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HAND-BOOK

OF THE

LAW OF TORTS

BY

EDWIN A. JAGGARD, A. M., LL. B.

Professor of the Law of Torts in the Law School of the University of Minnesota

IN TWO VOLUMES

VOL. I

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To

MY FATHER AND MOTHER.

Non vobis, cheu!
Sed memoriæ caræ vestræ.

PREFACE.

In this day, when of the making of books there is no end, it is becoming, as is said in a famous American medical treatise, that the producer of a new book should assign its raison d'etre.

One purpose of this book is to use and apply such portions of what is known as "Jurisprudence" as are especially relevant to the subject of Torts. John Austin, according to the Saturday Review, "was, with the single exception of Jeremy Bentham, the only Englishman of any considerable ability who ever made the study of Jurisprudence proper the object of his life." Mr. Holland has certainly joined this goodly company. And the labors of Gordon Campbell and Robert Campbell (supplementary to Austin), and of Sheldon Amos, have contributed materially to the advancement of this branch of legal knowledge. The enormous quantity of matter daily ground out by the mills of the law is making it necessary that the practitioner, as well as the student, should again resort to the first principles. The multitude of current authorities increases the necessity of a corrected analysis, and demands a better classification of the law. There is little hope of progression in this direction from its discussion under heads of concrete objects, as dogs, horses, bicycles, ice, beer, shillalahs, or the like. While there is not unanimity of opinion on the subject, there is every indication that the future development of the law will be, if not along the line on which these distinguished thinkers have worked, at least with increasing reference to the results of their labors. In the law of Torts, this tendency is manifest conspicuously in one of the ablest (Pigott's) and the most original (Innes') of the modern books on the subject.

Another purpose of this book has been to develop the general law of Torts as distinguished from the law of specific or isolated wrongs, and to then apply the general principles thus evolved to torts with conventional names. Specific torts were among the earliest subjects of judicial cognizance. Trespass to lands and persons, libel and slander, conspiracy, and nuisance, are among the oldest heads of the com-

mon law. But only within very recent times has the process of generalization been applied to them. Indeed, as Mr. Bishop's personal experience shows, the idea of a book on Torts, as a distinct subject, was a few years ago a matter of ridicule. His criticism on an unnamed American book, that it treated of Torts, not even as a subject, but as a collection of disconnected cases, might be justly extended to many others. The lack of general conceptions on this subject is apparent in the absence of any consistent theory as to why a man is liable for his tort, although in contract and in crime the reason for legal responsibility readily suggests itself to any inquirer, and is to be found in any book on those subjects. The theory of Torts was essentially terra incognita until the contributions of Oliver Wendell Holmes, Jr., appeared on the subject. His "Common Law" is pronounced by Mr. Fraser (himself a distinguished writer) the ablest law book ever written by an American. The confusion of ideas in regard to the importance of the mental element in the law of Torts is another illustration of this lack of general conceptions. Mr. Cooley's great book on Torts leaves on the reader's mind the impression that the mental status of the wrongdoer is not the material consideration in determining liability for tort, but that the wrong is to be regarded from the point of view of the injury to the sufferer. On the other hand, a learned judge (McCrary, J., in Shippen v. Bowen, 48 Fed. 659–660) insists that "a scienter is the very gist of a tort. To say that one may recover in tort without proving a scienter is to say that he may omit from his proof the chief element of his case." Such confusion is not in the subject-matter itself. The broader view, closer analysis, and more precise phraseology of the best modern writers, avoid it. The development of the general law of Torts owes its greatest debt to Sir Frederick Pollock. In his treatise on Torts (happily called by Judge Caldwell a "legal classic") he says: "The purpose of this book is to show that there is really a law of Torts, not merely a number of rules about various kinds of torts,—that there is a true, living branch of the common law, and not a collection of heterogeneous instances." He accordingly divided his discussion into two parts: (1) The general part, containing principles common to all or most torts; and (2) specific wrongs.

This plan is adopted here, and an attempt is made to extend it by making the discussion of specific wrongs more an illustration and

development of the principles stated in the general text than a mere isolated exposition of rulings as to specific wrongs. To this end, care has been taken to compare and contrast the various wrongs one with another. The thread of relationship of contract and tort, for example, considered in the general part, is traced throughout. It is discussed under the title of "Negligence" in a general way, and is then amplified in detail in the discussion of the liability of the master to his servant, and under the title of "Common Carriers." It is endeavored to bring out, without slavish devotion to the phrase, the idea that, while a contract is based on consent, a tort inheres in relations. This plan, as well as limits of space, preclude consideration of a few specific subjects; like torts arising in connection with copyrights and patents.

Another purpose of this book is to collate and weld together the best of the numerous and diverse contributions to the law of torts, and to bring the subject down to date.

The recent work of English authors along this line is important and valuable. The contributions of Fraser, Pigott, Innes, Clerk & Lindsell, Ball and Shearwood, and others have most materially advanced the study of Torts as a subject; especially with regard to the evolution of the general law, and the simplification of classification. Much legal learning is to be found in books of leading cases. Many of these contain scattered but open treasures, and some are the product of high scholarship, deep thought, and great labor. In no place can the historical development of the law as to specific wrongs be so accurately traced in the cases themselves as in the collections made by Professors Ames and Smith. They are mines rich in learning, but their wealth is deeply buried; nothing but close, hard, and prolonged work will extract it. It is inaccessible to the busy lawyer in the hurry of actual practice. Also, scattered throughout a score or more of legal publications, are articles of the greatest value. The writer has been impressed with the truth of the proposition that many of the most learned, penetrating, and satisfactory discussions of debatable questions, in the law of Torts at least, are to be found in these comparatively short essays. Some of them have been written by specialists on particular topics, who have investigated their subject with a thoroughness impossible to the writer of a general text. Others come as the finished product of trials in court by the

most eminent members of the bar, or as the result of dissection by learned teachers in the class room. Finally, the law of Torts has been materially advanced by writers on specific wrongs and collateral subjects. All these authorities and many others have been unsparingly used in the present treatise. Due credit has been given as far as possible, but a further and general acknowledgment is here made for matter borrowed without citation,—in every instance the result of the familiar but futile hunt for a lost reference. All of the more important recent cases have been either cited, or used as illustrations, and the book is brought thoroughly down to date.

Some features of the book which may suggest adverse criticism have been the result of a series of experiments in the class room as to the best means of clarifying confused ideas, and of so viewing a difficult subject from different points, as to also use iteration to impress on the student's mind certain ideas otherwise hopelessly fugitive.

That this book was written in hours stolen from active practice, and at considerable personal sacrifice, may have contributed to prevent any fair attainment of its purposes. It represents, however, at least the writer's own work. It has not been delegated to students. Every case and reference has been individually examined.

To Mr. William B. Hale, who edited the manuscript and prepared it for the press, the writer especially wishes to express his indebtedness for many wise suggestions and criticisms, for preparation of the index, and for much valuable assistance in mechanical details.

E. A. J.

St. Paul, Oct. 30, 1895.

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HAND-BOOK

OF THE

LAW OF TORTS.

Part I.

IN GENERAL.

CHAPTER I.

GENERAL NATURE OF TORTS.

DEFINITION.

1. A tort is an act or omission giving rise, by virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action on a contract.[1]

Derivation.

The French word "tort" is derived from the Latin "torquere," to twist; "tortus," twisted or wrested aside. It is what is crooked, as distinguished from what is straight. It is the opposite of right (droit).[2]

Definition by Reference to Remedy.

Many attempts have been made with varying success to define a "tort." The above definition of Mr. Pollock, while a negative one, seems to be least unsuccessful and unsatisfactory. It is founded upon a favorite and important distinction on which jurisprudents lay great stress, but with respect to which there is considerable difference in terminology. It is evident that there are two main ideas set forth by this definition: the conduct which constitutes a tort and the redress which the law provides for the wrong done,—the cause of action and the remedy. Accordingly, the definition may be considered as involving (a) a portion of the general law, which defines the rights and commands the corresponding duties controlling the relations of individuals to each other,—that is to say, a portion of the law substantive; and as involving, also, (b) a portion of the general law, which provides the means by which these rights and duties are enforced and a violation of them is prevented or redressed,—that is to say, a portion of the law adjective.[3] When a

[1] Pol. Torts, *4. Similarly, Mr. Bishop, in Noncontract Law, defines a tort to be "one's disturbance of another in rights which the law has created, either in absence of contract or in consequence of a relation which a contract had established between the parties." Bish. Noncontr. Law, § 4. This definition is not, however, so broad or so accurate as is Mr. Pollock's.

[2] Black, Law Dict. tit. "Tort"; Bouv. Law Dict. tit. "Tort"; Jac. Law Dict. tit. "Tort"; Co. Litt. 158b; Whyte v. Rysden, Cro. Car. 20; Pol. Torts, *2.

[3] Mr. Bentham and the German writers adopted the division of the law into law substantive and law adjective, or instrumental law. This arrangement Mr. Austin regards as involving a double logical error—First, because much of

right exists, there must be a corresponding duty to observe that right; and a tort or a wrong may be spoken of either as a breach or violation of a duty or an infringement of a right.[4] The law substantive, or the law of rights and duties, is concerned with acts or omissions complained of as a breach, or as a violation of a duty or infringement of a right. The law adjective, or the law of procedure and remedies, deals with tribunals, the forms of actions, and other means of prevention or redress.

Definition by Reference to Nature of Right.

This definition is clear and simple and accurate. It would not appear that so much can be said for the current definitions based on

the substantive law as thus understood is the adjective or instrumental; second, because, if the law of procedure is called "droit adjectif," that term ought to be extended to the law relating to rights and duties arising from civil injury and from crimes or punishment. He proposes as a substitute primary or principle, as distinguished from secondary or sanctioning, duties. 2 Aust. Jur. lect. 45, §§ 1031–1034, lect. 46, § 1041; and see 8 Harv. Law Rev. 187–196; Pom. Rem. & Rem. Rights, c. 1. The terms "law adjective" and "law substantive" will be used in this book with considerable latitude of meaning. According to perhaps what is the most recent contribution to the subject, rights are antecedent and remedial. Antecedent rights are: (1) Rights in rem; and (2) in personam. Rights in rem are rights available against all the world,—as the proprietary right of an owner of a house or land. Rights in personam are rights availing against a definite individual,—as a right of a landlord to his rent. Antecedent rights are those which exist independently of any wrong having been committed, as in the above examples. The persons clothed with them are in enjoyment of advantages not possessed by the rest of the community. A remedial right is one given by way of compensation when an antecedent right is violated. Remedial rights are also in rem and in personam (the latter being by far the most common). Proceedings to obtain a divorce, or against a ship in the admiralty division, are illustrations of the former, while proceedings against individuals who infringe antecedent rights are illustrations of the latter; and these are the subject of torts. Holl. Jur. 141; Shearw. Torts, 1, 2.

[4] Whart. Neg. § 24; Emry v. Roanoke, etc., Co., 111 N. C. 94, 16 S. E. 18. A legal duty is that which the law requires to be done or forborne to a determinate person, or to the public at large, and is a correlative to a right vested in such determinate person, or in the public at large. Whart. Neg. § 24; 16 Am. & Eng. Enc. Law, 412, and cases cited. Austin's definition of a right is that "a party has a right when another or others are bound or obliged by the law to do or forbear towards, or in regard of, him." 1 Jur. lect. 16, p. 277, sub. 576.

the distinction between rights in rem and rights in personam. Of these, the one found in Innes on Torts [5] may be fairly regarded as the best: "A tort is an unauthorized prejudicial interference of some person, by act or omission, with a right in rem of another person." This might be called a "lucus a non lucendo"; or be said to define what is unknown by something still more unknown.[6] Such criticism is unjust in effect. Indeed, as the misapprehension of the distinction between a right in rem and a right in personam embodied in the common law (largely through the classification of Blackstone's Commentaries [7]) gives way to a more natural, historically correct, and scientific division of the law,[8] it is not unlikely that the ultimate definition of the term "tort" will be of this type. This particular definition, however, is incomplete. If the person whose right in rem is interfered with is not innocent, but has by his own wrong contributed, as a proximate cause, to the interfer-

[5] Innes, Torts, introduction.

[6] The ordinary sense in which the action in rem is used, as distinguished from an action in personam, may be illustrated by the cases which hold that a seaman may recover wages either by libel in personam against the owners or masters, or by libel in rem against the ship in courts of admiralty. Sheppard v. Taylor, 5 Pet. 675–717; Temple v. Turner, 123 Mass. 125–128; Bronde v. Haven, Gil. 592; Rule 13 in Admiralty; 4 Law Q. R. 388. And see Hanley v. 16 Horses and 13 Head of Cattle, 97 Cal. 182, 32 Pac. 10; Dooley v. 17,500 Head of Sheep (Cal.) 35 Pac. 1011.

[7] Mr. Lawrence Maxwell, Jr. (solicitor general of the United States) has pointed out that Blackstone "accepted an arrangement of the law, based upon an analysis of Lord Chief Justice Hale, which is now known to be indefensible as a scientific classification. Blackstone supposed he was following the system of the Roman Institutes, which, in fact, he misconceived through a wrong translation of 'jus rerum,' and a misunderstanding of the distinction in Roman law between 'jus rerum' and 'jus personarum.' The civil law was little studied in England, and Blackstone's arrangement passed there unchallenged until John Austin took the field." 2 Mich. Law J. 305 (Aug. 1893). Mr. Cooley, in The Witness, replies to Mr. Maxwell, and recognizes the value of Mr. Austin's work as beyond question, but doubts whether justice is done to Littleton, Coke, and Blackstone in the criticism that their work falls below that of Mr. Austin in arrangement, in philosophical presentation, and logical analysis. Mr. Dillon (Laws & Jur. Pa., note) has been "often led to doubt the permanent intrinsic value of Austin's labors."

[8] See article by Sir Fredrick Pollock in 8 Harv. Law Rev. 187, 275, on "Divisions of Law." And see 1 Aust. Jur. lect. 16.

ence with his right in rem, there is no (actionable) tort. And it is inaccurate. Interference with rights essentially, if not technically or accurately, in personam, may constitute a tort.[9]

Other Definitions.

It is quite common to define a tort by ringing changes on the fallacious infelicity: "A tort is a wrong independent of a contract." [10] To so define a tort is to ignore the fact that there are other noncontractual wrongs. A breach of trust, adultery, or the refusal to pay just compensation for a relief to a vessel in distress, are wrongs; but none of them are torts, although they are all noncontractual wrongs.[11] Such a definition is like a definition of a horse as a quadruped. And, on the other hand, while rights involve, in the law of torts, a distinction from those arising out of

[9] Pig. Torts, 5, etc.; Shearw. Torts, 2. Further, as to rights in rem and in personam, see 1 Aust. Jur. (3d Ed.) p. 49; Whart. Neg. § 24.

