Co. v. Conlon, 92 Mo. 221.

¹ Philadelphia, &c., R. R. Co. v. Derby, 14 How. 468. See Powell v. Deveney, 3 Cush. 300; Weed v. Panama R. R. Co., 17 N. Y. 362; Luttrell

v. Hazen, 3 Sneed, 20. In Harriman v. Pittsburgh, &c., Co., 12 N. E. Rep. 451 (Ohio), servants in disregard of instructions placed signal torpedoes on the track, where there was no need of so doing, and a lad was hurt by one exploding. The master was held liable on the ground that the servants were doing the master's work, though deviating from the line of duty in disobeying orders.

not to injure the neighbor has failed in performance, and the law leaves him to bear the consequences.' It would be equally preposterous on the one hand to hold the master responsible whose servant should purposely set fire to a neighbor's house and thereby destroy it, and on the other to excuse him from the consequences of a fire which he had directed, because the agent he employed was not as careful as he had instructed him to be.

The foregoing rules seem to be just and require support from no reasoning, except such as would readily suggest itself to any thoughtful mind. Proceeding further with our subject we encounter questions which are more difficult, and rules a concurrence in which is by no means universal. They will be [*541] found,*however, to be rules firmly grounded in authority, and they probably subserve the general interest better than any which could be substituted in their place. The rules here referred to relate to the liability of the master to the servant himself, where the latter has been injured in his service.

General Rule: Master not liable to Servant. The rule is now well settled that, in general, when a servant, in the 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.

The reason most generally assigned for this rule is that the servant, when he engages in the employment, does so in view of all the incidental hazards, and that he and his employer, when

¹The following, among a great number of cases, illustrate this general rule: *Moir v. Hopkins*, 16 Ill. 313; *Keedy v. Howe*, 72 Ill. 133; *Cosgrove v. Ogden*, 49 N. Y. 255; S. C. 10 Am. Rep. 361; *Rounds v. Delaware, &c.*, R. R. Co., 64 N. Y. 129; 21 Am. Rep. 597; *Kreiter v. Nichols*, 28 Mich. 496; *Barden v. Felch*, 109 Mass. 154; *Coleman v. New York, &c.*, R. R. Co., 106 Mass. 160; *Garretzen v. Duenckel*, 50 Mo. 104; S. C. 11 Am. Rep. 405; *Redding v. S. C. R. R. Co.*, 3 Sou. Car. (n. s.) 1; S. C. 16 Am. Rep. 681; *Heenrich v. Pullman, &c.*,

Co., 20 Fed. Rep. 100. See *Ochsenbein v. Shapley*, 85 N. Y. 214. A servant ordered to go to a place and kill a certain animal, killed the only one he found but the wrong one. The master held liable. *Maier v. Randolph*, 33 Kan. 340. But where a driver, ordered to go to a place and return by a certain way, goes to the place and then, at the request and for the convenience of another, goes four miles further on, the master is not liable for an injury caused by the horses at such further point. *Stone v. Hill*, 45 Conn 44.

making their negotiations, fixing the terms and agreeing upon the compensation that shall be paid to him, must have contemplated these as having an important bearing on their stipulations. As the servant then knows that he will be exposed to the incidental risk, "he must be supposed to have contracted that, as between himself and the master, he would run this risk."¹

Whether this reason would be sufficient for all cases, if it were a matter of indifference to the general public whether the servant should have redress or not, may be matter of doubt; but it is supplemented by another, which considers the case from the standpoint of public interest. That reason is this: 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 a 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."² The rule is *therefore, one of general public policy, and there are [*542] grounds of public interest which make it of high importance. In many employments 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 any rule of law which would give the servant a remedy against the master for any injury resulting to himself from such an accident, instead of compelling him to rely for his protection upon his own vigilance, must necessarily tend in the direction of an abatement of his vigilance, and in the same degree to increase the hazards to others. The case of carriers of persons is the most common and most forcible illustration of this remark. It is of the highest importance in that employment that every one

¹ ALDERSON, B., in *Hutchinson v. Railway Co.*, 5 Exch. 343, 351.

² ABINGER, Ch. B., in *Priestly v. Fowler*, 3 M. & W. 1, 6; BREESE, J., in *Illinois Cent. R. R. Co. v. Cox*, 21

Ill. 20, 26; *Lawler v. Androscoggin R. R. Co.*, 62 Me., 463; S. C. 16 Am. Rep. 492; *Hanrathy v. Nor. Cent. R. R. Co.*, 46 Md. 280.

who has a duty or service to perform upon which the safety of others may depend, whether in the capacity of master or servant, should be under all reasonable inducements to discharge or perform it with fidelity and prudence, and that no one should be tempted to imperfect vigilance by any promise the law might make to compensate him for injuries against which his own caution might, perhaps, have protected not himself alone, but others also. The inducement to vigilance is sufficiently furnished, in the case of the master, by compelling him to respond to third persons for all injuries, whether caused by his own negligence or by that of his servants; but in the case of a servant it is supplied mainly by this rule, which, by denying him the remedy that is allowed to third persons, makes it his special interest to protect others, since it is only in doing so that he protects himself.¹

¹ The servant assumes not only the usual risks and perils of the service, but also such others as are apparent to ordinary observation. *Gibson v. New York & Erie R. R. Co.*, 63 N. Y. 449; *S. C. 20 Am. Rep. 552*; *Baltimore & Ohio R. R. Co. v. State*, 41 Md. 268. See cases p. *552, notes, *post*. See *Anthony v. Leeret*, 105 N. Y. 591, case of a trap door in a passage; *Beittemiller v. Bergner, &c., Co.*, 12 Atl. Rep. 599 (Penn.), poisonous vapor; *Moulton v. Gage*, 138 Mass. 390, unrailed platform. See, also, *Penn. Co. v. Lynch*, 90 Ill. 333; *Schultz v. Chicago, &c., Co.*, 67 Wis. 616; *Sykes v. Packer*, 99 Penn. St. 465. So the servant assumes the risk of injury from unguarded machinery with which he is familiar. *Sanborn v. Atchison, &c., R. R. Co.*, 35 Kan. 292; *Schroeder v. Mich. Car Co.*, 56 Mich. 132; *Kelley v. Silver Spring Co.*, 12 R. I. 112; *White v. Sharp*, 27 Hun, 94; *Pingree v. Leyland*, 135 Mass. 398; or which is patent to ordinary observation. *Kean v. Detroit Copper, &c., Co.*, 33 N. W. Rep. 395 (Mich.); *Houston, &c., Ry. Co. v. Conrad*, 62 Tex. 627. See *Hughes v. Winona, &c., R. R. Co.*, 27 Minn.

137; *Cagney v. Hannibal, &c., Co.*, 69 Mo. 416; *Porter v. Hannibal, &c., R. R. Co.*, 71 Mo. 66; *Rummell v. Dilworth*, 111 Penn. St. 343; *Huizega v. Cutler, &c., Co.*, 51 Mich. 272. So the danger from falling earth in excavating. *Naylor v. Chicago, &c., Ry. Co.*, 53 Wis. 661; *Galveston, &c., Ry. Co. v. Lempe*, 59 Tex. 19. So in railroad service the servant assumes the risk of unblocked guard rails or frogs. *McGinnis v. Can. South, &c., Co.*, 49 Mich. 466; *Lake Shore, &c., Co. v. McCormick*, 74 Ind. 440; *Chicago, &c., Co. v. Lonergan*, 118 Ill. 41; *Smith v. St. Louis, &c., Co.*, 69 Mo. 32; *Rush v. Mo. Pac. Ry. Co.*, 12 Pac. Rep. 582 (Kan.); *Wilson v. Winona, &c., Co.*, 33 N. W. Rep. 908 (Minn.); *Mayes v. Chicago, &c., Co.*, 63 Ia. 562. But see *Sherman v. Chicago, &c., Co.*, 34 Minn. 259; *Hubn v. Miss., &c., Co.*, 92 Mo. 440. Of handling disabled cars going to the repair shop. *Fraker v. St. Paul, &c., Co.*, 32 Minn. 54; *Watson v. Houston, &c., Co.*, 53 Tex. 434; *Barkdoll v. Penn., &c., Co.*, 13 Atl. Rep. 82 (Penn.); *Flannagan v. Chicago, &c., Ry. Co.*, 50 Wis. 462. See *Yeaton v. Boston, &c., Co.*,

Injuries by Negligence of Fellow Servants. The rule which exempts the master from responsibility for injuries to his servants, proceeding from risks incidental to the employment, extends to cases where the injury results from the negligence

135 *Mass.* 418. Of handling cars loaded with projecting rails or logs. *Nor. Centr., &c., Co. v. Husson*, 101 *Penn. St.* 1; *Toledo, &c., Co. v. Black*, 88 *Ill.* 112; *Scott v. Oreg., &c., Co.*, 14 *Oreg.* 211; *Day v. Toledo, &c., Co.*, 42 *Mich.* 523. Of low bridge over the track or posts or structures close beside it, if he knows or might by ordinary care know of their existence. *Baylor v. Delaware, &c., Co.*, 40 *N. J. L.* 23; *Perigo v. Chicago, &c., Co.*, 52 *Ia.* 276; *Balt. &c., Co. v. Stricker*, 51 *Md.* 47; *Lovejoy v. Boston, &c., Co.*, 125 *Mass.* 79; *Wells v. Burlington, &c., Co.*, 56 *Ia.* 520; *Clark v. St. Paul, &c., Co.*, 28 *Minn.* 128; *Pittsburgh, &c., Co. v. Sentmeyer*, 92 *Penn. St.* 276; *Clark v. Richmond, &c., Co.*, 78 *Va.* 709; *Illick v. Flint, &c., Co.*, 35 *N. W. Rep.* 708 (*Mich.*). Otherwise not. *Balt., &c., Co. v. Rowan*, 104 *Ind.* 88; *Louisville, &c., Co. v. Wright*, 16 *N. E. Rep.* 798 (*Ind.*); *Chicago, &c., Co. v. Russell*, 91 *Ill.* 298; *Ill., &c., Co. v. Whalen*, 19 *Ill. App.* 116. See *Holden v. Fitchburg, &c., Co.*, 129 *Mass.* 268; *Kearns v. Chicago, &c., Co.*, 66 *Ia.* 599; *Riley v. W. Va., &c., Co.*, 27 *W. Va.* 145; *Nugent v. Boston, &c., Corp.* 12 *Atl. Rep.* 197 (*Me.*). Of too sharp curve in track in yard. *Tuttle v. Detroit, &c., Co.*, 122 *U. S.* 189. Of ice or irregularity of road bed when leaving cars or coupling. *Piquegno v. Chicago, &c., Co.*, 52 *Mich.* 40; *Batterson v. Chicago, &c., Co.*, 53 *Mich.* 125. Of cuivert under track. *Couch v. Railroad Co.*, 22 *S. C.* 557; *De Forest v. Jewett*, 88 *N. Y.* 264. Of old light rails in a yard. *Mich. Centr., &c., Co. v. Austin*, 40 *Mich.* 247. But see *contra*, as to rails in the line. *Dev-*

lin v. Wabash, &c., Co., 87 *Mo.* 545. See *Hulehan v. Green Bay, &c., Co.* 68 *Wis.* 520; *Rosenbaum v. St. Paul, &c., Co.*, 36 *N. W. Rep.* 447 (*Minn.*). Of cars with double deadwoods. *Smithson v. Mich., &c., Co.*, 45 *Mich.* 212; *Simms v. So. Car, &c., Co.*, 2 *S. E. Rep.* 486 (*S. C.*); *Hathaway v. Mich. Centr., &c., Co.*, 51 *Mich.* 253; and with three link couplings. *Darracutt v. Chesapeake, &c., Co.*, 2 *S. E. Rep.* 511 (*Va.*). But see *Crane v. Miss., &c., Co.*, 87 *Mo.* 588; *Louisville, &c., Co. v. Frawley*, 110 *Ind.* 18. Of bucking snow. *Bryant v. Burlington, &c., Co.*, 66 *Ia.* 305; *Morse v. Minn., &c., Co.*, 30 *Minn.* 465. Of falling snow from a bank left near track. *Dowell v. Burlington, &c., Co.*, 62 *Ia.* 629; *Brown v. Chicago, &c., Co.*, 64 *Ia.* 652. Of snow plow coming over track without warning. *Olson v. St. Paul, &c., Co.*, 35 *N. W. Rep.* 866 (*Minn.*). See *Kelley v. Chicago, &c., Co.*, 53 *Wis.* 74; *Patton v. Centr. Ia., &c., Co.*, 35 *N. W. Rep.* 149 (*Ia.*). See, further, that a servant by remaining without complaint in the service after knowledge of the risk from dangerous appliances or place of labor assumes it. *Money v. Lower Vein, &c., Co.*, 55 *Ia.* 671; *Mayes v. Chicago, &c., Co.*, 63 *Ia.* 562; *Worden v. Humeston, &c., Co.*, 33 *N. W. Rep.* 629 (*Ia.*); *Umbaek v. Lake Shore, &c., Co.*, 83 *Ind.* 191; *Wannemaker v. Burke*, 111 *Penn. St.* 423; *Mansfield Coal Co. v. McEnery*, 91 *Penn. St.* 185; *McQueen v. Centr., &c., R. R. Co.*, 30 *Kan.* 689; *Chicago, &c., Co. v. Geary*, 110 *Ill.* 383; *Swo-boda v. Ward*, 40 *Mich.* 420. That a servant may know of the defects in an appliance without being held to

of other servants in the same employment.¹ Whatever controversy there may for a time have been on this point may now be said, by an overwhelming weight of authority, to have been thoroughly quieted and settled.² Some disputes still remain

know and accept the risk arising therefrom. See *Russell v. Minn., &c., Co.*, 32 Minn. 230; *Cook v. St. Paul, &c., Co.*, 34 Minn. 45; *Wuotilla v. Duluth, &c., Co.*, 33 N. W. Rep. 551. See, also, *Lasure v. Graniteville, &c., Co.*, 18 S. C. 275. So if he continues in service after failure to amend within a reasonable time after promise of amendment he assumes the risk. *Eureka, &c., v. Russ*, 81 Ala. 220. Otherwise now by statute. *Mobile, &c., Ry. Co. v. Holborn*, 6 South. Rep. 146 (Ala.) So if one, knowing the incompetence of his fellow or superior servant, remains without complaint in the employment, he assumes the risk of injury therefrom. *McDermott v. Hannibal, &c., Ry. Co.*, 87 Mo. 285; *Kansas, &c., Co. v. Peavy*, 34 Kan. 472; *Hatt v. Nay*, 144 Mass. 186; *Lake Shore, &c., Co. v. Stupak*, 108 Ind. 1. From remaining a few days the presumption is not conclusive that he takes the risk. *Lyberg v. North Pac., &c., Co.*, 38 N. W. Rep. 632 (Minn.)

¹ The injured person may recover from his fellow servant. *Rogers v. Overton*, 87 Ind. 410; *Osborne v. Morgan*, 130 Mass. 102; *Griffiths v. Woolfram*, 22 Minn. 185.

² The following cases, with numerous others, sustain the text: *Bartons-hill Coal Co. v. Reid*, 3 Macq., H. L. 266; *Same v. McGuire*, Id. 300; *Hutchinson v. Railway Co.*, 5 Exch. 343; *Morgan v. Railway Co.*, L. R. 1 Q. B. 149; *Brown v. Cotton Co.*, 3 H. & C. 511. *South Carolina*: *Murray v. R. R. Co.*, 1 McMullen, 385. *Massachusetts*: *Farwell v. Boston, &c., R. R. Co.*, 4 Met. 49; *O'Connor v. Roberts*, 120 Mass. 227. *Pennsylvania*:

Caldwell v. Brown, 53 Penn. St. 453; *Hays v. Millar*, 77 Penn. St. 238; S. C. 18 Am. Rep. 445. *Michigan*: *Davis v. Detroit, &c., R. R. Co.*, 20 Mich. 105; S. C. 4 Am. Rep. 364; *Michigan Central R. R. Co. v. Dolan*, 32 Mich. 510. *New York*: *Sherman v. Rochester, &c., R. R. Co.*, 17 N. Y. 153; *Hofnagle v. N. Y. C. & H. R. R. Co.* 55 N. Y. 608. *Illinois*: *Illinois Central R. R. Co. v. Cox*, 21 Ill. 20; *Toledo, Wabash & Western R. R. Co. v. Durkin, Admx.*, 76 Ill. 395. *Indiana*: *Columbus, &c., R. R. Co. v. Arnold*, 31 Ind. 174. *Connecticut*: *Hayden v. Smithville Manf. Co.*, 29 Conn. 548; *Burke v. Norwich & Worcester R. R. Co.*, 34 Conn. 474. *Maine*: *Lawler v. Androscoggin R. R. Co.*, 62 Me. 463; S. C. 16 Am. Rep. 492. *Iowa*: *Sullivan v. Railroad Co.*, 11 Iowa, 421; *Benn v. Null*, 65 Ia. 407; *Missouri*: *Harper v. Indianapolis, &c., R. R. Co.*, 47 Mo. 567; S. C. 4 Am. Rep. 353; *Lee v. Detroit Bridge & Iron Works*, 62 Mo. 565. *California*: *Hogan v. Central Pacific R. R. Co.*, 49 Cal. 129; *McDonald v. Hazletine*, 53 Cal. 35. *Kansas*: *Kansas Pacific R. R. Co. v. Salmon*, 11 Kan. 83. *Ohio*: *Pittsburgh, Ft. Wayne & Chicago R. R. Co. v. Devinney*, 17 Ohio St. 197. *North Carolina*: *Ponton v. Wilmington, &c., R. R. Co.*, 6 Jones (N. C.) L. 245. *Alabama*: *Walker v. Bolling*, 23 Ala. 204. *Georgia*: *Shields v. Yonge*, 15 Geo. 349. *Minnesota*: *Foster v. Minnesota R. R. Co.*, 14 Minn. 360. *New Jersey*: *Harrison v. Central R. R. Co.*, 31 N. J. 293. *Mississippi*: *Howd v. Miss. Cent. R. R. Co.*, 50 Miss. 178. *Maryland*: *Wonder v. Baltimore, &c., R. R. Co.*, 82 Md. 411; S. C. 3 Am. Rep. 143; *Hanrath v. Nor. Cent. R.*

*which concern the proper limits of the doctrine, and [*543] what and how many are the exceptional cases. In some quarters a strong disposition has been manifested to hold the rule 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 entrusted with duties of a higher grade, and from whose negligence the injury resulted.¹ But it cannot

R. Co., 46 Md. 230. *Tennessee*: Fox v. Sandford, 4 Sneed, 36. *Arkansas*: St. Louis, &c., Co. v. Shackelford, 42 Ark. 417. *Texas*: Houston, &c. Co. v. Miller, 51 Tex. 270. *West Virginia*: Berns v. Gaston Coal Co. 27 W. Va. 285. *Wisconsin*: Anderson v. Milwaukee R. R. Co., 37 Wis. 321. *Vermont*: Hard v. Vermont, &c., R. R. Co., 32 Vt. 473. *Colorado*: Summerhays v. Kansas Pac. Ry. Co., 2 Colorado, 484. *United States*: Dillon v. Union Pac. R. Co., 3 Dill. 319; Kielley v. Belcher Silver Co., 3 Sawyer, 437, 500; Halverson v. Nisen, 3 Sawyer, 462; Armour v. Hahn, 111 U. S. 313. See Railroad Co. v. Fort, 17 Wall. 553. The mere fact of minority does not affect the rule. Houston &c., Co. v. Miller, 51 Tex. 270; Fisk v. Cent. Pac., &c., Co. 13 Pac. Rep. 144 (Cal.) The rule has no application to a common employment merely, where the master is not the same. Svenson v. Atlantic, &c., Co., 33 N. Y. Sup. Ct. 277; Kelly v. Johnson, 123 Mass. 530; Louisville &c., Co., v. Conroy, 63 Miss. 562, a carefully considered case. And see *Muster v. Chicago, &c., Co.*, 61 Wis. 325. But, see, *Ewan v. Lippencott*, 47 N. J. L. 192. Nor does the rule cover the case where two railroads by arrangement use the same track so as to make the servants of each fellow-servants. *Phillips v. Chicago &c., Co.*, 64 Wis. 475; *Phila. &c., Co. v. State*, 58 Md. 372; *Sullivan v. Tioga R. R. Co.*, 44 Hun, 304; *Zeigler v. Danbury, &c.*, Co., 52 Conn. 543. In Illinois in

such case the negligence of the servants of the one master is held an ordinary risk of the business of those of the other. *Clark v. Chicago, &c., Co.*, 92 Ill. 43. One going to his work along the tracks or from it to catch a train as ordered is in the master's service within the rule. *Ewald v. Chicago, &c., Co.*, 36 N. W. Rep. 12 (Wis.); *O'Brien v. Boston &c., Co.*, 138 Mass. 387. The usual rule is not changed by the fact that those who did the harm were unreasonably overworked, when that was not the cause of their negligence. *Johnson v. Pittsburgh, &c., Co.*, 114 Penn. St. 443.

¹ *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415; *Cleveland, &c., R. R. Co. v. Keary*, 3 Ohio (n. s.) 201. See these cases explained in *Pittsburgh, &c., R. R. Co. v. Devinney*, 17 Ohio, (n. s.) 197. See also, *Louisville, &c., R. R. Co. v. Collins*, 2 Duv. 114; *Same v. Robinson*, 4 Bush, 507; *Toledo, &c., R. R. Co., v. O'Conner's Admx.* 77 Ill., 391. A conductor and the engineer of his train are not fellow servants. *Chicago, &c., Co., v. Ross*, 112 U. S. 377. So as to train dispatchers and trainmen. *Lewis v. Seifert*, 11 Atl. Rep. 514 (Penn.); *Darrigan v. New York &c., R. R. Co.*, 53 Conn. 285; *Smith v. Wabash, &c., Co.*, 92 Mo. 359; *McKune v. Cal., &c., Co.*, 66 Cal. 303. See the same rule applied to various other employees. *Chicago, &c., Co. v. McLellan*, 84 Ill., 109; *Ry. Co. v. Lavalley*, 38 Ohio St. 221; *Van Amburg v. Rail-*

[*544] be disputed that the *negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risks of negligent acts or omissions on the part of one class of servants and not those of another class. Nor on grounds of public policy could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public who, in their dealings with the employer, may be subjected to risks. Sound policy seems to require that the law should make it for the interest of the servant that he should take care not only that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer, if needful. And in this regard it can make little difference what is the grade of servant who is found to be negligent, except as superior authority may render the negligence more dangerous, and consequently increase at least the moral responsibility of any other servant who, being aware of the negligence, should fail to report it.¹

road Co. 37 La. Ann. 650; Moon v. Richmond, &c., Co., 78 Va. 745; Sioux City &c., Co., v. Smith, 36 N. W. Rep., 285 (Neb.); Burlington &c., Co. v. Crockett, 19 Neb. 188; Macy v. St. Paul, &c., Co., 35 Minn. 200; Boatwright v. Northeastern, &c., Co., 25 S. C. 128; Moore v. Wabash, &c., Ry. Co., 85 Mo. 588; McDermott v. Hannibal, &c., Co., 87 Mo. 285; Hoke v. St. Louis, &c., Co., 88 Mo., 360; Criswell v. Pittsburgh &c., Ry. Co., 6 S. E. Rep. 31 (W. Va.) If the master himself works with his servants and injures one of them by his negligence, he is liable therefor, and if he has partners in the business, they are liable also. Ashworth v. Stanwix, 3 El. & El. 701; Mellors v. Shaw, 1 Best & S. 437; McCarragher v. Gaskell, 42 Hun, 451. See Stroher v. Elting, 97 N. Y. 102.

¹ Persons are fellow servants where

they are engaged in the same common pursuit under the same general control. "A foreman is a servant, as much as any other servant whose work he superintends." WILLES, J., in Gallagher v. Piper, 16 C. B. (N. S.) 609, 694. The same doctrine was declared in Wigmore v. Jay, 5 Exch. 354; Feltham v. England, L. R. 2 Q. B. 33; Chicago, &c., R. R. Co. v. Murphy, 53 Ill. 336; S. C. 5 Am. Rep. 48; Summersett v. Fish, 117 Mass. 312; and O'Connor v. Roberts, 120 Mass. 227; Zeigler v. Day, 123 Mass. 152. In this country it has often been declared that the grade of service of the two servants is unimportant "provided the services of each in his particular sphere and department are directed to the accomplishment of the same general end." BACON, J., in Warner v. Erie R. R. Co., 39 N. Y. 468, 470. See Coon v. Syracuse, &c.,

*It has also sometimes been insisted that the law [*545] should exclude from the scope of the general rule 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; ¹ a carpenter employed on buildings injured by the negli-

R. R. Co., 5 N. Y. 492; Columbus, &c., R. R. Co. v. Arnold, 31 Ind. 174; Hayes v. Western R. R. Corp., 3 Cush. 270; Hard v. Vermont, &c., R. R. Co., 32 Vt. 473; O'Connell v. B. & O. R. R. Co., 20 Md. 212; Sherman v. Rochester, &c., R. R. Co., 17 N. Y. 153; Ryan v. Cumberland, &c., R. R. Co., 23 Penn. St. 334; Chicago, &c., R. R. Co. v. Keefe, 47 Ill. 108; Pittsburgh, &c., R. R. Co. v. Devinney, 17 Ohio, (N. S.) 197; Wood v. New Bedford Coal Co., 121 Mass. 252; St. Louis, &c., R. R. Co. v. Britz, 72 Ill. 256; Malone v. Hathaway, 64 N. Y. 5; S. C. 21 Am. Rep. 573; McMaster v. Ill. Centr. R. R. Co., 4 South. Rep. 59 (Miss.); McDermott v. Boston, 133 Mass. 349; Doughty v. Penobscot, &c., Co., 76 Me. 143; Cassidy v. Maine, &c., Co., Id. 488; Conley v. Portland, 78 Me. 217; Hoth v. Peters, 55 Wis. 405; Peschel v. Chicago, &c., Co., 62 Wis. 338; Mathews v. Case, 61 Wis. 491; Heine v. Chicago, &c., Co., 53 Wis. 525; Peterson v. Whitebreast, &c., Co., 50 Ia. 673; Foley v. Chicago, &c., Co., 64 Ia. 644; Fraker v. St. Paul, &c., Co., 33 Minn. 54; Kirk v. Railway Co., 94 N. C. 625; Loughlin v. State, 105 N. Y. 159; Caniff v. Blanchard, &c., Co., 33 N. W. Rep. 744 (Mich.); Keystone, &c., Co. v. Newbury, 96 Penn. St. 246; Reese v. Biddle, 112 Penn. St. 72; Waddell v. Simoson, Id. 567; Lehigh, &c., Coal Co. v. Jones, 86 Penn. St. 432; Bessou v. Goodwin, 17 N. E. Rep. 17 (Mass.) where a mate and sailor on a vessel are held fellow servants. It is

immaterial that one is in position of greater responsibility than the other, so long as the negligence of that one might contribute to the danger of the other. Quincy Min. Co. v. Kitts, 42 Mich. 84. "No member of an establishment can maintain an action against the master for an injury done to him by another member of that establishment, in respect of which, if it had been by a stranger, he might have had a right of action." POLLOCK, C. B., in Abraham v. Reynolds, 5 H. & N. 143. See Conway v. Belfast, &c., R. R. Co., 11 Irish L. T. Rep. 115; S. C. 4 Law & Eq. Rep. 451.

¹ See Nashville, &c., R. R. Co. v. Carroll, 6 Heisk. 347; Ryan v. Chicago, &c., R. R., 60 Ill. 171; S. C. 14 Am. Rep. 32; Toledo, &c., R. R. Co. v. Moore, 77 Ill. 217; Chicago, &c., Co. v. Moranda, 93 Ill. 303; North Chicago, &c., Co. v. Johnson, 114 Ill. 57; Chicago, &c., Co. v. Hoyt, 12 N. E. Rep. 225 (Ill.); Garrahy v. Kansas, &c., R. R. Co., 25 Fed. Rep. 258; Fay v. Minn. &c., Co., 30 Minn. 231; Tierney v. Minn. &c., Co., 33 Minn. 311; Davis v. Centr. Vt., &c., Co., 55 Vt. 84; St. Louis, &c., Co. v. Harper, 44 Ark. 524; Calvo v. Railroad Co., 23 S. C. 526; St. Louis, &c., Co. v. Weaver, 35 Kan. 412; Miss., &c., Co. v. Dwyer, 12 Pac. Rep. 353 (Kan.); Houston, &c., Co. v. Marcelles, 59 Tex. 334; Texas, &c., Co. v. Kirk, 62 Tex. 227; James v. Emmet Min. Co., 55 Mich. 335; Condon v. Miss., &c., Co., 78 Mo. 567; Kentucky, &c., Co.

gence of a yardmaster in making up trains; and the like. But in the main the authorities agree that the general rule must apply to such cases, and that, on the reasons on which the rule is rested, they cannot be distinguished from those in which the service of both persons was in the same line.¹

v. Ackley, 8 S. W. Rep. 695 (Ky.) So where a member of a city fire department is injured by the negligence of the street department. *Turner v. Indianapolis*, 96 Ind. 51. See elaborate notes, on who are fellow servants, to *McLeod v. Ginther*, 8 A. & E. R. R. Cas. 162; *Chicago, &c., Co. v. Ross*, 17 A. & E. R. R. Cas. 514.

¹ It was held in *Morgan v. Railway Co.*, L. R. 1 Q. B. 149, that a railway company was not liable to a carpenter employed to work at his trade on its line, who was injured by the negligence of its porters in shifting an engine on its turn-table close by the shed on which the carpenter was working. "The plaintiff and the porters were engaged in one common employment, and were doing work for the common object of their masters, viz., fitting the line for traffic." *ERLE*, Ch. J., p. 154. "If a carpenter's employment is to be distinguished from that of porters employed by the same company, it will be sought to split up the employees in every large establishment into different departments of service, although the common object of their service, however different, is but the furtherance of the business of the master; yet it might be said with truth that no two had a common immediate object." *POLLOCK*, C. B., p. 155. And, see, *Feltham v. England*, L. R. 2 Q. B. 33. It is held in Massachusetts that a railroad company is not responsible to a person employed by it to repair its cars, for a personal injury arising from the negligence of a switchman, in failing properly to adjust a switch on the track over which

he is carried by the company to his place of work, unless negligence in the employment of the man is made out. *Gilman v. Eastern R. R. Corp.*, 10 Allen, 233. See *Hodgkins v. Eastern R. R. Co.*, 119 Mass. 419; *Lawler v. Androscoggin R. R. Co.*, 62 Me. 463; *S. C. 16 Am. Rep. 493*; *Wonder v. Baltimore & Ohio R. R. Co.*, 32 Md. 411; *S. C. 8 Am. Rep. 143*. In *Albro v. Agawam Canal Co.*, 6 Cush. 75, it was decided that a manufacturing company was not liable to one of its operatives for an injury occasioned by the negligence of the superintendent. And, see *Columbus, &c., R. R. Co. v. Arnold*, 81 Ind. 174; *Louisville, &c., R. R. Co. v. Cavens*, 9 Bush. 559; *Weger v. Pennsylvania R. R. Co.*, 55 Penn. St. 460; *Brazil, &c., Co. v. Cain*, 98 Ind. 232; *Balt., &c., Co. v. Neal*, 65 Md. 438. Painters and carpenters engaged in putting up a building are fellow-servants. *Hoar v. Merritt*, 29 N. W. Rep. 15 (Mich). One employed in a mill to repair a machine and the person operating it. *McGee v. Boston, &c., Co.*, 139 Mass. 445. See *Reading Iron Works v. Devine*, 109 Penn. St. 246; *Rogers, &c., Works v. Hand*, 14 Atl. Rep. 766 (N. J.); but compare *Moynihan v. Hills Co.*; 16 N. E. Rep. 574 (Mass.) The following are cases in railroad service. *Smith v. Potter*, 46 Mich. 258; *Clifford v. Old Colony, &c., Co.*, 141 Mass. 564; *Holden v. Fitchburg, &c., Co.*, 129 Mass. 268; *Walker v. Boston, &c., Co.*, 128 Mass. 8; *Mackin v. Boston, &c., Co.*, 135 Mass. 201; *Railroad Co. v. Fitzpatrick*, 42 Ohio St. 318; *Smoot v. Mobile, &c., Co.*, 67 Ala. 13; *Toner v. Chicago, &c., Co.*, 33 N. W. Rep.

***Independent Contractors.** It has also been decided [*546] in England that the master is not liable for an injury, caused by the negligence of one of his servants, to the servant of a sub-contractor who is engaged in the performance of a part of of the same work. If the two servants were at the time engaged

433 (Wis.); *Dallas v. Gulf, & Co., Co.*, 61 Tex. 196; *Houston, & Co. v. Rider*, 62 Tex. 267; *East Tenn., & Co. v. Rush*, 15 Lea, 145; *Chicago, & Co., v. Doyle*, 60 Miss. 977; *Capper v. Louisville, & Co., Co.*, 103 Ind. 305; *Connelly v. Minn., & Co., Co.*, 35 N. W. Rep. 582 (Minn.); *Roberts v. Chicago, & Co., Co.*, 83 Minn. 218; *New York, & Co. v. Bell*, 112 Penn. St. 400. In *Randall v. Balt., & Co., Co.*, 109 U. S. 478, a brakeman is held fellow servant with an engineer on another train which strikes him while he is switching. But, see *Chicago, & Co., v. Ross*, 112 U. S. 377. The rule of exemption extends to "every member of an establishment." *POLLOCK, C. B.*, in *Abraham v. Reynolds*, 5 H. & N. 143. In the case of railway companies it is said there is no good reason to limit the rule to cases where the servants are in the same department of a general employment. It can make no difference whether the brakeman is injured by the carelessness of another brakeman, or by that of the engineer or conductor, nor whether the fireman is injured by the engineer, or by a machinist charged with fitting the engine for the road. The rule should be the same for all cases. *Mobile, & Co., R. R. Co. v. Thomas*, 42 Ala. 672. In Maryland it is said that fellow servant includes all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though in different grades and departments of it. *Wonder v. Baltimore, & Co., R. R. Co.*, 32 Md.

411; S. C. 3 Am. Rep. 143. Says *WILLIAMS, J.*: "Servants, it is said, are engaged in a common employment when each of them is occupied in service of such a kind that all the others, in the exercise of ordinary sagacity ought to be able to foresee, when accepting their employment, that it may possibly expose them to the risk of injury in case he is negligent. That this is the proper test is evident from the reason assigned for the exemption of masters from liability to their servants, viz.: that the servant takes the risk into account when fixing his wages. He cannot take into account a risk which he has no reason to anticipate, and he does take into account the risks, which the average experience of his fellows has led him, as a class, to anticipate." *Baird v. Pettit*, 70 Penn. St. 477, 482. But in Illinois a day laborer on a railroad track has been allowed to recover against the railway company for an injury resulting from the negligence of an engine driver. *Toledo, & Co., R. R. Co. v. O'Connor*, 77 Ill. 391. In a case where an engineer and conductor are held fellow servants it is said that to make persons fellow servants they must be directly co-operating in a particular business in the same line of employment or their usual duties must bring them habitually together so that they may exercise a mutual influence upon each other, promotive of proper caution. *Chicago, & Co., Ry. Co. v. Snyder*, 117 Ill. 376. And see, *Toledo, & Co., R. R. Co. v. Moore*, 77 Ill. 217; *Ryan v. Chicago, & Co., R. R. Co.* 60 Ill. 171; S. C. 14 Am. Rep. 32; *Nash-*

in doing the common work of the employer, they must be considered as for this purpose the servants of such employer while doing his work, "each directing and limiting his attention to the particular work necessary to the completion of the whole work," notwithstanding the one was employed by and responsible to the employer directly, and the other to one employed by him.¹ But this rule can only apply where the sub-contractor is under the direction and control of his employer, so that his position [*547] as contractor differs *from that of the other servants only in this: that he has some particular part of the work to do under a special arrangement, while the others work generally in the employment as directed.² In general, it is entirely competent for one having any particular work to be performed, to enter into 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. The exceptions to this statement are the following: He must not 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.³ Observ-

ville, &c., R. R. Co., v. Carroll, 6 Heisk. 347; McKnight v. The Iowa, &c., R. R. Co., 43 Iowa, 406. The subject is largely considered in *Wonder v. Baltimore & Ohio R. R. Co.*, 32 Md. 411; S. C. 3 Am. Rep. 143, and the cases are carefully examined.

¹ *Wiggett v. Fox*, 36 E. L. & Eq. 486; S. C. 11 Exch. 832. See *Schwartz v. Gilmore*, 45 Ill. 455.

² *Chicago v. Joney*, 60 Ill. 383, 387. See *Corbin v. American Mills*, 27 Conn. 274, 278; *Eaton v. European, &c., R. R. Co.*, 59 Me. 520; *Blake v. Ferris*, 5 N. Y. 48. Workmen of a contractor are servants of his principal, where the latter has a right to select and control them. *Burke v. Norwich, &c., R. R. Co.*, 34 Conn. 474; *Lowell v. Boston, &c., R. R. Co.*, 23 Pick. 24; *DuPratt v. Lick*, 38 Cal.

691; *Deford v. State*, 30 Md. 179; *Reed v. Allegheny City*, 79 Penn. St. 300; *Hale v. Johnson*, 80 Ill. 135. So if foreman selects but cannot discharge them. *Charles v. Taylor*, L. R. 3 C. P. D. 492.

³ *Chicago v. Robbins*, 2 Black, 418; *Clark v. Fry*, 8 Ohio, (N. S.) 358; *Hughes v. Railroad Co.*, 39 Ohio St. 461. So if owners are charged with duty of keeping a mine safe, they are liable though independent contractors are to take out the ore. *Lake Sup. &c., Co. v. Erickson*, 39 Mich. 492; *Kelly v. Howell*, 41 Ohio St. 438; responsible for negligent plan executed by independent contractor. *Lancaster v. Conn. Mut. &c., Co.*, 5 S. W. Rep. 23 (Mo.) See *Dorrity v. Rapp*, 72 N. Y. 307. If one makes an excavation on his land which will

ing these rules, he may make contracts, under which the contractor, for the time being, becomes an independent principal, whose servants are exclusively his, and not those of the employer he contracts with; and the contractor 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.¹ In one case the following rules have been laid *down: "1. If a contrac- [*548] tor faithfully performs his contract, and a third person is

naturally damage his neighbor's he cannot relieve himself of responsibility by employing an independent contractor. *Bower v. Peate*, L. R. 1 Q. B. D. 321; *Stevenson v. Wallace*, 27 Gr. 77. A carrier cannot escape liability by contracting with a person to haul its cars in the ordinary business of the road. *Phila. & C., Ry. Co. v. Hahn*, 12 Atl. Rep. 479 (Penn.); and see *Burton v. Galveston, & C., Co.*, 61 Tex. 526. Nor a city for negligence in street repairs by employing contractors. *Logansport v. Dick*, 70 Ind. 65; *Jacksonville v. Drew*, 19 Fla. 106; *Mayor, & C., of Baltimore v. O'Donnell*, 53 Md. 40; *Turner v. Newburgh*, 16 N. E. Rep. 344 (N. Y.) Compare *Herrington v. Lansingburgh*, 17 N. E. Rep. 728 (N. Y.)

¹ *Cincinnati v. Stone*, 5 Ohio (N. S.) 38, 41; *McGuire v. Grant*, 25 N. J. 356; *Hale v. Johnson*, 80 Ill. 185; *McCafferty v. Spuyten Duyvil, & C., R. R. Co.*, 61 N. Y. 178; S. C. 19 Am. Rep. 267; *King v. New York, & C., R. R. Co.*, 66 N. Y. 181; S. C. 23 Am. Rep. 37; *Devlin v. Smith*, 89 N. Y. 470; *Ferguson v. Hubbell*, 87 N. Y. 507; *Hexamer v. Webb*, 101 N. Y. 377; *McCarthy v. Sec. Parish*, 71 Me. 318; *Carter v. Berlin Mills Co.*, 58 N. H. 52; *Bailey v. Troy, & C., Co.*, 57 Vt. 252; *Edmundson v. Pittsburg & C., Co.*, 111 Penn. St. 316; *Ryan v. Curran*, 64 Ind. 345; *Hitte v. Rep. Vall., & C., Co.*, 19 Neb. 620; *Myer v. Hobbs*, 57 Ala. 175; *Davie v. Levy*, 2 South Rep. 395 (La.); *Bennett v. True-*

body, 66 Cal. 509; *Gulzoni v. Tyler*, 64 Cal. 334. The rule applies where the contract is to dig a ditch in a street for an individual who has municipal authority for the act; *Smith v. Simmons*, 103 Penn. St. 82. But the owner is liable for failure of contractor to put a light on a pile of brick left in the street at night, the ordinance requiring a light. *Wilson v. White*, 71 Geo. 506. In *Scammon v. Chicago*, 25 Ill. 424, 438, *WALKER, J.*, says: "The reason why the master is rendered liable for the negligent acts of his servant, resulting in injury to others, is because the servant, while he is engaged in the business of the master, is supposed to be acting under and in conformity to his directions, and to hold him to the employment of skillful and prudent servants. The presumption is one of law, and hence cannot be rebutted. But in this case the reason fails, and the presumption must also fail. These contractors, as we have seen, were not working under the directions or control of appellants, but under their contract, and were in no sense their servants." That the employer of an independent contractor is not master of the contractor's servants, see *Hilliard v. Richardson*, 8 Gray, 349; *Boswell v. Laird*, 8 Cal. 469; *Kellogg v. Payne*, 21 Iowa, 575; *Allen v. Willard*, 57 Penn. St. 374; *Hunt v. Pennsylvania R. R. Co.*, 51 Penn. St. 475; *Clark v. Vermont, & C., R. R. Co.*, 28 Vt. 103; *West v. St.*

injured by the contractor in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury; but for the negligence of the contractor not done *under* the contract, but in violation of it, the employer is in general not liable. * * 2. If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think, to be responsible on the same principle as in the last case, for I cause acts to be done which naturally expose others to injury. * * 3. If I employ as contractor a person incompetent or untrustworthy, I may be liable for injuries done to third persons by his carelessness in the execution of his contract. * * 4. The employer may be guilty of personal neglect, connecting itself with the negligence of the contractor in such manner as to render both liable.”¹ But 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 to be employed in doing it,² and the person for

Louis, &c., R. R. Co., 63 Ill. 545; Schwartz v. Gilmore, 45 Ill. 455; Kelly v. New York, 11 N. Y. 432; Blake v. Ferris, 5 N. Y. 48; Robinson v. Webb, 11 Bush, 464. There is a careful examination of the whole subject in Eaton v. European, &c., R. R. Co., 59 Me. 520; S. C. 8 Am. Rep. 490, in which a railroad company was held not responsible for negligent fires set by contractors for building its road.

¹SEYMOUR, J., in Lawrence v. Shipman, 39 Conn. 580, 589. And, see remarks by CLIFFORD, J., in Water Co. v. Ware, 16 Wall. 566, 576; also, Clark v. Fry, 8 Ohio, (N. S.) 353; Chicago v. Robbins, 2 Black, 418; Railroad Co. v. Hanning, 15 Wall. 649; Cuff v. Newark, &c., R. R. Co., 35 N. J. 17; S. C. 10 Am. Rep. 205, where the authorities are collated and examined. Deford v. State, 30 Md. 179; Tibbetts v. Knox, &c., R. R. Co., 62 Me. 437; Rourke v. White Moss Colliery Co., 1

C. P. Div. 556; 2 C. P. D. 305; while the owner is not liable for the contractor's negligence in a matter collateral to the contract, he is where the very thing contracted for is improperly done and causes mischief on the lands of another, at least where the injury is done after he has accepted the completed work. Gorham v. Gross, 125 Mass. 232 and cases cited; Mulchey v. Meth. Soc., 125 Mass. 487. See Sturgis v. Theol. Soc., 130 Mass. 414; Khron v. Brock, 144 Mass. 516; Chartiers, &c., Co. v. Lynch, 12 Atl. Rep. 435 (Penn.). If damage is caused by the fall of a wall in putting up a building forbidden by ordinance, both owner and contractor are liable. Walker v. McMillan, 6 Can. S. C. R. 241.

²As to the right of supervision which will render the employer liable as master of the contractor, compare Pack v. New York, 8 N. Y. 222;

whom the *work is to be done is interested only in [*549] 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.¹

The term contractor if 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 only for final performance. A common carrier is such a contractor, and so is a drayman,² and so is the master of a tug-boat.³

Master Responsible for his own Negligence. Undoubted as the general rule is, there is nevertheless an exception to it, resting on reasons as conclusive as those which support the rule itself. The exception is this: That if the injury results from the negligence of the master himself, he is responsible on the same rea-

Kelly v. New York, 11 N. Y. 482; Eaton v. European, &c. R. R. Co., 59 Me. 520; Allen v. Willard, 57 Penn. St. 374, with Sadler v. Henlock, 4 E. & B. 570; Lowell v. Boston, &c., R. R. Co., 23 Pick. 24; Linnehan v. Rollins, 137 Mass. 123; Schwartz v. Gilmore, 45 Ill. 455; Morgan v. Bowman, 22 Mo. 538; St. Paul v. Seitz, 3 Minn. 297; Speed v. Atlantic, &c., R. R. Co., 71 Mo. 303; Fink v. Miss., &c., Co., 82 Mo. 276; Callahan v. Burlington, &c., R. R. Co., 23 Iowa, 562; Cincinnati v. Stone, 5 Ohio (N. S.) 38; Tiffin v. McCormack, 34 Ohio St. 638; Brown v. Werner, 40 Md. 15; New Orleans, &c., Co. v. Norwood, 62 Miss. 565; Campbell v. Lunsford, 8 South. Rep. 500 (Ala.). The fact that the employer pays the contractor's servants does not conclusively determine that he is to be regarded as their master. Rourke v. White Moss Colliery Co., 1 C. P. Div. 556; 2 C. P. D. 305.

¹ Shearm. & Redf. on Neg. § 78; Schouler, Dom. Rel. 644-5. And the contractor is not liable for the direct consequence of the employer's negligence. Vanderslice v. Philadelphia, 103 Penn. St. 102.

² De Forrest v. Wright, 2 Mich. 368; McMullen v. Hoyt, 2 Daly, 271. So where a city hired a cart, horse and driver, and directed driver to water certain streets, and had no other control of the driver, he is an independent contractor. Jones v. Mayor, &c., of Liverpool, L. R. 14 Q. B. D. 890.

³ Sproul v. Hemmingway, 14 Pick. 1. See Milligan v. Wedge, 12 Ad. & El. 737. A pilot, whom the master of a vessel is compelled by law to accept, is not his servant. Steam Nav. Co. v. British, &c. Nav. Co., L. R. 8 Exch. 330.

sons which would render him responsible if the relation did not exist.¹ Under this head the following specification of negligent conduct may be of service:

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 general rule is, that while the owner of real estate is not bound to provide safeguards for wrong-doers, 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.

[*550] *Many cases in illustration of this rule are collected in another place,² but it is sufficient here to mention the general rule, with some instances of its application to this particular class of persons.³

The invitation to come upon dangerous premises without apprising him of the danger is just as culpable, and an injury resulting from it is just as deserving of compensation in the case of a servant as in any other case. Moreover, no reason of public policy, and none to be deduced from the contract of the parties, can be suggested, which would relieve the culpable master from responsibility. A man cannot be understood as contracting to take upon himself risks which he neither knows nor suspects, nor has reason to look for; and it would be more reasonable to imply a contract on the part of the master not to invite the servant into unknown dangers, than one on the part of the servant to run the

¹ Cases under the English Employers' Liability Act of 1880. *Cox v. Gt. West. Ry. Co.*, 9 Q. B. D. 106; *Osborne v. Jackson*, 11 Q. B. D. 619; *Millward v. Midland Ry Co.*, 14 Q. B. D. 68; *Heske v. Samuelson*, 12 Q. B. D. 30; *Cripps v. Judge*, 13 Q. B. D. 583; *Paley v. Garnett*, 16 Q. B. D. 52. A master may stipulate with the servant against liability under this act. *Griffiths v. Earl Dudley*, L. R. 9 Q. B. D. 357. But that a master may not by agreement at time of hiring relieve

himself from a duty to the servant, see *Little Rock, & Co. v. Eubanks*, 3 S.W. Rep. 808 (Ark.); *Kansas & Co. v. Peavey*, 29 Kan. 169. Nor from liability for negligence of a superior servant. *Lake Shore, & Ry Co. v. Spangler*, 8 N. E. Rep. 487 (Ohio).

² See post, p. *605-607.

³ The servant is entitled to the protection of this rule, though he is leaving his work without cause or excuse. *Marshall v. Stewart*, 33 Eng. L. & Eq. 1.

risk of them. But the question of contract may be put entirely aside from the case, and the responsibility of the master may be planted on the same ground which would render him responsible if the relation had not existed. Whether invited upon his premises by the contract of service, or by the calls of business, or by direct request, is immaterial; the party extending the invitation owes a duty to the party accepting it to see that at least ordinary care and prudence is exercised to protect him against dangers not within his knowledge, and not open to observation. It is a rule of justice and right which compels the master to respond for a failure to exercise this care and prudence.¹

¹ *Marshall v. Stewart*, 2 Macq. H. L. 20; S. C. 33 Eng. L. & Eq. 1; *Indermaur v. Dames*, L. R. 2 C. P. 811; *Ryan v. Fowler*, 24 N. Y. 410; *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; S. C. 15 Am. Rep. 387; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Perry v. Marsh*, 25 Ala. 659; *Schooner Norway v. Jensen*, 52 Ill. 373; *Walsh v. Peet Valve Co.*, 110 Mass. 23; *Akerson v. Dennison*, 117 Mass. 407; *Hornor v. Nicholson*, 56 Mo. 220; *Baxter v. Roberts*, 44 Cal. 187; *Holmes v. Northeastern Railway Co.*, L. R. 4 Exch. 254; S. C. affirmed, L. R. 6 Exch. 123; *Mellors v. Shaw*, 1 Best & S. 437; *Roberts v. Smith*, 2 H. & N. 213. The master must use ordinary care to provide a safe place for the servant to work in. *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294; *Pantzar v. Tilly Foster Min. Co.*, 99 N. Y. 368; *Bessex v. Chicago, &c., Co.*, 45 Wis. 477; *Luebke v. Chicago, &c., Co.*, 59 Wis. 127; *North Chicago, &c., Co. v. Johnson*, 114 Ill. 57. He is liable if he knew or ought to have known of the dangerous condition of the place and the servant did not and could not reasonably know of the danger. *Nason v. West*, 78 Me. 253; *Griffiths v. London, &c., Co.*, L. R. 12 Q. B. D. 435; 13 Id. 259. But he is not bound to provide for a mishap which can not reasonably be anticipated.

Wannemaker v. Burke, 111 Penn. St. 423; *Koontz v. Chicago, &c., Co.*, 65 Ia. 224. See *Tissue v. Balt., &c., R. R. Co.*, 112 Penn. St. 91; *Murphy v. Greeley*, 15 N. E. Rep. 654 (Mass.); *Goodenow v. Walpole Mills, Id.* 576 (Mass). A master is not bound to keep a building in process of construction safe at every moment for workmen. *Armour v. Hahn*, 111 U. S. 313. See *Diamond, &c., Co. v. Giles*, 11 Atl. Rep. 189 (Del.)

The rule has been applied against railroad companies in the case of injuries to their servants in consequence of the road bed being out of repair. See *Snow v. Housatonic R. R. Co.*, 8 Allen 441; *Paulmier v. Erie R. Co.*, 34 N. J. 151; *Lewis v. St. Louis, &c., R. R. Co.*, 59 Mo. 495; S. C. 21 Am. Rep. 385; *Stoher v. St. Louis, &c., Co.*, 91 Mo. 509; *Clapp v. Minn., &c., Co.*, 36 Minn. 6; *Trask v. Cal., &c., Co.*, 63 Cal. 96; *Davis v. Centr. Vt. &c., Co.*, 55 Vt. 84; *Elmer v. Locke*, 135 Mass. 575. "There is no rule better settled than this, that it is the duty of railroad companies to keep their road and works, and all portions of the track, in such repair and so watched and tended, as to insure the safety of all who may lawfully be upon them, whether passengers, or servants, or others. They are bound to furnish a safe road, and sufficient

[*551] *The terms in which the proposition has been stated will exempt the master from responsibility in all cases where the risks were apparent, and were voluntarily assumed by a person capable of understanding and appreciating them. No employer, by any implied contract, undertakes that his buildings are safe beyond a contingency, or even that they are as safe as those of his neighbors, or that accidents shall not result to those in his service from risks which perhaps others would guard against more effectually than it is done by him. Neither can a duty rest upon any one which can bind him to so extensive a responsibility. There are degrees of safety in buildings which differ in age, construction and state of repair, as there are also in the different methods of conducting business; and these, not the servant only, but any person doing business with the proprietor, is supposed to inform himself about and keep in mind when he enters upon the premises. Negligence does not consist in not putting one's buildings or machinery in the safest possible condition, or in not conducting one's business in the safest way; but there is negligence in not exercising ordinary care that the buildings 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.

and safe machinery and cars." BREESE, Ch. J., in *Chicago, &c., R. R. Co. v. Swett*, 45 Ill. 197, 203. Track inspection is a master's duty. The careless performance of which by a competent inspector renders the master liable. *Durkin v. Sharp*, 85 N. Y. 225; *Drymala v. Thompson*, 26 Minn. 40; *Calvo v. R. R. Co.*, 23 S. C. 526. See *Davis v. Centr. Vt., &c., Co.*, 55 Vt. 84. If a track gets out of repair by accident, the master's duty to the servant is to give him timely notice thereof. He is not bound to repair within any definite time. *Henry v. Lake Shore, &c., Co.*, 49 Mich. 495. The usual rule does not apply where one is employed to rebuild a partly abandoned track. *Brick v. Rochester, &c., Co.*, 98 N. Y. 211. But, see *Van Amburg v. Rail-*

road Co., 37 La. Ann. 650; *Gulf, &c., Co. v. Redeker*, 67 Tex. 181; *Bowen v. Chicago &c. Ry. Co.* 8 S. W. Rep. 230, (Mo.) But a railroad company is not liable to one of its employees for an injury occasioned by a latent defect in one of its bridges, where the company employed competent persons to supervise and inspect the bridge, by whom the defect was not discovered. *Warner v. Erie Railway Co.*, 39 N. Y. 468. See *Ladd v. New Bedford, &c., R. R. Co.*, 119 Mass. 112; S. C. 20 Am. Rep. 331; *Cooper v. Hamilton Manuf. Co.*, 14 Allen, 193. But where a bridge, bought with a road, is from its plan obviously weak to a proper inspection, it is liable. *Vosburgh v. Lake Shore, &c., Co.*, 94 N. Y. 874.

The principle is well stated by the Supreme Court of Connecticut, in a case where the injury the servant complained of was caused by his coming accidentally in contact with machinery which, it was claimed, ought to have been covered so as to protect against such an accident. "The employee here was acquainted with the hazards of the business in which he was engaged, and with the kind of machinery made use of in carrying on the *business. He must be held to have understood the [*552] ordinary hazards attending his employment, and therefore to have voluntarily taken upon himself this hazard when he entered into the defendant's service. 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 not thereby violate the law of the land. He may select his appliances, and run his mill with old or new machinery, just as he may ride in an old or new carriage, navigate an old or new vessel, occupy an old or new house, as he pleases. The employee having knowledge of the circumstances on entering his service for the stipulated reward, cannot complain of the peculiar taste and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service."¹

¹ *Hayden v. Smithville Manf. Co.*, 29 Conn. 548, 558, per ELLSWORTH, J., who, in citing authorities, refers, among others, to what is said by BRAMWELL, B., in *Williams v. Clough*, 8 H. & N. 258, 260. See, also, *Priestley v. Fowler*, 3 M. & W. 1; *Dynen v. Leach*, 26 L. J. Exch. 221; S. C. 40 Eng. L. & Eq. 491; *Seymour v. Maddox*, 16 Q. B. 326. This last case was thought by the Court of Appeals of New York to have gone too far. See *Ryman v. Fowler*, 24 N. Y. 410. A railway company is not bound to change its machinery in order to apply every new improvement or supposed improvement in appliances; and an employee who consents to operate the machinery already provided by the company, knowing its defects, does so at his own risk. *Wonder v. B. & O. R. R. Co.*, 32 Md. 411. The case of *Coombs v. New Bedford Cordage*

Co., 102 Mass. 572; S. C. 8 Am. Rep. 506, was very similar in many respects to that of *Hayden v. Smithville Manf. Co.*, *supra*, and the same general principle was laid down. The failure to employ sufficient assistance does not render the employer liable to a servant who, knowing the facts, had continued in the business without objection. *Skipp v. Eastern Counties R. R. Co.*, 9 Exch. 223; S. C. 24 Eng. L. & Eq. 396. But, see *Thorpe v. Miss., &c., Co.*, 89 Mo. 650. In *Woodley v. Metropolitan R. R. Co.*, L. R. 2 Ex. D. 384, it is said by COCKBURN, Ch. J.: "It is competent to an employer, at least so far as civil consequences are concerned, to invite persons to work for him under circumstances of danger caused or aggravated by want of due precautions on the part of the employer. If a man chooses to accept the employ-

[*553] *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. Such cases occur most fre-

ment, or to continue in it, with a full knowledge of the danger, he must abide the consequences, so far as any claim to compensation against the employer is concerned." Again: "That which would be negligence in a company, with reference to the state of their premises, or the manner of conducting their business, so as to give a right to compensation for an injury resulting therefrom to a stranger lawfully resorting to their premises, in ignorance of the existence of the danger, will give no such right to one who, being aware of the danger, voluntarily encounters it, and fails to take the extra care necessary for avoiding it." See further, *Fort Wayne, &c., R. R. Co. v. Gildersleeve*, 33 Mich. 133; *Ladd v. New Bedford, &c., R. R. Co.*, 119 Mass. 412; S. C. 20 Am. Rep. 331; *Gibson v. Erie R. Co.*, 63 N. Y. 449; S. C. 20 Am. Rep. 552; *Belair v. Chicago, &c., R. R. Co.*, 43 Iowa, 662; *St. Louis, &c., R. R. Co. v. Britz*, 72 Ill. 256, and see cases cited, p. 636, n. 1 *supra*. The master need not use the newest or safest appliances. He must furnish reasonably safe ones. *Hull v. Hall*, 78 Me. 114; *Probst v. Delamater*, 100 N. Y. 266; *Sweeney v. Berlin, &c., Co.*, 101 N. Y. 520; *Bajus v. Syracuse, &c., Co.*, 103 N. Y. 312; *Hickey v. Taaffe*, 105 N. Y. 26; *Allerton, &c., Co. v. Egan*, 86 Ill. 253; *Simmons v. Chicago, &c., Co.*, 110 Ill. 340; *Smith v. St. Louis, &c., Co.*, 69 Mo. 32; *Siela v. Hannibal, &c., Co.*, 82 Mo. 430; *Huhn v. Miss., &c., Co.*, 92 Mo. 440; *Mich. Centr., &c., Co. v. Smithson*, 45 Mich. 212; *Guthrie v. Louisville, &c., Co.*, 11 Lea, 372; *Tabler v. Hannibal,*

&c., Co., 5 S. W. Rep. 810 (Mo.); *Miss. &c., Co. v. Lyde*, 57 Tex. 505; *Burns v. Chicago, &c., Co.*, 69 Ia. 450; *Louisville, &c., Co. v. Orr*, 84 Ind. 50. See *Bradbury v. Goodwin*, 108 Ind. 286. A master is not liable for using an appliance of a kind which has long been safely used and from the use of which an injury could not reasonably be anticipated. *Burke v. Witherbee*, 98 N. Y. 562; *Kitteringham v. Sioux City, &c., Co.*, 63 Ia. 285; *Sjogren v. Hall*, 53 Mich. 274; *Richards v. Rough*, Id. 212. Where the master furnished suitable windlass, ropes, &c., for building a windmill, he was held not liable for negligence of the men in guying the windlass. That is a servant's duty. *Peschel v. Chicago, &c., Co.*, 62 Wis. 338, and see *Floyd v. Sugden*, 134 Mass. 563; *Robinson v. Blake Mfg. Co.*, 143 Mass. 528. He is liable for using a safe machine in an unusual and dangerous way without warning servant. *White v. Nonantum, &c., Co.*, 144 Mass. 276. Master held responsible for exposing servant to poisonous exhalations. *West v. St. Louis, &c., R. R. Co.*, 63 Ill. 545; *Citizens' Gas. Co. v. O'Brien*, 118 Ill. 174. It is the master's duty to prescribe sufficient rules for the conduct of the business. *Regan v. St. Louis, &c., Co.*, 6 S. W. Rep. 371 (Mo.); *Sheehan v. New York, &c., Co.*, 91 N. Y. 332; *Abel v. Pres., &c., Del., &c., Co.*, 103 N. Y. 581. But he need not adopt the safest system. *Hannibal, &c., Co. v. Kanaley*, 17 Pac. Rep. 324 (Kan.). The servant takes the risk of his fellow servant's failure to obey the rules. *Slater v. Jewett*, 85 N. Y. 61.

quently in the employment of infants. It has been repeatedly held that the case of an infant is no exception to the general rule which exempts the master from responsibility for injuries arising from the hazards of his service.¹ But while this is unquestionably true as a rule, it would be gross injustice, not to say absurdity, to apply in the case of infants the same tests of the master's culpable negligence which are applied in the case of persons of maturity and experience. It may be ordinary caution in one case to apprise the servant of the danger he must guard against, while in the case of another, not yet beyond the years of thoughtless childhood, it would be gross and most culpable, if not criminal, carelessness for the master to content himself with pointing out dangers which were not likely to be appreciated, or if appreciated, not likely to be kept with sufficient distinctness and caution in mind, and against which, therefore, effectual protections ought to be provided. The duty of the employer to take special precautions in such cases, has sometimes been very emphatically asserted by the courts.² The Supreme Court of Massachu-

¹ *King v. Boston, &c., R. R. Co.*, 9 Cush. 112; *Gartland v. Toledo, &c., R. R. Co.*, 67 Ill., 498. See a hard case in *Murphy v. Smith*, 19 C. B. (N. S.) 361. If he understands the risk he is held to accept it. *Hickey v. Taaffe*, 105 N. Y. 26; *McGinnis v. Can. Sou. Bridge Co.*, 49 Mich. 466; *Viets v. Toledo, &c., Ry. Co.*, 55 Mich. 120; *Brazil, &c., Co. v. Cain*, 98 Ind. 282; *Atlas Eng. Works v. Randall*, 100 Ind. 293; *Youll v. Sioux City, &c., Co.*, 66 Ia. 346; *Curran v. Merch., &c., Co.*, 180 Mass. 374; *Williams v. Churchill*, 187 Mass. 243; *Rock v. Ind., &c., Mills*, 142 Mass. 22. So a patent danger as from uncovered machinery. *Fones v. Phillips*, 30 Ark. 17; *Ciriack Merch., &c., Co.*, 15 N. E. Rep. 579 (Mass.); or from falling lumber. *East, &c., R. Co. v. Sims*, 6 S. E. Rep. 595; *Contra, Mis. Pac., &c., Co. v. Callbreath*, 66 Tex. 626. But whether a boy takes risk from fire when working on a fifth floor with no fire escape is for the

jury to say. *Schwander v. Birge*, 33 Hun, 186.

² *Grizzle v. Frost*, 8 Post. & F. 622; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; S. C. 8 Am. Rep. 506; *O'Connor v. Adams*, 120 Mass. 427. In *Bartonshill Coal Co. v. McGuire*, 8 Macq. H. L. 300, 311, Lord CHELMSFORD, in speaking of an injury to a young girl from exposure to machinery in the building where she was employed, says: "It might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed." One who put a boy of fifteen in charge of a wild and fractious horse in a place where trains of cars, moved by steam, were approaching in opposite directions, was held liable for an injury to the boy in consequence of the horse being frightened and becoming unmanageable. *Hill v. Gust*, 55 Ind. 45. The general obligation of the master

[*554] setts *has very properly said, in a case in which defendants relied for their protection upon a notice of danger which they had given to the party injured: "The notice which the defendants were bound to give the plaintiff of the nature of the risks incident to the service which he undertook, must be such as to enable a person of his youth and inexperience in the business intelligently to appreciate the nature of the danger attending its performance. The question, indeed, on this branch of the case is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences. But in determining this question it is proper and necessary to take into consideration not only the plaintiff's youth and inexperience, but also the nature of the service which he was to perform, and the degree to which his attention, while at work, would need to be devoted to its performance. The obligation of the defendants would not necessarily be discharged by merely informing the boy that the employment itself, or a particular place or machine in the building or room in which he was set to work, was dangerous. 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 his work."¹ This is not a rule which in its

to give information to one who, from immaturity or otherwise, would not be likely to understand and appreciate it, is affirmed in *Sullivan v. India Manuf. Co.*, 113 Mass. 396, though it is said it would be sufficient if the servant had the proper information from some other source.

¹ GRAY, J., in *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 596. Where an inexperienced boy, was sent into a mine to bring out tools and was injured by falling rock negligently left by other workmen, the master was held liable for failure

to inform him of the danger. *Jones v. Florence Min. Co.*, 66 Wis. 268, citing many cases, and see note to this case, 25 Am. L. Reg. (n. s.) 591. Where a minor was injured the day after he entered service as a brakeman by coupling a car with a double deadwood it was held that the master would be liable though the danger could be seen, if as a matter of fact the minor did not know and was not chargeable with the duty to know the risk incurred in the coupling. *Louisville, &c., Co. v. Frawley*, 110 Ind. 18. See, also, *Miss. Pac., &c.*,

application is confined exclusively to infants: the principle is a general one which requires good faith and reasonable prudence on the part *of the employer, under the special [*555] circumstances of the particular case; of which infancy, if it exists, may be a very important one, but possibly not more so 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 expect, or to consider as being within the employment.

It has been often—and very justly—remarked that a man may decline any exceptionally dangerous employment, but if he voluntarily engages in it he should not complain because it is dangerous.² Nevertheless, where one has entered upon the em-

Co. v. Callbreath, 66 Tex. 526. A similar requirement of extra caution and care in the case of small children received by carriers without attendants, was laid down in East Saginaw City Railway Co. v. Bohn, 27 Mich. 503. And see the well reasoned case of Railroad Co. v. Fort, 17 Wall. 553, in which the obligation to give to immature persons information of unknown or unappreciated perils is considered and insisted upon in an opinion by DAVIS, J.

¹ See Chicago, &c., R. R. Co. v. Bayfield, 37 Mich. 205; Patterson v. Pittsburgh, &c., R. R. Co., 76 Penn. St. 389; S. C. 18 Am. Rep. 412. Cases of liability for failure to instruct inexperienced adult servants. Parkhurst v. Johnson, 50 Mich. 79; Smith v. Oxford Iron Co., 42 N. J. L. 467; Hawkins v. Johnson, 105 Ind. 29; Smith v. Pen. Car Works, 60 Mich. 501; Miss. Pac., &c., Co. v. Watts, 64 Tex. 568. If the danger is obvious and familiar, a servant cannot demand instruction as to it. Berger v. St. Paul, &c., Ry. Co., 38 N. W. Rep. 814 (Minn.)

² "A master cannot be held liable

for an accident to his servant while using machinery in his employment, simply because the master knows that such machinery is unsafe, if the servant has the same means of knowledge as the master." BRAMWELL, B., in Williams v. Clough, 3 H. & N. 258, 260. See Mad River, &c., R. R. Co. v. Barber, 5 Ohio, (N. S.) 541. An employee injured by the falling of a hoisting apparatus sued his employer. *Heid*, that the liability of the defendant depended on three facts: 1. The defective and unsafe condition of the apparatus and that the injury proceeded therefrom. 2. That defendant knew or ought to have known of the defect. 3. That plaintiff did not know of it and had not equal means of knowledge. *Malone v. Hawley*, 46 Cal. 409. If, in obedience to express orders, an engineer runs over a track known to him to be unsafe yet in daily use he is not necessarily guilty of contributory negligence. *Hawley v. Nor. Centr., &c., Co.*, 82 N. Y. 370. See *McGlynn v. Brodie*, 31 Cal. 376; *Baltimore, &c., R. R. Co. v. Woodward*, 41 Md. 268. Of extrinsic and extraordinary risks it is

ployment and assumed the incidental risks, it is not reasonable to hold that other risks which he is directed by the master to assume, are to be left to rest upon his shoulders, merely because he did not take upon himself the responsibility of throwing up the employment instead of obeying the order. Many considerations might reasonably induce the servant to hesitate under such circumstances. In many cases the consequences might be very serious should he refuse to obey a lawful command of the master, and any command may not be clearly and manifestly unlawful which directs the doing of nothing beyond the general scope of the business. The servant who refuses to obey must consequently

expect to take upon himself the burden of showing a [*556] sufficient cause for the refusal. However clear the case might be to him, it might not be easy to make a showing satisfactory to third parties, who would naturally assume that the order was given in good faith, and that the master understood better than another the risks to be encountered in his business. The servant, also, it may reasonably be assumed, would, to some extent, have his fears allayed by the commands of a master, whose duty it would be not to send him into danger, and who might, therefore, be supposed to know, when he gave the command, that the dangers were not such or so great as the servant had apprehended.¹ In these cases, also, the age and immaturity

the duty of the master to notify the servant. *Perry v. Marsh*, 25 Ala. 659; *Baxter v. Roberts*, 44 Cal. 187; S. C. 13 Am. Rep. 160; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *West v. St. Louis, &c., R. R. Co.*, 63 Ill. 545; *Paulmier v. Erie Railway*, 34 N. J. 151.

¹ A boy hired for one service and sent upon another much more dangerous, was held entitled to recover for an injury suffered in the latter. *Railroad Co. v. Fort*, 17 Wall. 553. And see *Chicago, &c., R. R. Co. v. Bayfield*, 37 Mich. 205.

In *Lalor v. Chicago, &c., R. R. Co.*, 52 Ill. 401; S. C. 4 Am. Rep. 616, the declaration averred an employment of the plaintiff's intestate as a common laborer in the business of

loading and unloading cars, and for no other purpose; and that while he was engaged in loading a freight car with iron, the deceased was ordered by the superintendent or foreman of the company, employed to manage, direct and superintend the business of the company about the depot, to couple and connect a freight car with other cars, contrary to the special engagement of the deceased, &c., in doing which he was crushed to death. This was held to set out a good cause of action. "The company was constructively present, by and through this officer, and must be charged accordingly. It was, then, by the direct command of the company the deceased was exposed to this peril, and one out of the line of the business he

of the child are of the highest importance ; for a child, inexperienced in affairs and ignorant of the law, might well believe the obligation to obey was implicit, and might do so, consequently, under a species of coercion to which the will was wholly subjected.¹

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.

*The point here is, not that the master warrants the [*557] strength or safety of his machinery or appliances, but that he is personally negligent in not taking proper precautions to see that they are reasonably strong and safe. The law does not require him to guaranty the prudence, skill or fidelity of those from whom he obtains his tools or machinery, or the

had contracted to perform. He was killed by the negligence of the driver in charge of the locomotive while thus exposed. The law would be lamentably deficient did it furnish no remedy in such a case." *BRESE*, Ch. J., p. 404. See, also, *Indianapolis, &c., R. R. Co. v. Love*, 10 Ind. 554; *Benzing v. Steinway*, 101 N. Y. 547; *Jones v. Lake Shore, &c., Co.*, 49 Mich. 573; *Haley v. Case*, 142 Mass. 316; *Lee v. Woolsey*, 109 Penn. St. 124; *Lorentz v. Robinson*, 61 Md. 64. The master is liable unless to obey is plainly to imperil life or limb. *Stephens v. Hannibal, &c., Co.*, 86 Mo. 221. But if the servant knows the danger to be incurred, mere fear of discharge for disobedience will not excuse him. *Russell v. Tillotson*, 140 Mass. 201.