With respect to persons to whom and by whom duties are owed in tort, it would appear that there are four classes: (1) Some duties are owed to all persons by all persons; that is to say, to and by indeterminate persons. These duties have general regard to the three great fundamental rights in rem, as to person, property, and reputation; as in cases of fraud, assault and battery, negligence in its strict sense, and libel or slander. (2) Some duties are owed by certain determinate persons to other persons in corresponding situations; that is to say, to and by determinate persons. This is a special modification of the three fundamental rights which springs out of certain facts constituting a quasi contract or a quasi tort, and giving rise to an action ex contractu or an action ex delicto. Statutory duties are often of this class. (3) There are duties owed by persons in particular situations to all persons, or duties imposed on certain determinate persons to indeterminate persons. Thus the master is liable to the community for the negligence of his servant; the owner of ferocious animals, of cattle, or of other things having an active tendency to do damage, such as a reservoir, owes the duty of insuring the safety of the rest of the community. (4) Duties are owed by all persons to persons in a particular situation, or by indeterminate persons to determinate persons. Thus, every one is bound to respect the property of others; one maliciously causing a breach of contract is liable to all parties to the contract injured by the breach. The whole community owes duties to persons in the possession or ownership of property. Pig. Torts, 5–13, inclusive; Oliver Wendell Holmes, Jr., 7 Am. Law Rev. 652.

[10] Clerk & L. Torts, 1 (with this addition: "For which the appropriate remedy is a common-law action").

[11] Pol. Torts, p. 3.

contract, there is also a distinction from a vast array of other rights,—as right of trial by jury, the right to file a mechanic's lien, or to foreclose a mortgage, or the rights acquired by adverse possession. This definition is as defective as would be the definition of the horse as belonging to a class of animals independent of the horned animals.[12] Moreover, a class of torts conveniently called quasi torts arise out of a state of facts of which a contract is an essential part. Indeed there is good authority for saying that when a contract is broken an action on the contract or an action on the tort for the breach of the duty imposed by the contract may be brought.[13]

The famous saying of Bagley, J., in Rex v. Commissioners of Sewers of Pagham,[14] is frequently converted into a definition: "If a man sustains damages 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 wrong by another." This definition is fairly subject to criticism. "That an action in case will lie when there is concurrence of actual damage to plaintiff and wrongful act by defendant is a truism, yet, unexplained, misleading."[15] Perhaps the most vital objection to this definition is that it leads to merely verbal reasoning on the words "damage" and "wrong."

THE ADJECTIVE AND SUBSTANTIVE LAW OF TORTS.

2. This definition of a tort may be conveniently considered as involving a portion of—

(a) The law adjective and

(b) The law substantive.

[12] Innes, Torts, § 6.

[13] Broom, Comm. (5th Ed.) 660; Ball, Torts, 4; Boorman v. Brown, 3 Q. B. 511-526; Rich v. New York Cent. R. Co., 87 N. Y. 382 (collecting and commenting on definitions).

[14] Rex v. Commissioners of Sewers of Pagham, 8 Barn. & C. 355-362.

[15] Chambers v. Baldwin, 91 Ky. 121, 15 S. W. 57. A very simple, but in many respects admirable, definition suggested is: "A tort is a breach of duty fixed by municipal law, for which a suit for damages may be maintained." It will subsequently be seen that the duties for the violation of which an action in tort can be maintained against a common carrier or a

3. Under the law adjective will be considered the place the law of torts holds with respect to other matters of judicial cognizance; specifically:

(a) That the remedy for a tort is civil and not criminal;

(b) That the law of torts is administered by courts of common law only; and

(c) The administration of the law of torts by the courts of common law.

4. The law of rights, or substantive law of torts, will be treated as involving:

(a) The parties to the wrong, whether

(1) The tort feasor, the defendant in action on torts, or

(2) The injured one, the plaintiff in action on torts; and

(b) The wrong itself or the tortious conduct.

The worst objection to the title "torts," perhaps, is that it puts the cart before the horse; that legal liabilities are arranged with reference to the forms of action allowed by common law for enforcing them,—the substantive under the adjective law.[16] Accordingly, to follow the historical developments, the law adjective naturally comes up first for consideration: then the law substantive.

In this chapter it will be attempted to briefly discuss the definition on these lines, and to show in compact form the general nature of a tort, and of the principles on which liability for it is based. The remainder of the general part will be devoted to the development and further discussion of matters which will be briefly stated in this chapter.

master are really fixed by municipal law, although they may be also incorporated in a contract.

[16] Oliver W. Holmes, Jr., in 7 Am. Law Rev. 652–659. "In the common law the only sure way of ascertaining legal obligation, and the most convenient way of arranging this, is by considering the remedy by which the obligations are enforced. Rights and duties, so called, existing beyond the limits of legal remedy, may be matter of enlightened curiosity and moral and metaphysical speculation, but they are not violations of common law." American note to Coggs v. Bernard, 1 Smith, Lead. Cas. 411.

LAW ADJECTIVE—TORTS AND CRIMES.

5. The law of torts is the common border land of civil and criminal and of public and private law. The same conduct may be both a tort and a criminal wrong, but a criminal wrong is not necessarily a tort, nor is a tort necessarily a criminal wrong. A tort differs from a crime—

(a) As to the mental attitude of the wrongdoer.

(b) As to the consequences of the wrong, and

(c) As to redress or remedy.

Torts and Crimes not Convertible.

The same state of facts may constitute either a tort or a crime. Indeed most crimes may also be regarded as torts. Thus, one committing an assault with an intent to kill commits a crime for which he may be arrested, and does damage which may be recovered by the person assaulted in a civil action. Similarly, seduction, libel, nuisance, trespass, conversion, and even deceit may have both tortious and criminal aspects.

Until the time of Bracton (A. D. 1250) personal injuries were not the subject of civil action.[17] Even after that period, these subjects were treated under the head of criminal law, and the defendant in such cases, when sued by civil process, was compelled not only to compensate the plaintiff but also to pay an attendant fine to the king.[18] A trace of this quasi criminal nature of a tort is left in the allowance to the injured person of punitive or exemplary damages where the wrong is willful or malicious; because malice is the mens rea which is an indispensable ingredient of a crime.

A criminal wrong is not always a tort. Thus, treason cannot be called a tort. Nor does the violation of a public duty always create

[17] 1 Spence, 121.

[18] Pol. Torts, § 3; Innes, Torts, § 33; Finch, Com. Law (1654; Ed. 1759) 198. "Civil redress was often given in criminal actions." Bigelow, Lead. Cas. 18. And see historical portion of note to "Deceit," "Assault and Battery," "Trespass upon Property," and "Conversion." For example, the early writ of deceit in the register ran: "The King to the Sheriff of L., greeting: "If A. shall make you secure, etc., P. & C. as well to answer us as well as the aforesaid A., wherefore he, etc." Fitzh. Nat. Brev. 96a, 97b. So, in ap-

a right of action in a private citizen damaged thereby.[19] A public nuisance is a criminal wrong. It may or may not be also a private wrong or tort. It is not a private wrong unless the complaining party has suffered some special hurt apart from the injury done the whole community.[20] Many torts, like simple negligence, malicious interference with rights, accidental trespasses, cannot be regarded as criminal wrongs.[21] Even nuisance may be a civil and not a criminal wrong.[22] "Accountability for civil injuries is even greater than for criminal acts." [23]

Intention.

Intention is the essence of criminal liability. In some classes of cases of the law of torts this is also true, but in others, and perhaps ordinarily, the law of torts does not depend upon intention, or the mental attitude of the wrongdoer. In consequence, many persons incapable of committing a crime because of mental incapacity are held liable for torts. The difference which the element of intention involves in the law of crimes and torts is well illustrated in the case where one man points a pistol which he knows is not loaded at another. In such a case he cannot be arrested for criminal assault, because of absence of any possible intention to commit an assault.[24]

peal of robbery, restitution of the goods taken, as well as punishment for the felony, was awarded. Bigelow, Lead. Cas., historical portion of note to "Trespassers upon Property"; 3 Bl. Comm. 146.

[19] Ward v. Hobbs, 4 App. Cas. 13.

[20] Wilkes v. Hungerford, 2 Bing. N. C. 281; Long v. Minneapolis (Minn.) 63 N. W. 174; Henly v. Mayor, etc., 5 Bing. 91; Proprietors, etc., of Quincy Canal v. Newcomb, 7 Metc. (Mass.) 276; Barnes v. Racine, 4 Wis. 474.

[21] Contributory negligence in carelessly exposing property is no defense to proceeding for its theft. Clark, Cr. Law, 260.

[22] Com. v. Webb, 6 Rand. (Va.) 726.

[23] Agnew, J., in McGrew v. Stone, 53 Pa. St. 436–444.

[24] Chapman v. State, 78 Ala. 463; Chase, Lead. Cas. 70; 2 Green, Cr. Cas. 271a; State v. Sears, 86 Mo. 169; McKay v. State, 44 Tex. 43; State v. Godfrey, 17 Or. 300, 20 Pac. 625. But see People v. Lilley, 43 Mich. 521, 5 N. W. 982; People v. Ryan, 55 Hun, 214, 8 N. Y. Supp. 241. There would seem to be no sound basis for this distinction. Ames, Cas. 11. See Com. v. White, 110 Mass. 407; State v. Shephard, 10 Iowa, 126; State v. Smith, 2 Humph. 457; People v. Morehouse, 53 Hun, 638, 6 N. Y. Supp. 763; Richels v. State, 1 Sneed (Tenn.) 606; Morison's Case, 1 Brown, Just. R. 394; People v. Conner, 53 Hun, 352, 6 N. Y. Supp. 220. According to

The person at whom the pistol was pointed, even if he did not know it was loaded, may recover in tort.[25] Intent to inflict bodily harm is not necessarily of the essence of assault and battery regarded as a tort.[26] The injury such persons suffer is the same. Again, if one man willfully beat another, punitive damages can be recovered; but if the person who did the beating was insane this would at least mitigate damages; but under such circumstances there can be no conviction of assault.[27] So, if one man sells the property of another under the honest but mistaken belief that he has title to it, though he purchased it from a person who stole it, he cannot be convicted of larceny.[28] But under such circumstances he would be liable to the original and true owner of the property in an action on the tort, called conversion, even though he was a broker, and in reality made out of the transaction nothing more than a commission.[29]

Consequences of Wrong.

A crime is an injury to the whole community,—the state suffers. A tort is an injury to a private person,—the individual suffers. A crime is always a violation of a public law, and a tort is often a violation of a private law, and sometimes also of public law.[30] In con-

Stephens (Dig. Cr. Law, art. 241), the act of using a gesture towards another, giving him reasonable ground to believe that the person using the gesture meant to apply actual force to the person of another, directly or indirectly.

[25] Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373.

[26] Post, p. 431, "Assault and Battery."

[27] Post, p. 398, "Damage." And see M'Naghten's Case, 10 Clark & F. 172; Walker v. People, 88 N. Y. 81.

[28] Desty, Am. Cr. Law, § 145j. And see Reeves v. State, 95 Ala. 31, 11 South. 158–168; U. S. v. Harper, 33 Fed. 471.

[29] Hollins v. Fowler, L. R. 7 H. L. 757.

[30] Blackstone defines civil injuries as private wrongs, concerning individuals only; crimes as public wrongs, affecting the whole community. Commenting on this, Mr. Austin says: "If Blackstone had but reflected on his own catalogue of crimes, he must have seen that this is not the basis of the capital distinction in question. Most crimes are violations of duties regarding determinate persons, and therefore affect individuals in a direct or proximate manner. Such, for instance, are offenses against life and body,—murder, mayhem, battery, and the like. Such, too, are theft and other offenses against property. But, independently of this, Blackstone's statement of the distinction is utterly untenable. All offenses affect the community, and all offenses affect individuals. Some are not offenses against rights, and are

sequence, while a tort may be settled by the sufferer, a crime not only cannot be condoned,[31] but shielding an offender may be an offense.[32]

Remedy.

Redress for a crime is punishment by the state; the remedy for a tort is ordinarily compensation, and in some cases punitive damages, to the person injured. The law of crimes is administered by criminal courts with appropriate procedure; the law of torts is administered by civil courts under different practice. In France the two proceedings are combined so that the criminal is punished and damages are awarded by one process.

The English law contained an anomaly called "trespass merged in felony." Its principle, recognized perhaps without due consideration, was that the private right of action was suspended until the public prosecution was completed, whenever the tort amounted to a felony. Until 1870 conviction of a felony forfeited the estate of the felon to the crown. There could accordingly be no effective remedy after conviction. In many cases the right of the individual would have been "merged in the felony." There is good ground for believing that this rule would not now be sustained by English courts.

In the United States the civil and criminal proceedings have been kept separate. Both may be begun at the same time, or either may precede or succeed the other. Neither acquittal nor conviction of a criminal charge bars a civil action. In some states, however, it required statutory enactment to abrogate the English rule.[33]

therefore, of necessity, pursued directly by the sovereign or by some subordinate representing the sovereign." 1 Aust. Jur. lect. 17, p. 281.

[31] Clark, Cr. Law, 7; Fleener v. State, 58 Ark. 98, 23 S. W. 1 (embezzlement); State v. Tull, 43 Minn. 273, 45 N. W. 449 (forgery); Com. v. Slattery, 147 Mass. 423, 18 N. E. 399 (ravishment). As to effect of "consent," see post, p. 203.

[32] Clark, Cr. Law, 329.

[33] Wells v. Abrahams, L. R. 7 Q. B. 554; Ex parte Ball, 10 Ch. Div. 667–671; Roope v. D'Avigdor, 10 Q. B. Div. 412; Lutterell v. Reynell, 1 Mod. 282; Phillips v. Eyre, L. R. 6 Q. B. 1; Pol. Torts; Ring. Torts; Hast. Torts, 8. And see article in 98 Law T. 227; Williams v. Dickenson, 28 Fla. 90–97, 9 South. 847; Boston R. R. Corp. v. Dana, 1 Gray, 83–96; Pettingill v. Rideout, 6 N. H. 454; People v. Walsen (Colo. Sup.) 28 Pac. 1119; Bundy v. Maginess, 76 Cal. 532, 18 Pac. 668; Howk v. Minnick, 19 Ohio, 462; Newell v. Cowan,

IN WHAT CIVIL COURTS TORTS ARE COGNIZABLE.

6. A tort is cognizable in courts of common law only,[34] and not in

(a) Divorce courts;

(b) Ecclesiastical or probate courts;

(c) Courts of admiralty;

(d) Courts of equity.

This, strictly speaking, may be an artificial restriction of the natural and legitimate meaning of the term "tort." There certainly are legal wrongs essentially identical with the substantive elements of a tort recognized by courts which are not courts of common law. For the sake of convenience, however, whenever the term "tort" is used in this book it is treated as referring to the common law of torts only. It is to be noted, moreover, that the best English authorities (and they are entitled to special weight, because of the distinct separation of English courts) would sustain the text in limiting a tort to courts of common law.

Torts not Recognized by Divorce Courts.

"Formerly an injured husband could sue the seducer of his wife in an action of criminal conversation. The seduction, therefore, was a tort. As the law now stands, the husband's remedy is in the divorce court. The alteration is merely in procedure, * * * for the same redress is given as before, and on the same principle. Yet it would seem that, as the essential character of a tort is the

30 Miss. 492; Newkirk v. Dalton, 17 Ill. 413; Harris, Cr. Law, 1-6; Rev. St. N. Y. pt. 3, c. 4, § 2; St. Me. 1844, c. 102; Plumer v. Smith, 5 N. H. 553; White v. Fort, 3 Hawks (N. C.) 251; Knox v. Hunolt, 110 Mo. 67, 19 S. W. 628; Austin v. Carswell, 67 Hun, 579, 22 N. Y. Supp. 478; Lofton v. Vogles, 17 Ind. 105. And see cases collected in 1 Knight, Ruling Cas. The English rule was at one time recognized in some of the states as being there in force. It has been held, for instance, that an action for conversion of a stolen slave could not be maintained against the thief before institution of a prosecution against him for the felony. Martin v. Martin, 25 Ala. 201. And see Grant v. Moseley, 29 Ala. 302-304; Boody v. Keating, 4 Greenl. (Me.) 164.

[34] Pol. Torts, §§ 3, 4.

form of the remedy, the change must be considered as taking the seduction of a married woman out of the class of torts." [35]

Torts not Recognized by Ecclesiastical or Probate Courts.

English ecclesiastical courts have never been recognized in America.[36] A number of matters within the jurisdiction of those courts in England have been transferred to courts of common law in this country. Thus the common law, in its early stages, refused to recognize the idea of property in a corpse, and treated it as belonging to no one except the church. In the United States the right to possession of a dead body, for the purposes of preservation and interment, in the absence of testamentary disposition of it, belongs to the family of the deceased; and any infraction of this right, as by mutilation, will entitle to the recovery of damages by an action on tort in a court of common law.[37]

In early days there was an offense termed "defamation," as the publication of blasphemous words,[38] for which the ecclesiastical court provided a remedy. In this proceeding no "damages could be awarded," says Mr. Townshend. "The defamer might be censured, compelled to recant the defamation, to perform penance and pay costs, and, for disobedience to the court's decree, be excommunicated." [39] The jurisdiction of ecclesiastical courts over crimes like incest led to cognizance of certain malicious prosecutions.[40] In America, all civil proceedings for defamation and malicious prosecution are brought in courts of common law.

"While, in the process of gradual development, most American probate courts have been invested with much larger powers than

[35] Clerk & L. Torts (1889) 1. In some states this action still lies in the courts of common law.

[36] Young v. Ransom, 31 Barb. 49. And generally, see Smith, Ecc. Law. As to ecclesiastical law in England at the present time, see Boyer v. Bishop [1892] App. Cas. 417; Read v. Bishop, Id. 644.

[37] Larson v. Chase, 47 Minn. 307, 50 N. W. 238; but see Cook v. Walley, 1 Colo. App. 163, 27 Pac. 950. Further, as to law of dead bodies, see Hackett v. Hackett (R. I.) 26 Atl. 42; Wynkoop v. Wynkoop, 42 Pa. St. 293; Renihan v. Wright, 125 Ind. 536, 25 N. E. 822; Snyder v. Snyder, 60 How. Prac. 368.

[38] Odger, Sland. & L. 350–352.

[39] Townsh. Sland. & L. § 10; Jac. Law Dict. tit. "Court Eccl."

[40] Fisher v. Bristow, 1 Doug. 215; post, p. 602, "Malicious Prosecution."

the early English testamentary courts, yet in none of them have there ever been vested any such extensive powers. Ordinarily the functions of such courts have been limited to the control of the devolution of property upon the death of the owner, and have not been extended to collateral matters involving controversies between the estate and third parties. These, if an adjudication of them becomes necessary, have generally been left to be tried in the appropriate action in the courts of general jurisdiction." Accordingly, where the claim arises on tort, the claimant may bring his action against the personal representative in the district or other court of competent original jurisdiction, but not in the probate court.[41]

Torts not Recognized by Courts of Admiralty.

Courts of admiralty have jurisdiction over the whole subject of damages on the high seas. Maritime torts are of the same nature as common-law torts, with the element of locality added, and the consequent jurisdiction of the courts of admiralty.[42] The law as to maritime torts, however, is not always the same as the law relating to common-law torts.[43] This should be carefully borne in mind, in dealing with admiralty cases as authorities for propositions as to ordinary torts.

Wherever the common law is competent to give it, a suitor does not lose his right to use a common-law remedy because a tort is committed on the high seas, or other waters subject to the admiralty jurisdiction. Thus common-law remedies apply to a collision on the Ohio river. Ohio courts can administer it. It is not necessary to go into the courts of admiralty.[44] When damage is done

[41] Mitchell, J., in Comstock v. Matthews, 55 Minn. 111, 56 N. W. 583.

[42] In re Fassett, 142 U. S. 479, 12 Sup. Ct. 295; Ben. Adm. (2d Ed.); Philadelphia, W. & B. Ry. Co. v. Philadelphia & H. de G. Steam Towboat Co., 23 How. 209; Greenwood v. Town of Westport, 53 Fed. 824. An injury to a vessel from negligence in operating a draw in a drawbridge is a maritime tort, and a court of admiralty will entertain an action therefor. Greenwood v. Town of Westport, 60 Fed. 560. The wrongful arrest on shore of deserting seamen, by the procurement of the master, does not constitute a maritime tort. Bain v. Sandusky Transp. Co., 60 Fed. 912.

[43] As in cases of collision, post, p. 978, note 686, "Comparative Negligence."

[44] Schoonmaker v. Gilmore, 102 U. S. 118; McDonald v. Mallory, 77 N. Y. 546–556; Percival v. Hickey, 18 Johns. 201.

wholly on land, the fact that the cause of damage originated on the water, subject to admiralty jurisdiction, does not make the cause one for admiralty.[45] The law administered in the admiralty courts of this country, on the other hand, embraces, not merely what is peculiar to the maritime law, but also much of the municipal local law, derived from the constituted order of the states, and all competent state and national legislation. What is peculiar to the maritime law, or that which, by its interstate or international relations, would be incompatible with diverse state legislation, can be changed by congress alone, which, by implication, has the general power of legislation on the maritime law. This does not exclude state legislation upon maritime subjects of a local nature, nor legislation under the police power for the preservation of life or health, not incompatible with interstate and international interests, in the absence of legislation by congress. A state statute giving damages for death by negligence, as applied to a negligent collision on navigable waters within the state, does not infringe those conditions, and is valid.[46]

Torts not Recognized in Courts of Equity.

Courts of equity afford redress in cases where the common law affords no remedy, or an inadequate one. The normal remedy for a tort—compensation—is administered by the court of common law, not by a court of equity. When that remedy is sufficient, equity will not interfere. But there are cases where equity's peculiar remedies are necessary to do justice, and in these equitable interference is always granted.[47] In other words, the jurisdiction of equity may be concurrent.

The tendency is to do away with the artificial system which kept

[45] The Plymouth, 3 Wall. 20.

[46] The City of Norwalk, 55 Fed. 98. See Sherlock v. Alling, 93 U. S. 99. Damages given by a state statute for death by negligence may be recovered on a libel in personam for death by a negligent collision on navigable waters within the state (55 Fed. 98, affirmed). The Car Float No. 16, 9 C. C. A. 521, 61 Fed. 364; McCullough v. New York, N. H. & H. R. Co., Id.; New York & N. Steamboat Co. v. The Transfer No. 4, Id.

[47] Post, p. 353, "Remedies." As to the application of the equitable doctrine of subrogation to conversion, see Tobin v. Kirk, 73 Hun, 229, 25 N. Y. Supp. 931.

equity and common-law courts and proceedings distinct. Under the provisions of the law of so-called "Code States," this has been essentially accomplished. How it could have been done at common law is to be seen in the Pennsylvania system of administering equity through common-law forms.[48] The two systems of jurisprudence must, of course, remain separate. In some cases the injured one may elect to seek an equitable remedy under equitable principles, or to pursue his right to damages for tortious wrong under the common-law principle. Thus, in case of deceit, the injured one may sue in tort for damages produced by misrepresentation, or he may go into equity, have a fraudulent contract reformed, and then specifically enforced.[49] At one time the courts of equity and the courts of common law had concurrent jurisdiction to give compensation for fraud.[50]

ADMINISTRATION OF THE LAW OF TORTS BY COURTS OF COMMON LAW.

7. The common law provided two forms of personal action—

(a) Ex contractu and

(b) Ex delicto.

Actions at common law were commenced, in its early day, by the issuance of an original writ. The ancient forms of writs were kept in the registrum brevium.[51] There were three prescribed forms of ac-

[48] Laussatt on "Equity Administered through Common Law Forms in Pa."

[49] Fetter, Eq.; Pom. Eq.; Bisph. Eq.

[50] Slim v. Croucher, 1 De Gex, F. & J. 401; Peek v. Gurney, L. R. 13 Eq. 79. But see Wigsell v. School, etc., 8 Q. B. Div. 357; Whitham v. Kershaw, 16 Q. B. Div. 613.

[51] The common-law writs were always written (2 Reeves, Hist. 266); were settled verbatim by the time of Edward III.; were printed in the register in the reign of Henry VIII. (4 Reeves, Hist. 429); and were declared fixed and immutable, unless changed by authority of parliament (Bracton, de ex. lib. 5, c. 17, § 2). According to Lord Coke, the register antedates the Conquest (A. D. 1066). Pref. 10 Rep. p. xxiv.; 4 Inst. 140; Dugd. Orig. p. 56. Mr. Bigelow, as to this statement (Lead. Cas. 16), cites as authority for its improbability, Hicke's Thesaurus Dissertatio Epist. p. 8.

tions which it recognized, distinguished by subject-matter,—as real, personal, and mixed. Real actions were for the specific recovery of real property only. For a long time they have been extinct. Mixed actions were for the specific recovery of real property, and for damages for an injury thereto,—as ejectment. Personal actions were for the recovery of a debt, or a specific personal chattel, or of damages for a breach of contract, or of satisfaction in damages for some injury to the person or to real or personal property. Personal actions were, in form, ex contractu or ex delicto.[52]

Among the earliest actions ex delicto was the action of trespass. This lay for the recovery of damage for injury to the person, property, or relative rights of another; but only where such injuries have been committed with force, actual or implied.[53] It lay only where there was a direct, immediate invasion of another's right. When the wrong was with force to the person, as in assault and battery or false imprisonment, it was trespass vi et armis.[54] When it consisted in unlawfully breaking a man's close, it was trespass quare clausum fregit.[55] When it was committed by carrying away his chattels, it was trespass de bonis asportatis.[56]

However, as new causes of action arose, no matter how great was his wrong, the individual, if he could find in the register of writs no writ to fit his case, had no remedy. To supply this deficiency in the law adjective, the celebrated statute of Westm. II. (13 Edw. I.) was enacted. This provided that as often as it should happen that in one case a writ was found, and in a like case (in consimili casu) falling under the same right, and requiring like remedy, no writ was to be found, the clerks should agree in making a writ, or adjourn the complaint until, and refer the matter to, the next parliament. Under this statute new writs were copiously produced.[57] Out of it

[52] Chit. Pl. 110; Ship. Com. Law Pl. 2.

[53] Ship. Com. Law Pl. 72. Laws as to trespass not fully settled until time of Edward I., although mentioned by Bracton. 2 Reeves, Hist. 149.

[54] Id. Trespass vi et armis lay for negligence. Percival v. Hickey, 18 Johns. 256.

[55] Ship. Com. Law Pl. 74. Generally, as to forms of trespass, see 3 Bl. Comm. 120, 151. And see 1 Chit. Pl. 192, 193.

[56] Id. 73.

[57] 3 Bl. Comm. 49; Steph. Pl. 6.

arose the celebrated actions on the case, viz. action of assumpsit, which became in time an action ex contractu although it retained traces of the ex delicto character of its origin; the action of detinue, which is sometimes regarded as ex contractu, and sometimes as ex delicto, and sometimes as neither;[58] the action of conversion; and (the almost distinctive[59] action ex delicto) trespass on the case. This action (trespass on the case) lay, not for direct or immediate invasion of another's right, but for conduct in which the wrong consisted in consequential damage.[60] In trespass, the liability was absolute. In case, the liability was dependent on results. Case lay for injury to absolute rights, not involving force, and where the damages were consequential, as for keeping dangerous animals.[61] It lay also for invasion of relative rights, as seduction, or alienation of affection.[62] It lay also especially for the large class of cases known now by the vague name of "negligence."[63] When trespass lay, and when case, was, at common law, an important question of pleading, because if the pleader mistook his remedy, he would be dismissed from court.[64] Since the abolition of forms of action,

[58] Pol. Torts; Gilb. 6; Steph. Pl. 18b; Peabody v. Hayt, 10 Mass. 35.

[59] Mills v. U. S., 48 Fed. 738; 1 Chit. 99; Browne, Action, 318, note f.

[60] Cooper v. Landon, 102 Mass. 58; Ship. Com. Law Pl. 45, and cases there cited.

[61] Sarch v. Blackburn, 4 Car. & P. 297; Stumps v. Kelley, 22 Ill. 140. And see, generally, Cooper v. Landon, 102 Mass. 58; Singer v. Bender, 64 Wis. 172, 24 N. W. 903; Henry v. Ry. Co., 139 Pa. 289, 21 Atl. 157.

[62] Clough v. Tenney, 5 Me. 446; Hornketh v. Barr, 8 Serg. & R. 35.

[63] Coggs v. Bernard, Smith, Lead. Cas., 2 Ld. Raym. 909; Samuel v. Judin, 6 East, 333; Dearborn v. Dearborn, 15 Mass. 315; Church v. Mumford, 11 Johns. 479; Hamilton v. Plainwell Water-Power Co., 81 Mich. 21, 45 N. W. 648. As to the distinctions as to force and immediate and direct or immediate and consequential injuries, see 1 Chit. Pl. (16th Am. Ed.) 140, and cases cited; Cotteral v. Cummins, 6 Serg. & R. (Pa.) 341; Winslow v. Beal, 6 Call (Va.) 44; Scott v. Shepherd, 3 Wils. 403; Beckwith v. Shordike, 4 Burrows, 2093.

[64] The difference between trespass and case is well illustrated by Espinasse. "Trespass on the case is an action brought for the recovery of damages for acts unaccompanied with force, and which in their consequences only are injurious; for, though an act may be in itself lawful, yet if, in its effects or consequences, it is productive of any injury to another, it subjects the party to this action." 2 Esp. N. P. 597. [Cf. Wakeman v. Robinson, 1

the mere technical question of procedure has lost importance.[65] But the deep-seated distinctions in the law substantive involved are as much legal battle grounds as ever.[66]

8. Through these two classes of personal actions, the common law administered four kinds of obligations,[67] or provided remedies for four kinds of recognized substantive rights, viz.:

(a) Contracts pure and simple;

(b) Quasi contracts;

(c) Torts pure and simple;

(d) Quasi torts.

Contract.

The common law administered obligations of contracts pure and simple. All true contracts grow out of the intention of the parties

Bing. 213.] Thus, where the defendant put up a spout on his own premises, this was an act lawful in itself; but when it produced an injury to the plaintiff by conveying the water into his yard, trespass on the case was adjudged to lie for such consequential injury. Reynolds v. Clarke, 1 Strange, 634. So shooting of a gun, which in itself is an indifferent and lawful act, yet when by it the plaintiff's decoy was injured this action was held to lie. Keeble v. Hickeringill, 11 Mod. 131. Again, where the plaintiff declared in case that the defendant furiously, negligently, and improperly drove his cart against the plaintiff's carriage, that it was overturned and broken, this was held ill on demurrer, and that the action should be trespass vi et armis. Day v. Edwards, 5 Term R. 648. As to election between trespass and case, see Blin v. Campbell, 14 Johns. 432. Cf. Percival v. Hickey, 18 Johns. 256. And see Wilson v. Smith, 10 Wend. 324; Seneca R. R. Co. v. Auburn, 5 Hill. 170.