¹ *Fort v. Railway Co.*, 2 Dill. 259; *Railroad Co. v. Fort*, 17 Wall. 553. If one is called to do work outside his general duty, the question whether he knew or ought to have

known the risk is one of fact. *Ferren v. Old Colony R. R.*, 143 Mass. 197. But if a laborer is required to act as foreman a part of the time and after doing so for a time is injured he cannot recover. He accepts the risk. *Leary v. Boston &c., Co.*, 139 Mass. 580. So if a mature and experienced servant consents to do work outside of that he engaged to do; *Cole v. Chicago, &c., Co.*, 37 N. W. Rep., 84 (Wis.) Where a servant during his noon hour remained on the master's premises, and was called by the foreman to do dangerous work, the master is liable. *Broderick v. Detroit, &c., Co.*, 56 Mich. 261. But not if called to do work for the personal benefit of his immediate superior. *Hurst v. Chicago, &c., Co.*, 49 Ia., 76. Nor if asked to do work outside his business by a fellow servant. *Pittsburgh &c., Ry. Co. v. Adams*, 105 Ind. 151; *Osborne v. Knox, &c., Co.*, 68 Me. 49. See *Railroad Co. v. McDaniel*, 12 Lea, 386.

strength or fitness of the materials they make use of. If he employs reasonable care and prudence in selecting or ordering what he requires in his business, such as every prudent man is expected to employ in providing himself with the conveniences of his occupation, that is all that can be required of him ;¹ but this at his peril he must employ, and the duty is not one he can delegate so as to relieve himself from the contingent liability in case of failure in performance.² If, therefore, an injury results to the servant, from a failure to exercise reasonable care and prudence in this regard, the master may be and ought to be held responsible.³

¹ It has been so often affirmed, and is so well established, that the master is not guarantor of the safety of machinery which he puts into the hands of his servants, and is responsible only where he has failed to employ reasonable care and skill in its selection, that we content ourselves here with a reference to a few cases recognizing the principle: *Readhead v. Midland R. Co.*, 2 Q. B. 412; S. C. in Exch. Chamber, L. R. 4 Q. B. 370; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412; S. C. 20 Am. Rep. 331; *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; S. C. 14 Am. Rep. 598; *Indianapolis, &c., R. R. Co. v. Love*, 10 Ind. 554; *Fort Wayne, &c., R. R. Co. v. Gildersleeve*, 33 Mich. 134; *Toledo, &c., R. R. Co. v. Fredericks*, 71 Ill. 294; *Camp Point Manuf. Co. v. Ballou*, 71 Ill. 417; *Indianapolis, &c., R. R. Co. v. Flanigan*, 77 Ill. 365; *Columbus, &c., R. R. Co. v. Troesch*, 68 Ill. 545; S. C. 18 Am. Rep. 578; *Mobile, &c., R. R. Co. v. Thomas*, 42 Ala. 672; *Patterson v. Pittsburgh, &c., R. R. Co.*, 76 Penn. St. 389; S. C. 18 Am. 412; *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; *Lewis v. St. Louis, &c., R. R. Co.*, 59 Mo. 495; *Flike v. Boston, &c., R. R. Co.*, 53 N. Y. 549; *Kelley v. Norcross*, 121 Mass. 508; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Umbach v. Lake*

Shore, &c., Co., 83 Ind. 191; *Painton v. Nor. Centr., &c., Co.*, 88 N. Y. 7; *Hobbs v. Stauer*, 62 Wis. 108. If the defect in an appliance could have been discovered by proper and careful inspection, the master is liable. *Spicer v. South Boston, &c., Co.*, 132 Mass. 426; *Covey v. Hannibal, &c., Co.*, 86 Mo. 635; *Chicago, &c., R. R. Co. v. Platt*, 89 Ill. 141.

² See post, p. *560.

³ *Keegan v. Western R. R. Co.*, 8 N. Y. 175, is a leading case. The injury occurred from continuing to use a defective and dangerous locomotive after notice to the company of its dangerous condition. And see *McGatrick v. Wason*, 4 Ohio, (n. s.) 566; *Cayzer v. Taylor*, 10 Gray, 274, Columbus, &c., R. R. Co. v. *Arnold*, 31 Ind. 174; *Lewis v. St. Louis, &c., R. R. Co.*, 59 Mo. 495; S. C. 21 Am. Rep. 385; *Long v. Pacific R. R. Co.*, 65 Mo. 225; *Wedgewood v. Chicago, &c., R. R. Co.*, 41 Wis. 478; *Harper v. Indianapolis, &c., R. R. Co.*, 47 Mo. 567; S. C. 4 Am. Rep. 353; *Chicago, &c., R. R. Co. v. Taylor*, 69 Ill. 461; S. C. 19 Am. Rep. 626; *Mullan v. Philadelphia, &c., R. R. Co.*, 78 Penn. St. 25; S. C. 21 Am. Rep. 2; *Wonder v. Baltimore, &c., R. R. Co.*, 82 Md. 411; S. C. 8 Am. Rep. 143. In *Noyes v. Smith*, 28 Vt. 59; a declaration was sustained which charged the defend-

*5. The master's negligence may also consist in employing servants who are wanting in the requisite care, skill or prudence for the business entrusted to them, or in con-

ants with negligence in putting the plaintiff, their servant, in charge of an insufficient engine, whose insufficiency was unknown to the plaintiff, and but for the want of care and diligence would have been known to the defendants. A similar doctrine is declared in *Snow v. Housatonic R. R. Co.*, 8 Allen, 441; *Seaver v. Boston, &c., R. R. Co.*, 14 Gray, 466; *Hackett v. Middlesex Manuf. Co.* 101 Mass. 101; *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 521; *Louisville, &c., R. R. Co. v. Caven*, 9 Bush, 559; S. C. 15 Am. Rep. 740; *Shanny v. Androscoggin Mills*, 66 Me. 420, and *Illinois Central R. R. Co. v. Welch*, 52 Ill. 183. The peril in the case last cited was the projecting awning of the station house, which was liable to strike a passing car. Say the court: "The evidence shows that the peril had long before been observed by other employees, and the attention of both the division superintendent and division engineer called to it. This circumstance takes away all excuse from the company, and brings the case within the legal proposition of appellant's counsel, since it was a peril known to the employer and not revealed to the employee." The rule has been applied to the case of a railroad company which was charged with negligence in permitting its road to become blocked with snow and ice, and a car to be out of repair, by means whereof the plaintiff was injured. *Fifield v. Northern R. R. Co.*, 42 N. H. 225. Compare *Waller v. S. E. Railway Co.*, 2 H. & C. 102; *Columbus, &c., R. R. Co. v. Webb*, 12 Ohio, (N. S.) 475; *Toledo, &c., R. R. Co. v. Conroy*, 61 Ill. 162; *Toledo, &c., R. R. Co. v. Ingraham*, 77 Ill. 309.

A master is not liable to a servant if another servant injures him by using for one purpose a tool intended for another which breaks under the use, although the tool was defective. *Moran v. Brown*, 27 Mo. App. 487. Of course if the case rests upon a want of due care, the fact that the employer had no actual knowledge of the defect is no excuse. But to charge the master with notice that a tool is out of repair, knowledge of the defect must be brought home to a servant having some authority in the premises. *Solomon R. R. Co. v. Jones*, 80 Kan. 601. For a latent defect arising in a machine originally sound, not discoverable by ordinary tests, the master is not liable. *Louisville, &c., Co. v. Allen*, 78 Ala. 494. But he is, if he has not used ordinary care to discover it. *Clowers v. Wabash, &c., Ry. Co.*, 21 Mo. App. 213; *Current v. Miss., &c., Co.*, 86 Mo. 62. See *Pittsburgh, &c., Co. v. Adams*, 105 Ind. 151. The master is not liable if a rope breaks from a hidden original fault or an apparent one arising from use and not brought to his notice. He is, however, bound to know that a rope originally sound will wear out. *Baker v. Allegheny, &c., R. R. Co.*, 95 Penn. St. 211. See *Johnson v. Boston Tow Boat Co.*, 135 Mass. 209. He must make reasonable efforts to keep his machinery in repair. *Solomon R. R. Co. v. Jones*, 80 Kan. 601; *Richmond, &c., Co. v. Moore*, 78 Va. 93. The duty to repair is, like that to furnish originally safe machinery, a master's duty not escaped by delegation. *Fuller v. Jewett*, 80 N. Y. 46. See *Penn. Co. v. Mason*, 109 Penn. St. 296; *Wilson v. Willimantic, &c., Co.*, 50 Conn. 433; *Nor. Pac. &c.,*

tinuing such persons in his employ after their unfitness has become known to him, or when, by the exercise of ordinary care, it would have been known. "The servant when he engages to run the risks of the service, including those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect him from such risks, by associating him only with persons of ordinary skill and care."

The obligation to employ suitable servants is precisely the same as that to provide suitable machinery and appliances for the business. It has been thus stated in a railroad case:

"A *railroad corporation is bound to provide proper [*559] road, machinery and equipment, and proper servants. It must do this through appropriate officers. If acting through appropriate officers it knowingly and negligently employs incompetent servants, it is liable for an injury occasioned to a fellow servant by their incompetency. If it continues in its employment an incompetent servant after his incompetency is known to

Co., *v.* Herbert, 116 U. S. 642. While the master performs his whole duty by furnishing suitable means and competent men for the keeping of a machine in ordinary repair and running order, *McGee v. Boston Cordage Co.*, 139 Mass. 445; *Daley v. Boston &c. Co.*, 16 Atl. Rep. 690. (Mass.), yet, if the defect is substantial and renders the machine unfit for use and dangerous, he is not relieved by showing that he has furnished such means and men. *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198; *Rice v. King Philip Mills*, Id. 229. In New York where the negligence charged was a failure to sharpen and reset saws, it is held that the master's duty is performed when he has furnished suitable saws and means for keeping them sharp and properly set and that the setting and sharpening is a servant's duty. *Webber v. Piper*, 17 N. E. Rep. 216.

Cars coming from another road need not be inspected for hidden defects. *Guttridge v. Miss., &c., Co.*, 7 S. W. Rep. 476 (Mo.); *Ballou v. Chica-*

go, &c., Ry Co., 54 Wis. 257. See, further, on this, *Mackin v. Boston, &c., Co.*, 135 Mass. 201; *Mich. Centr., &c. Co. v. Smithson*, 45 Mich. 212; *Brann v. Chicago, &c., Co.*, 53 Ia. 595; *Chicago, &c., Co. v. Avery*, 109 Ill. 314; *Fay v. Minn., &c., Co.*, 30 Minn. 231. But the owner of a car used without his permission on another road in its business owes no duty to the latter's servant. *Sawyer v. Minn., &c., Ry Co.* 35 N. W. Rep. 671 (Minn.)

¹ ALDERSON, B., in *Hutchinson v. Railway Co.*, 5 Exch. 343. See *Alabama, &c., R. R. Co. v. Waller*, 48 Ala. 459; *New Orleans, &c., R. R. Co. v. Hughes*, 49 Miss. 253; *Moss v. Pacific R. R. Co.*, 49 Mo. 167; *S. C. v. Am. Rep.* 126; *Mich. Cent. R. R. Co. v. Dolan*, 32 Mich. 510; *Columbus, &c., R. R. Co. v. Troesch*, 63 Ill. 545; *S. C. v. 18 Am. Rep.* 578; *Hogan v. Cent. Pacific R. R. Co.*, 49 Cal. 128; *Memphis, &c., R. R. Co. v. Thomas*, 51 Miss. 637; *United States, &c., Co. v. Wilder*, 116 Ill. 100.

its officers, or is so manifest that its officers, using due care, would have known it, such continuance in employment is as much a breach of duty and a ground of liability as the original employment of an incompetent servant."¹

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. This case may also be planted on contract, but it is by no means essential to do so. If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover the assurances remove all ground

¹ GRAY, J., in *Gilman v. Eastern R. R. Co.*, 13 Allen, 433. The same point is strongly put by FOLGER, J., in *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 521, 533. See, also, *Tarrant v. Webb*, 18 C. B. 797; *S. C. 87 E. L. & Eq.* 281; *Illinois Cent. R. R. Co. v. Jewell*, 46 Ill. 99; *Harper v. Indianapolis, &c., R. R. Co.*, 47 Mo. 567, and cases cited; *Moss v. Pacific R. R. Co.*, 49 Mo. 167; *Pittsburgh, &c., R. R. Co. v. Ruby*, 38 Ind. 294; *Davis v. Detroit, &c., R. R. Co.*, 20 Mich. 105; *McMahon v. Davidson*, 12 Minn. 357; *Weger v. Pennsylvania R. R. Co.*, 55 Penn. St. 460; *Huntingdon, &c., R. R. Co. v. Decker*, 82 Penn. St. 119; *S. C. 84 Penn. St. 419*; *Chapman v. Erie R. Co.*, 55 N. Y. 579; *Blake v. Maine Centr. R. R. Co.*, 70 Me. 60; *Maxwell v. Hannibal, &c., Co.*, 85 Mo. 95; *Ind. Mfg. Co. v. Millican*, 87 Ind. 87; *Nordyke, &c., Co. v. Van Sant*, 99 Ind. 188. In *McDermott v. Hannibal, &c., Co.*, 87 Mo. 285, it is held that the master is liable whether he knew the unfitness or not, if the servant injured did not. The duty cannot be escaped by delegation. *Fay v. Minn., &c., Co.*, 30 Minn. 231;

Quincy Min. Co. v. Kitts, 42 Mich. 34; *Mann v. Pres., &c., Del., &c., Co.*, 91 N. Y. 495. As to the degree of care required in the selection of servants, see *Mobile, &c., R. R. Co. v. Thomas*, 42 Ala. 672, 715; *Alabama, &c., R. R. Co. v. Waller*, 43 Ala. 459. It is not enough that such care as is ordinary is used if that is not reasonable under all the circumstances. *Wabash Ry. Co. v. McDaniels*, 107 U. S. 454. If a servant, originally fit, is retained after the master might, with reasonable care, know he has become unfit, the master is liable. *Mich. Centr., &c., Co. v. Gilbert*, 46 Mich. 176; *Hilts v. Chicago, &c., Ry. Co.*, 55 Mich. 437. See *Neilon v. Kansas, &c., Ry. Co.*, 85 Mo. 599. But the mere proof of specific careless acts is not enough to charge the master with knowledge of his incompetence. *Huffman v. Chicago, &c., Ry. Co.*, 78 Mo. 50. Nor is a single negligent act of a servant enough to show him incompetent. *Balt., &c., Co. v. Neal*, 65 Md. 433. Nor is his laziness. *Corson v. Maine Centr., &c., Co.*, 76 Me. 244.

for the argument that the servant, by continuing the employment, engages to assume its risks. So far as the particular peril is concerned the implication of law is rebutted by the giving and accepting of the assurance; for nothing is plainer or more reasonable than that parties may and should, where practicable, come to an understanding between themselves regarding matters of this nature.¹

[*560] *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 a case, and as such is responsible under rules heretofore given.

8. As the servant only undertakes to assume the hazards 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 ground for an action under the same circumstances which would render liable any stranger who might have been the employer of the negligent servant.

Liability where the Master delegates his Superintendence. The foregoing enumeration of cases is sufficient to show that the master is liable in all cases where the injury has resulted

¹ See *Patterson v. Wallace*, 1 Macq. H. L. 748, S. C. 28 Eng. L. & Eq. 48; *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 521; *Patterson v. Pittsburgh, &c., R. R. Co.*, 76 Penn. St. 389; S. C. 18 Am. Rep. 412; *Conroy v. Vulcan Iron Works*, 6 Mo. App. 102. The master is liable if the defect or danger is such that an ordinarily prudent servant would continue at the work after promise. *Hough v. Railway Co.*, 100 U. S. 213. Otherwise not. *Dist. of Col. v. McElligott*, 117 U. S. 621. If in the particular case the business of the master is entrusted to another, his assurance must be taken as that of the master himself, but the assurance of any subordinate servant could not be so taken. *Fort Wayne*

&c., *R. R. Co. v. Gildersleeve*, 33 Mich. 133. See *Nelson v. Winona, &c., Co.*, 33 N. W. Rep., 908 (Minn.); *Ind., &c., Co. v. Watson*, 14 N. E. Rep. 721 (Ind). It is sufficient if the promise is made not to plaintiff individually but to his gang of workmen in his presence. *Atchison &c. Co., v. Sadler*, 16 Pac. Rep., 46 (Kan.)

² *Paulmier v. Erie R. Co.*, 34 N. J. 151; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700; *Pittsburgh, &c., Co. v. Henderson*, 37 Ohio St. 549; *Cone v. Del. &c., Co.*, 81 N. Y. 206; *Ellis v. New York &c., Co.* 95 N. Y. 546; *Stringham v. Stewart*, 100 N. Y. 516; *Booth v. Boston, &c., Co.* 73 N. Y. 38; *Elmer v. Locke*, 135 Mass. 575.

from his own negligence, and not from any of the customary risks of the employment.' But there still remains the very serious difficulty of determining what, in particular cases, is fairly imputable to the master as a neglect of personal duty, or on the other hand, is to be regarded as neglect on the part of one of his subordinates, who, though vested with a special authority in the case, and therefore representing the master *more directly and specially than do servants generally, is still, for all the purposes of the rules so far given, to be looked upon only as a servant whose negligence is within the ordinary risks of other servants in the same general employment.

We have seen that in some cases the master is charged with a duty to those serving him of which he cannot divest himself by any delegation to others. He is charged with such a duty as regards the safety of his premises, the suitability of the tools, implements, machinery or materials he procures or employs, and the servants he engages or makes use of. Whoever is permitted to exercise the master's authority in respect to these matters is charged with the master's duty, and the latter is responsible for a want of proper caution on the part of the agent, as for his own personal negligence.*

* For this general rule the following additional cases may be cited; *Roberts v. Smith* 2 H. & N. 213; *Mellers v. Shaw*, 1 Best & S. 437; *Ashworth v. Stanwix*, 8 El. & El. Q. B. 701; *Columbus, &c., R. R. Co. v. Webb*, 13 Ohio, (N. S.) 475; *O'Donnell v. Allegheny Valley R. R. Co.*, 59 Penn. St. 239; *Johnson v. Bruner*, 61 Id. 58; *Harrison v. Central R. R. Co.* 81 N. J. 293; *Paulmier v. Erie R. R. Co.* 34 N. J. 151; *Chicago, &c., R. R. Co. v. Harney*, 28 Ind. 28; *McGlynn v. Brodie*, 31 Cal. 376; *Chicago, &c., R. R. Co. v. Jackson* 55 Ill. 492; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282. In *Flike v. Boston, &c., R. R. Co.* 53 N. Y. 549, and *Booth v. Boston, &c., R. R. Co.*, 73 N. Y. 38, a railroad company was held liable as for its own negligence

for the act of a subordinate in sending out a train insufficiently supplied with brakemen. But compare *Mad River, &c., R. R. Co. v. Barber* 5 Ohio, (N. S.) 541; *Skipp v. Eastern Counties R.*, 9 Exch. 223.

* *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 562; *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 521; *Chicago, &c., R. R. Co. v. Jackson*, 55 Ill. 492. "As to acts which a master or principal is bound as such to perform toward his employes, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present and liable for the manner in which they are performed." *Corcoran v. Holbrook*, 59 N. Y. 517, 520, per RAPALLO, J.; S. C. 17 Am. Rep.

But these are not the only cases in which the master is to be considered as represented by an agent, who for the time being is charged with his duty. A corporation can only manage its affairs through officers and agents, and if it is to be held responsible to its servants for negligence in any case, it must be because some of these are negligent. But whose negligence shall be imputed to the corporation as the negligence of the principal itself? Certainly not that of all its officers and agents, for this would be to abolish wholly, in its application to the case of corporations, a rule alike reasonable and of high importance.

So far as the corporate directors are concerned, no question can be made that for any such purpose they represent the corporation, and their acts, as a board, are the acts of a principal. They constitute the highest and most authoritative expression of corporate volition, and the corporate duties are duties to be performed by the board. But such board holds only [*562] periodical *meetings, and at other times the powers of the corporation are usually expected to be, and actually are, exercised by some officer or general superintendent with large discretionary powers. Unless such officer or superintendent is to be considered as occupying, for all the purposes of the

369. This applied to the case of employment of servants by superintendent. *Gormly v. Vulcan Iron Works*, 61 Mo. 492; *Brabbits v. Chicago, &c., R. R. Co.*, 38 Wis. 289. And, see *Stoddard v. St. Louis, &c., R. R. Co.*, 65 Mo. 514; *Mann v. Pres., &c., Del., &c., Co.*, 91 N. Y. 495; *Quincy Min. Co. v. Kitts*, 42 Mich. 34. So of the duty to warn an inexperienced servant of non-apparent dangers in the service. *Wheeler v. Wason Mfg. Co.*, 135 Mass. 294; *Ryan v. Tarbox*, Id. 201; *Atlas Eng. Works v. Randall*, 100 Ind. 293. If a superior servant, who, as to some duties represents the master in doing a servant's work injures another servant the master is not liable. Thus where a superintendent starts machinery. *Crispin v. Babbitt*, 81 N. Y. 516; where a foreman, ordered by the master to replace

ropes with new ones when needed, fails to do so; *Johnson v. Boston Tow Boat Co.*, 135 Mass. 209; where a yard master signals to start an engine; *McCosker v. Long Isl., &c., Co.*, 84 N. Y. 77. See *Brick v. Rochester, &c., Co.*, 98 N. Y. 211; *Willis v. Oreg., &c., Co.*, 11 Oreg. 257; *Quinn v. New Jersey, &c., Co.*, 23 Fed. Rep. 363; *Peterson v. Whitebreast, &c., Co.*, 50 Ia. 673. *Contra*, *Berea Stone Co. v. Kraft*, 31 Ohio St. 287. In *Chicago, &c., Co. v. May*, 108 Ill. 283, a foreman in ordering the pushing of a car in a yard was held to be performing a master's duty; and see *Wabash, &c. Ry. Co. v. Hawk*, 12 N. E. Rep. 253 (Ill.); *Baldwin v. St. Louis, &c., Co.*, 68 Ia. 37; *Hoke v. St. Louis, &c., Co.*, 88 Mo. 360; *Criswell v. Pittsburgh, &c., Ry. Co.*, 6 S. E. Rep. 31 (W. Va.).

rule now under consideration, the position of the principal itself, it is obvious that there must be assumed in the case of corporations, and indeed in other cases where the whole charge of the business is delegated to another, some risks which the servant does not assume where the master himself takes general charge in person.

It has been seen that the superior position of the negligent servant, as that of a foreman, conductor, etc., is not regarded as affecting the case. But a foreman is not necessarily, or usually perhaps, entrusted with any large share of the master's discretionary authority. Neither is the conductor of a train of cars, except as to the particular duty of taking it safely to its destination. His duty may be and probably is less responsible than that of the telegraph operator who directs his movements and those of others in charge of trains on the line; and if the conductor is to be regarded as principal for some purposes, so should the operator be for others. But this would suggest questions and distinctions that could only be confusing, and would preclude the possibility of any settled rule whatsoever. 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. As is said in one case: "When the servant by whose negligence or want of skill other servants of the common employer have received injury is the '*alter ego*' of the master, to whom the employer has left everything, then the middleman's negligence is the negligence of the employer, for which the latter is liable. The servant in such case represents the master, and is charged with the master's duty. When the middleman or superior servant employs and discharges the subalterns, and the principal withdraws from the management of the business, or 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 the 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."¹ It is the personal duty of the mas-

¹ ALLEN, J., in *Malone v. Hathaway*, 64 N. Y. 5, 9; S. C. 21 Am. Rep. 573. A foreman or superior servant, with power to hire and dis-

ter to see that suitable servants are employed, that his tools, machinery, etc., are reasonably safe, or at least, to see that there is no negligence in employing or procuring them; and the delegate

charge the men under him is such an *alter ego*. *Stephens v. Hannibal, &c., Ry. Co.*, 86 Mo. 221; *Texas, &c., R. R. Co. v. Whitmore*, 58 Tex., 276; *Gunter v. Graniteville, &c., Co.*, 18 S. C. 262; *Patton v. West, &c., R. R. Co.*, 1 S. E. Rep. 863 (N. C.); *Hussey v. Coger*, 39 Hun, 639. See *Tyson v. South, &c., R. R. Co.*, 61 Ala. 554; *Brown v. Sennett*, 68 Cal. 225; *Slater v. Chapman*, 35 N. W. Rep. 106 (Mich.) So is the superintendent of a mine; *Mayhew v. Sullivan Min. Co.*, 76 Me. 100; *Beeson v. Green Mt., &c., Co.*, 57 Cal. 20; *Ryan v. Bagaley*, 50 Mich. 179. A master mechanic of a railroad; *Ohio, &c., Ry. Co. v. Collarn*, 73 Ind. 201. A conductor as to the engineer of his train; *Chicago, &c., Ry. Co. v. Ross*, 112 U. S. 377, and see cases note 1, p. 639, *supra*. If the master places the entire charge of his business, or a distinct branch of it, in the hands of an agent, exercising no discretion and no oversight, the neglect by the agent of ordinary care in supplying proper machinery, is a breach of duty for which the master is liable. *Mullan v. Philadelphia, &c., R. R. Co.*, 78 Penn. St. 25; S. C. 21 Am. Rep. 2. See *Malone v. Hathaway*, 64 N. Y. 5; S. C. 21 Am. Rep. 573; *Hofnagle v. N. Y. Cent. R. R. Co.*, 55 N. Y. 608. That the duty to furnish safe appliances or place to work cannot be escaped by delegation, see also *Wilson v. Willimantic, &c., Co.*, 50 Conn. 433; *Krueger v. Louisville, &c., Co.*, 111 Ind. 51; *Sanborn v. Madura, &c., Co.*, 70 Cal. 261; *Fay v. Minn., &c., Ry. Co.*, 30 Minn. 231; *Kelly v. Erie, &c., Co.*, 34 Minn. 321; *St. Louis, &c., Ry. Co. v. Harper*, 44 Ark. 524; *Ind. Car Co. v. Parker*, 100 Ind. 181;

Moore v. Wabash, &c., Ry. Co., 85 Mo. 588. So as to the duty to keep appliances in repair. *Hough v. Railway Co.*, 100 U. S. 213; *North. Pac. R. R. Co. v. Herbert*, 116 U. S. 642. Where a master gave proper orders and employed a competent master mechanic but the workmen failed to repair properly an engine boiler which exploded and injured the engineer, the master was held liable. *Fuller v. Jewett*, 80 N. Y. 46; *Penn., &c., Co. v. Mason*, 109 Penn. St. 296. Otherwise, if after the boilermakers had finished work it explodes and injures machinists at work at it while still in the shop. *Murphy v. Boston, &c., Co.*, 88 N. Y. 146. Where a foreman, ordered to replace a rope when worn out, neglected to do so, and a workman was hurt, the master was held not liable. His duty is to furnish suitable means and competent men to keep his appliances in order when the defect is one that must frequently arise from use. The servants who use the appliances and those whose duty it is to maintain them in order are fellow servants. *Johnson v. Boston Tow Boat Co.*, 135 Mass. 209; *McGee v. Boston Cordage Co.*, 139 Mass. 445. See *Daley v. Boston, &c., R. R. Co.*, 16 Atl. Rep. 620 (Mass.) A similar ruling has been made as to a miner and a servant employed to repair the timber work in the mine. *Quincy Min. Co. v. Kitts*, 42 Mich. 34. But if a machine is dangerous from lack of repair and the machinists repair it only when it ceases to do good work without regard to its condition as a dangerous machine, the master is not necessarily relieved by showing that he has employed competent machinists and

to whom he entrusts the duty, stands, in respect thereto, in the master's place.

It is also, as has been shown, the duty of the master not to send the servant upon dangerous service which he has not undertaken for; and if he places the servant under the orders of another who requires him to perform such dangerous service, whereby he is injured, the wrongful act is properly attributable to the master himself.¹

Contributory Negligence. Where the master is sued by his servant for an injury which it is claimed has been occasioned by his negligence, it is very properly and justly held that the plaintiff is not to recover if his own negligence contributed with that of the defendant in producing the injury.² The rules here are

furnished suitable means for repair. *Rogers v. Ludlow Mfg. Co.*, 144 Mass. 198. *Rice v. King Philip Mills*, 144 Mass. 229. Notice of want of repair to foreman in charge of such work is notice to the master; *Brabbits v. Chicago, &c., R. R. Co.*, 88 Wis. 289; *Schultz v. Chicago, &c., Co.*, 48 Wis. 875. This duty applies to keeping a railway track safe; *Elmer v. Locke*, 135 Mass. 575; *Davis v. Cent. Vt. &c., Co.*, 55 Vt. 84; *Calvo v. Railroad Co.*, 23 S. C. 526, and cases in note 1, p. 649, *supra*.

¹ This is well shown by *POTTER, J.*, in *Mann v. Oriental Print Works*, 11 R. I. 152. And, see *Chicago, &c., R. R. Co. v. Bayfield*, 37 Mich. 205; *Frandsen v. Chicago, &c., R. R. Co.*, 26 Iowa, 372; *Cook v. St. Paul, &c., Co.*, 84 Minn. 45; *Douglas v. Texas, &c., Co.*, 63 Tex. 564; *Atlanta, &c., Co. v. Speer*, 69 Geo. 137. Compare *Allen v. New Gas Co.*, 1 Exch. Div. 251. So the master is liable, if a foreman, knowing its condition, orders a workman to use a defective machine. *Ind. Car Co. v. Parker*, 100 Ind. 181. Where a child was employed to work under a "boss" in a certain room and was sent by the

boss to work elsewhere and was there injured, the master was held not liable on the ground that the sending him elsewhere was beyond the boss' power. *Fisk v. Centr. Pac., &c., Co.*, 13 Pac. Rep. 144 (Cal).

² *Thompson v. Central R. R. Co.*, 54 Geo. 509; *Johnson v. Western, &c., R. R. Co.*, 55 Geo. 133; *Western, &c., R. R. Co. v. Adams*, 55 Geo. 279; *Hayden v. Smithville Manuf. Co.*, 29 Conn. 548; *Mulherrin v. Delaware, &c., R. R. Co.*, 81 Penn. St. 366; *Cooper v. Butler*, 103 Penn. St. 412; *Lyon v. Detroit, &c., R. R. Co.*, 31 Mich. 429; *Brewer v. Flint, &c., Ry. Co.*, 56 Mich. 620; *Chicago, &c., R. R. Co. v. Donahue*, 75 Ill. 106; *Illinois Cent. R. R. Co. v. Patterson*, 69 Ill. 650; *Chicago, &c., R. R. Co., v. Bragonier*, 119 Ill. 51; *Burns v. Boston, &c., R. R. Co.*, 101 Mass. 50; *Vicksburgh, &c., R. R. Cp. v. Wilkins*, 47 Miss. 404; *Hulett v. Kansas, &c., Co.*, 67 Mo. 239; *Rasmussen v. Chicago, &c., Co.*, 65 Ia. 236; *Wormell v. Maine Centr., &c., Co.*, 10 Atl. Rep. 49 (Me.); *Judkins v. Maine Centr. R. R. Co.*, 14 Atl. Rep. 735 (Me.) It is such negligence if the servant is injured from disobedience

the same that are applied in other cases of contributory negligence; and all that is special in their application springs [*564] from *the obligation that may, under some circumstances, rest upon the servant to report dangers to the master. It has often been held that if a 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 justly be held to be contributory negligence on the plaintiff's part if he failed to report it.¹

It may also be remarked that in all cases 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 plain-

of the rules of the master. *Penn. &c., Co. v. Whitcomb*, 111 Ind. 212; *Deeds v. Chicago, &c., Co.*, 37 N. W. Rep. 124 (1a); *North. Centr. Ry. Co. v. Husson*, 101 Penn. St. 1; *Pilkenton v. Gulf, &c., Ry. Co.*, 7 S. W. Rep. 805 (Tex.) But such disobedience is not conclusive of contributory negligence if the master suffers the rule to be habitually disregarded or makes its violation necessary or probable. *Hayes v. Bush, &c., Mfg. Co.*, 41 Hun, 407. If a servant left free to choose a method of doing work, needlessly adopts a dangerous way the master is not liable. *St. Louis Bolt, &c., Co. v. Brennan*, 20 Ill. App. 555. When in carrying out the master's personal direction, the servant does what may or may not be negligent, the question of his being at fault is for the jury. *Woodward v. Shumpp*, 14 Atl. Rep. 378.

¹ *Ladd v. New Bedford, &c., R. R. Co.*, 119 Mass. 412; S. C. 20 Am. Rep. 331; *LeClair v. St. Paul, &c., R. R. Co.*, 20 Minn. 9; *Sullivan v. Louisville Bridge Co.*, 9 Bush, 81; *Patterson v. Pittsburgh, &c., R. R. Co.*, 76 Penn. St. 389; S. C. 18 Am. Rep. 412; *Malone v. Hawley*, 46 Cal. 409; *Dil-*

lon v. Union Pacific R. R. Co., 3 Dill. 319; *Belair v. Chicago, &c., R. R. Co.*, 48 Iowa, 662; *Davis v. Detroit, &c., R. R. Co.*, 20 Mich. 105; *Mad River, &c., R. R. Co. v. Barber*, 5 Ohio, (n. s.) 541; *St. Louis, &c., R. R. Co. v. Britz*, 72 Ill. 256. It has been held that an instruction that a railroad company would not be liable notwithstanding the unsafe condition of the track if plaintiff, a servant, knew, or could by ordinary diligence have known, the state of the track, was properly refused; that it was not the business of the servant to ascertain whether the machinery and structure of the road are defective; but that the duty of the company is to keep them in a safe condition, and it is responsible for a failure to do so. *Porter v. Hannibal, &c., R. R. Co.*, 60 Mo. 160. But if the servant has full knowledge and makes no report or objection, he takes the risk. *Kroy v. Chicago, &c., R. R. Co.*, 32 Iowa, 357; *McGlynn v. Brodie*, 31 Cal. 376. So if he knows of his fellow servant's habit of doing business contrary to the rules or in an improper way and acquiesces in it. *Youll v. Sioux City, &c., Co.*, 66 Ia. 346; *Lake Shore, &c., Ry. Co. v. Knittal*, 33 Ohio St. 468.

tiff he must make out his case, but also because all presumptions will favor the proper performance of duty.¹

General Summary. Perhaps this whole subject may be accurately summed up in a single sentence as follows: 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.

¹ See *Gilman v. Eastern R. R. Co.*, 10 Allen 233; *Wright v. N. Y. Central R. R. Co.*, 25 N. Y. 562; *Hildebrand v. Toledo, &c., R. R. Co.*, 47 Ind. 399; *Crandall v. McIlrath*, 24 Minn. 127; *Stafford v. Chicago, &c., R. R. Co.*, 114 Ill. 244; *Pingree v. Leyland*, 185 Mass. 898; *Heath v. Whitebreast Coal, &c., Co.*, 65 Ia. 747; *Louisville, &c., Co. v. Allen*, 78 Ala. 494; *Painton v. Nor. Centr. Ry. Co.*, 88 N. Y. 7; *Murphy v. St. Louis, &c., Co.*, 71 Mo. 202; *St. Louis, &c., Ry. Co. v. Harper*, 44 Ark. 524; *East Tenn. &c., Co. v. Stewart*, 13 Lea, 432

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*CHAPTER XIX.

NUISANCES.

In the Commentaries of Mr. Justice BLACKSTONE a nuisance is defined as being anything done to the hurt or annoyance of the lands, tenements or hereditaments of another.¹ By hurt or annoyance here is meant, not a physical injury necessarily, but an injury to the owner or possessor thereof, as respects his dealing with, possessing or enjoying them. Strictly construed the definition would include those injuries done by the direct application of force, and which are known in the law as trespasses; but these were not meant to be embraced, although some of them may be treated either as trespasses or nuisances, at the option of the party injured. For example, to keep a vicious animal after notice of his vicious propensity, is to maintain a nuisance;² but when the vicious beast attacks and injures an individual, the party injured may treat this violence as the unlawful violence of the owner and bring suit in trespass.³

It should be observed also that a nuisance which will support a private action may consist in such interference with a public easement or with any other public right as specially annoys or injures an individual; such, for instance, as the blocking up of a public way of any sort when one is endeavoring to make use of it. In these cases the public nuisance becomes a private nuisance also, and any sufficient definition must include cases of this nature. An actionable nuisance may, therefore, be said to be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights.

¹ 8 Bl. Com. 215. The intention is immaterial to the inquiry whether an act is a nuisance. *Bonnell v. Smith*, 53 Ia. 281.

² *Brown v. Hoburger*, 52 Barb. 15; *Milman v. Shockley*, 1 Houst. 444;

Meibus v. Dodge, 33 Wis. 300; S. C. 20 Am. Rep. 6.

³ *Van Leuven v. Lyke*, 1 N. Y. 515, 516; *Wales v. Ford*, 8 N. J. 267; *Dolph v. Ferris*, 7 W. & S. 267; *Morse v. Nixon*, 6 Jones, (N. C.) 293; *Cogswell v. Baldwin*, 15 Vt. 404.

***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 of nuisances may flow from them. For example, the swamps and marshes that, from their exhalations, prove injurious to the health of those living near them, are not nuisances provided they exist only as they were by nature, and the hand of man has done nothing to increase them or vary their deleterious effects. No authority in the State to compel their owners to abate them by drainage is recognized, though the State may doubtless assume the duty and provide for it by special levies.¹ 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

Classification of Nuisances. Recurring to the definition of a nuisance it will be perceived that it must embrace a very large proportion of those injuries that are commonly redressed in

¹ See *Reeves v. Treasurer, &c.*, 8 Ohio, (N. S.) 333, and cases collected in *Cooley on Taxation*, pp. 510-511. When, however, the right of the State to make special levies on the owners for drainage is recognized, it would seem to be going but a step further to compel them to drain by way of abating a nuisance. But the one step is nevertheless a doubtful step.

That cannot be a common law nuisance which the law authorizes as a public improvement. *Transportation Co. v. Chicago*, 99 U. S. 635. But a license to do an act lawfully, as to run a steam engine, is not a license to create a nuisance. *Sullivan v. Royer*, 18 Pac. Rep. 655 (Cal.).

² See *Woodruff v. Fisher*, 17 Barb. 224; *Hartwell v. Armstrong*, 19 Barb. 166. Unwholesome vapor from an artificial pond is a nuisance. *Adams v. Popham*, 76 N. Y. 410. The ob-

struction of a running stream occasioned by the washing down of its banks does not, in law, constitute a nuisance, unless the obstruction is attributable to the acts or agency of man. *Mohr v. Gault*, 10 Wis. 513. Where for his own protection one changes the bed of a stream upon his own land and in flood time the opposite bank is thereby injured, he is not liable if a person of ordinary prudence would not have anticipated such injury. *Railroad Co. v. Carr*, 38 Ohio St. 448. But if damage is done to another by an ordinary flood after the embanking and the damage might reasonably have been foreseen, he is liable. *Crawford v. Rambo*, 44 Ohio St. 279. See *Lamb v. Recl. Dist.*, 14 Pac. Rep. 625 (Cal.); *Avery v. Empire Woolen Co.*, 82 N. Y. 582. But compare *Armendaiz v. Stillman*, 67 Tex. 458.

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. It is very seldom, indeed, that even a definition of a nuisance has been attempted, for the reason that, to make it sufficiently comprehensive, it is necessary to make it so general it is likely to define nothing. A classification would be equally difficult, because it must either be greatly extended or it must omit many cases. Indeed, new and peculiar cases are arising constantly. In this brief summary of the law of [*567] *nuisance a few of the most important will be noticed, and the principles applicable to them may be applied generally.

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 an upper bay window or some similar 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 So it is a nuisance if the branches of one's trees extend over the premises of another, and the latter may abate it by sawing them off.² The

¹ *Meyer v. Metzler*, 51 Cal. 142; *Codman v. Evans*, 5 Allen, 308; *Cherry v. Stein*, 11 Md. 1; *Skinner v. Wilder*, 88 Vt. 115; *Grove v. Fort Wayne*, 45 Ind. 429; S. C. 15 Am. Rep. 262; *Wilmarth v. Woodcock*, 58 Mich. 482. So a bay window over a street is a public nuisance. *Reimer's App.* 100 Penn. St. 182.

² *Earl of Lonsdale v. Nelson*, 3 B. & C. 302, 311; *Grandona v. Lovdal*, 70 Cal. 161. Where maple branches overhung a lot, it was held the remedy was by clipping them, not by abatement as they were not noxious. *Countryman v. Lighthill*, 24 Hun, 405. But where overhanging poisonous yew branches poison a pasturing horse, an action will lie for his value.

Crowhurst v. Amersham, &c., Board, L. R. 4 Exch. D. 5. There is a dispute concerning the ownership of trees on the line of adjoining estates, or so near them as to draw sustenance from both. The rule, however, seems to be that if the tree is on the line, it is owned in common by the two. *Dubois v. Beaver*, 25 N. Y. 123; *Lyman v. Hale*, 11 Conn. 177. If it stands on one side the line, it is owned, with its fruits, by the proprietor on that side. *Masters v. Pollicie*, 2 Roll. R. 141; *Holder v. Coates*, 1 Mood. & M. 112; *Waterman v. Soper*, 1 Ld. Raym. 737. But, see, as to this, *Griffin v. Bixby*, 12 N. H. 454.

same rule applies here as in trespass; the insignificance of the injury goes to the extent of the recovery and not to the right of action. More serious cases are mentioned below.¹

Filthy Percolations. It is said in an early case that 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 *Nor where this is the natural result of the [*568] deposit is the question of liability one depending on degrees of care to prevent it. Says FOSTER, J.: "To suffer filthy water from a vault to percolate or filter through the soil into the land of a contiguous proprietor, to the injury of his well or cellar, where it is done habitually and within the knowledge of the party who maintains the vault, whether it passes above ground or below, is of itself an actionable tort. Under such

¹For a case of a cooking range held to be a nuisance to the occupant on the other side the partition wall, see *Grady v. Wolsner*, 46 Ala. 381. A stand to which spectators are admitted erected on one's land so as to overlook a fenced ball park is not a nuisance of which the ball club can complain. *Detroit Base Ball Club v. Deppert*, 27 N. W. Rep. 856 (Mich.).

²*Tenant v. Goldwin*, 1 Salk. 360; S. C. 6 Mod. 311.

³*Tenant v. Goldwin*, 1 Salk. 360; *Ball v. Nye*, 99 Mass. 582; *Columbus Gas. Co. v. Freeland*, 12 Ohio, (N. S.) 892; *St. Helens Chemical Co. v. St. Helens*, L. R. 1 Exch. Div. 196; *Marshall v. Cohen*, 44 Geo. 489; S. C. 9 Am. Rep. 170; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257; *Tate v. Parrish*, 7 T. B. Mon. 325; *Greene v. Nunnemacher*, 36 Wis. 50; *Haugh's App.* 102 Penn. St. 42. Plaintiff and defendant were adjoining occupiers. Plaintiff's premises and stock in trade were injured by water and sewage coming into his cellar from defend-

ant's premises. An old drain commenced on defendant's premises and received his sewage; ran under and received the sewage of several other houses; turned back through defendant's premises; ran under plaintiff's cellar, and then to a main sewer. Defendant did not know that this drain turned back and ran through his premises under those of the plaintiff, nor that it was out of repair. It was in fact out of repair and its defective state under defendant's premises caused the mischief to plaintiff. The defective state of the drain was not attributable to the negligence of the defendant, but he was held liable. While the plaintiff was bound to receive sewage through the old drain, the defendant was bound to keep the sewage which he was bound to receive from passing from his own premises to the plaintiff's otherwise than through the old drain. *Humphries v. Cousins*, L. R. 2 C. P. D. 239.

circumstances the reasonable precaution which the law requires, is effectually to exclude the filth from the neighbor's land; and not to do so is of itself negligence." Only sudden and unavoidable accident, which could not have been foreseen by due care could be an excuse in such a case.¹

Injury to realty by percolating waters. The soil of a man's estate may be rendered cold and unproductive, or the walls of his buildings weakened, or made damp and unhealthy, and in various other ways his property injured 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;² or gathering water in reservoirs not sufficiently protected against such consequence;³ or damming up the stream below and thus compel-

¹ *Ball v. Nye*, 99 Mass. 592; *Hodgkinson v. Ennor* 4 Best & S. 229. See *Ballard v. Tomlinson*, L. R. 29 Ch. D. 115, stated fully p. *587, *supra*. The possible pollution from a graveyard to be established of a well some distance off, is not within this rule, distinguishing the above cases where the exclusion was practicable. "If withdrawing the water from one's well by an excavation in adjoining lands will give no right of action, it is difficult to understand how corrupting its waters by a proper use of adjoining premises can be actionable where there is no intent to injure and no negligence." *Upjohn v. Richland*, 46 Mich. 542.

² *Bellows v. Sackett*, 15 Barb. 96; *Underwood v. Waldron*, 33 Mich. 232.

³ *Monson, &c., Co. v. Fuller*, 15 Pick. 554; *Wilson v. New Bedford*, 108 Mass. 261. So where by a mound or defective piping, one causes water to run into his cellar, whence it percolates through defendant's wall. *Hurdman v. Northeastern Ry. Co.*, L. R. 3 C. P. D. 168; *Snow v. White-*

head, L. R. 27 Ch. D. 588. Distinguishing cases where water flows by gravitation from an upper worked out mine into a lower, such as *Wilson v. Waddell*, L. R. 2 App. Cas. 95; *Lord v. Carbon Iron Co.*, 42 N. J. Eq. 157; *Nat. Copper Co. v. Minn. Min. Co.*, 57 Mich. 83; *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583. If water flows into another's cellar from defendant's he is liable, although part of the water in his cellar got there without his fault. *Slater v. Mersereau*, 64 N. Y. 138. So if one excavates his land and lets in the sea which percolates into his neighbor's well. *Mears v. Dole*, 135 Mass. 508. Where one dug a hole in his lot and water gathering in it damaged an adjoining lot, it was held that it was for the jury to say whether the allowing the water to collect and remain was a nuisance. *Quinn v. Chicago, &c. Co.* 63 Ia. 510. But where spouts from a house threw water on defendant's land and it soaked through the soil into plaintiff's cellar on a lower lot adjoining it was held that no action would lie,

ling 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 The right of one to be secure against the undermining of his buildings by water, or the destruction of his crops, or the poisoning of the air by the stealthy attacks of an unseen element, is as complete as his right to be protected against open personal assaults or the *more demonstrative, but not more destructive, [*569] trespasses of animals.*

Deposits upon Land. For one without license to step upon another's estate has been seen to be 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, therefore, a nuisance if the highway authorities shall open drains by the side of the roads which must and do carry earth and other materials and deposit them upon adjacent lands.* Their liability here rests upon the same ground as that of any other persons committing a like nuisance; indeed, it is because in what they do they exceed their authority as officers and lose the official protection, that they become liable at all. So it is a nuisance if a riparian proprietor shall cast into the stream earth, sand, the refuse of his business,

as the natural flow of surface water is no wrong. *Sowers v. Lowe*, 9 Atl. Rep. 44 (Penn).

¹ РЕСКНАМ, J., in *Pixley v. Clark*, 85 N. Y. 520, 531. See *Gray v. Harris*, 107 Mass. 493; *Shipley v. Fifty Associates*, 106 Mass. 194; *Brown v. Bowen*, 30 N. Y. 519; *Fuller v. Chicopee Manuf. Co.* 16 Gray, 46.

* See *Broder v. Saillard*, 2 Ch. Div. 692; *S. C. 17 Moak*, 693; *Cooper v. Barber*, 8 Taunt. 99; *Smith v. Kendrick*, 7 C. B. 515.

* *Pumpelly v. Green Bay Co.*, 18 Wall. 166; *Nevins v. Peoria*, 41 Ill. 502; *Aurora v. Gillett*, 56 Ill. 132;

Aurora v. Reed, 57 Ill. 30; *Alton v. Hope*, 68 Ill. 167; *Jacksonville v. Lambert*, 62 Ill. 519; *Pettigrew v. Evansville*, 25 Wis. 223; *Moran v. McClearns*, 63 Barb. 185. See *Mosier v. Vincent*, 34 Iowa, 478, 494; *Marvin v. Pardee*, 64 Barb. 353; *Rowe v. Portsmouth*, 56 N. H. 291; *S. C. 23 Am. Rep. 464*; *Adams v. Richardson*, 43 N. H. 212; *Waldron v. Berry*, 51 N. H. 136; *Proprietors, &c. v. Lowell*, 7 Gray, 223; *Woodward v. Worcester*, 121 Mass. 245; *Ashley v. Port Huron*, 85 Mich. 296; *S. C. 20 Am. Rep. 628 n.*; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463.

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.¹ 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.² 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.³

[*570] ***Leakage from Water Pipes, etc.** 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 pipes, or by leakage from other cause, the question of liability is dependent upon the observance or neglect of care. If the proprietor of the pipes is guilty of negligence, which causes the leakage, or fails to observe due care in protecting against it, he is responsible, otherwise not.⁴

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 with sufficient strength to retain the water under all contingencies which can reasonably

¹ Little Schuylkill, &c., Co. v. Richards, 57 Penn. St. 143, 146. See Red River, &c., Mills v. Wright, 30 Minn. 249. The depositing of waste must be no more than a reasonable use of the stream if it is to be defended. Lockwood, &c., Co. v. Lawrence, 77 Me. 297; Canfield v. Andrew, 54 Vt. 1. A deposit of mining waste cannot be upheld on the ground of custom. Woodruff v. North Bloomfield, &c., Co., 18 Fed. Rep. 753; People v. Gold Run, &c., Co., 66 Cal. 138. But if material lawfully put in a stream to protect a bridge is washed down by an extraordinary flood and causes an

overflow of the lower land, there is no liability. Ill. Centr. &c., Co. v. Bethel, 11 Ill. App. 17.

² MILLER, J., in Pumpelly v. Green Bay Co., 15 Wall. 166, 177; Eaton v. Boston, &c., R. R. Co., 51 N. H. 504.

³ Little Schuylkill, &c., Co. v. Richards, 57 Penn. St. 143, 146; Robinson v. Black, &c., Co., 50 Cal. 460.

⁴ Carstairs v. Taylor. L. R. 6 Exch. 217; Blyth v. Proprietors, &c., 11 Exch. 781; Ortmayer v. Johnson, 45 Ill. 469; Killion v. Power, 51 Penn. St. 429; Moore v. Goedel, 7 Bosw. 591; S. C. 34 N. Y. 527; Schwab v. Cleveland, 28 Hun, 458.

be anticipated, and afterwards to preserve and guard it with due care. For any negligence, either in construction or in subsequent attention, from which injury results, parties maintaining such reservoirs must be responsible.¹ We say nothing now of injuries arising from the flooding of lands by reservoirs, which, by raising the water, must and do have that effect, but confining our attention to the case of reservoirs which cause injuries to the lower proprietors only as they break away, the American decisions seem to plant the liability on the ground of negligence, and the party constructing or maintaining the reservoir is held liable, not at all events, but as he might be if he had negligently constructed a house which fell down, or invited another into a dangerous place without warning. How far the English doctrine is different may be learned from certain recent cases. In the leading case of *Rylands v. Fletcher* 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.

Says Mr. Justice BLACKBURN, *with the approval of the [*571] House of Lords, "We think that the true rule of law is, that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth from his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome

¹ *New York v. Bailey*, 2 Denio, 433; *Pixley v. Clark*, 35 N. Y. 520; *Monson Manuf. Co. v. Fuller*, 15 Pick. 554; *Wendell v. Pratt*, 12 Allen. 464; *Fuller v. Chicopee Manuf. Co.*, 16 Gray, 46; *Wilson v. New Bedford*,

108 Mass. 261; *Ipswich v. County Commissioners*, 108 Mass. 363; *China v. Southwick*, 12 Me. 238; *Lapham v. Curtis*, 5 Vt. 371; *Everett v. Hydraulic Co.*, 26 Cal. 225.

vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others, so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his bringing it there no mischief could have accrued, and it seems but just that he should, at his peril, keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench¹."

Precisely what is meant by "*vis major*, or the act of God," in this opinion we may, perhaps, learn by subsequent decisions. The recent case of *Nichols v. Marsland* to some extent appears to explain it. In that case a reservoir, in the construction and maintenance of which there was no negligence, was broken away by a rainfall greater and more violent than any during the memory of witnesses. An action being brought for injury thereby done,

Lord Ch. J. COCKBURN held the defendant liable, but in [*572] the *Exchequer Chamber the judgment was reversed.

Says Baron BRAMWELL, "What has the defendant done wrong? What right of the plaintiff has she infringed? She has done nothing wrong. She has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did, indeed, store it, and store it in such quantities that if it was let loose it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then, if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbor, the occupier of the house would be liable. That cannot be. Then why is the defendant liable, if some agent, over which she has no control, lets the water out? What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a lot of water for her own purposes; in the case of chimneys some one has put a ton of bricks fifty

¹ *Fletcher v. Rylands*, L. R. 1 Exch. 265, affirmed in the House of Lords, L. R. 3 H. L. Cas. 330, 339. See,

also, *Smith v. Fletcher*, L. R. 7 Exch. 305; S. C. L. R. 9 Exch. 64. Compare *Smith v. Kenrick*, 7 C. B. 515.

feet high for his own purposes; both equally harmless if they stay where placed, and equally mischievous if they do not. The water is no more a wild or savage animal than the bricks, while at rest, nor more so when in motion. Both have the same common property of obeying the law of gravitation. Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbor's land, and cause it to do damage; or a field of ripe wheat, which might be fired by lightning, and do mischief. I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but would be liable if, through any defect, though latent, the water escaped or the bricks fell. But here the act is that of an agent he cannot control.

"This case 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. I am by no means sure that the likeness of a wild animal is exact. I am by no means sure that if a man kept a tiger, and lightning broke his chain, *and he got loose and did mischief, that the man [*573] who kept him would not be liable. But this case and the case I put of the chimneys are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district, and so adapting it for habitation."¹

¹ *Nichols v. Marsland*, L. R. 10 Exch. 255; S. C. 14 Moak, 538, 542. See, also, *Madras R. Co. v. The Zemindar*, L. R. 1 Ind. App. 364; S. C. 9 Moak, 289; *Crompton v. Lea*, L. R. 19 Eq. Cas. 115; S. C. 11 Moak, 719. And see Mr. Bigelow's comments on *Rylands v. Fletcher*, Lead. Cas. on Torts, 492 et seq. Where a pipe sup-

plying the first floor with water from a tank at the top of a building burst and damaged a tenant's goods in the basement, the landlord was held not liable because the water was brought on the premises partly for the tenant's benefit. *Auderson v. Oppenheimer*, L. R. 5 Q. B. D. 602.

A comparison of these cases seems to show the English rule 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 is 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 and reasonable care by him. Due care must of course be a degree of care proportioned to the danger of injury from the escape;¹ but it is not very clear that the English rule, as thus explained, differs from that of this country.²

¹ It has been held in this country that if a dam is constructed on a stream subject to extraordinary freshets, these must be anticipated in building it, though they occur only once in many years. *Gray v. Harris*, 107 Mass. 492; *New York v. Bailey*, 2 Denio, 433; *Gulf, &c., R. R. Co. v. Pomeroy*, 67 Tex. 498. See *Rich v. Keshena, &c., Co.*, 56 Wis. 287. A mine owner dammed water coming into his mine from abandoned mines above. The adjacent lower owner had dug through the dividing line. When the dam broke the lower mine was flooded. If ordinary care was used in building the dam, there was no liability to the owner of the lower mine. *Jones v. Robertson*, 116 Ill. 543. See, also, *Myers v. Fritz*, 10 Atl. Rep. 30 (Penn.), where an extraordinary storm broke the barrier.

² In *Shipley v. Fifty Associates*, 106 Mass. 194, in which parties were held liable for an injury occasioned by the sliding of ice and snow from the roof, the court, in approval of *Rylands v. Fletcher*, say that "one must, at his peril, keep the ice or snow that collects upon his own roof within his own limits;" but they add—and this is the pith of the decision—

that he "is responsible for all damages if the shape of his roof is such as to throw them upon his neighbor's land, in the same manner as he would be if he threw them there himself." This is perfectly just, but the case seems far removed from *Fletcher v. Rylands*, for here the injury results as a natural and necessary consequence of the defendant's act, and must have been or should have been anticipated by him. Just as in *Hay v. Cohoes Co.*, 2 N. Y. 159, the defendant must or should have anticipated that the fragments of stone that were being blasted would fall within the plaintiff's enclosure. *Cabill v. Eastman*, 18 Minn. 324, is decided on the authority and reasoning of *Fletcher v. Rylands*. It was a case where defendant had undertaken to cut a channel for water through rock, and before its completion the water had burst through the sides of the tunnel, and rushed through and washed out land on which the plaintiff had a right of way and a mill. *Held*, that defendant was responsible irrespective of any question of negligence. *Hay v. Cohoes Co.*, 2 N. Y. 159, was cited with approval in what it says that the right of every man to make

***Falling Waters and Snows.** Every man has a clear [*574] 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 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 to so use his own as not unreasonably to restrict the enjoyment by others of corresponding rights. Still this duty only obliges him to use all due care and prudence to protect his neighbor, and does not require that he shall, at all events and under all circumstances, protect him; 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 eave troughs or gutters upon his building for leading off the water upon 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 cir- [*575]

use of his own as he pleases is not an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. On the other hand, the owner of a steam engine, purchased of makers of good reputation and handled with care, is not bound to anticipate that it will explode—*Losee v. Buchanan*, 51 N. Y. 476; *Marshall v. Welwood*, 38 N. J. 339—any more than he is that a domestic animal which has all his life been gentle and harmless will suddenly become vicious and inflict upon the first person who comes near him great bodily in-

jury. And see *Grand Rapids, &c., R. R. Co. v. Huntley*, 33 Mich. 537.

¹*Baker's Case*, 9 Co. 53 b; *Jackson v. Pesked*, 1 M. & S. 234; *Tucker v. Newman*, 11 Ad. & El. 40; *Fay v. Prentice*, 1 M. G. & S. 828; *Ashley v. Ashley*, 6 Cush. 70; *Aiken v. Benedict*, 39 Barb. 400; *Shipley v. Fifty Associates*, 106 Mass. 194; *Hazleton v. Edgmand*, 35 Kan. 202; *Gould v. McKenna*, 86 Penn. St. 297, where it is held no defense that the neighbor's wall struck by the drip is not well built. See, also, *Hooten v. Barnard*, 137 Mass. 36. 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.

cumstances, for which no one is in fault; and such injuries must be left to be borne by those on whom they fall.¹

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 cultivation, or unproductive. In the first case, that is, where the lower proprietor is deprived of the benefit of the natural flow of mere surface water, or of some portion thereof, we suppose he can have no remedy. As has been forcibly said, one party cannot insist upon another maintaining his field as a mere water table for the other's benefit.² On the other hand, it is equally well settled that one may lawfully drain his lands into a natural water course, even though a lower proprietor is injured by the increased flow. "For the sake of agriculture, *agri colendi causa*, a man may drain his ground which is too moist, and, discharging the water according to its natural channel, may cover up and conceal the drains through his lands; may use running streams to irrigate his fields, though he thereby diminishes, not unreasonably, the supply of his neighbors below; and may clear out impediments in the natural channel of his streams, though the flow of water upon his neigh-

¹ Underwood v. Waldron, 33 Mich. 282; Barry v. Peterson, 48 Mich. 263.

² Rawstron v. Taylor, 11 Exch. 369, 383. To the same effect is Broadbent v. Ramsbotham, 11 Exch. 602, in which it is said (p. 615) that "the water belongs absolutely to the defendant, on whose land it falls." See, also, Curtiss v. Ayrault, 47 N. Y. 73; Livingston v. McDonald, 21 Iowa, 160; Wheatley v. Baugh, 25 Penn. St. 528; Boynton v. Gilman, 53 Vt. 17; Gibbs v. Williams, 25 Kan. 214. If the unused overflow from a spring on one's land sinks into the soil, he may divert and use it before it reaches a watercourse on a lower level. Bloodgood v. Ayers, 37 Hun, 356. But

where water from springs forms a pond and watercourse on one's land, he may not stop the flow to lower land. Howe v. Norman, 13 R. I. 488. See Colrick v. Swinburne, 105 N. Y. 503.

The rule prevailing elsewhere is not accepted in New Hampshire, where the doctrine seems to be, as respects water percolating through the soil, and also mere surface water not gathered into a stream, "that the land owner's right to obstruct or divert it is limited to what is necessary in the reasonable use of his own land." Bassett v. Salisbury Manuf. Co. 43 N. H. 569; Swett v. Cutts, 50 N. H. 439.

bor be thereby increased. * * It is not more agreeable to the laws of nature that water should descend, than it is that lands should be farmed and mined ; but in many cases they cannot be, if an increased volume of water may not be discharged through *natural channels and outlets. The principle, [*576] therefore, should be maintained, but it should be prudently applied ;”¹ and it will not preclude the lower proprietor erecting 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 land. In Massachusetts it has been decided 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. “The right of an owner of land to occupy and improve it in such manner and for such purpose as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation, in any portion of it, will cause water which may accumulate thereon by rains and snows falling upon its surface, or flowing on to it over the surface of adjacent lands, to pass into and over the same in greater quantities or in other directions than they were accustomed to flow.”² The point of these decisions is, that where there is no water course, by grant or prescription, and no stipulation exists between conterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate or control the surface drainage of water can be asserted by the owner of one lot over that of his neighbor. *Cujus est solum, ejus est usque ad cælum* is a general rule applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land, above, upon, or beneath the surface, cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment.

¹ WOODWARD, J., in *Kauffman v. Grieseiner*, 26 Penn. St. 407, 414.

² 9 Cush. 171; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*,

³ Citing *Luther v. Winnisimmet Co.*, 7 Allen, 19.

Nor is it at all material, in the application of this principle of the law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level [*577] of the soil, so as to *turn it off in a new course after it has come within his boundaries. The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does no act inconsistent with the due exercise of dominion over his own soil.”¹

The doctrine of this case is fully approved in several States.² In others, the rule of the civil law has been adopted and followed, 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.³ No doubt all the States would recognize an exception 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.⁴ In respect to

¹ BIGELOW, Ch. J., in *Gannon v. Hargadon*, 10 Allen, 106.

² *Morrison v. Bucksport*, 67 Me. 353; *Murphy v. Kelly*, 68 Me. 521; *Grant v. Allen*, 41 Conn. 156; *Chadayne v. Robinson*, 11 Atl. Rep. 592 (Conn.); *Bowlsby v. Speer*, 31 N. J. 351; *Swett v. Cutts*, 50 N. H. 439; S. C. 9 Am. Rep. 276, but see *Rindge v. Sargeant*, 9 Atl. Rep. 723 (N. H.); *Barkley v. Wilcox*, 86 N. Y. 140; *White v. Sheldon*, 35 Hun, 193; *Hill v. Cincinnati & Co.*, 109 Ind. 511; *Cairo & Co., R. R. Co. v. Stevens*, 73 Ind. 278; *Taylor v. Fickas*, 64 Ind. 167; *Atchison & Co., R. R. Co. v. Hammer*, 22 Kan. 763; *Abbott v. Kansas City & Co.*, 83 Mo. 271, overruling *Shane v. Kansas City & Co.*, 71 Mo. 237; *O'Connor v. Fond Du Lac & Co., Ry. Co.* 52 Wis. 526; *Hanlin v. Chicago & Co.*, 61 Wis. 515. So if the water is turned, not back, but off, on another proprietor at one side. *Lessard v. Stram*, 62 Wis. 112. See *Baigor v. Lausil*, 51 Me. 521. The

overflow from a swollen stream is to be regarded as surface water. *Abbott v. Kansas City & Co., Ry. Co.*, 83 Mo. 271; *Cairo & Co., R. R. Co. v. Stevens*, 73 Ind. 278. *Contra*, *Crawford v. Rambo*, 44 Ohio St. 279; *Byrne v. Minn. & Co., Ry. Co.*, 36 N. W. Rep. 339 (Minn.) Not if overflow is caused by too small a culvert over a water course. *Sullens v. Chicago & Co., Ry. Co.*, 38 N. W. Rep. 546 (Ia.)

³ See *Delahoussaye v. Judice*, 13 La. Ann. 587; *Butler v. Peck*, 16 Ohio (n. s.) 334; *Tootle v. Clifton*, 22 Ohio (n. s.) 247; *Beard v. Murphy*, 37 Vt. 99; *Ogburn v. Connor*, 46 Cal. 346; S. C. 13 Am. Rep. 213; *Gillham v. Madison Co. R. R. Co.*, 49 Ill. 484; *Gormiey v. Sanford*, 52 Ill. 158; *Nininger v. Norwood*, 73 Ala. 277; *Farris v. Dudley*, 78 Ala. 124; *Boyd v. Conklin*, 54 Mich. 583; *Louisville & Co., R. R. Co. v. Hays*, 11 Lea, 382. See also *Jacksonville & Co., R. R. Co. v. Cox*, 91 Ill. 500.

⁴ See *Vanderwiele v. Taylor*, 65 N.

agricultural lands, strong reasons may be given for either view, and it is probable that each will continue to find supporters hereafter as heretofore.

The question of liability, where one improves his lands by artificial drains, which cast water upon a lower proprietor, is equally difficult with that just mentioned. No doubt he may improve them by filling up low and wet places, without incurring liability to a lower proprietor, upon whom the flow would be increased,¹ just as the public may lawfully improve streets and public grounds, though the improvement may have the effect to cast the falling or surface water upon adjoining grounds.² A natural water course must not be stopped up, and the water turned back upon the lands of another proprietor.³ But "the *true water course is well defined. There must be [*578] 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 into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing into the hollows or ravines in land, which is the mere surface

Y. 341. Chadeayne v. Robinson, 11 Atl. Rep. 592 (Conn.); Barkley v. Wilcox, 86 N. Y. 140, and Bowlsby v. Speer, 31 N. J. 851, *supra*, were cases of town lots.

¹ Goodale v. Tuttle, 29 N. Y. 459, 467; Flagg v. Worcester, 13 Gray, 601; Hoyt v. Hudson, 27 Wis. 656; Bangor v. Lansil, 51 Me. 521.

² Martin v. Riddle, 26 Penn. St. 415; Luther v. Winnisimmet Co., 9 Cush. 171; Greeley v. Maine Cent. R. R. Co., 53 Me. 200. One may drain such place into a natural surface water channel. Peck v. Herrington, 109 Ill. 611. But when the right to surface flow upon a lower heritage is prescriptive, it is held that by draining wet places one may not increase the flow. Gregory v. Bush, 31 N. W. Rep. 90 (Mich.)

³ Parks v. Newburyport, 10 Gray, 28; Flagg v. Worcester, 13 Gray, 601; Dickinson v. Worcester, 7 Allen, 19; Turner v. Dartmouth, 13 Allen, 201; Emery v. Lowell, 104 Mass. 13; Imbler v. Springfield, 55 Mo. 119. It is held, in Franklin v. Fisk, 13 Allen 211, that if a proprietor of lands protects them against surface water by an embankment, which throws the water back into the road, the public have no cause of complaint. On the other hand an action will not lie against a town for failing to keep open a drain across a highway, unless it can be shown that an obligation to construct the drain was imposed, either by the common law or by the statute. Estes v. China, 56 Me., 407.

water from rain or melting snow, and is discharged through them from a higher to a lower level, but which, at other times, are destitute of water. Such hollows or ravines are not, in legal contemplation, water courses."¹

¹ DIXON, Ch. J., in *Hoyt v. Hudson*, 27 Wis. 656, 661. In this case an intimation in *Bowlsby v. Speer*, 31 N. J. 351, that there may possibly be an exception to this proposition in the case of gorges and narrow passages in hills or mountainous regions is repeated. As bearing on the question, see *Eulrich v. Richter*, 37 Wis. 236, and 41 Wis. 318. And compare *Gillham v. Madison, &c.*, R. R. Co., 49 Ill. 484; *Barnes v. Sabron*, 10 Nev. 217; *Wagner v. Long Island R. R. Co.* 2 Hun, 633. A gorge in which excessive rains have immemorially found outlet is a water course. *Palmer v. Waddell*, 23 Kan. 353, but a mere depression is not. *Gibbs v. Williams*, 25 Kan. 214; *Kansas City &c., R. R. Co. v. Riley*, 33 Kan. 374. Says BIGELOW, Ch. J., in *Ashley v. Wolcott*, 11 Cush. 192, 195. "To maintain the right to a water course or a brook, it must be made to appear that the water usually flows in a certain direction, and by a regular channel, with banks or sides. It need not be shown to flow continually; it may be dry at times, but it must have a well defined and substantial existence. Angell on Water Courses, § 4; *Shields v. Arndt*, 3 Green Ch. R. 234, 246; *Luther v. Winnisimmet Co.*, 9 Cush. 171." To substantially the same effect are *Stanchfield v. Newton*, 142 Mass. 110; *Ferris v. Wellborn*, 64 Miss. 29. In *Earl v. DeHart*, 12 N. J. 280, 283, the chancellor gives a definition of a water course. "A water course is defined to be 'a channel or a canal for the conveyance of water, particularly in draining lands.' It may be natural, as when it is made by the natural flow of the water,

caused by the general superficies of the surrounding land from which the water is collected into one channel, or it may be artificial, as in case of a ditch, or other artificial means used to divert the water from its natural channel, or to carry it from low lands, from which it will not flow, in consequence of the natural formation of the surface of the surrounding land. It is an ancient water course, if the channel through which it naturally runs has existed from time immemorial. Whether it is entitled to be called an ancient water course, and, as such, legal rights can be acquired and lost in it, does not depend upon the quantity of water it discharges. Many ancient streams of water, which, if dammed up, would inundate a large region of country, are dry for a great portion of the year. If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and melting of large bodies of snow, as to require an outlet of some common reservoir, and if such water is regularly discharged through a well defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient water course."

A lake was fed by living streams. A current set out of it through a gravel bed into which it percolated. The passage through the lake to the bed was held a water course. *Hebron Gravel Rd. Co. v. Harvey*, 90 Ind. 192. A pond, covering four acres of ground owned by different

*In Iowa, in a carefully considered case, it was held [*579] that if a ditch made by the defendant for the purpose of draining his lands, 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 improvement of his farm.¹ So in Wisconsin it has been decided that the owner of land on which there is a pond or reservoir of surface water cannot lawfully discharge it through an artificial channel upon the land of another, or so near it that it

persons, made by surface flow but itself permanent and retained in a natural basin, is not surface water. It is governed by the rules as to water courses and one land owner cannot by ditching drain the pond. *Schaefer v. Marthaler*, 84 Minn. 487.

See, further, on this subject, *Martin v. Riddle*, in note to *Kauffman v. Griesemer*, 26 Penn. St. 407, 415.

¹*Livingston v. McDonald*, 21 Iowa, 160. See *Reynolds v. Clark*, *Ld. Raym.* 1399; *Laney v. Jasper*, 39 Ill. 46. To substantially the same effect are *McCormick v. Kansas City, &c.*, *R. R. Co.*, 70 Mo. 359; *Hicks v. Silliman*, 93 Ill. 255; *West Orange v. Field*, 37 N. J. Eq. 600; *Templeton v. Voshloe*, 73 Ind. 184; *Hogenson v. St. Paul, &c.*, *Ry. Co.*, 81 Minn. 224; *Gillison v. Charleston*, 16 W. Va. 282; *Knight v. Brown*, 25 W. Va. 808; *Mitchell v. New York, &c.*, *R. R. Co.*, 36 Hun, 177; *Hughes v. Anderson*, 68 Ala. 280; *Crabtree v. Baker*, 75 Ala. 91. The case of *Adams v. Walker*, 34 Conn. 466, the facts of which are somewhat imperfectly stated in the report, lays down the same doctrine, perhaps going somewhat further. In New Hampshire, apparently, the question would be

one of reasonable use. *Swett v. Cutts*, 50 N. H. 439. Says *DENIO*, Ch. J., in *Goodale v. Tuttle*, 29 N. Y. 459, 467: "In respect to the running off of surface water, caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well settled rule that the owner of land has full dominion over the whole space above and below the surface." If, by ditching, water from a pond with no natural outlet is cast on land there is a wrong. *Davis v. Londgreen*, 8 Neb. 43. If the water is diverted from its natural course but is cast in the same quantity and place and at the same rate there is no wrong. *Dorr v. Simerson*, 34 N. W. Rep. 752 (Ia.). Where a railroad commits a wrong in pouring surface water from its ditch upon another's land it is not liable for damage caused by water turned into such ditch by others without its sanction. *Chicago, &c.*, *Ry. Co. v. Glenney*, 118 Ill. 487.

will flow over upon such land to its injury.¹ A case in Ohio somewhat similar was decided in the same way. In that case a part of the water which the defendant discharged upon the land of the plaintiff would naturally have found its way there had the drain not been cut.² These cases seem to confine the [*580] *obligation of the owner of the lower estate to receive the water flowing from the upper estate, to "waters which flow naturally without the art of man; those which come from springs, or from rain falling directly on the heritage, or even by the natural depressions of the place."³ The conclusion seems to be that where the surface waters are collected and cast in a body upon the proprietor below, unless into a natural watercourse, the lower proprietor sustains a legal injury, and may have his action therefor. This is the rule that has been applied against municipal corporations: While they are not bound to construct sewers or drains to protect adjoining owners against the flow of surface water from the 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.⁴

¹ *Pettigrew v. Evansville*, 25 Wis. 223. And, see *Proctor v. Jennings*, 6 Nev. 83; *Vernum v. Wheeler*, 35 Hun, 53.

² *Butler v. Peck*, 16 Ohio, (n. s.) 334. Compare *Curtiss v. Ayrault*, 47 N. Y. 73. And, see *Wheeler v. Worcester*, 10 Allen, 591. In *Whalley v. Lancashire, & Co.*, L. R. 13 Q. B. D. 131, an embankment was cut to let off accumulations of an unprecedented rainfall, and though it was reasonably necessary to save the embankment and though the water would have percolated through it in time, it was held a wrong.

³ *Kauffman v. Griesemer*, 26 Penn. St. 407, 413. See *Martin v. Jett*, 12 La. 504. And, compare *Bowlsby v. Speer*, 31 N. J. 351.

⁴ *Nevins v. Peoria*, 41 Ill. 502; *Aurora v. Gillett*, 56 Ill. 132; *Aurora v. Reed*, 57 Ill. 30; *Alton v. Hope*, 63 Ill. 167; *Pettigrew v. Evansville*, 25

Wis. 223; *Ashley v. Port Huron*, 35 Mich. 296, and cases cited. *Gould v. Booth*, 66 N. Y. 62; *Rice v. Evansville*, 108 Ind. 7; *Gilluly v. Madison*, 63 Wis. 513; *West Orange v. Field*, 37 N. J. Eq. 600; *Vale Mills v. Nashua*, 63 N. H. 136. And, see *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

So as to highway officers. *Blakely v. Devine*, 36 Minn. 53. As to flowage caused incidentally by changing grade of streets. *Morris v. Council Bluffs*, 67 Ia. 343; *Bronson v. Wallingford*, 54 Conn. 513. Upon the right of an upper proprietor to have natural passages for the surface water kept open for his drainage, though they are not water courses, see *Franklin v. Fisk*, 13 Allen, 211; *Goodale v. Tuttle*, 29 N. Y. 459; *Tootle v. Clifton*, 23 Ohio, (n. s.) 247; *Ex parte Martin*, 13 Ark. 198.

One may turn his surface water

Subterranean Waters. If one by an excavation on his own land draws off the subterraneous waters from the land of his neighbor to the prejudice of the latter, no action will lie for the consequent damage. This is fully settled in England by the leading case of *Acton v. Blundell*,¹ and in a later case it is decided that prescriptive rights cannot be gained in subterraneous waters, which will preclude such excavations on adjoining grounds as may draw them off.² These decisions have been generally followed in this country, and it may be considered settled law that 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*.³ Probably if the subterraneous water [*581] were a stream flowing in a well-known course it would be

into a natural water course provided the natural capacity thereof is sufficient to carry off such additional water, although the flow is accelerated. *McCormick v. Horan*, 81 N. Y. 86; *Peck v. Goodberlett*, 16 N. E. Rep. 350 (N. Y.); *Noonan v. Albany*, 79 N. Y. 470. And water drawn from wells on the land may be thus disposed of. *Jackman v. Arlington Mills*, 137 Mass. 277. So whether the channel is that of a water course or of surface flowage. *Peck v. Herrington*, 109 Ill. 611. But if such flowage increases a small pond tenfold, it is unjustifiable. *Galveston, &c., Ry Co. v. Tait*, 63 Tex. 223. If one covers a brook so as to make a drain, he is liable if he diminishes its capacity to carry the natural flow from a heavy rain, but not if an increase of flow is due to the city's discharging water into it above his land. *Selleck v. Hall*, 47 Conn. 260.

¹ *Acton v. Blundell*, 12 M. & W. 324.

² *Chasemore v. Richards*, 7 H. L. Cas. 349; S. C. in Ex. Ch. 2 H. & N. 163. See, also, *New River Co. v. Johnson*, 2 El. & El. 435; *Hammond v. Hall*, 10 Sim. 551; *Smith v. Kenrick*, 7 C. B. 515; *The Queen v. Metropolitan Board of Works*, 3 B. & S.

710; *Popplewell v. Hodkinson*, L. R. 4 Exch. 248.

³ *Greenleaf v. Francis*, 18 Pick. 117; *Wheatley v. Baugh*, 25 Penn. St. 528; *Haldeman v. Bruckhart*, 45 Penn. St. 514; *Frazier v. Brown*, 12 Ohio, (n.s.) 294; *Roath v. Driscoll*, 20 Conn. 533; *Bliss v. Greeley*, 45 N. Y. 671; *Bloodgood v. Ayers*, 15 N. E. Rep. 433 (N. Y.); *New Albany, &c., R. R. Co. v. Peterson*, 14 Ind. 112; *Chatfield v. Wilson*, 28 Vt. 49; *Clark v. Conroe*, 38 Vt. 469; *Chase v. Silverstone*, 62 Me. 175; *Morrison v. Bucksport, &c., R. R. Co.*, 67 Me. 353; *Commonwealth v. Richter*, 1 Penn. St. 467; *Ocean Grove Ass. v. Comrs. of Asbury Park*, 40 N. J. Eq. 447. *Compare Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439; *Parker v. Boston, &c., R. R. Co.*, 3 Cush. 107; *Buffum v. Harris*, 5 R. I. 243. The same rule has been applied to polluting waters underground. *Upjohn v. Richland*, 46 Mich. 542. Draining such waters incidentally by the proper use of land so that they do not reach a spring is not a breach of contract of sale of the spring and its waters. *Brain v. Marfell*, 29 Am. L. Reg. 93 (Court App. of England). It is said in some cases that if this is done not for his

different, and one through whose land it 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; not an easy task in any case.²

Nuisances in the Use of Water Courses. Certain principles control the utilization of water in the running streams of the country, the violation of which may constitute a nuisance. These principles apply equally to navigable and non-navigable waters, and in general they are not affected by the fact that one riparian proprietor has first appropriated the waters to his own use. It is well settled that at the common law no superior rights can be acquired by one over the other by such prior appropriation.³ The rule is modified in the mining [*582] States *where the use of water upon the public domain is allowed to be appropriated to private use, independent of any ownership in the soil; and there the right of the first

own benefit but to injure his neighbor, the neighbor may recover damages. *Thurston v. Hancock*, 12 Mass. 221; *Panton v. Holland*, 17 Johns, 93; *Greenleaf v. Francis*, 18 Pick. 117; see *Chesley v. King*, 74 Me. 164. The decision in *Chatfield v. Wilson*, 28 Vt. 49, is directly to the contrary, but some of the other cases here cited avoid the point. See also cases, Ch. XXII.

¹ See *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282, 300; *Dudden v. Guardians, &c.*, 1 H. & N. 627; *Chasemore v. Richards*, 7 H. L. Cas. 349, 373; *Smith v. Adams*, 6 Paige, 435; *Wheatley v. Baugh*, 25 Penn. St. 528; *Whetstone v. Bowser*, 29 Penn. St. 59; *Cole Silver Mining Co., v. Virginia, &c.*, Water Co., 1 Sawyer, 470; *Burroughs v. Saterlee*, 67 Ia. 396; *Hale v. McLea*, 53 Cal. 578. But in Pennsylvania it is denied that this rule applies where the course of the stream cannot be discovered from the surface. *Lybe's App.* 106, Penn. St. 626. One may not dig a well near a pond

which supplies power and let the well fill by percolation to the injury of the owner of the power. *Emporia v. Soden*, 25 Kan. 588. See *Bailey v. Woburn*, 126 Mass. 416; *Ætna Mills v. Waltham*, 126 Mass. 423; *Same v. Brookline*, 127 Mass. 69.

² See *Hanson v. McCue*, 42 Cal. 303; *Mosier v. Caldwell*, 7 Nev. 363.

³ *Wright v. Howard*, 1 Sim. & Stu. 190; *Mason v. Hill*, 3 B. & Ad. 304; *Martin v. Bigelow*, 2 Aik. 184; *Dumont v. Kellogg*, 29 Mich. 420; *Platt v. Johnson*, 15 Johns. 213; *Tyler v. Wilkinson*, 4 Mason, 397; *Gilman v. Tilton*, 5 N. H. 231; *Cowles v. Kidder*, 24 N. H. 364; *Hoy v. Sterrett*, 3 Watts, 327; *Hartzall v. Sill*, 12 Penn. St. 24; *Keeney & Wood Manuf. Co. v. Union Manuf. Co.*, 39 Conn. 576; *Parker v. Hotchkiss*, 25 Conn. 321; *Heath v. Williams*, 25 Me. 209; *Snow v. Parsons*, 28 Vt. 459; *Bliss v. Keeney*, 43 Ill. 67; *Wood v. Edes*, 2 Allen, 578; *Thurber v. Martin*, 2 Gray, 394; *Gould v. Boston Duck Co.*, 13 Gray 442.

appropriator is recognized as the superior right.¹ It is also modified by those statutes which in some States allow a riparian proprietor to flow the lands of those above him, for manufacturing purposes, on making compensation. "The priority of first possession necessarily arises from the nature of the appropriation; 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."²

Questions may arise 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 the right to the use, not of one-half merely, but of the whole bulk of the stream; that is, he is entitled to such advantage as it can be to him to have the whole stream flow past his estate; and neither can carry off or divert any part of it without the consent of the other.³ The advantage might be very great where the stream is used for moving machinery, though it is obvious that, in order to obtain power by means of dams, the consent of the two proprietors would also be essential, since neither could go upon the land of the other for the purpose without permission.

¹ *Atchison v. Peterson*, 20 Wall. 507; *Kelly v. Natoma Water Co.*, 6 Cal. 105; *Butte Canal, &c., Co. v. Vaughn*, 11 Cal. 143; *Nevada Water Co. v. Powell*, 34 Cal. 109; *Lobdell v. Simpson*, 2 Nev. 274; *Ophir S. M. Co. v. Carpenter*, 4 Nev. 534; *Barnes v. Sabron*, 10 Nev. 217; *Strait v. Brown*, 16 Nev. 317. See an elaborate discussion of appropriation in *Lux v. Haggia*, 69 Cal. 253. The prior appropriator may remove an obstruction upon an upper proprietor's land to the usual flow. *Ware v. Walker*, 70 Cal. 591; but he does not own the water before it reaches him and may not sue for its diversion as for goods sold. *Parks, &c., Co. v. Hoyt*, 57 Cal. 44. The appropriator has no right to a surplus in flood time not used by him.

Edgar v. Stevenson, 70 Cal. 286; nor to more than necessary for his purposes at any time. *Clough v. Wing*, 17 Pac. Rep. 453 (Ariz).

² *Gould v. Boston Duck Co.*, 18 Gray, 442, 451; *Fuller v. Chicopee Manuf. Co.*, 16 Gray, 43; *Lincoln v. Chadbourne*, 56 Me. 197.

³ *Blanchard v. Baker*, 8 Me. 253; *Vandenburgh v. Van Bergen*, 18 Johns. 212; *Pratt v. Lamson*, 3 Allen, 275; *Canal Trustees v. Haven*, 11 Ill. 554; *Harding v. Water Co.* 41 Conn. 87. Where there is a public landing at the mouth the owner on one side of a brook may not sell one half the water as merchandise. *Moulton v. Newburyport Water Co.*, 137 Mass. 163.

The general principle is that every proprietor of land on a water course is entitled to the enjoyment and use of the stream substantially according to its natural flow, subject only to such interruption as is necessary and unavoidable in its reasonable and proper use by other proprietors. The proprietors above have no right to divert, or unreasonably to retard the [*583] natural *flow of the water to the proprietors below, and the proprietors below have no right to retard it or turn it back upon the proprietors above to their prejudice.¹ The use may be for mills, for irrigation or other agricultural purposes; in short for any purpose whatsoever, within the limits of what is reasonable.

Diversion. 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.² But he has no right to divert it without thus returning it; and to turn any portion of it into a new channel would be an actionable injury.³ He may not divert the water even for the purposes of repair of machinery; though a mere detention of

¹ *Wright v. Howard*, 1 Sim. & Stu. 190; *Webb v. Portland Manuf. Co.*, 3 Sum. 189; *Blanchard v. Baker*, 8 Me. 253; *Thurber v. Martin*, 2 Gray, 394; *Chandler v. Howland*, 7 Gray, 348; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Miller v. Miller*, 9 Penn. St. 74; *Pool v. Lewis*, 41 Geo. 162; S. C. 5 Am. Rep. 526; *Arnold v. Foot*, 12 Wend. 330.

² *Tolle v. Correth*, 31 Tex. 362; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Dilling v. Murray*, 6 Ind. 324; *Van Hoesen v. Coventry*, 10 Barb. 518; *Sackrider v. Beers*, 10 Johns. 241; *Merritt v. Brinkerhoff*, 17 Johns. 306; *Oregon Iron Co. v. Trullinger*, 3 Ore. 1; *Porter v. Durham*, 74 N. C. 767; *Blanchard v. Baker*, 8 Me. 253. So as to one not a riparian owner, but the licensee of such an owner, who

takes and returns the water by pipes. *Kensit v. Grt. East. Ry. Co.*, L. R. 27 Ch. D. 122.

³ *Webb v. Portland Manuf. Co.*, 3 Sum. 189; *Parker v. Griswold*, 17 Conn. 287; *Harding v. Stamford Water Co.*, 41 Conn. 87; *Newhall v. Iveson*, 8 Cush. 595; *Pratt v. Lamson*, 2 Allen, 275; *Anthony v. Lapham*, 5 Pick. 175; *Blanchard v. Baker*, 8 Me. 253; *Vandenburgh v. Van Bergen*, 13 Johns. 212; *Shively v. Hume*, 10 Oreg. 76; *Weiss v. Oreg. &c., Co.*, 13 Oreg. 496. So if for more than twenty years an upper proprietor has caused water to run in an artificial channel, upon which a lower owner has erected a mill, he may not divert it from the channel. *Shepardson v. Perkins*, 58 N. H. 354.

the water for that purpose would be lawful, if not under the circumstances unreasonable.¹

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.²

Reasonable Use. The reasonableness of the use depends upon the nature and size of the stream, the business or purposes to which it is made subservient, and on the ever-varying circumstances of each particular case. Each case [*584] must therefore stand upon its own facts, and can be a guide in other cases only as it may illustrate the application of general principles.³ It has been well said that in determining upon the reasonableness of the use, it is necessary to take into account not only the general customs of the country, but also any local customs along the stream; and that such general rule should be laid down as appears best calculated to secure the entire water of the stream to useful purposes.⁴

Detention of the Water. The general rule is that each riparian proprietor is entitled to the steady flow of the stream,

¹ *Davis v. Getchell*, 50 Me. 602; *Van Hoesen v. Coventry*, 10 Barb. 518. See *Angell on Water Courses*, § 99 a. *Peter v. Caswell*, 38 Ohio St. 518, where water long diverted was turned into original channel causing harm. ² *Wilts, &c., Canal Co. v. Swindon Water Works Co.*, L. R. 9 Ch. App. 451; *S. C. L. R.* 7 H. L. 697; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Emporia v. Soden*, 25 Kan. 588. The state may not authorize the drawing of water from a lake which feeds a stream whereby the power is decreased, unless compensation is made to the riparian owners. *Smith v. Chester*, 92 N. Y. 463. But a corporation for the improvement of navigation may divert navigable water from a riparian owner. *Black River,*

&c., Co. v. LaCrosse, &c., Co., 54 Wis. 659.

³ *Hetrich v. Deachler*, 6 Penn. St. 32; *Davis v. Winslow*, 51 Me. 264; *Tyler v. Wilkinson*, 4 Mason, 397; *Davis v. Getchell*, 50 Me. 602; *Hayes v. Waldron*, 44 N. H. 580; *Holden v. Lake Co.*, 53 N. H. 552; *Parker v. Hotchkiss*, 25 Conn. 321; *Pool v. Lewis*, 41 Geo. 162; *S. C. 5 Am. Rep.* 526; *Honsee v. Hammond*, 39 Barb. 89; *Dilling v. Murray*, 6 Ind. 324; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Timm v. Bear*, 29 Wis. 254; *Snow v. Parsons*, 28 Vt. 459; *Dumont v. Kellogg*, 29 Mich. 420; *Embrey v. Owen*, 6 Exch. 352; *Chasemore v. Richards*, 2 H. & N. 168.

⁴ *Keeney, &c., Manuf. Co. v. Union Manuf. Co.*, 39 Conn. 576.

according to its natural course. But to apply this rule strictly would be to preclude the best use of flowing waters in most cases; and where power is desired, the rule must yield to the necessity of gathering the water into reservoirs. It is lawful to do this where it 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 or in order that, by letting it off occasionally a *flood may be obtained for the purpose of floating logs;⁴ but it is not unreasonable, and therefore not unlawful to detain the surplus water not used in a wet season and discharge it in proper quantities for use in a dry season.⁵

¹ Hoy v. Sterrett, 2 Watts, 327.

² Pitts v. Lancaster Mills, 13 Met. 156; Gould v. Boston Duck Co., 13 Gray, 442; Wood v. Edes, 2 Allen, 578; City of Springfield v. Harris, 4 Allen, 494; Hetrich v. Deachler, 6 Penn. St. 32; Hartzall v. Sill, 12 Penn. St. 248; Hoy v. Sterrett, 2 Watts, 327; Platt v. Johnson, 15 Johns. 213; Van Hoesen v. Coventry, 10 Barb. 518; Clinton v. Myers, 46 N. Y. 511; S. C. 7 Am. Rep. 373; Mabie v. Matteson, 17 Wis. 1; Davis v. Getchell, 50 Me. 602; Parker v. Hotchkiss, 25 Conn. 321; Pool v. Lewis, 41 Geo. 162; S. C. 5 Am. Rep. 526; Oregon Iron Co. v. Trullinger, 3 Ore. 1.

³ Clinton v. Myers, 46 N. Y. 511; S. C. 7 Am. Rep. 373; Brace v. Yale, 10 Allen, 441; Timm v. Bear, 29 Wis. 254.

⁴ Thunder Bay, &c., Co. v. Speechly, 31 Mich. 336; S. C. 18 Am. Rep. 184.

⁵ Oregon Iron Co. v. Trullinger, 3 Ore. 1, 7. The discharge, however, must not be made in such unusual and unnatural quantities as to preclude the lower proprietors from

making use of it as it flows past them. Pollitt v. Long, 58 Barb. 20; Merritt v. Brinkerhoff, 17 Johns. 306; Thunder Bay Co. v. Speechly, 31 Mich. 336; Thurber v. Martin, 2 Gray, 394; Oregon Iron Co. v. Trullinger, 3 Ore. 1. See also Mason v. Hoyt, 14 Atl. Rep. 786 (Conn.), as to unreasonable use of reservoir.

In Drake v. Hamilton Woolen Co., 99 Mass. 574, it was held that the owner of a reservoir and mill may discharge from his reservoir in a dry season what is reasonably necessary for the use of his mill if it does not increase the volume beyond its usual limits, though it exceeds the amount which would naturally flow during such season and renders the intermediate land wet and less valuable for cultivation.

Whatever injury is incidental to a reasonable use of the water of a running stream is of course *damnum absque injuria*. Tyler v. Wilkinson, 4 Mass. 397, 401; Chandler v. Howland, 7 Gray, 348; Pitts v. Lancaster Mills, 13 Met. 156; Hetrich v. Deachler, 6 Penn. St. 32; Hartzall v. Sill, 12

Diminution of the Water. The right of the lower proprietor to have the stream flow to him in undiminished volume is qualified to this extent, that the proprietor may lawfully withdraw from it whatever may be necessary to supply the wants of his family and 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.¹

Flooding Lands by Water. At the common law, the owner of land has no right, by dams or otherwise, to cause the water of a stream passing through his lands to set back upon the lands of a proprietor above. He must allow the water to enter upon *his premises in the accustomed way, and the upper [*586] proprietor, if necessary, may cross his line to keep the channel open.² Any act of his which raises the water in the stream above his estate is presumptively damaging and therefore actionable.³ It is actionable also, because, if persisted in, with-

Penn. St. 248; *Bliss v. Kennedy*, 43 Ill. 68.

¹ *Evans v. Merriweather*, 4 Ill. 492; *Bliss v. Kennedy*, 43 Ill. 68; *Fleming v. Davis*, 37 Tex. 173; *Blanchard v. Baker*, 8 Me. 253; *Lapham v. Anthony*, 5 Pick. 175; *Lakin v. Ames*, 10 Cush. 198; *Colburn v. Richards*, 13 Mass. 420; *Arnold v. Foot*, 12 Wend. 330; *Randall v. Silverthorn*, 4 Penn. St. 173; *Wadsworth v. Tillotson*, 15 Conn. 366; *Gillett v. Johnson*, 30 Conn. 180; *Embrey v. Owen*, 6 Exch. 353; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; *Wood v. Waud*, 3 Exch. 748, 780; *Chasemore v. Richards*, 2 H. & N. 168; *Messinger's Appeal*, 109 Penn. St. 285; *Baker v. Brown*, 55 Tex. 377; *Shook v. Colohan*, 12 Ore. 239. Water for locomotives may not be taken if flow is sensibly diminished. *Garwood v. New York, &c., R. R. Co.*, 83 N. Y. 400; *Penn. R. R. Co. v. Miller*, 112 Penn. St. 34; *Anderson v. Cinn., &c., Co.*, 5 S. W. Rep. 49 (Ky.). The right to the flow

extends to the non-riparian grantee of the riparian right. *Williams v. Wadsworth*, 51 Conn. 277. Compare *Weston v. Alden*, 8 Mass. 136; *Perkins v. Dow*, 1 Root, 535; *Haywood v. Mason*, 1 Root, 537.

² *Prescott v. Wilhams*, 5 Met. 429.

³ *Bell v. McClintock*, 9 Watts, 119; *Martin v. Riddle*, 26 Penn. St. 415; *Brown v. Bowen*, 30 N. Y. 519; *Brown v. Cayuga, &c., R. R. Co.*, 12 N. Y. 486; *Bellinger v. N. Y. Cent. R. R. Co.*, 23 N. Y. 42; *Pixley v. Clark*, 35 N. Y. 520; *Williams v. Nelson*, 23 Pick. 141; *Staple v. Spring*, 10 Mass. 72; *Smith v. Agawam Canal*, 2 Allen, 355; *Monson v. Fuller*, 15 Pick. 554; *Pillsbury v. Moore*, 44 Me. 154; *Monroe v. Gates*, 48 Me. 463; *Strout v. Milbridge Co.*, 45 Me. 76; *Merritt v. Parker*, 1 N. J. 460; *Pinzy v. Augusta*, 47 Geo. 260; *Whitcomb v. Vt. Cent. R. R. Co.*, 25 Vt. 49; *Davis v. Fuller*, 12 Vt. 178; *Hutchinson v. Granger*, 13 Vt. 386; *Cowles v. Kidder*, 24 N. H. 364; *Woodman v.*

out objection, it might, in the lapse of time, establish permanent rights by prescription.¹ Any showing of actual damage is therefore unnecessary to the maintenance of the action.² It has been already stated, that in aid of manufactures, this common law has been so far changed by statute in some States as to allow parties 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. Thus, if a town shall so erect a bridge as that the natural and probable consequences shall be to raise the water on the lands above, by the partial obstruction interposed to its flow, the town will be liable, as an individual would for a like obstruction.⁴

[*587] *Fouling the Water of Streams, etc. It has been said, in one case, that whether the use of a stream to

Tufts, 9 N. H., 88; Amoskeag Manuf. Co. v. Goodale, 46 N. H. 53; Miss. Cent. R. R. Co. v. Caruth, 51 Miss. 77; Arimond v. Green Bay, &c., Co., 31 Wis. 316; Lull v. Davis, 1 Mich. 77; Eaton v. Railroad Co., 51 N. H. 504; Sullens v. Chicago, &c., Ry. Co. 38 N. W. Rep. 546 (Ia.). But the upper proprietor may not recover for setting back of water by a barrier put across by a lower proprietor to prevent refuse from the upper mill from coming down and doing damage. Davis v. Munroe, 33 N. W. Rep. 408 (Mich.). If a right to flow to a certain extent with a dam built loosely and with flash boards has become prescriptive, the extent cannot be increased by making the dam tighter and solid though it is not built higher than before. Turner v. Hart, 38 N. W. Rep. 890 (Mich.) departing from the opposite Massachusetts rulings.

¹ See ante, p. 71; Mississippi Cent. R. R. Co. v. Mason, 51 Miss. 234.

² Ante, p. 71, and cases cited. The rule applies not only to the raising of water, but to any diversion or deten-

tion that cannot be justified on the ground of reasonable use. Cook v. Hull, 3 Pick. 269; Butman v. Hussey, 12 Me. 407; Monroe v. Stickney, 48 Me. 462; Parker v. Griswold, 17 Conn. 237; Woodman v. Tufts, 9 N. H. 88; Amoskeag Manuf. Co. v. Goodale, 46 N. H. 53; Newhall v. Ireson, 8 Cush. 595; Wilts, &c., Canal Co. v. Swindon Water Works Co., L. R. 9 Ch. App. 451; S. C. L. R. 7 H. L. 697.

³ The cases under these statutes are collected in Cooley Const. Lim. 666-669.

⁴ Haynes v. Burlington, 38 Vt. 350; Lawrence v. Fairhaven, 5 Gray, 110; Parker v. Lowell, 11 Gray, 353; Sprague v. Worcester, 13 Gray 193; Helena v. Thompson, 29 Ark. 559. But if a town changes the course of a watercourse under legislative authority, it is not liable for a flood caused by the change in an extraordinary freshet when the ground is frozen. Diamond Match Co. v. New Haven, 13 Atl. Rep. 409 (Conn.). So if a bridge built under proper author-

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; such as the size and character of the stream, and for what purpose it is used, the extent of the pollution, the benefit to the manufacturer, and the injury to the other riparian owners.¹ The general right of every riparian owner is to have the stream come to him in its natural state;² and when the privilege is claimed to do that which will foul the water to his prejudice, the reasonableness of so doing must be justified by the circumstances, and usage short of the period of prescription cannot determine this.³

In the leading case of *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 soapsuds, wool comber's suds, etc. In defense, it was urged that the act

and with due care causes an overflow, it is held there is no liability. *Abbott v. Kansas City, &c., Co.*, 83 Mo. 271.

¹ *Hayes v. Waldron*, 44 N. H. 590. See *Murgatroyd v. Robinson*, 7 El. & Bl. 391; *Merrifield v. Lombard*, 13 Allen, 16; *Merrifield v. Worcester*, 110 Mass. 216; S. C. 14. Am Rep. 592.

² *Merrifield v. Lombard*, 13 Allen, 16; *Gladfelter v. Walker*, 40 Md. 1. See cases p. 676 n. 1 *supra*. The non-riparian grantee of a riparian owner may not return water which he has taken so changed in quality as to be sensibly less valuable. *Ormerod v. Todmorden Mills Co.*, L. R. 11. Q. B. D. 155. In a late case in the English Court of Appeals the question arose as to an underground current. Plaintiff had a deep well on his land. On higher land near by defendant had likewise a deep well which he used as a receptacle for filth. The filth affected the water which plaintiff pumped from his well. Defendant was held liable for polluting plaintiff's source of supply although the latter had no property

in the water until he appropriated it. "No one," says Brett. M. R., "of those who have a right to appropriate it has a right to contaminate the source so as to prevent his neighbor from having the full benefit of his right of appropriation." Nor does it alter the case that plaintiff gets his water by artificial means, that is, by pumping. *Ballard v. Tomlinson*, L. R. 29 Ch. D. 115. Compare with this *Upjohn v. Richland*, 46 Mich. 542.

³ *Stockport Waterworks v. Potter*, 7 H. & N. 160. *Clowes v. Staffordshire Potteries, &c., Co.*, L. R. 8 Ch. App. 125; *Norton v. Scholefield*, 9 M. & W. 665; *Goldsmid v. Commissioners*, L. R. 1 Ch. App. 849; *Wright v. Williams*, 1 M. & W. 77; *Baxendale v. McMurray*, L. R. 3 Ch. App. 790; *St. Helens' Chemical Co. v. St. Helens*, 1 Exch. Div. 196; *Richmond, &c., Co. v. Atlantic, &c., Co.*, 10 R. I. 106; *Blydenburgh v. Miles*, 39 Conn. 484; *Merrifield v. Lombard*, 13 Allen, 16; *Hayes v. Waldron*, 44 N. H. 590; *Merrifield v. Worcester*, 110 Mass. 216; *Howell v. McCoy*, 3 Rawle, 256.

of defendant did no actual damage to the plaintiffs, because the stream was already so polluted by similar acts of mill owners above the defendant's mills, etc., that the wrongful act complained of made no practical difference. It was held, notwithstanding, that the plaintiffs had received damage in point of law: "they had a right to the natural stream flowing through the land in its natural state, as an incident to the right to the land on which the water course flowed."¹ And again, it is said, in *Holsman v. Boiling Spring Bleaching Co.*, "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 [*588] pollution. *The right extends to the *quality*, as well as to the quantity of the water. If, therefore, an adjoining proprietor corrupts the water, an action upon the case lies for the injury."² Language equally pointed is used in other cases.³ Nevertheless, we think these must be understood merely as

¹ *Wood v. Waud*, 3 Exch. 748, 772. See *Stonehewer v. Farrar*, 6 Q. B. 730. An injunction will lie against one of several who pollute a stream, though his act causes but an inconsiderable part of the damage. *Woodyear v. Schaefer*, 57 Md. 1. It is no defense that the plaintiff has himself to some extent polluted the stream. *Jackman v. Arlington Mills*, 137 Mass. 277.

² *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, 342, citing *Aldred's Case*, 9 Co. 59, and other cases. This language is approved and adopted in *Richmond Manuf. Co. v. Atlantic Delaine Co.*, 10 R. I. 106, 111. In both cases the language of Chancellor KENT is quoted with approval: "The right of the riparian proprietor to the use and enjoyment of a stream of water in its natural state is as sacred as the right to the soil itself." *Gardner v. Newburgh*, 2 Johns. Ch. 162. In *Silver Spring, &c., Co. v. Wanskuck Co.*, 13 R. I. 611, it is held that this right is not

changed by the fact that the flow has been increased by reservoirs up the stream.

³ See *Gladfelter v. Walker*, 40 Md. 1, where a stream was fouled by throwing into it the refuse of a paper manufactory, where Judge DOBBIN instructed the jury as follows: "Every man must so use his own property as not to injure the property of another; and if the jury shall find that the drainage or refuse from the defendant's paper mill was, prior to the institution of the suit, discharged into a stream of water which flowed through the land of the plaintiff, and that the stream was thus soiled or polluted, to the injury of the plaintiff, then he is entitled to recover, even if the jury shall believe that the business carried on by defendant at his mill was a lawful one, conducted in the usual manner, and with the usual precaution." This instruction was fully approved by the Court of Appeals.

strong and clear declarations of the general principle in cases in which it did not become necessary to consider how far there might be exceptions, or how far one might be at liberty to complain of insignificant injuries which still left the stream to flow on in the main as it did before. Every saw mill upon a stream of water to some extent changes the natural condition of the water, and many saw mills may entirely unfit it for some purposes; but 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 from their use. But if there may be some change in the natural condition of the water without legal wrong, the question, how much, and what, shall constitute a legal wrong must necessarily, it seems to us, be a question of what, under the circumstances, is a reasonable use. This is strongly and clearly put by Chief Justice REDFIELD, in one case: "The reasonableness of the use," he says, "must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing *altogether indispen- [*589] sable to any beneficial use at every point of the stream. 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. This is true of everything which we use in common with others. The air is somewhat corrupted by the most ordinary use; large manufacturing establishments affect it still more seriously, and some, by reason of their vicinity to a numerous population, become so offensive and destructive of comfort, and health, even, as to be regarded as common nuisances. Within reasonable limits, those who have a common interest in the use of air and running water, must submit to small inconveniences to afford a disproportionate advantage to others." ¹

¹ Snow v. Parsons, 28 Vt. 459, 463. See Canfield v. Andrew, 54 Vt. 1; Lockwood, &c., Co. v. Lawrence, 77 Me. 297. The same idea is expressed

clearly and fully by BELLOWS, J., in Hayes v. Waldron, 44 N. H. 580, 585, and by WELLS, J., in Merrifield v. Worcester, 110 Mass. 216; S. C. 14

Negligent Fires. Fire being a dangerous element, a degree of care is required in making use of it corresponding to [*590] the *danger. It may be employed lawfully for all the purposes of life for which it is useful, and also for amusement, upon one's own 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 obligation of the party kindling it is well stated in a case in Maine. He must do it at a proper time and in a suitable manner, and use "reasonable care and diligence to prevent its spreading and doing injury to the property of others. The time may be suitable and the manner prudent, and yet if he 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. The gist of the action is negligence, and if that exists in either of these particulars, and an in-

Am. Rep. 592. In this last case it was held that a city was liable for polluting a stream by the flow from its sewers, provided it was attributable to the improper construction or unreasonable use of the sewers, or to negligence or other fault in the care or management of them; but it is said that "the natural right of the plaintiff to have the water descend to him in its pure state, fit to be used for the various purposes to which he may have occasion to apply it, must yield to the equal right of those who happen to be above him. Their use of the stream for mill purposes, for irrigation, watering cattle, and the manifold purposes for which they may lawfully use it, will tend to render the water more or less impure. Cultivating and fertilizing the lands bordering on the streams, and in which are its sources, their occupation by farm houses and other erections, will unavoidably cause impurities to be carried into the stream. As the lands are subdivided, and their occupation

and use become multifarious, these causes will be rendered more operative and their effects more perceptible. The water may thus be rendered unfit for many uses for which it had before been suitable; but so far as that condition results only from the reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy."

For other cases where this sort of nuisance has been complained of, see *Carhart v. Gas Light Co.*, 22 Barb. 297; *Davis v. Lambertson*, 56 Barb. 480, case of fouling a spring. *Tate v. Parrish*, 7 T. B. Mon. 325; *Jacobs v. Allard*, 42 Vt. 303; S. C. 1 Am. Rep. 331. In Pennsylvania after much discussion it has been held the right to pump water from a coal mine into a stream which forms the natural drainage of the basin is superior to that of the lower owner to have the water pure. *Penn. Coal Co. v. Sanderson*, 113 Penn. St. 126.

jury is done in consequence thereof, the liability attaches, and it is immaterial whether the proof establishes gross negligence or only a want of ordinary care on the part of defendant.”¹ But there must be some evidence which will warrant imputing the injury to the negligence or misconduct of the defendant or his servants, and the burden is upon the plaintiff to make this showing.² The plaintiff makes out this part of his case 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 If the fire was kindled by a servant while engaged about his master’s business, *and [*591] acting within the general scope of the employment, it is no excuse for the master that the servant departed from his instructions in doing so.⁴ A case of spontaneous combustion may be one of negligent fire, if ignition was reasonably to be looked for.⁵ It is immaterial whether the fire spreads by running along

¹ *Hewey v. Nourse*, 54 Me. 250, citing *Barnard v. Poor*, 21 Pick. 378; *Bachelor v. Heagan*, 18 Me. 30; *Tourtellot v. Rosebrook*, 11 Met. 462; *Dean v. McCarty*, 2 Up. Can. Q. B. 448. In *Scott v. Hale* 16 Me. 326, the care required was “that degree of carefulness which a discreet, prudent and careful man would do in the possession of his own premises.” See *Fahn v. Reichart*, 8 Wis. 255; *Mich. Cent. R. R. Co. v. Anderson*, 20 Mich. 244. Ordinary care must be used in setting and in restraining it. *Sweeney v. Merrill*, 16 Pac. Rep. 454, (Kan.).

² *Clark v. Foot*, 8 Johns. 421; *Hannon v. Ingram*, 3 Iowa, 81; *Gagg v. Vetter*, 41 Ind. 228; *Clealand v. Thornton*, 43 Cal. 437; *Stuart v. Hawley*, 22 Barb. 619; *Teall v. Barton*, 40 Barb. 137; *Calkins v. Barger*, 44 Barb. 424; *Miller v. Martin*, 16 Mo. 508; *Averitt v. Murrell*, 4 Jones, (N. C.) 322; *Fahn v. Reichart*, 8 Wis. 255. See *Sturgis v. Robbins*, 62 Me. 289, (under statute); *Gillson v. North Grey, &c.*, 33 Up. Can. Q. B. 128; S. C. 35

Up. Can. Q. B. 475; *Catron v. Nichols*, 81 Mo. 80.

³ *Higgins v. Dewey*, 107 Mass. 494; S. C. 9 Am. Rep. 63; *Clealand v. Thornton*, 43 Cal. 437; *Garrett v. Freeman*, 5 Jones, (N. C.) 78; *Hewey v. Nourse*, 54 Me. 257; *Fahn v. Reichart*, 8 Wis. 255; *Barnard v. Poor*, 21 Pick. 378; *Jacobs v. Andrews*, 4 Iowa, 506. Leaving an oil can on a hot stove is evidence of negligence. *Read v. Penn. R. R. Co.* 44 N. J. L. 280. See, also, a carefully considered case where after a fire had burnt four or five days and some effort had been made to extinguish it, it escaped and the landowner was held liable. *Furlong v. Carroll*, 7 Ont. App. 145.

⁴ *Johnson v. Barber*, 10 Ill. 425; *Armstrong v. Cooley*, 10 Ill. 509. Compare *Wilson v. Peverly*, 2 N. H. 548; *Garrett v. Freeman*, 5 Jones, (N. C.) 78. But for negligence of an independent contractor in clearing land the owner is not liable. *Ferguson v. Hubbell*, 97 N. Y. 507.

⁵ *Vaughan v. Menlove*, 3 Bing. (N. C.) 468.

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. This is the case in some States where large prairies exist. Whoever unlawfully sets a fire thus prohibited must take all the consequences.² The same must be true in any case where the kindling of the fire was a trespass or otherwise unlawful.³

Fires Communicated by Machinery. Steam machinery is so exceedingly liable to cause unintentional fires that special precautions are required to prevent them. But where the use 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.⁴ 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.⁵ And [*592] in the case of railroad engines it has been repeatedly decided that the fact that fire had been communicated by

¹ *Higgins v. Dewey*, 107 Mass. 494. See *Ayer v. Starkey*, 30 Conn. 304.

² *Burton v. McClellan*, 3 Ill. 434. See *Finley v. Langston*, 12 Mo. 120.

³ This rule was applied in *Jones v. Festiniog R. Co.*, L. R. 3 Q. B. 733, to an incorporated company using a steam engine which it was held under its charter it had no right to employ. But the fact that a fire started from hot ashes kept contrary to the ordinance in a wooden barrel is not conclusive of negligence. *Cook v. Johnston*, 58 Mich. 437.

⁴ *Burroughs v. Housatonic, &c., R. R. Co.*, 15 Conn. 124; *Hoyt v. Jeffers*, 30 Mich. 181; *Jefferis v. Philadelphia, &c., R. R. Co.*, 3 Houst. 447. See *Huyett v. Philadelphia, &c., R. R. Co.*, 23 Penn. St. 373; *McCready v. Sou. Car. R. R. Co.*, 2 Strob. 356; *Hull v. Sac. Val. R. R. Co.*, 14 Cal., 387; *Sheldon v. Hud. Riv. R. R. Co.*,

29 Barb. 226; *Hinds v. Barton*, 25 N. Y. 544; *Teall v. Barton*, 40 Barb. 137. It is evidence of negligence if a burning stick is thrown upon a right of way covered by grass. *Mobile, &c., R. R. Co. v. Gray*, 62 Miss. 333. Where an unlicensed engine is a nuisance, a recovery for damage from a fire caused by it cannot be maintained on the mere ground that no license had been taken out. *Burbank v. Bethel, &c., Co.*, 75 Me. 373.

⁵ *Ill. Cent. R. R. Co. v. McClelland*, 43 Ill. 355; *Frankford, &c. Co. v. Philadelphia, &c., R. R. Co.*, 54 Penn. St. 345; *Hoyt v. Jeffers*, 30 Mich. 181; *Anderson v. Cape Fear Steamboat Co.*, 64 N. C. 399; *Chicago, &c., R. R. Co. v. McCabill*, 56 Ill. 28; *Toledo, &c. R. R. Co. v. Corn*, 71 Ill. 493. If a spark arrester is of an approved pattern and in good order there is no liability. *Hoff v. West*

them to the premises of individuals is sufficient to raise a presumption that the railroad company was not employing the best known contrivances to retain the fire and to make out a *prima facie* case of negligence.¹ Still, as the business itself is lawful, all that can be required is that it be managed with a care proportioned to its risks; the law cannot require that which is unusual.²

In some States statutes exist which either render railroad companies responsible for all injuries by fire originating with their engines, or which expressly impose upon them the burden of showing that the fire originated without negligence on their part.³

It is held to be negligent in a railroad company to leave grass

Jersey R. R. Co., 45 N. J. L. 201. But the fact that a fire has occurred from sparks may be evidence that the arrester is imperfect. *Alpern v. Churchill*, 53 Mich. 607. It must, of course, be made to appear that the burning was the natural and proximate consequence of the defendant's carelessness, and ought to have been foreseen. *Milwaukee, &c., R. R. Co. v. Kellogg*, 94 U. S. 469; *Penn. R. R. Co. v. Hope*, 80 Penn. St. 373; *Lehigh, &c., R. R. Co. v. McKeen*, 90 Penn. St. 122. See cases on page 85, et seq. *ante*.

¹ *Pigott v. East. Counties R. R. Co.*, 3 C. B. 229; *Ill. Cent. R. R. Co. v. Mills*, 42 Ill. 407; *Ellis v. Portsmouth, &c., R. R. Co.*, 2 Ired. 138; *Galpin v. Chicago, &c., R. R. Co.*, 19 Wis. 633; *Spalding v. Chicago, &c., R. R. Co.*, 30 Wis. 110; *Brusberg v. Milw., &c., Ry. Co.*, 55 Wis. 106; *Miller v. St. Louis, &c., Ry. Co.*, 90 Mo. 389. See *Erd v. Chicago, &c., R. R. Co.*, 41 Wis. 65. But the case is only *prima facie*. *Tilley v. St. Louis, &c., Ry. Co.*, 6 S. W. Rep. 8 (Ark.). And see *Ruffner v. Railroad Co.*, 34 Ohio St. 96, contrary to the cases above.

² *Mich. Cent. R. R. Co. v. Coleman*, 28 Mich. 440; *Frankford, &c., Co. v.*

Philadelphia, &c., R. R. Co., 54 Penn. St. 345; *Jefferis v. Philadelphia, &c., R. R. Co.*, 3 Houst. 447; *Aldridge v. Great West. R. R. Co. & M. & Gr.*, 515; *Toledo, &c., R. R. Co. v. Corn*, 71 Ill. 493.

³ See *Lyman v. Boston, &c., R. R. Co.*, 4 Cush. 288; *Hart v. Western R. R. Co.*, 13 Met. 90; *Ingersoll v. Stockbridge, &c., R. R. Co.*, 8 Allen, 433; *Perley v. Eastern R. R. Co.*, 98 Mass. 414; *Chapman v. Atlantic, &c., R. R. Co.*, 37 Me. 92; *Pratt v. Same*, 42 Me. 579; *Stearns v. Same*, 46 Me. 95; *Chicago, &c., R. R. Co. v. McCabill*, 56 Ill. 28; *Baltimore, &c., R. R. Co. v. Shipley*, 39 Md. 251; *Hooksett v. Concord, &c., R. R. Co.*, 38 N. H. 243; *Rowell v. Railroad*, 57 N. H. 132. For a case arising under the Vermont statute, see *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454. If the property burned is not covered by the statute, negligence must be shown. *Lowney v. New Brunswick, Ry. Co.*, 78 Me. 479. If a fire started on A's land is allowed to burn at his request, and thence reaches B's land, the railroad is liable to B. *Simmonds v. New York, &c., R. R. Co.*, 52 Conn. 264.

and other combustibles lying along the track, where they are peculiarly liable to take fire by falling sparks or coals.¹ The rules of contributory negligence apply here, as in other cases, [*593] *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

The explosion of a steam boiler whereby one is injured is held in Illinois *prima facie* evidence of negligence in those having the management of it;³ but this does not seem to be the rule elsewhere.⁴

¹ Flynn v San Francisco, &c., R. R. Co., 40 Cal. 14; Webb v. Rome, &c., R. R. Co., 49 N. Y. 420; Kellogg v. Chicago, &c., R. R. Co., 26 Wis. 223; Bass v. Chicago, &c., R. R. Co., 28 Ill. 9; Ill. Cent. R. R. Co. v. Mills, 42 Ill. 407; Ill. Cent. R. R. Co. v. Frazier, 47 Ill. 505; Delaware, &c., R. R. Co. v. Salmon, 39 N. J. 299; Ohio, &c., R. R. Co. v. Clutter, 82 Ill. 123; Troxler v. Richmond, &c., R. R. Co., 74 N. C. 277; Fort Worth, &c., R. R. Co. v. Hogsett, 67 Tex. 685; Jones v. Mich. Cent. R. R. Co., 59 Mich. 437. See Gibbons v. Wisconsin, &c., Ry. Co., 66 Wis. 161. Compare Henry v. Sou. Pac. R. R. Co., 50 Cal. 176; Smith v. Hannibal, &c., R. R. Co., 37 Mo. 287; Pittsburgh, &c., R. R. Co. v. Nelson, 51 Ind. 150. In the absence of statute negligence is not to be presumed from the fact that fire has started near the track. Pittsburg, &c., Ry. Co. v. Hixon, 110 Ind. 225. But if it starts in combustible matter on the track, a railroad company is negligent if it allows it to spread on adjoining lands. Ind., &c., Ry. Co. v. Overman, 110 Ind. 538. See Louisville, &c., Ry. Co. v. Ehlert, 87 Ind. 339. Under the S. C. statute, if a fire starts on the right of way, the company is liable without regard to negligence. Thompson v. Richmond,

&c., Co., 24 S. C. 366. In Kansas, for a purely accidental escape of fire from men burning over the right of way there is no liability. Atchison, &c., Ry. Co. v. Dennis, 17 Pac. Rep. 153. See Same v. Riggs, 31 Kan. 622.

² Flynn v. San Francisco, &c., R. R. Co., 40 Cal. 14. See Philadelphia, &c., R. R. Co. v. Hendrickson, 80 Penn. St. 183; Delaware, &c., R. R. Co. v. Salmon, 39 N. J. 299; Fero v. Buffalo, &c., R. R. Co., 22 N. Y. 269; Vaughan v. Taff Vale R. Co., 3 H. & N. 743. But see Ill. Cent. R. R. Co. v. Nunn, 51 Ill. 78. See West v. Chicago, &c., Ry. Co., 35 N. W. Rep. 479 (Ia.); Engle v. Chicago, &c., Ry. Co., 37 N. W. Rep. 61 (Ia.); Kendrick v. Towle, 60 Mich. 363; Gibbons v. Wisconsin, &c., Ry. Co., 66 Wis. 161. Failure to try to put out a fire after hearing of it will not prevent recovery for damage done before. Stebbins v. Centr. Vt. R. R. Co., 54 Vt. 464. See, also, on contributory negligence, Moomey v. Peak, 57 Mich. 259; Alpern v. Churchill, 53 Mich. 607; King v. Am. Tr. Co., 1 Flipp. 1; Miss. Pac. Ry. Co. v. Cornell, 30 Kan. 85.

³ Ill. Cent. R. R. Co. v. Phillips, 99 Ill. 234, and 55 Ill. 194.

⁴ Spencer v. Campbell, 9 W. & S. 82; Losee v. Buchanan, 51 N. Y.

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 proportioned to the danger of injury from it.¹ The firing of guns for sport or exercise is not unlawful if 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.² In New York a military officer has been held liable for negligence in ordering the firing of blank cartridges by the men under his command, at an assembled crowd of people, whereby one of them was injured.³ But the owner of a vessel is not responsible for an injury caused by the firing of a gun therefrom, where the firing was by one of the crew, not in the line of his employment and against the owner's orders.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 takes place.⁶ So if he put articles

476; *S. B. New World v. King*, 16 How. 469; *Marshal v. Welwood*, 38 N. J. 339.

¹ *Underwood v. Hewson*, Stra. 596; *Weaver v. Ward*, Hob. 134; *Chataigne v. Bergeron*, 10 La Ann. 699. See *Sutton v. Bonnett*, 16 N. E. Rep. 180 (Ind).

² See *Conklyn v. Thompson*, 29 Barb. 218, case of injury by fright from exploding fire crackers. Compare *Cole v. Fisher*, 11 Mass. 137; *Bissell v. Booker*, 16 Ark. 308. The president of a club, in the name of which a meeting is held, is liable to one injured in the street by the explosion of fireworks at the meeting, when he has paid for the fireworks. *Jenne v. Sutton*, 43 N. J. L. 257. "Shooting at a mark is lawful, but not necessary, and may be dangerous, and the law requires extraordinary care to prevent injury to others; and if the act is done where there are ob-

jects from which the balls may glance and endanger others, the act is wanton, reckless, without due care, and grossly negligent." *BUTLER, J.*, in *Welch v. Durand*, 36 Conn. 182, 185, citing *Bullock v. Babcock*, 3 Wend. 391, approving *Y. B. 21 H. vii.*, 28 a. The owners of fair grounds permitting target shooting thereon are liable to one whose horse is hit thereby. *Conrad v. Clauve*, 93 Ind. 476.

³ *Castle v. Duryee*, 2 Keyes, 169.

⁴ *Haack v. Fearing*, 5 Rob. 528.

⁵ *Dixon v. Bell*, 5 M. & S. 198; *S. C. 1 Stark. 287*. A child too young to understand the effects of exploding powder, and who injures himself therewith may have his action against the person who sold it to him. *Carter v. Towne*, 98 Mass. 567. It is a nuisance to explode fireworks in streets. *Conklyn v. Thompson*, 29 Barb. 218.

⁶ *Williams v. East India Co.*, 3 East,

in the trade for a certain use, in which they would be dangerous, or sell poisonous drugs wrongly labeled, or labeled as being innocent.²

Removing Lateral Support. Incident to the ownership of land is the right to lateral support by the land which adjoins it. This exists independent of contract, and to remove it, or to do anything which endangers it is to commit a nuisance.³ Whoever in the course of improvements on his own lands may have occasion to make excavations which endanger the land of his neighbor, must supply walls or other sufficient substitutes for the support which he removes. But his obligation is limited to the support of the land in its natural condition; and if the neighbor's land shall be weighted with buildings or other burdens, the owner of the servient tenement, in removing collateral support, can be held responsible only for such consequences as would have followed if the land had not been thus weighted.⁴

[*595] *The case, however, is eminently 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

192; *Farrant v. Barnes*, 11 C. B. (N. S.) 553; *Carter v. Towne*, 98 Mass. 567; *Boston, &c., R. R. Co. v. Carney*, 107 Mass. 568.

¹ *Wellington v. Downer, &c., Co.*, 104 Mass. 64.

² *Thomas v. Winchester*, 6 N. Y. 397; *George v. Skivington*, L. R. 5 Ex. 1; *Loop v. Litchfield*, 42 N. Y. 351; *Hansford v. Payne*, 11 Bush, 380; *Norton v. Sewall*, 106 Mass. 143; S. C. 8 Am. Rep. 298.

³ *Thurston v. Hancock*, 12 Mass. 220; *Farrand v. Marhsall*, 19 Barb. 380; *Lasala v. Holbrook*, 4 Paige, 169; *McGuire v. Grant*, 25 N. J. 356; *Foley v. Wyeth*, 2 Allen, 131; *Charless v. Rankin*, 22 Mo. 566; *Boothby v. Androscoggin R. R. Co.*, 51 Me. 318; *Guest v. Reynolds*, 68 Ill. 478; *Baltimore, &c., R. R. Co. v. Reaney*, 42 Md. 117; *Beard v. Murphy*, 37 Vt. 99. The lower proprietor on a hill side

may not by quarrying cause an upper proprietor's land to slide down. *Wier's App.* 81 * Penn. St. 203. A city in grading may not remove lateral support. *Dyer v. St. Paul*, 27 Minn. 457.

⁴ *Wyatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 3 M. & W. 220; *Backhouse v. Bonomi*, 9 H. L. Cas. 502; *Humphries v. Brogden*, 12 Q. B. 739; *Quincy v. Jones*, 76 Ill. 231; *Thurston v. Hancock*, 12 Mass. 220; *Foley v. Wyeth*, 2 Allen, 131; *Richardson v. Vermont Cent. R. R. Co.*, 25 Vt. 465. See *Cahill v. Eastman*, 18 Minn. 324; S. C. 10 Am. Rep. 184; *McMillan v. Watt*, 27 Ohio, (N. S.) 306; *Tunstall v. Christian*, 80 Va. 1; *Backus v. Smith*, 5 Ont. App. 341. Under Cal. statute there is an easement for support after five years. *Aston v. Nolan*, 63 Cal. 269.

owner of the dominant tenement may have the opportunity to provide against any threatened danger.¹ He must also observe due care in making the excavations, and will be responsible for all the consequences of negligence.²

The right to collateral support for land weighted with buildings may be acquired by prescription; it being in the nature of an easement.³

Subscent Support. A freehold is sometimes divided laterally, that is, one man owns the surface, and another owns the sub-surface where minerals exist or are supposed to exist. Where that condition of things is found, it must have had its origin in grants emanating from a common source; as the whole must at some time have been in the same hands. Therefore contracts or covenants fixing the respective rights and obligations of the parties are likely to exist, and these must govern so far as they extend.⁴ In the absence of any such contracts or covenants, the owner of the surface is entitled to support, not only for the land itself, but for the buildings erected upon it.⁵ The liability of the sub-surface 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 [*596] to work mines without providing such support is unreasonable and void.⁶

¹ Wyley Canal Co. v. Bradley, 7 East, 368; Massey v. Goyder, 4 C. & P. 161; Shriever v. Stokes, 8 B. Mon. 453; Richart v. Scott, 7 Watts, 460; Brown v. Werner, 40 Md. 15.

² Jeffries v. Williams, 5 Exch. 792; Elliot v. N. E. R. Co., 10 H. L. Cas. 333; Humphries v. Brogden, 12 Q. B. 739; Baltimore, &c., R. R. Co. v. Reaney, 42 Md. 117; Shafer v. Wilson, 44 Md. 268; Boothby v. Androscoggin, &c., R. R. Co., 51 Me. 318; Shriever v. Stokes, 8 B. Mon. 453; Foley v. Wyeth, 2 Allen, 181; Charless v. Rankin, 22 Mo. 566; Myer v. Hobbs, 57 Ala. 175. See Tunstall v. Christian, 80 Va. 1. If the drainage of land weakens collateral support there is no responsibility for it. Popple-

well v. Hodkinson, L. R. 4 Exch. 248. An abutter may not cause a highway to fall in by his excavating. Milburn v. Fowler, 27 Hun, 568.

³ Washb. on Easements, 3d ed. 547; Richart v. Scott, 7 Watts, 460.

⁴ See, for example, Smith v. Darby, L. R. 7 Q. B. 715; S. C. 3 Moak, 281; Aspden v. Seddon, L. R. 10 Ch. App. 394.

⁵ Hext v. Gill, L. R. 7 Ch. App. 699; S. C. 3 Moak, 574; Bonomi v. Backhouse, El., Bl. & El. 622; S. C. in error, 9 H. L. Cas. 503; Smith v. Thackerah, L. R. 1 C. P. 564.

⁶ Hilton v. Lord Granville, 5 Q. B. 701; Humphries v. Brogden, 12 Q. B. 739; Blackett v. Bradley, 1 Best & S. 940; Jones v. Wagner, 66 Penn. St.

Nuisances causing Personal Discomfort. Where the complaint is that something done or suffered by the defendant causes personal discomfort to the plaintiff, it is seldom that the controversy is confined to the single point of personal annoyance, and it will generally be found to embrace 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. If a discomfort were wantonly caused from malice or wickedness, a slight degree of inconvenience might be sufficient to render it actionable; but if it were to result from pursuing a useful employment in a way which but for the discomfort to others would be reasonable and lawful, it is perceived that the position of both parties must be regarded, and that what would have been found wholly unreasonable before may be found as clearly justified by the circumstances now.

The rule by which the relative rights of the parties are to be regulated is laid down for England by the case of *St. Helen's Smelting Co. v. Tipping*. The Lord Chancellor, in that case, speaking for the court, said, that with regard to the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing com- [*597] plained 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 which are actually necessary for trade

429; S. C. 5 Am. Rep. 385; *Horner v. Watson*, 79 Penn. St. 242; S. C. 21 Am. Rep. 55, *Zinc Co. v. Franklinite Co.*, 13 N. J. 342.

The right of action arises when some actual damage is done. *Bonomi v. Backhouse*, El. Bl. & El. 622; S. C. in error, 9 H. L. Cas. 503; *Fisher v. Beard*, 32 Iowa, 346.

Perhaps it is not entirely certain how far the party mining is bound to provide support for the buildings on

the surface. There is no doubt on the authorities that he is liable if the buildings are injured for want of support that would have been sufficient without their weight; in other words, is liable unless the buildings themselves caused the support to give way. So he would be liable if the buildings had been on the land for the period of prescription. See *Bonomi v. Backhouse*, El. Bl. & El. 623.

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. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground for complaint because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration. In a case of that description 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.¹ Every business should be carried on in a suitable and convenient place, and by convenient is meant, not a place which may be convenient to the party himself, looking at his interest merely, but a place suitable and convenient when the interests of others are considered.²

In the application of this rule to actual controversies, in this country, there has been some apparent divergency in views; but this probably is to be attributed to local or special circumstances and not to any disagreement concerning the law itself.³

¹ *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; S. C. Big. Lead. Cas. 454. And see *Bamford v. Turnley*, 3 Best & S. 66, questioning *Hole v. Barlow*, 4 C. B. (N. S.) 334; *Cavey v. Leadbitter*, 13 C. B. (N. S.) 470; *Walter v. Selve*, 4 De G. & S. 315; S. C. 4 Eng. L. & Eq. 15; *Gaunt v. Fynney*, L. R. 8 Ch. App. 8; S. C. 4 Moak, 718.

² WILLIAMS, J., in *Bamford v. Turnley*, 3 Best & S. 65, 75, citing *Jones v. Powell*, Palm. 536; S. C. Hutt. 135.

³ *St. Helen's Smelting Co. v. Tipping* was accepted as authority in *Huckenstine's Appeal*, 70 Penn. St. 102; S. C. 10 Am. Rep. 669. That was an application to enjoin the burning of brick adjoining com-

plainant's premises. The court denied the injunction on the special circumstances, but dwelt upon the fact that the business of defendant only caused that sort of inconvenience which must be caused by manufactures, and said: "In the present case the kiln of the defendant is situated on an outskirt of the city of Allegheny. The properties of the plaintiff and defendant lie adjoining each other on the hill side overlooking the city, whose every day cloud of smoke from thousands of chimneys and stacks hangs like a pall over it, obscuring it from sight. This single word describes the characteristics of this city, its kind of fuel, its business, the habits of its people, and the

[*598] *The question, then, is 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.¹ Towns cannot be built up and the business of a dense population cannot be carried on upon any principle less accommodating.

It should be remarked, however, that in those cases in which the questions of nuisance or no nuisance have been raised in a court of equity, the conclusion of the court to grant or deny

industries which give it prosperity and wealth. The people who live in such a city, or within its sphere of influence, do so of choice, and they voluntarily subject themselves to its peculiarities and its discomforts for the greater benefits they think they derive from their residence or their business there. A chancellor cannot disregard all this." In *McKeon v. Sec.*, 51 N. Y. 300; S. C. 10 Am. Rep. 659, *St. Helen's Smelting Co. v. Tipping*—or rather the case in the court below where the same rule was laid down—was also cited with approval; but there the business was found to be a nuisance. In *Campbell v. Seaman*, 9 N. Y. Sup. C. 231; S. C. on Appeal, 63 N. Y. 563, and 20 Am. Rep. 567, it is assumed that the cases in 70 Penn. St. and 51 N. Y. are in conflict, which they clearly are not, on the rule of law. But in the latter, which was a case of brick burning, near the little village of Castleton, on the Hudson river, the business was declared to be a nuisance, and the plaintiff recovered damages. The special circumstances to which the Pennsylvania court attached importance were entirely wanting here, and it seems quite probable that on the same state of facts the Pennsylvania

court would have reached the same conclusion. Moreover, the Pennsylvania court only refused an injunction without deciding what rights the plaintiff might have had at law.

For further American cases laying down a like rule of law, see *Gilbert v. Showerman*, 23 Mich. 448; *Kirkman v. Handy*, 11 Humph. 406; *Whitney v. Bartholomew*, 21 Conn. 213.

¹*Gaunt v. Fynney*, L. R. 8 Ch. App. 8; S. C. 4 Moak, 718. An unsightly building near a residence is not a nuisance, *per se*. *Trulock v. Merte*, 84 N. W. Rep. 307 (Iowa.). Nor an undertaker's shop, where a single very sensitive person is annoyed. *Westcott v. Middleton*, 11 Atl. Rep. 490 N. J.). Nor a private burying ground which does not injure the health though it depreciates the value of one's land and offends the taste. *Monk v. Packard*, 71 Me. 309. Where the extension of a cemetery is complained of, that one has voluntarily settled near it is to be considered. *Upjohn v. Richland*, 46 Mich. 542. But it is a nuisance to stand stallions and jacks for mares near a dwelling. *Farrell v. Cook*, 16 Neb. 483; *Hayden v. Tucker*, 37 Mo. 214.

relief in the particular cases is not always a guide to a court of law when it comes to pass upon similar facts. The relief which equity gives by way of injunction is so severe in its consequences that it is never granted except upon a case clearly and conclusively made out. To break up a man's business in a case *of doubt, or even of slight inconvenience, would [*599] be an abuse of power. The court of equity wisely and justly, in such cases, declines to interfere, and sends the plaintiff to a court of law for damages.¹ In the latter court the question of law is the same, but the remedy not resting in discretion, as it does in equity, the court and jury must apply the rule of law and award or refuse damages according as they find the plaintiff does or does not suffer an inconvenience which is not merely trifling and proceeds from conduct of defendant that cannot be justified as reasonable under the circumstances.

Offensive Noises. A dog which disturbs the rest of the community at night by loud and continuous barking about or in the neighborhood of their residences may be a nuisance.² 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, may also, from their noises and other reasons, be nuisances to the neighborhood.³

¹ Huckenstine's Appeal, 70 Penn. St. 102; S. C. 10 Am. Rep. 669. "If one lives in a city he must expect to suffer the dirt, smoke, noisome odors, noise and confusion incident to city life. As Lord Justice JAMES beautifully said in *Salvin v. North Brancepeth Coal Co.* L. R. 9 Ch. App. 705. 'If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town, which would drive the Dryads and their masters from their ancient solitudes.'" EARL, J., in *Campbell v. Seaman*, 63 N. Y. 568; see *Rouse v. Martin*, 75 Ala. 510; *Daniels v. Keokuk Water Works*, 61

Ia. 549; *Louisville Coffin Co., v. Warren*, 78 Ky., 400.

² *Brill v. Flagler*, 23 Wend. 354.

³ See *Tanner v. Albion*, 5 Hill, 121; *Bloomhuff v. State*, 8 Blackf. 205; *People v. Sergeant*, 8 Cow. 139; *Gaunt v. Fynney*, L. R. 8 Ch. App. 8; S. C. 4 Moak, 718; *Inchbald v. Robinson*, L. R. 4. Ch. App. 388; *Marsau v. French*, 61 Tex. 173; see *Givens v. Van Studdiford*, 86 Mo. 149. Gathering in a noisy way in a pigeon shooting match may be a nuisance. *King v. Moore*, 3 B. & Ad. 184. See *Walker v. Brewster*, L. R. 5. Eq. Cas. 25. The noise of a roller skating rink near a dwelling may be a nuisance. *Snyder v. Cabell*, 1 S. E. Rep. 241 (W. Va.).

No doubt the blowing of a steam whistle as a signal of the approach or departure of trains may be prohibited in cities and places densely populated; but it may possibly, under extraordinary circumstances, become a private nuisance also.¹ And so may the keeping of a noisy livery stable,² or the manufacture of *machinery, or any business in which the noises are great and incessant or frequent.³

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. It is usually increased, also, by smoke, soot, etc.⁴ Grist mills are sometimes complained of on this ground.⁵

Nuisance of Dust, Smoke, etc. This may be caused in many kinds of business. It is what is generally complained of in

¹ See *Knight v. Goodyear, & Co.*, 38 Conn. 438; S. C. 9 Am. Rep. 406; *First Baptist Church v. Schenectady, & Co., R. R. Co.*, 5 Barb. 79. The ringing of a large bell at an early hour in a village may be a nuisance. *Davis v. Sawyer*, 133 Mass. 289, but the question of nuisance in ringing a church bell depends on its effect on ordinary persons, not on those who are ill. *Rogers v. Elliott*, 15 N. E. Rep. 768 (Mass.).

² *Ball v. Ray*, L. R. 8 Ch. 467; *Broder v. Saillard*, 2 Ch. Div. 692; S. C. 17 Moak, 693; *Dargan v. Waddill*, 9 Ired. 244.

³ *Soltau v. DeHeld*, 2 Sim. (n. s.) 133; *Elliottson v. Feetham*, 2 Bing. (N. C.) 134; *Fish v. Dodge*, 4 Denio, 311; *McKeon v. See*, 51 N. Y. 300; *Green v. Lake*, 54 Miss. 540; *Bishop v. Banks*, 33 Conn. 118; *Rhodes v. Dunbar*, 57 Penn. St. 274; *Robinson v. Baugh*, 31 Mich. 290; *Duncan v. Hayes*, 22 N. J. Eq. 25; *Davidson v. Isham*, 9 N. J. Eq. 186, 190; *Dennis v. Eckhardt*, 3 Grant, 390; *Bradley v. Gill*, Lutw. 69. This applies to a plan-

ing mill near a dwelling. *Hurlbut v. McKone*, 10 Atl. Rep. 164 (Conn.). To a school for training in hammered brass work. *Appeal of Ladies' Art, & Co.*, 13 Atl. Rep. 537 (Penn.). But not necessarily to a blacksmith shop. *Faucher v. Grass*, 60 Ia. 505. See *Balt., & Co., R. R. Co. v. Fifth Bapt. Ch.*, 108 U. S. 317; *Cogswell v. New York, & Co.*, 103 N. Y. 10; *Beseman v. Penn. R. Co.*, 13 Atl. Rep. 164 (N. J.).

⁴ *Robinson v. Baugh*, 31 Mich. 290; *McKeon v. See*, 51 N. Y. 300; S. C. 10 Am. Rep. 659; *Wesson v. Washburn Iron Co.*, 13 Allen, 95; *Whitney v. Bartholomew*, 21 Conn. 213; *Crumphorn v. Lambert*, L. R. 3 Eq. Cas. 409; *Demarest v. Hardham*, 34 N. J. Eq. 469. See *McCaffrey's App.* 105 Penn. St. 253. A license to run an engine will not defeat an action for jar of machinery distinct from the engine and run by its power. *Quinn v. Lowell, & Co.*, 140 Mass. 106.

⁵ *Gilbert v. Showerman*, 23 Mich. 448; *Cooper v. Randall*, 53 Ill. 34.

brick making, but sometimes also in the grinding of grain, the manufacture of machinery, etc.¹ If the smoke or dust, or both, that rises 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.² But the inconvenience must be something more than mere fancy; mere delicacy or fastidiousness; "it must be an inconvenience materially interfering with the ordinary comfort, physically, of human existence; not merely according to elegant and dainty modes and habits of living, but according to plain, sober and simple notions among the English people."³

***Offensive Odors.** These may proceed from a business [*601] carried on in an inconvenient place, or managed improperly, or from something simply permitted on one's premises from which offensive odors arise. Where they proceed from a lawful and proper business, the question of suitability and reasonableness in point of place and management is almost necessarily presented. Some kinds of business are in their nature offensive,

¹ See *Ross v. Butler*, 19 N. J. Eq. 294; *Hutchens v. Smith*, 63 Barb. 251; *Wesson v. Iron Co.*, 18 Allen, 95; *Cooper v. Randall*, 53 Ill. 24; *Norcross v. Thoms*, 51 Me. 503; *Conklin v. Phoenix Mills*, 62 Barb. 299; *Gilbert v. Showerman*, 23 Mich. 448; *Sampson v. Smith*, 8 Sim. 272; *Crump v. Lambert*, L. R. 3 Eq. Cas. 409; *Hyatt v. Myers*, 71 N. C. 271; *Jeffersonville, &c., R. R. Co. v. Esterle*, 13 Bush, 667; *Daniels v. Keokuk Water Works*, 61 Ia. 549; *Louisville Coffin Co. v. Warren*, 78 Ky. 400.

² *Ross v. Butler*, 19 N. J. Eq. 294; *Rhodes v. Dunbar*, 57 Penn. St. 274; *Beier v. Cooke*, 37 Hun, 38. If a city has no power to declare an act a nuisance it may not punish as such the emitting of dense smoke, which is not necessarily a common law nuisance. *St. Paul v. Gilfillan*, 36 Minn. 298.

³ **V. C. KNIGHT-BRUCE**, in *Walter v. Selfe*, 4 De G. & S. 315; S. C. 4 Eng.

L. & Eq. 15. And, see *Soltau v. Do Held*, 2 Sim. (n. s.) 133, 159; *Columbus Gas Co. v. Freeland*, 12 Ohio, (n. s.) 392.