[65] New Orleans J. & G. N. R. Co. v. Hurst, 36 Miss. 660; Howe v. Cooke, 21 Wend. 28. And see Ricker v. Freeman, 50 N. H. 420.

[66] The importance of the distinction from a theoretical standpoint is manifest in discussions of the ultimate basis of liability in tort. Practically it is of great moment in determining, for example, connection as cause (conspicuously in questions of damage), defense available (as of contributory negligence, independent contractor), the kind and extent of proof required of plaintiff (as the exercise of due care under the circumstances, or the breach of absolute duty). See Holmes v. Mather, L. R. 10 Exch. 261; Johnson v. Philadelphia & R. R. Co., 163 Pa. St. 127, 29 Atl. 854.

[67] The propriety of this use of the term "obligation" has been questioned.

to the transaction, and are dictated only by their mutual and accordant wills. When this intention is expressed, the contract is expressed. When this intention is not expressed, but may be inferred, implied, or presumed from circumstances as really existing, then, and then only, is the contract thus ascertained properly called an "implied contract." [68] In all cases of contract the parties are determinate, and the rights in personam.

Quasi Contract.

The obligation of a quasi or constructive contract was imposed by law in certain cases, without reference to the intention of the parties, and was administered through personal actions, ex contractu. Here the parties are determinate, but the right is not so clearly in personam. The substantive right was not contractual, but the common law, providing no strictly appropriate remedy, invented the fiction of an implied contract to strain an action ex contractu into use.[69] Thus a judgment for damages was called a "contract of record," to

Mr. Anson (Ans. Cont. 6) says that it is of the essence of obligation that the liabilities which it imposes are imposed on definite persons, and are themselves definite; the rights which it creates are rights in personam. Even, however, if this be the case, certain torts are based upon rights in personam. The term as here used is, moreover, employed in this sense by Bentham, Austin, Pollock, and many other writers of eminence. And see Leake, Cont. 3; Clark, Cont. 13. "There are many obligations not within the definition of contract, all of which require the consent or agreement of the parties." Field, J., in Milford v. Com., 144 Mass. 64, 10 N. E. 516; Murdock Parlor Grate Co. v. Com., 152 Mass. 28, 24 N. E. 854. According to Austin, the difference between sanction and obligation is this: "Sanction is evil, incurred or to be incurred by disobedience to command. Obligation is liability to that evil, in the event of disobedience. Obligation regards the future. An obligation to a past act, or an obligation to a past forbearance, is a contradiction in terms. If the party has acted or foreborne agreeably to the command, he has fulfilled the obligation wholly or in part. And here there is a certain difference between positive and negative duties. The performance of a positive duty extinguishes both the duty and the corresponding right. A negative duty is never extinguished by fulfillment, though, if the right be extinguished by another cause, the duty ceases. 1 Aust. Jur. 311, lect. 22.

[68] 2 Bl. Comm. 442; Clark, Cont. 752; Hertzog v. Hertzog, 29 Pa. St. 465–467; McIntyre Tp. v. Walsh, 137 Pa. St. 302, 20 Atl. 706; McSorley v. Faulkner (Com. Pl. N. Y.) 18 N. Y. S. 460.

[69] Clark, Cont. 753.

allow its revival by actions ex contractu.[70] Again, where one has unjustly enriched himself at the expense of another, as where he has been paid money by mistake, and without giving anything in return, there is clearly no agreement, expressed or implied, between the parties. It would, however, be manifest injustice not to make the one enriched by mistake disgorge. The common law, to supply the deficiency of its remedies, invented the fiction of implied promise on the part of him to whom the money was paid to repay.[71] Accordingly money paid under mistake could be recovered on an implied promise, by action ex contractu, called indebitatus assumpsit.[72] And finally a quasi contract may also be said to be founded upon statutory official or customary duty.[73]

Torts.

The common law administered also the obligation of torts, pure and simple. These consisted of violations of legal duty in no wise connected with contract.[74] Thus personal violence, assault and battery; interference with freedom of locomotion, false imprisonment; improperly starting, or abusing properly started, legal proceedings, malicious prosecution; injury to reputation, libel and slander; an-

[70] Louisiana v. Mayor, etc., of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211.

[71] Clark, Cont. 764.

[72] Merchants' Nat. Bank v. National Bank of the Commonwealth, 139 Mass. 513, 2 N. E. 89; Clark, Cont. 771.

[73] State T. I. Co. v. Harris, 89 Ind. 363; Steamship Co. v. Joliffe, 2 Wall. 450; Mechem, Pub. Off. 674, note 5; Keener, Quasi Cont. 16.

[74] A tort pure and simple is essentially different from a contract pure and simple. (a) The most substantial difference would seem to be that a tort pure and simple is independent of previous consent of the wrongdoer or of the injured one to bear the loss the tort may produce, whereas contract is always based on an agreement of minds. (b) The right involved in a tort of this kind is distinguished from that involved in such a contract in being in actual enjoyment at the time of the commission of a tort, while that of a contract is the right to the fulfillment of a promise made by some person. Innes, Torts, § 4. (c) The rule as to parties to an action on the contract and on the tort vary materially. Parties to a contract are determined by its terms. Contract rights are in personam. Parties to a tort are indeterminate. Rights ex delicto are in rem. Many persons may be liable for tort who cannot bind themselves by contract. Rights of contribution between defendants and judgment debtors are different in the two classes of actions; so, also, differs the effect of death of parties plaintiff or defendant, both at common law and

noyance or offense to the senses, or to the enjoyment of life and property, nuisance; a trespass to land or goods,—are all actionable wrongs, and are committed, not only without any consent, but despite the will, of the person injured. Here the parties were indeterminate, and the rights in rem.

Quasi Torts.

The obligation of a quasi tort may be strictly said to include all species of actionable civil wrongs not included in the preceding three classes. It is, however, convenient to apply it in a broader sense, so as to include also all cases in which an action ex delicto lies upon a state of facts of which a contract is a necessary part.[75] It may arise from a violation of a right or duty which the law prescribes, and which to a limited extent individuals may modify with respect to certain conventional or contractual relations which are entered into by agreement, or from the violation of a different right or duty which the law recognizes as created by a range of facts of which a contract is a necessary part.

When a passenger takes a train, he ordinarily holds, as evidence of the contract he has made with the common carrier, a ticket and a baggage check. The shipper holds a bill of lading. Upon this simple state of facts the law bases a complex system of rights and duties as to person and property. Part of this the parties may have contemplated, but most of it exists in the common law alone, and derives its origin, not from real consent, but from ancient history,

under the statutes of the various states. (d) Finally, the remedy in an action on a tort is the award of damages only. On the other hand, while damages may be awarded in an action ex contractu, a contract may also be reformed and specifically enforced. There is a material difference as to the measure of damage and the extent to which liability for consequences can be carried. Attention is called to the confusion likely to arise from attempts to distinguish a tort from a contract. It would seem that it conduces to distinguish between the four kinds of common-law obligations, rather than merely between contracts and torts.

[75] The use of the term "quasi tort" may be open to the objection that it is not the same as the use of the same term in the civil law. This terminology of the civil law, however unjustly criticised, can scarcely be said to be one strictly followed by the common law. See Pol. Torts, 18, note s. Moreover, the term as here used applies alike to breaches of statutory, customary, and conventional duties, which also might be called violations of quasi contracts.

the legislation of the judges, and from statutes. Such rights and duties are not properly contractual, nor is their breach a contractual wrong; as, for example, where a passenger is assaulted by a servant of the common carrier, or injured by its negligence. In the case of master and servant, this is even more marked. The contract of employment, generally informal, incomplete, oral, and containing no more than an agreement of wages, work, and time of payment, entails liability and secures rights or superimposes duties implied [16] by law, with respect to the relation, unknown to the parties, and in large measure to lawyers, and, as to most material matters, in a number of instances, to the courts, prior to the decision of the case in issue. Thus it will be seen that the courts implied into the contract the doctrine of assumption of risk of the employment by the servant, and especially the risk of the negligence of a fellow servant. Nevertheless it is the contract, without which the relationship could not exist, which brings these rights into existence; and the rights and duties vary with the contracts. Thus a railroad company owes one set of duties to the person in its contract to carry a passenger, another to its employé, and a still different set of duties to a person with whom it has no contract. The same principle applies in a large measure to the reciprocal rights and duties of physicians and patient, attorney and client, owner and architect or contractor, and in many other cases, as a telegraph company and the sender of a message, a vendor and vendee, a bank and a depositor, and the like. There is a body of law outside of the agreement of the parties prescribing rights and defining duties not directly contemplated by the parties, but a breach of which is actionable as a tort.

The degree to which the causes of action in quasi torts depend upon contract is apparent in the normal rule that only parties and

Keener, Quasi Cont.; Whittaker v. Collins, 25 Am. Law Rev. 695. And see Amos, Jur. 295. But these objections, on reflection, will, it is thought, not prove as real as apparent. The substantial advantages in clearness and simplicity and good authority (Underh. Torts; Ring. Torts; Shearw. Torts) seem to justify the application of quasi tort here made. Mr. Shearwood suggests the terms "pure and impure torts."

[16] Post, p. 990, "Negligence," "Master and Servant."

privies to such contract can recover for its violation. There are, however, a number of cases in which persons who are not parties to the contract may sue for its violation.

While thus the omission to perform a contract obligation is not a tort, unless that omission is also an omission of a legal right, such legal duty may arise, not only out of certain conventional relations, but also out of a wider range of facts, of which a contract is an element, giving rise to a legal duty due from every man to his fellows, to respect the rights of property and person, and refrain from invading them by force or fraud or carelessness. This duty applies to both willful and o negligent wrongs.

The law does not allow a party to use a violation of contract obligation as an instrument of oppression and damage to accomplish his purpose, and then to interpose the contract as a limitation of his liability.[77] Therefore, where a party willfully broke his contract with another to restore a depot to its original location near the latter's land, so as to precipitate foreclosure of a mortgage executed by the latter, by depriving him of restoration in value because of the return of the depot, this was held an actionable tort.[78] And on the same principle liability will attach in favor of strangers because of negligence in connection with a contract. Thus, in dealing with dangerous things the owner or keeper owes a duty to the world to avoid doing harm; and this duty applies although he may have sold the dangerous thing to some other person than the person injured. So, in dealing with property under contract, any negligence which damages another's property is actionable, although the person complaining was not a party to the contract.

In quasi torts it would seem that persons are sometimes determinate and sometimes indeterminate, and that the rights are sometimes in rem and sometimes in personam.

[77] Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609.

[78] Rich v. New York Cent. R. Co., 87 N. Y. 382, per Finch, J. And see Louisville, St. L. & T. Ry. Co. v. Neafus, 93 Ky. 53, 18 S. W. 1030. Cf. Dawe v. Morris, 149 Mass. 188, 21 N. E. 313 (where plaintiff's cause of action was held to be contract, not tort); and see Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632.

9. The common law observed no distinct or strictly logical rule with respect to the administration of these four kinds of obligations by means of the two forms of personal action. It sometimes allowed the enforcement of a tort or a quasi tort through an action ex contractu and of a contract and quasi contract through an action ex delicto.[79]

The normal application of these two forms of action to the four kinds of obligations would have been to administer wrongs based on contract[80] and quasi contracts[81] through actions ex contractu, and wrongs based on torts[82] and quasi torts through actions ex delicto. In a large measure this was carried out, but there were many variations and a confusing inconsistency in the application of the forms of remedy to the obligation.

Contract Sued ex Delicto.

Even certain actions which are really based on a contract and might be sued ex contractu may be brought in the form of an action ex delicto to evade either a statute or the ordinary provisions of law. Thus, the statute of frauds required guaranties to be in writing to avail. Instead of suing on a parol guaranty, therefore, actions were brought, in order to evade the statute, on the tort in deceit on allegation of false representations as to credit. The statute had no application to torts. By this means parol evidence was admitted, not to prove the guaranty, but the falseness of the

[79] Clark, Cont. 766. For a note as to the right of election of one who has been held liable for the tort or breach of contract of another, between an action founded on an express promise of indemnity, if such there be, or on the implied assumpsit raised by the payment of the obligation of the other, or upon the theory of subrogation. See 30 Abb. N. C. 173.

[80] Livingston v. Cox, 6 Pa. St. 360; Link v. Jarvis (Cal.) 33 Pac. 206; Russell & Co. v. Polk County Abstract Co., 87 Iowa, 233, 54 N. W. 212; City of Ft. Wayne v. Hamilton, 132 Ind. 487, 32 N. E. 324; Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. 802. Even under the Code, a complaint showing a cause of action in tort is not sustained by proving a cause of action on contract. De Graw v. Elmore, 50 N. Y. 1.

[81] Keener, Quasi Cont. c. 1; Clark, Cont. 752.

[82] Wilson v. Haley Live-Stock Co., 153 U. S. 39–47, 14 Sup. Ct. 768.

representations. Such actions were so successful that Lord Tenterden's act was passed to make the statute of frauds cover, as to these points, both actions ex contractu and actions ex delicto.[82] As will be seen, some persons, as infants and married women, were under a legal disability making them incapable of contracting, but a recovery could be had for their torts. Accordingly, a person, whenever he could, would sue ex delicto rather than ex contractu. Thus, if an infant should hire a horse and abuse it, it would be to the bailor's interest to sue on the tort, because he could not recover on the contract.[84]

Quasi Contract Sued ex Contractu or ex Delicto.

While the ordinary quasi contract is sued ex contractu on the fiction of a promise, an action ex delicto is sometimes brought for the breach of statutory duty. Thus, a sheriff may be liable for negligence with respect to his statutory duty.[85] Indeed the common law freely recognized the right to sue for the negligent performance of a contract either ex contractu or ex delicto, whether there was actual [86] damage or not.[87] And in general it would seem that, when a person has suffered injury from the neglect of duty which another has impliedly promised to perform, the action may be in tort or on contract, at the former's option, whether that duty be implied into a contract or arises from a statutory enactment.[88]

[83] Pasley v. Freeman, 3 Term R. 51; Lyde v. Barnard, 1 Mees. & W. 101; Tatton v. Wade, 18 C. B. 371–381; Wade v. Tatton, 25 Law J. C. P. 240; Rice v. Manley, 66 N. Y. 82; DeCol. Guar.

[84] Post, p. 158, "Infants."

[85] Post, pp. 126, 130, 133, "Public Officers," "Register of Deeds," "Sheriffs."

[86] An apothecary could be sued for breach of implied contract to use reasonable skill and care or for tortious negligence followed by actual damage. Seare v. Prentice, 8 East, 348; Livingston v. Cox, 6 Pa. St. 360.

[87] If a banker improperly dishonors a customer's check, the customer may bring suit in tort, although no actual damages have been sustained. Marzetti v. Williams, 1 Barn. & Adol. 415. So, if a bailee negligently damages goods intrusted to him, he may be sued in tort, although he commits a breach of the contract of bailment. Hayn v. Culliford, 4 C. P. Div. 182; Coggs v. Bernard, 2 Ld. Raym. 909; Smith, Lead. Cas.; Boorman v. Brown, 3 Q. B. 511. Or he may be sued in assumpsit. See Zell v. Dunkle, 156 Pa. St. 353.

[88] An action against a sheriff for damages for failure to permit plaintiff

Torts Sued ex Contractu.