A railway company authorized to build such works as were necessary and convenient for the maintenance of its road built its round house close to a church. The smoke and noise incident to the use of the round house greatly interfered with the comfortable use of the church as a place of worship. Held a nuisance for which damages could be recovered. *Balt., &c., R. R. Co. v. Fifth Bapt. Church*, 108 U. S. 317. In a like case it is held that statutory sanction cannot justify acts otherwise constituting a nuisance unless the right to do the acts in that way is expressly or by necessary implication conferred. *Cogswell v. New York, &c., R. R. Co.*, 103 N. Y. 10. (And as to this in case of storing explosives, see *McAndrews v. Colliard*, 42 N. J. L. 189.) But incidental damage to land near a

and tenements near them can be occupied with neither health nor comfort. But if a business be necessary or useful, it is always presumable that there is a proper place and a proper manner for carrying it on; in other words, that it may be carried on without being a nuisance. "It is the injury, annoyance, inconvenience or discomfort that the law regards, and not the particular business, trade or occupation from which these result. A lawful as well as an unlawful business may be carried on so as to prove a nuisance. The law in this respect looks with an impartial eye upon all useful trades, avocations and professions. 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 It has, therefore, been held repeatedly that the burning of brick was a nuisance;² but this can be no general rule: indeed the contrary has been sometimes held. The same methods of making brick are not universal; the same fuel is not always used; and sometimes the business is not offensive even in the immediate neighborhood. So the business of tanning leather is often found to be a nuisance;³ 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 is often a nuisance; and it is said in one case that situated within sixty [*602] five feet of a hotel it is *prima facie* a nuisance.⁴ But no such general rule can be applied. A livery stable may well be kept from being offensive in almost any locality not

railroad track from a proper running of the road is not a ground of recovery. *Beseman v. Penn. R. Co.* 13 Atl. Rep. 164 (N. J.). So an owner of land not abutting on the right of way may not recover for annoyance from dust from a coal chute beside the track. *Dunsmore v. Centr. Ia. Ry. Co.*, 33 N. W. Rep. 456 (Ia.).

¹ *Norcross v. Thoms*, 51 Me. 503, 504. To constitute it a nuisance, it is not necessary the offensive smell should be unwholesome. *Davidson v. Isham*, 9 N. J. Eq. 186.

² See in addition to the cases before mentioned, *Duke of Grafton v. Hil-*

liard, referred to in 18 Ves. 210, and in note to 4 Eng. L. & Eq. 18; *Earl of Ripon v. Hobart*, 3 M. & K. 169; *Walter v. Selfe*, 4 De G. & S. 315; S. C. 4 Eng. L. & Eq. 15; *State v. Board of Health*, 16 Mo. App. 3.

³ See *Rex v. Pappineau*, 1 Stra. 686; *Howard v. Lee*, 3 Sandf. 231; *Moore v. Webb*, 1 C. B. (N. S.) 673; *Howell v. McCoy*, 3 Rawle, 256; *Francis v. Schoelkopf*, 53 N. Y. 153.

⁴ *Coker v. Birge*, 9 Geo. 425; S. C. 10 Geo. 336. See *Aldrich v. Howard*, 8 R. I. 246; *Dargan v. Waddill*, 9 Ired. 244. But see *Shivery v. Streeper*, 3 South Rep. 865.

generally devoted to residences. It is peculiarly a business which may or may not be offensive according as it is carried on.¹ The same may be said of a brewery, which is also sometimes a nuisance.² A distillery is more likely to be one,³ and a soap manufactory still more.⁴ A gas manufactory may be under some circumstances,⁵ and so may a tobacco mill.⁶ For a slaughter house or a fat rendering establishment the only "convenient" place would seem to be at some considerable distance;⁷ and the same may be said of some manufactories of manure.

Dead animals left unburied are likely to be a nuisance;⁸ and a privy may be one if offensive odors arise from it which destroy the comfortable occupation of a neighboring tenement.⁹ Further illustrations of the nuisance of offensive smells will be found in cases cited in the note.¹⁰

¹ *Kirkman v. Handy*, 11 Humph. 406; *Dargan v. Waddill*, 9 Ired. 244; *Brooder v. Salliard*, 2 Ch. Div. 692; S. C. 17 Moak, 693. A private stable is not a nuisance *per se*. *Keiser v. Lovett*, 85 Ind. 240; *Rounsaville v. Kohlheim*, 68 Geo. 668.

² *Jones v. Williams*, 11 M. & W. 176. Slops from a brewery thrown into a ditch and carried upon adjoining land constitute a nuisance. *Beckley v. Skroh*, 19 Mo. App. 75.

³ *Smiths v. McConathy*, 11 Mo. 517.

⁴ *Brady v. Weeks*, 3 Barb. 157.

⁵ *Cleveland v. Gas Light Co.*, 20 N. J. Eq. 201; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257.

⁶ *Jones v. Howell*, Hutt. 136.

⁷ *Catlin v. Valentine*, 9 Paige, 575; *Peck v. Elder*, 3 Sandf. 126; *Morley v. Pragnal*, Cro. Car. 510; *Bishop v. Banks*, 33 Conn. 118; *Meigs v. Lister*, 23 N. J. Eq. 199; *Pruner v. Pendleton*, 75 Va. 516; *Reichert v. Geers*, 98 Ind. 73. See *Dennis v. State*, 91 Ind. 291; *Seifried v. Hays*, 81 Ky. 877. Bone boiling in a populous neighborhood is a nuisance, *Czarnecki's App.* 11 Atl. Rep. 660 (Penn.).

⁸ *Ellis v. Kansas City, &c., R. R. Co.*, 63 Mo. 131.

⁹ *Barnes v. Hathorn*, 54 Me. 124; *Whale v. Reinback*, 76 Ill. 323.

¹⁰ *Shaw v. Cummiskey*, 7 Pick. 76; *Meigs v. Lister*, 23 N. J. Eq. 199; *Ashbrook v. Commonwealth*, 1 Bush, 139; *Illinois, &c., R. R. Co. v. Grabbill*, 50 Ill. 241; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257; *Cleveland v. Gas Light Co.*, 20 N. J. Eq. 201; *Marshall v. Cohen*, 44 Geo. 489; *Neal v. Henry*, *Meigs*, 17; *Davis v. Lambertson*, 56 Barb. 480; *Cooke v. Forbes*, L. R. 5 Eq. Cas. 166; *Hackney v. State*, 8 Ind. 494. A private tomb may be a nuisance. *Barnes v. Hathorn*, 54 Me. 124. Casting the refuse of a tomato canning establishment into a stream is a nuisance. *Butterfoss v. State*, 40 N. J. Eq. 325. A piggery which pollutes the air of the neighborhood is a nuisance. *Com. v. Perry*, 139 Mass. 198; so is a railroad stock yard near to dwellings if the odors prejudicial to health are not unavoidable. *Shively v. Cedar Rapids, &c., Rty. Co.* 37 N. W. Rep. 133 (Ia.). Otherwise if the business is authorized and there is no negligence in the manner of maintaining the yard. *London, &c., Rty. Co. v. Trueman*, L. R. 11 App. Cas. 45.

Mental Disquietude. It was decided in *Owen v. Henman* that an action would not lie for being disturbed in the hearing of a clergyman and the other exercises of a place of public worship. The plaintiff, it was said, "claims no right in the build-
or any pew in it, which has been invaded. There is no
[*603] *damage to his property, health, reputation or person.

He is disturbed in listening to a sermon by noises. Could an action be brought by every person whose mind or feelings were disturbed in listening to a discourse, or any other mental exercise—and it must be the same whether in a church or elsewhere—by the noises, voluntary or involuntary of others, the field of litigation would be extended beyond endurance. The injury, moreover, is not of a temporal nature: it is altogether of a spiritual character for which no action lies."¹ This case has been approved in a suit brought to restrain a street railway company from running its cars on Sunday; the grievance alleged being "that by reason of the said unlawful business carried on as aforesaid by the defendants, they, the complainants, have been and are and will be 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; that they have been and are and will be deprived from enjoying peaceably and without interruption the worship of Almighty God in their accustomed places of public worship, or in their own residences on the Sabbath day; and that the lawful peace of the said day is thereby disturbed and broken; and the right of property which they possessed in their said churches or places of public worship and in their private residences are, and will continue to be thereby infringed upon, and their said churches and residences deteriorated and lessened in value." Putting aside the question of alleged injury to property—which at the time it was not necessary to consider—the Court say: "Religious meditation and devotional exercises are a duty and a privilege undoubtedly, but result nevertheless from sentiments not universal in their demonstrations, by any means, but peculiar to individuals rather than to the whole community. Of this, * * injury to it by disturbance cannot be measured by a standard applicable to the privation of ordinary comfort. It cannot be affirmed, in regard to the devotional exercise em-

¹ *Owen v. Henman*, 1 Watts & S. 543.

braced within the privilege that it is more than a mental disturbance—an inconvenience. Human tribunals cannot tell anything about the effect of mere noise occasioned by ordinary employments on the mind. The belief is reasonable that its *operations are independent of such physical facts; [*604] that it is cognizant of its own impulses and emotions under all ordinary circumstances, when in its normal condition and free from disease. This is the rule of the criminal law, and it is never been held that a disturbance from ordinary causes excuses a criminal act.” The only true rule in judging of injuries from alleged nuisances is 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, feelings 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 belonging to no church. It must be something about the effects of which all agree; otherwise that which might be no nuisance to the majority might be claimed to deteriorate property by particular persons. Noises which disturb sleep, bodily rest a physical necessity, noxious gases, sickening smells, corrupted waters and the like, usually affect the mass of community in one and the same way, and may be testified to by all possessed of their natural senses, and can be judged of by their probable effect on health and comfort, and in this way damages may be perceived and estimated. Not so of that which only affects thought or meditation. What would disturb one in his reflections might not disturb another. There can be no general rule or experience as to this; it is incapable of being judged of, like those things which affect health or comfort.”¹

So in Massachusetts it has been held that, although by statute the keeping for sale of intoxicating liquors was made a common nuisance, yet that such keeping of liquors, and the sale thereof, even though made to the husbands, wives, children and servants of complaining parties, did not make it a special nuisance to

¹ THOMPSON, J., in *Sparhawk v. Union Passenger R. Co.*, 54 Penn. St. 401, 427. But a railway may be a nuisance to a religious corporation if its trains disturb worship on Sunday, and thereby deteriorate the value

of the church property. *First Baptist Church v. Schenectady, &c.*, R. R. Co., 5 Barb. 79. See *Balt., &c., R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317.

such persons, so as to authorize and justify them in proceeding to break into the shop or building where the liquor was kept and the sales made, and to destroy the liquor and the vessels in which it was found; but that the nuisance must be deemed a public nuisance exclusively.¹ Here, as in the cases before [*605] referred to, *the disturbance was only mental. Such cases may become common law nuisances if noisy and riotous proceedings are suffered, and if disorderly people are allowed to gather in them for their customary practices. But the nuisance is then in the disorder, not in the business itself. If the mental disquietude they occasion could give a right of action, the question of locality would be of little importance, and one might be specially inconvenienced by a nuisance in a distant town 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 deemed to be one, there may be many other statutory nuisances which cannot afford grounds for a private action, for the reason above assigned, namely, 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. It has been stated on a preceding page that one is under no obligation to keep his premises in safe condition for the visits of trespassers. (On the other hand, when he expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit. Many cases illustrate this rule.³) Thus, individuals holding a

¹ *Brown v. Perkins*, 12 Gray, 89.

² The power to declare what shall be nuisances is not vested in city or town councils, and they can punish as such only what are nuisances at the common law or by statute. *Yates v. Milwaukee*, 10 Wall. 497; *Wreford v. People*, 14 Mich. 41; *Everett v. Council Bluffs*, 46 Iowa, 66. See *St. Paul v. Gilfillan*, 36 Minn. 298.

³ *Bush v. Steinman*, 1 B. & P. 404; *Burgess v. Gray*, 1 M., G. & S. 578; *Randleson v. Murray*, 8 Ad. & El. 109; *Southcote v. Stanley*, 1 H. & N. 247; *S. C.* 38 E. L. & Eq. 295; *Indermaur v. Dames*, L. R. 1 C. P. 274, and L. R. 2 C. P. 181; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Elliott v. Pray*, 10 Allen, 378; *Harriman v. Pittsburgh*,

fair and erecting structures for the purpose are liable for injuries to their patrons caused by the breaking down of these structures through such defects in construction as the exercise of proper care would have avoided.' A railroad company is liable to a hackman doing business with it, who steps without [*606] fault into a cavity negligently left by it in its platform, whereby he is injured.* So a railroad company is liable to

&c., Ry. Co., 12 N. E. Rep. 451, (Ohio).

¹ Latham v. Roach, 72 Ill. 179. The owner of a house who has put up a scaffold for the purpose of building an addition to it is liable to a workman who is injured by the scaffold falling because of its insufficiency. Coughtry v. Globe Woolen Co., 56 N. Y. 124; S. C. 15 Am. Rep. 387. A dock owner is liable to the servant of one whom he has employed to paint a vessel in his dock when injured by the breaking of an unfit rope supporting a staging. Since the man was there to do something which the dock owner was interested in having done, the latter must be held to have invited him to use the appliances furnished for immediate use in the dock. Heaven v. Pender, L. R. 11 Q. B. D. 503. Where a sub-contractor put up a scaffold for the use of his own men and another man employed about the building is hurt by a defect in it, while using it for his own convenience, the sub-contractor is not liable, Maguire v. Magee, 13 Atl. Rep. 551 (Penn.). See the general rule laid down in Beck v. Carter, 68 N. Y. 283, citing Blithe v. Topham, Cro. Jac. 158; Hardcastle v. Railway Co., 4 H. & N. 67; Barnes v. Ward, 9 C. B. 392; Hadley v. Taylor, L. R. 1 C. P. 53; Corby v. Hill, 4 C. B. (N. S.) 556; Hounsell v. Smyth, 7 C. B. (N. S.) 730. And, see Deford v. Keyser, 30 Md. 179; Godley v. Hagarty, 20 Penn. St. 387.

² Tobin v. Portland, &c., R. R. Co.,

59 Me. 183. See Swords v. Edgar, 59 N. Y. 28; S. C. 17 Am. Rep. 295. So to a husband coming to meet his wife. McKone v. Mich. Centr. R. R. Co., 51 Mich. 601. To a traveller going over a way leading to the wharf of a connecting carrier. Bennett v. Railroad Co., 102 U. S., 577; or going out of the station grounds where there is a hole near the path. Cross v. Lake Shore, &c., Co., 37 N. W. Rep. 361 (Mich.). A wharf owner is liable to a custom's officer injured in watching for smugglers by lack of rail on wharf. Low v. Grand Trunk Ry Co., 72 Me. 818. So a church is liable to a member of another society attending service by invitation for defects in its premises. Davis v. Centr. Cong. Soc., 129 Mass. 367. If the appearance of premises points out a certain space as the mode of approach, that space must be kept safe. Here there was a well in a passage between two houses. Learoyd v. Godfrey, 138 Mass. 315. A toll bridge owner is liable if, knowing it is dangerous, he allows one to use the bridge. Stokes v. Tift, 64 Geo., 312. But one who is about to do business with a railroad company at its office is a mere licensee, if injured in its yard, when his business did not call him there. Diebold v. Penn. R. R. Co., 14 Atl. Rep. 576 (N. J.). So is one who, having missed a train, waits about a station for a horse car. Heintlein v. Boston, &c., Ry Co., 16 Atl. Rep. 698 (Mass.).

one who is injured in attempting to cross its track, invited to cross by a signal indicating that it is safe to do so,¹ and to people who, coming to the station to welcome an arrival, are injured by the giving way of the platform.² So a brewer is liable to one who, coming on his premises to do business with him, without fault of his own, falls through an unguarded trap door.³ Other illustrations are given in the notes.

But one is not invited into danger when his entrance upon dangerous premises is simply not opposed and prevented. Thus, one whose unenclosed grounds people cross without objection is

¹ *Sweeny v. Old Colony R. R. Co.*, 10 Allen, 368; see *Louisville, &c., Co. v. Thompson*, 64 Miss. 584.

² *Gillis v. Penn. R. R. Co.*, 59 Penn. St. 129; *Hamilton v. Texas, &c. Ry. Co.*, 64 Tex. 251; see *Holmes v. N. E. Ry. Co.* L. R. 4 Exch. 254. If one of the public is injured from mere failure to repair a private way, there is no liability. *Gautret v. Egerton*, L. R. 2 C. P. 371; *Nugent v. Wann*, 3 Fed. Rep. 79; *Ferguson v. Virginia, &c., Co.*, 13 Nev. 184; *Birnbaum v. Crowninshield*, 137 Mass. 177. Nor though a walk originally private has become public. *Robbins v. Jones*, 15 C. B. (N. S.) 221; but see *Campbell v. Boyd*, 88 N. C. 129. One is liable for defect in private road causing injury to one rightfully using it. *Atlanta, &c., Mills v. Coffey*, 4 S. E. Rep. 759 (Geo.). But not for defects in premises at a place outside of ordinary paths where persons doing business thereon could not be expected to be. *Armstrong v. Medbury*, 34 N. W. Rep. 566 (Mich.). One abutter upon a private alley is not liable for maintaining over the alley a platform by which the servant of another abutter is knocked from a wagon. *Cahill v. Layton*, 57 Wis. 600.

³ *Chapman v. Rothwell*, El. Bl. & El. 168. See *Nave v. Flack*, 90 Ind. 205; *Freer v. Cameron*, 4 Rich. 228;

Totten v. Phipps, 52 N. Y. 354; *Swords v. Edgar*, 59 N. Y. 28; *Fairbank v. Haentzsche*, 73 Ill. 236; *Stratton v. Staples*, 59 Me. 94; *Elliott v. Pray*, 10 Allen, 378; *Gilbert v. Nagle*, 118 Mass. 278; *Pierce v. Whitcomb*, 48 Vt., 127; S. C. 21 Am. Rep. 120; *Hydraulic Works v. Orr*, 83 Penn. St. 332. Followed in *Schilling v. Abernethy*, 112 Penn. St. 437, where a wall fell on a child passing through an alley. See the general rules of liability stated in *Malone v. Hawley*, 46 Cal. 400. For injuries in consequence of defective or unsafe buildings, the owner is not responsible if he has employed competent contractors or mechanics to build or examine them, and is guilty of no personal fault. *Brown v. Cotton Co.*, 3 H. & C. 511. See *Ryan v. Fowler*, 24 N. Y. 410. Compare *Homan v. Stanley*, 66 Penn. St. 464; S. C. 5 Am. Rep. 389. The owner of a hall is liable if the aisles are unsafe from lack of ordinary care. *Currier v. Boston Music Hall*, 135 Mass. 414. The rule as to invitation applies where a sidewalk is laid up to the line of a building and near its entrance close to the wall an unguarded area is left. *Crogan v. Schiele*, 53 Conn. 186. But even if one is invited upon the premises, he must show negligence in the owner. *McLean v. Burnham*, 8 Atl. Rep. 25 (Penn.).

not liable to one who falls into an unguarded cistern there.¹ The owner of a vessel is not liable to a servant employed upon it who, in wandering about the vessel from curiosity, falls through a scuttle.² One who publicly exposes a machine on market day is

¹Hargreaves v. Deacon, 25 Mich., 1; or into a pond of surface water. Klix v. Nieman, 83 N. W. Rep. 223 (Wis.); Schmidt v. Kansas City, &c., Co., 90 Mo. 284; Overholt v. Vieths, 7 S. W. Rep. 74 (Mo.); or a pit, Morgan v. Penn., &c., Co., 19 Blatchf. 239; Gramlich v. Wurst, 86 Penn. St. 74; Early v. Lake Shore, &c., Co., 33 N. W. Rep. 813 (Mich.). But see Mackey v. Vicksburg, 64 Miss. 777. Evansville, &c., Co. v. Griffin, 100 Ind. 221; Gillespie v. McGowan, 100 Penn. St. 144; Union Stk. Yard Co. v. Bourke, 10 Ill. App. 474. Nor is he liable if in a storm a part of an old building is blown against an intruder. Lary v. Cleveland, &c., R. R. Co., 78 Ind. 823. Merely abstaining from driving children off a lot is not an invitation to come upon it. Galligan v. Metacomet, &c., Co., 143 Mass. 527. If one comes on premises to see for his own benefit a person employed there, he is not invited to enter. Galveston Oil Co. v. Morton, 7 S. W. Rep. 756 (Tex.) The owner is not liable however frequently his premises are used by others for their own convenience unless he leads them to believe a way is intended to be created there for travelers. Evansville, &c., R. R. Co. v. Griffin, 100 Ind. 221. Where a hole is dug across a path long used as part of a sidewalk, he is liable. Graves v. Thomas, 95 Ind. 361. And see Branson v. Labrot, 81 Ky., 638. One who goes on land to seek employment may not recover for injury from a machine not obviously dangerous, which he passes in his course, even if the defect might with reasonable care have been discovered. Larmore v. Crown

Point, &c., Co., 101 N. Y., 391. Nor if he is a mere licensee. Batchelor v. Fortescue, L. R. 11 Q. B. D., 474. Landlord is not liable if one not a guest takes refuge from a storm under a piazza which breaks from the crowd on it. Converse v. Walker, 30 Hun, 596; distinguishing a case where a guest walked off an unguarded piazza; Camp v. Wood, 76 N. Y. 92. Where to avoid skids lawfully across the sidewalk one got upon the steps of a building and slipped, the occupant is not liable. Welsh v. Wilson, 101 N. Y. 254. But if a railroad company has long permitted persons to cross its track or go upon it at a certain point, a duty to use reasonable care not to injure them is imposed. Byrne v. New York, &c., R. R. Co., 104 N. Y. 362; Taylor v. Dela., &c., Co., 118 Penn. St. 162; Davis v. Chicago, &c., Co., 58 Wis. 646; Virginia, &c., R. R. Co. v. White, 5 S. E. Rep. 578 (Va.); Harri-man v. Pittsburgh, &c., R. R. Co., 12 N. E. Rep. 451 (Ohio.); Georgia, &c., R. R. Co. v. Blanton, 4 South. Rep. 621 (Ala.). Compare Memphis, &c., R. Co. v. Womack, Id. 618. But in Mass. there can in such case be no recovery, unless the injury is wanton or willful. Wright v. Boston, &c., Co., 142 Mass. 296. If tracks are allowed to be used by other companies for switching, it is an invitation to the servants of such companies. Ind., &c., R. R. Co. v. Barnhart, 16 N. E. Rep. 121 (Ind.).

²Severy v. Nickerson, 120 Mass. 306. See, for cases like this in principle, Pierce v. Whitcomb, 48 Vt. 127; S. C. 21 Am. Rep. 120; and Caniff v. Blanchard Nav. Co., 83 N. W.

not responsible for injuries to boys who meddle with it without permission.¹ The liability in any such case must spring [*607] 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.²

The duty in all such cases must in general pertain to occupancy, not to ownership;³ 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.⁴

Nuisances which Threaten Calamity. Many things are nui-

Rep. 744 (Mich.). So if without invitation a stranger goes aboard. *Metcalf v. Cunard, S. S. Co., 16 Atl. Rep. 701 (Mass.)*.

¹ *Mangan v. Atterton, L. R. 1 Exch. 239*. Compare *Keffe v. Milwaukee, &c., R. R. Co., 21 Minn. 207*; *Copper v. Penn., &c., Co., 13 Ill., App. 600*; *Powers v. Harlow, 53 Mich. 507*, and cases p. *683, *post*.

² As where a mash tub in a brewery gave way and injured a servant, being weakened by natural decay. *Malone v. Hathaway, 64 N. Y. 5*; *S. C. 21 Am. Rep. 573*. The question in every such case must be whether the defect was one that ought to have been detected and remedied, and would have been by the exercise of due care. If so, the owner should be responsible; otherwise, not.

³ See *Rich v. Basterfield, 4 M., G. & S. 783*.

⁴ *Campbell v. Sugar Co., 62 Me. 552*; *Burdick v. Cheadle, 26 Ohio, (N. S.) 393*; *S. C. 20 Am. Rep. 767*. A landlord who undertakes to protect his building against excavations on the adjoining lot, but by the negligence of whose workmen the wall falls, rendering the building untenable, is liable to the tenant for damages, and the latter may abandon. *McHenry v.*

Marr, 89 Md. 510. See *Toole v. Beckett, 67 Me. 544*; *Marshall v. Cohen, 44 Geo. 489*. A tenant having the right to use a staircase leading to another part of the building may recover of the owner if injured by its defects. *Looney v. McLean, 129 Mass. 33*. A landlord owes no duty to a child of his tenant's visitor to protect a skylight in a roof overlooked by the tenant's window, the roof being used by the tenant to dry clothes upon, and the child falling out of the window. *Miller v. Woodhead, 104 N. Y. 471*. Nor if a tenant using a roof by license to dry clothes upon is injured from lack of a rail is the landlord liable. *Ivay v. Hedges, L. R. 9 Q. B. D. 80*. If there are concealed defects about the premises known to the lessor which a careful examination would not disclose to the lessee, the former is liable to the latter if an injury occurs. Here a defective cesspool cover concealed by earth. *Cowen v. Sunderland, 14 N. E. Rep. 117 (Mass.)*. A landlord is not liable for premises being out of repair to a sub-tenant when the lease forbids subletting and the subletting is unknown to the landlord. *Cole v. McKey, 66 Wis. 500*, discussing many cases. *Donaldson v. Wilson, 60 Mich. 86*.

sances because they threaten calamity to the persons or property of others, and thereby cause injury, though the calamity feared may never befall. A building so negligently constructed or so greatly decayed that it is likely to fall upon an adjoining tenement, or upon persons lawfully making use of easements near it, is a nuisance of this sort;¹ and so is powder or any other dangerous explosive stored and imperfectly guarded in the vicinity of residences;² and so is a building infected with disease, and rented in that condition without notifying the tenant of the fact.³ So if one who is constructing a brick building abutting on a highway shall put his servants at work without providing any protection against the *accident of a brick falling upon pass- [*608] ing travelers, he may be held responsible for such an accident, even if the servants have observed due care.⁴ So the blasting of rocks sufficiently near the dwellings of others to endanger them is a nuisance.⁵ So is a mill dam from which pestilential vapors arise,⁶ and any business which endangers the neighbor-

¹ *Mullen v. St. John*, 57 N. Y. 567; S. C. 15 Am. Rep. 530, case of a suit for an actual injury, citing *Regina v. Watts*, 1 Salk, 357. So *Kappes v. Appel*, 14 Ill. App. 170; *Gorham v. Gross*, 125 Mass. 232; *Grove v. Fort Wayne*, 45 Ind. 429; S. C. 15 Am. Rep. 262, case of dangerous cornice overhanging a street. *Meyer v. Metzler*, 51 Cal. 142. The owner of a house is liable for an injury caused by a brick falling on one who in using the street sat upon the door-sill to tie his shoe. *Murray v. McShane*, 52 Md. 217; *Khron v. Brock*, 144 Mass. 516, where zinc from a roof fell upon traveller and the owner was held liable.

² *Myers v. Malcolm*, 6 Hill, 292; *Cheatham v. Shearon*, 1 Swan, 213. *Emory v. Hazard Powder Co.*, 22 S. C. 476. Although explosives may be necessary to do a work pursued under legislative authority, yet keeping such substances in large quantities near habitations is a nuisance, irrespective of negligence. *McAndrews v. Colder*, 43 N. J. L. 189. Whether a

magazine is a nuisance depends not on negligence, but on all the surrounding circumstances of a case. *Heeg v. Licht*, 80 N. Y. 579. See *Dilworth's App.* 91 Penn. St. 247.

³ *Minor v. Sharon*, 112 Mass. 477; S. C. 17 Am. Rep. 122; *Cesar v. Karutz*, 60 N. Y. 229; S. C. 19 Am. Rep. 164. See *Eaton v. Winnie*, 20 Mich. 156; S. C. 4 Am. Rep. 377; *King v. Vantandillo*, 4 M. & S. 73.

⁴ *Jager v. Adams*, 123 Mass. 26. And see cases note 1, *supra*. A building so constructed that snow and ice are likely to slide from the roof into the street is not necessarily a nuisance, and the owner is only liable if he fails to observe due care in respect to it. *Garland v. Towne*, 55 N. H. 55.

⁵ *Scott v. Bay*, 3 Md. 431. Whether the damage is by flying rocks or concussion of the air. *Colton v. Onderdonk*, 65 Cal. 155.

⁶ *State v. Rankin*, 3 Sou. Car. 438; S. C. 16 Am. Rep. 737; *Adams v. Popham*, 76 N. Y. 410.

hood by the noxious vapors which come from the place where it is carried on.¹ In these 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.

Diseased Beasts. Domestic animals which have an infectious or contagious disease become a nuisance when the care and management of them by their owners is such as to expose the domestic animals of others to the infection or contagion,² or when they are sold to be put with others, to one who is not informed of their condition.³ The question of liability is one of negligence,⁴ and of the want of good faith.⁵

Who Responsible. 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.⁶ And here, as elsewhere in the law of torts, there may be distinct parties equally liable; one, perhaps, for the positive wrong of creating, and the other for the negative wrong of failing to abate.

[*609] *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. It follows that, as between landlord and tenant, the party presumptively responsible is the tenant.⁷ But

¹ *Cooke v. Forbes*, L. R. 5 Eq. Cas. 166; *Campbell v. Seaman*, 63 N. Y. 568; S. C. 20 Am. Rep. 567; *Penn. Lead Co.'s App.*, 96 Penn. St. 116. But the injury must be substantial and not caused by peculiar susceptibility in the one complaining. *Price v. Grantz*, 11 Atl. Rep. 794 (Penn.).

² *Mills v. New York, &c., R. R. Co.*, 2 Rob. 326; affirmed 41 N. Y. 619, note; *Hite v. Blandford*, 45 Ill. 9. See *Anderson v. Buckton*, 1 Stra. 192; *Barnum v. Vandusen*, 16 Conn. 200. One who is induced to keep a horse with his own, on the false statement that he is not diseased, when he is, may have an action for the communication of the disease to those with which he was placed. *Fultz v. Wycoff*, 25 Ind. 321.

³ *Mullett v. Mason*, L. R. 1 C. P. 559. See *Jeffrey v. Bigelow*, 13 Wend. 518.

⁴ See *Fisher v. Clark*, 41 Barb. 329; *Kemish v. Ball*, 30 Fed. Rep. 759; *Bradford v. Floyd*, 80 Mo. 207; *Hawks v. Locke*, 139 Mass. 205.

⁵ See ante, p. 563.

⁶ Where a nuisance is not in the use alone, but also in the creation of the structure, the liability attaches to those who caused the erection. *Chenango Bridge Co. v. Lewis*, 63 Barb. 111.

⁷ *Todd v. Flight*, 9 C. B. (N. S.) 377; *Rich v. Basterfield*, 4 C. B. 783; *Russell v. Shenton*, 8 Q. B. 449; *Swords v. Edgar*, 59 N. Y. 28; S. C. 17 Am. Rep. 225. If a tenant before the expiration of his term puts a fence

the facts when developed, remove many cases from this presumption, for the very satisfactory reason that 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 lands 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.¹ "He transferred it with the original wrong, and his demise affirms the continuance of it. He has also his rent as a consideration for the continuance, and therefore ought to answer the damage it occasions."² 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.³ As is

which injures a child, his surrender does not exonerate him. *Hussey v. Ryan*, 64 Md. 426. A landlord is not liable for injury to tenant's guest's child injured by falling in a hole dug at the tenant's request. *Moore v Logan, & Co.*, 7 Atl. Rep. 198 (Penn.). A tenant from month to month is not liable for nuisance from decay of a privy vault. *Griffith v. Lewis*, 17 Mo. App. 605. But see *Deutsch v. Abeles*, 15 Mo. App. 398. The owner of an apartment house whose janitor opens coal hole for tenant's coal and negligently leaves it unguarded, is liable to a passer by, who falls in. *Jennings v. VanSchaick*, 15 N. E. Rep. 424 (N. Y.).

¹ *Roswell v. Prior*, 12 Mod. 635; S. C. 2 Salk. 460, and 1 Ld. Raym. 713; *Fish v. Dodge*, 4 Denio, 311; *Smith v. Elliott*, 9 Penn. St. 845; *Helwig v. Jordan*, 53 Ind. 21; S. C. 21 Am. Rep. 189. See *House v. Metcalf*, 27 Conn. 632; *People v. Irwin*, 4 Denio, 129; *Rex v. Pedley*, 1 Ad. & El. 822; S. C. 3 N. & M. 627. If one buys

leased land with a nuisance on it of which he knows, and takes rent from the tenant, he is liable for the nuisance. *Pierce v. German, & Co., Soc.*, 13 Pac. Rep. 478 (Cal.).

² *SAFFOLD, J.*, in *Grady v. Wolner*, 46 Ala. 381, 383. Lessor held liable for a sink in a foot pavement left open in cleaning. *Owings v. Jones*, 9 Md. 108. See *Clancy v. Byrne*, 56 N. Y. 129; S. C. 15 Am. Rep. 391. If premises are so constructed or in such condition that the continuance of their use must result in a nuisance the landlord is liable. *Fow v. Roberts*, 103 Penn. St. 489; *Albert v. State*, 66 Md. 325; *Jackman v. Arlington Mills*, 137 Mass. 277. See *Nugent v. Boston, & Co., Corp.*, 12 Atl. Rep. 797 (Me.).

³ *Leonard v. Storer*, 115 Mass., 83; S. C. 15 Am. Rep. 76. The roof was so constructed that snow and ice, unless removed, were likely to slide from it into the street, and the injury was actually caused by its sliding off upon a passing traveler. Compare

said in one case, in order to render a landlord liable in a case of this sort, there must be some evidence that he authorized the continuance of the nuisance; for instance, that he assumed the obligation to repair the premises might be a circumstance [*610] to show *that he authorized its continuance. But there is no such obligation where the landlord has required the tenant himself to assume it.¹ For similar reasons it has been held that one who floods his neighbor's lands by a dam erected on his own, and then conveys his lands with covenants of seizin and of quiet enjoyment, "with the right to flow as far as has hitherto been necessary for the use of the mills on the premises conveyed, the dam remaining at its present height," is liable for the continuance of the nuisance, as having expressly affirmed and encouraged it.² It would have been otherwise had the possession passed to others without any evidence of any conveyance or demise; for in such case the evidence that the will of the party accompanied and encouraged the continuance of the nuisance would be want-

Shipley v. Fifty Associates, 106 Mass. 194; S. C. 8 Am. Rep. 318. Where by the burning of a steam mill operated by a lessee other property is damaged, the landlord is liable if when delivered to the lessee the mill was in fact a nuisance, and was under the contract to be used substantially as it then was. He is not, if at that time it was not a nuisance and the repairs were to be made by the lessee. *Burbank v. Bethel, &c., Co.*, 75 Me. 373. If the injury is caused by the use of premises made by the lessee, as in overcrowding a gallery, sufficient so far as the owner knew, the latter is not liable. *Edwards v. New York &c., R.R. Co.*, 98 N. Y. 245.

¹ *Pretty v. Bickmore*, L. R. 8 C. P. 401. See *Gwinnell v. Eamer*, 32 Law T. Rep. 835; *Todd v. Flight*, 9 C. B. (N. S.) 377; *Harris v. Cohen*, 50 Mich. 324; *Johnson v. McMillan*, 36 N. W. Rep. 803 (Mich.). Nor for danger caused by structure put on by tenant, owner having delivered the premises in safe condition. *Ryan v. Wilson*,

87 N. Y. 471. See *Texas, &c., Ry. Co. v. Mangum*, 4 S. W. Rep. 617 (Tex.) If a tenant has created a nuisance during the term, and after it, without abating the nuisance and without entry, the landlord re-lets to the same tenant, he is liable, though the tenant may agree to repair. *Ingwerson v. Rankin*, 47 N. J. L. 18.

² *Waggoner v. Jermaine*, 3 Denio, 306. See *Lohmiller v. Indian Ford, &c., Co.*, 51 Wis. 683; *Staple v. Spring*, 10 Mass. 72; *Cahill v. Eastman*, 18 Minn. 324; *Eastman v. Amoskeag Co.*, 44 N. H. 143. Where parts of a building are let to several tenants, the landlord is liable to them severally for a water-closet nuisance therein. *Marshall v. Cohen*, 44 Geo. 489. Landlord is liable to subtenant for damage from overflow caused by his servant. *Pike v. Brittan*, 71 Cal. 159. But he is not liable to one tenant for overflow of properly constructed water closet caused by negligence of another tenant. *Allen v. Smith*, 76 Me. 335.

ing, and the law must refer it to the will of the possessor.¹ So 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. "It being quite possible for the tenant to occupy the shop without making fires, and quite optional on his part to make them or not, or to make them with certain times excepted, so as not to annoy the plaintiff, or in such a manner as not to create any quantity of smoke that could be deemed a nuisance * * the utmost that can be imputed to the defendant is that he enabled the tenant to make fires if he pleased."²

*The fact that the party erecting the nuisance remains [*611] responsible for its continuance does not excuse the actual possessor. The continuance and every use of that which is in its erection a nuisance is a new nuisance.³ And persons may be

¹ *Blunt v. Akin*, 15 Wend. 522. This case examines and comments upon *Roswell v. Prior*, 1 Ld. Raym. 713; *Beswick v. Cander*, Cro. Eliz. 402, 520; *Cheetham v. Hampson*, 4 T. R. 818, and they in turn, as well as the principal case, are examined and distinguished in *Waggoner v. Jermaine*, 3 Denio, 806. In *Bizer v. Ottumwa, &c., Co.*, 70 Ia. 145, it is held that the injury done by a dam being permanent, the builder solely is liable and that his grantee is not.

² *Rich v. Basterfield*, 4 M., G. & S. 783, 801. This case examines very fully all preceding cases which might be supposed to have a bearing, and especially *Bush v. Steinman*, 1 B. & P. 404; *Burgess v. Gray*, 1 M., G. & S. 578; *Randleson v. Murray*, 8 Ad. & El. 109; *Laugher v. Pointer*, 5 B. & C. 547, and 8 D. & R. 556; *Quarman v. Burnett*, 6 M. & W. 499, and *Leslie v. Pounds*, 4 Taunt. 649, cases where the responsibility of the owner of property for injuries done or occasioned by it was in question. Compare *Little Schuylkill, &c., Co. v. Richards*, 67 Penn. St. 142; *Moore v. Langdon*,

² *Mackey* 127. To hold a landlord for the indecent conduct of his tenants, he must have let the premises for a bawdy house or have continued the lease knowing the use. *Givens v. Van Studdiford*, 86 Mo. 149.

³ *Staple v. Spring*, 10 Mass. 72, 74; *McDonough v. Gilman*, 8 Allen, 264, 267; *Nichols v. Boston*, 98 Mass. 39, 43; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Clancy v. Byrne*, 56 N. Y. 129; S. C. 15 Am. Rep. 391; *Pillsbury v. Moore*, 44 Me. 154; *Morris Canal v. Ryerson*, 27 N. J. 457; *Wasmer v. Del., &c., R. R. Co.*, 80 N. Y. 212. Where the lessee of premises makes use of an excavation in a sidewalk which was made for the benefit of the premises, but insufficiently covered, he is responsible either severally or jointly with the lessor for a damage to one who is injured by falling into it. *Irvine v. Wood*, 51 N. Y. 224; S. C. 10 Am. Rep. 603. But the owner is not liable for the breaking by third persons of the cover of such excavation when it has been properly dug by the tenant under city authority and he has had no knowledge of

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. "That is a consequence of their original wrong, and they cannot be permitted to excuse themselves from paying damages for the injury it causes by showing their inability to remove it without exposing themselves to another action."¹

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. "This rule is very reasonable. The purchaser of property might be subjected to very great injustice if he were made responsible for consequences of which he was ignorant, and for damages which he never intended to occasion. They are often such as cannot be easily known, except to the party injured. A plaintiff ought not to rest in silence, and presently surprise an unsuspecting purchaser by an action for damages; but should be presumed to acquiesce until he requests a removal of the nuisance."² [*612] But it *seems that if one has already been notified

any defect. *Wolf v. Kilpatrick*, 101 N. Y. 146. See *Johnson v. McMullan*, 36 N. W. Rep. 803 (Mich.).

¹ *Thompson v. Gibson*, 7 M. & W. 456, 462. If one's chimney is negligently weakened, so that it falls upon a passer-by, the owner may be liable, though the weakening was through the unauthorized act of another. But he will have a remedy over. *Gray v. Boston, &c., Co.*, 114 Mass. 149; S. C. 19 Am. Rep. 324.

² SHERMAN, J., in *Johnson v. Lewis*, 13 Conn. 307. See, also, *Penruddock's Case*, 5 Co. 101; *Winsmore v. Greenbank*, 1 Willes, 577; *Woodman v. Tufts*, 9 N. H. 88; *Plumer v. Harper*, 3 N. H. 88; *Carleton v. Redington*, 21 N. H. 291; *Noyes v. Stillman*, 24 Conn. 15; *Snow v. Cowles*, 26 N. H. 275; *Eastman v. Amoskeag Co.*, 44 N. H. 14; *Pierson v. Glenn*, 14 N. J. 36; *Beavers v. Trimmer*, 25 N. J. 97; *Walter v. County Commissioners*, 35 Md. 385; *Bonner v. Wilborn*, 7 Geo.

296; *Dodge v. Stacy*, 39 Vt. 548; *Conhocton Stone Road v. Buffalo, &c., R. R. Co.*, 51 N. Y. 573; S. C. 10 Am. Rep. 646; *Groff v. Ankenbrandt*, 19 Ill. App. 148; but if he has notice of it, a request to abate is unnecessary. *Dickson v. Chicago, &c., Co.*, 71 Mo. 575; *Buesching v. St. Louis, &c., Co.*, 73 Mo. 219, case of unguarded area near street line. But where a pipe, which one neither uses nor repairs, was upon premises when bought, and water from another's part of the building is discharged by it on a sidewalk and there freezes, the owner is not liable to one injured by slipping on the ice, unless he has been requested to abate the pipe. *Wenzlick v. McCotter*, 87 N. Y. 123. And where there is a pit near a highway when it is dedicated, there is no duty in the owner to abate it, for neglect of which an indictment lies. *State v. Society, &c.*, 44 N. J. L. 502.

to remove the nuisance, and the party giving the notice then sells to another, his alienee may sue without giving notice himself.¹ 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.²

Where the nuisance consists in a dangerous building, which was originally constructed properly, and the condition of the structure has been changed so as to render it injurious or dangerous by *vis major*, as by fire, or by the act of a third person, which the owner had no reason to anticipate, he cannot be held liable, or bound to make the structure safe until he has had a reasonable time after it has so become dangerous, to take the necessary precaution.³

A mere agent or servant is not liable for the continuance of a nuisance on the land of his master or employer,⁴ unless he is guilty of some distinct wrongful act, or of personal negligence, from which injury flows.⁵

Who may Complain. 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. Therefore, it is of no importance to the right of

¹ Caldwell v. Gale, 11 Mich. 77. See Brown v. Cayuga, &c., R. R. Co., 12 N. Y. 486.

² Jones v. Williams, 11 M. & W. 176; Irvine v. Wood, 51 N. Y. 224; S. C. 10 Am. Rep. 603. Where a nuisance consists in continuing the obstruction of a stream by a highway, an action will not lie against the county commissioners unless there has been on their part some active participation in its continuance, or some positive act evidencing its adoption. Walter v. County Commissioners, 35 Md. 385. See Bond v. Smith, 44 Hun, 219; Buesching v. St. Louis, &c., Co., 73 Mo. 219. The rule as to notice does not apply where the nuisance is an obstruction in a highway. Matthews v. Miss. &c., Ry Co., 26

Mo. App. 75. Where an unsecured awning over a street is forbidden, a landlord is liable if one put up by a former owner is used by his tenant. Jessen v. Sweigert, 66 Cal. 182.

³ Mahoney v. Libbey, 123 Mass. 20, citing L. R. 10 Exch. 255, and 1 Exch. Div. 1; Gray v. Harris, 107 Mass. 492.

⁴ Brown Paper Co. v. Dean, 123 Mass. 267; Stone v. Cartwright, 6 T. R. 411.

⁵ Carleton v. Reddington, 21 N. H. 291; Brown v. Lent, 20 Vt. 529. An independent contractor is liable as well as the owner if an injury is caused by a falling wall in a building put up contrary to an ordinance. Walker v. McMillan, 6 Can. S. C. R. 241.

action that the plaintiff has come into the neighborhood since the nuisance was created; he has the right to locate himself wherever he can do so to his satisfaction, and no one can have the authority to set limits to his choice of location by interposing something which is offensive. Moreover, it would detract very seriously from the value of property if the owner, [*613] desiring *to dispose of it, could not transfer all his rights, including his right to protection in its complete enjoyment, but must, when a nuisance is created near him, either await the result of proceedings for its abatement, or dispose of his land with the nuisance practically assented to, and for a price which the nuisance has assisted in establishing. Nothing can be plainer than if the grantor could have complained when he conveyed, the grantee may complain afterwards; and to whatever use the grantor might have put the land, as being suitable and proper for the locality, the grantee is at liberty to choose and adopt.¹ Nevertheless, if one were to purchase an estate in the neighborhood of a nuisance, for the express purpose of litigation, and should demand the extraordinary process of injunction to put a stop to another's business, it may be that the court of equity, in its discretion, would refuse him this relief, while conceding his undoubted right to a remedy in damages.²

It is a familiar principle that no lapse of time can confer the right to maintain a nuisance as against the State.³ On the other hand 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.⁴ There still remains the case of a public nuisance,

¹St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; Bliss v. Hall, 4 Bing. (N. C.) 183; King v. Morris, &c., R. R. Co., 18 N. J. Eq. 397; Gilbert v. Showerman, 23 Mich. 448; Bushnell v. Robeson, 62 Ia. 540; Angel v. Penn. R. R. Co., 38 N. J. Eq. 58. If one's act contributes to the creation of the nuisance complained of, he cannot recover. Richards v. Wau-pun, 59 Wis. 45.

²Edwards v. Allouez Mining Co., 38 Mich. 46.

³United States v. Hoar, 2 Mason,

311; State v. Rankin, 3 S. C. (n. s.) 438; S. C. 16 Am. Rep. 737; People v. Cunningham, 1 Denio, 524; Commonwealth v. Upton, 6 Gray, 473; Commonwealth v. McDonald, 16 S. & R. 390; Commonwealth v. Alburger, 1 Whart. 469; State v. Phipps, 4 Ind. 515; Elkins v. State, 2 Humph. 543; State v. Franklin Falls Company, 49 N. H. 240; S. C. 6 Am. Rep. 513; Philadelphia, &c., R. R. Co. v. State, 20 Md. 157; Driggs v. Phillips, 103 N. Y. 77.

⁴Elliotson v. Fealtham, 2 Bing. (N.

not complained of by the State but by those to whom it works a special and peculiar injury; and whether the right to maintain it as against such persons can be gained by lapse of time may possibly be open to some question. It would seem plain that it could not be as against any one who had not personally been a *sufferer from the nuisance for the whole period [*614] and while the nuisance was maintained without change.

In other words, the prescription would run against individuals, and one could lose his action only because he had failed to complain, having had the whole period of prescription in which he was at liberty to do so. Therefore persons coming newly within the evil influence of the nuisance might complain when others could not. Moreover, if the injury was not constant, but could only arise occasionally, there would be no room for the application of the doctrine of prescription. Thus, if the nuisance consisted in an obstruction to navigation, no one could maintain a personal action until he had occasion to make use of the public right and found it obstructed; and his failing to bring suit for that particular injury would be a waiver only of such right of action as he then had, but nothing more, and if another injury should be received more than twenty years subsequently, the fact that he had once abstained from bringing suit for a similar wrong could have no bearing whatever upon his right of action. And in any case of a public nuisance from which individual injury was received, it would seem anomalous — to say the least — that a portion of the sufferers should be at liberty to bring private suits and another portion not, or that a land owner who had long lived near it should be precluded, but might sell to another who should come in with ample right. On the whole the better doctrine would seem 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.¹

C.) 134; *Carlyon v. Lovering*, 1 H. & N. 784; *Johns v. Stevens*, 3 Vt. 308; *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 241; *Gladfelter v. Walker*, 40 Md. 1; *Crosby v. Bessey*, 49 Me. 539; *Baldwin v. Calkins*, 10 Wend. 167; *Stiles v. Hooker*, 7 Cow. 266.

¹ See *Folkes v. Chad*, 3 Doug. 340; *Weld v. Hornby*, 7 East, 195; *Simmons v. Cornell*, 1 R. I. 519; *Knox v. Chaloner*, 42 Me. 150; *Mills v. Hall*, 9 Wend. 315; *Renwick v. Morris*, 3 Hill, 621; *S. C. 7 Hill*, 575; *Kellogg v. Thompson*, 66 N. Y. 88; *Veazie v. Dwinel*, 50 Me. 479; *Lewis v. Stein*,

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, *first*, that the public easement or privilege exists; and, *second*, that he has [*615] been *hindered or obstructed in the common right to enjoy it. To show both is necessary to his action, because the public wrong must be redressed at the suit of the State and not of an individual, and the fact that a public wrong is suffered creates no presumption of individual injury.¹

It being found that a public easement exists, it may then appear, perhaps, that what is complained of has been authorized by the State. If so, no action can be maintained on the assumption that what is thus allowed is a public nuisance, for that cannot be a public nuisance that the State assents to and authorizes. It would be a contradiction in terms to say that the State assents to a certain act, and yet that the act constitutes an offense against the State.* Therefore, 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 a navigable stream may be

16 Ala. 214; *Stoughton v. Baker*, 4 Mass. 522; *Arundel v. McCulloch*, 10 Mass. 70; *Woodruff v. North Bloomfield, &c., Co.*, 18 Fed. Rep. 753, and cases cited at p. 788. In *New Salem v. Eagle Mills Co.*, 138 Mass. 8, it is held 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.

¹ *Brown v. Perkins*, 12 Gray, 89; *Fort v. Groves*, 29 Md. 198; *Houck v. Wachter*, 34 Md. 265; *Gerrish v. Brown*, 51 Me. 256. That one cannot, of his own authority, abate a public nuisance unless it causes him special injury, see *Clark v. St. Clair Ice Co.*, 24 Mich. 508; *McGregor v. Boyle*, 34 Iowa, 268, ante, p. 48-9 and cases

cited. A mayor of a city may abate a nuisance dangerous to public safety. *Fields v. Stokely*, 99 Penn. St. 306.

² *Commonwealth v. Reed*, 34 Penn. St. 275; *Danville, &c., R. R. Co. v. Commonwealth*, 73 Penn. St. 29; *People v. Gaslight Co.*, 64 Barb. 55. A city may not abate as a nuisance an opening in a sidewalk which it has authorized, though afterward it has ordered it closed. *Everett v. Marquette*, 53 Mich. 450.

³ *Danville, &c., R. R. Co. v. Commonwealth*, 73 Penn. St. 29; *Commonwealth v. Erie & N. E. R. R. Co.*, 27 Penn. St. 339; *Commonwealth v. Old Colony, &c., R. R. Co.*, 14 Gray, 93; *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Randle v. Pacific R. R. Co.*, 65 Mo. 325; *Williams v. N. Y. Cent. R.*

bridged or dammed; awnings may be permitted above a city street and covered areas below it; navigation companies may be given special privileges in the public streams of the State,¹ and *so on. In these cases the State only restricts [*616] or narrows its own right, and the right of the individual, which is only a part of the public right, can be no broader than that which the State has retained.

But while the State may restrict its own right, it cannot restrict or take away the rights which are purely individual, even though they are intimately associated with the public right. An example has been given in another place of a railroad laid down in a public highway by State consent, and it was stated that this consent would not empower the railroad company to cut off an adjacent land owner from convenient access to the street. This right of access is an individual, not a public right, and the land owner, in claiming damages for being deprived of it, is complaining not of a public but of a private nuisance.² So no regulation

R. Co., 16 N. Y. 97; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526; *Sou. Car., &c., R. R. Co. v. Steiner*, 44 Geo. 546; *Easton v. New York, &c., R. R. Co.*, 24 N. J. Eq. 49; *Chicago, &c., Co. v. Loeb*, 118 Ill. 203; *State v. Louisville, &c., Co.*, 86 Ind. 114; *Garnett v. Jacksonville, &c., Co.*, 20 Fla. 889. A lot owner who does not own the fee of the street has an easement of light therefrom which he may not be deprived of without compensation by the building of an elevated railroad. *Story v. New York El. R. R. Co.*, 90 N. Y. 122. The erection of telephone poles in a city street is not a new servitude of which an abutter can complain. *Julia Bld. Ass. v. Bell Telephone Co.*, 88 Mo. 258. Nor is the digging by municipal authorities of a ditch in a public street for the purpose of laying water pipe a nuisance *per se*. *Smith v. Simmons*, 103 Penn. St. 32. One buying land adjoining a street takes subject to the use of the street for all appropriate purposes, e. g. the lawful use of it by a ditch company. *State, &c.,*

Ditch Co. v. Anderson, 8 Col. 131; but not subject to a subsequent use of it by the city for the erection of a tank and pumping engine. *Morrison v. Hinkson*, 87 Ill. 587.

A pier built in navigable water without legal authority is a nuisance *per se*. *People v. Vanderbilt*, 38 Barb. 282. See *Plankford Co. v. Elmer*, 9 N. J. Eq. 754; *Franklin Wharf Co. v. Portland*, 67 Me. 46.

A street railway constructed without authority of law is a nuisance. *Denver, &c., R. Co. v. Denver City R. Co.*, 2 Col. 673.

¹ *Arimond v. Green Bay, &c., Co.*, 31 Wis. 316; *Trenton Water Power Co. v. Raff*, 36 N. J. 335; *Lee v. Pembroke Iron Co.*, 57 Me. 481.

² *Muskegon Booming Co. v. Evart Booming Co.*, 34 Mich. 462; *People v. Ferry Co.*, 68 N. Y. 71.

³ See *Stone v. Fairbury, &c., R. R. Co.*, 68 Ill. 394; *Grand Rapids, &c., R. R. Co. v. Heisel*, 38 Mich. 62; *Elizabeth, &c., R. R. Co. v. Combs*, 10 Bush, 332; S. C. 19 Am. Rep. 67. If a track has been laid lawfully in

of the right of navigation can lawfully take from a riparian proprietor his water front and the right to make use of it for the purposes of navigation; nor can any special privilege which is conferred, to make use of public waters, empower the beneficiaries to flood the lands of individuals.* The State license in all these cases precludes complaint for anything which, but for the license, would be a State offense, but it cannot go further.*

[*617] *Objects in the highway, which do not prevent pas-

part of a street, the laying of additional tracks which cut off access to a lot is actionable. *Pittsburg, &c., R. R. Co. v. Reich*, 101 Ill. 157. Permission to use a street for a track does not cover the use of the street as a switching yard. *Penn. R. R. Co. v. Angel*, 41 N. J. Eq. 816. See *Bell v. Edwards*, 87 La. Ann. 475; *Mahady v. Bushwick, &c., R. R. Co.*, 91 N. Y. 148; *Kavanaugh v. Mobile, &c., Co.*, 2 S. E. Rep. 636 (Geo.); and see cases p. 433, n. 8.

¹ *Ryan v. Brown*, 18 Mich. 196. See *Davis v. Winslow*, 51 Me. 264; *Arundel v. McCulloch*, 10 Mass. 70; *Washburn, &c., Co. v. Worcester*, 116 Mass. 458; *Wood v. Esson*, 9 Can. S. C. R. 239.

² *Trenton Water Power Co. v. Raff*, 36 N. J. 335; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 303; *Middleton v. Booming Co.*, 27 Mich. 533; *Thunder Bay, &c., Co. v. Speechly*, 31 Mich. 336; *Muskegon Booming Co. v. Evert Booming Co.*, 84 Mich. 463; *Brown v. Dean*, 123 Mass. 254; *Lee v. Pembroke Iron Co.*, 57 Me. 481.

³ *Danville, &c., R. R. Co. v. Com.*, 73 Penn. St. 29; *Williams v. N. Y. Cent. R. Co.*, 16 N. Y. 97; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526; *People v. Kerr*, 27 N. Y. 188; *Starr v. Camden, &c., R. R. Co.*, 24 N. J. 592; *Trenton Water Power Co. v. Raff*, 36 N. J. 335. It is no nuisance for a railroad to cross a highway at grade where the proper authority has been ob-

tained therefor, even though the railroad might have been carried above or below the highway. *Town Council of Johnston v. Providence, &c., R. R. Co.*, 10 R. L. 363. Nor, when a railroad company is empowered to operate its road in the highway, is it any nuisance to stop a train therein for the purpose of loading or unloading a car, provided it be done in such a prudent manner as not unreasonably to interfere with the rights of those having occasion to use the highway for ordinary purposes of travel. *Mathews v. Kelsey*, 58 Me. 56.

If by legislative authority a dam is erected across tide waters, which causes injury to an ancient mill, the proprietor is entitled to redress at the common law, if the statute provides for none. *Lee v. Pembroke Iron Co.*, 57 Me. 481, citing many cases.

If a stream is navigable for a single purpose only—for example for rafting—the bank proprietor, as against the public, is only bound not to obstruct it in that regard. *Morgan v. King*, 18 Barb. 277. And see, as to obstructing streams, *Knox v. Chaloner*, 42 Me. 150; *Veazie v. Dwinel*, 50 Me. 479; *Parks v. Morse*, 52 Me. 260; *Amoskeag Manuf. Co. v. Goodale*, 46 N. H. 53. Obstructions to navigation by the casting of slabs into the stream to float away, may give rise to private rights of action. *Washburn v. Gilman*, 64 Me. 163; *Haskins v. Haskins*, 9 Gray, 390.

sage, but render it dangerous from the tendency to frighten horses, are nuisances.¹ But when the object is something employed to facilitate travel or traffic on the highway, the question whether it is a nuisance is seen to be one which is not susceptible of being determined on the single consideration of its tendency to frighten horses of even ordinary gentleness. A traction steam engine on the common highway, for example, is no more a wrong because of its tendency to frighten horses than is a bridge over a navigable river a wrong because of its tendency to delay vessels. The one may be a wrong under some circumstances, and so may the other; but it is equally true that both may be proper and lawful under other circumstances. It would be difficult to pass through the streets of any considerable city without encountering objects moving along them which are well calculated to frighten horses of ordinary gentleness until they have become accustomed to them, but which, nevertheless, are used and moved about for proper and lawful purposes. The steam engine for protection against fire may be mentioned as one of these; and though this is usually owned and moved about by public authority, there can be no doubt of the right of a private individual to keep and use one for his own purposes, and to take it through the streets when necessary. But other things which are sometimes moved on wheels along the streets are equally *alarming to horses when first used. Wild beasts [*618] collected and moved about the country for exhibition are even more likely to frighten domestic animals. So steam power is admitted as a matter of necessity on street railways; even on the roads where cars move above the heads of the people and over the common vehicles; and these are not nuisances, but if injury occurs from their use, the question the injury presents is

¹ See *Cook v. Charlestown*, 98 Mass. 80; *Kingsbury v. Dedham*, 18 Allen, 186; *Horton v. Taunton*, 97 Mass. 266, n.; *Foshay v. Glen Haven*, 25 Wis. 288; *Dimock v. Suffield*, 30 Conn. 129; *Young v. New Haven*, 39 Conn. 435; *Ayer v. Norwich*, 39 Conn. 376; S. C. 12 Am. Rep. 396; *Morse v. Richmond*, 41 Vt. 435; *Piollet v. Simmers*, 106 Penn. St. 95; *Wilkins v. Day L. R.*, 12 Q. B. D. 110; *Brownell v. Troy*,

&c., R. R. Co., 55 Vt. 218; *Agnew v. Corunna*, 55 Mich. 428; *Bennett v. Fifield*, 13 R. I. 139; *Rushville v. Adams*, 107 Ind. 475; *Wabash, &c., Ry Co. v. Farver*, 111 Ind. 195. The habitual failure of a railroad company to make signals at dangerous crossings may be a nuisance. *Louisville, &c., R. R. Co. v. Commonwealth*, 13 Bush, 388.

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. It is a special injury if one has a dock on navigable water,² and the city, by running a sewer into it, causes it to be filled up, or the entrance materially obstructed.³ So 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,³ or a bridge which has been constructed without permission and which renders his passage inconvenient or impossible;⁴ or if in passing along the highway he finds himself stopped by a fence put up without authority,⁵ or kept up after the authority once given has expired.⁶ So 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. So any dangerous excavation made in the public way is a nuisance. It is only necessary for the plaintiff in these cases to show how he has been injured by the nuisance, and to distinguish his injury from that suffered by the public at large, and he brings himself within the rules entitling him to redress.⁷ So if one's premises are situate

¹ *Macomber v. Nichols*, 34 Mich. 212; S. C. 22 Am. Rep. 523, where in a note the following cases under English statutes regulating the use of steam engines for the protection of travel on the highway are referred to. *Watkins v. Reddin*, 2 F. & F. 629; *Smith v. Stokes*, 4 B. & S. 84; *Harrison v. Leaper*, 5 Law Times Rep. (N. S.) 640. Compare *Favor v. Boston, &c., R. R. Co.*, 114 Mass. 350; S. C. 19 Am. Rep. 364.

² *Clark v. Peckham*, 10 R. I. 35; S. C. 9 R. I. 455; *Brayton v. Fall River*, 113 Mass. 218; S. C. 18 Am. Rep. 470. See *French v. Conn. River, &c., Co.*, 14 N. E. Rep. 113 (Mass.)

³ *Rose v. Miles*, 4 M. & S. 101. See *Walker v. Shepardson*, 2 Wis. 282. Or a boom. *Dudley v. Kennedy*, 63 Me. 465; *Union Mill Co. v. Shores*, 66 Wis. 476; *Gifford v. McArthur*, 55

Mich. 535. See *McPheters v. Moose River, &c., Co.*, 78 Me. 329.

⁴ *Arundel v. McCulloch*, 10 Mass. 70; *Gates v. Nor. Pac. R. R. Co.*, 64 Wis. 64; *Little Rock, &c., R. R. Co. v. Brooks*, 39 Ark. 403. So if driftwood gathers against bridge piers. *St. Louis Co. v. Meese*, 44 Ark. 414. But, see *Clark v. Chicago, &c., Ry. Co.*, 36 N. W. Rep. 326 (Wis.); *Blackwell v. Old Colony R. R. Co.*, 123 Mass. 1.

⁵ *Gregory v. Commonwealth*, 2 Dana, 417. But see *Sohn v. Cambern*, 106 Ind. 302; *Powell v. Bunger*, 91 Ind. 64; *Holmes v. Corthell*, 12 Atl. Rep. 730 (Me.) and note.

⁶ *Adams v. Beach*, 6 Hill, 271. See *Allen v. Lyon*, 2 Root, 213; *Columbus v. Jaques*, 30 Geo. 506.

⁷ See case of a warehouse projecting into the street and obstructing the view from the plaintiff's warehouse.

upon *public navigable water, whatever obstruction [*619] in the stream tends specially to interfere with his access to the water is an actionable injury.¹ And in general it may be sufficient to say that to entitle him to an action it is only necessary that he suffer some peculiar injury, differing from that suffered by the community at large.*

Stetson v. Faxon, 19 Pick. 147. Of a bridge built so as to prevent entrance to a building. *Knox v. New York*, 55 Barb. 404. Of a wall extended into the street. *Schulte v. N. P. T. Co.*, 50 Cal. 592. If a street is obstructed so that access to one's premises is hindered or cut off, it is actionable. *Cummins v. Seymour*, 79 Ind. 491; *Callanan v. Gillman*, 14 N. E. Rep. 264 (N. Y.); *Brakken v. Minn., &c., Ry Co.*, 29 Minn. 41; *Wilder v. DeCou*, 26 Minn. 10. But not if the obstruction is 500 feet away. *Rude v. St. Louis*, 6 S. W. Rep. 257 (Mo.); or several squares. *Chicago v. Union Bldg. Ass.*, 102 Ill. 379. See *Barnum v. Minn., &c., Ry Co.*, 83 Minn. 365; *Sheedy v. Union, &c., Works*, 25 Mo. App. 527; *Crook v. Pitcher*, 61 Md. 510. It is not a special injury if a street in front of a lot is narrowed. *Bigley v. Nunan*, 53 Cal. 403. Nor if the adjacent sidewalk is encroached upon. *Marini v. Graham*, 67 Cal. 180, and cases. Nor if a landing on a street used by a ferryman without any contract right is obstructed by a bridge. *Pittsburgh, &c., R. R. Co. v. Jones*, 111 Penn. St. 204. But it is held a special injury if, in case of a store, an obstruction diverts travel from the street. *Platt v. Chicago, &c., Ry Co.*, 87 N. W. Rep. 107 (Ia.); or if a lot is lowered in value by the obstruction. *Shepherd v. Barnett*, 53 Tex. 638. If a railroad train obstructs a road crossing in violation of statute, one thereby hindered from taking another train suffers special

injury. *Patterson v. Detroit, &c., R. Co.*, 56 Mich. 172.

¹ *Dobson v. Blackmore*, 9 Q. B. 991; *Ryan v. Brown*, 18 Mich. 196; *Larson v. Furlong*, 63 Wis. 323; *Wood v. Esson*, 9 Can. S. C. R. 239, where the obstruction was under an invalid government permission. *Gould on Waters*, sec. 122-127.

* See *Venard v. Cross*, 8 Kan. 248; *Green v. Nunnemacher*, 36 Wis. 50; *Yolo v. Sacramento*, 36 Cal. 193. But a special injury to plaintiff's property in the street, by a crowd gathered to hear a speech, is not a special injury from the public nuisance of obstructing the street. *Fairbanks v. Kerr*, 70 Penn. St. 86; S. C. 10 Am. Rep. 664. The difference must be in kind, not merely in degree. *Thelan v. Farmer*, 36 Minn. 225; *East St. Louis v. O'Flynn*, 119 Ill. 200; *Givens v. Van Studdiford*, 86 Mo. 149; *Nottingham v. Balt., &c., Co.*, 3 Mac-Arth. 517; *Hogan v. Centr. Pac. R. R. Co.*, 71 Cal. 83. Use of public square by hucksters is such to owner of dwelling near by. *McDonald v. Newark*, 42 N.J. Eq. 138. So erection by municipal authority of dangerously inflammable building near dwellings. *Blanc v. Murray*, 36 La. Ann. 162. The injury to a man by the obstruction of a road which passes his farm is not special. *Atwood v. Par-tree*, 14 Atl. Rep. 85 (Conn.). See *Potter v. Howe*, 141 Mass. 357; also *Chicago v. Union Bldg. Ass.*, 102 Ill. 379, for a clear statement of the cases in which damages may be recovered for the obstruction of a public right.

Continuity of the Wrong. A nuisance continued is a fresh nuisance every day it is suffered to remain unabated. New suits for the damage caused by its continuance may therefore be brought from day to day.¹

Nuisances by Municipal Corporations. As the wrongs for which municipal corporations may be responsible are more often than otherwise in the nature of nuisances, the present seems a suitable place for according to them brief notice.

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 through proper agencies putting into execution their plans, and discharging such duties as they have imposed upon themselves or as the State has imposed upon them; and, *third*, as artificial persons owning and managing property. In [*620] this last *capacity they are chargeable with all the duties and obligations of other owners of property, and must

¹ *Shadwell v. Hutchinson*, 4 C. & P. 333; *Holmes v. Wilson*, 10 Ad. & El. 503; *Howell v. Young*, 5 B. & C. 259; *Gillon v. Boddington*, Ry. & M. 161; *Bowyer v. Cook*, 5 C. B. 236; *Allen v. Worthy*, L. R. 4 Q. B. 163; *Queen v. Waterhouse*, L. R. 7 Q. B. 545; *Beckwith v. Griswold*, 29 Barb. 291; *Conhocton Stone Co. v. Buffalo, &c.*, R. R. Co., 52 Barb. 390; *Vedder v. Vedder*, 1 Denio, 257; *Mahon v. New York Cent. R. R. Co.*, 24 N. Y. 658; *Slight v. Gutzlaff*, 35 Wis. 675; *Philsbury v. Moore*, 44 Me. 154; *Staple v. Spring*, 10 Mass. 72; *Byrne v. Minn., &c.*, Ry. Co., 36 N. W. Rep. 339 (Minn.); *Crawford v. Rambo*, 44 Ohio St. 279; *Reid v. Atlanta*, 73 Geo. 523. The mere continuance of a building wrongfully erected on the land of another is a continual wrong, for which the owner of the land may bring new suits after recovery and satisfaction for the original erection. *Russell v. Brown*, 63 Me. 203. The diversion of spring water is a contin-

uing wrong. *Colrick v. Swinburne*, 105 N. Y. 503. So is flooding land. *New Salem v. Eagle Mills Co.*, 138 Mass. 8; *Van Hoozier v. Hannibal, &c.*, R. R. Co., 70 Mo. 145; *Dickson v. Chicago, &c.*, R. R. Co., 71 Mo. 575; *Valley Ry. Co. v. Franz*, 4 N. E. Rep. 88 (Ohio); *Omaha, &c.*, Ry. Co. v. *Standan*, 35 N. W. Rep. 163 (Neb.). See *Chicago, &c.*, Ry. Co. v. *Schaffer*, 16 N. E. Rep. 230 (Ill.). So is the wrongful use of a side track in a street in front of a lot. *Cain v. Chicago, &c.*, Co., 54 Ia. 255. For a continuing nuisance an action may be maintained against the original wrongdoer or his grantee continuing it after request to abate. *Prentiss v. Wood*, 132 Mass. 486. See cases pp. 725, n. 1 and 2, 727, n. 1. But see *Bizer v. Ottumwa, &c.*, Co., 70 Ia. 145. If the cause of action is not a nuisance but negligence in the course of a permanent public improvement, a second action will not lie. *North Vernon v. Voegler*, 103 Ind. 314.

respond for creating or suffering nuisances under the same rules which govern the responsibility of natural persons.¹ Under this head, therefore, nothing more need be said in this place.

For taking or neglecting to take strictly governmental action, municipal corporations are under no responsibility whatever except the political responsibility to their corporators and to the State. The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised within prescribed limits, at discretion, for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries. Therefore, 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 cattle are not prohibited from running at large,³ or because "coasting" in the highways is not prevented,⁴ or because the operation of an ordinance which prohibits the explosion of fire works within the city is temporarily suspended,⁵ or because

¹ See *Clark v. Peckham*, 9 R. L. 455. *Pennyer v. Saginaw*, 8 Mich. 455; *Cumberland, &c., Co. v. Portland*, 63 Me. 504; *Rowland v. Kalamazoo Sup'ts.* 49 Mich. 558; *Moulton v. Scarborough*, 71 Me. 267. If a municipality uses a public building for profit and one is injured by negligence of the municipality, it is liable. *Worden v. New Bedford*, 131 Mass. 23. If the use is not for profit, it is not liable. *Larrabee v. Peabody*, 128 Mass. 561.

² *Davis v. Montgomery*, 51 Ala. 139; 8 C. 23 Am. Rep. 545; *Wheeler v. Cincinnati*, 19 Ohio, (n. s.) 19; *Patch v. Covington*, 17 B. Mon. 722. See, also, *Howard v. San Francisco*, 51 Cal. 52; *Joliet v. Verley*, 35 Ill. 58; *Russell v. New York*, 2 Denio, 461; *O'Meara v. New York*, 1 Daly, 425; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104

Mass. 87; *Grant v. Erie*, 69 Penn. St. 420.

For *ultra vires* acts done under supposed authority, a city is not liable. *Cavanagh v. Boston*, 139 Mass. 426. See *Wakefield v. Newport*, 60 N. H. 374; *Seele v. Deering*, 10 Atl. Rep. 45 (Me.). Compare *Stanley v. Davenport*, 54 Ia. 463.

³ *Kelly v. Milwaukee*, 18 Wis. 83. See *Mich., &c., R. R. Co. v. Fisher*, 27 Ind. 96; *Rivers v. Augusta*, 65 Geo. 376.

⁴ *Hutchinson v. Concord*, 41 Vt. 271. See *Altwater v. Baltimore*, 31 Md. 463. *Burford v. Grand Rapids*, 53 Mich. 98; *Lafayette v. Timberlake*, 88 Ind. 330; *Faulkner v. Aurora*, 85 Ind. 130; *Taylor v. Mayor, &c., of Cumberland*, 64 Md. 68; *Schultz v. Milwaukee*, 49 Wis. 254.