Perhaps the most singular anomaly in the application of the law adjective to the law substantive is to be found in the ruling of the common-law courts that an action on the contract will lie for a tort pure and simple. Thus, assumpsit lies for seduction, and if a man commits a crime, as by stealing goods of another, the latter may waive the tort and sue in assumpsit, although there is no contract.[89] It was not unnatural that certain cases which are in themselves ambiguous should have been regarded from a point of view both of tort and of contract as sustaining an action either ex contractu or ex delicto.[90] Thus, if goods have been sold, not by mistake but because of actionable fraud, the seller may sue in tort for damages because of deceit, or ex contractu in assumpsit for the value of the goods.[91]

Quasi Torts.

With respect to quasi torts the confusion is perhaps inextricable. It seems that there are two distinct classes of cases: (1) Where a

to obtain bail is in case. Taylor v. Smith (Ala.) 16 South. 629; Pittsburgh v. Grier, 22 Pa. St. 54–65; Lightly v. Clouston, 1 Taunt. 112, per Mansfield, J.

[89] Clark. Cont. 766, 768; Hill v. Davis, 3 N. H. 384; Gordon v. Bruner, 49 Mo. 570; Halleck v. Mixer, 16 Cal. 574; Hawk v. Thorn, 54 Barb. 164. In assumpsit on contract of sale and purchase, the action not being for money had and received by defendant through the sale of goods unlawfully taken from plaintiff, it is not necessary to allege or prove a sale of the converted property. Galvin v. Mac Mining & Milling Co. (Mont.) 37 Pac. 366. Where a complaint is in assumpsit on contract of sale and purchase, and the proof discloses a tortious detention and unwarranted refusal to deliver the property to plaintiff on his demand therefor, there is no variance. Id. But see Downs v. Finnegan (Minn.) 50 N. W. 981. So where money is obtained by fraud, but only when the money is the plaintiff's. Westcott v. Sharp, 50 N. J. Law, 392, 13 Atl. 243. A cause of action ex contractu and for conversion ex delicto may arise out of same transaction, and be united in same proceeding. Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co., 63 Conn. 551, 29 Atl. 76.

[90] Right to waive a tort and sue in assumpsit is subject to the limitation that thereby defendant is not deprived of any benefit which he would have derived under the appropriate form of action on tort. 2 Greenl. Ev. § 120, citing Lindon v. Hooper, Cowp. 414–419; Anscomb v. Shore, 1 Camp. 285; Young v. Marshall, 8 Bing. 43; and many other cases.

[91] Hill v. Perrott, 3 Taunt. 274. One who has been induced to make a purchase by fraudulent representations may waive the tort, and sue in assump-

contract has created a duty between the parties and privies, a breach of which is actionable under rules already considered, but in addition to this the contract has either repeated or put in force the common-law duty governing the relation or situation, a party or privy to the contract may sue ex contractu for breach of the contractual duty, or ex delicto for the breach of the common-law duty. Thus, by way of contrast, a stranger injured in a railroad accident can sue the company only ex delicto, while a passenger can sue either ex contractu or ex delicto.[92] The limitations which the contracts themselves may contain may affect the rights of the parties to the contract materially. If a contract should stipulate against liability for negligence in a jurisdiction where such a stipulation is enforced it might happen that the passenger in the case supposed could not recover, while a mere stranger might. (2) With respect to the right of third persons to recover in an action ex delicto for injury arising from a state of facts of which the breach of a contract is an essential part, three propositions may be made: (a) The mere contract creates no duty the violation of which gives rise to a cause of action on behalf of a stranger. (b) The contract of limitation on liability does not affect a stranger to the contract. (c) The contract excludes no liability, and does not prevent recovery by a stranger for the malicious, fraudulent, or negligent act of a party to the contract.[93]

Effect of Abolishing Forms of Action.

With the abolition of forms of action, artificial distinctions involved in the choice of remedies—the juggling with remedies—should disappear. Mr. Keener has said as to quasi contracts, particularly with reference to the fiction of implied promise where the

sit. Steiner v. Clisby (Ala.) 15 South. 612. Article by Keener, 6 Harv. Law Rev. 223–269. And see Mr. Ames' History of Assumpsit in 2 Harv. Law Rev. 64; Clark, Cont. 766. Plaintiff may waive tort, and sue in assumpsit for benefits received by wrongdoer through conversion of property, though the latter has not disposed of the property converted; but intent to waive tort must appear on the face of pleading. Braithwaite v. Aiken (N. D.) 56 N. W. 133.

[92] Post, p. 902, "Negligence"; Wilt v. Welsh, 6 Watts, 9; M'Call v. Forsyth, 4 Watts & S. 179.

[93] Post, p. 904.

tort is waived, and action is brought on the contract: "The continuance of such a fiction (existing for the purposes of a remedy only) cannot be justified, to say nothing of its extension, in those jurisdictions where all forms of action have been abolished. In such jurisdictions the inquiry should be, not as to the remedy formerly given by the common law, but as to the real nature of the right." [94]

In quasi torts there is every reason for the trial of the case on the plain and simple substantive right of the party. Nevertheless the distinction retains great importance. While forms of action have been abolished in England, the question of costs in the superior court is still dependent on the accurate observance of the distinction.[95]

In Massachusetts the action on the tort is one of the three forms of civil action. In Pennsylvania, under the recent practice act, there is a similar modification of the common law.[96] In other states the old common-law form of action is still in use. Even in Code states there has been comparatively little success achieved in the elimination of many of the common-law anomalies. This is due perhaps not so much to the conservatism of courts as to the natural and unavoidable connection between the law substantive and the law adjective.[97] Moreover, the tendency is naturally to bring actions which may be really ex contractu in the form of actions ex delicto, because in tort the rule as to the measure of damages recoverable is more favorable, and the extent to which wrongful conse-

[94] Keener, Quasi Cont. 100; Pig. Torts, 7.

[95] Pontifox v. Midland Ry. Co., 3 Q. B. Div. 23; Bryant v. Herbert, 3 C. P. Div. 389; Shaw v. Coffin, 58 Me. 254.

[96] See Johnson v. Philadelphia & R. R. Co., 163 Pa. St. 127, 29 Atl. 854.

[97] In Minnesota, the importance of the distinction between actions ex contractu and ex delicto has been denied with emphasis. Serwe v. Northern Pac. R. Co., 48 Minn. 78, 50 N. W. 1021. But a demurrer to a complaint in an action against a physician for malpractice was there sustained because it appeared from the complaint that the defendant had a partner, who was not made a party defendant. Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632. If this action had been in tort, and the parties were tort feasors, one or all could have been sued. If it was in contract, both should have been made parties.

quences may be traced is much greater, and the right of election as to parties defendant is more favorable to the plaintiff, than in an action on the contract. And the statute of limitation may bar an action on the contract when it will not bar an action on the tort.[98]

THE LAW SUBSTANTIVE AS TO THE PERSON INJURED.

10. The law recognizes a normal right of every one against whom a tort is committed to secure legal redress therefor. But this right may be defeated by plaintiff's own conduct, as by his consent or his own wrong.

The Normal Right.

This is another way of putting the familiar maxim that wherever there is a wrong there is a remedy.[99] The remedy in tort lies ordinarily at the suit of the person injured. The action cannot generally be brought by one person to the use of another.[100] But personal disability may in certain cases necessitate bringing an action in tort in the name of some person other than the party injured. Thus, an infant, or a person absolutely insane, can sue only through a guardian [101] or other person designated by law. Damages thus recovered for a tort against an insane person go to his estate. This requirement as to the appointment of a guardian is part of the law adjective, and not of the law substantive. At common law the husband

[98] Galveston, H. & S. A. R. Co. v. Roemer, 1 Tex. Civ. App. 191, 20 S. W. 843; Frick v. Larned, 50 Kan. 776, 32 Pac. 383. And see Blakely v. Le Duc, 22 Minn. 476. On the other hand, recovery may sometimes be had in contract, where it would be denied in tort; because of the death of one of the parties prior to the commencement of the suit. Post, c. 4, p. 329, note 148.

[99] Post, p. 348.

[100] Kansas City, M. & B. R. Co. v. Cantrell, 70 Miss. 329, 12 South. 344.

[101] Though in suits conducted by a next friend the minors ought regularly to sue by him, yet, if the next friend sue in behalf of the minors, it is the same in substance. Van Pelt v. Chattanooga, R. & C. R. Co., 89 Ga. 706, 15 S. E. 622. Appearance in judicial proceedings is generally regulated by statute. Plympton v. Hall, 55 Minn. 22, 56 N. W. 351; In re Hunter's Estate, 84 Iowa, 388, 51 N. W. 20; Redmond v. Peterson, 102 Cal. 595, 36 Pac. 923; Harlammert v. Moody's Adm'r (Ky.) 26 S. W. 2; Worthington v. Mencer, 96 Ala. 310, 11 South. 72. The infant plaintiff should sue as plaintiff, not the guardian as plaintiff. Perine v. Grand Lodge, A. O. U. W., 48 Minn. 82, 50 N. W. 1022.

brought an action in his own name for a tort to his wife. Damages recovered were really part of her estate, although they actually went to him together with all her other property.[102] These apparent exceptions to the principle as stated, properly viewed, are really its adaptation to other branches of jurisprudence.

Personal status, as a rule, is immaterial in the law of torts.[103] "For a Roman of the republic, and even of the empire down to Justinian's time and later, the question, 'With what kind of a person have I to do?' had a very clear and prominent legal meaning, and no question could be more practical. However, there is a general tendency among modern authors to regard the law of persons as supplementary to the general body of legal rules."[104] Capacity in fact is a material consideration, especially in cases of negligence.[105]

Consent.

Before the conduct complained of, plaintiff may have actually or impliedly consented to what would otherwise be a tort. A football player cannot complain of damage suffered in accordance with the rules of the game. No action can be maintained for damages arising from conduct to which the plaintiff consented, provided the conduct was not illegal,—that is, criminal. Consent, however, cannot make an illegal action lawful. A person can only consent to the commission of lawful acts. His consent justifies only so far as it goes. A patient may lawfully consent to a surgical operation on him. This consent justifies the physician in performing the operation, but not in committing an assault. A prize fight is illegal, and, notwithstanding the consent of the parties in participating in it, one of them may sue the other for damages.

Plaintiff's consent operating as a bar to his recovery may be subsequent to the wrong complained of. Thus, if he has executed a release or accepted something in satisfaction of his claim for the wrong done, or has waived the tort, he cannot succeed in an action on the tort.

[102] Post, p. 464, "Husband and Wife."

[103] Pol. Torts, *46.

[104] 8 Harv. Law Rev. 189.

[105] Pol. Torts, *46. Post, p. 871, "Negligence."

Wrong.

Again, the plaintiff cannot recover unless he himself be innocent. "In an action on a tort, a bad man stands on the same footing as a good one, but neither can have judicial assistance in breaking the law, or compensation for having broken it, or reimbursement for what may have been expended in its breach."[106] In Meryweather v. Nixan,[107] plaintiff and defendant damaged a mill, for which plaintiff was forced to pay the whole. It was held that he could not recover contribution from defendant; for ex turpi causa non oritur actio.

Plaintiff's wrong may consist in conscious wrong, or in mere inadvertence or negligence.[108] But, while plaintiff's wrong doing may prevent his recovery, to have this effect it must have been connected as a proximate cause of the tort. If a person rides his horse faster than the law allows, this does not justify a cowboy in using his lasso to throw the horse.[109]

THE LAW SUBSTANTIVE AS TO TORT FEASORS.

11. Liability for torts normally extends to every person, natural or artificial, independent of personal status; but modifications of and exceptions to, or exemptions from, liability are recognized. These may be:

(a) General or

(b) Special.

[106] Bish. Noncont. Law. So, "A man must come into equity with clean hands." However, where corporations enter into an illegal trust, and one of them, on withdrawing, attempted to recover the property put into the combination, the court sustained it in so doing, on the theory "that, as a continuing execution of the contract involves a continuing wrong to the public, the judicial courts will aid either party in abandoning it and in extricating itself from it, and that the doctrine in pari delicto does not apply in such case." Mallory v. Hanauer Oil Works, 86 Tenn. 599, 8 S. W. 396.

[107] Merryweather v. Nixan (1799) 8 Term R. 186; Smith, Lead. Cas. (Am. Notes) 1700.

[108] Plaintiff's own conduct, to prevent his recovery, "cannot in any case be less than (1) a willful and intentional act of wrongdoing; (2) a voluntary assumption of the risk which resulted in injury; (3) negligence." 2 Thomp. Neg. 154.

[109] Post, p. 189.

The law of torts was a substitute for private war.[110] It was designed to suppy a sufficient remedy for the illegal harm which men were caused to suffer. Award of pecuniary compensation was the commonest, but by no means the only, form of redress. The purpose was not, primarily, to punish the wrongdoer (the criminal courts did that), but to make good the damage the injured party had suffered, and, incidentally perhaps, to deter others from evil.[111] Accordingly, it was generally immaterial whether the defendant in an action on a tort be natural or artificial, responsible or irresponsible, or whether his conduct was intentional or unintentional, so far as the mere right, but not the extent, of the plaintiff's recovery was concerned.[112]

The earliest theory of liability for tort was, as will presently be seen, based largely on the common-law action of trespass.[113] In the simple act of trespass there is involved a minimum of mental element. Accordingly, the early cases stated the doctrine broadly, that individual status—youth, old age, insanity, or incapacity generally—had nothing to do with liability in tort.[114] This language was afterwards strained beyond the original holdings (as was done with Weaver v. Ward, conspicuously) and made to cover classes of cases not contemplated when the doctrine was formulated.[115] There has been a distinct reaction against the universal application of this general principle, especially to cases in which the mental attitude of the wrongdoer is an essential part.[116]

[110] Pol. Torts, *53; Townsh. Sland. & L. 39, 44, note 1.

[111] Post, p. 392, "Exemplary Damages." And see Pol. Torts.

[112] "As long as a man keeps himself within the law by doing no act which violates it, we must leave his motive to Him who searches the heart." Black, J., in Jenkins v. Fowler, 24 Pa. St. 308–310. "The legal wrong is found in the injury done, and not in the motive. * * * Motive generally becomes important only when the damages for the wrong are to be estimated." Cooley, Torts, §§ 692–694.

[113] Amick v. O'Hara, 6 Blackf. 258; Haynes v. Thomas, 7 Ind. 38; Indianapolis R. Co. v. Caldwell, 9 Ind. 397–421; Leach's Ex'r v. Prebster, 35 Ind. 415.

[114] Post, p. 109. Weaver v. Ward, Hob. 89; Chase, L. C. 49.

[115] Bullock v. Babcock, 3 Wend. 391; Welch v. Durand, 36 Conn. 182; Flinn v. State, 24 Ind. 286; Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132. Post, p. 48, "Theory of Liability."

[116] As in negligence. Am. & Eng. Enc. Law.

In whatever way the liability may attach, it can attach only as to wrongs of which the person sought to be charged is directly or indirectly connected as the legal cause. Merely that his servant may have had something to do with an alleged wrong done is not sufficient. Even if the defendant individually in some remote way was the occasion or condition of the wrong, this would not charge him. He must be connected, directly or indirectly, as the legal cause of the wrong.

There are further variations in the normal right to sue arising from the defendant's condition, based on exceptions which the law, for reasons of public policy, for example, recognizes. These exceptions or exemptions are of two kinds: (1) General, or those which apply indifferently to all or to most all kinds of wrongs; or (2) special, which are peculiar to specific torts.[117] Thus the state cannot, in absence of its consent, be sued for any tort. Privilege of the state is a general exemption. But privileged communication, for example, is a special exception, peculiar as a defense to libel and slander. Accordingly, general exceptions will be considered in the first part, and special exceptions in the second part, of this book.

LAW SUBSTANTIVE AS TO THE WRONGFUL CONDUCT.

12. Wrongful conduct has reference to—

(a) The mental attitude of the wrong doer, or mens rea;

(b) The act or omission complained of, which may be—

(1) Complete or

(2) Continuing.

Mental Element.

Each act or omission may be involuntary, intentional, or negligent.[118] Accordingly, in dealing with a tort, it is of increasing importance to consider how far the state of the mind of a tort feasor

[117] Pol. Torts, c. 4 ("General and Particular Exceptions").

[118] "The English law, which in its earliest stages began with but an imperfect line of demarcation between torts and breaches of contracts, presents us with no scientific analysis of the degree to which the intent to harm, or, in the language of the civil law, the 'animus vicino nocendi,' may enter into

at the time of the commission of the wrong influences the question.[119]

Act or Omission.

Mere intention to do wrong is not actionable. To constitute a tort, a wrong must have been committed, but it need not be done by positive act only. A tort may also arise out of omission. "There is great distinction between an omission and an act done." [120] It is sometimes said that to avoid commission of a tort, "one needs only to forbear." [121] But this is not strictly true, in the ordinary sense of "forbearance." "Diligence—the converse of negligence—may imply a forbearance to act as well as to act; [122] and on the other hand, failure to act is often the gist of liability. Thus, there may be negligence in omission as well as negligence in commission.[123] The same distinction was recognized in the civil law, under the terms "culpa in faciendo" and "culpa in non faciendo." [124]

or effect the conception of a personal wrong." Bowen, L. J., in Mogul v. McGregor, 23 Q. B. Div. 598. And see Chasemore v. Richards, 7 H. L. Cas. 367.

[119] What is meant by the mens rea, as distinguished from the act or omission complained of, may be made clear by reference to deceit. In this wrong, inter alia, two things are to be considered: (1) defendant's state of mind, his intention to deceive, his knowledge of the falsity of representations, and the like; (2) his consequent conduct, as the lie he tells, or the truth he suppresses when he ought to speak. Correspondingly on plaintiff's part, he suffers no wrong unless (1) he believes and relies on defendant's wrong, and (2) in consequence of such mental condition acts or fails to act, whereby he is damaged. Post, p. 560, "Deceit."

[120] Abbott, C. J., in Devereux v. Barclay, 2 Barn. & Ald. 702, Am. Lead. Cas. 432.

[121] Aust. Jur. lect. 14, pt. 1, par. 502, p. 250; Keener, Quasi Cont. 15. A current jocular definition of negligence is: "I have done those things which I ought not to have done, and I have left undone those things which I ought to have done." And see Whart. Neg. § 24.

[122] 16 Am. & Eng. Enc. Law, 405, and cases cited, note 3; Underwood v. Smith, 93 Tenn. 687, 27 S. W. 1008 (libel).

[123] Blyth v. Birmingham Works, 11 Exch. 781; Bramwell, J., Southcote v. Stanley, 1 Hurl. & N. 246; Gallagher v. Humphery, 10 Wkly. Rep. 664; Cotton v. Wood, 8 C. B. (N. S.) 568; Cleland v. Thornton, 43 Cal. 437; Grant v. City of Erie, 69 Pa. St. 420. Omissions not in discharge of positive duty are not subject to suit, but are so when constituting the discharge of a legal duty. Whart. Neg. §§ 82, 83.

[124] Whart. Neg. § 79.

Misfeasance—Malfeasance—Nonfeasance.

The distinction of conduct as malfeasance, misfeasance, and nonfeasance was at one time a favorite one in the common law. Nonfeasance is the omission of an act which a person ought to do, misfeasance is improperly doing an act which a person might lawfully do, and malfeasance is the doing of an act which a person ought not to do at all.[125] The difficulty with this distinction lies in the shadowy character of the line between misfeasance and nonfeasance, and the consequent tendency to lapse into merely a verbal reasoning. This is specially true where the not doing of a thing is wrongful, and therefore a nonfeasance becomes a misfeasance. In consequence, the tendency at the present time is to disuse the terms.[126]

Continuing or Completed Wrong.

Many torts consist of specific, distinct acts or omissions, which, however connected with consequential injuries, are the original, and, so far as the wrongdoer is concerned, the sole, cause of harm.[127] Thus seduction cannot be repeated. If assault and battery is repeated, the second attack is a new wrong.[128] Repetition of a libel may be a new publication, and give rise to a new cause of action.[129] A wrongful conduct may be said to be completed when the wrongdoer has no further control over its consequences. But a tort may be continuing. The wrong may not be distinctly separated from subsequent conduct or damages. Thus a trespass may consist of a single, simple entry by a person on another's land, after which he leaves it. If it be repeated the wrong is a new offense. Each

[125] 2 Vin. Abr. 35; Thompson v. Gregory, 4 Johns. 81; Six Carpenters' Case, 8 Coke, 146a; Bouv. Inst. tit. "Misfeasance"; Coggs v. Bernard, 2 Ld. Raym. 909; Bell v. Josselyn, 3 Gray, 309.

[126] See liability of agent to third person for nonfeasance, post, p. 287. Liability of executive officers to third persons, post, p. 128. As to development in the law of contract, see Hare, Cont.

[127] Post, p. 926, "Connection as Cause."

[128] Hodsoll v. Stallebrass, 11 Adol. & E. 301. And see Fitter v. Veal, 12 Mod. 542; Lamb v. Walker, 3 Q. B. Div. 389; Lord Blackburn, in Darley, etc., Co. v. Mitchell, 11 App. Cas. 143. But see North, C. J., in Townsend v. Hughes, 2 Mod. 150.

[129] Every continuance of false imprisonment is a new imprisonment. Hardy v. Ryle, 9 Barn. & C. 603. And see Dusenbury v. Kielly, 58 How. Prac. 286.

new wrong gives a new cause of action. This may also be true of nuisance.[130] But if a trespasser [131] erect a permanent structure on another's land, or a person create a permanent nuisance,[132] the tort may, under some circumstances, be continuing, and the right of action will correspond.[133]

HOW LIABILITY FOR TORTS MAY BE ATTACHED TO DEFENDANT.

13. Conduct may attach liability in one or more of five ways, namely:

(a) By personal commission;

(b) By consent or command;

(c) By virtue of relationship;

(d) Because of instrumentalities; and

(e) Because of conduct operating essentially as estoppel.

Personal Commission.

Where wrongs are committed by a man in person, as where one man assaults, slanders, or imprisons another, or trespasses upon or takes the property of another, or carelessly does him harm, the tort is properly his own. It makes no difference, so far as the mere fact of liability is concerned, whether he committed such wrongs by himself, or in conjunction with third persons. But it may be very material to the extent and character of his responsibility whether he acts jointly with such other persons, accidentally or independently, or whether he and they co-operate by agreement, or in any form of concerted action. Indeed, while it was originally said that what one man may do lawfully by himself any number of men may properly do together, it is now open to at least serious question whether

[130] Hopkins v. W. P. R. Co., 50 Cal. 190–194; Baldwin v. Calkins, 10 Wend. 167.

[131] Kansas P. R. Co. v. Mihlman, 17 Kan. 224, 4 Cent. Law J. 108. Post, p. 407, "Continuing Trespass."

[132] Whitehead v. Hellen, 74 N. C. 679; Schlitz Brewing Co. v. Compton, 142 Ill. 511. Post, p. 410, "Continuing Nuisance."

[133] Whitehouse v. Fellowes, 10 C. B. (N. S.) 765, 30 L. J. C. P. 305.

the mere joinder in action of a number of men in doing what one might legally do by himself is not actionable.[134]

Consent or Command.

"Qui facit per alium, facit per se," is a maxim which, in the law of torts, has created much confusion. In its simplest application thereto, it expresses a manifest truth,—that whoever commands the commission of a wrong by another does that wrong himself, not by actual, personal commission, but by constructive identity. If the command or consent to the tort is prior to the wrong complained of, he may be said to have authorized it. It will appear, however, that some torts are not, in their nature, susceptible of being committed by deputy, as the wrongs of seduction and slander. The command or consent which makes another's tort one's own may be subsequent to the wrong. It is then called "ratification" or "adoption." What ratification or adoption attaches liability for another's tort will, for sake of convenience, be presently discussed in this chapter, at some length.

Relationship.

When, however, the maxim, "Qui facit per alium, facit per se," is applied beyond this primary meaning, to cases where liability may be independent of consent or command, there is much confusion. In many jurisdictions now, and always at common law, the husband was held liable for the torts of his wife.[135] Here the civil responsibility followed from the relation existing between them. There might or might not be consent on his part. If there was, the tort would properly be his actual wrong; if not, it would be his by construction only. In the same way, the negligence of a parent in exposing a very young child, incapable of negligence, to danger, is sometimes attributed to the child. And there are other recognized cases of vicarious negligence.[136] There are many cases, however, in which the courts have confused the liability which is based on consent or command and the liability which follows from a relationship to which recognized responsibilities are attached. If a master assists a servant in an assault, they are actual joint

134 Post, p. 637, "Conspiracy."

135 Post, p. 216, "Husband and Wife."

136 Post, p. 980, "Negligence," "Vicarious Negligence."

tort feasors. If he commands his servant to assault, they are constructively joint tort feasors. This is also true when he directs his servant to do something which necessarily or naturally involves an assault. But when a servant, contrary to orders, and without the knowledge of the master, assaults, for example, the master's customer or the master's passenger, the master is sometimes held responsible, not because the tort is really his, but because of the relationship he bears both to the servant and to the injured man. If he sustains no relationship to the complainant which imposes on him a duty which his servant violates, there is no responsibility.

Instrumentalities.

Whoever uses, owns, or controls things which are in themselves dangerous, as a wild beast, or which may become dangerous in fact, as an engine, may become liable for harm done by such instrumentalities. The principles upon which liability is attached are not in entire harmony, but all agree that liability under some circumstances may attach for the harm they produce. Mr. Innes has made a valuable contribution to the law of torts in emphasizing the proposition that an instrumentality may be personal or impersonal. The personal instrumentality may be rational or irrational.[137] The impersonal instrumentality may be animate, as an animal of wild or domestic nature, or inanimate, as a ponderous article, a weapon, an explosive, or a thing of motion.[138] Now, where a dangerous impersonal inanimate instrumentality—for example, a torpedo—does damage by the unauthorized act of a servant, there is great, and it would seem unnecessary, confusion in tracing civil responsibility for the wrong. Liability because of relationship of master and servant is one consideration; liability because of instrumentality is another and distinct one. Even the most apparently innocent things, like real estate, may become instrumentalities of harm. Again, it is insisted that deceit is not the wrong of which the party injured complains, but merely the instrumentality by which the wrong is caused.[140]

[137] A master may be held liable for the torts of his lunatic servant. Cole v. Nashville, 4 Sneed (Tenn.) 162.

[138] It is said in an early case that, "where one has filth deposited on his premises, he whose dirt it is must keep it that it may not trespass." See Tenant v. Goldwin, 1 Salk. 360.

[140] That the deceit is not the injury itself, but merely a piece of conduct of

By Conduct Operating as an Estoppel.

In most cases liability for tort attaches in one or more of the four ways heretofore considered. This classification, however, in the nature of things is neither mutually exclusive nor exhaustive. There are, in addition, other ways in which liability for tort may be attached.

It is constantly said that where harm has been inflicted as between two innocent parties, he who caused the harm should suffer.[141] This principle, as applied, is likely to lead into error. As a consideration of natural equity it is given due weight by courts, but it proceeds on the false assumption that, where damage is actually done, somebody must be held responsible. Still, there are cases in which a person may be held responsible in an action ex delicto when he could not be said to have committed the tort in any ordinary sense. If a man illegally enriches himself to the impoverishment of another, the law will make him disgorge. This result is sometimes worked out through implying consent after the tort; that is, by saying the retention of benefit operates as an implied ratification of another's wrong. This, however, is an unnecessary and fictitious indirection; for the law at an early date recognized direct liability, on the princi-

the injurer which leads ultimately through the mind of the person deceived to the violation of a right in rem, is shown by the fact that various classes of injuries are brought about by false representation. Longmeid v. Holliday, 6 Exch. 761; injury to person, Pasley v. Freeman, 3 Term R. 51; injury to property, Fitz John v. Mackinder, 9 C. B. (N. S.) 504, 30 L. J. C. P. 257. Wrongful prosecution and injury to reputation, as in the case of a clergyman being induced to visit a house of ill fame on the false representation that it was the house of a person on whom he desired to call, and the address of whom the person furnishing the false information pretended to give. Innes, Torts, vii.

[141] As to actionable negligence in clothing a person with title, name, and authority, see McCabe v. Brown (Tex. Civ. App.) 25 S. W. 134; Curtis v. Janzen, 7 Wash. 58, 34 Pac. 131; Blaisdell v. Leach, 101 Cal. 405, 35 Pac. 1019; Clarke v. Milligan (Minn.) 59 N. W. 955. See, also, Gould v. Wise, 97 Cal. 532, 32 Pac. 576, and 33 Pac. 323; Foreman v. Weil, 98 Ala. 495, 12 South. 815; Hollis v. Harris, 96 Ala. 288, 11 South. 377; Lawrence v. Investment Co., 51 Kan. 222, 32 Pac. 816; Dolbeer v. Livingston, 100 Cal. 617, 35 Pac. 328. And see post, c. 3, "Liability of Master to Third Persons for Torts of Servant—Fraud."

ple here involved, in the large and important class of cases where the impoverished party could sue in tort or in assumpsit.[142]

The measure of recovery is the amount which defendant cannot in conscience keep.[143] Thus, while an executor is ordinarily not liable for the tort of the deceased, still, where the estate of deceased had been unjustly enriched at another's expense, the latter could sustain his action in tort.[144] Accordingly, since the right to recover money which has been stolen, fraudulently obtained, or wrongfully converted to another's use rests on the equitable principle of unjust enrichment, the claim may be asserted, not only against the immediate tort feasor, but against any one into whose possession the money may be traced, until it reaches the hands of a holder for value without notice.*

[142] Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892; National Trust Co. v. Gleason, 77 N. Y. 400; Keener, Quasi Cont. 160, quoting Hambly v. Trott, Cowp. 371; Powell v. Rees, 7 Adol. & E. 426; Ex parte Adamson, 8 Ch. Div. 807; Patterson v. Prior, 18 Ind. 440; Tightmyer v. Mongold, 20 Kan. 90; Fanson v. Linsley, Id. 235; New York Guaranty Co. v. Gleason, 78 N. Y. 503. "It is true," says Mr. Keener, "that you cannot sue in assumpsit a person who commits an assault and battery, while you can sue in assumpsit one who steals your goods and sells them. But it is submitted that the true reason is not that suggested by a learned writer [Cooley, Torts, 108], that it would be absurd in the one case to assume that the defendant promised to make compensation for the damage done, while in the other case there are facts which would support the implication of a promise. In the one case there is no enrichment, in the other there is; hence in the one case your remedy is in tort only, while in the other you can sue in quasi contract."