⁵ *Hill v. Charlotte*, 72 N. C. 55; 8 C. 21 Am. Rep. 451. See *McDade v. Chester*, 13 Atl. Rep. 421 (Penn.);

provision is not made for lighting the streets,¹ or because the drains which it orders and constructs are insufficient to carry off the surface water,² or because the plan of a bridge or sewer, or any other public work does not provide against accidental injury to individuals as completely as it might have done.³

Neither is a municipal corporation responsible for the [*621] 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.⁴ Neither is it

Ball v. Woodbine, 61 Ia. 83. For failure to exercise power to remove a ruinous wall it is not liable to one injured upon adjoining premises by its fall. *Cain v. Syracuse*, 95 N. Y. 83; *Kiley v. Kansas City*, 87 Mo. 103. Otherwise if one injured is in the street. *Duffy v. Dubuque*, 63 Ia. 171.

¹ *Freeport v. Isbell*, 83 Ill. 440.

² See *Roberts v. Chicago*, 26 Ill. 249, and cases cited in next note.

³ *Governor, &c., v. Meredith*, 4 T. R. 794; *Wilson v. New York*, 1 Denio, 595; *Mills v. Brooklyn*, 32 N. Y. 489; *White v. Yazoo*, 27 Miss. 357; *Lamb v. St. Louis*, 15 Mo. 610; *Detroit v. Beckman*, 34 Mich. 125; *Delphi v. Evans*, 36 Ind. 90; *Toolan v. Lansing*, 38 Mich. 315; *Foster v. St. Louis*, 71 Mo. 157; *Johnston v. Dist. of Columbia*, 118 U. S. 19; *Rozell v. Anderson*, 91 Ind. 591; *Urquhart v. Ogdensburg*, 91 N. Y. 67; but see same case, 97 N. Y. 238. See *Cotes v. Davenport*, 9 Iowa, 237; *Carr v. Northern Liberties*, 35 Penn. St. 324; *Pontiac v. Carter*, 33 Mich. 164. For negligence in devising a plan a city is liable. *North Vernon v. Voegler*, 103 Ind. 314. And see *Gould v. Topeka*, 82 Kan. 485; *Lehn v. San Francisco*, 66 Cal. 76; *State v. Portland*, 74 Me. 260; *Seifert v. Brooklyn*, 101 N. Y. 136. A city is not liable for a

change in a street grade. *Heiser v. Mayor, &c.*, New York, 104 N. Y. 68; *Henderson v. Minneapolis*, 32 Minn. 319; *North Vernon v. Voegler*, 103 Ind. 314; *Olney v. Wharf*, 115 Ill. 519. But see *Sheehy v. Kansas City, &c., Co.*, 7 S. W. Rep. 579 (Mo.); *Morris v. Council Bluffs*, 67 Ia. 343. County not liable to one who has been a prisoner for negligently permitting its jail to be unwholesome to his injury. *Pfeferle v. Lyon Co.*, 18 Pac. Rep. 506 (Kan.).

⁴ *Thayer v. Boston*, 19 Pick. 511; *Pelrey v. Georgetown*, 7 Gray, 464; *Barney v. Lowell*, 98 Mass. 570; *Bigelow v. Randolph*, 14 Gray 541; *Hayes v. Oshkosh*, 33 Wis. 314; S. C. 14 Am. Rep. 760; *Young v. Comr. of Roads*, 2 N. & McC. 537; *Martin v. Brooklyn*, 1 Hill, 545; *Lorillard v. Monroe*, 11 N. Y. 392; *Sherman v. Grenada*, 51 Miss. 186; *Mitchell v. Rockland*, 53 Me. 118; *Barbour v. Ellsworth*, 67 Me. 294; *Prather v. Lexington*, 13 B. Mon. 559; *Judge v. Meriden*, 38 Conn. 90; *Sheldon v. Kalamazoo*, 24 Mich. 383; *Eastman v. Meredith*, 36 N. H. 284; *Hyde v. Jamaica*, 27 Vt. 443. See *Hunt v. Boonville*, 65 Mo. 620; *Rowland v. Gallatin*, 75 Mo. 134; *Shieb v. Collier*, 11 Atl. Rep. 366 (Penn.); *Cooney v. Hartland*, 95 Ill. 516; *Wakefield v. Newport*, 60 N. H. 374; *Little v. Madison*, 49 Wis. 605; *Wallace v.*

responsible for the destruction of property by a mob, unless expressly made so by statute, as in some States it has been.¹ But municipal corporations are responsible for due care in the execution of any work ordered by them,² and if the work is one for

Menasha, 48 Wis. 79. Otherwise if in obedience to orders an officer seizes goods upon a void special street assessment. *Durkee v. Kenosha*, 59 Wis. 123. See *Worley v. Columbia*, 88 Mo. 106. A city is not responsible for the negligence or misbehavior of its firemen, *Jewett v. New Haven*, 38 Conn. 368; S. C. 9 Am. Rep. 382; *Greenwood v. Louisville*, 13 Bush, 226; *Torbush v. Norwich*, 38 Conn. 225; S. C. 9 Am. Rep. 395; *Smith v. Rochester*, 76 N. Y. 506; *Welsh v. Rutland*, 56 Vt. 228; *Robinson v. Evansville*, 87 Ind. 334; *Grube v. St. Paul*, 34 Minn. 402; *Burrill v. Augusta*, 78 Me. 118. Nor a town for the negligence of the town surveyor or his assistant. *Barney v. Lowell*, 98 Mass. 570; *Walcott v. Swampscott*, 1 Allen, 101; *Pratt v. Weymouth*, 17 N. E. Rep. 538 (Mass.); *Judge v. Meriden*, 38 Conn. 90. Nor for the neglects of persons connected with its sanitary service or hospitals. *Ogg v. Lansing*, 35 Iowa, 495; S. C. 14 Am. Rep. 499; *Murtagh v. St. Louis*; 44 Mo. 479; *Brown v. Vinalhaven*, 65 Me. 402; S. C. 20 Am. Rep. 709; *White v. Marshfield*, 48 Vt. 20; *Summers v. Board, &c.*, 103 Ind. 262; *Bryant v. St. Paul*, 33 Minn. 289. Nor for the torts of its policemen. *Calwell v. Boone*, 51 Ia. 687; *Attaway v. Cartersville*, 68 Geo. 740; *Norristown v. Fitzpatrick*, 94 Penn. St. 121; *Robinson v. Greenville*, 42 Ohio St. 625. In the last two cases there was a failure to stop firing of cannon. See, further, *Sherbourn v. Yuba County*, 21 Cal. 113; *Rudolphe v. New Orleans*, 11 La. Ann. 242; *Mitchell v. Rockland*, 41 Me. 363; and 45 Me. 496; *Dargan v. Mobile*, 31 Ala. 469; *Richmond v. Long*, 17

Grat. 375; *Stewart v. New Orleans*, 9 La. Ann. 461; *Pollock's Admr. v. Louisville*, 13 Bush, 231. A county is not liable for the acts of its officers in the course of a public improvement by which land is flooded by a stream. *Downing v. Mason Co.*, 8 S. W. Rep. 264 (Ky.) citing *Brabham v. Supervisors*, 54 Miss. 363; *Kincaid v. Hardin Co.*, 53 Ia. 430; *Dosdall v. Olmsted Co.*, 30 Minn. 96.

¹ *Western College, &c., v. Cleveland*, 12 Ohio, (N. S.) 375. See *in re Pennsylvania Hall*, 5 Penn. St. 204; *Darlington v. New York*, 31 N. Y. 164; *Folsom v. New Orleans*, 28 La. Ann. 936; *Underhill v. Manchester*, 45 N. H. 214; *Chadbourne v. New Castle*, 48 N. H. 196.

² See *Detroit v. Corey*, 9 Mich. 165; *Hannon v. St. Louis*, 62 Mo. 313; *Broadwell v. Kausas*, 25 Mo. 213; *Semple v. Vicksburg*, 62 Miss. 63; *Logansport v. Dick*, 70 Ind. 65; *Princeton v. Gieske*, 93 Ind. 102; *Kranz v. Baltimore*, 64 Md. 491; *Hardy v. Brooklyn*, 90 N. Y. 435; *Ironton v. Kelly*, 38 Ohio St. 50; *Fort Worth v. Crawford*, 64 Tex. 202; *Mootry v. Danbury*, 45 Conn. 550; *Suffolk v. Parker*, 79 Va. 660; *Keating v. Cincinnati*, 38 Ohio St. 141. There must be willful misconduct or culpable neglect. *Hunt v. New York*, 16 N. E. Rep. 320 (N. Y.). If in blasting in the performance of a public duty one is injured, there can be no recovery in the absence of negligence in the city's agent. *Murphy v. Lowell*, 128 Mass. 396. *Contra*, *Joliet v. Harwood*, 586 Ill. 110. *Blumb v. Kansas*, 84 Mo. 112 (distinguishing *Russell v. Columbia*, 74 Mo. 480) decides that an individual injured cannot re-

the special benefit of its own people, it must not negligently be allowed to get out of repair to the injury of individuals.¹

[*622] *Municipal corporations are generally required to construct and keep in repair the public ways within their limits. These, however, are for the use, not of their own citizens merely, but of all the people of the State, and any duty they owe to keep them in repair is a duty to the State, and not to individuals. It is well settled, therefore, that at the common law a municipal corporation is not liable to an individual for neglect to keep a highway in repair, whereby he suffers an injury in using it.² In some of the States, however, the liability is expressly imposed upon towns by statute,³ and in the note

cover, on the ground that the duty is to the public. Compare *Cunningham v. St. Louis*, 8 S. W. Rep. 787 (Mo.).

If the benefit of the agent's act accrues solely to an individual the city is not liable for his negligence. *Waller v. Dubuque*, 69 Ia. 541. If the duty is one to the public imposed on the municipality by law, there is no liability in the absence of statute. So held after elaborate discussion where a child was injured by the unsafe condition of a school building which the city was obliged to maintain. *Hill v. Boston*, 122 Mass. 344. Followed where the duty was assumed, not imposed, under a general statute. *Wixon v. Newport*, 13 R. I. 454. See also, *Tindley v. Salem*, 137 Mass. 171; *Benton v. Trustees Boston City Hosp.*, 140 Mass. 13; *Condict v. Jersey City*, 46 N. J. L. 157; *Wild v. Paterson*, 47 N. J. L. 408.

¹ Thus, a city is liable if one of its drains or sewers is suffered to become obstructed, whereby the lands of individuals are flooded. *Gilman v. Lancia*, 55 N. H. 130; S. C. 20 Am. Rep. 175; *Ashley v. Port Huron*, 35 Mich. 296; S. C. 20 Am. Rep. 629; *Taylor v. Austin*, 32 Minn. 247; *Vanderslice v. Philadelphia*, 103 Penn. St. 102; *Fort Wayne v. Coombs*, 107

Ind. 75. So for negligently permitting coal gas to escape into a sewer, causing explosion. *Kibele v. Philadelphia*, 105 Penn. St. 41. Negligently raising sewer grades at junction point. *Defer v. Detroit*, 34 N. W. Rep. 680 (Mich.); *Rice v. Flint*, Id. 719. So for neglect to adopt, after notice, means to remedy continuing injury to an individual from a defect in plan. *Seifert v. Brooklyn*, 101 N. Y. 136; *Kieruan v. Jersey City*, 13 Atl. Rep. 170 (N. J.).

² *Russell v. Men of Devon*, 3 T. R. 667; *Young v. Comr. of Roads*, 2 N. & McC. 537; *Morey v. Newfane*, 8 Barb. 645; *Mower v. Leicester*, 9 Mass. 247; *Niles v. Martin*, 4 Mich. 557; *Perry v. John*, 79 Penn. St. 411; *State v. Cumberland*, 7 R. I. 75; *Huffman v. San Joaquin Co.*, 21 Cal. 426; *Sutton v. Board of Police*, 41 Miss. 236; *Freeholders v. Strader*, 18 N. J. 108; *Livermore v. Freeholders*, 31 N. J. 507; *Barbour Co. v. Horn*, 48 Ala. 649; *Detroit v. Blackeby*, 21 Mich. 84; *Yeager v. Tippecanoe*, 81 Ind. 46; *Eikenberry v. Bazaar*, 22 Kan. 559; *Frazer v. Lewiston*, 76 Me. 531; *Peters v. Fergus Falls*, 35 Minn. 549; *Swineford v. Franklin Co.*, 6 Mo. App. 39; *Abbett v. Johnson Co.*, 16 N. E. Rep. 127.

³ The statutes extend the obliga-

cases are referred to which have been decided under these statutes.¹

tion so far as to require the supplying of suitable fences, protections and guards at the sides, and the following are cases where towns were prosecuted for failure to perform this duty. *Collins v. Dorchester*, 6 Cush. 396; *Sparhawk v. Salem*, 1 Allen, 30; *Alger v. Lowell*, 3 Allen, 403; *Stevens v. Boxford*, 10 Allen, 25; *Burnham v. Boston*, 10 Allen, 290; *Murdock v. Warwick*, 4 Gray, 173; *Palmer v. Andover*, 2 Cush. 600; *Hayden v. Attleborough*, 7 Gray, 338; *Titus v. Northbridge*, 97 Mass. 258; *Horton v. Taunton*, 97 Mass. 266, note; *Cobb v. Standish*, 14 Me. 198; *Blaisdell v. Portland*, 39 Me. 113; *Stinson v. Gardiner*, 43 Me. 248; *Moulton v. Sanford*, 51 Me. 127; *Hey v. Philadelphia*, 81 Penn. St. 44; *Winship v. Enfield*, 42 N. H. 197; *Houfe v. Fulton*, 29 Wis. 296; *Hunt v. Pownal*, 9 Vt. 411; *Weeks v. Conn. &c.*, Turnpike Co., 20 Conn. 134. See *Barnes v. Ward*, 9 C. B. 392; *Toms v. Whitby*, 35 Up. Can. Q. B. 195; *Hyatt v. Rondout*, 44 Barb. 385; *Palmer v. Andover*, 2 Cush. 600; *Winship v. Enfield*, 42 N. H. 197. The measure of duty as to keeping bridges in repair is ordinary care. *Stebbins v. Keene*, 55 Mich. 552; *Medina v. Perkins*, 48 Mich. 67. Not bound to provide for passage of an extraordinary load. *Wilson v. Granby*, 47 Conn. 59; *McCormick v. Washington*, 112 Penn. St. 185. If one makes use of the railings of a bridge to lean against or rest upon, he does it at his own risk. *Orcutt v. Kittery Point Bridge Co.*, 53 Me. 500. See *Stickney v. Salem*, 3 Allen, 374.

¹ The obligation to repair is in the main confined to that part of the road usually traveled. *Philbrick v. Pittston*, 63 Me. 477, and cases cited. See *Keyes v. Marcellus*, 50 Mich. 439; *Fitzgerald v. Berlin*, 64 Wis. 203.

This is varied somewhat by custom and the circumstances. *Cobb v. Standish*, 14 Me. 198. If a municipality has assumed the duty of keeping up a sidewalk within the corporate limits, but outside of street, it must repair. *Mansfield v. Moore*, 16 N. E. Rep. 246. That stumps and logs left in the road may constitute defects, see *Ward v. Jefferson*, 24 Wis. 342; *Coggswell v. Lexington*, 4 Cush. 307; *Snow v. Adams*, 1 Cush. 443. Compare *Rogers v. Newport*, 62 Me. 101; *Springer v. Bowdoinham*, 7 Me. 442; *Bigelow v. Weston*, 3 Pick. 267; *McArthur v. Saginaw*, 58 Mich. 357. So may a tent set up in the road which frightens horses. *Ayer v. Norwich*, 39 Conn. 376; S. C. 12 Am. Rep. 396. Or a steam roller, suffered to remain in it over Sunday. *Young v. New Haven*, 39 Conn. 435. See *Keith v. Easton*, 2 Allen, 552; *Rushville v. Adams*, 107 Ind. 475; *Bennett v. Fifield*, 13 R. I. 139; *North Mannheim v. Arnold*, 13 Atl. Rep. 444 (Penn.); *Agnew v. Corunna*, 55 Mich. 428; *Maxwell v. Clarke Tp.* 4 Ont. App. 460. Or a dangerous awning over a walk. *Drake v. Lowell*, 13 Met. 202.

But a town is not liable for an injury occasioned by the falling of a sign which has been fastened to an adjacent building. *Taylor v. Peckham*, 8 R. I. 349. Nor is it liable as for a defect in the highway for the fall upon a traveler of an insufficiently guyed derrick in use in repairing a road. *Pratt v. Weymouth*, 17 N. E. Rep. 538 (Mass.). Nor for injury occasioned by a ditch dug by a citizen under municipal authority to lay pipe in a street. *Susquehanna Depot v. Simmons*, 112 Penn. St. 384. Nor for an injury occasioned by the

jubilating of a mob in the street. *Campbell's Admr. v. Montgomery*, 58 Ala. 527. Nor for an injury suffered by unmanageable and unruly horses, where the road is in such condition that horses under control would have been driven with safety. *Jackson v. Belleview*, 80 Wis. 250. Nor for an injury caused by the earth giving way under the feet of the horses, in consequence of a defect not discoverable. *Prindle v. Fletcher*, 39 Vt. 255. Nor for an injury caused by a locomotive of a railway company whose track illegally crossed the street. *Vinal v. Dorchester*, 7 Gray, 421. Nor for an injury caused by the traveler leaving the beaten track in order to have the benefit of snow. *Kelly v. Fond du Lac*, 31 Wis. 179; *Rice v. Montpelier*, 19 Vt. 470. See *Rowell v. Lowell*, 7 Gray, 100. Compare *Cassidy v. Stockbridge*, 21 Vt. 391. Nor for an injury occasioned by the defect in a bridge of a railroad crossing the street, and which the railroad company is bound to repair. *Sawyer v. Northfield*, 7 Cush. 490. See *Flanders v. Norwood*, 141 Mass. 17. Compare *Currier v. Lowell*, 16 Pick. 170; *Wellcome v. Leeds*, 51 Me. 313; *Sides v. Portsmouth*, 59 N. H. 24; *Tierney v. Troy*, 41 Hun, 120. Nor for one caused by running upon stones outside the traveled way and beyond the gutter. *Howard v. North Bridgewater*, 16 Pick. 189. Objects within the limits of the highway, but outside the traveled way, are held in Massachusetts not to be defects, merely from their tendency to frighten horses; and the towns are held, therefore, not liable for injuries occasioned by teams becoming frightened by them and running away. *Keith v. Easton*, 2 Allen, 552; *Kingsbury v. Dedham*, 13 Allen, 186; *Horton v. Taunton*, 97 Mass. 266; *Cook v. Charlestown*, 98 Mass. 80; but in Connecticut and Vermont the con-

trary doctrine is maintained. *Young v. New Haven*, 89 Conn. 435; *Ayers v. Norwich*, 89 Conn. 376; 8 C. 12 Am. Rep. 396; *Morse v. Richmond*, 41 Vt. 435, where the Massachusetts cases are reviewed. See also *Agnew v. Corunna*, 55 Mich. 428.

Whether one can recover where the injury is the combined result of neglect of duty on the part of the town and of accident, has been, and still is, a disputed question. In Vermont, New Hampshire, Missouri and Wisconsin it is held he may. *Hunt v. Pownal*, 9 Vt. 411; *Kelsey v. Glover*, 15 Vt. 708; *Allen v. Hancock*, 16 Vt. 230; *Hull v. Kansas City*, 54 Mo. 598; *Norris v. Litchfield*, 35 N. H. 271; *Clark v. Barrington*, 41 N. H. 44; *Tucker v. Henniker*, 41 N. H. 317; *Winship v. Enfield*, 42 N. H. 197; *Dreher v. Fitchburg*, 22 Wis. 675; *Ward v. Milwaukee, &c., R. R. Co.*, 29 Wis. 144; *Houfe v. Fulton*, 29 Wis. 296; 8 C. 9 Am. Rep. 568; *Olsen v. Chippewa Falls*, 37 N. W. Rep. 575 (Wis.). Compare *Willey v. Belfast*, 61 Me. 569; and the same doctrine is held in Upper Canada. *Sherwood v. Hamilton*, 37 Up. Can. Q. B. 410. See, also, *Lower Macungie v. Merkhoffer*, 71 Penn. St. 276; *Crawfordsville v. Smith*, 79 Ind. 308; *Balt., &c., Co., v. Bateman*, 13 Atl. Rep. 54 (Md.); *Lane v. Wheeler*, 35 Hun, 606. The rule is the other way in Massachusetts and Maine. *Davis v. Dudley*, 4 Allen, 557; *Titus v. Northbridge*, 97 Mass. 258; *Horton v. Taunton*, 97 Mass. 266; *Fogg v. Nahant*, 98 Mass. 578; *Murdock v. Warwick*, 4 Gray, 178; *Wright v. Templeton*, 132 Mass. 49; *Moore v. Abbot*, 32 Me. 46; *Farrar v. Greene*, Id. 574; *Coombs v. Topsham*, 38 Me. 204; *Anderson v. Bath*, 42 Me. 346; *Moulton v. Sanford*, 51 Me. 127; *Spaulding v. Winslow*, 74 Me. 528; *Aldrich v. Gorham*, 77 Me. 287. But if a horse takes fright from the carriage striking an

obstruction in a road, and becomes unmanageable and runs away, throwing out the driver and injuring him, the obstruction is to be deemed the proximate cause of the injury. *Clark v. Lebanon*, 63 Me. 393. But not if frightened at cows before striking the obstruction. *Perkins v. Fayette*, 68 Me. 152.

The following statement of cases in Vermont may be of interest: *Hunt v. Pownal*, 9 Vt. 411, a nut fastening the tongue of the vehicle to the axle-tree gave way, and the vehicle was thrown over a bank not sufficiently guarded; *Kelsey v. Glover*, 15 Vt. 709, a runaway team was turned upon the plaintiffs by the projection of a tree top into the highway; *Allen v. Hancock*, 16 Vt. 230, a horse smooth shod was not able to hold back a load, and plaintiff's team was thrust over an unguarded bank; *Fletcher v. Barnet*, 43 Vt. 192, plaintiff's gig was broken in passing a depression in the highway, the gig being defective; *Hodge v. Bennington*, 43 Vt. 450, the injury was the combined result of the defect in the way and of the breaking of a defective axle. In all these cases the principle is applied that where the traveler on the highway, in the exercise of ordinary care and prudence, receives an injury, which is the combined result of accident and insufficiency of the highway, and the injury is attributable to such insufficiency co-operating with the accidental cause, the town is liable. This doctrine approved in *Joliet v. Verley*, 35 Ill. 58. In *Toms v. Whitby*, 35 U. C. Q. B. 195, the approach to a bridge was not protected, and the plaintiff's horse, being driven over the bridge, shied, and backed the carriage over the bank. The town was held liable. A county, liable for a defective bridge, is not liable for injury from the backing of a team before reaching a bridge from fright at a plank stand-

ing upright in it. *Board of Fulton Co. v. Rickel*, 106 Ind. 501. If the injury is caused by fright at a defect, the defect must be such as to frighten an animal of ordinary gentleness. *Kennedy v. Com'rs of Cecil Co.*, 14 Atl. Rep. 524 (Md.)

If a highway at a railway crossing is defective, it is no defense that the defect was one the railroad company ought to have remedied. *Wellcome v. Leeds*, 51 Me. 313, citing *State v. Gorham*, 87 Me. 451; *Currier v. Lowell*, 16 Pick. 170. See *Sides v. Portsmouth*, 59 N. H. 24; *Tierney v. Troy*, 41 Hun, 120. Compare *Sawyer v. Northfield*, 7 Cush. 490.

The liability of the town always presupposes the existence of fault; and therefore, if the defect is caused suddenly, by *vis major*, or accident, or the wrongful act of an individual, the town is not liable until the proper authorities have notice of it, or until after such delay that notice must be presumed. *Reed v. Northfield*, 13 Pick. 94; *Green v. Danby* 12 Vt. 338; *Springer v. Bowdoinham*, 7 Me. 443; *Hamden v. New Haven, &c., Co.*, 27 Conn. 158; *Bragg v. Bangor*, 51 Me. 532; *Holt v. Penobscot*, 56 Me. 15; *Colley v. Westbrook*, 57 Me. 181. See *Chicago v. McCarthy*, 75 Ill. 602; *Chicago v. Langlass*, 66 Ill. 361; *Peru v. French*, 55 Ill. 317; *Rowell v. Williams*, 29 Iowa, 210. As to what is constructive notice, *Galesburg v. Higley*, 61 Ill. 237; *Springfield v. Doyle*, 76 Ill. 202; *Atlanta v. Perdue*, 53 Geo. 607; *Alexander v. Mt. Sterling*, 71 Ill. 366. But it is no defense to an action for an injury that the town used ordinary care and diligence in repairing, if notwithstanding the road continues defective. *Horton v. Ipswich*, 12 Cush. 483. And snow and ice may become defects, giving rise to a cause of action when allowed to continue an unreasonable time. *McLaughlin v. Corry*, 77 Penn. St. 103;

[*625] ***Defects in Sidewalks.** The statutes rendering towns liable for defects in highways are generally held to include defects in sidewalks also.¹

Streets and Highways in Incorporated Cities, etc. It is a principle of nearly universal acceptance 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, that 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 that for any failure in the discharge of this duty the corporation is responsible to the party injured.² This rule applies to injuries sustained in conse-

Green v. Danby, 13 Vt. 338. See Seeley v. Litchfield, 49 Conn. 134. That a road is let to a contractor to keep in repair does not affect the liability of the town. Mahanoy v. Scholly, 84 Penn. St. 136. If an individual causes the defect, he will be responsible; but so will the town for suffering or not preventing it. Rowell v. Wilhams, 29 Iowa, 210; Smith v. Leavenworth, 15 Kan. 81; Centerville v. Woods, 57 Ind. 192; Boucher v. New Haven, 40 Conn. 456. And it will be liable, though under proper authority it has imposed the obligation to repair upon the adjacent land owners. Wallace v. New York, 2 Hill. 440; Rockford v. Hildebrand, 61 Ill. 155. If the municipality is compelled to make compensation for an injury for which some individual is primarily liable, it is entitled to indemnity under the principles heretofore laid down. See ante 166, et seq. Also, Patterson v. Colebrook, 29 N.H. 94; Elliott v. Concord, 27 N. H. 204; Willard v. Newbury, 22 Vt. 458; Newbury v. Conn. &c., R. R. Co., 25 Vt. 377; Robbins v. Chicago, 4 Wall. 657; Portland v. Richardson, 54 Me. 46; Centerville v. Woods, 57 Ind. 192.

¹ Bacon v. Boston, 3 Cush. 174;

Brady v. Lowell, 3 Cush. 121; Raymond v. Lowell, 6 Cush. 524; Lowell v. Spaulding, 4 Cush. 277; Kirby v. Market Assn., 14 Gray, 249; Manchester v. Hartford, 30 Conn. 118; Hubbard v. Concord, 35 N. H. 52; Coombs v. Purrington, 42 Me. 332; Stewart v. Ripon, 38 Wis. 584; Smith v. Wendell, 7 Cush. 498; Winn v. Lowell, 1 Allen, 177; Loan v. Boston, 106 Mass. 450; Weare v. Fitchburg, 110 Mass. 334; Harriman v. Boston, 114 Mass. 241; McAuley v. Boston, 113 Mass. 503; Street v. Holyoke, 105 Mass. 82; Drake v. Lowell, 13 Met. 292; Hixon v. Lowell, 13 Gray, 59; Providence v. Clapp, 17 How. 161. (from R. I.) See Monies v. Lynn, 121 Mass. 442.

² See Weightman v. Washington, 1 Black, 39; Chicago v. Robbins, 2 Black, 418; Nebraska v. Campbell, 2 Black, 590; Manchester v. Ericsson, 105 U. S. 347; Grant v. Stillwater, 35 Minn. 242; Galveston v. Posnainsky, 62 Tex. 118; Kent v. Worthing Local Board, L. R. 10 Q. B. D. 118; Nelson v. Canisteo, 100 N. Y. 89; Weet v. Brockport, 16 N. Y. 161, note, and numerous other cases. See Veeder v. Little Falls, 100 N. Y. 343; Dubois v. Kingston, 102 N. Y. 219. *Contra*,

quence of defects in sidewalks.¹ A city may impose the duty *of making and keeping the sidewalks in repair [*626] upon the adjoining owners; but doing so 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 individual in default may be united in a suit for the injury caused by the nuisance.²

Detroit v. Blackeby, 21 Mich. 84; *Young v. Charleston*, 20 S. C. 116. This subject cannot be pursued here; it is of course treated fully in the exhaustive treatise of Judge DILLON on the Law of Municipal Corporations. A city does not escape liability by employing an independent contractor. *Logansport v. Dick*, 70 Ind. 65; *Jacksonville v. Drew*, 19 Fla. 106; *Mayor, &c. of Baltimore v. O'Donnell*, 53 Md. 110. As to liability for unguarded area near street lines, see *Clarke v. Richmond*, 5 S. E. Rep., 369 (Va.); *Indianapolis v. Emmelman*, 108 Ind. 530; *Hubbell v. Yonkers*, 104 N. Y. 434; *Monk v. New Utrecht*, Id. 552. Liable for fall of dangerous building on street line. *Duffy v. Dubuque*, 63 Ia. 171. Not liable for defect nor obstruction in untraveled part of a street. *McArthur v. Saginaw*, 58 Mich. 357; *Fitzgerald v. Berlin*, 64 Wis. 203; see *Agnew v. Corunna*, 55 Mich. 428; at least in a suburban street, *Monongahela v. Fischer*, 111 Penn. St. 9.

¹ *Bloomington v. Bay*, 42 Ill. 503; *Scammon v. Chicago*, 25 Ill. 424; *Rockford v. Hillebrand*, 61 Ill. 155; *Lacon v. Page*, 48 Ill. 499; *Alexander v. Mt. Sterling*, 71 Ill. 366; *Lovenguth v. Bloomington*, 71 Ill. 238; *Quincy v. Barker*, 81 Ill. 300; *Chicago v. McGiven*, 78 Ill. 347; *Chicago v. McCarthy*, 75 Ill. 602; *Joliet v. Verley*, 35 Ill. 58; *Galesburg v. Higley*, 61 Ill. 287; *Chicago v. Kelly*, 69 Ill. 475; *Chicago v. Robbins*, 2 Black, 418, (from Illinois); *Wallace v. New York*,

2 Hilt. 440; *Davenport v. Ruckman*, 87 N. Y. 568; *Koester v. Ottumwa*, 34 Iowa, 41; *Rowell v. Williams*, 29 Iowa, 210; *St. Paul v. Kuby*, 8 Minn. 154; *Atlanta v. Perdue*, 53 Geo. 607; *Bohen v. Waseca*, 32 Minn. 176. See *Bell v. West Point*, 51 Miss. 262; *Baltimore v. Marriott*, 9 Md. 160; *Atchison v. King*, 9 Kan. 550; *McDonough v. Virginia City*, 6 Nev. 90; *Russell v. Canastota*, 98 N. Y. 496; *Dotton v. Albion*, 50 Mich. 129; *O'Neil v. Detroit*, Id. 133. See *Hanscom v. Boston*, 141 Mass. 242; *Plattsburgh v. Mitchell*, 29 N. W. Rep. 593 (Neb.). In *Chicago v. Schmidt*, 107 Ill. 187, the city was held liable where from a defective walk one was thrown on a railroad track and killed by a train. Liable for defects though a minor was using street as a playground. *Chicago v. Keefe*, 114 Ill. 222. See *Donoho v. Vulcan Iron Works*, 75 Mo. 401; *Varney v. Manchester*, 58 N. H. 430; *McGuire v. Spence*, 91 N. Y. 303; *Gulline v. Lowell*, 144 Mass. 491. Standing for five minutes to watch a procession is not such a use of a street that one ceases to be a traveler and entitled to protection as such. *Varney v. Manchester*, 58 N. H. 430, collecting many cases.

² *Davenport v. Ruckman*, 87 N. Y. 568. See *Rowell v. Williams*, 29 Iowa, 210. *Contra*, *Marquette v. Cleary*, 37 Mich. 296. If a common duty rests on the city and the owner both are liable though there is no concert of action. *Peoria v. Simpson*,

Obstructions consequent on the repair of streets create no liability if there is no negligence.¹

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—as by excavations made in the sidewalks, or by unsafe hatchways left therein, or by opening or leaving open area ways in the traveled way, or by undermining the street or sidewalk—he commits a nuisance, and he is liable to any person who, while exercising due care, is injured in consequence.² If, however, he has the consent of the proper

110 Ill. 204. See *Papworth v. Milwaukee*, 64 Wis. 389.

Space will not be taken up with a specification of what constitute defects in sidewalks. How far snow and ice may constitute a defect has been so much a matter of controversy that the following references to cases are given: *Cook v. Milwaukee*, 24 Wis. 270; *Luther v. Worcester*, 97 Mass. 268; *Hutchins v. Boston*, 97 Mass. 273, note; *Collins v. Council Bluffs*, 32 Iowa, 324; *Nason v. Boston*, 14 Allen, 508; *Stanton v. Springfield*, 12 Allen, 566; *Chicago v. McGiven*, 78 Ill. 347; *Powers v. Chicago*, 20 Ill. App. 178; *McLaughlin v. Corry*, 77 Penn. St. 103; *Mauch Chunk v. Kline*, 100 Penn. St. 119; *Hanson v. Warren*, 14 Atl. Rep. 405 (Penn.) *Shea v. Lowell*, 8 Allen, 136; *Wilson v. Charlestown*, 8 Allen, 137; *Payne v. Lowell*, 10 Allen, 147; *Hall v. Lowell*, 10 Cush. 260; *Baltimore v. Marriott*, 9 Md. 160; *Providence v. Clapp*, 17 How. 161; *Calkins v. Hartford*, 33 Conn. 57; *Dooley v. Meriden*, 44 Conn. 117; *Cloughesey v. Danbury*, 51 Conn. 405; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459; *Taylor v. Yonkers*, 105 N. Y. 202; *Kinney v. Troy*, 15 N. E. Rep. 728 (N. Y.) *Kaveny v. Troy*, Id. 726 (N. Y.); *Grossen-*

bach v. Milwaukee, 65 Wis. 31; *Smyth v. Bangor*, 72 Me. 249; *Broburg v. DesMoines*, 63 Ia. 523; *McKellar v. Detroit*, 57 Mich. 158.

¹ *Kimball v. Bath*, 38 Me. 219. See *Robbins v. Chicago*, 4 Wall. 657; *Klatt v. Milwaukee*, 53 Wis. 196, where a barrier had been removed without notice to the city. Compare *Mayor, &c., of Baltimore v. O'Donnell*, 53 Md. 110.

² *Robbins v. Chicago*, 2 Black, 418; S. C. 4 Wall. 657; *Bush v. Johnston*, 23 Penn. St. 209; *Beatty v. Gilmore*, 16 Penn. St. 463; *Irvin v. Fowler*, 5 Rob. 482; *Davenport v. Ruckman*, 10 Bosw. 20; S. C. 37 N. Y. 568; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, 18 N. Y. 84; *Durant v. Palmer*, 29 N. J. 544; *Pfau v. Reynolds*, 53 Ill. 212; *Severin v. Eddy*, 53 Ill. 189; *Rowell v. Williams*, 29 Iowa, 210; *Driscoll v. Carlin*, 11 Atl. Rep. 482 (N. J.); *Calder v. Smalley*, 66 Ia. 219. If a street car company leaves ridges of snow in cleaning its tracks and thereby a traveler is injured, it is liable. *Bowen v. Detroit, &c., Ry Co.*, 54 Mich. 496; *Wallace v. Detroit, &c., Ry Co.* 58 Mich. 231. If the slot for the grip in track of a cable car company is large enough to let a carriage wheel slip into it, the com-

public authorities, and what he does is consistent with the customary use of the way for private purposes—as where he is making connection with a public sewer or with a gas *main—and he observes a degree of care proportioned to [*627] the danger, and is consequently chargeable with no fault, he cannot be held responsible for accidental injuries, inasmuch as in such case he has failed in the observance of no duty.¹ The question in all such cases is one of due and proper care.

pany is liable without notice. *Keitel v. St. Louis Cable Ry Co.*, 28 Mo. App. 657.

¹*Ottumwa v. Parks*, 43 Iowa, 119; *Portland v. Richardson*, 54 Me. 46. See *Kimball v. Bath*, 38 Me. 219; *Kirkpatrick v. Knapp*, 28 Mo. App. 427; *Crandall v. Loomis*, 56 Vt. 664. If one chargeable with no duty as to maintaining a sidewalk, takes up and replaces a loose plank in it, he is not liable to one afterward injured by it. *Davis v. Mich. Bell, &c., Co.*, 28 N. W. Rep. 108 (Mich.). One is not obliged to make his bridge as safe as a sidewalk if he is digging under the sidewalk by a city's authority. *Nolan v. King*, 97 N. Y. 565. Lot owner not liable for fall of limbs upon traveler where a city has authority to trim shade trees. *Weller v. McCormick*, 47 N. J. L. 897. Where an owner's duty is to repair the walk and in default thereof the city is to do it and charge the lot with the expense, if by

reason of its non-repair the city has to pay damages, the owner is not liable over. *Keokuk v. Ind. Sch. Dist.*, 53 Ia. 352. But see *Detroit v. Chaffee*, 37 N. W. Rep. 882 (Mich.) and cases in note p. 746, *supra*. The owner may be made primarily liable for the injury in Wisconsin. *Henker v. Fond du Lac*, 38 N. W. Rep. 187; *Raymond v. Sheboygan* 35 Id. 540; but in Minnesota, he can be made liable only to the city. *Noonan v. Stillwater*, 33 Minn. 198. As to liability for failure to remove snow and ice where ordinance requires it. *Wenzlick v. McCotter*, 87 N. Y. 122; *Moore v. Gadsden*, 32 N. Y. 12; *Taylor v. Lake Shore, &c., Co.*, 45 Mich. 74. See also *Merritt v. Fitzgibbons*, 102 N. Y. 362, where a man slipped under a horse's feet and was hurt by the horse and lot owner was held not liable. As to liability over in such case. *Hartford v. Talcott*, 43 Conn. 525.

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* CHAPTER XX:

WRONGS FROM NON-PERFORMANCE OF CONVENTIONAL AND STATUTORY DUTIES.

In this chapter will be considered 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, but in some a special duty is undertaken or in contemplation of law promised as regards both person and property.

Bailment, what is. Bailment is a delivery of goods in trust, upon an agreement expressed or implied, that the trust shall be duly exercised, and the goods returned or delivered over when the purpose of the bailment is accomplished. There are several sorts of bailment, and for our purposes we follow the classification of Mr. Justice STORY, which is as follows:

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 for the Benefit of the Bailor. Of the first class of bailments, or those in which one assumes a trust in goods for the benefit of the owner, it is to be said that these are usually mere matters of friendly accommodation; such as the carriage of a parcel from one town to another by one who is going on
[*629] his *own business, for his neighbor, who is thereby saved the necessity of a journey to carry it himself. In

¹ Story on Bailments, § 8.

this case by receiving the parcel on an understanding that he will carry it, the bailee undertakes to do so, and though there is no benefit to accrue to him from the performance of the trust, the delivery to him of the parcel is a sufficient consideration for the undertaking. Another illustration is the case of one who, 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.

If the trust to carry and deliver in the one case, or to keep safely in the other is not performed, the bailee is guilty of a 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: of this there can be no question.

What, then, would be a loss or injury without the bailee's fault? One occurring by inevitable accident would certainly be; but this term is somewhat ambiguous and uncertain, and few accidents occur that might not, by extreme care, have been avoided. It has been said in another place¹ that for accidents occurring without fault no action will lie; and those accidents are usually spoken of as inevitable which have occurred notwithstanding the exercise of such care as might reasonably have been expected under the circumstances.* The utmost human vigilance is not to be anticipated or demanded under the ordinary circumstances of every day life.

The bailee who accepts a trust for the benefit of the bailor is of course obligated to its performance, and he is not discharged from this obligation 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.

***Negligence, what is.** The question of legal liability [*630] is therefore one of negligence, and its consideration

¹ Ante, p. 91-2.

² See *Holmes v. Mather*, L. R. 10 Exch. 261; S. C. 14 Moak, 548 and

the editor's note thereto, for an examination of the subject of accident.

demands, first, a determination of what negligence is. To reach this we are not to look solely at a man's acts or his failure to act: 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 is not the same in all cases: it may vary according to the danger involved in the want of vigilance. A few simple illustrations may make this apparent. It might not be negligence in one having charge of an infant to permit it to wander in the fields where friendly people would be continually within call and no peculiar danger was to be looked for, when to allow the same liberty in a country where the people were few and ferocious beasts abundant would be highly culpable if not criminal. The degree may vary also according to the benefit, if any, that the party assuming the duty is to derive from its performance: if he is paid a large sum for undertaking it, the evident understanding is that he shall give to it an attention and vigilance in proportion, and he is justly put to a watchfulness that is not expected of one who, on request, undertakes a mere friendly commission. The degree may also vary according to the value of the thing in respect to which the trust is assumed, not only because the loss that might result from want of care would be more severe, but also because the danger of loss generally bears some proportion to the value; a jewel being unsafe where something of little worth might be exposed with impunity, and consequently requiring more care and vigilance for its protection. All these circumstances are to be taken into account when the question involved is one of negligence; for negligence in a legal sense is no more nor less than this: 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.¹ Some writers classify negligence as gross [*631] *negligence, ordinary negligence and slight negligence;

¹ Negligence is the absence of care according to circumstances. *Turnpike Co. v. &c., Railroad Co.*, 54 Penn. St. 345; *Philadelphia, &c., Railroad Co. v. Stinger*, 78 Penn. St. 219; *Texas, &c., R. R. Co. v. Murphy*, 46 Texas, 356; *Blaine v. Ches. & Ohio R.R. Co.*, 9 W. Va. 252; *Nor. Cent. R. R. Co.*

v. State, 29 Md. 420; *Barber v. Essex*, 27 Vt. 63.

"The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do." *Alderson B. in Blyth v. Birmingham Water-*

but this classification only indicates this: 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.¹

Applying these principles to the case of a gratuitous bailee we perceive that that is not to be attributed to him as negligence which is only a failure to apply to his charge the highest degree of vigilance and prudence, because to require so much would not be reasonable. Neither on the other hand should he be excused for a loss which has occurred from an entire neglect of his charge, for this would be equally unreasonable.² His undertaking must consequently be for something which falls short of the highest vigilance, but which, on the other hand, is not entire neglect.

Degrees of Negligence. Sir WILLIAM JONES has undertaken to define the degrees of care which can justly be required of bailees under the different classes of bailments. Where the bailment is for the mutual benefit of both parties, he finds it just to require that degree of care which every person of common prudence and capable of governing a family ordinarily takes of his own concerns; and this he designates ordinary diligence. If, on the other hand, the bailment is for the benefit of the bailee, it is proper to require of him the highest vigilance, or such as a very cautious and vigilant man would take of his own possessions, while if it were for the benefit of the bailor exclusively, the bailee is chargeable only with such slight care as a man of common sense, however inattentive, would give to his own affairs.³

works, 11 Exch. 781, 784. "The absence of such care as a person is by law bound to take." Hyman v. Nye, L. R. 6 Q. B. D. 685; Lindley, L. J. "Actionable negligence consists in the neglect of the use of ordinary care or skill toward a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff without contributory negligence on his part has suffered injury to his person or property." Brett, M. R. in Heaven v. Pender L. R. 11 Q. B. D. 503, 507.

¹ Hinton v. Dibbin, 2 Q. B. 644, 661; Wilson v. Brett, 11 M. & W. 113, 115; Steamboat New World v. King, 16 How. 469, 474. A bailment for the mutual amusement and recreation of both parties, is to be considered one for the benefit of both, and the want of ordinary care in the bailee will render him liable. Carpenter v. Branch, 13 Vt. 161.

² See Griffith v. Zipperwick, 28 Ohio, (N. S.) 388.

³ Jones on Bailments, 4-10.

We have here the three degrees of extreme care, ordinary [*632] care and slight care demanded in different cases, *according to the circumstances and the nature of the trust; the highest being demanded when the person who is to be benefited by the trust is himself the person to perform it, and the lowest when he accepts the trust as a mere favor to another. But, as has already been said, these degrees 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.¹

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.² But any dealing with the subject of the bailment in a manner not warranted by the understanding, is in law wrongful. Therefore, if one having undertaken to carry and deliver money for another, shall hand it over to a third person to be carried, from whom it is stolen or by whom it is lost, the loss must fall upon the bailee, who alone was trusted by the owner.³

The question whether the proper degree of care has been observed is one of fact, not of law.⁴ A bailee is not responsible if the property is stolen from him without his fault, and this rule applies to a bank from which a special deposit is stolen by its officers.⁵ Neither is a railroad company liable for the loss,

¹ *Coggs v. Bernard*, 2 Ld. Raym. 909; *Foster v. Essex Bank*, 17 Mass. 479; *Chase v. Mayberry*, 3 Harr. 266.

² *Thorne v. Deas*, 4 Johns. 84. Compare *Shillibeer v. Glyn*, 2 M. & W. 143.

³ *Colyar v. Taylor*, 1 Cold. 372. If one who undertakes to carry money, sends it by mail, he is responsible for the loss. *Stewart v. Frazier*, 5 Ala. 114. See *Bland v. Womack*, 2 Murphey, 373; *Jenkins v. Motlow*, 1 Sneed, 248; *Graves v. Ticknor*, 6 N. H. 537.

⁴ *Chase v. Mayberry*, 3 Harr. 266; *Jenkins v. Motlow*, 1 Sneed, 248;

Beatty v. Gilmore, 16 Penn. St. 463; *Storer v. Gowen*, 18 Me. 174; *Tracy v. Wood*, 8 Mason, 132; *Doorman v. Jenkins*, 2 Ad. & E. 256.

⁵ *Foster v. Essex Bank*, 17 Mass. 479; *DeHaven v. Kensington Bank*, 81 Penn. St. 95. Bank liable when bonds specially deposited are stolen if it has been grossly negligent. *Whitney v. Nat. Bank*, 55 Vt. 154. See *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 83; *Nat. Bank v. Graham*, 100 U. S. 699; *Wylie v. Northampton Bank*, 119 U. S. 361; *Comp v. Carlisle & Co., Bank*, 94 Penn. St. 409. So of an individual bailee of money. *Bron-*

without fault, of property which it has received to carry gratuitously.¹

***Bailments for the benefit of the Bailee.** The case of [*633] a bailment for the exclusive benefit of the bailee is the opposite of that already considered, and requires of the bailee the exercise of more than the ordinary care and vigilance. A common instance is the gratuitous loan of his horse by the owner to a friend for a particular journey. If in such a transaction the party accommodated is guilty of even slight neglect, and the horse is lost or injured in consequence, this is such negligence as will render him responsible.²

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 simple, involving a

nenburg v. Charman, 80 Ind. 475; *Caldwell v. Hall*, 60 Miss. 830. Of a bailee of a ring left to be raffled for contrary to law. *Woolf v. Bernero*, 14 Mo. App. 518. A gratuitous bailee, it is held, is only liable for gross negligence. *Patterson v. McIver*, 90 N. C. 493; *Carrington v. Ficklin*, 82 Gratt. 670. In a case where, with bailor's knowledge, the bailee had put his bonds in a locked drawer from which they were stolen it was held there was no liability and the rule was stated that a gratuitous bailee "is bound to observe such care in the custody of property committed to his keeping as persons of ordinary prudence in his situation and business usually bestow on the custody and keeping of like property belonging to themselves." *Schermer v. Neurath*, 54 Md. 491. See *Rea v. Simmons*, 141 Mass. 561; *Brant v. McMahan*, 56 Mich. 498.

¹ *Van Gilder v. Chicago, &c., R. R. Co.*, 44 Iowa, 548; *Flint, &c., R. Co. v. Weir*, 37 Mich. 111, case of gratuitous carriage of baggage. So only liable for gross negligence of baggage gratuitously stored. *Clark v. Eastern*

R. R. Co., 139 Mass. 423. But if one receives money to be carried gratuitously, and can give no account whatever of its disposition, a presumption of gross neglect arises against him. *Boyd v. Estis*, 11 La. Ann. 704. See *Fairfax v. N. Y. Cent. R. R. Co.*, 67 N. Y. 11.

² *Phillips v. Coudon*, 14 Ill. 84; *Howard v. Babcock*, 21 Ill. 259; *Watkins v. Roberts*, 28 Ind. 167.

He is responsible for even the slightest neglect, and when a loss occurs the burden is upon him to prove that it was the result of inevitable accident or of a wrongful act which, in the exercise of due diligence, could not have been foreseen or prevented. *Scranton v. Baxter*, 4 Sandf. 5; *Wood v. McClure*, 7 Ind. 155. Such a bailee of a flag which is injured by a hail storm is not liable from the mere fact of injury. *Beller v. Schultz*, 44 Mich. 529. If one furnishes a carriage gratuitously to three persons and a fourth without his knowledge gets in, he is not liable if such an one is injured by a runaway. *Siegrist v. Arndt*, 86 Mo. 200.

consideration only of the particular transaction, as where the livery-keeper lets a horse, to be taken by the bailee for a journey, for a consideration paid or to be paid. Others 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. Among the first may be named the case of a pledge of goods in security for a debt.¹ Here the goods are delivered to a bailee, whose implied undertaking is that he will keep them safely and return them when the debt is paid. Another case is that of the delivery of a thing to a 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. As in each of [*634] these cases the bailment is for the benefit of both *parties, the bailee is charged with the obligation of ordinary care, but no more.² Another case is that of the deposit of grain in a mill or warehouse, to be returned on demand. This case is peculiar in that it is commonly expected that the grain deposited will be stored with other grain of like kind and quality, so that the return of precisely the same grain will be impossible. This circumstance, however, does not vary the rules of legal responsibility. The bailor is entitled to receive from the agree-

¹ A bank, as bailee of bonds deposited as security for a loan, is bound only to ordinary care. *Jenkins v. Nat. Bank of Bowdoinham*, 58 Me. 275, citing *Field v. Brackett*, 56 Me. 121. And see *Maury v. Coyle*, 84 Md. 235; *First Nat. Bank v. Graham*, 79 Penn. St. 106; S. C. 21 Am. Rep. 49. A warehouseman is only liable for want of ordinary care. *Mobile, &c., R. R. Co. v. Prewitt*, 46 Ala. 63. As to the liability of a national bank as gratuitous bailee, see *DeHaven v. Kensington Bank*, 81 Penn. St. 95; *Wiley v. First Nat. Bank*, 47 Vt. 546; S. C. 19 Am. Rep. 122 and cases, p. 754, n. 5, *supra*.

² So when cotton is left to be ginned. *Kelton v. Taylor*, 11 Lea, 264; horse left with stable keeper over night. *Dennis v. Huyck*, 48 Mich.

620; logs to be sawed left with sawyer. *Gleason v. Beers*, 59 Vt. 581; notes left for collection, *Kincheloe v. Priest*, 89 Mo. 240; when a horse is hired. *Carrier v. Dorrance*, 19 S. C. 30. An agricultural society is liable for goods, stolen through its negligence from its fair ground, which had been left for exhibition. *Vigo Ag'l. Soc. v. Brumfiel*, 102 Ind. 146. A bailee for hire of cars to be returned in as good condition as when received, ordinary wear excepted, is not liable for loss from fire occurring without its fault. *St. Paul, &c., R. R. Co. v. Minn., &c., Ry Co.*, 26 Minn. 243. In Mass. under a like contract the bailee of a piano was held liable where the loss occurred from the blowing down of the house. *Harvey v. Murray*, 136 Mass. 377.

gate 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. It would be a valid excuse if, while he was in the exercise of ordinary care, the grain was stolen, or was destroyed by an accidental or incendiary fire.¹ If, however, by the custom of the business, a 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, this course of dealing negatives the supposition that the grain deposited is to remain subject to call. It is, therefore, not a bailment, but it 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. If he hires a horse to go to one place, but goes with it to another, he is guilty of a conversion of the horse from the moment the departure from the journey agreed upon takes place. It is immaterial that the change is not injurious to the interests of the bailor; it is enough that it is not within the contract.³ Contracts are matters of agreement, and even a more beneficial contract [*635] cannot be substituted for another without the mutual assent upon which all agreements must rest.

Innkeepers. Among the employments to which special obligations are attached is that of an innkeeper. An innkeeper is one who holds himself out to the public as ready to accommodate all

¹ *Erwin v. Clark*, 18 Mich. 10; *Perkins v. Dacon*, 13 Mich. 81; *Norton v. Woodruff*, 2 N. Y. 152.

See *Nelson v. Brown*, 44 Iowa, 455; *Young v. Miles*, 20 Wis. 615.

² *Nelson v. Brown*, 44 Iowa, 455; *Wilson v. Cooper*, 10 Iowa, 565; *Smith v. Clark*, 21 Wend. 83; *Carlisle v. Wallace*, 12 Ind. 252; *Chase v. Washburn*, 1 Ohio, (N. S.) 244; *Sou. Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101; *Jones v. Kemp*, 49 Mich. 9. But see *Sexton v. Graham*, 53 Ia. 181; *Ledyard v. Hibbard*, 48

Mich. 421; *Schindler v. Westover*, 99 Ind. 395; *Dean v. Lammers* 63 Wis. 331.

³ *Homer v. Thwing*, 3 Pick. 492; *Rotch v. Hawes*, 12 Pick. 136; *Duncan v. Sou. Car. R. R. Co.*, 2 Rich. 613; *Columbus v. Howard*, 6 Geo. 213; *Mullen v. Easley*, 8 Humph. 423. See *Fox v. Young*, 22 Mo. App. 386. Compare *Harvey v. Epes*, 12 Grat. 153, in which it was decided that a departure from the terms of a hiring was not a conversion, unless injury was occasioned thereby.

corners with the conveniences usually supplied to travelers on their journeys.¹ He is bound, as a matter of law, to furnish the entertainment called for; and while he may demand his hire in advance, if he doubts the traveler's ability to pay, yet if that be paid or tendered, he must receive the person offering himself as guest 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 or intoxicated. And after having received a guest he might turn him away if his conduct was disorderly, or if he refused to comply with the reasonable rules of the establishment. And a disorderly guest might be removed with force if necessary;³ but a traveler turned away without cause, either before or after being received, may sustain an action therefor.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 with meals.⁶

As bailee of the personal effects which the guest brings with him to the inn, it is generally held, that where the guest himself is not in fault, the innkeeper is responsible as insurer, [*636] except *only as against losses by the act of God or of the public enemy.⁷ This imposes upon the innkeeper not

¹ See *Thompson v. Lacy*, 3 B. & Ald. 283. An inn is a public house of entertainment for all who choose to visit it. *Pinkerton v. Woodward*, 33 Cal. 557. See *Southwood v. Myers*, 3 Bush, 681; *Dickerson v. Rogers*, 4 Humph. 179.

² *Hawthorn v. Hammond*, 1 C. & K. 404; *Rex v. Ivens*, 7 C. & P. 213. A landlord in a large village is bound to have food enough for two persons who apply. *Atwater v. Sawyer*, 76 Me. 539.

³ *Howell v. Jackson*, 6 C. & P. 723. See *Calve's Case*, 8 Co. 32; *Markham v. Brown*, 8 N. H. 523. Mere apprehension that guests may be disorderly will not justify their exclusion. *Atwater v. Sawyer*, 76 Me. 539.

⁴ *Whiting v. Mills*, 7 Up. Can. Q. B. 450; *McCarthy v. Niskern*, 23 Minn. 90.

⁵ *State v. Mathews*, 2 Dev. & Bat. 424; *Lyon v. Smith*, 1 Morris, (Iowa.) 184; *Carter v. Hobbs*, 12 Mich. 52; *Johnson v. Reynolds*, 3 Kan. 257; *Southwood v. Myers*, 3 Bush, 681.

⁶ *Parkhurst v. Foster*, Carth. 417; *S. C. 1 Salk*, 387; *Shoecraft v. Bailey*, 25 Iowa, 553; *Pinkerton v. Woodward*, 33 Cal. 557; *Chamberlain v. Masterson*, 26 Ala. 371; *Wintermute v. Clarke*, 5 Sandf. 242; *Walling v. Potter*, 35 Conn. 183. A saloon keeper is not an innkeeper. *Doe v. Laming*, 4 Camp. 73. But he is bound to protect one guest from the assault of another in his presence. *Rommel v. Schambacher*, 11 Atl. Rep. 779 (N. J.).

⁷ *Mason v. Thompson*, 9 Pick. 280; *Shaw v. Berry*, 31 Me. 478; *Norcross v. Norcross*, 53 Me. 163; *Piper v. Manny*, 21 Wend. 282; *Grinnell v.*

only all losses attributable to his own negligence or misconduct, or those of his servants, but also such as may result from accidental fires, and the thefts or other misconduct or negligence of third persons—a degree of responsibility which is certainly very severe, and the justice and policy of which have recently been called in question, both in England and in this country.¹ In Illinois, it is held 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;² and the like rule has been laid down in Vermont and in Michigan.³

One important difference between innkeepers and other bailees

Cook, 3 Hill, 485; Hulett v. Swift, 33 N. Y. 571; Hill v. Owen, 5 Blackf. 328; Thickstun v. Howard, 8 Blackf. 535; Johnson v. Richardson, 17 Ill. 302; Sasseen v. Clark, 37 Geo. 242; Manning v. Wells, 9 Humph. 746; Mateer v. Brown, 1 Cal. 221; Burrows v. Trieber, 21 Md. 320; Sibley v. Aldrich, 33 N. H. 553; Woodworth v. Morse, 18 La. Ann. 156; Howth v. Franklin, 20 Tex. 798; Packard v. Northcraft, 2 Met. (Ky.) 439. Liable for goods stolen unless by guest's servant or companion. Walsh v. Porterfield, 87 Penn. St. 376. To be held to a stricter accountability if guest gets drunk at the hotel bar. Rubenstein v. Cruikshanks, 54 Mich. 199. Liable for injury to horse left with him though owner stays elsewhere. Russell v. Fagan, 8 Atl. Rep. 258 (Del.). *Contra*, Healey v. Gray, 68 Me. 489. Liable to guest who has taken small-pox from person sick in hotel, if with knowledge of sickness landlord keeps house open for business without informing guests of the fact. Gilbert v. Hoffman, 66 Ia. 205.

An innkeeper, however, may entertain travelers and also keep boarders, and as respects the latter he is not an innkeeper, and does not assume any

such extraordinary liabilities. As to the distinction between guests and boarders, see Chamberlain v. Master-son, 26 Ala. 371; Shoecraft v. Bailey, 25 Iowa, 553; Johnson v. Reynolds, 8 Kan. 257; Hancock v. Rand, 94 N. Y. 1. Special rate does not necessarily make one a boarder. Beale v. Posey, 72 Ala. 328. Nor duration of stay. Presumption is that one coming as a guest remains such. Ross v. Mellin, 36 Minn. 421. A farmer who receives and provides for travelers as matter of accommodation, is not an innkeeper, though he receives pay therefor. Howth v. Franklin, 20 Tex. 798. One who keeps a sea bathing house, separate from his inn, is not liable as innkeeper for clothes stolen from bathing house. Minor v. Staples, 71 Me. 316.

¹ See Burgess v. Clements, 4 M. & S. 306; Dawson v. Chamney, 5 Q. B. 164. Merritt v. Claghorn, 23 Vt. 177.

² Metcalf v. Hess, 14 Ill. 129. And see Laird v. Eichold, 10 Ind. 212.

³ Merritt v. Claghorn, 23 Vt. 177; Cutler v. Bonney, 30 Mich. 259. See Clary v. Willey, 49 Vt. 55. And as to boarders in a hotel, see Vance v. Throckmorton, 5 Bush, 41.

is, that the former do not necessarily come into actual possession of the thing bailed; usually they have a constructive possession only. Their liability extends to the traveler's luggage, to the clothes upon his person, and to the money in his pocket.¹

[*637] It has *been held that the grain in the traveler's sleigh, when brought within the enclosure, was constructively in the innkeeper's possession;² and in a very careful decision the landlord has been held responsible for a considerable sum of money taken from a trunk in a traveler's room, though the traveler appears to have left the room unguarded and the key in the door, the jury having acquitted him of the charge of negligence.³ An innkeeper, at the common law, cannot relieve himself of this responsibility, or any part of it, by any notice posted about the inn which may or may not have been brought to the notice of the guest.⁴ 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 are very reasonable and proper statutes, but they must be strictly complied with or they will constitute no protection.⁵

¹ *Wilkins v. Earle*, 44 N. Y. 172; 8 C. 4 Am. Rep. 653. See the extent of this liability discussed at length in *Vance v. Throckmorton*, 5 Bush, 41. The liability extends only to such things as are brought in the character of guest. *Mateer v. Brown*, 1 Cal. 221. Covers cattle brought by drover. *Hilton v. Adams*, 71 Me. 19. Does not cover what is brought to the inn for business, as a stallion to the hotel barn to stand for service. *Mowers v. Fethers*, 61 N. Y. 34. See *Myers v. Cottrill*, 5 Biss. 465. Not liable at common law for goods stolen from a room used for business of selling by samples. *Fisher v. Kelsey*, 121 U. S. 383.

² *Clute v. Wiggins*, 14 Johns, 175. See *Hill v. Owen*, 5 Blackf. 323; *Mason v. Thompson*, 9 Pick. 280; *Packard v. Northcraft*, 2 Met. (Ky.) 439.

³ *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417. And, see *Burrows v. Trieber*, 21 Md. 320; S. C. 27 Md. 130; *Classen v. Leopold*, 2 Sweeney, 705;

Buddenburg v. Benner, 1 Hilt. 84; *Spring v. Hager*, 13 N. E. Rep. 479 (Mass). So where money taken from belt on traveller's person after forcing back the bolt to the door of his room. *Smith v. Wilson*, 36 Minn. 334. A landlord is not liable for money deposited in his office by one who is not a guest, and one whose purpose is merely so to deposit is not a guest. *Arcade Hotel Co., v. Wiatt*, 4 N. E. Rep. 398 (Ohio). Nor is one who goes to a hotel with a harlot for purposes of prostitution a guest who can hold a landlord for such deposit. *Curtis v. Murphy*, 63 Wis. 4.

⁴ *Bodwell v. Bragg*, 29 Iowa, 232; *Maltby v. Chapman*, 25 Md. 310. See *Epps v. Hinds*, 27 Miss. 657.

An innkeeper does not relieve himself from responsibility by telling the guest, when he receives his property, that the guest must run all risks. *Woodward v. Birch*, 4 Bush, 510.

⁵ *Porter v. Gilkey*, 57 Mo. 235; *Woodworth v. Morse*, 18 La. Ann

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, of course, excused.¹

If an innkeeper's servants take charge of the luggage of a departing guest to deliver it to a railroad company or other carrier, the responsibility of the innkeeper continues until actual delivery.² And probably if the guest goes away without, at the *time, taking his baggage with him, the inn- [*638] keeper's liability as such will continue until it is removed, if this be within reasonable time.³

An innkeeper has a lien for reasonable charges on the goods brought with him by his guest,⁴ but not upon the clothing on his person.⁵ A boarding-house keeper, or an innkeeper as to those who merely board with him and are not guests in the proper sense, has no such lien. On the other hand, his liability to his

156; *Chamberlain v. West*, 83 N. W. Rep. 114 (Minn.). See *Faucett v. Nichols*, 64 N. Y. 377; *Batterson v. Vogel*, 8 Mo. App. 24.

¹ *Cashill v. Wright*, 6 El. & Bl. 891; *Burgess v. Clements*, 1 Stark. 251; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Vance v. Throckmorton*, 5 Bush, 41; *Read v. Amidon*, 41 Vt. 15; *Kelsey v. Berry*, 43 Ill. 469; *Hadley v. Upshaw*, 27 Tex. 547. The innkeeper may establish reasonable rules, which the guest must observe. *Fuller v. Coats*, 18 Ohio, (N. S.) 343. And he is relieved from liability by non-compliance with such rules, if called to guest's attention. *Burbank v. Chapin*, 140 Mass. 123. But mere notice in the register is not sufficient as calling the attention of the guest to the rule. *Murchison v. Sergeant*, 69 Geo. 206.

It is negligence in a guest to carry a large sum of money in his valise, and, without notifying the innkeeper, allow it to be treated as mere luggage. *Fowler v. Dorlon*, 24 Barb.

384. See also, *Elcox v. Hill*, 98 U. S. 218. Mere failure to lock one's door is not lack of such ordinary care. *Murchison v. Sergeant*, 69 Geo. 206.

² *Richards v. London, &c.*, R. Co., 7 C. B. 839.

³ *Adams v. Clem*, 41 Geo. 65; S. C. 5 Am. Rep. 524; *Murray v. Clarke*, 2 Daly, 102. But see *Murray v. Marshall*, 9 Cal. 432. Not liable as innkeeper if left for guest's convenience. *Palin v. Reid*, 10 Ont. App. 63; *Miller v. Peebles*, 60 Miss. 819; *O'Brien v. Vaill*, 1 South. Rep. 137 (Fla.). As to liability for money left behind with clerk, see *Whitemore v. Haroldson*, 2 Lea, 312.

⁴ *Watson v. Cross*, 2 Duv. 147; *Ewart v. Stark*, 8 Rich. 423; *Pollock v. Landis*, 36 Iowa, 651. Even though they be goods with which another has entrusted him. *Snead v. Watkins*, 1 C. B. (N. S.) 267; *Manning v. Hollenbeck*, 27 Wis. 202. *Contra*, *Domestic, &c., Co. v. Watters*, 50 Geo. 573.

⁵ *Sunbolf v. Alvord*, 3 M. & W. 249.

boarders for such of their property as may be in his care is only that of any other bailee in a bailment for mutual benefit.

Common Carriers. Closely resembling the liability of an innkeeper is that of a common carrier. 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.¹ The definition includes railway corporations, express companies, stage coach proprietors, the proprietors of all ships, boats and vessels employed in carriage on regular routes, wagoners and carmen, who carry as a regular employment from town to town or from place to place within the same town, street railway companies and the proprietors of omnibus routes. It does not include vessel owners who employ their vessels for particular voyages as they may make contracts, nor draymen and others who take particular jobs or commissions, but who have no regular route, nor those who let horses and carriages for hire, nor tug-boatmen.²

[*639] *A carrier may profess to limit his employment to some one species of goods, or may exclude one or more things from his general offer to carry. His employment is then limited by his offer, and he cannot be required to go beyond it. But within the limits of his accustomed business he must receive

¹ *Gisbourn v. Hurst*, 1 Salk. 249; *Mershon v. Hobensack*, 22 N. J. 373; *U. S. Express Co. v. Backman*, 28 Ohio (N. S.) 144; *Parsons on Cont.* 163. No person is a common carrier who is not a carrier for hire. *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16; *Knox v. Rives*, 14 Ala. 249; *Fay v. Steamer New World*, 1 Cal. 348. Log driving companies are not. *Mann v. White River, &c., Co.*, 46 Mich. 38; *Chesley v. Mississippi, &c., Boom Co.*, 38 N. W. Rep. 769 (Minn.); Railroad carrying a mail is not liable as a carrier to one who sends a letter which is lost. *Centr. R. R., &c., Co. v. Lampley*, 76 Ala. 357. One who lets carriages for hire is bound to as much care to provide safe vehicles as is a stage propri-

etor or railway company. *Hyman v. Nye*, L. R. 6 Q. B. D. 685.

² But as to tug or tow-boatmen, see *White v. Tug Mary Ann*, 6 Cal. 462; *Smith v. Pierce*, 1 La. (O. S.) 354; *Davis v. Houren*, 6 Rob. La. 255; *Clapp v. Stanton*, 20 La. Ann. 495; *Bussey v. Mississippi, &c., Co.*, 24 La. Ann. 165. These Louisiana cases hold that tug-boatmen, such as ply between New Orleans and the Gulf of Mexico, are common carriers. The rule is otherwise in New York, Pennsylvania and Kentucky. *Caton v. Rumney*, 13 Wend. 387; *Wells v. Steam Nav. Co.*, 2 N. Y. 204; *Leonard v. Hendrickson*, 18 Penn. St. 40; *Brown v. Clegg*, 63 Penn. St. 51; *Hays v. Millar*, 77 Penn. St. 238; *Varble v. Bigley*, 14 Bush, 698. See *Alkali Co. v. Johnson*, L. R. 9 Exch. 338.

and carry for all who offer, without partiality or discrimination.³ He may, nevertheless, make special bargains for carrying for exceptional prices, or on exceptional terms;⁴ but he cannot restrict or change his common law liability by a mere notice posted at his place of business, or given to the party delivering goods for carriage, and to which the latter does not appear to have given assent.⁵ It is thus seen that a common carrier cannot decline a bailment which is tendered to him within the line of his employment, neither *can he enforce upon [*640] the party proposing to employ him any terms to which the latter refuses assent. The obligation which is imposed upon him by the common law is that he shall deliver at its destination

³ *Keeney v. Grand Trunk, &c., R. Co.*, 47 N. Y. 525; *Chicago, &c., R. R. Co. v. People*, 67 Ill. 11; *S. C. 16 Am. Rep. 599*; *McDuffee v. Railroad Co.*, 52 N. H. 430; *Mich. Cent. R. R. Co. v. Hale*, 6 Mich. 243. *Houston, &c., Ry Co. v. Smith*, 63 Tex. 322; *Scofield v. Lake Shore, &c., Co.*, 3 N. E. Rep. 907 (Ohio). A railroad company is under no common law duty to furnish equal facilities to all express companies for doing business over its line. *Express Cases*, 117 U. S. 1.

⁴ *New Jersey Steam Nav. Co. v. Merchant's Bank*, 6 How. 344; *Fitchburg R. R. Co. v. Gage*, 12 Gray, 393; *Mich. Cent. R. R. Co. v. Hale*, 6 Mich. 243; *Audenried v. Philadelphia, &c., R. R. Co.*, 68 Penn. St. 370; *Bankard v. Baltimore, &c., R. R. Co.*, 34 Md. 197; *N. E. Express Co. v. Maine Cent. R. R. Co.*, 57 Me. 188. In *Messenger v. Penn. R. R. Co.*, 37 N. J. 531, a contract by which a railroad company undertook to give to certain favored parties a large specified drawback in freights, beyond what from time to time ought to be allowed to others, was held void, as establishing a practical monopoly. See *Scofield v. Lake Shore, &c., Co.*, 3 N. E. Rep. 907 (Ohio.) See the American cases on the right of a carrier to re-

strict his liability by agreement, &c., collected in 13 *Moak's Eng. R.* 152, note. And see cases on p. *685.

⁵ *New Jersey Steam Nav. Co. v. Merchant's Bank*, 6 How. 344; *Hollister v. Nowlen*, 19 Wend. 234; *McMillan v. Michigan, &c., R. R. Co.*, 16 Mich. 79; *Brown v. Eastern R. Co.*, 11 Cush. 97; *Buckland v. Adams Express Co.*, 97 Mass. 124; *Baltimore, &c., R. R. Co. v. Brady*, 32 Md. 333; *Smith v. Nor. Car. R. R. Co.*, 64 N. C. 235; *Steele v. Townsend*, 37 Ala. 247; *Sou. Exp. Co. v. Caperton*, 44 Ala. 101; *Sou. Exp. Co. v. Armstead*, 50 Ala. 350; *Bennett v. Dutton*, 10 N. H. 481; *Jones v. Voorhees*, 10 Ohio, 145; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462; *Baldwin v. Collins*, 9 Rob. La. 468; *Railroad Co. v. Manuf. Co.* 16 Wall. 318. The contract for any exemption must be by clear and distinct terms, and there must be reason and justice to sustain it. *McCoy v. Erie, &c., Co.*, 43 Md. 498; *Sou. Exp. Co. v. Caperton*, 44 Ala. 101.