[143] Keener, Quasi Cont. 183.

[144] "If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer,—as beating or imprisoning a man, etc.,—there the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall. So far as the tort itself goes, an executor shall not be liable, and therefore it is that all public and all private crimes die with the offender, and the executor is not chargeable; but, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged." Lord Mansfield in Hambly v. Trott, Cowp. 371.

* Keener, Quasi Cont. 183.

So, in cases of fraud, the principal may be guilty of no personal wrong, and not be guilty because of relationship with the agent who committed the tort, and still be held liable because of unjust enrichment.[145] Indeed, in England it has been held that his liability is precisely coextensive with the fruits of the wrong which he has received. And in respect, also, to agents, "the rule is that where one has reasonably and in good faith been led to believe, from appearance of authority which the principal permits his agent to have, and because of such belief has in good faith dealt with the agent, the principal will not be allowed to deny the agency (and consequent liability) to the prejudice of one so dealing." [146]

The principle which is involved in these cases is natural equity and public policy, and in general may conveniently, if not always actually or consistently, be said to operate by way of estoppel in pais. It would seem, indeed, that this underlying principle determines, in a large measure, the extent of the master's liability in other cases than those referred to. The master is held liable for the tort of his servant, according to this view, to the extent that public policy justifies and demands.

The recognition of rights and duties by the law is largely a matter of policy. Certain distinctions may exist in nature; but, essentially, the law is an artificial science. There are no rights except such as the law sanctions. Accordingly, the law is continually reaching a conclusion as a matter of utility, and then justifying by a process of reasoning as unsatisfactory as it is unreal. This seems to be the case, for example, with the rules as to the extent of liability of the master to his servant or of the master to third persons not in his employ for the torts of his servant.

[145] Continental Ins. Co. v. Insurance Co. of Pennsylvania, 2 C. C. A. 535, 51 Fed. 884; Albitz v. Railway Co., 40 Minn. 476, 42 N. W. 394.

[146] Gilfillan, C. J., in Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224–229, 53 N. W. 1061. "There is a class of acts or representations that may be considered as addressed generally to all who may have occasion to act on them, may claim them as an estoppel." This was applied to leaving a deed, executed and acknowledged, in the hands of an attorney, with the name of the grantee and the consideration in blank, which being filled out, the deed was delivered. It was held that the persons executing the deed could not say that it was not fully executed and completed. Pence v. Arbuckle, 22 Minn. 417. Cf. Beardsley v. Day, 52 Minn. 451, 55 N. W. 46.

SAME—LIABILITY BY RATIFICATION.

14. Liability for torts committed by another person may attach by ratification of such wrong.

It is a recognized rule of general jurisprudence that an act done in violation of the law or in controversion of public policy, the performance of which could not be lawfully delegated, cannot be lawfully ratified.[147] It has accordingly been seriously questioned whether a bare personal trespass committed by one person can be made the wrong of another by adoption.[148] "If a man assaulted another in the street, out of his own head, it would seem rather strong to say that if he merely called himself my servant and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk." [149] The doctrine, however, from an early date has been well established.[150] Even a state may be made liable by an act of legislature for an unauthorized wrong of a public officer.[151]

15. A valid ratification may be either express or implied, and to constitute a valid ratification

(a) The act must have been done in the interest of the person sought to be charged by ratification;

[147] Zottman v. San Francisco, 20 Cal. 96; Armitage v. Widoe, 36 Mich. 124; Turner v. Phœnix Ins. Co., 55 Mich. 236, 21 N. W. 326; Mechem, Ag. §§ 111–115.

[148] Bishop v. Montague, Cro. Eliz. 824; Adams v. Freeman, 9 Johns. 116.

[149] Dempsey v. Chambers, 154 Mass. 330–333, 28 N. E. 279.

[150] The earlier authorities will be found collected in Dempsey v. Chambers, supra. An early case from the Year Book 7 Hen. IV. fol. 34, pl. 1, is given in the note to Wilson v. Tumman, 6 Man. & G. 236. And see Judson v. Cook, 11 Barb. (N. Y.) 642, and cases cited; Ring. Torts, 50; Heidenheimer v. Loring, 26 S. W. 99; Cooley, Torts, § 127; Pig. Torts, 71.

[151] State of Wisconsin v. Torinus, 26 Minn. 1, 3, 49 N. W. 259, collecting cases.

(b) Such person must have adopted the conduct with full knowledge of its tortious nature, and with actual or imputed intention to ratify.

The conduct ratified must have been in interest of ratifier. The rule as to the extent to which an act may be ratified is thus stated by Lord Coke: "He that receiveth a trespasser and agreeth to a trespass after it be done, is no trespasser unless the trespass was done to his use or for his benefit; and that his agreement subsequent amounteth to a commandment; for in that case omnis ratihabitio retrotrahitur et mandato æquiparatur."[152] In Wilson v. Tumman,[153] the principle was laid down that "when A. does an act as agent for B., without communication with C., C. cannot afterwards, by adopting the act, make A. his agent, and incur liability or take benefit under the act of A." This was applied to a person's inability to make a sheriff his agent by adopting the torts of the sheriff in seizing goods under a proper writ. Where, however, the judgment creditor has intermeddled, either by accompanying the sheriff's officers, or by giving a bond, the creditor himself may become a trespasser,—certainly as to trespasses subsequently committed. In this case, however, his liability would not seem to depend upon ratification.[154]

While ordinarily the conduct of a principal or master will be construed favorably to ratification,[155] as to torts the fairer rule is that to hold one responsible for an act not committed by himself, nor by his order, his adoption or an assent to the same must be clear and explicit, and made with full knowledge of the tort, and that the injured party claims that there has been a tort committed.[156] Thus, where the husband makes false representations in order to sell land

[152] 4 Inst. 317; Shearw. Torts, 56, 57.

[153] Wilson v. Tumman, 6 Man. & G. 236; Fitler v. Fossard, 7 Pa. St. 540; Morehouse v. Northrop, 33 Conn. 380; Griswold v. Haven, 25 N. Y. 595; National Life Ins. Co. v. Minch, 53 N. Y. 144; Lane v. Black, 21 W. Va. 617.

[154] Knight v. Nelson, 117 Mass. 458; Lovejoy v. Murray, 3 Wall. 1; Menham v. Edmonson, 1 Bos. & P. 369.

[155] Johnson v. Carrere, 45 La. Ann. 847, 13 South. 195; Mechem, Ag. § 177.

[156] Tucker v. Jerris, 75 Me. 184; West v. Shockley, 4 Har. 287; Kreger v. Osborn, 7 Blackf. (Ind.) 74; Abbott v. Kimball, 19 Vt. 551; Lewis v. Read, 13

standing in his name, but bought with his wife's money, her acceptance of the purchase money without knowledge of the fraud is not a ratification of it.[157] Where the ratification is expressed, even the government may become liable for the illegal act of its officer; for example, in destroying powder.[158] The rule stated above is carried so far that it has been insisted [159] that the ratification must be expressed, and cannot be implied. While this would seem to be extreme, and perhaps untenable ground, it is clear that, in addition to the knowledge of the facts to be ratified, there must also be an intention to ratify. The intention to ratify cannot be inferred from mere expressions of regret conveyed to the person injured, and promises to investigate the circumstances, nor other acts which may be treated as matters of friendship or favor merely.[160] Retention of an employé who has committed an unauthorized wrong is not ordinarily evidence of ratification of his wrong.[161] Taken in connection with other circumstances,—for example, promotion after a brakeman had maltreated and assaulted a passenger,—it may be necessary for the jury to determine whether or not there was a ratification.[162] Retention of benefit attaches liability. The principal is held rather to be estopped from denying the liability

Mees. & W. 834; Buttrick v. Lowell, 1 Allen (Mass.) 172; Eastern Counties Ry. v. Broom, 6 Exch. 314.

[157] Brown v. Wright, 22 Ark. 20, 22 S. W. 1022. An action by an employer against an employé for funds embezzled, and recovery of judgment,—the amount sued for being based on the representations of, and books kept by, the employé,—is not a ratification of his concealed frauds. Grouch v. Hazlehurst Lumber Co. (Miss.) 16 South. 496.

[158] Wiggins v. U. S., 3 Ct. Cl. 412.

[159] Pig. Torts, 73.

[160] Roe v. Birkenhead, etc., Ry., 7 Exch. 36; Edwards v. London, etc., Ry., 5 C. P. 445–449; Buttrick v. Lowell, 1 Allen (Mass.) 172.

[161] Gulf, C. & S. F. Ry. Co. v. Kirkbride, 79 Tex. 457, 15 S. W. 495; Gulf, C. & S. F. Ry. Co. v. Reed, 80 Tex. 362, 15 S. W. 1105; Deacon v. Greenfield, 141 Pa. St. 467, 21 Atl. 650. But retention and promotion of wantonly negligent servant may be evidence of such ratification of his conduct as will make the master liable even for exemplary damages. Bass v. Railway Co., 42 Wis. 654; Goddard v. Railway Co., 57 Me. 202; Perkins v. Railway Co., 55 Mo. 201. But see Edelmann v. Transfer Co., 3 Mo. App. 503.

[162] Bass v. Chicago & N. W. Ry. Co., 42 Wis. 654. And see Haluptzok v. Great Northern Ry. Co., 55 Minn. 446, 57 N. W. 144.

than to have ratified the conduct of the wrongdoer in its entirety.[163] It would appear, however, that generally, in the United States, while appropriating a benefit may not be conclusive evidence of ratification,[164] the court will not allow any one enjoying the benefit of a wrong to deny the responsibility for it. Thus, if a father knowingly appropriates property converted by the independent tort of his child, he makes himself liable for the child's wrong.[165]

16. Ratification properly is the equivalent of antecedent authority. It proceeds on the theory of election, not of estoppel, and establishes the relation of the master and servant or principal and agent from the beginning. In consequence—

(a) The person ratifying is liable for all torts committed by his adopted deputy, servant, or agent, in the course of employment, and not merely those which he specifically adopts. Ratification is total, not partial.

(b) Ratification does not ordinarily discharge the liability of tort feasors to third persons, but it does as to the person ratifying.

Ratification establishes the relation of master and servant or principal and agent ab initio. In Massachusetts, following Hil-

[163] Post, p. 268, "Fraud"; Pig. Torts, 71.

[164] Hyde v. Cooper, 26 Vt. 552; Lewis v. Read, 13 Mees. & W. 834.

[165] Hower v. Ulrich, 156 Pa. St. 410, 27 Atl. 37. So if a partner willfully or through mistake commits a trespass on timber land, and takes timber therefrom, his copartner is liable for the act, of which he may have known nothing, if the firm retain the timber after the notification of the wrong done. U. S. v. Baxter, 46 Fed. 350. Compare liability of employer of independent contractor. Benton v. Beattie, 63 Vt. 186, 22 Atl. 422. Where an auditor of a railroad company represented the shortage of a station agent to be $600, and certain persons contributed that sum to make good the deficit, and it was afterwards discovered that the shortage was larger, and thereupon the agent was arrested, it was held that the railroad company had ratified the false, though honest statements of the auditor by retaining the money paid. Burke v. Milwaukee, L. S. & W. Ry. Co., 83 Wis. 410, 53 N. W. 692. And see Dunn v. Hartford, etc., Co., 43 Conn. 434.

lard v. Richardson,[166] it was held in Coomes v. Houghton [167] that the contractor for a job, by accepting and paying for the work done thereon by a mechanic without his prior order or authority, does not render himself liable for injury caused to a third person by a negligent act committed by the mechanic while doing the work, but not a part or a result of the work itself. It is, however, recognized generally that, if an agent exceed his authority, ratification of his conduct proceeds, not on the principle of estoppel, but of election.[168] If a wrong is done by a complete stranger, ratification of what he undertook to do generally, but not of the trespass directly, constitutes him a servant, and creates liability. Thus, if a stranger delivers coal for a person, and in doing so does damage, that person, by adopting the general employment, becomes liable for the specific wrong. "Ratification goes to the relation, and establishes it ab initio." [169] The adoption or ratification by a principal of the wrongful act of his agent may be implied from the conduct of the principal. He cannot ratify the conduct in part, and repudiate in part. If he ratifies part, he ratifies all.[170]

Ratification does not release tort feasors. The liability of the master or principal which follows ratification is additional, and the wrongdoer also remains liable. So far as the liability of the latter to third persons is concerned, the injured person is not a party to the ratification, and cannot be compelled to lose his right of action against the servant by any act of the master. Authority to do wrong is never a defense.[171] It is accordingly immaterial whether the authority to do wrong preceded or followed the wrongful act. The liability of the principal is an additional, and not a substituted,

[166] 3 Gray (Mass.) 349.

[167] 102 Mass. 211.

[168] Smith v. Cologan, 2 Term R. 188n; Wellington v. Jackson, 121 Mass. 157–159; Metcalf v. Williams, 144 Mass. 452, 11 N. E. 700; Bullard v. Moor, 158 Mass. 418–424, 33 N. E. 928.

[169] Dempsey v. Chambers, 154 Mass. 330, 28 N. E. 279; Nims v. Mt. Hermon Boys' School (1893) 160 Mass. 177, 35 N. E. 776.

[170] Byne v. Hatcher, 75 Ga. 289; Mechem, Ag. 130, collecting cases; Farmers' Loan, etc., Co. v. Walworth, 1 N. Y. 433.

[171] Post, p. 286, "Liability of Agent to Third Persons." Wright v. Eaton, 7 Wis. 595.

one.[172] But the proposition is not an universal one. Where a person assuming to act for a city, changed the grade of a street, to the injury of an abutting landowner, and the city ratified his act, though after suit brought, it was held that the act was justified.[173] A city is not generally liable for damages consequent on change of grade.[174] As between the person ratifying the wrong, and the wrongdoer, however, it would seem clear that by ratification the principal and master assumes the responsibility of the transaction, with all its advantages and all of its burdens. He has consented to the wrong, and volenti non fit injuria. Ordinarily he cannot recover from the wrongdoer.[175]

THEORY ON WHICH LIABILITY FOR TORT ATTACHES.

17. One theory of liability for tort is that of absolute responsibility,—that a man acts at his peril. Another is that liability is confined to moral shortcomings, and is based on culpability. Neither, as a matter of fact, is exclusively true. The law has pursued no consistent course,[176] but there are three main categories of acts to which responsibility is affixed with reference to specific harm:

(a) Acts done at peril with reference to that harm;

(b) Acts done willfully with reference to that harm;

(c) Acts done negligently with reference to that harm.[177]

There is a definite theory of liability for a contract. Responsibility is based on consent, actual or implied.[178] There is a definite theory of liability for crimes. Responsibility is based on intent,

[172] Mechem, Ag. § 182.

[173] Wolfe v. Pearson, 114 N. C. 621, 19 S. E. 264.

[174] Post, p. 140, "Damage Incident to Authorized Act."

[175] Hoffman v. Livingston, 46 N. Y. Super. Ct. 552; Pickett v. Pearsons, 17 Vt. 470; Woodward v. Suydam, 11 Ohio, 361; Bray v. Gunn, 53 Ga. 144; Foster v. Rockwell, 104 Mass. 167.

[176] O. W. Holmes, Jr., 7 Am. Law Rev. 652; Holmes, Com. Law, 79; Wabash, St. L. & P. Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391.