Carriers have a right to require that those entrusting property to them for carriage shall disclose its value. See *Crouch v. London R. Co.*, 14 C. B. 255; *Magnin v. Dinsmore*, 63 N. Y. 35; *Oppenheimer v. U. S. Exp. Co.*, 69 Ill. 62.

the property received by him, without damage while in his hands, unless prevented by the act of God, or of the public enemy.¹ And he must deliver, or be ready to deliver,

¹ *Coggs v. Bernard*, 2 Ld. Raym. 909; *Eagle v. White*, 6 Whart. 505; *Morrison v. Davis*, 20 Penn. St. 171; *Orange Co. Bank v. Brown*, 9 Wend. 85; *Hollister v. Nowlen*, 19 Wend. 234; *Fish v. Chapman*, 2 Kelly, 349; *Turney v. Wilson*, 7 Yerg. 340; *Boyle v. McLaughlin*, 4 H. & J. 291; *Friend v. Woods*, 6 Grat. 189; *Bohannon v. Hammond*, 43 Cal. 227; *Powell v. Mills*, 30 Miss. 231; *Swindler v. Hilliard*, 2 Rich. 286; *McMillan v. Michigan, &c., R. R. Co.*, 16 Mich. 79; *Fillebrown v. Grand Trunk, &c., Co.*, 55 Me. 462; *Railroad Co. v. Reeves*, 10 Wall. 176.

In *Gordon v. Buchanan*, 5 Yerg. 72, 82, the act of God, it is said, "means disasters with which the agency of man has nothing to do, such as lightning, tempests, and the like." In *Friend v. Woods*, 6 Grat. 189, 196, it is said that the act of God, which excuses the carrier must be "a direct and violent act of nature." The negligence of the carrier must not concur with it in producing the injury. *New Brunswick, &c., Co. v. Tiers*, 24 N. J. 697. WRIGHT, J., in *Michaels v. N. Y. Cent. R. R. Co.*, 30 N. Y. 564, 571, says: "What is precisely meant by the expression 'act of God,' as used in the case of carriers, has undergone discussion, but it is agreed that the notion of exception is those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of the injury or loss. If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God; nor

even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work to their injury, is he excused. In short, to excuse the carrier, the act of God, or *vis divina*, must be the sole and immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God." "The act of God," says Lord MANSFIELD, "is natural necessity, and wind and storms, which arise from natural causes, and distinct from inevitable accident." *Proprietors, &c., v. Wood*, 4 Doug. 287, 290. See, also, *Chicago, &c., R. R. Co. v. Sawyer*, 69 Ill. 285. A loss caused solely by an earthquake is by "act of God." *Slater v. So. Car. Ry. Co.*, 6 S. E. Rep. 936 (S. C.). Accidental fires, the explosion of steam boilers, &c., are therefore casualties against which a common carrier is insurer. *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Merchants' Despatch Co. v. Smith*, 76 Ill. 542; *Bulkley v. Naumkeag, &c., Co.*, 24 How. 386; *Cox v. Peterson*, 30 Ala. 603. See *Hayes v. Kennedy*, 41 Penn. St. 378, for discussion of the phrases act of God, inevitable accident, and unavoidable dangers. If the loss happens as the result of the act of God and lack of ordinary care, liability exists. *Rodgers v. Cent. Pac., &c., Co.*, 67 Cal. 607; *Packer v. Taylor*, 35 Ark. 402. See *Davis v. Wabash, &c., Co.*, 89 Mo. 340; *Hewitt v. Chicago, &c., Ry. Co.*, 63 Ia. 611; *McGraw v. Balt., &c., R. R. Co.*, 18 W. Va. 361. The negligence, however, must be a real producing cause. *Balt., &c., R. R. Co. v. Sulphar*

*within a reasonable time; but custom has much to do [*641] with the time, place and manner of delivery.¹

The common law liability of a common carrier does not apply in all respects to railroad companies as carriers of live stock. This mode of transportation is new; it imposes great 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 is expected to accompany them and have the entire charge, care and management, and to that extent he 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 train.²

Springs Dist. 2 A. & E. R. R. Cas., 171 (Penn.) and note. The fidelity of the servants of a common carrier is at the risk of the employers. Therefore, it is no answer to a suit for failure to deliver goods with reasonable promptness that a strike among their employees prevented. *Blackstock v. N. Y. & Erie R. R. Co.*, 1 Bosw. 77; S. C. 20 N. Y. 48; *Galena, &c., R. R. Co. v. Rae*, 18 Ill. 488. But if the employees are discharged, and afterwards interfere unlawfully with the business, and cause delays, the carrier is no more chargeable with this than he would be with the lawless conduct of any other mob. *Pittsburgh, &c., R. R. Co. v. Hazen*, 84 Ill. 86. So, if without being formally discharged. *Geismer v. Lake Shore, &c., Ry Co.*, 102 N. Y. 563; *Pittsburgh, &c., Ry. Co. v. Hollowell*, 65 Ind. 188; *Lake Shore, &c., Ry Co. v. Bennett*, 89 Ind. 457. No liability if the railroad is in the hands of the government for war purposes. *Phelps v. Ill. Centr. R. R. Co.*, 94 Ill. 548; nor if goods taken up within the Confederate lines were destroyed by Confederate soldiers. *Nashville, &c., R.*

Co. v. Estes, 10 Lea, 749. Carrier not liable if goods, while in transit, are taken by an officer under regular process. *Pingree v. Detroit, &c., R. R. Co.*, 33 N. W. Rep. 298 (Mich.); *Wells v. Maine S. S. Co.*, 4 Cliff. 228; *French v. Star Un., &c., Co.*, 134 Mass. 288.

¹ If, by the local custom, the consignee is to furnish the conveniences for unloading and delivery, and he does so, and an injury occurs through defects in them, the carrier is not responsible for this injury. *Loveland v. Burke*, 120 Mass. 139; S. C. 21 Am. Rep. 507, citing *St. John v. Van Santvoord*, 25 Wend. 660; *Gibson v. Culver*, 17 Wend. 305; *Farmers', &c., Bank v. Transportation Co.*, 18 Vt. 131, and 28 Vt. 176. See *Forbes v. Boston, &c., R. R. Co.*, 133 Mass. 154; *Stimson v. Jackson*, 58 N. H. 138; *Turner v. Huff*, 46 Ark. 222.

² *Michigan, &c., R. R. Co. v. McDonough*, 21 Mich. 165; *Clark v. Rochester, &c., R. R. Co.*, 14 N. Y. 570; *Penn v. Buffalo, &c., R. R. Co.*, 49 N. Y. 204; *Smith v. New Haven, &c., R. R. Co.*, 12 Allen, 531; *Squire v. N. Y. Cent. R. R. Co.*, 98 Mass.

The liability of the common carrier, as such, does not attach in respect to goods in his hands awaiting the orders of the owner for shipment.¹ The time when the liability ceases depends upon circumstances. If the carrier is to transport the goods for a 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 [*642] only.* *But if his route covers the whole distance, his liability as carrier only ceases when the goods are actual-

239. The carrier is not liable for injuries occasioned by the propensities of the animals but is for others. *Kenrick v. Chicago, &c., Co.*, 69 Ia. 665; *Lindsley v. Chicago, &c., Co.*, 86 Minn. 539; *Miss. Pac., Ry Co. v. Harris*, 67 Tex. 166. See *Bills v. New York, &c., Co.*, 84 N. Y. 5, and note 3 A. & E. R. R. Cas. 326; *Holsapple v. New York, &c., Co.*, 86 N. Y. 275; *Phila. &c., Ry Co. v. Lehman*, 56 Md. 209; *Farnham v. Camden, &c., R. R. Co.*, 55 Penn. St. 53; *Bryant v. Southw., &c., Co.*, 68 Geo. 805; *Lake Shore, &c., Co. v. Bennett*, 89 Ind. 457; *Ball v. Wabash, &c., Co.*, 83 Mo. 574; *Sprague v. Miss. &c., Co.*, 34 Kan. 347; *St. Louis, &c., Ry Co. v. Lesser*, 46 Ark. 236. The duty of delivering live stock is like that as to other freight. *North Penn. R. R. Co. v. Commercial Bank*, 123 U. S. 727; *Furman v. Union Pac. &c., Co.*, 106 N. Y. 579. Carrier need not furnish safest appliances, *Ill., &c., R. R. Co. v. Haynes*, 63 Miss. 485, but must use reasonable diligence to furnish suitable cars when asked. *Ayres v. Chicago, &c., Co.*, 37 N. W. Rep. 432 (Wis.). As to a menagerie carried on its owner's cars and run on time to suit the owners, the railroad is not a common carrier. *Coup v. Wabash, &c., Ry Co.*, 56 Mich. 111.

¹ *Michigan, &c., R. R. Co. v. Shurtz*, 7 Mich. 515; *St. Louis, &c., R. R. Co. v. Montgomery*, 39 Ill. 335; *Little Rock, &c., Ry Co. v. Hunter*, 42

Ark. 200. See further, *Iron Mt. Ry Co. v. Knight*, 122 U. S. 79; *Miss. Pac. Ry Co. v. Douglass*, 16 A. & E. R. R. Cas. 98 and note; *Montgomery, &c., Ry Co. v. Kolb*, 73 Ala. 396; *Ill. Centr. R. R. Co. v. Tronstine*, 64 Miss. 834; *Grand Tower, &c., Co. v. Ullman*, 89 Ill. 244.

* *Gray v. Jackson*, 51 N. H. 9; *Am. Ex. Co. v. Second National Bank*, 69 Penn. St. 394; *Pendergast v. Adams Ex. Co.*, 101 Mass. 120; *Baltimore, &c., R. R. Co. v. Schumacher*, 29 Md. 168; *Myrick v. Mich. Centr. R. R. Co.*, 107 U. S. 102; *Berg v. Atchison, &c., R. R. Co.*, 30 Kan. 561; *Knight v. Prov., &c., R. R. Co.*, 13 R. I. 572; *Detroit, &c., Ry Co. v. McKenzie*, 43 Mich. 609; *Hadd v. U. S. Exp. Co.*, 52 Vt. 335. Payment of through rate does not itself make a carrier liable beyond his own line. *Piedmont, &c., Co. v. Columbia, &c., Co.*, 19 S. C. 353. See *Ortt v. Minn., &c., Co.*, 86 Minn. 396. If the carrier contracts to carry beyond its own line, the connecting carriers are its agents and it is liable for their negligence; *Pereira v. Centr. Pac., &c., Co.*, 66 Cal. 92; and they are entitled to the protection of exceptions in its bill of lading. *Halliday v. St. Louis, &c., Ry Co.*, 74 Mo. 159; *Ala. G. S. Ry Co. v. Mt. Vernon Co.*, 4 South. Rep. 356 (Ala.); *St. Louis, &c., Ry Co. v. Weakly*, 8 S. W. Rep. 134 (Ark.). In Ala. the English rule is adopted and a carrier receiving goods

ly delivered, unless, by the custom of the business, the consignee 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.¹

Prima facie the consignee is the person entitled to demand and receive the goods 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 ;²

for transportation over and beyond its line is liable for their delivery at the end of the route unless it expressly limits its liability to its own line. *Mobile, &c., R. R. Co. v. Copeland*, 63 Ala. 219. If, at the end of the route of an intermediate carrier, goods are put in a warehouse, awaiting transportation by the succeeding carrier, the liability does not change to that of warehouseman until the carrier's liability has been imposed on the succeeding carrier and to that end there must be delivery to the latter or a tender equivalent thereto. *Condon v. Marquette, &c., R. R. Co.*, 55 Mich. 218.

¹*Morris, &c., R. R. Co. v. Ayres*, 29 N. J. 393; *Blumenthal v. Brainerd*, 88 Vt. 402; *Thomas v. Boston, &c., R. R. Co.*, 10 Met. 472; *Wood v. Crocker*, 18 Wis. 345; *Moses v. Boston, &c., R. R. Co.*, 32 N. H. 523; *McMillan v. Michigan, &c., R. R. Co.*, 16 Mich. 79; *Nat. Line, &c., Co. v. Smart*, 107 Penn. St. 492. In New York it is held that the carrier must deliver the goods or give notice of their arrival and allow a reasonable time for removal before he becomes a warehouseman. *Faulkner v. Hart*, 82 N. Y. 413. Even after such constructive delivery he is liable for ordinary care while the goods are in his hands. *Tarbell v. Royal, &c., Co.*, 17 N. E.

Rep. 721 (N. Y.). The cases are not entirely in accord as to whether mere receiving and storing without the allowance of a reasonable time is enough to make one a warehouseman. See *Gashweiler v. Wabash, &c., Co.*, 83 Mo. 112; *Merch. Desp., &c., Co. v. Merriam*, 111 Ind. 5; *Ind. Mills Co. v. Burlington, &c., Co.*, 34 N. W. Rep. 320 (Ia.); *Kennedy v. Mobile, &c., Co.*, 74 Ala. 430; *Louisville, &c., R. R. Co. v. McGuire*, 79 Ala. 395; *Wood's Brown on Carriers*, p. 297 et seq.; *Wilson v. South Pac. R. R. Co.*, 7 A. & E. R. R. Cas., 400 and note; *Burlington, &c., Co. v. Arms*, 16 A. & E. R. R. Cas., 272 and note; *Texas, &c., Co. v. Capps*, Id. 118, note. An express company, which receives a package on Saturday and holds it without delivering or notifying consignee residing near by is liable when it is burnt on Tuesday night. *Union Exp., &c., Co. v. Ohleman*, 92 Penn. St. 323. A carrier becomes a warehouseman as to baggage carried with a passenger when a reasonable time has elapsed for delivery after putting it in the baggage room at the end of the route. *Hoeger v. Chicago, &c., Ry Co.*, 63 Wis. 100. See *Jacobs v. Tutt*, 33 Fed. Rep. 412; *Penn. Co. v. Miller*, 35 Ohio St. 541.

²*Sou. Exp. Co. v. Caperton*, 44 Ala. 101. The carrier must deliver

or he may, as vendor to one who has become insolvent, be entitled to exercise his right of stoppage *in transitu*,¹ or some other right which the carrier cannot resist.

Carriers of Persons. Where the business of a carrier is to transport both persons and property, his obligation and his consequent liability in respect to the two are different. For the safe transportation of the property he is responsible as insurer, with the exceptions already stated; but in the case of passengers he only undertakes that he will carry them without negligence or fault. But as there are committed to his charge for the time the lives and safety of persons of all ages and of all degrees of ability for self-protection, and as the slightest failure in watchfulness may be destructive of life or limb, it is reasonable to require of him the most perfect care of prudent and cautious men, and his 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. He is not liable if injuries happen from sheer accident or misfortune, where there is no negligence or

according to the bill of lading. Penn. R. Co. v. Stern, 12 Atl. Rep. 756 (Penn.); North v. Merch., &c., Co., 15 N. E. Rep. 779 (Mass.). Although the bill says notify A, when B is the consignee. North Penn. R. R. Co. v. Commercial Bank, 123 U. S. 727. A delivery to another than the consignee, unless the consignor has the right to stop in transit, will not be excused by the consignor's direction. Phila., &c., Co. v. Wireman, 88 Penn. St. 264. The carrier delivers to the wrong person at his peril after failure to find the consignee upon investigation. Wernwag v. Phila., &c., Co., 11 Atl. Rep. 868 (Penn.). Failure to deliver upon demand to consignee makes *prima facie* case of negligence. Canfield v. Balt., &c., Co., 93 N. Y. 532. Delivery to person named by consignee sufficient against the consignor. Dobbin v. Mich. Cent. R. R. Co., 56 Mich. 523. See further on delivery to the wrong person. Gib-

bons v. Farwell, 29 N. W. Rep. 855 (Mich.); Jellett v. St. Paul, &c., Ry. Co., 30 Minn. 265; McCulloch v. McDonald, 91 Ind. 240; Guillaume v. Gen. Trans. Co., 100 N. Y. 491. If without negligence the carrier delivers the goods to the actual consignee it is not liable to the consignor, though he supposes he is shipping to another person of the name. The Drew, 15 Fed. Rep. 826; Wilson v. Adams, Exp. Co., 27 Mo. App. 360.

¹Bohtlingk v. Inglis, 3 East, 351; Newsom v. Thornton, 6 East, 17; Vertue v. Jewell, 4 Camp. 31; James v. Griffin, 1 M. & W. 20; Buckley v. Furniss, 15 Wend. 137, and 17 Wend. 504; Mottram v. Heyer, 5 Denio, 629; Naylor v. Dennie, 8 Pick. 198; Atkins v. Colby, 20 N. H. 154; Reynolds v. Railroad, 43 N. H. 580; Pool v. Columbia, &c., R. R. Co., 23 S. C. 286; Dougherty v. Miss. &c., R. Co., 8 S. W. Rep. 900 (Mo.)

fault, and where no want of caution, foresight or judgment would *prevent the injury. But he is liable for the [*643] smallest negligence in himself or his servants.¹ And this liability is applied with great strictness, as well as great justice, when he undertakes to transport passengers by the powerful and dangerous agency of steam.² On the other hand, the luggage, which it is customary for carriers to permit their passengers to take with them, without charge beyond what is paid for their own conveyance, is taken under the like obligation which attends the carriage of ordinary freight.³

¹ *Derwort v. Loomer*, 21 Conn. 246, per ELLSWORTH, J.; *Christie v. Griggs*, 2 Camp. 79; *Farish v. Reigle*, 11 Grat. 697; *Frink v. Potter*, 17 Ill. 406; *Simmons v. New Bedford, &c., Steamboat Co.*, 97 Mass. 361; *Knight v. Portland, &c., R. R. Co.*, 56 Me. 234; *Maverick v. Eighth Ave. R. R. Co.*, 36 N. Y. 378; *Johnson v. Winona, &c., R. R. Co.*, 11 Minn. 296; *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304; *Sherlock v. Alling*, 44 Ind. 184; *Gallagher v. Bowie*, 66 Tex. 265; *Citizens' St. Ry Co. v. Twiname*, 111 Ind. 587; *White v. Fitchburg R. R. Co.*, 136 Mass. 321. Not an insurer against the act of God. *Gillespie v. St. Louis, &c., Ry Co.*, 6 Mo. App. 554; *International, &c., R. R. Co. v. Halloren*, 53 Tex. 46.

² *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 282; *Meier v. Pennsylvania R. R. Co.*, 64 Penn. St. 225; *Baltimore & Ohio R. R. Co., v. Miller*, 29 Md. 252. If passengers are carried on a freight train, the highest care must be used consistent with the usual operations of such trains. *Woolery v. Louisville, &c., Co.*, 107 Ind. 381; *McGee v. Miss., &c., Co.*, 92 Mo. 208; but to stand in the aisle or sit on the arm of a seat while switching is being done is contributory negligence. *Harris v. Hannibal, &c., Co.*, 89 Mo. 233; *Smith v. Richmond, &c., Co.*, 5 S. E. Rep. 896 (N. C.)

³ *Hannibal R. R. Co. v. Swift*, 12 Wall. 262; *Merrill v. Grinnell*, 80 N. Y. 594. Luggage or baggage includes such articles of necessity and convenience as passengers usually carry for their personal use, comfort, instruction, amusement or protection, having regard to the length and object of their journeys, including such an amount of money as it would be reasonable to take for expenses and contingencies. *Parmelee v. Fischer*, 22 Ill. 212; *Dibble v. Brown*, 12 Geo. 217; *Doyle v. Kiser*, 6 Ind. 243; *Jordan v. Fall River R. R. Co.*, 5 Cush. 69; *Bomar v. Maxwell*, 9 Humph. 621; *Giles v. Fauntleroy*, 13 Md. 127; *Noble v. Milliken*, 74 Me. 225; 77 Me. 359; *Ill. Centr., &c., R. R. Co. v. Handy*, 63 Miss. 609. See *Hopkins v. Westcott*, 6 Blatch. 64; *Hutchings v. Western, &c., R. R. Co.*, 25 Geo. 63; *Woods v. Devin*, 13 Ill. 746; *Torpey v. Williams*, 3 Daly, 162; *Dexter v. Syracuse, &c., R. R. Co.*, 43 N. Y. 326; *Johnson v. Stone*, 11 Humph. 419; *Hillis v. Chicago, &c., Co.*, 33 N. W. Rep. 643 (Ia.). What is reasonable in a given case is for the jury. *Railroad Co. v. Fraloff*, 100 U. S. 24. A railroad company is not obliged to carry large amount of money, not for the use of the traveler where express facilities are furnished. *Pfister v. Centr. Pac., &c., Co.*, 70 Cal. 169. Sleeping car companies are liable

The responsibility of the carrier begins when the passenger [*644] presents himself for transportation; and this he may be said to do when he approaches the place of reception for the purpose. 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.¹ The carrier of persons, like the carrier

only for want of reasonable care if baggage or valuables are stolen. *Woodruff, &c., Co., v. Diehl*, 84 Ind. 474; *Pullman, &c., Co. v. Gardner*, 16 A. & E. R. R. Cas., 324 (Penn.); *Pullman, &c., Co. v. Pollock*, 5 S. W. Rep. 814 (Tex.) *Scaling v. Pullman, &c., Co.*, 24 Mo. App. 29; *Lewis v. New York, &c., Co.*, 143 Mass. 267. But if stolen by its servants it is liable irrespective of traveler's negligence. *Root v. New York, &c.*, 28 Mo. App. 199. A railroad company is liable for the loss of a valise entrusted to the porter of a sleeping car owned by another company. *Louisville, &c., Co. v. Katzenberger*, 16 Lea, 380. But not for money left in a sleeper by a passenger if the porter is not negligent. *Ill. Centr. R. R. Co. v. Handy*, 63 Miss. 609.

A notice by a carrier that baggage must be at the risk of the owner is of no force, unless assented to. *Hollister v. Nowlen*, 19 Wend. 234; *Jones v. Voorhees*, 10 Ohio, 146; *Gott v. Dinsmore*, 111 Mass. 45; *Bennett v. Dutton*, 10 N. H. 481. But a rule that carriers will not be responsible for baggage beyond a certain amount, unless the value is reported to them and carriage paid for, is reasonable, and obligatory when brought home to the knowledge of the passenger. *Brown v. Eastern R. R.*, 11 Cush. 97; *Brehme v. Dinsmore*, 25 Md. 328. Compare *Coward v. East Tenn., &c., Co.*, 16 Lea, 225. Express companies may limit their liability in the same

way. *Green v. Southern Express Co.*, 45 Geo. 305; *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62; *Newstadt v. Adams*, 5 Duer. 43. See *Nicholson v. Willan*, 5 East, 507; *Baldwin v. Collins*, 9 Rob. La. 469. But the owner need not disclose the value unless required to do so. *Phillips v. Earle*, 8 Pick. 182; *Parmeles v. Lowitz*, 74 Ill. 116; *Railroad Co. v. Fraloff*, 100 U. S. 24. Articles carried for sale are not properly baggage. *Blumantle v. Fitchburg, &c., R. R. Co.*, 127 Mass. 322; *Alling v. Boston, &c., Co.*, 126 Mass. 121; *Spooner v. Hannibal, &c., Co.*, 23 Mo. App. 403; *Norfolk, &c., Co. v. Irvine*, 5 S. E. Rep. 532 (Va.). Unless their nature being known, it is agreed to carry them. *Jacobs v. Tutt*, 33 Fed. Rep. 12; *Hoeger v. Chicago, &c., Ry. Co.*, 63 Wis. 100. As to when a carrier becomes a warehouseman as to baggage, see cases p. 767 at end note 1.

For such baggage as a passenger keeps in his own possession a carrier is not liable as insurer, but only for negligence. *Steamship Co. v. Bryan*, 83 Penn. St. 446; *Whitney v. Pullman, &c., Co.*, 143 Mass. 243; *Kinsley v. Lake Shore, &c., Co.*, 125 Mass. 54; *Henderson v. Louisville, &c., Co.*, 123 U. S. 61.

¹ *Smith v. London, &c., R. R. Co.*, L. R. 3 C. P. 326; *Poucher v. N. Y. Central R. R. Co.*, 49 N. Y. 263; *Tobin v. Portland, &c., R. R. Co.*, 59 Me. 183; *Chicago, &c., R. R. Co. v. Wilson*, 63 Ill. 167; *McDonald v. Chi-*

of goods, is under obligation to carry impartially; and, therefore, he cannot refuse to receive one who offers, unless he has valid excuse therefor.¹ It will be a sufficient excuse that the person refuses to pay his fare in advance, when demanded, or to procure a ticket evidencing his right to a passage, or that he is grossly intoxicated, or for other reason unfit to be received as a passenger with others.² But the color of a person is no justification for refusing to carry him as others are carried.³ The carrier

cago, &c., R. R. Co., 26 Iowa, 124; Mich. Cent. R. R. Co. v. Coleman, 28 Mich. 440; Bueneman v. St. Paul, &c., Ry Co., 32 Minn. 390; Snow v. Fitchburg R. R. Co., 186 Mass. 552; Reynolds v. Texas, &c., Ry Co., 37 La. Ann. 694; Ala., &c., R. R. Co. v. Arnold, 80 Ala., 600; see Cross v. Lake Shore, &c., Co., 37 N. W. Rep. 361 (Mich.) Not bound to so high a degree of care about approaches as about the running of trains. Moreland v. Boston, &c., R. R. Corp., 141 Mass. 31. Carrier liable where platform used is owned by another company. Wabash, &c., Ry Co. v. Wolff, 13 Ill. App. 437. The obligation of care extends to those who come to welcome friends or to aid them in leaving. Gillis v. Penn. R. R. Co., 59 Penn. St. 129; Doss v. Missouri, &c., R. R. Co., 59 Mo. 27; S. C. 21 Am. Rep. 371, a valuable case; McKone v. Mich. Centr. R. R. Co., 51 Mich. 601; Hamilton v. Texas, &c., Ry Co., 64 Tex. 251. Not liable for the intrusion of indecent persons into a station where not reasonably to be anticipated. Batton v. South. &c., R. R. Co., 77 Ala. 491.

¹ Nevins v. Pullman, &c., Co., 106 Ill. 222; Atwater v. Delaware, &c., Co., 48 N. J. L. 65; Lake Erie, &c., Ry Co. v. Acres, 103 Ind. 548, and cases cited.

² See Jencks v. Coleman, 2 Sumn. 221; Bennett v. Dutton, 10 N. H. 481; Elmore v. Sands, 54 N. Y. 512; Pittsburgh, &c., R. R. Co. v. Vandyne, 57 Ind. 576.

³ See ante, p. 335. One is to be deemed a passenger on a steamboat who enters for the purpose of being carried, though he has not yet paid his fare. Cleveland v. Steamboat Co., 68 N. Y. 306; see Muehlhausen v. St. Louis, &c., Co., 91 Mo. 332. Presumptively one on a train is a passenger though not in a passenger car. Creed v. Penn. R. R. Co., 86 Penn. St. 139. Carrier having permitted one to travel is liable though contract of carriage is not directly with it. Foulkes v. Metr., &c., Ry Co., L. R. 5 C. P. D. 157. One traveling on a non-transferable ticket by fraudulently personating the owner is not entitled to the care due a passenger. Toledo, &c., Ry Co. v. Beggs, 85 Ill. 80; Way v. Chicago, &c., Ry. Co., 64 Ia. 48; see Chicago, &c., R. R. Co. v. Michie, 83 Ill. 427; Virginia, &c., Co. v. Roach, 5 S. E. Rep. 175 (Va.). There is no doubt, however, of the right to require passengers to purchase and exhibit a ticket before going on board boat or cars. Pittsburgh, &c., R. R. Co. v. Vandyne, 57 Ind. 576. The conductor has a right to put one off the cars when the point indicated by his ticket is reached, and if the passenger claims that he purchased a ticket for a more distant point and received the wrong ticket by mistake, he should pay the additional fare, and have the mistake corrected afterwards. Frederick v. Marquette, &c., R. R. Co., 37 Mich. 342. See further as to conclusiveness of

is also under obligations to use the utmost care and diligence in providing safe, suitable and sufficient vehicles for the [*645] conveyance of his passengers,¹ to *carry the passenger therein to the end of his route,² to protect him against assaults and other ill-treatment by those employed by or under the carrier's control while on the way;³ "to exercise the utmost

ticket on passenger's right to travel. *Mosher v. St. Louis, &c., Ry Co.*, 8 S. C. Rep. 1324; *Hufford v. Grand Rapids, &c., Ry Co.*, 53 Mich. 118; 31 N. W. Rep. 544; *Phila., &c., Co. v. Rice*, 64 Md. 63; *Yorton v. Milwaukee, &c., Co.*, 54 Wis. 234; *Bradshaw v. South Boston, &c., Co.*, 135 Mass. 407. One has no right on a train which does not stop at the station to which he has a ticket. *Chicago, &c., Ry Co. v. Bills*, 104 Ind. 13; *Lake Shore, &c., Ry Co. v. Pierce*, 47 Mich. 277; see *Duling v. Phila., &c., Co.*, 66 Md. 120. Compare *Richmond, &c., Co. v. Ashby*, 79 Va., 130; *Alabama, &c., Co. v. Heddleston*, 82 Ala. 218.

¹ *Readhead v. Midland R. Co.*, L. R. 2 Q. B. 412; S. C. 4 L. R. Q. B. 379; *Ingalls v. Bills*, 9 Met. 1; *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304; *Caldwell v. New Jersey, &c., Co.*, 47 N. Y. 282; *Grand Rapids, &c., R. R. Co. v. Huntley*, 38 Mich. 537; *Baltimore, &c., R. R. Co. v. Miller*, 29 Md. 252; *Va. Cent. R. R. Co. v. Sanger*, 15 Grat. 230; *Kelly v. New York, &c., Ry Co.*, 15 N. E. Rep. 879 (N. Y.). A railroad company must also see that its track is reasonably safe for use. *Curtis v. Rochester, &c., R. R. Co.*, 18 N. Y. 534; *Baltimore, &c., R. R. Co. v. Worthington*, 21 Md. 275; *State v. O'Brien*, 33 N. J. 169. Liable if car negligently left across an intersecting track is struck by car of another company on that track although the collision was not likely to have occurred. *Kellogg v. Centr. Ry Co.*, 68 Ia. 470. Liable for in-

jury from fall of a berth in a sleeping car of another corporation carried in its train. *Penn. Co. v. Roy*, 102 U. S. 451. So for the negligence of such corporation's servant in the absence of notice that it will not be bound. *Railroad Co. v. Walrath*, 38 Ohio St. 461.

² *Porter v. Steamboat New England*, 17 Mo. 290; *Gilhooly v. New York, &c., Co.*, 1 Daly, 197; *Hamilton v. Third Av. R. Co.*, 53 N. Y. 25. As to liability for putting a passenger off wrongfully, see *Cincinnati, &c., R. R. Co. v. Cole*, 29 Ohio, (π. a.) 126; *Lake Shore, &c., Ry Co. v. Rosenzweig*, 113 Penn. St. 519. One ejected for non payment of fare cannot, by offering fare while he is being put off, or afterward, or by resisting, acquire any rights against the carrier. *Pease v. Del., &c., R. R. Co.*, 101 N. Y. 367; *Railroad Co. v. Skillman*, 39 Ohio St. 444; *Penn., &c., Co. v. Connell*, 113 Ill. 295; *Atchison, &c., Co. v. Gants*, 17 Pac. Rep. 54. (Kan.) But see *South Car., &c., Co. v. Nix*, 68 Geo. 572; *Texas, &c., Ry Co. v. Bond*, 63 Tex. 442; *Clark v. Wilmington, &c., Co.*, 91 N. C. 506.

³ *Baltimore, &c., R. R. Co. v. Blocher*, 27 Md. 277; *St. Louis, &c., R. R. Co. v. Dalby*, 19 Ill. 353; *Hanson v. European, &c., R. R. Co.*, 62 Me. 84; *Goddard v. Grand Trunk, &c., R. R. Co.*, 57 Me. 202; *Sherley v. Billings*, 8 Bush, 147; *Bass v. Chicago, &c., R. Co.*, 36 Wis. 450; *Craker v. Chicago, &c., R. Co.*, 36 Wis. 657; *Ramsden v. Boston, &c., R. R. Co.*, 104 Mass. 117; *Bryant v. Rich*, 106 Mass. 180; *Atlas*

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," and when the journey is completed, to afford the passenger reasonable opportunity to leave the cars with safety.* It is scarcely necessary to add that a failure in the performance of any of these duties, whereby damage results, will render the carrier liable to the appropriate action.

tic, &c., R. R. Co. v. Dunn, 19 Ohio, (N. a.) 163; Louisville, &c., R. R. Co. v. Kelly, 92 Ind. 371. See Louisville &c., R. R. Co. v. Ballard, 3 S. W. Rep. 530 (Ky.). Liable for excessive force of servant in removing passenger from a part of a boat where he has no right to be. Steamboat Co. v. Brockett, 121 U. S. 637. For assault by sleeping car porter upon passenger who is not riding in sleeper. Williams v. Pullman, &c., Co., 4 South Rep. 85 (La.). For failure to wake a passenger at his station as agreed by the conductor, the railroad company is not liable. Nunn v. Georgia, &c., Co., 71 Geo. 760; Sevier v. Vicksburg, &c., Co., 61 Miss. 8. As a railroad company is bound to furnish a passenger with a seat, if it does not and he refuses to pay fare, he is not so far a trespasser that he may be put off at a distance from a station. Hardenbergh v. St. Paul, &c., Ry Co., 38 N. W. Rep. 625 (Minn.).

*SHIPMAN, D. J., in Flint v. Norwich, &c., Co., 34 Conn. 554; Pittsburgh, &c., R. R. Co. v. Pillow, 76 Penn. St. 510; Britton v. Atlanta, &c., Ry Co., 88 N. C. 583. The carrier is not liable for the death of a passenger pushed from a flat car by drunken passengers, having no reason to anticipate such conduct. Felton v. Chicago, &c., Co., 69 Ia. 577. Nor for the acts of a mob which could not

have been anticipated. Pittsburgh, &c., R. R. Co. v. Hinds, 53 Penn. St. 512. It is for failure to use the utmost care in affording protection. Chicago, &c., Co. v. Pillsbury, 14 N. E. Rep. 22 (Ill.). In New York a carrier has been held responsible for the moneys of which a gambler was permitted to defraud a minor while in his charge. Smith v. Wilson, 31 How. P. R. 272.

²Burrows v. Erie, &c., R. Co., 63 N. Y. 556; Southern, &c., R. R. Co. v. Kendrick, 40 Miss. 374; Hickman v. Miss., &c., Ry Co., 91 Mo. 433; Strauss v. Kansas City, &c., Ry Co., 86 Mo. 421; Keller v. Sioux City, &c., Co., 27 Minn. 178; Raben v. Centr. Ia. Ry Co., 35 N. W. Rep. 645 (Ia.); Wood v. Lake Shore, &c., Co., 49 Mich. 370; Centr. R. R. Co. v. Van Horn, 38 N. J. L. 133; Taber v. Del. &c., R. R. Co., 71 N. Y. 489. See Lafflin v. Buffalo, &c., Co., 106 N. Y. 136; Secor v. Toledo, &c., R. R. Co., 10 Fed. Rep. 15; Hemmingway v. Chicago, &c., Co., 67 Wis. 668. If, however, the passenger gets out and moves about at intermediate stations, he gives up, for the time, his character of passenger. State v. Grand Trunk R. Co., 53 Me. 176. A passenger has a right to safe egress from a depot. Archer v. New York, &c., R. R. Co., 106 N. Y. 589; Keefe v. Boston, &c., R. R. Co., 142 Masa. 251.

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. These supplement the rules of law which require a passenger to conduct himself with decency, and not render himself an offense or an annoyance to others; for a failure to observe which, he may and should be removed from the vehicle.¹ A com- [*646] mon rule, *and not an unreasonable one, is that the passenger shall procure a ticket as evidence of his right to a passage; that he shall show this whenever called upon by the carrier to do so, and that this ticket shall be used only for one continuous journey, unless permission be asked for and obtained to take a part of the journey at one time and part at another.¹

¹ *Vinton v. Middlesex, &c., R. R. Co.*, 11 Allen, 304; *Putnam v. Broadway, &c., R. R. Co.*, 55 N. Y. 108; *Marquette v. Chicago, &c., R. R. Co.*, 33 Iowa, 563; *Hanson v. European &c., R. Co.*, 62 Me. 84; *Keeley v. Maine Cent. R. R. Co.*, 67 Me. 163; *Atchison, &c., Co. v. Weber*, 33 Kan. 543.

¹ *Cheney v. Boston, &c., R. R. Co.*, 11 Met. 121; *Boston, &c., R. R. Co., v. Proctor*, 1 Allen, 267; *Elmore v. Sands*, 54 N. Y. 512; *Shedd v. Troy, &c., R. R. Co.*, 40 Vt. 88; *Jerome v. Smith*, 48 Vt. 230; *S. C. 21 Am. Rep.* 125; *Dietrick v. Penn. R. R. Co.*, 71 Penn. St. 432; *Brooke v. Grand Trunk R. Co.*, 15 Mich. 332; *Frederick v. Marquette, &c., R. R. Co.*, 37 Mich. 842; *State v. Overton*, 24 N. J. 435. See *Pier v. Finch*, 24 Barb. 514. If ticket is required, office need not be open so long that one buying must get on train after it has started. *State v. Hungerford*, 38 N. W. Rep. 628 (Minn.). If the agents of the railway company inform a passenger he can purchase a ticket for a continuous journey and stop over with it, the company is bound by this. *Burnham v. Grand Trunk R. Co.*, 63 Me. 298. Stop-over checks may be required. *Yorton v.*

Milwaukee, &c., Co., 54 Wis. 234; *Wyman v. North. Pac. R. R. Co.*, 34 Minn. 210; *Hatten v. Railroad Co.*, 39 Ohio St. 375; *Petrie v. Penn., &c., Co.*, 42 N. J. L. 449. While on a limited ticket a continuous trip may be required. *Johnson v. Phila., &c., Co.*, 63 Md. 106, (but see *Little Rock, &c., Co. v. Dean*, 43 Ark. 529). Yet the journey need not be completed within the time. *Auerbach v. New York Centr., &c., Co.*, 89 N. Y. 281; *Evans v. St. Louis, &c., Co.*, 11 Mo. App. 463; *Lundy v. Centr. Pac., &c., Co.*, 66 Cal. 191. See *Georgia, &c., R. R. Co. v. Bigelow*, 68 Geo. 219. As to rules about stopping at a given station. See *Logan v. Hannibal, &c., Co.*, 77 Mo. 663; *Wilson v. New Orleans, &c., Co.*, 63 Miss. 352.

If a railroad sells a through ticket over its own and connecting roads it is liable for safe carriage to the end of the route of the passenger. *Little v. Dusenberry*, 46 N. J. L. 614; *Centr. &c., R. R. Co. v. Combs*, 70 Geo. 533. and his baggage, in the absence of agreement to the contrary. *Baltimore, &c., R. R. Co. v. Campbell*, 36 Ohio St. 647; *Louisville, &c., Co. v. Weaver*, 9 Lea, 33. See *Atchison, &c., Co. v. Roach*, 12 Pac. Rep. 93 (Kan.). But

These are only instances of reasonable rules: many others might be named. But while a passenger may be removed from the cars for non-compliance with any reasonable rule, the carrier must see that this is not done with unnecessary force or injury. The same rule applies here as in the case of force to remove a wrong-doer from one's premises: no more must be employed than the necessity of the case demands.

Telegraph Companies. Companies for the transmission of messages by telegraph hold relations to the public and to those doing business with them much resembling those of railway companies. Their lines are constructed under legislative authority, and are either set up in the public highways, or on private lands where they appropriate an easement for the purpose under the eminent domain. The legislation which permits this 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. They, therefore, to some extent, in their functions and in their responsibilities, resemble common carriers, and are sometimes so designated.¹ But the resemblance does not go very far; they receive nothing to carry, and the risks of theft, robbery, fire and flood which render the undertaking of the common carrier so onerous, they are not exposed to. In reason as well as on authority, they are responsible in sending, receiving and delivering messages, on the grounds only that through their negligence errors or *unnecessary de- [*647] lays 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

in Illinois the selling company is held not liable over the whole route in the absence of a contract to that effect. *Penn. R. R. Co. v. Connell*, 112 Ill. 295.

¹ Telephone companies stand in this respect upon the same footing with telegraph companies. *Central Un. Tel. Co. v. Bradbury*, 106 Ind. 1; *Chesapeake, &c., Co. v. Balt., &c.,*

Co., 66 Md. 399. See *State v. Tel. Co.*, 86 Ohio St. 296; *State v. Nebraska Tel. Co.*, 22 N. W. Rep. 237 (Neb.).

² *Western U. Tel. Co. v. Carew*, 15 Mich. 525; *Aiken v. Telegraph Co.*, 5 Sou. Car. 358; *Parks v. Telegraph Co.*, 13 Cal. 422; *Grinnell v. Western U. Tel. Co.*, 113 Mass. 299; *S. C. 18 Am. Rep.* 485; *Washington &c., Tel. Co. v. Hobson*, 15 Grat. 122. Liable

they are not insurers, and if errors occur without their fault, they are not responsible.¹ And like common carriers they are permitted to make rules for the regulation of their business; and these when brought home to those dealing with them, and assented to expressly or by implication, will be binding as contracts, provided they appear to be reasonable. A rule, for example, that any claim against the company for damages arising from delays or errors shall be presented within sixty days, has been sustained in Pennsylvania as a reasonable regulation of the business.² So a rule is valid that the company sending the message will not be responsible for errors occurring on connecting lines.³ And if rules which are reasonable in themselves are printed con-

for mistake unless excused by atmospheric cause. *Western U. Tel. Co. v. Cohen*, 73 Ga. 522. Burden of disproving negligence in delaying a message is on the company. *Western U. Tel. Co. v. Scircle*, 103 Ind. 227. The receiver of the dispatch may recover damage for the negligence. *Hadley v. Western U. Tel. Co.*, 15 N. E. Rep., 845 (Ind.); *Wadsworth v. West. U. Tel. Co.*, 8 S. W. 574 (Tenn.); *Loper v. Same*, Id. 600; (Tex.) At least where he has repaid the sender the cost of sending. *West v. Western U. Tel. Co.*, 17 Pac. Rep. 807 (Kan.). As to damages recoverable, see *Western U. Tel. Co. v. Hall*, 8 S. C. Rep. 577; *Western U. Tel., &c., Co. v. Fatman* 73 Geo. 285; *Ayer v. Western U. Tel. Co.*, 10 Atl. Rep. 495 (Me.); *Western U. Tel. Co. v. Landis*, 13 Atl. Rep. 467 (Penn.); *Western U. Tel. Co. v. Hyer*, 1 South Rep. 129 (Fla.); *West v. Western U. Tel. Co.*, 17 Pac. Rep. 807 (Kan.); *Cannons v. West. U. Tel. Co.*, 6 S. E. Rep. 731 (N. C.); *Pegram v. Same*, Id. 171 (N. C.).

¹ *Sweetland v. Illinois, &c., Tel. Co.*, 27 Iowa, 433; S. C. 1 Am. Rep. 285; *Breese v. U. S. Telegraph Co.* 48 N. Y. 132; S. C. 8 Am. Rep. 526. Not liable for payment to an impositor of a money order sent in response

to his request when there is no negligence on part of agent. *Western U. Tel. Co. v. Meyer*, 61 Ala. 158.

² *Wolf v. West. U. Tel. Co.*, 63 Penn. St. 83, and in Texas, *West. U. Tel. Co. v. Edsall*, 63 Tex. 663. See *West. U. Tel. Co. v. Scircle*, 103 Ind. 227; *West. U. Tel. Co. v. Jones*, 95 Ind. 228. Such stipulation does not apply to action for statutory penalty. *West. U. Tel. Co. v. Cobbs*, 1 S. W. Rep. 558 (Ark.). Stipulation for claim within thirty days is unreasonable where sender sues. *Johnston v. West. U. Tel. Co.*, 33 Fed. Rep. 362, citing many cases. So may make a rule as to deposit when an answer is asked. *West. U. Tel. Co. v. McGuire*, 104 Ind. 130; *Hewlett v. West. U. Tel. Co.*, 28 Fed. Rep. 181. So reasonable rules as to keeping offices open. *West. U. Tel. Co. v. Harding*, 103 Ind. 505. See *Given v. West. U. Tel. Co.*, 24 Fed. Rep. 119.

³ *West. U. Tel. Co. v. Carew*, 15 Mich. 525. See, further, *Redpath v. West. U. Tel. Co.*, 112 Mass. 71; *U. S. Telegraph Co. v. Gildersleeve*, 29 Md. 232. As to the liability independent of such regulation, see *Leonard v. N. Y., &c., Tel. Co.*, 41 N. Y. 544; S. C. 1 Am. Rep. 446; *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 744; S. C. 6 Am. Rep. 165.

spicuously on the blanks of the company, they will be deemed assented to by those who make use of the blanks.¹

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. In all those employments where peculiar skill is requisite, if one offers his services, he is understood, as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment, and if his *pretensions are unfounded, he commits a species [*648] of fraud upon every man who employs him in reliance on his public profession. But no man, whether skilled or unskilled, undertakes that the task he assumes shall be performed successfully, and without fault or error; he undertakes for good faith and integrity, but not for infallibility, and he is liable to his employer for negligence, bad faith or dishonesty, but not for losses consequent upon mere errors of judgment.²

Professional Services. It is the misfortune of members of the learned professions that, in a very considerable proportion of all the cases in which their services are employed, their efforts must necessarily fall short of accomplishing the purpose desired, so that if they do not disappoint expectations, they must at least fail to fulfill hopes. For this reason they are peculiarly liable to the charge of failure in the performance of professional duty, and it is therefore important to know exactly what it is that the professional man promises when he engages his services. As the promise is not different in the case of the physician and surgeon from what it is in the case of the attorney, solicitor and proctor, one general rule may be given which will apply to all.

The English authorities are, perhaps, somewhat more indulgent

¹ *Young v. West. U. Tel. Co.*, 65 N. Y. 103; *Passmore v. West. U. Tel. Co.*, 78 Penn. St. 238; *West. U. Tel. Co. v. Buchanan*, 35 Ind. 430; *Clement v. Western U. Tel. Co.*, 137 Mass. 463; *Cole v. Same*, 33 Minn. 227; *Heiman v. Same*, 57 Wis. 562; *Schwartz v. Atlantic, &c., Co.* 18 Hun. 157. Even if blank is torn, if

sender accustomed to use them. *Keiley v. West. U. Tel. Co.*, 16 N. E. Rep. 75 (N. Y.).

² *Page v. Wells*, 37 Mich. 415. Wherever an employment requires skill, a failure to exercise it is actionable negligence. *The New World v. King*, 16 How. 469.

to the faults and mistakes of professional men than are those of this country. Thus Lord CAMPBELL, with the full concurrence of his associates in the House of Lords, declared that in order to maintain an action against one's legal adviser, it was necessary, "most undoubtedly, that the professional adviser should be guilty of some misconduct, some fraudulent proceeding, or should be chargeable with gross negligence or with gross ignorance. It is only upon one or the other of these grounds that the client can maintain an action against the professional adviser."¹

[*649] *On the other hand, the rule is laid down in Pennsylvania that the professional man must bring to the practice of his profession a degree of skill and diligence such as those "thoroughly educated in his profession ordinarily employ."² This is a severe rule, and fixes a standard of professional skill and attainments which, in the newer portions of the country, would be quite out of the question. In New Hampshire the undertaking of the practitioner has been stated in the following language: "By our law a person who offers his services to the community generally, or to any individual, for employment in any professional capacity as a person of skill, contracts with his employer: 1. That he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community and those conversant with that employment as necessary and sufficient to qualify him to engage in such business." "2. That he will use reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge to accomplish the purpose for which he is employed. He does not undertake for extraordinary care or extraordinary diligence any more than he does for

¹ Purves v. Landell, 12 C. & F. 91, 102. See, also, Shiells v. Blackburne, 1 H. Bl. 158; Blaikie v. Chandless, 3 Camp. 17; Godefroy v. Dalton, 6 Bing. 461; Hart v. Frame, 6 C.&F. 193; Pip-pin v. Sheppard, 11 Price, 400; Slater v. Baker, 2 Wils. 359; Rich v. Pierpont, 3 F. & F. 85; Seare v. Prentice, 3 East, 349; Hancke v. Hooper, 7 C. & P. 81; Lanphier v. Phipos, 8 C. & P.

234; Lowry v. Guilford, 5 C. & P. 234; Russell v. Palmer, 2 Wils. 325; Chapman v. Chapman, L. R. 9 Eq. Cas. 276; Parker v. Rolls, 14 C. B. 691; Pitt v. Yalden, 4 Burr. 260. See Pennington v. Yell, 11 Ark. 212.

² McCandless v. McWha, 23 Penn. St. 261. In Potter v. Warner, 91 Penn. St. 363, he is held to the use of reasonable diligence and skill.

uncommon skill." "3. In stipulating to exert his skill and apply his diligence and care, the medical and other professional men contract to use their best judgment."¹ This is believed to be an accurate statement of the implied promise. 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.²

***Voluntary Services.** Where friends and acquaintances are accustomed to give, and do give, to each other voluntary services without expectation of reward, either because other assistance cannot be procured, or because the means of parties needing help will not enable them to engage such as may be within reach, the law will not imply an undertaking for

¹ *Leighton v. Sargent*, 27 N. H. 460.

² *Landon v. Humphrey*, 9 Conn. 209; *Howard v. Grover*, 29 Me. 97; *Simonds v. Henry*, 39 Me. 155; *Patten v. Wiggin*, 51 Me. 594; *Holmes v. Peck*, 1 R. I. 243; *Ritchey v. West*, 53 Ill. 385; *Utley v. Burns*, 70 Ill. 162; *Barnes v. Means*, 82 Ill. 379; *Holtzman v. Hoy*, 118 Ill. 534; *Walker v. Goodman*, 21 Ala. 647; *Branner v. Stormont*, 9 Kan. 51; *Wilmot v. Howard*, 39 Vt. 447; *Hathorn v. Richmond*, 48 Vt. 557; *Gallaher v. Thompson*, *Wright*, (Ohio,) 466; *Craig v. Chambers*, 17 Ohio, (N.S.) 253; *Wood v. Clapp*, 4 Sued. 65; *Smothers v. Hanks*, 34 Iowa, 286; *Hitchcock v. Burgett*, 38 Mich. 501; *Reynolds v. Graves*, 3 Wis. 416; *Long v. Morrison* 14 Ind. 595; *Gramm v. Boener*, 56 Ind. 497; *Reilly v. Cavanaugh*, 29 Ind. 435; *Foulks v. Falls*, 91 Ind. 815; *Gambert v. Hart*, 44 Cal. 542; *Heath v. Glisan*, 3 Ore. 64; *Boydston v. Giltner*, 3 Ore. 119; *Williams v. Poppleton*, 3 Ore. 139; *Hord v. Grimes*, 13 B. Mon. 188; *Bellinger v. Craigie*, 31 Barb. 534; *Carpenter v.*

Blake, 60 Barb. 488; *Phillips v. Bridge*, 11 Mass. 242; *Varnum v. Martin*, 15 Pick. 440; *Small v. Howard*, 128 Mass. 131; *O'Hara v. Wells*, 14 Neb. 403; *Vanhooser v. Berghoff*, 90 Mo. 487; *Gates v. Fleischer*, 67 Wis. 504. The question is one of reasonable skill. Evidence as to how he got his diploma is irrelevant in an action for a physician's negligence. *Bute v. Potts*, 18 Pac. Rep. 329 (Cal.). Where an attorney without his principal's knowledge takes worthless second mortgages he is liable. He must use such skill as is ordinarily possessed by those engaged in like work. *Whitney v. Martine*, 88 N. Y. 535. If a railroad company furnishes a surgeon to attend one injured, it is not liable for his negligence as to a particular patient, provided he is a surgeon reasonably fit for the duty laid on him. *Secord v. St. Paul, &c., Ry Co.*, 18 Fed. Rep. 221. If a professional man turns an employment over to another, he is responsible for his conduct. *Walker v. Stevens*, 79 Ill. 193; *Bradstreet v. Everson*, 72 Penn. St. 124.

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 So 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 want of the skill he pretends to, even when his services are rendered gratuitously.³

STATUTORY DUTIES.

Liability for Neglect. Where duties are imposed by statute upon individuals or corporations, questions of liability for neglect corresponding to the questions which arise when official duty fails in performance, are of frequent occurrence and often of difficulty. The regulations which include the requirement of such duties are usually in the nature of regulations of police, and the duties may be imposed 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 [*651] 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.

There are certain rules for the construction of such statutes which will afford some aid in the endeavor to arrive at the real intent. It must be admitted, however, that they are not very certain or very conclusive guides, and that the exceptions to

¹ Shiells v. Blackburne, 1 H. Bl. 158; Beardslee v. Richardson, 11 Wend. 25.

² Fish v. Kelly, 17 C. B. (N. S.) 194. But when an employment actually exists, it is immaterial whether the injured party was the employer or not; the liability is the same. Pippin

v. Sheppard, 11 Price, 400; Gladwell v. Steggall, 5 Bing. (N. C.) 733.

³ McNevins v. Lowe, 40 Ill. 209; Hord v. Grimes, 13 B. Mon. 188. See Conner v. Winton, 8 Ind. 315; Musser's Executor v. Chase, 29 Ohio, (N. S.) 577.

them are numerous. The rules, as we shall give them below, relate not only to the cases where new duties are imposed, but also to those where a new remedy is given for the breach of a pre-existing duty, and they are brought together because the cases that illustrate one rule will often throw light upon the others also.

L. 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 it was 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.¹ For example, the common law gives to one whose property is seized on an attachment sued out maliciously and without probable cause an action on the case for the injury, and it has often been held that a statute requiring the attachment creditor to give bond to pay all damages suffered by the suing out of his writ, provided for a cumulative remedy only, and the remedy at the common law might still be resorted to.² So a statute giving a summary remedy for the assessment *of damages done by trespassing cattle is cumu- [*652] lative.³ So the statute authorizing highway commissioners to order the removal of fences encroaching upon highways does not take away the common law remedy by abatement.⁴ So the 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

¹ *Farmer's Turnpike Road v. Coventry*, 10 Johns. 339; *Crittenden v. Wilson*, 5 Cow. 165; *Livingston v. Van Ingen*, 9 Johns. 507; *Renwick v. Morris*, 7 Hill, 575; *Tremain v. Richardson*, 63 N. Y. 617; *Ward v. Severance*, 7 Cal. 126; *Gooch v. Stevenson*, 18 Me. 371; *Hayes v. Porter*, 22 Me. 371; *Cumberland, &c., Corp. v. Hitchings*, 59 Me. 206; *Washington, &c., Road v. State*, 19 Md. 239; *Candee v. Hayward*, 37 N. Y. 653; *Lane v. Salter*, 51 N. Y. 1; *Mayor, &c., of Lichfield v. Simpson*, 8 Q. B. 65; *Williams v. Golding*, L. R. 1 C. P. 69. See *Gibbes v. Town Council*, 20 S. C. 213; *Jarrett v. Apple*, 81 Kan. 693.

² *Lawrence v. Hagerman*, 56 Ill. 68; *Spaids v. Barrett*, 57 Ill. 289; *Donnell v. Jones*, 18 Ala. 490; *Sanders v. Hughes*, 2 Brevard, 495; *Smith v. Eakin*, 2 Sneed, 456; *Smith v. Story*, 4 Humph. 169; *Pettit v. Mercer*, 8 B. Mon. 51; *Sledge v. McLaren*, 29 Geo. 64. See *Booker's Exrs. v. McRoberts*, 1 Call, 213; *Washington &c., Co. v. State*, 19 Md. 239.

³ *Colden v. Eldred*, 15 Johns. 220; *Stafford v. Ingersoll*, 3 Hill, 38; *Moore v. White*, 45 Mo. 206.

⁴ *Wetmore v. Tracy*, 14 Wend. 250. See, for the same principle, *Renwick v. Morris*, 7 Hill, 575.

contained in the subscription.¹ So if a highway surveyor obstructs the passage from one's dwelling to the road by cutting a ditch along the side of the road, it is no answer to a common law action against him that a statute in such case gives a remedy against the town.² Neither is it an answer to an action against a ferry keeper for an injury occasioned by his negligence that under the statute he has been compelled to give bond, on which an action will lie for the same injury.³

II. 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. It has been so held in many cases where land or other property has been taken for public use under the eminent domain.⁴

¹ Goshen Turnpike Co. v. Hurtin, 9 Johns. 217; Small v. Herkimer Manuf. Co., 2 N. Y. 330; Nor. R. R. Co. v. Miller, 10 Barb. 260; Troy, &c. R. R. Co. v. Tibbits, 18 Barb. 297; Carson v. Mining Co., 5 Mich. 288; Inglis v. Great Nor. R. Co. 1 Macq. H. L. Cas. 112; Great Nor. R. Co. v. Kennedy, 4 Exch. 417; Giles v. Hutt, 3 Exch. 18.

² Adams v. Richardson, 43 N. H. 212.

³ Wells v. Steele, 31 Ark. 219. Making the supervisor of roads liable for defects in the highways does not relieve the county commissioners who were liable before. County Commissioners v. Gibson, 36 Md. 229.

⁴ Fuller v. Edings, 11 Rich. 239; Conwell v. Hagerstown Canal Co., 2 Ind. 538; Crawfordville, &c., R. R. Co. v. Wright, 5 Ind. 252; People v. Mich. Sou. R. R. Co., 3 Mich. 496; Smith v. McAdam, 3 Mich. 506; McCormick v. Terre Haute, &c., R. R. Co., 9 Ind. 283; Sudbury Meadows v. Middlesex Canal Co., 23 Pick. 36; Stevens v. Middlesex, 12 Mass. 466; Soulard v. St. Louis, 36 Mo. 546; Baker

v. Hannibal, &c., R. R. Co., 36 Mo. 543; Calking v. Baldwin, 4 Wend. 667; McKinney v. Monon. Nav. Co., 14 Penn. St. 65; Cole v. Muscatine, 14 Iowa, 296; Stowell v. Flagg, 11 Mass. 364; Dodge v. Commissioners, &c., 3 Met. 380; Null v. Whitewater, &c., Co., 4 Ind. 431; Kimble v. Whitewater, &c., Co., 1 Ind. 285; Lebanon v. Olcott, 1 N. H. 339; Troy v. Cheshire R. R. Co., 23 N. H. 83; Henniker v. Contoocook Valley R. R. Co., 39 N. H. 146; Renwick v. Morris, 7 Hill, 575; Babb v. Mackey, 10 Wis. 371. In some cases it has been held that the common law remedy still remained and might be resorted to; as where a water course was diverted by statutory authority. Proprietors, &c., v. Frye, 5 Me. 38. *Contra*, Calking v. Baldwin, 4 Wend. 667; McKinney v. Monon. Nav. Co., 14 Penn. St. 65. And where land and buildings were injured by flooding, or by the percolation of water, caused by the enlargement of a canal under statutory authority. Selden v. Canal Co., 24 Barb. 362. *Contra*, Stowell v. Flagg, 11

*III. Where the statute imposes a new duty, where [*653] 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.¹ It is upon this ground that it has been many times 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 an attempt is made to evade payment.² So if performance of the duty is enjoined under penalty, the recovery of this penalty is in general the sole remedy, even when it is not made payable to the party injured.³ But the rule is not without its

Mass. 364; *Hazen v. Essex Co.*, 12 Cush. 475. If a privilege is given by statute which is exceeded, the statutory remedy will not exclude a suit for the excess. *Renwick v. Morris*, 7 Hill, 575.

¹ *Almy v. Harris*, 5 Johns. 175; *Edwards v. Davis*, 16 Johns. 281; *Smith v. Lockwood*, 13 Barb. 209; *Dudley v. Mahew*, 3 N. Y. 9; *Thurston v. Prentiss*, 1 Mich. 193; *Reddick v. Governor*, 1 Mo. 147; *Lang v. Scott*, 1 Blackf. 405; *Johnston v. Louisville*, 11 Bush, 527; *Smith v. Drew*, 5 Ma.s. 514; *Green v. Bailey*, 8 N. H. 33; *Com'rs v. Bank*, 32 Ohio St. 194; *Beckford v. Hood*, 7 T. R. 620; *Doe v. Bridges*, 1 B. & Ad. 847; *Vestry of St. Pancras v. Battenbury*, 2 C. B. (N. S.) 477; *Stevens v. Jeacocke*, 11 Q. B. 731; *Marshall v. Nicholls*, 18 Q. B. 882. See *Vallance v. Falle*, L. R., 13 Q. B. D. 109. Where under a statute as to fire escapes a public remedy is given and also a remedy by injunction, available by individuals, an action on the case after an injury based on non-compliance with the statute will not lie. *Grant v. Slater, & Co.*, 14 R. L. 380.

² *Turnpike Co. v. Martin*, 12 Penn. St. 361; *Beeler v. Turnpike Co.*, 14 Penn. St. 162; *Kidder v. Boom Co.*, 24 Penn. St. 193; *Turnpike Co. v. Van*

Dusen, 10 Vt. 197; *Russell v. Turnpike Co.*, 18 Bush. 307. This is the rule generally applied in the case of taxes; if the statute imposing them prescribes a remedy, no other can be implied. See cases collected in *Cooley on Taxation*, 18. But if the statute gives a corporation the right to "demand and recover" tolls for the passage of logs, and to detain the logs until the tolls are paid, this, by implication, authorizes suits. *Bear Camp River Co. v. Woodman*, 2 Me. 404.

³ *Turnpike Co. v. Brown*, 2 Penn. & Watts, 462; *Almy v. Harris*, 5 Johns. 175. Failure to remove snow as required by ordinance is a breach of duty to the public from which an individual action does not arise. *Flynn v. Canton Co.*, 40 Md. 312; *Kirby v. Market Ass'n.*, 14 Gray, 249; *Taylor v. Lake Shore, & Co.*, 45 Mich. 74; *Moore v. Gadsden*, 93 N. Y. 12; *Hartford v. Talcott*, 48 Conn. 525; *Heaney v. Sprague*, 11 R. I. 456. Compare *Collinson v. Newcastle, & Co.*, 1 C. & K. 545. So allowing unmuzzled dog to run at large. *State v. Donohue*, 10 Atl. Rep. 150 (N. J.). So violation of police regulation as to licensing steam engines. *Burbank v. Bethel, & Co.*, 75 Me. 373. In *Phila., & Co. v. Ervin*, 89 Penn.

[*654] exceptions; for 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, if not conclusive, 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.¹ And if the duty imposed is obviously meant to be a duty to the public, and also to individuals, and the penalty is made payable to the State or to an informer, the right of an individual injured to maintain an action on the case for a breach of the duty owing to him will be unquestionable.

There are always questions of difficulty respecting the remedy 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. Is the duty imposed on public grounds exclusively, and if not, what persons or classes of persons are within its intended protection? These are the problems which such statutes usually present. Some idea of the difficulties attending their construction may be had from a brief consideration of one class of them.

Statutes for Fencing Railroads. At the common law, rail-

St. 71; Phila., &c., Co., v. Boyer, 97 Penn. St. 91, and Heeney v. Sprague, 11 R. I. 456, it is held that an ordinance cannot create a civil duty enforceable in a common law action. *Contra*, Penn., &c., Co. v. Hensil, 70 Ind. 569. In Cook v. Johnston, 58 Mich. 437, where ashes kept in a wooden barrel contrary to an ordinance caused a fire, it is held that primarily the object of ordinances is public and that whether in a given case the damaging act, contrary to an ordinance, is negligent is a question of fact. So the violation of an ordinance as to leaving horses unhitched in the street is held evidence of negligence. Siemers v. Eisen, 54 Cal. 418; but not necessarily negligent. Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488. But where such an ordinance appears intended for the bene-

fit of individuals using the street, the breach of it is a ground of action. Bott v. Pratt, 33 Minn. 323, and cases cited.

¹ Salem Turnpike, &c., Co. v. Hayes, 5 Cush. 458. See Aldrich v. Howard, 7 R. I. 199; Ryan v. Gallatin Co., 14 Ill. 78; Dunlap v. Gallatin Co., 15 Ill. 7; Johnston v. Louisville, 11 Bush. 527; Curry v. Chicago, &c., R. R. Co., 43 Wis. 665. See, also, Shepherd v. Hills, 11 Exch. 55; Mayor of Litchfield v. Simpson, 8 Q. B. 65. This rule applied to a statute for the protection of elevator shafts. Parker v. Barnard, 135 Mass. 116, and to one for the furnishing of fire escapes in tenement houses by the owner, where no penalty was imposed till after he had been notified by the authorities. Willy v. Mulledy, 78 N. Y. 310.

road 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, and it is the duty of the owners of cattle to prevent their thus straying.¹

If the owners *fail in this duty, they would not only be [*655] without remedy for any injury their cattle might receive while trespassing on the track, but they might even be liable themselves if cars or engines were injured by the cattle being encountered, provided the owners were negligent in suffering them to stray there.*

It is now very generally required by statute that railroad companies shall fence their tracks. The statutes differ greatly in their provisions, and in the remedies they prescribe for a breach of the duty. It is conceded that one of the chief purposes of such statutes is to protect the lives and limbs of the traveling public, who, as they pass over railroads, are exposed to great and constant hazards 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

¹ Manchester, &c., R. v. Wallis, 14 C. B. 213; S. C. 25 E. L. & Eq. 373; Tonawanda R. R. Co. v. Munger, 5 Denio, 255; S. C. 4 N. Y. 349; Williams v. Mich. Cent. R. R. Co., 2 Mich. 259; Vandergrift v. Rediker, 22 N. J. 185; Price v. N. J. R. R. Co., 31 N. J. 229; Brown v. Hannibal, &c., R. R. Co., 33 Mo. 309; Richmond v. Railroad Co., 18 Cal. 351; Railroad Co. v. Skinner, 19 Penn. St. 298; Nor. Penn. R. R. Co. v. Rehman, 49 Penn. St. 101; Vandergrift v. Delaware, &c., R. R. Co., 2 Houst. 237; Louisville, &c., R. R. Co. v. Ballard, 2 Met. (Ky.) 177; Hurd v. Rutland, &c., R. R. Co., 25 Vt. 116. Compare Jackson v. Rutland, &c., R. R. Co., 25 Vt. 150; Housatonic R. R. Co. v. Knowles, 30 Conn. 313; Locke v. First Div., &c., R. R. Co., 15 Minn. 350; Fritz v. First Div., &c., R. R. Co., 22 Minn. 404; Towns v. Cheshire R. R. Co., 21 N. H. 363; Michigan, &c., R. R. Co.

v. Fisher, 27 Ind. 96; Nor. East. R. R. Co. v. Sineath, 8 Rich. 185.

² Railroad Co. v. Skinner, 19 Penn. St. 298; Williams v. New Albany, &c., R. R. Co., 5 Ind. 111. The question in such a case will of course be one of negligence. If cattle are straying upon a railroad track they must not be willfully or recklessly run over; if they are, the company may be responsible. See Laws v. Nor. Car. R. R. Co., 7 Jones, (N. C.) 468; Hurd v. Rutland, &c., R. R. Co., 25 Vt. 116; Holden v. Same, 30 Vt. 297; New Orleans, &c., R. R. Co. v. Field, 46 Miss. 573; Fritz v. First Div., &c., R. R. Co., 22 Minn. 404; Trout v. Virginia, &c., R. R. Co., 23 Grat. 619; Baltimore, &c., R. R. Co. v. Mulligan, 45 Md. 486; Darling v. Boston, &c., R. R. Co., 121 Mass. 118; Rockford, &c., R. R. Co., v. Rafferty, 73 Ill. 58.

responsible for the cattle killed or injured by their engines or otherwise upon the unfenced tracks.¹

Where a liability for injury to cattle is imposed in general terms, a question is certain to arise, whether, in fact, the remedy is intended to be as broad as the general terms would indicate, or whether, on the other hand, its benefits were not intended exclusively for those whose cattle were lawfully on the adjacent lands; that is to say, the cattle of the owners of such adjacent lands, and such other cattle as might be kept there, or have a right for any reason to be there. In many cases this question has arisen, and the decisions are not uniform. In some States it [*656] has been held *that if cattle stray upon the adjoining lands, and from 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 whatever.² But in other States the conclusion is, that it was intended that

¹ Failure to fence as required by statute affords a ground of action, if a child thereby gets upon the track and is injured. *Keyser v. Chicago, &c., Co.*, 56 Mich. 559; 33 N. W. Rep. 867. So if fence is required by a city ordinance. *Hayes v. Mich. Centr. R. R. Co.*, 111 U. S. 228. But not if child crosses the track and is injured by falling into a trench on land beyond. *Moressey v. Prov., &c., R. R. Co.*, 3 Atl. R.-p. 10 (R. I.). Where contributory negligence as a defense is excluded by the statute, as against "persons injured," an employee of the railroad, injured in the service, after knowing of the lack of a fence may recover. *Quackebush v. Wisconsin &c., Co.*, 63 Wis. 411. If a railroad is leased, the lessor is liable under such a statute. *Nelson v. Vermont &c., R. R. Co.*, 26 Vt. 717; *Clement v. Canfield*, 28 Vt. 302. So is the lessee. *Ill. Cent. R. R. Co. v. Kanouse*, 39 Ill. 272; *Toledo, &c., R. R. Co. v. Rumbold*, 40 Ill. 143. The contractor is liable under some statutes while building the road. *Gardner v. Smith*, 7 Mich.

410. See *St. Louis, &c., R. R. Co. v. Gerber*, 82 Ill. 632. In Indiana, Illinois and Nebraska the injury must be by actual contact of the train with the animal. *Louisville, &c., Ry Co. v. Thomas*, 106 Ind. 10; *Schertz, v. Ind., &c., Ry Co.*, 107 Ill. 577; *Burlington, &c., R. R. Co. v. Shoemaker*, 18 Neb. 369. In New York the railroad must produce the injury by mechanical or other agency. Not liable if the animal falls through a bridge. *Knight v. New York, &c., R. R. Co.*, 99 N. Y. 25.

² See *Bemis v. Connecticut, &c., R. R. Co.*, 42 Vt. 375; *Eames v. Salem, &c., R. R. Co.*, 98 Mass. 560; *McDonald v. Pittsfield, &c., R. R. Co.*, 115 Mass. 564. See *Berry v. St. Louis, &c., R. R. Co.*, 65 Mo. 172; *Peddicord v. Miss. &c., Ry Co.*, 85 Mo. 160. No liability, except for recklessness, for injuring trespassing animals running at large in violation of an ordinance. *Vanhorn v. Burlington, &c., Ry Co.*, 63 Ia. 67; *Kansas City, &c., R. R. Co. v. McHenry*, 24 Kan. 501.

all persons should have the benefit of the statutory protection.¹ Differences in the phraseology of statutes will account in part for the differences in conclusions, but not entirely.²

¹Indianapolis, &c., R. R. Co. v. McKinney, 24 Ind. 283; Isbell v. New York, &c., R. R. Co., 27 Conn. 393; McCall v. Chamberlain, 13 Wis. 637; Curry v. Chicago &c., R. R. Co., 43 Wis. 665; Corwin v. New York, &c., R. R. Co., 18 N. Y. 42; Bradley v. Buffalo, &c., R. R. Co., 34 N. Y. 427; Shepard v. Buffalo, &c., R. R. Co., 35 N. Y. 641; Tracy v. Troy, &c., R. R. Co., 38 N. Y. 433; Ewing v. Chicago, &c., R. R. Co., 72 Ill. 25; Calro, &c., R. R. Co. v. Murray, 82 Ill. 76. See Fawcett v. York, &c., R. R. Co., 16 Q. B. 610.

These statutes do not impose on railroad companies the obligation to fence their stations and such grounds as would be inconveniently used if fenced, and the question of liability for cattle injured in such places is purely one of negligence. Swearingen v. Missouri, &c., R. R. Co., 64 Mo. 73; Smith v. Chicago, &c., R. R. Co., 34 Iowa, 506; Robertson v. Railroad Co., 64 Mo. 412; Toledo, &c., R. R. Co. v. Spangler, 71 Ill. 568. Liable for not fencing land erroneously supposed by it to be in the highway. Coleman v. Flint, &c., Co., 31 N. W. Rep. 47 (Mich.). Where they are required to fence, an agreement with the adjoining owner that they need not do so will not relieve them from any obligation to other persons. Gilman v. European, &c., R. Co., 60 Me. 235. And the fact that they exercise the highest care in running their trains will not excuse them. Gorman v. Railroad Co., 26 Mo. 441. See Union Pac. R. R. Co. v. Rollins, 5 Kan. 187.

²Following are cases in which the liability of railroad companies for injury to cattle on unfenced or imper-

fectly fenced tracts have been considered: Dawson v. Midland R. Co., L. R. 8 Exch. 8; Williams v. Great Western R. Co., L. R. 9 Exch. 157; Wanless v. N. E. R. Co., L. R. 6 Q. B. 491; Stapley v. London, &c., R. Co., L. R. 1 Exch. 20. Hurd v. Rutland, &c., R. R. Co., 25 Vt. 116; Nelson v. Vt. Cent. R. R. Co., 26 Vt. 717; Thorpe v. Rutland, &c., R. R. Co., 27 Vt. 140; Clark v. Vt. & Can. R. R. Co., 28 Vt. 103; Clement v. Canfield, 28 Vt. 302; Holden v. Rutland, &c., R. R. Co., 30 Vt. 297; Bemis v. Can. &c., R. R. Co., 42 Vt. 875; White v. Concord R. R. Co., 80 N. H. 188; Horn v. Atlantic, &c., R. R. Co., 35 N. H. 169; Smith v. Eastern R. R. Co., 35 N. H. 356; Widner v. Maine Cent. R. R. Co. 65 Me. 332; McCall v. Chamberlain, 13 Wis. 637; Brown v. Milwaukee, &c., R. R. Co., 21 Wis. 39; Blair v. Milwaukee, &c., R. R. Co., 20 Wis. 254; Schmidt v. Milwaukee, &c., R. R. Co., 23 Wis. 186; Antisdel v. Chicago, &c., R. R. Co., 26 Wis. 145; Laude v. Chicago, &c., R. R. Co., 33 Wis. 640; Bay City, &c., R. R. Co. v. Austin, 21 Mich. 390; Flint, &c., R. R. Co., v. Lull, 28 Mich. 510; Grand Rapids, &c., R. R. Co. v. Southwick, 30 Mich. 445; Ill. Cent. R. R. Co. v. Williams, 27 Ill. 48; Chicago, &c., R. R. Co. v. Utley, 38 Ill. 410; Chicago, &c., R. R. Co. v. Cauffman, 38 Ill. 424; Ill. Cent. R. R. Co. v. Kanouse, 39 Ill. 272; Toledo, &c., R. R. Co. v. Rumbold, 40 Ill. 143; Toledo, &c., R. R. Co., v. Arnold, 43 Ill. 418; Peoria, &c., R. R. Co. v. Barton, 80 Ill. 72; McCoy v. California, &c., R. R. Co., 40 Cal. 532; Jeffersonville R. R. Co. v. Martin, 10 Ind. 416; Gabbert v. Jeffersonville R. R. Co., 11 Ind. 365;

[*657] *Other neglects of Statutory Duty. The following are also cases of neglect of statutory duty for which individuals injured have been allowed to recover in actions on the case for negligence. 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;¹ neglect to guard their cross-

Indianapolis, &c., R. R. Co. v. Taffe, 11 Ind. 458; Indianapolis R. R. Co. v. Fisher, 15 Ind. 203; Indianapolis, &c., R. R. Co. v. McKinney, 24 Ind. 283; Ohio, &c., R. R. Co. v. Miller, 46 Ind. 215; Ohio, &c., R. R. Co. v. McClure, 47 Ind. 317; Indianapolis, &c., R. R. Co. v. Lyon, 48 Ind. 119. There are many others. Liable for failure to fence against a "crazy" horse as against any other. Liston v. Centr. Ia. Ry. Co., 70 Ia. 714. See for cases under such statutes, notes to Dunkirk, &c., R. R. Co. v. Mead, 1 A. & E. R. R. Cas. 171; Brentner v. Chicago, &c., Ry Co., 7 Id. 577, and cases and notes *passim*, 19 Id. 529-674. If a fence is out of repair, the company is not responsible for injury resulting therefrom, provided there is no negligence in proceeding to put it in repair. Robinson v. Grand Trunk R. Co. 32 Mich. 322; Toledo, &c., R. R. Co. v. Daniels, 21 Ind. 256; Indianapolis, &c., R. R. Co. v. Truitt, 24 Ind. 162; Pittsburgh, &c., R. R. Co. v. Smith, 26 Ohio (N. S.) 124; Russell v. Hanley, 20 Iowa, 219; Aylesworth v. Chicago, &c., R. R. Co., 30 Iowa, 459. Compare Ohio, &c., R. R. Co. v. Clutter, 82 Ill. 123. See Crosby v. Detroit, &c., Ry Co., 58 Mich. 458; Railway Co. v. Smith, 38 Ohio St. 410, and as to care in keeping gate shut, Wait v. Burlington, &c., Ry Co., 87 N. W. Rep. 159 (Ia.). As to what is a sufficient fence, see Lyons v. Merrick, 105 Mass. 71; Chambers v. Matthews, 18 N. J. 368. Whether the doctrine of contributory negligence is to be allowed any force

when an injury occurs through the neglect of a statutory requirement, see Caswell v. Worth, 5 El. and Bl. 849; Steves v. Oswego, &c., R. R. Co., 18 N. Y. 422; Nashville, &c., R. R. Co. v. Smith, 6 Heisk. 174; Quackenbush v. Wisconsin, &c., R. R. Co., 62 Wis. 411. Not liable for animals getting upon track through a farm gate unless it was left open through company's fault. Lemon v. Chicago, &c., Co., 59 Mich. 618. Farmer's duty to keep the gate shut. Louisville, &c., Ry Co. v. Goodbar, 103 Ind. 596. But if the cattle of third persons are injured by coming through his open gate, his negligence is not a defense. Wabash, &c., Ry Co. v. Williamson, 104 Ind. 154.

¹ Wilson v. Rochester, &c., R. R. Co., 16 Barb. 167; Ernst v. Hud. Riv. R. R. Co., 35 N. Y. 9; Richardson v. N. Y., &c., R. R. Co., 45 N. Y. 846; Renwick v. New York, &c., R. R. Co., 36 N. Y. 132; Chicago, &c., R. R. Co. v. Triplett, 33 Ill. 482; Toledo, &c., R. R. Co. v. Jones, 76 Ill. 311; Toledo, &c., R. R. Co. v. Durkin, 76 Ill. 395; Indianapolis, &c., R. R. Co. v. Smith, 78 Ill. 112; Dimick v. Chicago, &c., R. R. Co., 80 Ill. 338; Langhoff v. Milwaukee, &c., R. R. Co., 19 Wis. 489; Horn v. Chicago, &c., R. R. Co., 38 Wis. 463; Linfield v. Old Colony, &c., R. R. Co., 10 Cush. 562; Kimball v. Western R. R. Co., 6 Gray, 542; Norton v. Eastern R. R. Co., 113 Mass. 366; State v. Vermont, &c., R. R. Co., 28 Vt. 583; Wakefield v. Connecticut, &c., R. R. Co., 37 Vt. 240; Dodge v. Burlington, &c., R. R. Co.

[*658] ings with *a gate or with watchmen when required;¹ moving trains at unlawful speed;² neglecting to fence or otherwise protect dangerous machinery,³ or the shaft of a mine;⁴ neglecting to keep a bridge in repair;⁵ neglecting to sink telegraph wire in crossing a stream;⁶ disregarding a statute which forbids selling naphtha as a burning fluid;⁷ neglect of the

84 Iowa, 276; Correll v. Burlington, &c., R. R. Co., 38 Iowa, 120; Augusta, &c., R. R. Co. v. McElmurry, 24 Geo. 75; Nashville, &c., R. R. Co. v. Smith, 6 Heisk. 174; Chicago, &c., R. R. Co. v. Boggs, 101 Ind. 522, and cases; Johnson v. Chicago, &c., Ry Co., 77 Mo. 546. Such a statute in Rhode Island held not to be designed for the benefit of others than those intending to cross on the highway, and therefore one who is injured in walking along the track can have no action because of the omission. O'Donnell v. Providence, &c., R. R. Co., 6 R. I. 211. But, see Hill v. Portland, &c., R. R. Co., 55 Me. 438; Norton v. Eastern R. R. Co., 113 Mass 866; Wilson v. Rochester, &c., R. R. Co., 16 Barb. 167; Wakefield v. Connecticut, &c., R. R. Co., 37 Vt. 330. Failure is actionable if thereby one driving parallel to the track near crossing, though not intending to cross, is injured from fright of horse. Ransom v. Chicago, &c., Ry Co., 62 Wis. 178. Compare, however, East Tenn. &c., Co. v. Feathers, 10 Lea, 103, where the person was some distance from the crossing. Failure to give signals is actionable if cattle are thereby injured. Palmer v. St. Paul, &c., R. R. Co., 38 N. W. Rep. 100 (Minn.) It was not presumptively negligent not to sound a signal in approaching a crossing before these statutes were passed. See Galena, &c., R. R. Co. v. Dill, 22 Ill. 246; Galena, &c., R. R. Co. v. Loomis, 13 Ill. 548; Ill. Cent. R. R. Co. v. Phelps, 29 Ill. 447.

¹ Lunt v. London, &c., R. R. Co., L. R. 1 Q. B. 277; Bilbee v. London, &c., R. R. Co., 18 C. B. (N. S.) 583; St. Louis, &c., R. R. Co. v. Dunn, 78 Ill. 197; Johnson v. St. Paul, &c., R. R. Co., 81 Minn. 283. Failure to obey a statute as to obstructing highways with cars gives an action. Patterson v. Detroit, &c., R. R. Co., 56 Mich. 172. See Cumming v. Brooklyn, &c., Co., 38 Hun, 362.

² Houston, &c., R. R. Co. v. Terry, 42 Tex. 451; Aycock v. Wilmington, &c., R. R. Co., 6 Jones, (N. C.) 231; Bowman v. Chicago, &c., R. R. Co., 85 Mo. 533; Keim v. Union &c., Co., 90 Mo. 314; Crowley v. Burlington, &c., Ry Co., 65 Ia. 658; Phila., &c., R. R. Co. v. Stebbing, 62 Md. 504; South., &c. R. R. Co. v. Donovan, 4 South. Rep. 142 (Ala.). So where a building was struck and person hurt by car going off track. Mahan v. Union Depot, &c., Co., 34 Ming. 29. But such speed is not conclusive of negligence. Hanlon v. South Boston, &c., Co., 129 Mass. 310.

³ Coe v. Platt, 6 Exch. 752; Holmes v. Clarke, 6 H. & N. 348; Clarke v. Holmes, 7 H. & N. 937; Caswell v. Worth, 5 El. & Bl. 849; Fawcett v. York, &c., R. R. Co., 16 Q. B. 610; Reynolds v. Hindman, 32 Iowa, 146. ⁴ Bartlett, &c., Co. v. Roach, 68 Ill. 174.

⁵ Titcomb v. Fitchburg R. R. Co., 12 Allen, 254.

⁶ Blanchard v. West. Un. Tel. Co., 60 N. Y. 510.

⁷ Hourigan v. Nowell, 110 Mass. 470; Wellington v. Oil Co., 104 Mass. 64.

master of a vessel to take a proper supply of medicines for the benefit of his crew and passengers when going upon a voyage,¹ and neglect of a toll-bridge company to keep the bridge in repair, as required by its charter.² But without going further into particulars, it is sufficient to say of the authorities that they recognize the rule as a general one, that when the duty imposed by statute is manifestly intended for the protection and benefit of individuals, the common law, when an individual is injured by a breach of the duty, will supply a remedy, if the statute gives none.³

Where a statutory requirement cannot be fully complied with, whatever is possible under the circumstances to prevent injury should be done. *Mobile, &c., R. R. Co. v. Malone*, 46 Ala. 391, citing *Gr. West. R. R. Co. v. Geddis*, 83 Ill. 304; *Nashville, &c., R. R. Co. v. Comans*, 45 Ala. 437.

¹ *Couch v. Steel*, 8 El. & Bl. 402.

² *Grigsby v. Chappell*, 5 Rich. 443. See *Orcutt v. Bridge Co.*, 53 Me. 500.

³ *Commissioners v. Duckett*, 20 Md. 468. See *Caswell v. Worth*, 5 El. & Bl. 849; *Holmes v. Clarke*, 6 H. & N. 848; *S. C. in Ex. Ch.*, 7 H. & N. 937; *Fawcett v. York, &c., R. Co.*, 16 Q. B. 610; *Britton v. Gt. West. Cotton Co. L. R.* 7. Exch. 130; *Atkinson v. Newcastle, &c., Co.*, L. R. 6 Exch. 402.

*CHAPTER XXI.

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THE GENERAL PRINCIPLES GOVERNING REDRESS FOR
NEGLIGENCE.

In the last chapter some attention was given to wrongs resulting from the non-performance of conventional and statutory duties, and it was shown that where negligence in the performance of a legal duty is brought home to any one, and another has suffered damages therefrom, an action will lie therefor. The endeavor was also made to point out in what negligence consisted: to show that the term was rather negative than positive, and implied only the absence of such care, prudence and forethought as under the circumstances duty required should be given or exercised: that although the terms slight negligence, ordinary negligence and gross negligence are frequently employed to characterize particular conduct, yet the terms themselves have no distinctive meaning or importance in the law, and only imply that there has been culpable neglect under circumstances calling for different degrees of care; any injurious neglect of duty being actionable. It was also shown that the law imposes on those who follow certain callings in life exceptional obligations, requiring in some cases a care and caution far beyond what is required generally: also that in the case of official and other statutory duties, an individual may bring suit for failure in performance wherever it appears that they were imposed for his advantage or protection. But, 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 becomes now of importance that we 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. The first requisite in establishing negligence is to show the existence of the duty which it is supposed has not been *performed. A duty may be general, and owing to every- [*660]

body, or it may be particular, and owing to a single person only, by reason of his peculiar position.¹ An instance of the latter sort is the duty the owner of land owes to furnish by it lateral support to the land of the adjoining owner. But a duty owing to everybody can never become the foundation of an action until some individual is placed in position which gives him particular occasion to insist upon its performance: it then becomes a duty to him personally. 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: the tramp who steals a ride cannot insist that it is a duty to him; neither can he when he makes a highway of the railway track and is injured by the train.² A man may be careless to the degree of criminality who leaves poisoned food about where others will be likely to pick it up and be injured by it; but he owes in this regard no duty to the burglar who breaks into his house to despoil it. So it may not be wise or prudent for one to have upon his premises an uncovered pit, but he is under no obligation to cover it for the protection of trespassers.³ On the other hand if one shall make an excavation

¹The defendant who controlled a vehicle negligently sent it full of coal in a defective condition to the buyers of the coal. A servant of the buyer in unloading the truck was injured by the defect. Held the defendant owed a duty to the injured man. *Elliott v. Hall*, L. R. 15 Q. B. D. 315. See *Heaven v. Pender*, L. R. 11 Q. B. D. 503.

²*Ill. Cent. R. R. v. Hall*, 72 Ill. 292; *Bresnahan v. Mich. Centr. R. R. Co.*, 49 Mich. 410. See *Mobile, &c., R. R. Co. v. Stroud*, 64 Miss. 784; *Railroad Co. v. Depew*, 40 Ohio St. 121; *Pittsburgh, &c., Ry. Co. v. Collins*, 87 Penn. St. 405; *State v. Balt., &c., R. R. Co.*, 58 Md. 482; *Chicago, &c., Ry. Co. v. Eininger*, 114 Ill. 79. It makes no difference that one was at a point on the track where a highway crosses it. *Kelley v. Mich. Centr. R. R. Co.*, 31 N. W. Rep. 904 (Mich.). In Pennsylvania it is held that the

railroad company is entitled to a clear track, and whoever puts himself upon it, except as he has occasion to cross, must take upon himself the consequences. *Mulherrin v. Delaware, &c., R. R. Co.*, 81 Penn. St. 366; *Penn. R. R. Co. v. Lewis*, 79 Penn. St. 33. But, if the track is laid in the street, one is not a trespasser in walking upon it. *Louisville, &c., Ry. Co. v. Phillips*, 13 N. E. Rep. 133 (Ind.).

That there must be a breach of some duty owing to plaintiff to constitute actionable negligence, see *Cole v. McKey*, 66 Wis. 500; *Galveston City, &c., Co. v. Hewitt*, 67 Tex. 473. In any suit for negligence the particular duty neglected must be counted upon: a recovery cannot be had for one breach on a declaration counting on another. *Flint, &c., R. Co. v. Stark*, 38 Mich. 714.

³*Aldred's Case*, 9 Co. 58 b.; *Blithe v. Topham*, Cro. Jac. 153; *Stone v.*

so near the line of the highway that one lawfully making use of the highway might accidentally fall into it, his duty to erect guards as a protection against such accidents is manifest, and he will be responsible for injuries occasioned by his neglect to do *so.¹ These are illustrations; but in every [*661] instance the complaining party must point out how the duty arose which is supposed to have been neglected. And this is the real reason why one cannot complain of an injury to which his own negligence has contributed: When it appears that but for his own fault the injury would not have occurred, it also ap-

Jackson, 16 C. B. 199; S. C. 32 E. L. & Eq. 349; Hounsell v. Smyth, 7 C. B. (N. S.) 731; Humphries v. Brogden, 12 Q. B. 739; Gautret v. Egerton, L. R. 2 C. P. 371; Mangan v. Atterton, L. R. 1 Exch. 239; Parker v. Foote, 19 Wend. 309; Steuart v. Maryland, 20 Md. 97; Hargreaves v. Deacon, 25 Mich. 1; Zebisch v. Tarbell, 10 Allen, 385; Knight v. Abert, 6 Penn. St. 472. Morgan v. Penn., & Co., 19 Blatchf. 239; Gillespie v. McGowan, 100 Penn. St. 144; Union Stock Yards Co. v. Bourke, 10 Ill. App. 474. Nor to guard a pool of water against trespassing children. Schmidt v. Kansas City, & Co., 90 Mo. 284; Overholt v. Vieths, 6 S. W. Rep. 74 (Mo.); Klux v. Nieman, 32 N. W. Rep. 223 (Wis.). One who leaves syrup exposed on his premises, which a trespassing cow drinks and is damaged is under no liability to the owner of the cow for this injury. Bush v. Brainard, 1 Cow. 78. Compare Fisher v. Clark, 41 Barb. 329, case of injury by diseased sheep. A loiterer about a railway station has no claim upon the railway company for an injury caused by negligence in the construction or maintenance of the station house. Pittsburgh, & Co., R. R. Co. v. Bingham, 29 Ohio, (N. S.) 364.

¹ Barnes v. Ward, 2 C. & K. 661; S. C. 9 C. B. 392; Wettor v. Dunk, 4 F. & F. 298; Hardcastle v. South

Yorkshire, & Co., R. Co., 4 H. & N. 67; Vale v. Bliss, 50 Barb. 358; Davis v. Hill, 41 N. H. 329; Baltimore & Ohio R. R. Co. v. Boteler, 38 Md. 568; Stratton v. Staples, 59 Me., 94; Beck v. Carter, 68 N. Y. 283; Buesching v. St. Louis, & Co., 78 Mo. 219; Haughey v. Hart, 62 Ia. 96; State v. Society, 42 N. J. L. 504. See Crogan v. Schiele, 53 Conn. 186; Cross v. Lake Shore, & Co., 87 N. W. Rep. 361 (Mich.). Not if the excavation is so far from the street line that one falling into it, must be a trespasser. Gramlich v. Wurst, 86 Penn. St. 74; Early v. Lake Shore, & Co., 33 N. W. Rep. 813 (Mich.).

This principle has been applied to towns, which, being under obligation to keep highways in repair, fail to guard properly against passengers falling into dangers immediately outside the line. Coggswell v. Lexington, 4 Cush. 307; Alger v. Lowell, 3 Allen, 402; Norris v. Litchfield, 35 N. H. 271; Indianapolis v. Emmelman, 108 Ind. 530; Seymer v. Lake, 66 Wis. 651. The rule does not cover the case of an embankment outside of a sidewalk down which a frightened horse plunges. Hubbell v. Yonkers, 104 N. Y. 434. See, also, Monk v. New Utrecht, 104 N. Y. 522; Clarke v. Richmond, 5 S. E. Rep. 369 (Va.).

pears 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. The duty being pointed out, the failure to observe it is to be shown; in other words, the existence of negligence. This is an affirmative fact; the presumption always being, until the contrary appears, that every man will perform his duty. But the quantum 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. A bailee who returns in an injured condition an article which has been loaned to him is, by this very condition, called upon for an explanation; for a presumption of fault must arise therefrom against him. If a child is sent into the streets of a city in charge of a spirited team which apparently he is too young and weak to manage, the negligence seems manifest, while there might be no appearance of want of due care had the team been broken down by labor and years. Often the injury itself affords sufficient *prima facie* evidence of negligence. Thus if the buildings of individuals are destroyed by fire originating in sparks from a locomotive, the fire itself is held to be evidence of negligence, which requires to be overcome by some showing that the railway company provides suitable precautions against such an occurrence.¹ Every lawful business is supposed capable of being carried on in a manner that [*662] will be consistent with safety to the business and *property of others: all police rules, whether constituting a part of the common law or imposed by statute, must assume that this is practicable.² The construction of railroads could not be permitted if their trains must necessarily run across the country, scattering fire and destruction along their way. But experience shows that this may be avoided by the exercise of reasonable care. Reasonable care in such a case is unquestionably a high degree of care, because the risk of injury when care is not observed is very great, not to one person merely, but to whole communities of persons all along the line of the road. There is, consequently, nothing unreasonable in presuming negligence from the

¹ *Piggot v. Eastern Counties R. Co.*, 3 C. B. 229, and cases page 703 note 1, *ante*.

² When damage occurs from an act

which when properly done does not cause damage, a presumption of negligence arises. *Mulcairns v. Janesville*, 67 Wis. 24.

occurrence of an injury, and calling upon the railway authorities to rebut the *prima facie* case by showing that they take reasonable care, in the selection and management of their machines, to prevent such injury occurring.

In the case of a railway company as carriers of passengers, the reasons which charge the company with presumptive negligence in case of an injury seem to be still stronger. Suppose a railway train thrown from the track from some cause not at first apparent, and a large number of persons injured; would it be reasonable to put an injured person to the necessity of discovering and pointing out the cause, and tracing to the railway company the fault, before he could recover? Must he show that it did not occur through a defect in the machinery which vigilance would not have discovered, or through a felonious tearing up of the rails by robbers, or by the act of God or inevitable accident, and thus make out negligence in the company by negating the existence of any other cause? Or may he who has entrusted his person and his life to the control of the company, to be carried by them in vehicles of their own selection and management, rely upon the injury itself as entitling him to redress, and leave to the defense the task of presenting exculpatory evidence?

Perhaps this question may be answered by a consideration of the nature of railway carriage of persons, and the means usually employed to render it safe. When properly managed it is supposed to be at least as safe as any other method of travel, and when crime or negligence or inevitable accident do not intervene, the risk of injury is so small as to awaken little concern. A flood may tear up the track, a felon may place obstructions upon *it; but even as against these due caution will [*663] usually give complete protection. If, therefore, such caution is observed, the probability that any particular passenger will be injured is only as one to many millions. 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 required.

Presumptions accept the ordinary and probable as true until it is shown not to be true. Thus we presume a man innocent of crime; that a house standing yesterday is standing to-day; that a man in peaceful possession of a tenement has a rightful

possession; that a man and woman living together as husband and wife, recognizing each other and being recognized by the community as such, are lawfully married: these presumptions are made because in the great majority of cases the fact accords with the presumption, and therefore any different presumption in the great majority of cases would be a false one. 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. As is well said in a Pennsylvania case: "*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." This is the rule where the injury is caused by a defect in the road, cars or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can and ought to control, as a part of its duty to carry the passengers safely; but this rule of evidence is not conclusive. The carrier may rebut the presumption and relieve himself from responsibility by showing that the injury arose from an accident which the utmost skill, foresight and diligence could not prevent.¹ The same rule is applied as against the proprietors of

¹ *Carpue v. London, etc., R. Co.*, 5 Q. B. 747; *Laing v. Colder*, 8 Penn. St. 479; *Sullivan v. Philadelphia, etc., R. R. Co.*, 30 Penn. St. 234; *Meier v. Pennsylvania R. R. Co.*, 64 Penn. St. 225, 230; *Louisville, &c., Ry. Co. v. Jones* 103 Ind., 551. See further on presumption of negligence from injury to a passenger. *Seybolt v. New York, &c., R. R. Co.*, 95 N. Y. 562; *Hill v. Ninth Ave. &c., Co.*, 16 N. E. Rep. 61 (N. Y.); *White v. Boston, &c., R. R. Co.*, 144 Mass. 404; *Eagle Packet Co. v. Defries*, 94 Ill. 598; *Smith v. St. Paul, &c., Co.*, 32 Minn. 1; *Memphis &c., Co. v. McCool*, 83 Ind. 392; *Moore v. Des Moines, &c., Co.*, 69 Ia. 491; *Coudy v. St. Louis &c., Co.* 85 Mo. 79; *Pres., &c., Balt., &c., Road v. Leonhardt*, 66 Md. 70. That if the evidence rebuts the presumption,

there is no *prima facie* case from the injury, see *Terre Haute, &c., R. Co. v. Buck*, 96 Ind. 346. See, also, *Spear v. Phila. &c., Co.*, 12 Atl. Rep. 324 (Penn.). If a collision occurs between the vehicles of two carriers and the passenger of one is injured, there is no presumption of negligence against the other. *Phila. &c., R. R. Co. v. Boyer*, 97 Penn. St. 91; but there is as to the carrying company. *Iron, &c., R. R. Co. v. Mowery*, 36 Ohio St. 418. See *Centr. Pass. &c., Co. v. Kuhn*, 6 S. W. Rep. 411 (Ky.). No presumption of negligence where injury occurs in pushing a swing door in a passage in going to a boat. *Hayman v. Penn., &c., Co.*, 11 Atl. Rep. 815 (Penn.). Nor where just after getting on a platform of a horse car one is thrown off by a jerk. Sta-

stage coaches, and on like reasons. The presumption of negligence is raised by the injury, but it may be overcome by showing a cause consistent with due care.¹

[*664] *In the case of an injury by a railway train to one who is not a passenger, the rule of presumption would 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. The probabilities are that with the exercise of due caution one will protect himself against injury at such places; and if he receives an injury and complains of it, he may justly be called upon for an explanation. Thoughtlessness, pre-occupation, intoxication, a reckless pushing forward to cross in advance of the train — any of these would be at least as likely to lead to such an injury as carelessness in the managers 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

ger v. Ridgeton Co. 12 Id. 821 (Penn.). See also Brown v. Congress, &c., Ry Co., 49 Mich. 153; Delaware, &c., R. R. Co. v. Napheys, 90 Penn. St. 135. There is no presumption of negligence from fact of death in transit of a horse carried as freight, where there was no collision or accident to the train. Penn. R. R. Co. v. Riordon, 13 Atl. Rep. 324 (Penn.). St. Louis, &c. v. Weakly, 8 S. W. Rep. 134 (Ark.). From an injury to a passenger there is no presumption that he was in the exercise of due care. Bonce v. Dubuque St. Ry Co. 53 Ia. 278. Negligence may be presumed from a fact but not from a presumption from that fact. From the fact that other drivers are overworked it cannot be presumed that a given driver is overworked, and that an injury occurred because of his inattention caused by overwork. Phila., &c., Ry Co. v. Henrice, 92 Penn. St. 431.

¹ Christie v. Griggs, 2 Camp. 79; Crofts v. Waterhouse, 11 Moore, 133; S. C. 3 Bing. 319; Boyce v. California

Stage Co., 25 Cal. 460; Lawrence v. Green, 70 Cal. 417; McKinney v. Neil, 1 McLean, 540; Stokes v. Saltonstoll, 13 Pet. 181; Wall v. Livezey, 6 Col. 465; Sanderson v. Frazier, 8 Id. 79; Anderson v. Scholey, 17 N. E. Rep. 125 (Md.). An injury caused by a gun going off while held in one's hand *prima facie* charges him with negligence. Underwood v. Hewson, 1 Strange, 596; Morgan v. Cox, 22 Mo. 373; Chataigne v. Bergeron, 10 La. Ann. 699. So where it occurs in shooting at a mark. Welch v. Durand, 36 Conn. 182.

It has been said that it is competent in connection with all the facts and circumstances of the case, to infer the absence of fault on the part of the injured party from the known disposition of men to avoid injury to themselves. Northern Cent. R. Co. v. State, 81 Md. 357, and see cases p. *673 notes; but as this would generally, in the case of railway accidents, operate strongly with both parties, it cannot often aid much in reaching a just conclusion.

that negligence existed.¹ Unlike the case of the passenger, who submits himself to the control of the carrier, and is not called upon to do more than to quietly remain in his place, this case is one calling for vigilance on both sides, and in which the want of care by either, would be equally liable to result in injury.

But while the plaintiff's case would require some showing of negligence, it might, perhaps, be easily made out, if the statute required a warning to be sounded as the train approached, and it could be shown that this was neglected. Trace the injury to this neglect and the *prima facie* case is made out; and while the fact of neglect does not conclusively determine that the injury is attributable to it,² yet as the party approaching [*665] a *crossing has reason to expect that the statute will be complied with, he is not put to that degree of vigilance and watchfulness that otherwise would be required of him, and he goes into the evidence with less necessity for full and satisfactory

¹ Skelton v. London, &c., R. Co., L. R. 2 C. P. 631; Cliff v. Midland R. Co., L. R. 5 Q. B. 258. So there is no presumption of negligence from striking an animal upon a crossing. McKissock v. St. Louis, &c., Ry Co., 73 Mo. 456; nor from the explosion of giant powder in a car in a railroad yard, whereby adjacent property is injured. Walker v. Chicago, &c., Ry Co., 33 N. W. Rep. 224 (Ia.). Nor that a freight car door falls on one standing near the track. Case v. Chicago, &c., Co., 69 Ia. 449. Nor that a cow is found dead in an agister's field. Wood v. Reunick, 143 Mass. 453. Nor from fact that when one's horse is running away his carriage damages another. Bouton v. Frink, 51 Conn. 342. So there is in general no presumption of the master's negligence from fact of servant's injury. Kuhns v. Wisconsin &c., Ry Co., 70 Ia. 561; Baldwin v. St. Louis, &c., Co., 68 Ia. 37; Baltimore, &c., Co., v. Neal, 65 Md. 438; Murray v. Denver, &c., Co., 17 Pac. Rep. 484 (Col.); Phila., &c., Co., v. Hughes, 13 Atl. Rep. 286 (Penn.); Sorenson v.

Menasha, &c., Co., 56 Wis. 339. But circumstances may be such as to raise such presumption. Cummings v. Nat. Furn. Co., 60 Wis. 603.

² The failure to ring a bell or sound a whistle does not alone make out a case of liability. Quincy, &c., R. R. Co. v. Wellhoener, 73 Ill. 60; Chicago, &c., R. R. Co., v. Bell, 70 Ill. 102; Kidder v. Dunstable, 11 Gray. 342; Cleveland, &c., R. R. Co. v. Elliott, 29 Ohio, (N. S.) 340; Pakalinsky v. New York, &c., R. R. Co., 82 N. Y. 424; Railroad Co. v. Houston, 95 U. S. 697; Zimmerman v. Hannibal, &c., R. R. Co., 71 Mo. 76. See International, &c., Ry Co. v. Gray, 65 Tex. 32; Baltimore, &c., R. R. Co. v. Miller, 29 Md. 252. Especially if sounding the alarm could not have prevented the injury. Ill. Cent. R. R. Co. v. Phelps, 29 Ill. 447; Toledo, &c., R. R. Co. v. Jones, 76 Ill. 311; Toledo, &c., R. R. Co. v. Durkin, 76 Ill. 335. Compare Beisiegel v. N. Y. Cent. R. R. Co., 34 N. Y. 622; Steves v. Oswego, &c., R. R. Co., 18 N. Y. 423; Hoffman v. Union Ferry Co., 68 N. Y. 355.

explanation of his own movements than would otherwise be demanded. He has shown fault in the railway company when he has shown the failure to sound the alarm ; and as the injury is precisely such an one as the alarm was intended to prevent, some presumption that the injury resulted from the neglect may well be indulged unless his own fault was manifest.

The rule applied to carriers of passengers is not a special rule, to govern only their conduct, but is a general rule which may be applied wherever the circumstances impose upon one party alone the obligation of special care. The case may be instanced of a householder on a prominent street of a city repairing his roof. While thus engaged a slate falls from the roof and injures a person passing along the street below. Here, manifestly, it was the duty of the householder to take such precautions as would reasonably guard against such an injury ; all the obligation of special care was upon him, and the passer-by had a right to assume that no work being done over the walk was to subject him to danger.¹ True, the act of God, or some excusable accident may have caused the slate to fall, but the explanation should come from the party charged with the special duty of protection.

It is thus perceived that 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. Some other cases may not be quite so plain, and yet in these a similar presumption may go far to support the plaintiff's case. The case of collisions in the use of the highway is in point. The custom of this country, in some States *enacted into statute law, requires that where [*666] teams approach and are about to pass in the highway, each shall keep to the right of the center of the traveled portion of the road. This is a regulation to avoid collisions, and if one neglects it he is justly required to take upon himself unusual

¹ *Byrne v. Boadle*, 2 H. & C. 723. So if piece of zinc falls from a completed roof. *Khron v. Brock*, 144 Mass. 516. See *Hunt v. Hoyt*, 20 Ill. 544. Also, cases of injury by throwing snow from roofs. *Corrigan v. Union Sugar Refinery*, 98 Mass. 577;

Jewell v. Grand Trunk R. Co., 55 N. H. 84. Where one walking on the street is burnt by a cinder falling from an elevated railroad, there is a presumption of negligence. *Wiedmer v. New York El. R. R. Co.*, 41 Hun, 284.

care to avoid mischief,¹ and, if an accident follow, an explanation of the occurrence must begin with some presumption against him. Still, the other party, though he has obeyed the statute and kept to the proper side of the road, is not at liberty to neglect all further precautions, and if he can prevent injury by the exercise of ordinary care, he will have no ground for complaint if he is injured through a failure to exercise it.² The being on the wrong side of the road is a fault, but it is not one from which a collision necessarily results, and if the collision only followed the concurrence of this fault with others equally blameworthy, the apparent case which the first fault went far to establish is met and overcome by the further showing.³

Whether Negligence is a question of Law. A point of very high importance is, 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. It is of high importance because in a great proportion of cases where injuries are supposed to have resulted from negligence the case of the injured party is one which appeals strongly to sympathy and *this sympathy is in danger of influencing improperly—perhaps insensibly—the minds of those who are called upon to consider the question of redress. If a jury is summoned, the influence upon their minds is likely to be more than upon the mind of the judge. The judge is the representa-

¹ *Pluckwell v. Wilson*, 5 C. & P. 375; *Chapin v. Hawes*, 3 C. & P. 554; *Wilson v. Rockland, &c., Co.*, 2 Harr. 67; *McLane v. Sharpe*, 2 Harr. 481; *Daniels v. Clegg*, 28 Mich. 32; *Brooks v. Hart*, 14 N. H. 307.

² See ante, p. 182, and cases cited; also, *Clay v. Wood*, 5 Esp. 44; *Wayde v. Carr*, 2 D. & R. 255; *Turley v. Thomas*, 8 C. & P. 103; *Kennard v. Burton*, 25 Me. 39; *Bigelow v. Reed*, 51 Me. 325; *McLane v. Sharpe*, 2 Harr. 481. If an obstruction forces one over on the wrong side of the road and he runs against another without fault, the case is to be treated as one of inevitable accident, and he is not liable. *Strouse v. Whittlesey*,

41 Conn. 559. The fact that one is on the wrong side of the road is no evidence of negligence in an action brought by one who was injured while crossing the road on foot. *Lloyd v. Ogleby*, 5 C. B. (N. S.) 667.

³ The party on the wrong side of the road should be held responsible for an injury, unless it appear clearly that the other had ample means and opportunity to prevent it. *Chapin v. Hawes*, 3 C. & P. 554. See the subject discussed in *Hoffman v. Union Ferry Co.*, 68 N. Y. 385. And, see further, *Sheridan v. Brooklyn, &c., R. R. Co.*, 36 N. Y. 39; *Lane v. Atlantic Works*, 107 Mass. 104.

tive of order and stability in the State; his training has impressed upon his mind the necessity of fixed laws, and has taught him how destructive of these is the yielding to sympathy. He knows that "hard cases are apt to make bad law." Moreover, when corporations are defendants in suits for negligence, the popular prejudice is apt to run strongly against them, and this may affect the jury when it might not affect the judge. Defendants are, therefore, likely to prefer that the judge himself shall dispose of the question of negligence, in the belief that in his rulings they will be safer than in the uncertain conclusions of the popular tribunal.

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 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. But if it is not a question of law he will not be likely to venture an opinion upon it, and if he does the jury may disregard it.

On the general question whether the law can draw the conclusion of negligence, the following considerations are presented: The question broadly stated must be, whether, 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. Manifestly this is impossible. There is no clear line of either moral or legal right by which the infinite diversity of cases where injury has resulted may be classified. Seldom, indeed, is one case in its facts exactly like one 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 certain so as to constitute guides; but the rule of one case can never constitute a guide in the next if the facts and the conclusions flowing from them are of that indeterminate 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 and could be *no real doubt in the minds of fair men. Thus, [*668] if the engineer of a train of cars were to run it at a maximum rate of speed through a city, across its principal streets, at an hour of the day when many persons would be likely to be

passing, and a person should be run over at one of the crossings, the case would seem to be so clearly one of reckless conduct that the judge might well say to the jury that it was a case of negligence and that the law so pronounced it. If, on the other hand, the engineer were in the night time, when moving at customary speed, to run over a drunken man lying upon the track at a point distant from crossings and where danger was not to be anticipated, it would seem equally plain that a conclusion exonerating the engineer should be drawn.¹ It is not to be supposed that two men equally fair could differ concerning such cases.

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 conclusion so doubtful, that different minds would be unable to agree concerning the existence of fault, or the responsibility for it. The question will often be, does the defendant appear to have exercised the degree of care which a reasonable man would be expected to exercise under like circumstances? To such a question a man of exceeding cautious temperament might respond that he did not; another more sanguine and bold might say he did; and by the side of one or the other of these would the rest of the community range themselves, each person largely affected by temperament and perhaps by his own experience, but firmly maintaining that rule to be a proper one which now, on a retrospective examination of the facts, seems to him to be such.

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; a rule which his predecessor might not have accepted, and which his successor may reject, and upon which a court of review may reverse his action, not because the facts are differently regarded, but because judges are men and

[*669] men are *different. As has been said in one case, it must be a very clear case, indeed, which would justify the

¹ Toledo, &c., R. R. Co. v. Miller, 76 Ill. 278; Grows v. Maine Cent. R. R. Co., 67 Me. 100. Williams v. South. Pac. R. Co., 72 Cal. 120. See Kean v. Balt., &c., Co., 61 Md. 154.

Same case 65 Md. 394; Houston, &c., Ry. Co. v. Sympkins, 54 Tex. 613; McClelland v. Louisville, &c., Co., 24 Ind. 276.

court in taking upon itself this responsibility. For when the judge decides that a want of due care is or is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and measuring the conduct of the party by that, turns the case out of court or otherwise disposes of it upon his opinion of what a reasonably prudent man ought to have done under the circumstances.¹ But this is only one of many difficulties when the court takes into its own hand the decision upon questions of negligence. It often happens that fault in some one is unquestionable, and yet that the deduction of negligence is in dispute, because the duty to guard against it is disputable and is disputed. Thus, a passenger by railway allows his arm to project somewhat out of the window, and he is injured by its striking some object which is being passed. Some one, manifestly, is chargeable with want of due care: either the passenger in allowing his arm to project at all, or the railway company in not taking care that nothing shall be so near to the cars as that so natural an act as the putting the hand outside shall peril a limb. In some cases it has been said the passenger is guilty of negligence in law;² but other

¹ *Detroit, &c., R. R. Co. v. Van Steinburg*, 17 Mich. 99. See *Leavitt v. Chicago, &c., Ry Co.*, 64 Wis. 238; *Cumberland, &c., R. R. Co. v. State*, 37 Md. 156; *Lewis v. Baltimore & Ohio R. R. Co.*, 38 Md. 589; *McMahon v. Nor. Cent. R. R. Co.*, 39 Md. 438; *Healey v. City R. R. Co.*, 28 Ohio, (n. s.) 23; *Eppendorf v. Railroad Co.*, 69 N. Y. 195; *Lake v. Milliken*, 62 Me. 240; *Estes v. Atlantic, &c., R. R. Co.*, 63 Me. 303; *Garlick v. Dorsey*, 48 Ala. 220. "Negligence in one sense is a quality, attaching to acts dependent upon and arising out of the duties and relations of the parties concerned, and is as much a fact to be found by the jury as the alleged facts to which it attaches, by virtue of such duties and relations." ROBERTS, Ch. J., in *Texas, &c., R. R. Co. v. Murphy*, 46 Tex. 356, 366. What duty rested upon the defendant is matter of law; whether the duty was performed, of

fact. *Nolan v. New York, &c., R. R. Co.*, 53 Conn. 461; *Penn. Co. v. Conlan*, 101 Ill. 93; *Yarnall v. St. Louis, &c., Co.*, 75 Mo. 575; *Dyer v. Erie Ry Co.*, 71 N. Y. 228. If there is a reasonable doubt as to the facts, or if fair minded men might draw different conclusions from the facts, the question is for the jury. *Nugent v. Boston, &c., R. Corp.*, 12 Atl. Rep. 797 (Me.); *Penn. R. Co. v. Peters*, 9 Atl. Rep. 317 (Penn.); *McDermott v. San Francisco, &c., Co.*, 68 Cal. 33; *O'Neill v. Chicago, &c., Ry Co.*, 1 McCrary 505; *Lincoln v. Gillilan*, 18 Neb. 114; *Ohio, &c., R. Co. v. Col-larn*, 73 Ind. 261. See *Hogan v. Chicago, &c., Ry Co.*, 59 Wis. 139. See, further, *Smith v. Fletcher*, L. R. 9 Exch. 64; *Bridges v. North London R. Co.*, L. R. 7 H. L. 213.

² *Todd v. Old Colony R. R. Co.*, 3 Allen, 18; *Pittsburgh, &c., R. R. Co. v. McClurg*, 56 Penn. St. 294, overruling *New Jersey R. R. Co. v. Ken-*

courts, with certainly some good reason, hold that the question of responsibility in such a case must be one of fact, and might be different according as the circumstances varied.¹

[*670] *The proper conclusion seems to be this: 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. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute. On the contrary he should say to them, "In the judgment of the law this conduct was negligent," or, as the case might be, "There is nothing in the evidence here which tends to show a want of due care." In either case he draws the conclusion of negligence or the want of it as one of law.

Many cases would be very clear if they were not complicated with questions of contributory negligence. Such are the cases of a 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. The case might be equally clear if the railway company were to send out a train without brakes, and thereby an injury should result through the impossibility of stopping it when a danger appeared; or if one were to set a bonfire in a town while a fierce wind was raging; or if one were to deliver a loaded gun as a plaything to a young child; or if he were to send a package of dynamite by express without disclosing its

nard, 21 Penn. St. 203; Indianapolis, &c., R. R. Co. v. Rutherford, 29 Ind. 82; Louisville, &c., R. R. Co. v. Sickings, 5 Bush, 1; Pittsburgh, &c., R. R. Co., v. Andrews, 39 Md. 329; Dun v. Seaboard, &c., R. R. Co., 78 Va. 645.

¹ Spencer v. Milwaukee, &c., R. R. Co., 17 Wis. 487; Holbrook v. Utica, &c., R. R. Co., 12 N. Y. 236; Dahl-

berg v. Minn. St. Ry Co., 32 Minn. 404; Summers v. Crescent City R. R. Co., 34 La. An. 139; See Chicago, &c., R. R. Co. v. Pondrom, 51 Ill. 333; Farlow v. Kelly, 108 U. S. 288. If the injury occurs from upsetting of coach it is not negligence that one's arm is outside of the rail. Sanderson v. Frazier, 8 Col. 79.

dangerous nature. Concerning such cases no one should be in doubt. But in the great majority of cases the question of negligence on any given state of facts must be one of fact.¹

¹ *Railroad Company v. Stout*, 17 Wall. 657; *Hawks v. Northampton*, 121 Mass. 10; *Chicago, &c., R. Co. v. Hutchinson*, 120 Ill. 587; *Schmidt v. Chicago, &c., R. R. Co.*, 83 Ill. 405; *Chicago, &c., R. R. Co. v. Lee*, 60 Ill. 501; *Cramer v. The City of Burlington*, 42 Iowa, 315; *Artz v. Chicago, &c., R. R. Co.*, 44 Iowa, 284; *Belair v. Chicago, &c., R. R. Co.*, 43 Iowa, 663; *Colorado, &c., R. Co. v. Martin*, 7 Col. 592; *Lake Shore, &c., R. R. Co. v. Miller*, 25 Mich. 274; *Hassenger v. Mich. Centr. R. R. Co.*, 48 Mich. 205; *Kan. Pac. R. Co. v. Brady*, 17 Kan. 388; *Atchinson, &c., R. Co. v. Bales* 16 Kan. 252; *Perry v. S. P. &c., R. R. Co.*, 50 Cal. 578; *McNamara v. N. P. &c., R. R. Co.*, 50 Cal. 581; *Conroy v. Vulcan Iron Works*, 65 Mo. 35; *Keegan v. Kavanaugh, et al.*, 62 Mo. 231; *Georgia, &c., Co. v. Neely*, 56 Geo. 541; *Allen v. Hancock*, 16 Vt. 230; *Rice v. Montpelier*, 19 Vt. 470; *Hill v. New Haven*, 37 Vt. 501; *Gagg v. Vetter*, 41 Ind. 228; *Pittsburgh, &c., R. R. Co. v. Pearson*, 72 Penn. St. 169; *Sheehy v. Burger*, 62 N. Y. 558; *Spooner v. Brooklyn*, 54 N. Y. 230; *Delany v. Milwaukee, &c., R. R. Co.*, 33 Wis. 67; *Wheeler v. Westport*, 30 Wis. 392; *Townley v. Chicago, &c., Co.*, 53 Wis. 626. Failure to give statutory crossing signals is negligence in law. *Chicago, &c., R. Co. v. Boggs*, 101 Ind. 522 and cases page 788, note 1. So is the sale contrary to statute of cartridges to a child. *Binford v. Johnston*, 82 Ind. 426. The court must declare negligent a failure to observe a duty imposed by statute. *St. Louis, &c., R. R. Co. v. Huggins*, 20 Ill. App. 639.

The frightening of horses by the use of a steam whistle may or may

not be a negligent injury according to circumstances. *Knight v. Good-year Co.*, 38 Conn. 438; *Philadelphia, &c., Co. v. Stinger*, 78 Penn. St. 219. So may be an injury at a road crossing which might have been avoided by stationing a flagman there. *Delaware, &c., R. R. Co. v. Toffey*, 38 N. J. 525, citing *Pennsylvania R. R. Co. v. Mathews*, 36 N. J. 531.

It is not negligence in law that the speed of a railroad train is not slackened at a road crossing. *Zeigler v. N. E. R. R. Co.*, 7 Sou. Car. (N. S.) 402. The subject is much discussed in *Cleveland v. N. J. Steamboat Co.*, 68 N. Y. 306, 309, where FOLGER, J., speaking of the duty of carriers of passengers, says: "That duty is to use the strictest diligence to protect the life and person. By this rule the defendant is liable for any injury which might reasonably be anticipated to occur, in view of all the circumstances, and of the nature of the carriage, and the number and character of the persons on the boat: *Flint v. Nor. & N. Y. Trans. Co.*, 34 Conn. 554; *Putnam v. Broadway, &c., R. R. Co.*, 55 N. Y. 108, 119. This broad statement has limits. A carrier of passengers is not bound to foresee and provide against casualties never before known and not reasonably to be expected: *Dougan v. Ch. Tr. Co.* 56 N. Y. 1; see, also, *Wyckoff v. Queens Co. Ferry Co.*, 56 N. Y. 656. Hence his duty is not to be estimated by what, after an accident, then first appears to be a proper precaution against a recurrence of it. *Bowen v. N. Y. Cent. R. R. Co.*, 18 N. Y. 403; *Dougan's case supra.*"

So where gas pipe was made to leak by steam pipe laid by municipal au-

[*671] And *in no case where the facts are in dispute can the judge 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

It should be added that the principles here stated are applicable as much when negligence is relied upon to defeat an action as when the plaintiff seeks to recover upon it.²

thority in the street and an explosion was caused, the city was held not liable where all precautions had been taken which at the time of laying the pipe seemed needful. *Hunt v. New York*, 16 N. E. Rep. 82 (N. Y.).

Where a passenger is injured by a loaded car running from an inclined side track upon the main track, the court cannot say as a matter of law that there was no negligence though the car had been securely blocked. *Smith v. New York, &c., R. R. Co.*, 46 N. J. L., 7. See *Smith v. Atchison, &c., R. R. Co.*, 25 Kan. 738; *McKimble v. Boston, &c., R. R. Co.*, 141 Mass. 403. So the court cannot say there was negligence where one person has been unintentionally shot by another and it is not clear whether the explosion was caused by the negligent pointing of a gun or by an accidental turning of a fence rail on which the latter was sitting. *Moebus v. Becker*, 46 N. J. L., 41. Racing on the public street is negligence *per se*. *Potter v. Moran*, 61 Mich. 60. Rapid driving is not. *Carter v. Chambers*, 79 Ala. 223. Leaving mule and wagon unhitched and unattended in a street is. *Bowen v. Flanagan*, 4 S. E. Rep. 724. (Va.). So building a bridge only four feet above the top of a car. *Louisville, &c., Ry Co. v. Wright*, 17 N. E. Rep. 584 (Ind.).

¹ *Barber v. Essex*, 27 Vt. 62. See *Marcott v. Marquette, &c., R. R. Co.*, 47 Mich. 1; *Longenecker v. Penn. R. R. Co.*, 105 Penn. St. 328; *Chicago, &c., Ry Co., v. Carey*, 115 Ill. 115;

Dublin, &c., Ry Co. v. Slattery, L. R. 3 App. Cas. 1155. Compare *Randall v. Balt., &c., R. R. Co.*, 109 U. S. 478; *Goodlett v. Louisville, &c., R. R. Co.*, 122 U. S. 391, 410; *Bloomfield v. Burlington, &c., Ry Co.*, 38 N. W. Rep. 431 (Ia.).

² *Donaldson v. Milwaukee, &c., R. R. Co.*, 21 Minn. 233; *McMahon v. Nor. Cent. R. R. Co.*, 39 M. l. 435; *N. J. Cent. R. R. Co. v. Moore*, 24 N. J. 824; *Orange, &c., R. R. Co. v. Ward*, 47 N. J. L. 560; *Fassett v. Roxbury*, 55 Vt. 552; *Teipel v. Hilsendogen*, 44 Mich. 461; *Kaminitsky v. North East. R. R. Co.*, 25 S. C. 53. If the facts and inferences from them are undisputed the question is for the court. *Lehigh, &c., R. R. Co. v. Greiner*, 113 Penn. St. 600; *Delaware, &c., R. R. Co. v. Cadow*, 14 Atl. Rep. 450 (Penn.); *Woodward Iron Co. v. Jones*, 80 Ala. 123.

It is negligence in law to leave a street railway car by the front entrance in disregard of the known rule of the road forbidding it, even though allowed by the driver. *Baltimore, &c., R. Co. v. Wilkinson*, 30 Md. 224. So it is negligence not to look out upon the track in approaching a railroad crossing to cross it. *Cent. R. R. Co. v. Feller*, 85 Penn. St. 226. See, also, *Cleveland, &c., R. R. Co. v. Elliott*, 28 Ohio, (N. S.) 340, and see cases p. *680, *post*. So is getting off a moving train. *Bardwell v. Mobile, &c., R. R. Co.*, 63 Miss. 574; *Lake Shore, &c., Ry Co. v. Bangs*, 47 Mich. 470; *Reibel v. Cincinnati,*

***Contributory Negligence.** It may happen that the [*672] injury complained of was brought about by the concurring negligence of the party injured and of the party of whose conduct he complains. This presents a case 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

&c., Co., 17 N. E. Rep. 107 (Ind.) But, under peculiar circumstances, held a question for the jury. *Shannon v. Boston, &c., R. R. Co.*, 78 Me. 52. For a child to jump off in excitement and through fear of being carried by is not negligence. *Hemmingway v. Chicago, &c., Co.*, 37 N. W. Rep. 804 (Wis.). If ordered by the conductor, and the train going slowly, it is not negligence *per se*. *Balt., &c., R. R. Co. v. Leapley*, 66 Md. 571. See *McIntyre v. New York, &c., R. R. Co.*, 37 N. Y. 287. Compare *Stewart v. Boston, &c., R. Co.*, 16 N. E. Rep. 466 (Mass.). Getting on a moving train is negligent. *Gulf, &c., Ry Co. v. Ryan*, 7 S. W. Rep. 83 (Tex.); *Solomon v. Manhattan Ry Co.* 103 N. Y. 437; *Novock v. Mich. Cent. R. R. Co.*, 29 N. W. Rep. 535 (Mich.). So may be the entering of a street car when in motion. *Eppendorf v. Railroad Co.*, 69 N. Y. 193. Going between cars in a train temporarily cut, knowing the facts. *Lake Shore, &c., Ry Co. v. Pinchin*, 13 N. E. Rep. 677 (Ind.) Lying down drunk on a track. *Yarnall v. St. Louis, &c., Ry Co.*, 75 Mo. 575; *Denman v. St. Paul, &c., R. R. Co.*, 26 Minn. 357. But intoxication to some extent is not conclusive of contributory negligence in case of an injury upon a highway. *Seymer v. Lake*, 66 Wis. 651. Failing to get off a hand car and walk or to go to a fire when one's feet are freezing is negligent. *Farmer v. Centr. Ia. Ry Co.*, 67 Ia. 136. So if one in hurry of working falls into an elevator shaft,

the danger of which he appreciates. *Taylor v. Carew Mfg. Co.*, 140 Mass. 150. So carelessly grasping uninsulated part of a wire in repairing electric light line. *Piedmont El. &c., Co. v. Patten*, 6 S. E. Rep. 4 (Va.). So if one knowing danger continues to work, undermining a dangerous wall. *Campbell v. Lunsford*, 3 South. Rep. 522 (Ala.). See *Naylor v. Chicago, &c., Ry Co.*, 52 Wis. 661. Leaving valuables in sleeping car berth while in wash-room. *Root v. New York, &c., Co.*, 28 Mo. App. 199. Not contributory negligence in law that blind man, accustomed to walk in street, fell into an open hatchway where men were working. *Smith v. Wildes*, 143 Mass. 556. Nor for one rightfully on an engine to ride on the footboard at engineer's order. *Lake Shore, &c., Ry Co. v. Brown*, 14 N. E. Rep. 192 (Ill.). Nor on foot board of open car. *City Ry Co. v. Lee*, 14 Atl. Rep. 883 (N. J.). Nor that passenger by coach at night knows that no lights are carried nor that an over-set is caused by driving at his suggestion out of road. *Anderson v. Scholey*, 17 N. E. Rep. 125 (Md.). See, for further illustrations, *Chappell v. Bradshaw*, 13 Atl. Rep. 50 (Md.); Ala., &c., R. Co. v. *Yarbrough*, 3 South. Rep. 447 (Ala.); *Coleman v. Second Ave., &c., Co.*, 41 Hun, 380. If one uses knowingly a defective or obstructed sidewalk or roadway, the question of his negligence is usually for the jury. *Bullock v. Mayor, &c., of New York*, 99 N. Y. 654; *Gilbert v. Boston*, 139 Mass. 313; *Emporia v.*

leave the consequences to rest where they have chanced to fall.¹ Therefore, although the injury complained of was caused by the negligence of the defendant, yet if legal fault contributing to

Schmidling, 33 Kan. 485; Baltimore v. Holmes, 39 Md. 243; Fulliam v. Muscatine, 70 Ia. 436; Spearbracker v. Larrabee, 64 Wis. 573; Henry, &c., Turnp. Co. v. Jackson, 86 Ind. 111. Evansville, &c., Co. v. Carvener, 14 N. E. Rep. 739 (Ind.); Gulf, &c., Ry Co. v. Gascamp, 7 S.W. Rep. 227 (Tex.); Cantwell v. Appleton, 37 N. W. Rep. 813 (Wis.); Shook v. Cohoes, 15 N. E. Rep. 531 (Md.); Lowell v. Watertown, 58 Mich. 563; Monongahela Bridge Co. v. Bevard, 11 Atl. Rep. 575 (Penn.); Altoona v. Lotz, 114 Penn. St. 238; Powers v. Chicago, 29 Ill. App. 178. But the danger may be so great and apparent as render the use of the way negligent in law. Merrill v. North Yarmouth, 78 Me. 200; Schaefer v. Sandusky, 33 Ohio St. 246; Bruker v. Covington, 69 Ind. 33; Hartman v. Muscatine, 70 Ia. 511; especially if another route is open. Pittsburgh, &c., Ry Co. v. Taylor, 104 Penn. St. 306; McGinty v. Keokuk, 66 Ia. 725. See St. Louis, &c., Ry Co. v. Morgart, 8 S. W. Rep. 179 (Ark.).

Where alternatives are presented to a traveler upon a highway as modes of escape from collision with an approaching traveler, it is a question of fact whether either might not fairly be chosen by an intelligent and prudent person. Larrabee v. Sewall, 66 Me. 376.

Where one is placed by the negligent acts of another in such a position that he is compelled to choose upon the instant, and in the face of a grave and impending peril, between two hazards, and he makes such a choice as a person of ordinary prudence in the same position might make, and an injury results there-

from, the fact that if he had chosen the other hazard he would have escaped injury does not prove contributory negligence. Twomley v. Railroad Co., 69 N. Y. 153. For the same principle, see Stokes v. Saltonstall, 13 Pet. 181; Penn. R. R. Co. v. Kilgore, 83 Penn. St. 292; Frink v. Potter, 17 Ill. 406; Macon, &c., R. R. Co. v. Winn, 26 Geo. 250; Filer v. New York Cent., &c., Co., 49 N. Y. 47; Railroad Co. v. Mowery, 36 Ohio St. 418; Mark v. St. Paul, &c., Co., 30 Minn. 493; Brown v. Chicago, &c., Co., 54 Wis. 342. If one, lulled by another into a feeling of security, is hurt, the latter cannot say he should have been on his guard. Chicago, &c., R. Co. v. Goebel, 119 Ill. 515.

¹ Gibbon v. Paynton, 4 Burr. 2298; Clay v. Willan, 1 H. Bl. 298. "There must be a wrong as well as damage, and there is no legal injury where the loss is the result of the common fault of both parties." Rathbun v. Payne, 19 Wend. 399, per ROBINSON, J. In Admiralty contributory negligence does not bar recovery. The Max Morris, 23 Fed. Rep. 881, note.

The doctrine of contributory negligence applies to statutory actions. Curry v. Chicago, &c., R. R. Co., 43 Wis. 665, where the subject is carefully and ably examined by RYAN, Ch. J. See, also, Keech v. Baltimore, &c. R. R. Co., 17 Md. 32; Little v. Brockton, 123 Mass. 511 and cases cited; Taylor v. Carew Mfg. Co. 143 Mass. 470; Western U. Tel. Co. v. McDaniel, 103 Ind. 204; Nugent v. Vandervoer, 39 Hun. 322. Compare Louisville, &c., R. R. Co. v. Com. 80 Ky. 143. Under the Mass. act of 1874 as to death of a railway passen-

the injury is imputable to the plaintiff himself, he will not be heard to complain. This is the general rule.

Respecting the application of this rule the following questions will frequently arise:

1. Upon whom is the burden of proof when contributory negligence is in question?
2. What must be the nature and degree of contributory negligence which will disentitle an injured party to maintain a suit?
3. What is the rule where the party injured, and whose want of care contributed to the injury, was not morally accountable therefor, by reason of immaturity, mental unsoundness or imbecility?

*Upon each of these questions some remarks seem to [*673] be called for.

Burden of Proof. Where negligence is the ground of an action, it devolves upon the plaintiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances under which it occurred. If from these circumstances it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has by showing them disproved his right to recover.¹ But going no further, it may be said that there is a legal presumption against negligence upon which he is at liberty to rely,² thus casting the burden of showing contributory negligence upon the defendant. Many cases so hold.³ But in other cases it is said that negli-

ger, the rule is otherwise. *McKimble v. Boston, &c., R. R. Co.*, 139 Mass. 542; *Com. v. Boston, &c., R. R. Co.*, 134 Mass. 211. Contributory negligence is a defense to an action against a physician for malpractice. *Lower v. Franks*, 17 N. E. Rep 630 (Ind.).

¹*See Railroad Co. v. Gladmon*, 15 Wall. 401; *Frech v. Philadelphia, &c., R. R. Co.*, 39 Md. 574; *McQuilken v. Cent. Pac. R. R. Co.*, 50 Cal. 7.

²*Hoyt v. Hudson*, 10 Wis. 105; *Pennsylvania R. R. Co. v. Weber*, 76 Penn. St. 157; *Weiss v. Pennsylvania R. R. Co.*, 79 Penn. St. 387; *Paducah, &c., R. R. Co. v. Hoehl*, 12 Bush, 41; *County Comrs. v. Burgess*,

61 Md. 29; *Baltimore, &c., R. R. Co. v. McKenzie*, 81 Va. 71; *Montgomery, &c., Co. v. Chambers*, 79 Ala. 338; *Thorpe v. Miss., &c., Ry Co.*, 89 Mo. 650; *MacDougall v. Cent. Pac. R. R. Co.*, 63 Cal. 431. At least if plaintiff's evidence does not indicate such negligence; *Gulf, &c., Ry Co. v. Redeker*, 67 Tex. 181. If it raises a presumption of it, the burden is on the plaintiff. *Railroad Co. v. Whitacre* 35 Ohio St. 627. If it shows it clearly, there is nothing for the jury. *State v. Balt., &c., R. R. Co.*, 58 Md. 482; *Hoth v. Peters*, 55 Wis. 405.

³*Railroad Co. v. Gladmon*, 15 Wall. 401; *McQuilken v. Cent. Pac. R. R.*

gence in one party presupposes the duty of care imposed upon him for the protection of the other; and that the plaintiff does not show the existence of this duty until he has first shown his own relative position, and that he was himself in the exercise of proper care. In this view the absence of contributory negligence becomes a part of the plaintiff's case, and should appear, *prima facie* at least, before the defendant can be called upon to answer the negligence imputed to himself.' Nor is this calling upon him to prove a negative; it is requiring of him merely that he show the duty he counts upon and its breach.

*674] *Negligence and Recklessness Co-operating. Where the conduct of the defendant is wanton and willful, or where it indicates that degree of indifference to the rights of others which may justly be characterized as recklessness, the

Co. 50 Cal. 7; St. Paul v. Kuby, 8 Minn. 154; Wheeler v. Westport, 30 Wis. 892; Thompson v. Nor. Mo. R. R. Co., 51 Mo. 190; Cleveland, &c., R. R. Co. v. Rowan, 66 Penn. St. 393.

¹Lane v. Crombie, 12 Pick. 177; Wilson v. Charlestown, 8 Allen, 137; Wheelock v. Boston, &c., R. R. Co., 105 Mass. 203; Galena, &c., R. R. Co. v. Yarwood, 15 Ill. 468; Dyer v. Talcott, 16 Ill. 300; Galena, &c., R. R. Co. v. Dill, 22 Ill. 264; Lake Shore, &c., R. R. Co. v. Miller, 25 Mich. 274; Teipel v. Hilsendegen, 44 Mich. 461; Button v. Hudson R. R. Co. 18 N. Y. 248; Warner v. N. Y. Cent. R. R. Co., 44 N. Y. 465; Wendell v. New York, &c., R. R. Co., 91 N. Y. 420; Merrill v. Hampden, 26 Me. 234; Lesan v. Maine Centr. R. R. Co., 77 Me. 85; Hyde v. Jamaica, 27 Vt. 443; Bovee v. Danville, 53 Vt. 183; Moore v. Cent. R. R. Co., 24 N. J. 268, 284; Park v. O'Brien, 23 Conn. 339; Jeffersonville, &c., R. R. Co. v. Lyon, 55 Ind. 477; Indiana, &c., Ry Co. v. Greene, 106 Ind. 279; Murphy v. Chicago, &c., R. R. Co., 45 Iowa, 661; Hawes v. Burlington, &c., Ry Co., 64 Ia. 315; Miss. Cent. R. R. Co. v. Mason, 51 Miss. 234; Vicksburg v.

Hennessey, 54 Miss. 391; Bigelow v. Reed, 51 Me. 325; Owens v. Richmond, &c., R. R. Co., 88 N. C. 502. As to what will satisfy this rule, see Raymond v. Burlington, &c., Ry Co., 65 Ia. 152; Hart v. Hudson River, &c., Co., 84 N. Y. 56. The requisite care without direct proof may be inferred from absence of fault where sufficient circumstances are shown to exclude the idea of negligence. Maguire v. Fitchburg R. R. Co., 15 N. E. Rep. 904 (Mass.); Burns v. Chicago, &c., Ry Co., 69 Ia. 450; see Greany v. Long. Isld. R. R. Co., 101 N. Y. 419; Cahill v. Hilton, 106 N. Y. 512. See Northern Cent. R. Co. v. State, 31 Md. 357. In Wakelin v. London, &c., Co., L. R. 12 App. Cas. 41, it is held that the mere fact of death at a level crossing is not basis for the inference of due care. See Tolman v. Syracuse, &c., Co., 98 N. Y. 193. But there being nothing to show carelessness it is held in Schum v. Penn. R. R. Co., 107 Penn. St. 8, that care is to be presumed in such case, and see Keim v. Union Ry, &c., Co., 99 Mo. 314.

doctrine of contributory negligence 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.³ The fact that one has carelessly put himself in a place of danger is never an excuse for another purposely or recklessly injuring him. Even the criminal is not out of the protection of the law,⁴ and is not to be struck down with impunity by other persons. If, therefore, 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.⁵ Or it may be said that in such a case the negligence of the plaintiff only put him in 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.⁶

¹ *Hartfield v. Roper*, 21 Wend. 615; *Vandegrift v. Rediker*, 23 N. J. 185; *Lafayette, &c., R. R. Co. v. Adams*, 26 Ind. 76; *Indianapolis, &c., R. R. Co. v. McClure*, 26 Ind. 370; *Mulherin v. Delaware, &c. R. R. Co.*, 81 Penn. St. 366; *Norris v. Litchfield*, 85 N. H. 271; *Daley v. Norwich, &c., R. Co.*, 26 Conn. 591; *Chicago, &c., R. Co. v. Donahue*, 75 Ill. 106; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Tanner v. Louisville, &c., R. R. Co.*, 60 Ala. 621. See *Claxton's Admr. v. Railroad Co.*, 13 Bush. 636, and cases cited. *Banks v. Highland St. Ry Co.*, 136 Mass. 485. To allow one to recover in spite of contributory negligence, the act must have been done with design to produce injury or so that its natural and probable consequence would be to inflict injury on others. *Belt. R. R., &c., Co. v. Mann*, 107 Ind. 89; *Louisville, &c., Co. v. Ader*, 110 Ind. 376. An act may be "willful" in this sense without a direct intent. It may be such if reckless. *Palmer v. Chicago, &c., Co.*, 14 N. E. Rep. 70 (Ind.). Injury caused by dropping of a toll gate to

prevent passage without paying is not willful. *Brannen v. Kokomo, &c., Co.*, 17 N. E. Rep. 202 (Ind.).

² See ante, p. 181. While the mere fact that a plaintiff is doing an unlawful act when he is injured may not charge him, as matter of law, with contributory negligence, he cannot recover if the unlawful act is a cause contributing to the injury and not merely a condition of it. This was a case of collision with plaintiff's cab standing as forbidden by ordinance. *Newcomb v. Boston Prot. Dep't*, 16 N. E. Rep. 555 (Mass.).

³ *Brown v. Hannibal, &c., R. R. Co.*, 50 Mo. 461; *Macon, etc., R. R. Co. v. Davis*, 18 Geo. 679; *State v. Manchester, &c., R. R. Co.*, 52 N. H. 528; *Cooper v. Cent. R. R. Co.*, 44 Iowa, 134; *Kerwhacker v. Cleveland, &c., R. R. Co.*, 8 Ohio, (N. S.) 172.

⁴ See *Balt. & Ohio R. R. Co. v. State*, 33 Md. 542, 554. This seems to be the precise doctrine applied in *Burham v. St. Louis, &c., R. R. Co.*, 56 Mo. 338. See *Greenland v. Chaplin*, 5 Exch. 243; *O'Brien v. McGlinchy*, 68 Me. 552; *Gunter v. Wick-*

The General Rule of Contributory Negligence. Regarding the case of a negligent injury the general result of the authorities seems to be, 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 at [*675] tempt any *apportionment thereof. This is the English rule, and it has been accepted by the courts in this country with few exceptions. In a leading English case, often quoted, in which the responsibility for the collision of vessels was in question, Mr. Justice WIGHTMAN said: "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary or common care and caution, that but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care and caution would not, however, disentitle him to recover, unless it were such that but for that negligence and want of ordinary care and caution the misfortune could not have happened; nor, if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff."¹ In the note a great many American cases are named which follow this rule.²

er, 85 N. C. 310, and see cases post, p. *680.

¹Tuff v. Warman, 5 C. B. (n. s.) 573, 585. See, also, Butterfield v. Forester, 11 East, 60; Mayor of Colchester v. Brooke, 7 Q. B. 339; Davies v. Mann, 10 M. & W. 545; Lewis v. Baltimore, &c. R. R. Co., 38 Md. 588; Balt., &c., Co. v. Kean, 65 Md. 394.

²Indianapolis, &c., R. R. Co. v. Horst, 93 U. S. 291; Railroad Co. v. Jones, 95 U. S. 439; Reeves v. Dela-

ware, &c., R. R. Co., 30 Penn. St. 454; Pennsylvania R. R. Co. v. Lewis, 79 Penn. St. 33; Mulherrin v. Delaware, &c., R. R. Co., 81 Penn. St. 366; Cent. R. R. Co. v. Feller, 84 Penn. St. 226; Forks Township v. King, 84 Penn. St. 230; Monongahela v. Fischer, 111 Penn. St. 9; Nor. Cent. R. R. Co. v. Price, 29 Md. 429; Frech v. Philadelphia, &c., R. R. Co., 89 Md. 574; Lewis v. Balt. & Ohio R. Co., 38 Md. 588; Baltimore, &c.,

*But while the English rule has been generally ac- [*676] cepted in this country, there has, perhaps, in two or three States, been a departure from it. The early Illinois cases accepted the English rule without question;¹ but in later cases, when the question of contributory negligence has been presented,

R. R. Co. v. Mulligan, 45 Md. 486; Trow v. Vt. Cent. R. R. Co., 24 Vt. 487; Hill v. New Haven, 37 Vt. 501; Barnes v. Cole, 21 Wend. 188; Johnson v. Hudson R. R. Co., 20 N.Y. 65; Gray v. Second Av. R. R. Co., 65 N. Y. 561; Steves v. Oswego, &c., R. R. Co., 18 N. Y. 423; Dufer v. Cully, 3 Oreg. 377; Lucas v. New Bedford, &c., R. R. Co., 6 Gray, 64; Smith v. Smith, 2 Pick. 621; Farnum v. Concord, 2 N. H. 392; State v. Manchester, &c., R. R. Co., 52 N. H. 528; Moore v. Cent. R. R. Co., 24 N. J. 268; Cent. R. R. Co. v. Moore, 24 N. J. 824; Telfer v. Nor. R. R. Co., 30 N. J. 188; Central R. R. Co. v. Van Horn, 38 N. J. 133; Garmon v. Bangor, 38 Me. 443; Timmons v. Cent. Ohio R. R. Co., 6 Ohio, (n. s.) 105; Cleveland, &c., R. R. Co. v. Terry, 8 Ohio (n. s.) 570; Sandusky, &c., R. R. Co. v. Sloan, 27 Ohio, (n. s.) 341; Williams v. Mich. Cent. R. R. Co., 2 Mich. 259; Lake Shore, &c., R. R. Co. v. Muller, 25 Mich. 274; Mich. Cent. R. R. Co. v. Campau, 35 Mich. 463; New Haven, &c., Co. v. Vanderbilt, 16 Conn. 420; Birge v. Gardiner, 19 Conn. 507; Beers v. Housatonic R. R. Co., 19 Conn. 566; Park v. O'Brien, 23 Conn. 339; Jackson v. Commissioners, &c., 76 N. C. 292; Donaldson v. Milwaukee, &c., R. R. Co., 21 Minn. 293; Brown v. Milwaukee, &c., R. R. Co., 23 Minn. 165; Erd v. St. Paul, 22 Minn. 443; New Orleans, &c., R. R. Co. v. Hughes, 49 Miss. 258; Memphis, &c., R. R. Co. v. Thomas, 51 Miss. 637; Paducah, &c., R. R. Co. v. Hoehl, 12 Bush, 41; Koutz v. Toledo, &c., R. R. Co., 54

Ind. 515; Louisville, &c., R. R. Co. v. Boland, 63 Ind. 398; Jeffersonville, &c., R. R. Co. v. Lyon, 55 Ind. 477; West. Union Tel. Co. v. Eysler, 2 Colorado, 141; Robinson v. West. Pac. R. R. Co., 48 Cal. 409; Deville v. Sou. Pac. R. R. Co., 50 Cal. 383; Hearne v. Sou. Pac. R. R. Co., 50 Cal. 482; Macon, &c., R. R. Co. v. Baber, 42 Geo. 300; Adams v. Wiggins Ferry Co., 27 Mo. 95; Smith v. Union Pac. R. R. Co., 61 Mo. 588; Harlan v. St. Louis, &c., R. R. Co., 65 Mo. 22; Laicher v. New Orleans, &c., R. R. Co., 28 La. Ann. 320; Johnson v. Canal, &c., Co., 27 La. Ann. 53; West. U. Tel. Co. v. Quinn, 56 Ill. 319; Mobile, etc., R. R. Co. v. Ashcraft, 48 Ala. 15; Carter v. Chambers, 79 Ala. 223; Lynam v. Philadelphia, &c., R. R. Co., 4 Houst. 583; Jefferson v. Brady, 4 Houst. 626; Trout v. Virginia, &c., R. R. Co., 23 Grat. 619; Patterson v. Burlington, &c., R. R. Co., 39 Iowa, 279; Murphy v. Chicago, &c., R. R. Co., 45 Iowa, 661. There is a statute in this State which provides that "every railroad company shall be liable for all damages sustained by any person, including employes of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employees of the corporation, to any person sustaining such damage." In the case last cited it is decided that that statute is not intended to disturb the rule that the plaintiff shall not recover when chargeable with contributory negligence.

¹Aurora Branch R.R. Co. v. Grimes, 18 Ill. 585.

a form of language has been used which is, to say the least, liable to be understood as a departure. The departure, if there [*677] is any, in that State, began *with *Galena, etc., R. R. Co. v. Jacobs*, in which the English cases are reviewed at length, and without at all questioning the leading cases, either English or American, the following remarks are made: "It will be seen from these cases that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care or want of care as manifested by both parties; for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think, is, 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." "We say, then, that in this as in all like cases, 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."¹ But was not this equivalent, in the mind of the judge, to saying that if the defendant is chargeable with the want of ordinary care, and the plaintiff is not, the latter may recover, notwithstanding that a higher degree of care might have prevented the injury? In several cases the court has declared that a mere preponderance of negligence on the part of the defendant, where both were in fault, will not justify a

¹ *Galena, &c., R. R. Co. v. Jacobs* 20 Ill. 478, 496, per BREESE, J. The following are some of the more recent cases in which this doctrine has been approved and applied: Ill. Cent. R. R. Co. v. Benton, 69 Ill. 174; Toledo, &c., R. R. Co. v. McGinnis, 71 Ill. 346; Ill. Cent. R. R. Co. v. Hall, 72 Ill. 222; Rockford, &c., R. R. Co. v. Hillmer, 72 Ill. 235; Ill. Centr. R. R. Co. v. Hammer, 72 Ill. 347; St. Louis, &c., R. R. Co. v. Britz, 72 Ill. 256; Chicago, &c., R. R. Co. v. Dona-

hue, 75 Ill. 106; Toledo, &c., R. R. Co. v. O'Connor, 77 Ill. 391; Chicago, &c., R. R. Co. v. Hatch, 79 Ill. 137; Sterling Bridge Co. v. Pearl, 80 Ill. 251; Kewanee v. Depew, 80 Ill. 119; Chicago, &c., R. R. Co. v. Damerell, 81 Ill. 450; Chicago, &c., R. R. Co. v. Harwood, 90 Ill. 425; Calumet, &c., Co. v. Martin, 115 Ill. 358; Lake Shore, &c., Ry. Co. v. O'Conner, 115 Ill. 254; Chicago, &c., Co. v. Hutchinson, 120 Ill. 587; Chicago, &c., Co. v. Warner 14 N. E. Rep. 206 (Ill.)

recovery,¹ and when a jury has been told that the plaintiff may recover unless his negligence contributed to the injury in a *considerable degree* the court has promptly set aside the verdict.² And it seems to be clear that the court has aimed at *all times to make the plaintiff's right of recovery—so [*678] far as concerned contributory negligence—depend upon the question whether he had or had not been chargeable with a want of ordinary care which directly contributed to the injury.³ And as what is ordinary care must of course depend upon the circumstances, this would be equivalent to holding—if the idea of degrees in negligence was put aside—that the plaintiff may recover in such cases, because he was not guilty of what in law is negligence.

In Georgia a rule seems to be laid down not essentially different from that in Illinois. "It is this, that although the plaintiff be somewhat in fault, yet if the defendant be grossly negligent and thereby occasioned or did not prevent the mischief, the action may be maintained."⁴ The same is true of Kansas.⁵

In a case in Tennessee, where it appeared that the engine of a railroad company was running in the night time without a head-

¹ Chicago, &c., R. R. Co. v. Clark, 70 Ill. 276; Indianapolis, &c., R. R. Co. v. Flannigan, 77 Ill. 365.

² Sterling Bridge Co. v. Pearl, 80 Ill. 251.

³ See Ill. Cent. R. R. Co. v. Green, 81 Ill. 19, and cases cited. See, also Rockford, &c., R. R. Co. v. Delaney, 82 Ill. 198; Schmidt v. Chicago, &c., R. R. Co., 83 Ill. 405. Says RYAN, Ch. J., in Griffin v. Willow, 43 Wis. 509, 512: "Slight negligence is not slight want of ordinary care contributing to the injury which would defeat an action for negligence. 'Slight negligence is defined to be only an absence of that degree of care and vigilance which persons of extraordinary vigilance and foresight are accustomed to use.' And such want of extraordinary care on the part of the person injured will not defeat an action for negligence. Dreher v. Fitchburg, 22 Wis. 675; Ward v. Rail-

way Co. 29 Wis. 144; Hammond v. Mukwa, 40 Wis. 35. In ordinary circumstances, persons traveling upon public highways are held to the exercise of ordinary care only."

⁴ Augusta, &c., R. R. Co. v. McMurry, 24 Geo. 75, 80. See Atlanta, &c., Co. v. Wyly, 65 Geo. 120.

⁵ Union Pacific R. R. Co. v. Rollins, 5 Kan. 167. In later cases the court disclaim asserting the doctrine of comparative negligence, but hold, nevertheless, that if the plaintiff's negligence is slight he may recover. Kansas, &c., Ry Co. v. Peavey, 20 Kan. 169; Atchison, &c., R. R. Co. v. Morgan, 31 Kan. 77. So in Texas while holding the doctrine of comparative negligence erroneous, the court has allowed a recovery if the plaintiff's negligence is not such as to amount to want of ordinary care. Houston, &c., Ry Co. v. Gorbett, 49 Tex. 573.

light, and ran over and killed a man lying across the track, it was held that the contributory negligence of the deceased was no bar to a recovery for the killing, though it might be taken into account in mitigation of damages.' That would be in [*679] effect *an attempt at an apportionment of damages, and that, too, in a case where the want of care in the party killed was at least equal to that of the party sued.

Negligence must have been Proximate to the Injury. 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. It would be quite impossible, within such limits as can here be assigned to the subject, to enter upon an examination of specific instances, and the mention of a few must suffice. 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, one's buildings near the line of a railway, by reason of very combustible material, may be peculiarly exposed to take fire from passing engines; but while the owner must take upon himself all such risks as may result from a careful management of trains, he has a right to redress if his buildings are negligently burned.¹ It is not contributory negligence that one allows his

¹ Nashville, &c., R.R. Co. v. Smith, 6 Heisk. 174. The jury allowed it to "mitigate" the damages to \$10,000. The early case in Tennessee of Whirley v. Whiteman, 1 Head, 610, seems to have adopted the English rule, and while this is approved in Nashville, &c., R.R. Co. v. Carroll, 6 Heisk. 347, yet the rule is so far qualified as to support an instruction that where the plaintiff could have avoided the injury by ordinary care he cannot recover, *unless the defendant was guilty of gross negligence*. In Dusk v. Fitzhugh, 2 Lea, 307, it is held the plaintiff, though in some degree negligent, may recover if defendant's neglect more immediately produced the injury. This seems to

allow the jury full liberty to return a verdict for the plaintiff where both were in fault, if in their opinion the defendant was the more culpable.

² Philadelphia, &c., R. R. Co. v. Hendrickson, 80 Penn. St. 183. See, for the same principle, Underwood v. Waldron, 33 Mich. 232; King v. Morris, &c., R. R. Co., 3 C. E. Green, 397; Salmon v. Delaware, &c., R. R. Co., 88 N. J. 5. Not contributory negligence to erect buildings without metallic roofs near a dangerous waste burner. Alpern v. Churchill, 53 Mich. 607. See King v. Am. Tr. Co., 1 Flipp 1, and cases p. 704, n. 2, *supra*. But if one employs in his business an engine known to throw sparks, he cannot recover of the owner. Mar-

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.¹ In neither of these cases does the party neglect any duty he owes to the railway company; he merely does what he may rightfully do with his own. And so highly does the law regard human life, that it will not impute negligence to an effort to preserve it if, from the appearances, the party had reason to believe he might succeed in the attempt, though not without danger of failure and injury to himself.² But where a party in the exercise of his own right, is *in the enjoyment of that which is [*680] 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, will be held precluded, by his contributory negligence, from a recovery 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.³

quette, &c., R. R. Co. v. Spear, 44 Mich. 169. Piling lumber on inflammable waste in a dry season close to a track is contributory negligence. Post v. Buffalo, &c., R. R. Co., 108 Penn. St. 585. See Miss. Pac. Ry Co. v. Cornell, 80 Kan. 35.

¹ Blaine v. Ches. & Ohio R. R. Co., 9 W. Va. 252. And, see Trow v. Vt. Cent. R. R. Co., 24 Vt. 487. Compare Fritz v. First Div., &c., R. R. Co., 22 Minn. 404; Wilder v. Maine Cent. R. R. Co., 65 Me. 332; Trout v. Virginia, &c., R. R. Co., 23 Grat. 619; Van Horn v. Burlington, &c., Ry Co., 59 Ia. 33.

² Eckert v. Long Island, &c., R. R. Co., 43 N. Y. 502. Compare Nor. Penn. R. R. Co. v. Mahoney, 57 Penn. St. 187. Donahoe v. Wabash, &c., Co., 83 Mo. 560; Clark v. Famous Shoe, &c., Co., 16 Mo. App. 463.

³ Railroad Co. v. Whitton, 18 Wall.

270; Railroad Co. v. Houston, 95 U. S. 697; Schofield v. Chicago, &c., Ry Co., 114 U. S. 615; Butterfield v. Western R. R. Co., 10 Allen, 533; Allyn v. Boston, &c., R. R. Co., 105 Mass. 77; Craig v. New York, &c., R. R. Co., 118 Mass. 431; Wheelwright v. Boston, &c., Co., 135 Mass. 225; Grippen v. N. Y. Cent. R. R. Co., 40 N. Y. 34; Baxter v. Troy, &c. R. R. Co., 41 N. Y. 502; Massoth v. Delaware, &c., R. R. Co. 64 N. Y. 524; Salter v. Utica, &c., R. R. Co., 88 N. Y. 42; Tolman v. Syracuse, &c., Co., 98 N. Y. 198; Bellefontaine, &c., R. R. Co. v. Hunter, 33 Ind. 365; Indianapolis, &c., Ry Co. v. Green, 106 Ind. 279; Nor. Penn. R. R. Co. v. Heileman, 49 Penn. St. 60; Gerety v. Phila., &c., R. R., Co. 81 Penn. St. 274; Reading, &c., Co. v. Ritchie, 102 Penn. St. 425; Fletcher v. Atlantic, &c., R. R. Co., 64 Mo. 484; Stepp v. Chicago, &c., Co., 85 Mo.

Negligence of Infants, etc. In an action brought in New York for a negligent injury to a child two years of age, who was run over while at play in the public street, the court held that he

229; Taylor v. Miss. Pac. Ry Co., 86 Mo., 457; Brown v. Milwaukee, &c., R. R. Co., 22 Minn. 165; Marty v. Chicago, &c., Co. 35 N. W. Rep. 670 (Minn.); Bellefontaine, &c., R. R. Co. v. Snyder, 24 Ohio, (n. s.) 671; Zeigler v. Nor. East. R. R. Co., 5 Sou. Car. 221; Chicago, &c., R. R. Co. v. Hatch, 79 Ill. 137; Chicago, &c., R. R. Co. v. Harwood, 80 Ill. 88; Rockford, &c., R. R. Co. v. Byam, 80 Ill. 528; Chicago, &c., R. R. Co. v. Damerell, 81 Ill. 451; Myers v. Ind. &c., Ry. Co., 113 Ill. 386; Chicago, &c. Co. v. Hutchinson, 120 Ill. 587; Lake Shore, &c., R. R. Co. v. Miller, 25 Mich. 274; Staal v. Grand Rapids, &c., Co., 57 Mich. 239; Rhoades v. Chicago, &c. Ry Co., 58 Mich. 268; Kwiotkowski v. Chicago, &c., Ry Co., 38 N. W. Rep. 463 (Mich.). Williams v. Chicago, &c., Ry Co., 64 Wis. 1; Lesan v. Maine Centr. R. Co., 77 Me. 85; Baltimore, &c., R. R. Co. v. Mall, 66 Md. 53; Penn. R. R. Co. v. Righter, 42 N. J. L. 180; Merkle v. New York, &c., Co., 9 Atl. Rep. 680 (N. J.); Kennedy v. Chicago, &c., Ry Co., 68 Ia. 559; Reed v. Chicago, &c., Co., 87 N. W. Rep. 149 (Ia.); Bloomfield v. Burlington, &c., Ry Co., 38 N. W. Rep. 481 (Ia.). The track is a warning of danger. Matti v. Chicago, &c. Co., 37 N. W. Rep. 54 (Mich.). So is a siding. Mynning v. Detroit &c., Co., 59 Mich. 257. But one has a right to assume a crossing is safe without stopping or careful looking, when a gate is open and the gateman by it. Schneider v. Cincinnati, &c., Ry Co., 17 N. E. Rep. 321 (Ohio). The rule is of course liable to be affected by obstructions which prevent the track on each side being seen as the team approaches.

See Lake Shore, etc., R. R. Co. v. Miller, 25 Mich. 274; Craig v. N. Y. &c., R. R. Co., 118 Mass. 431; Miss. Pac. Ry Co. v. Lee, 7 S. W. Rep. 857 (Tex.); Atchison, &c., R. R. Co. v. Townsend, 17 Pac. Rep. 804 (Kan.); Strong v. Sacramento, &c., Co., 61 Cal. 326; Klanowski v. Grand Trunk, &c., Co., 57 Mich. 525; Chase v. Maine Centr. R. R. Co., 78 Me. 346; Seefeld v. Chicago, &c., Co., 35 N. W. Rep. 278 (Wis.). Cases of foot passengers. Laverenz v. Chicago, &c., Co., 56 Ia. 689; Young v. New York, &c., Co., 14 N. E. Rep. 434 (N. Y.); Woodard v. New York, &c., Co., 106 N. Y. 369; Davey v. London, &c., Co., L. R. 12 Q. B. D. 70; Mahlen v. Lake Shore, &c., Ry Co., 49 Mich. 585; Ormsbee v. Boston, &c., Corp., 14 R. I. 102, a valuable case. South. &c., R. Co. v. Donovan, 4 South. Rep. 142 (Ala.). Cases of crossing after one train has passed and being hit by another. Moore v. Phila. &c., R. R. Co., 106 Penn. St. 349; Allerton v. Boston, &c., Co. 15 N. E. Rep. 621 (Mass.); Chicago, &c., Co. v. Hedger, 105 Ind. 398. If one is seen on the track in time for him to get out of the way, the engineer has a right to assume he will do so, unless he has reason to suppose he is laboring under some disability, or that he does not hear or comprehend the signals. Frech v. Philadelphia R. R. Co., 39 Md. 574, and cases cited. Bouwmeester v. Grand Rapids, &c., Co., 84 N. W. Rep. 414 (Mich.); Nichols v. Louisville, &c., Co., 6 S. W. Rep. 339 (Ky.); Gregory v. Cleveland, &c., Co., 14 N. E. Rep. 228 (Ind.); Maloy v. Wabash, &c., Co., 84 Mo. 270; Terre Haute, &c., Ry Co. v. Graham, 95 Ind. 284

was not entitled to recover, because it was negligent for him to be thus exposed to injury. It is true he was not of an age to be able to judge for himself whether or not the place was one of danger, but it was 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.¹ This case has been *followed as authority in several States,* but rejected [*681]

But it is held that if, after discovering a trespasser in time to avoid him, reasonable effort is not made to prevent injuring him, his negligence is not the cause of the injury. *Meeks v. South Pac. R. R. Co.*, 56 Cal. 513; *Maryland, & C. R. R. Co. v. Neubeur*, 62 Md. 391; *Balt. & C. Co. v. Kean*, 65 Md. 394; *Miss. Pac. Ry Co. v. Weisen*, 65 Tex. 443; *Burnett v. Burlington, & C., Co.*, 16 Neb. 332; *Louisville, & C. Co. v. Colman*, 6 S. W. Rep. 438 (Ky.). See *Keyser v. Chicago, & C., Co.*, 56 Mich. 559; *State v. Balt. & C., R. R. Co.*, 14 Atl. Rep. 686 (Md.). So if at a point where two tracks cross, trains meet and the engineer of the one which has the right of way sees that by the other's mistake a collision will occur if he attempts to cross first, he must stop or his company will be liable for the injury suffered. *Pratt v. Chicago, & C., Ry Co.*, 38 N. W. Rep. 356 (Minn.). When a child is seen on the track an engineer is bound to use only reasonable care. *Chrystal v. Troy, & C., Co.*, 105 N. Y. 164. See *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; *Nolan v. New York, & C., Co.*, 53 Conn. 461. *Jamison v. Illinois Centr. & C., Co.*, 63 Miss. 33. *Kansas Pac. Ry Co. v. Whipple*, 18 Pac. Rep. 730 (Kan.). But compare *Ind., & C. Co. v. Pitzer*, 109 Ind. 179; *Payne v. Humeston, & C., Co.*, 70 Ia. 584. That a trespasser is not discovered in time to avoid injuring him is not negligence. *Frazer v. South, & C., R. R. Co.*, 81 Ala. 185; *Masser v.*

Chicago, & C., Co., 68 Ia. 603; *St. Louis, & C., Ry Co. v. Monday*, 4 S. W. Rep. 782 (Ark.); *Denman v. St. Paul, & C., Ry Co.*, 26 Minn. 357; *Memphis, & C., R. Co. v. Womack*, 4 South. Rep. 618 (Ala.). But see *Georgia, & C., R. Co. v. Blanton*, Id. 631 (Ala.); *Louisville, & C., R. R. Co. v. Schuster*, 7 S. W. Rep. 874 (Ky.); *Citizens St. Ry Co. v. Steen*, 42 Ark. 331; *Kansas, & C., Ry Co. v. Cramner*, 4 Col. 524; *Townley v. Chicago, & C., Ry Co.*, 53 Wis. 626. In Missouri it has been held that liability arises only from negligence after discovering the trespasser. *Yarnall v. St. Louis, & C., Co.*, 75 Mo. 575; *Bell v. Hannibal, & C., Co.*, 72 Mo. 50; 86 Mo. 599; *Rine v. Chicago, & C., Co.*, 88 Mo. 392; *Kelly v. Un. Ry & C., Co.*, 8 S. W. Rep. 420 (Mo.); but also that failure to discover is negligent where precautions required by law are not observed in moving the train. *Bergman v. St. Louis, & C., Co.*, 88 Mo. 678; *Keim v. Union Ry, & C., Co.*, 90 Mo. 314; *Dunkman v. Wabash, & C., Co.*, 4 S. W. Rep. 670; or it is moved recklessly. *Donahoe v. Wabash, & C., Co.*, 83 Mo. 548. One who passes through a chance opening in a train one hundred feet from a street, is a trespasser and acts at his peril. *Dahlstrom v. St. Louis, & C., Ry Co.*, 8 S. W. Rep. 777 (Mo.).

¹ *Hartfield v. Roper*, 21 Wend. 615. See *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; *Flynn v. Hatton*, 4 Daly, 552.

² *Wright v. Malden, & C., R. R. Co.*,

in others. It was very soon questioned by Ch. J. REDFIELD, of Vermont, in an opinion, the pith of which is comprised in the following words: "We are satisfied 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. If one know that such a person is in the highway, or on a railway, he is bound to a proportionate degree of watchfulness, and what would be but ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger."¹ The conclusions in many other States have been to the same effect.* The law on the *subject in this country is thus

4 Allen, 283; Callahan v. Bean, 9 Allen, 401; Holly v. Boston Gas Light Co., 8 Gray, 123; Lynch v. Smith, 104 Mass 52; S. C. 6 Am. Rep. 188; Brown v. European, &c., R. R. Co., 58 Me. 384; Leslie v. Lewiston, 62 Me. 468; Pittsburgh, &c., R. R. Co. v. Vining, 27 Ind. 513; Lafayette, &c., R. R. Co. v. Huffman, 28 Ind. 287; Jeffersonville R. R. Co. v. Bowen, 40 Ind. 545. See East Saginaw, &c., R. Co. v. Bohn, 27 Mich. 503; Karr v. Parks, 40 Cal. 188; Fitzgerald v. St. Paul, &c., Ry Co., 29 Minn. 336; Reed v. Minn. St. Ry Co., 34 Minn. 557; Meeks v. South. Pac. R. R. Co., 52 Cal. 602. Where the action in case of death is by the administrator for the benefit of the next of kin it is intimated that there can be no recovery. Toledo, &c., Ry Co. v. Grable, 88 Ill. 441. If the child is injured in obeying the directions of the parent, it cannot recover. Stillson v. Hannibal, &c., R. R. Co., 67 Mo. 671. In Ewen v. Chicago, &c., R. R. Co., 88 Wis. 613, 628, where the complaint was that a boy nine years of age had been negligently run over, by the cars of the defendant, COLE, J. said: "Were it clear, from the undisputed

facts of the case that the boy himself, considering his age and intelligence, was at fault, while crossing the railroad track, when he was killed, and did not exercise proper care; or, if it appeared that he was too young to be *sui juris*, and that the negligence of his mother in permitting him to go alone on the errand on which he was sent, contributed to the accident, then we could say, as a proposition of law, that there could be no recovery." This rule applied where a boy of eight riding on a sleigh runner jumped off in front of a horse. Messenger v. Dennie, 137 Mass. 197, 141 Id. 331. For a somewhat peculiar case, where negligence of parent was imputed to child, see Leslie v. Lewiston, 62 Me. 468.

¹ Robinson v. Cone, 22 Vt. 313, 234.

² Philadelphia, &c., R. R. Co. v. Kelly, 31 Penn. St. 372; Philadelphia, &c., R. R. Co. v. Spearen, 47 Penn. St. 300; Oakland R. Co. v. Fielding, 48 Penn. St. 320; Nor. Penn. R. R. Co. v. Mahoney, 57 Penn. St. 137; Kay v. Penn. R. R. Co., 65 Penn. St. 269; S. C. 3 Am. Rep. 623; Bellefontaine, &c., R. R. Co. v. Snyder, 13 Ohio, (N. S.) 399; Daley v. Norwich,

left in a very unsatisfactory state. The English rule corresponds to that of the New York courts.¹

But the fact that a party who 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: a child of five may be allowed on a city sidewalk, and a child of ten to run on errands without any one feeling shocked by the risks to which he is exposed, though confessedly these would be greater than in the case of an adult. Suffering such liberties is not an exercise of the highest care, but it is, nevertheless, not inconsistent with ordinary care. It is, therefore, not negligence. 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 in the exposure which, under the doctrine of any of the courts, should preclude recovery.*

McC., R. R. Co., 26 Conn. 591; *Norfolk &c.*, R. R. Co. v. Ormsby, 27 Gratt. 455; *St. Paul v. Kuby*, 8 Minn. 155; *Cahill v. Eastman*, 18 Minn. 374; *Whirley v. Whiteman*, 1 Head, 610; *Boland v. Missouri R. R. Co.*, 66 Mo. 484. In an action by the child the parent's negligence is not a bar. *Huff v. Ames*, 16 Neb. 139; *Pratt &c.*, Co. v. *Brawley*, 3 South. Rep. 536; *Erie Pass. Ry Co v. Schuster*, 113 Penn. St. 412; *Galveston, &c.*, Ry Co. v. *Moore*, 59 Tex. 64. In an action by the parent it is. *Frazer v. South. &c.*, R. R. Co., 81 Ala. 185; *Williams v. Texas, &c.*, Co., 60 Tex. 205; *St. Louis, &c.*, Co. v. *Freeman*, 36 Ark. 41; *Mayhew v. Burns*, 103 Ind. 328; *Cauley v. Pittsburgh, &c.*, Co., 95 Penn. St. 398. See, as having some bearing, *Paducah, &c.*, R. R. Co. v. *Hoehl*, 12 Bush, 41; *Baltimore, &c.*, R. R. Co. v. *McDonnell*, 43 Md. 534; *Baltimore &c.*, R. R. Co. v. *State*, 30 Md. 47; *Chicago v. Major*, 18 Ill. 349; *Chicago v. Starr*, 42 Ill. 174; *Keeffe v. Mil-*

waukee, &c., R. R. Co., 31 Minn. 207; *Wood v. School District*, 44 Iowa, 27.

¹ *Waite v. Nor. East. R. Co.*, El. Bl. & El. 719, 728; *Singleton v. Eastern Counties R. Co.*, 7 C. B. (n. s.) 287; *Mangan v. Atterton*, L. R. 1 Exch. 239. See *Gardner v. Grace*, 1 Fost. & F. 859. It may be urged, with some plausibility, that this doctrine is more likely to guard the interests of children and imbeciles than is the opposite. If a heartless parent or guardian may suffer a child to take his first lessons in walking in the crowded streets of a city, and then, when he is injured or killed, as in all probability he would be, may recover for such injury or killing, on the ground that the child himself is too young to be chargeable with negligence, there will not, perhaps, be wanting depraved custodians of children, unrestrained by any considerations of humanity, willing enough to count upon probable gains from such reckless conduct.

* *Railroad Company v. Stout*, 17

But the extreme youth of a child is always an important [*683] circumstance in its bearing on the question of negligence in the party by whose act or neglect he is injured.¹ One has no right to demand of a child, or of any other person known to be wanting in ordinary judgment or discretion, a prudence beyond his years or capacity, and therefore in his own conduct, where it may possibly result in injury, a degree of care is required commensurate to the apparent immaturity or imbecility that exposes the other to peril.² Thus, a person driving rapidly

Wall. 657; *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; *Karr v. Parks*, 40 Cal. 188; *Mulligan v. Curtis*, 100 Mass. 542; *Pittsburgh, &c., R. R. Co. v. Bumstead*, 48 Ill. 221; *Koons v. St. Louis, &c., R. R. Co.*, 65 Mo. 592; *Rauch v. Lloyd*, 31 Penn. St. 358; *Bronson v. Southbury*, 37 Conn. 199; *Baltimore, &c., R. R. Co. v. State*, 30 Md. 47; *Farris v. Cass Ave., &c., Co.*, 80 Mo. 325; *Gavin v. Chicago*, 97 Ill. 66. See *Brown v. European, &c., R. R. Co.*, 58 Me. 384. It is not negligence *per se* in a parent to allow a child to play in the street. *Kunz v. Troy*, 104 N. Y. 844. In the following cases it has been held a question of fact whether the parent was negligent in allowing the child to remain unattended or to go out in charge of an older child. *Reilly v. Hannibal, &c., Co.*, 7 S. W. Rep. 407 (Mo.); *Gibbons v. Williams*, 135 Mass. 333; *Collins v. South Boston, &c., Co.*, 142 Mass. 301; *Payne v. Humeston, &c., Co.*, 70 Ia. 584; *Dahl v. Milwaukee, &c., Co.*, 65 Wis. 371; *Bliss v. South Hadley*, 18 N. E. Rep. 352 (Mass.); *Stafford v. Rubens*, 115 Ill. 196. See *Gulline v. Lowell*, 144 Mass. 491; *Johnson v. Chicago, &c., Ry. Co.*, 56 Wis. 274. If the conduct of the infant, relied upon as showing negligence, would not have been negligence in an adult, of course the questions discussed in the text become unimportant. *McGary v. Loomis*, 63 N. Y.

104; S. C. 20 Am. Rep. 510; *Ihl v. Ferry Co.*, 47 N. Y. 317; S. C. 7 Am. Rep. 450; *O'Brien v. McGlinchy*, 63 Me. 552.

¹ Where infants are the actors, that might probably be considered an unavoidable accident which would not be so considered where the actors are adults. *Bullock v. Babcock*, 3 Wend. 391, 394; *Cosgrove v. Ogden*, 49 N. Y. 255; S. C. 10 Am. Rep. 361. As to duty to child trespassing on cars, see *Chicago, &c., Ry. Co. v. Smith*, 46 Mich. 504; *Cauley v. Pittsburgh, &c., Co.*, 95 Penn. St. 398; *Ecliff v. Wabash, &c., Co.*, 31 N. W. Rep. 180 (Mich.); *Bishop v. Union R. R. Co.*, 14 R. I. 314; *Emerson v. Peteler*, 35 Minn. 481; trespassing on railway track, see cases note 3, p. 817, *ante*.

² See, as to persons of apparently unsound mind, or deprived of one or more of their senses, *Chicago, &c., R. R. Co. v. Gregory*, 58 Ill. 226; *Chicago, &c., R. R. Co. v. McKean*, 40 Ill. 218; Ill. Cent. R. R. Co. v. *Buckner*, 28 Ill. 299. In crossing a track the law requires the same degree of care in a woman as in a man. *Hassenyer v. Mich. Centr. R. R. Co.*, 48 Mich. 205. Contributory negligence is not possible in a child which has not the ability to foresee danger. *Bay Shore, &c., R. R. Co. v. Harris*, 67 Ala. 6; *Phila., &c., R. R. Co. v. Laver*, 112 Penn. St. 414. Less care is demanded of a child than of an

along a highway where he sees boys engaged in sports, is not at liberty to assume that they will exercise the same discretion in keeping out of his way that would be exercised by others; and ordinary care demands of him that he shall take notice of their immaturity and govern his action accordingly.¹ And if a carrier of persons receives an infant passenger without any guardian, he should give him the care and attention required by his age, and cannot object, when an injury happens to him, that it was negligence in those responsible for his care, in permitting him thus to move about by himself.²

Concurring Negligence Subsequent to Injury. It is no answer to an action that the injured party, subsequent to the injury, was guilty of negligence which aggravated it. The negligence that will constitute a defense must have concurred in producing the injury.³

***Negligence of Third Parties.** In general the negligence [*684]

adult. *Barry v. New York, &c., R. R. Co.*, 92 N. Y. 289; *Cooper v. Lake Shore, &c., Ry Co.*, 83 N. W. Rep. 306 (Mich.). But if *aut juris* some care on his part is demanded. *Wendell v. New York, &c., R. R.*, 91 N. Y. 420. See *Ecliff v. Wabash, &c., Co.*, 81 N. W. Rep. 180 (Mich.); *Baltimore, &c., R. R. Co. v. Schwindling*, 101 Penn. St. 258; *Moore v. Penn. R. R. Co.*, 99 Penn. St. 301. If in excavating, an unguarded precipice likely to attract children is left, a city may be liable. *Mackey v. Vicksburg*, 64 Miss. 777. So if an explosive is left within reach of children. *Powers v. Harlow*, 53 Mich. 507. So if a railroad turntable is left unsecured and a child playing about it is injured. *Railroad Co. v. Stout*, 17 Wall. 657; *Evansich v. Gulf, &c., Ry Co.*, 57 Tex. 126. *Nagel v. Miss. Pac. Ry Co.*, 75 Mo. 653. See *Bridger v. Asheville, &c., Co.*, 25 S. C. 24. *Contra*, *Frost v. Eastern R. R. Co.*, 9 Atl. Rep. 790 (N. H.). Not liable if the child displaces the fasten-

ing. *Kolsti v. Minn. &c., Co.*, 32 Minn. 133.

¹ *Railroad Co. v. Gladmon*, 15 Wall. 401; *Lynch v. Smith*, 104 Mass. 52; S. C. 6 Am. Rep. 188; *Walters v. Chicago, &c., R. R. Co.*, 41 Iowa, 71; *East Tenn. R. R. Co. v. St. John*, 5 Sneed, 524; *Hund v. Geier*, 72 Ill. 394; *Kerr v. Forgue*, 54 Ill. 482; S. C. 5 Am. Rep. 146.

² *East Saginaw, &c., Co. v. Bohn*, 27 Mich. 503; *Maher v. Central Park, &c., Co.*, 67 N. Y. 52; *Baltimore, &c., R. Co., v. McDonnell*, 43 Md. 534.

³ *Loeser v. Humphrey*, 41 Ohio St. 378; *Page v. Sumpter*, 53 Wis. 652; *Wilmot v. Howard*, 39 Vt. 447; *Hathorn v. Richmond*, 48 Vt. 557. These last were actions against physicians, where the defense was that the cases were taken out of their hands and committed to others who were negligent. It is nevertheless the duty of the party injured to take care that the damage shall be as light as possible. *Plummer v. Penobscot Ass'n*, 67 Me. 363.

of third parties concurring with that of the defendant to produce an injury is no defense: it could at most only render the third party liable to be sued also as a joint wrong-doer.¹ But in some cases where the person injured was for the time being with and under the direction of the third party, whose negligence concurred in producing the injury, this negligence has been held to be a bar to any recovery. In the leading English case the plaintiff, in alighting from a public omnibus, was knocked down and injured by an omnibus belonging to the defendant. The case was put to the jury under instructions that if it was found that the driver of each omnibus was guilty of negligence contributing to the injury, the plaintiff was not entitled to recover; he being so far identified with the driver of the vehicle he was riding in that he must be considered a party to the negligence.² The like rule has been frequently laid down in this country.³ But in several States its soundness is denied.⁴ In New Jersey it is held

¹ North Penn. R. Co. v. Mahoney, 57 Penn. St. 187; Cleveland, &c., R. R. Co. v. Terry, 8 Ohio, (N. S.) 570; see Pittsburgh, &c., R. Co. v. Spencer, 98 Ind. 186; Wabash, &c., Ry Co. v. Shacklet, 105 Ill. 364.

² Thorogood v. Bryan, 8 C. B. 115. See, also, Bridge v. Grand Junction R. Co., 8 M. & W. 244; Child v. Hearn, L. R. 9 Exch. 176; Armstrong v. Lancashire, &c., R. Co., L. R. 10 Exch. 47.

³ Lake Shore, &c., R. R. Co. v. Miller, 25 Mich. 274; Houfe v. Fulton, 29 Wis. 296; Prideaux v. Mineral Point, 43 Wis. 513; Otis v. Janesville, 47 Wis. 422; Lockhart v. Litchenthaler, 46 Penn. St. 151; Forks Township v. King, 84 Penn. St. 230; Phila., &c., R. R. Co. v. Boyer, 97 Penn. St. 91; Crescent v. Anderson, 114 Penn. St. 643; Hershey v. Road Com'rs., 9 Atl. Rep. 454 (Penn.); Payne v. Chicago, &c., R. R. Co., 39 Iowa, 523; Stafford v. Oskaloosa, 57 Ia. 743; Slater v. Burlington, &c., Co., 32 N. W. Rep. 264 (Ia.); Joliet v. Seward, 86 Ill. 402; Huntoon v. Trumbull, 2 McCrary 814.

⁴ Chapman v. New Haven, &c., R. R. Co., 19 N. Y. 341; Colegrove v. New York, &c., R. R. Co., 6 Duer, 882 and 20 N. Y. 493; Robinson v. New York Cent. R. R. Co., 69 N. Y. 11; S. C. 23 Am. Rep. 1; Masterson v. New York, &c., Co., 84 N. Y. 247; McCallum v. Long Isl. R. R. Co., 38 Hun, 569. And, see Webster v. Hudson Riv. R. R. Co., 38 N. Y. 260; Arctic &c., Co. v. Austin, 69 N. Y. 471. Otherwise if driving with another engaged in a common employment. Donnelly v. Brooklyn, &c., Co., 15 N.E. Rep. 733 (N. Y.). So if driver, known to be unfit, is driving recklessly and plaintiff is riding at his own request. Smith v. New York, &c., Co., 38 Hun, 33. In Maryland, Minnesota, Indiana and New Hampshire, the person riding at the invitation of the driver is not affected by his negligence. Phila. &c., Co. v. Hogeland, 65 Md. 149; Follman v. Mankato, 35 Minn. 522; Albion v. Hetrick, 90 Ind. 545; Noyes v. Boscawen, 10 Atl. Rep. 690 (N. H.). So Carlisle v. Brisbane, 113 Penn. St. 544; Mann v. Weiland, 81* Penn. St.

that the negligence of the driver of a street car in which the plaintiff was riding is not to be imputed to the plaintiff as a bar to an action for the injurious negligence of a third party,¹ and in the United States Supreme Court, and some of the other States, a like ruling has been made.² The English Court of Appeal has recently overruled *Thorogood v. Bryan* in so far as it applies to public conveyances.³

Contracts against Liability for Negligence. The right of common carriers to agree for a limitation of their common law liability has been supported in many cases, while their right to force contracts upon those who come to do business with them has been denied. The contracts are supported on the ground that the parties respectively have found it for their interest to make them, and no reason exists to preclude it. But there may be *contracts which, perhaps, public policy would [*685] forbid. This has been held to be the case with the contracts of common carriers 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 their 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.⁴ There-

243. But if one riding with an intoxicated driver makes no remonstrance against his attempt to run a toll-gate, he is not free from contributory negligence. *Brannen v. Kokomo, &c.*, N. E. Rep. 202 (Ind.). In Ohio a girl riding with her father is not affected by his carelessness. *Street Ry Co. v. Eadie*, 43 Ohio St. 91.

¹ *Bennett v. New Jersey R. R. Co.*, 36 N. J. 235. See *New York, &c., Co. v. Steinbrenner*, 47 N. J. L. 161; But one is chargeable with the negligence of his servant; *Penn. R. R. Co. v. Righter*, 42 N. J. L. 180.

² *Little v. Hackett*, 116 U. S. 366. Here a person hired a public hack and told the driver where to go. See *Holzab v. New Orleans, &c., Co.*, 38 La. Ann. 185; *Transfer Co. v. Kelly*, 36

Ohio St. 86, cases of a street car; *Cuddy v. Horn*, 46 Mich. 596, case of a vessel.

³ *The Bernina L. R.* 12 Prob. Div. 58, case of fault in the engineer of a steamer whereby a passenger was injured in a collision.

⁴ *Camden, &c., R. R. Co. v. Baldauf*, 16 Penn. St. 67; *Goldey v. Pennsylvania R. R. Co.*, 30 Penn. St. 242; *Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St. 315; *Farnham v. Camden, &c., R. R. Co.*, 55 Penn. St. 53; *Colton v. Cleveland, &c., R. R. Co.*, 67 Penn. St. 211; *Bickham v. Smith*, 62 Penn. 45; *Lackawanna, &c., R. R. Co. v. Chenewith*, 52 Penn. St. 382; *Penn. R. R. Co. v. Riordon*, 13 Atl. Rep. 324 (Penn.); *Orndorff v. Adams Express Co.*, 3 Bush, 194; *Smith v. Nor.*

fore, 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 for the want of ordinary care on the part of the carrier himself or his servants.¹ Carriers of passengers, it is also held, cannot [*686] relieve themselves from the *obligation to observe ordi-

CAR. R. R. Co., 64 N. C. 235; Great West. R. Co. v. Hawkins, 18 Mich. 427; S. C. 17 Mich. 57; Steele v. Burgess, 37 Ala. 247; Mobile, &c., R. R. Co. v. Hopkins, 41 Ala. 496; Sou. Exp. Co. v. Crook, 44 Ala. 468; South, &c., R. R. Co. v. Henlein, 52 Ala. 606; Hooper v. Wells, 27 Cal. 11; Sager v. Portsmouth, &c., R. R. Co., 31 Me. 228; Indianapolis, &c., R. R. Co. v. Allen, 31 Ind. 394; Michigan, &c., R. R. Co. v. Heaton, 37 Ind. 448; Virginia, &c., R. R. Co. v. Sayers, 26 Grat. 323; Graham v. Davis, 4 Ohio, (N. S.) 862; Gaines v. Union Trans. Co., 28 Ohio, (N. S.) 418; Adams Exp. Co. v. Stettaners, 61 Ill. 184; Levering v. Union Trans. Co., 43 Mo. 88; Sturgeon v. St. Louis, &c., R. R. Co., 65 Mo. 569; Swindler v. Hilliard, 2 Rich. 286; Berry v. Cooper, 28 Geo. 543; Georgia R. R. Co. v. Gann, 68 Geo. 350; Whitesides v. Thurlkill, 20 Miss. 599; Sou. Exp. Co. v. Moon, 39 Miss. 823; Chicago, &c., Ry. Co. v. Abels, 60 Miss. 1017; Welch v. Boston, &c., R. R. Co., 41 Conn. 333; Kansas City, &c., Co. v. Simpson, 30 Kan. 645; Moulton v. St. Paul, &c., Co., 31 Minn. 85; Black v. Goodrich Tr. Co., 55 Wis. 319; Cream City, &c., Co. v. Chicago, &c., Ry. Co., 63 Wis. 93.

¹ New Jersey, &c., Co. v. Merchants' Bank, 6 How. 344; York Co. v. Central R. R. Co., 3 Wall. 107; School Dist. v. Boston, &c., R. R. Co., 102 Mass. 552; Condict v. Grand Trunk R. Co., 54 N. Y. 500; Powell v. Pennsylvania R. R. Co., 32 Penn. St. 414;

Delaware, &c., R. R. Co. v. Starrs, 69 Penn. St. 36; Mo. Val. R. R. Co. v. Caldwell, 8 Kan. 244; N. O. Ins. Co. v. New Orleans, &c., R. R. Co., 20 La. Ann. 302; Erie, &c., Tr. Co. v. Dater, 91 Ill. 195; Merch. Desp. Tr. Co. v. Leysor, 89 Ill. 43; McFadden v. Miss. Pac. Ry. Co., 92 Mo. 343. See Mitchell v. Georgia R. R. Co., 68 Geo. 644. Leaving cattle to die of neglect, is not negligence, but an abandonment of the contract of carriage, and the carrier is responsible on that ground. Keeney v. Grand Trunk R. Co., 59 Barb. 104; S. C. 47 N. Y. 525. Though the bill of lading provides that in case of loss of goods the carrier shall be liable for a certain amount only, yet if the sum named was understood at the time not to be the real value, he will be liable for the full value if lost through his negligence. U. S. Express Co. v. Backman, 28 Ohio, (N. S.) 144. But if a reduced rate is given in consideration of which the liability is limited and the contract is fairly made, only the agreed amount can be recovered even if the injury is caused by negligence. Hart v. Penn. Co., 112 U. S. 831; Graves v. Lake Shore, &c., Co., 187 Mass. 33; Hill v. Boston, &c., Co., 144 Mass. 284; Elkins v. Empire Tr. Co., 81 * Penn. St. 315; Louisville, &c., R. R. Co. v. Sherrod, 4 South. Rep. 29 (Ala.); Centr. R. R. &c., Co. v. Smitha, Id. 708 (Ala.); St. Louis, &c., Co. Weakly, 8 S. W. Rep. 134 (Ark.). See Rosenfeld v. Decatur, &c., Ry. Co., 103 Ind. 121.

nary care by any contract whatsoever, even in the case of "drover's passes," which are given without charge to those who accompany consignments of cattle,¹ or in cases where free passage is given as mere matter of courtesy or favor.² In New York and New Jersey, 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.³ The weight of authority,

¹ *Flinn v. Philadelphia, &c., R. R. Co.*, 1 Hout. 469; *Cleveland, &c., R. R. Co. v. Curran*, 19 Ohio, (N. S.) 1; *Ohio, &c., R. R. Co. v. Selby*, 47 Ind. 471; *Carroll v. Miss. Pac. Ry Co.*, 88 Mo 239; *Miss. Pac. Ry Co. v. Cornwall*, 8 S. W. Rep. 312 (Tex.) See *Lawson v. Chicago, &c., Ry Co.*, 64 Wis. 447. Compare *Gardner v. New Haven, &c., R. R. Co.* 51 Conn. 143.

² *Philadelphia, &c., R. R. Co. v. Derby*, 14 How. 468; *Pennsylvania R. R. Co. v. McCloskey*, 23 Penn. St. 526; *Pennsylvania R. R. Co. v. Butler*, 57 Penn. St. 335; *Ind. Cent. R. R. Co. v. Mundy*, 31 Ind. 48; *Ill. Cent. R. R. Co. v. Read*, 37 Ill 484; *Gulf &c., Ry Co. v. McGown*, 65 Tex. 640. See, also, *Waterbury v. New York &c., Co.*, 17 Fed. Rep. 671 and note; *Prince v. International, &c., R. R. Co.*, 64 Tex. 144; *Sherman v. Hannibal, &c., R. R. Co.*, 73 Mo. 63; *Gradin v. St. Paul, &c., Co.*, 30 Minn. 217. So a servant carried free on his own business is a passenger, *State v. Western Md. R. R. Co.*, 63 Md. 433; otherwise if so carried to his work as part of his contract of service. *Vick v. New York, &c., R. R. Co.*, 95 N. Y. 267.

³ *Bissell v. N. Y. Cent. R. R. Co.*, 25 N. Y. 442; *Wells v. N. Y. Cent. R. R. Co.*, 24 N. Y. 181; *Perkins v. N. Y. Cent. R. R. Co.*, 24 N. Y. 196; *Smith v. N. Y. Cent. R. R. Co.*, 24 N. Y.

222; *Poucher v. N. Y. Cent. R. R. Co.*, 49 N. Y. 263; *Wilson v. New York, &c., Co.*, 97 N. Y. 87; *Kinney v. Cent. R. R. Co.*, 32 N. J. 407; *S. C. 84 N. J.*, 513. See *Knowlton, v. Erie R. Co.*, 19 Ohio, (N. S.) 260. But there must be an express contract to that effect. *Holsapple v. Rome, &c., Co.*, 86 N. Y. 275. Shipping at "owner's risk" will not excuse gross negligence, *Canfield v. Balt. &c., Co.*, 93 N. Y. 532. That one riding in a parlor car and paying for that privilege does not abrogate his agreement in his railroad pass against liability for negligence of the railroad company, see *Ulrich v. New York, &c., R. R. Co.*, 15 N. E. Rep. 60 (N. Y.). The carrier does not escape liability to a U. S. mail agent for negligence, by which he is injured in the course of his duty, because he has a pass with an exemption clause endorsed on it. *Seybolt v. New York, &c., Co.*, 95 N. Y. 562; and see cases in note to this case, 18 A. & E. R. R. Cas. 169. Under Penn. statutes such agent is not entitled to the care due a passenger. *Penn. R. R. Co. v. Price*, 96 Penn. St. 256. In Massachusetts an express messenger riding under a release contract in a baggage car is held bound by the contract if injured there. *Bates v. Old Colony R. R. Co.*, 17 N. E. Rep. 633.

however, is most distinctly the other way, both in this country and in England.¹

[*687] ***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. Such conditions have frequently been supported as reasonable.² But the condition to be available must be brought to the

¹ The subject is exhaustively considered by Mr. Justice BRADLEY, in *Railroad Company v. Lockwood*, 17 Wall. 357, which was the case of a drover's pass. The authorities are all examined with care, and the principle of the decision is that carefulness and fidelity are essential duties of the carrier's employment, which cannot be abdicated. It was recognized in that case, as it has been generally, that a drover's pass is not in reality gratuitous, but must be considered as taken into account in paying for the transportation of stock. Whether in the case of a strictly gratuitous carriage the carrier might stipulate against liability, the court was not called upon to decide. See, also, *Railway Company v. Stevens*, 95 U. S. 655. In *Jacobus v. St. Paul, &c., R. R. Co.*, 20 Minn. 125, it was said that the carrier is held to the same extreme care in such cases as in others, but in Illinois where comparative negligence is recognized, the court say of a stipulation against liability for negligence in the case of a gratuitous carriage, "While we hold this agreement did not exempt the railroad company from the gross negligence of its employees, we are free to say that it does exempt it from all other species or degrees of negligence not denominated gross, or which might have the character of recklessness." Ill. Cent. R. R. Co. v. Read, 37 Ill. 484.

In Wisconsin if a strictly gratuitous pass is given upon an agreement endorsed thereon to release from liability for negligence, there can be no recovery except for recklessness or such carelessness as is made a crime by statute. *Annas v. Milwaukee, &c., Co.*, 67 Wis. 46.

In Connecticut in such case there can be no recovery. *Griswold v. New York, &c., R. R. Co.*, 53 Conn. 371.

The English law is affected by statute, which leaves the court to determine the reasonableness of exemptions in carrier's contracts; but the courts hold contracts for exemption from liability for negligence in the transportation of goods unreasonable. *Peck v. N. Stafford R. Co.*, 10 H. L. Cas. 478. They however hold that carriers of passengers may stipulate in passes to drovers that the carrier shall not be responsible for any risks. *McCawley v. Furness, L. R.* 8 Q. B. 57.

² *McAndrew v. Elec. Tel. Co.*, 17 O. B. 8; *Ellis v. Am. Tel. Co.*, 13 Allen, 226; *Grinnell v. West. U. Tel. Co.*, 113 Mass. 299; S. C. 18 Am. Rep. 485; *Clement v. West. U. Tel. Co.*, 137 Mass. 463; *Young v. West. U. Tel. Co.*, 65 N. Y. 163; *Camp v. West. U. Tel. Co.*, 1 Met. (Ky.) 164; *West. U. Tel. Co. v. Carew*, 15 Mich. 525; *De Ruite v. N. Y., &c., Tel. Co.*, 1 Daly 547; *Breese v. U. S. Tel. Co.* 45 Barb. 274; S. C. 48 N. Y. 132; *Birney*

knowledge of the party interested in the message, sender or receiver,¹ and in the absence of a provision requiring the message to be repeated, it would be void as an attempt by the company to relieve itself of the consequences of its own fault.²

The cases of carriers and telegraph companies have been specifically mentioned, because it is chiefly in these cases that such contracts are met with. But although the reasons which forbid such contracts have special force in the business of carrying persons and goods, and of sending messages, 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.

v. N. Y., &c., Tel. Co., 18 Md. 341; *Passmore v. W. U. Tel. Co.*, 78 Penn. St. 238; *Wann v. West. U. Tel. Co.*, 37 Mo. 472; *West. U. Tel. Co. v. Edsall*, 63 Tex. 668. But such conditions are held void in Maine. *Ayer v. West. U. Tel. Co.*, 10 Atl. Rep. 495. May limit its liability for error in unrepeatd message where it is not guilty of gross negligence. *Hart v. West. U. Tel. Co.*, 66 Cal. 579; *Becker v. West. U. Tel. Co.*, 11 Neb. 87; *Kiley v. West. U. Tel. Co.* 16 N. E. Rep. 75 (N. Y.). See *Thompson v. West. U. Tel. Co.*, 64 Wis. 531.

¹ *N. Y., &c., Tel. Co. v. Dryburg*, 35 Penn. St. 298. Compare *Ellis v. Am. Tel. Co.*, 13 Allen, 226. In Louisiana it is said it can be available, if at all, only against the sender. *La-Grange v. Sou. West. Tel. Co.*, 25 La. Ann. 383.

² *True v. Int. Tel. Co.*, 60 Me. 9. In Illinois the force of the condition seems to be restricted to errors arising from causes beyond the company's control. *Tyler v. West. U. Tel. Co.*, 60 Ill. 421; S. C. 14 Am. Rep. 38; *West. U. Tel. Co. v. Tyler*, 74 Ill. 168. And see *Sweatland v. Ill., &c., Tel. Co.*, 27 Iowa, 432; *Candee v. West. U. Tel. Co.*, 34 Wis. 471. In Missouri it is denied that telegraph companies

can contract not to be responsible for their own carelessness. *Wann v. West. U. Tel. Co.*, 37 Mo. 472. See *West. U. Tel. Co. v. Harris*, 19 Ill. App. 347; *West. U. Tel. Co. v. Shotter*, 71 Geo. 760; *West. U. Tel. Co. v. Crall*, 17 Pac. Rep. 309 (Kan.). In Colorado and Texas it is held that the condition not to be responsible for unrepeatd messages is no defense to an action for failure to deliver. *West. U. Tel. Co. v. Graham*, 1 Col. 230; *Gulf, &c., Co. v. Miller*, 7 S. W. Rep. 653 (Tex.). In Maine and Wisconsin, it is decided that a condition in sending a night message that the company shall be liable for errors or delay only to the extent of what is received for sending the message is void, as contrary to public policy. *Bartlett v. West. U. Tel. Co.*, 62 Me. 209; *Hibbard v. West. U. Tel. Co.*, 33 Wis. 559. Nor can it limit the damage to ten times the price. *Marr v. West. U. Tel. Co.*, 3 S. W. Rep. 496 (Tenn.); *West. U. Tel. Co. v. Shotter*, 71 Geo. 760; *West. U. Tel. Co. v. Harris*, 19 Ill. App. 347. And, see *Sweatland v. Illinois, &c., Tel. Co.*, 27 Iowa, 433; *West. U. Tel. Co. v. Fenton*, 52 Ind. 1; *West. U. Tel. Co. v. Meek*, 49 Ind. 53; *Birney v. N. Y., &c., Tel. Co.*, 18 Md. 341.

[*688]

*CHAPTER XXII.

THE PLACE OF EVIL MOTIVE IN THE LAW OF TORTS.

When a bad Motive Important. In the course of the preceding pages it has been made very manifest 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. What was said in the opening chapter of the work, that the exercise by one man of his legal right cannot be a legal wrong to another, has been abundantly shown to be justified by the authorities, even if it were not in itself a mere truism. "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."¹ "Any transaction which would be lawful and proper, if the parties were friends, cannot be made the foundation of an action merely because they happened to be enemies. As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart."² To state the point in a few words, whatever one has a right to do another can have no right to complain of.

Damage at the hands of Government. It has been shown, also, 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. The discussions in *Milligan's* case cover this point very fully.³ But if the

¹ PARKER, B., in *Stevenson v. Newnham*, 13 C. B. 285, 297. See *Floyd v. Barber*, 12 Co. 23; *Stowball v. Ansell*, Comb. 11; *Taylor v. Henniker*, 12 Ad. & El. 488; *Heald v. Carey*, 11 C. B. 977.

² BLACK, J., in *Jenkins v. Fowler*, 24 Penn. St. 303, 310. See *Fowler v. Jenkins*, 28 Penn. St. 176; *Covanhoven v. Hart*, 21 Penn. St. 495; *Clin-*

ton v. Myers, 46 N. Y. 511; *Frazier v. Brown*, 13 Ohio, (N. S.) 294; *Thomason v. Agnew*, 24 Miss. 93; *McMillin v. Staples*, 36 Iowa, 532; *Brothers v. Morris*, 49 Vt. 460; *Kiff v. Youmans*, 86 N. Y. 324; *Estey v. Smith*, 45 Mich. 402. See cases *infra* 832 et seq.

³ *Ex parte Milligan*, 4 Wall. 3. See *Planters' Bank v. Union Bank*, 16

*circumstances were such that no individual can be [*6S9] 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.¹ There can be no other under such circumstances.

It has also been stated that an exercise of legislative authority can afford no ground for legal complaint. A strong illustration of this is afforded by the grant by the government of a new franchise which has the effect to destroy or render useless a prior grant of a like franchise.² If the first grant was not in terms exclusive, the second is perfectly lawful, and no inquiry into the motives for making it will be suffered. The rule is universal, that legislation shall not be assailed in the courts on an allegation of malice, bad faith or corruption in passing it; and it is manifest that if the allegation, when established, could not affect the validity of the legislation, permitting it to be made could only be an impertinence and an affront.³ One department of the gov-

Wall. 483; *Mitchell v. Harmony*, 13 How. 115; *Griffin v. Wilcox*, 21 Ind. 370; *Johnson v. Jones*, 44 Ill. 142; *Hough v. Hoodless*, 35 Ill. 166; *Wilson v. Franklin*, 63 N. C. 259; *Hogue v. Penn*, 3 Bush, 663. If persons, while claiming to act as State officers, invade private rights under color of authority unconstitutional and void, they are liable. *U. S. v. Lee*, 106 U. S. 196; *Cunningham v. Macon, &c., Co.*, 109 U. S. 446; *Poindexter v. Greenhow*, 114 U. S. 270.

¹ *Durand v. Hollins*, 4 Blatch. 451; *Ford v. Surget*, 46 Miss. 130; *Sutton v. Tiller*, 6 Coldw. 593; *Despan v. Olney*, 1 Curt. C. C. 306. If a suit against officers is really to enforce the performance of an obligation of the State in its political capacity, courts of the United States will not entertain it. *Louisiana v. Jumel*, 107 U. S. 711; *Hagood v. Southern*, 117 U. S. 52.

In Great Britain it is customary, after times of civil commotion, to pass acts of indemnity and oblivion to heal the disorders which may have sprung up while alarm prevailed, and to protect officials who in good faith exceeded their authority in attempts to prevent or suppress breaches of the law. There is an enumeration of such acts in *Phillips v. Eyre*, L. R. 4 Q. B. 225. Something similar was done by provisions in some of the revised State constitutions after the recent civil war in this country. See *Drehman v. Stifle*, 8 Wall. 595.

² See *Charles River Bridge v. Warren Bridge*, 11 Pet. 420

³ *Sunbury, &c., R R Co. v. Cooper*, 33 Penn. St. 278; *Baltimore v. State*, 15 Md. 376; *Ex parte McCordle*, 7 Wall. 506; *Doyle v. Insurance Co.*, 94 U. S. 535; *Ex parte Newman*, 9 Cal. 502; *Slack v. Jacob*, 8 W. Va.

ernment is not at liberty to assail another department in this manner, or to suffer its machinery to be employed by individuals for such a purpose. But legislation exceeds its limits when it orders a trespass upon the property or persons of individuals, or when it provides for taking individual property for [*690] the public *use without making compensation. Legislatures, like courts, must keep within the limits of their lawful authority.

The General Rule. Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful.¹ When in legal pleadings the defendant is charged with having wrongfully and unlawfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged.² The principle is forcibly illustrated by the case of *Mahan v. Brown*. In that case 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 windows, 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 house uninhabitable. It was held that the action would not lie. "The defendant has not so used his property as to injure another. No one, legally speaking, is injured or damnified unless some right is infringed. The refusal or discontinuance of a favor gives no cause of action. The plaintiff in this case has only been refused the use of that which did not belong to her; and whether the motives of the defendant were good or bad, she had no legal cause of complaint."³ The decision is important, not only as an illustration of the general rule, but also because it is opposed to the doctrine which prevailed in the

612, 635; *Flint, &c., P. R. Co. v. Woodhull*, 25 Mich. 199; *State v. Fagan*, 22 La. Ann. 545. If a municipality has authority to impose taxes, its motives are immaterial. *Brown v. Cape Girardeau*, 90 Mo. 377.

¹ *Jenkins v. Fowler*, 24 Penn. St. 308, 310, per BLACK, J.

² WILLES, J., in *Gerard v. Lewis*, L. R. 2 C. P. 305.

³ *Mahan v. Brown*, 18 Wend. 261, 265. See *Panton v. Holland*, 17 Johns. 92; *Harwood v. Tompkins*, 24 N. J. 425; *Jenks v. Williams*, 115 Mass. 217; *Thornton v. Thornton*, 63 N. C. 211; *Burke v. Smith*, 37 N. W. Rep. 838 (Mich.)

common law of England, that one, by the uninterrupted enjoyment of the privilege of receiving light and air into his buildings over the contiguous land of another, might acquire a prescriptive right thereto; a doctrine which almost universally has been considered in this country unsuited to our condition and circumstances.¹

*So it has been held that no action would lie for [*691] maliciously conspiring as insurance officers to refuse insurance on the plaintiff's property;² or for maliciously collecting the notes of a bank and presenting them for redemption;³ or for maliciously adopting a trade mark to the prejudice of a plaintiff who has no exclusive right to appropriate it;⁴ or for throwing open one's land to the public, so that they may pass over it, thereby avoiding a toll gate;⁵ or for maliciously throwing down

¹*Parker v. Foote*, 19 Wend. 309; *Myers v. Gemmel*, 10 Barb. 537; *Rogers v. Sawin*, 10 Gray, 376; *Carrig v. Dee*, 14 Gray, 588; *Randall v. Sander-son*, 111 Mass. 114; *Keats v. Hugo*, 115 Mass. 204; *Jenks v. Williams*, 115 Mass. 217; *Ward v. Neal*, 87 Ala. 500; *Cherry v. Stein*, 11 Md. 1; *Powell v. Sims*, 5 W. Va. 1; *Keiper v. Klein*, 51 Ind. 316; *Mullen v. Stricker*, 19 Ohio, (n. s.) 135; *Napier v. Bulwinkle*, 5 Rich. 312; *Pierre v. Fernald*, 26 Me. 436; *Hubbard v. Town*, 83 Vt. 295; *Guest v. Reynolds*, 63 Ill. 478; *S. C.* 18 Am. Rep. 570; *Ray v. Sweeney*, 14 Bush, 1; *Lapere v. Luckey*, 23 Kan. 534. See *Morrison v. Marquardt*, 24 Iowa, 85, and compare *Robeson v. Pittenger*, 2 N. J. Eq. 57; *Barnett v. Johnson*, 15 N. J. Eq. 481. Mere prescription is not enough. *Hayden v. Dutcher*, 81 N. J. Eq. 217. The intent to grant such a servitude will not be implied from the grant of a building having windows overlooking the land retained by the grantor. *Keats v. Hugo*, 115 Mass. 204. The subject is discussed at large in this case. To warrant preventing the vendor from darkening the vendee's windows, they must be a real neces-

sity to him. *Rennyson's App.* 94 Penn. St. 147. See *Sutphen v. Therkelson*, 88 N. J. Eq. 318. Whether a grant may be implied under any circumstances, see *United States v. Appleton*, 1 Sum. 492; *Durel v. Boisblanc*, 1 La. Ann. 407; *French v. New Orleans, &c., R. R. Co.*, 2 La. Ann. 80; *Haverstick v. Sipe*, 33 Penn. St. 368; *Janes v. Jenkins*, 84 Md. 1; *Parker v. Foote*, 19 Wend. 309. As to what comes within a statute for bidding malicious erection on one's land, see *Gallagher v. Dodge*, 48 Conn. 387.

² *Hunt v. Simonds*, 19 Mo. 583.

³ *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505.

⁴ *Glendon Iron Co. v. Uhler*, 75 Penn. St. 467.

⁵ *Auburn, &c., P. R. Co. v. Douglass*, 9 N. Y. 444, 450, per SELDEN, J. "Independent of authority, if a malignant motive is sufficient to make a man's dealings, with his own property, when accompanied by damage to another, actionable, where is the principal to stop? For instance, if a man sets up a trade, not with a view to his own profit, but solely to injure one already in the same trade, how

fences put up through one's land to mark the lines of a road which has never lawfully been laid out.¹ Illustrations [*692] might be multiplied indefinitely, *but it is needless. And on the other hand the cases are equally numerous which show that 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 found in the injury done and not in motive.¹

can the case be distinguished in principle from this? So, if one compels his debtor to pay, not because he wants the money, but that the latter may call upon his debtor and thus ruin him; or if one who holds stock in an incorporated company, with a view to depreciate the stock and thus injure some other holder, throws his stock upon the market and sells at a great sacrifice, would not these cases fall within the same principle? and yet no one would contend that an action would lie in these or similar cases." See, also, *Stearns v. Sampson*, 59 Me. 568, 572. The malice of a witness in giving injurious testimony, or of a party in making injurious allegations in his pleadings, &c., cannot be the foundation of a suit. *Dampert v. Simpson*, Cro. Eliz. 250; *Revis v. Smith*, 18 C. B. 125; *Henderson v. Broomhead*, 4 H. & N. 569; *Cunningham v. Brown*, 18 Vt. 123; *Dunlap v. Glidden*, 31 Me. 435; *White v. Carroll*, 42 N. Y. 161.

¹ *Fowler v. Jenkins*, 28 Penn. St. 176; *Jenkins v. Fowler*, 24 Penn. St. 308. If one maliciously throw down a fence erected as a boundary fence, but on his side the line, this is no wrong, for the other was a trespasser in building it. *Smith v. Johnson*, 76 Penn. St. 191. Where a railroad agent maliciously notified its employees that any one dealing with plaintiff, a storekeeper, would be discharged, it was held that there could be no recovery. *Payne v. Railroad Co.*, 13 Lea, 507. So where the employer

maliciously threatened to refuse to employ any one who hired plaintiff's premises as a dwelling thereby greatly diminishing their value, the plaintiff was held to have no remedy against the employer, if the employee, a tenant at will, abandoned the premises. *Heywood v. Tillson*, 75 Me. 225. So where a bank about a spring in defendant's land caused an increase of water in a well on plaintiff's land, the latter has no remedy if the former by cutting the bank diminishes the water in the well. *Phelps v. Nowlen*, 72 N. Y. 39. But in Maine in a carefully considered case it is held that if one digs a well upon his own land not for the benefit of his own estate but maliciously and for the sole purpose of cutting off water percolating to a spring, from which another has a right to draw water, an action will lie. "We think," says the Court, "it cannot be regarded as a maxim of universal application that malicious motives cannot make that a wrong, 'which in its own essence is lawful.'" *Chesley v. King*, 74 Me. 164. The same doctrine has been applied where the owner of a dam privilege by letting out water, when ice was forming, prevented the riparian owner from harvesting the ice. If the act was malicious and solely to injure, an action lies. *Stevens v. Kelly*, 78 Me. 445; otherwise not. *Stevens v. Kelly*, 13 Atl. Rep. 43.

² The servant who innocently converts the property of another when acting for and in the interest of his

Apparent Exceptions. Some cases are apparent exceptions to the general rule. Thus, we have seen that malice is said to be an ingredient in the wrongs of slander and libel. But in most cases the exception is only apparent. If the damaging imputation is false, the law supplies the malice, and will neither require it to be proved, nor give immunity because it is disproved. That malice is an element of the wrong in a case in which the proof of it is unimportant, must be purely a legal fiction.

Real Exceptions. 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. Many such cases of privilege have been given in preceding pages,¹ and it has been shown that the party is protected, even though what he published is false, if he published only what he honestly believed. But in such cases the law itself sets bounds to the right; it gives a privilege with a limit plainly defined; a privilege 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 [*693] 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

master, is nevertheless liable personally. *Porter v. Thomas*, 23 Geo. 467. The army officer who undertook to remedy the wrong done to a loyal man in the taking of his property by seizing and handing over to him the property of a confederate, was of course liable as a trespasser. *Moran v. Smell*, 5 W. Va. 26. If good motive could render an otherwise illegal

act lawful, one might justify inflicting punishment by way of discipline on his neighbor's children when they seemed to need it, and the improvised lynch courts which exercise jurisdiction on the borders of civilization in some cases would become perfectly lawful tribunals.

¹ Ante, p. 246 et seq.

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 was well founded. Good faith in these cases is the limit of the privilege. It would be monstrous if one might with impunity make use of the process of the law for the sole purpose of wreaking his malice upon his fellows; and it would, perhaps, be equally destructive of social order if every man were subject to be called to account for the motives with which his legal rights were exercised.

Bad motive increases necessity for Caution. But it cannot be said that motive is entirely 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. Suppose, for instance, he were to make an excavation in his grounds for the mere purpose of annoying his neighbor and compelling him to be at the expense of supports for his building, would not his motive demand of him the observance of more than ordinary care to avoid injury? Suppose he were to build a fire on his own premises for the sole purpose of incommoding a neighbor with the smoke and dust, and the fire should spread to the neighbor's premises, would not the motive itself strengthen greatly any other evidence that might exist of the want of proper care to prevent the fire spreading? The point is not without interest, and it would seem that there must certainly be some difference between the man who proposes to keep within the limits of legal right, and also to cause no annoyance, and the man who proposes to cause what annoyance he may find possible without exceeding those limits.

[*694] *Motive generally 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. The unintended blow, though negligent, is excused, when the blow meant for an affront, though no heavier, is

justly punished with heavy damages. The justice of this is universally and spontaneously conceded in private life and acted upon everywhere.¹

¹If the following anecdote shall at first blush seem a little out of place in a law treatise, the aptness and force with which it illustrates the point of the text must excuse its introduction:

In his early years Mr. Macaulay has a curiosity to see how an election is conducted, and goes out for the purpose. As he approaches the place of voting he is struck in the face by the carcass of a dead cat which some one has thrown in his direction. This certainly is unpleasant; the missile is unsavory and the victim is proportionally enraged. No money just then would have compensated satisfactorily for the outrage. It is an unprecedented affront and insult. But the guilty party soon appears and

apologizes. The missile was not intended for Mr. Macaulay, but for another person against whom it had been thought to be a proper political argument. The injury is almost redressed at once. "Well," says Mr. Macaulay, "please next time intend the missile for me and hit the other man." Thus a grievous injury becomes merely the occasion for a jocose remark, and the trespass which, if intended, would have been for a considerable period a source of irritation and annoyance, is all removed by an explanation and a slight ablution, and good nature is restored. A tort was of course committed, but the damage was nominal.

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