[177] John H. Wigmore, in 7 Harv. Law Rev. 455, 456.

[178] Clark, Cont. 3, 4, 752.

actual or constructive.[179] But there is no consistent theory as to liability for tort. As stated in the black-letter text, there are three theories advanced: (1) The historical, based on absolute liability; (2) the philosophical, based on culpability; and (3) the practical, based on the actual state of the law. These will be considered in order.

Absolute Liability.

Perhaps the commonest conception of liability in tort is expressed by the classical phrase, that a man acts at his peril. He insures the world against wrong on his part. The duty to avoid harm to others is regarded as absolute. Breach of that duty, and consequent damage, is sufficient to create responsibility without reference to his mental attitude,—that is, his consciousness or intention. Whether legal wrong has been done for which the law affords reparation in damages depends upon the nature of the conduct, and cannot consistently be made to depend upon the motive of the person doing it.[180] This view of the law had its origin in the early Germanic conceptions of liability. These conceptions inclined to the position that whenever harm was done some one must be held responsible. There was no definite logic in the selection of the victim. "The primitive notion instinctively visited liability on the visible offending cause, whatever it might be, of a visible evil result."[181] The master was liable, both civilly and criminally, for the wrongs of his servants.[182]

The primitive conception of the law of torts is well expressed in Lambert v. Bessey:[183] "In all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering. * * * For, though a man doth a lawful thing, yet, if any damage due thereby befall another, he shall answer for it if he could have avoided it." "The old writs in trespass did not allege, nor was it necessary to show anything, savoring of culpability. It was enough that a certain event had happened; and it

[179] Clark, Cr. Law, 43, 44.

[180] Chambers v. Baldwin, 91 Ky. 121, 15 S. W. 57. And see Jenkins v. Fowler, 24 Pa. St. 308.

[181] 7 Harv. Law Rev. 319.

[182] Mr. Wigmore in 7 Harv. Law Rev. 317.

[183] T. Raym. 421.

was not even necessary that the act should have been done intentionally, though innocently."[184] Thus, in Leame v. Bray,[185] Gross, J., held that, if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally, or by misfortune, yet he is answerable in trespass. In Underwood v. Hewson,[186] the defendant was uncocking his gun. It accidentally went off, and wounded a bystander. The defendant was charged, and holden liable in trespass. Interference with the person by a blow,[187] or restraining freedom of locomotion,[188] or interference with real property by going upon it,[189] or by converting personal property to one's own use, as by taking it away, keeping, using, or destroying it,[190] is generally regarded as conduct which

[184] 7 Am. Law Rev. 652.

[185] 3 East, 593. Here a person on a dark night had got on the wrong side of the road, and injured another, and it was held that trespass lay. In Grant v. Moseley (1856) 29 Ala. 302, it was distinctly held that damages resulting from an accident could be recovered.

[186] Strange, 596. This decision has never been questioned. Cole v. Fisher, 11 Mass. 136. And see Weaver v. Ward, Hob. 289, where a soldier was held liable for accidentally shooting a comrade with whom he was practicing at arms. In America it has been distinctly held that when an injury to another is caused by an act that would have amounted to trespass vi et armis under the old system of action, as where one by the negligent handling of a gun kills another, it is no defense that the act occurred through inadvertence and without the wrongdoer's intending it; that it must appear that the injury was inevitable, and utterly without fault on the part of the alleged wrongdoer. Morgan v. Cox, 22 Mo. 373. A hunter who kills a dog by mistake for a wolf will be liable to the owner though he act in good faith, and the dog may look like a wolf. Ranson v. Kitner, 31 Ill. App. 241. And see Taylor v. Rainbow, 2 Hen. & M. (Va.) 423; Hodges v. Weltberger, 6 T. B. Mon. 337; Sullivan v. Murphy, 2 Miles (Pa.) 298; Welch v. Durand, 36 Conn. 182; Chataigne v. Bergeron, 10 La. Ann. 699.

[187] Post, p. 434, "Assault and Battery." And see Chapman v. State, 78 Ala. 463.

[188] See post, p. 417, "False Imprisonment."

[189] Brown v. Collins, 53 N. H. 442; Castle v. Duryee, 2 Keyes (N. Y.) 169. Post, p. 660, "Trespass." Guille v. Swan, 19 Johns. (N. Y.) 381; Striegel v. Moore, 55 Iowa, 88, 7 N. W. 413.

[190] Post, p. 706, "Conversion." Boyce v. Brockway, 31 N. Y. 490; Hollins v. Fowler, L. R. 7 H. L. 757; Eten v. Luyster, 60 N. Y. 252, per Allen, J. Generally, as to trespass to chattels, see Morgan v. Cox, ante, note 186; Tally v. Ayers, 3 Sneed (Tenn.) 677; Jennings v. Fundeburg, 4 McCord (S. C.) 161.

violates absolute duties, and which creates corresponding absolute rights to redress. So, if an act complained of is a nuisance, the person creating and maintaining it is said to be absolutely liable, no matter how proper his motives and how useful his purpose.[191]

Legal remedies being substituted for personal war, it was natural that liability for torts should be regarded from the point of view of the man who suffered, and not from the point of view of the intention or mental attitude of the cause of that harm. Moreover, the distinction between rights that were absolute and the rights that were merely natural as distinguished from rights acquired, was not constantly present before the minds of the judges. And, historically, the injuries most frequent of occurrence were injuries directly to the person or property. Prior to the statute of Westm. II. there were none of the modern actions on the case. These are, indeed, the bulk of the present law of torts.

The category of things done at peril has been materially increased by an important class of cases more or less generally recognized. These cases involve a duty to insure safety[192] as distinguished from the general class now under consideration, namely, the duty to insure against wrong generally, on the one hand, and from the duty merely to exercise proper care in view of all circumstances, on the other. Thus, in Rylands v. Fletcher,[193] it was held that if a person gathers water in dangerous quantities on his own land, and it escapes and damages another's, the latter can recover, although the former exercised due care. A person is bound, under such circumstances, to insure the safety of third persons against harm from the dangerous agency he had collected on his premises.

Theory of Culpability.

Great jurisprudents have inclined to trace responsibility for torts to the mental element, as is done in the cases of crimes and contracts. Liability they would confine to moral shortcomings. According to Austin, whose theory is that of a criminalist, the char-

[191] This does not really involve reasoning in a circle as much as might at first appear. Consideration of cases where nuisance and breach of duty to insure safety seem to be identical will satisfy on this point.

[192] Pol. Torts, c. 12.

[193] L. R. 1 Exch. 265. Compare Losee v. Buchanan, 51 N. Y. 476.

acteristic feature of law is a sanction threatened or imposed by the sovereign for disobedience to the sovereign's command, and the greater part of the law makes a man civilly answerable for breaking it. He is compelled to regard the liability to an action as that sanction, or, in other words, as a penalty for disobedience, and accordingly liability ought only to be based on personal fault.[194] Liability is so based in the wrongs of fraud, deceit, slander, libel, and malicious prosecution. And, even in cases of damage by direct act of force, it is insisted that the rule is that the "plaintiff must come prepared with evidence to show either that the intention was unlawful or that the defendant was in fault; for, if the injury was unavoidable and the conduct of the defendant free from blame, he will not be liable." [195] Critical modern investigation is not only ques-

[194] Holmes, Com. Law, 77-129. "I assumed * * * that intention, negligence, heedlessness, or rashness is a necessary ingredient in injury or wrong. * * * Now, there can obviously be no breach of duty—no rupture of the vinculum juris—unless the duty has some binding force; that is to say, unless the sanction were capable of operating as a motive to the fulfillment of the duty. But sanctions operate upon the obliged in a twofold manner; that is to say, they counteract the motives or desires which prompt to a breach of duty, and they tend to excite the attention which the fulfillment of duty requires. And unless the party knew that he was violating his duty, or unless he might have known he was violating his duty, the sanction could not operate at the moment of the wrong, to the end of impelling him to the act which the law enjoins, or of deterring him from the act which the law forbids. Consequently, injury or wrong supposes unlawful intention or unlawful inadvertence. And it appears from the foregoing analysis that every mode of unlawful inadvertence must be one of those which are styled negligence, heedlessness, or rashness. The only instance wherein intention or inadvertence is not an ingredient in breach of duty is furnished by the law of England. * * * Unlawful intention or unlawful inadvertence is therefore of the essence of injury, and for this reason: that the sanction could not have operated upon the party as a motive to the fulfillment of the duty, unless at the moment immediately preceding the wrong he had been conscious that he was violating his duty, or unless he would have been conscious that he was violating his duty if he had adverted or attended as he ought." 1 Aust. Jur. 329.

[195] Shaw, C. J., in Brown v. Kendall, 6 Cush. 292. "It is impossible to conceive the idea of a tort as separate and apart from an intentional wrong and injury, or such negligence or other misconduct as necessarily to imply such wrong or injury. A scienter is the very gist of a tort. To say that one may recover in tort without proving a scienter is to say that he may omit from his

tioning, but denying,[196] and courts are recognizing[197] many exceptions to, the clearest cases of absolute liability. The idea of absolute duty may remain, but not the idea of absolute right as an inevitable consequence of a violation of a material right.[198] The change has been wrought largely through recognition of the doctrine that a person cannot be held liable for a wrong of which he was not rationally a cause. This theory accords with the common-sense view of the laws,—that no man should be held responsible in damages unless he is at fault.

True Theory.

The true view, as Mr. Holmes has pointed out, is that the law has not adopted any logically consistent theory of liability.[199] At the one extreme there are cases in which culpability is not an element, in which the defendant is held liable although he may not be to blame; as trespass to person or property, and breach of duty to insure safety. At the other extreme moral wrong is material to wrongs of malice and fraud.[200] Negligence is a common battle ground. It is vigorously insisted that negligence is and that it is not a state of the mind;[201] and it is clear that the very authorities who deny that negligence is a state of the mind recognize that as

proof the chief element of his case." McCrary, J., in Shippen v. Bowen, 48 Fed. 659.

[196] Post, p. 815, "Negligence"; Brown v. Kendall, 6 Cush. 292. Harvey v. Dunlop, Hill & D. 193; Nitro-Glycerine Case, 15 Wall. 524; Lansing v. Stone, 37 Barb. 15; Center v. Finney, 17 Barb. 94; Morris v. Platt, 32 Conn. 75; Paxton v. Boyer, 67 Ill. 132; Dygert v. Bradley, 8 Wend. 470; 1 Hill, Torts, c. 5, § 9; 2 Greenl. Ev. 85.

[197] See, for instance, cases of trespass where the act is involuntary, and cases of damage by cutting timber, intentionally or unintentionally. Post, p. 660, "Trespass." And see post, p. 734, "Conversion," "Ministerial Duties." Assault and battery, see Holmes v. Mather, L. R. 10 Exch. 261; Stanley v. Powell, 1 Q. B. 86 (91); Ames, Torts, and cases cited in note at page 64. Nuisance, —high board fence cases. Post, p. 749. Generally, see Am. & Eng. Enc. Law, tit. "Negligence." In the absence of negligence, a man who accidentally shoots another is not liable in tort. Stanley v. Powell, 1 Q. B. 86 (91).

[198] Townsh. Sland. & L.

[199] Holmes, Com. Law, 79–81; 7 Am. Law Reg. 48, 652.

[200] Post, p. 560, "Deceit."

[201] Post, p. 820, "Negligence."

soon as a defendant acts not inadvertently, but willfully, his wrong is no longer negligence.[202]

It would seem that the theory of personal culpability as the basis of liability in tort is gaining ground. This will appear in subsequent discussion in different degrees and with varying certainty, inter alia, in (a) cases as to liability of persons of peculiar status (as of infants in negligence);[203] (b) cases of trespass to persons[204] and of conversion (as in performances of ministerial duties);[205] (c) cases of libel and slander;[206] (d) cases of negligence and breach of duty to insure safety;[207] (e) malicious use of property;[208] (f) generally cases of conduct actionable because of wrong motive (as in more recent developments of malicious conspiracy);[209] and (g) in the development of the doctrine of connection as cause.[210]

THE LAW SUBSTANTIVE AS TO MENTAL ATTITUDE OF THE TORT FEASOR.

18. The law of torts regards primarily, and in some cases exclusively, the conduct and not the mental attitude of the wrongdoer. Intentional wrongdoing may aggravate damages which the sufferer may be entitled to recover.

It is true that, in many instances, liability for torts is based on the wrong done, and not on the reason why.[211] The law of torts treats every person as intending his conduct, and holds him responsible for

[202] 16 Am. & Eng. Enc. Law, tit. "Negligence," p. 389.

[203] Post, p. 871.

[204] Holmes v. Mather, L. R. 10 Exch. 261; Stanley v. Powell, 1 Q. B. 86 (91).

[205] Post, p. 734, "Conversion."

[206] Post, p. 525, "Libel and Slander."

[207] Cork v. Blossom, 162 Mass. 330, 38 N. E. 495, 8 Harv. Law Rev. 225. Berger Gas Light Co., 62 N. W. 336 and see exceptions enumerated,—Post, p. 832, "Negligence." The fact that responsibility for harm consequent upon commercial use of electricity has been subjected to the rules of negligence, and not governed by the doctrine of duty to insure safety,—post, 863, "Negligence," is significant.

[208] Post, p. 557.

[209] Post, p. 637.

[210] Post, p. 61.

[211] "Intention has found no place on the English law of torts." Lord Wensleydale, Chasemore v. Richards, 7 H. L. Cas. 297.

its natural and probable consequence. Statements of this character, however, are likely to be too sweeping, as will appear in the analysis of mental attitude which follows. The law of torts is designed, primarily, to compensate for injury done.[212] The effect of intention to do wrong is to increase the amount of damages recoverable by the person injured. This is a survival from the original criminal character of the law of torts. Thus, while good faith will not excuse a trespass, bad faith may aggravate it.[213]

19. Mere intention to do wrong, or mere malice, not resulting in conduct which violates a right or duty, is not actionable.

Mere intention to do wrong, not carried into effect, does not constitute a tort. "You cannot sue a man for the state of his mind. A man may conspire to commit murder, but until something is done amounting to assault and battery there is no civil liability." An act contemplated but not yet accomplished, though it may sometimes be ground for preventive remedies, cannot support an action for a tort.[215] Thus, a mere agreement between two or more persons to convert property of another, without an actual intermeddling with it, does not give the owner a cause of action against the parties to the agreement.[216] The original view of the law was that an act done in pursuance of an unlawful intent is no ground for an action unless damage recognized by the law has resulted.[217] Mere

[212] Post, p. 360, "Compensatory Damages."

[213] Cubit v. O'Dett, 51 Mich. 347, 16 N. W. 679. Post, p. 392, "Exemplary Damages."

[215] Sheple v. Page, 12 Vt. 519; Kimball v. Harman, 34 Md. 407; Heron v. Hughes, 25 Cal. 555; Jones v. Baker, 7 Cow. 445; Page v. Parker, 43 N. H. 363; Taylor v. Bidwell, 65 Cal. 489, 4 Pac. 491. Just as at criminal law, there must not only be wrongful intent, but act. Bish. Cr. Law, § 206; Clark, Cr. Law, 45.

[216] Heron v. Hughes, 25 Cal. 555.

[217] Morgan v. Bliss, 2 Mass. 111; State v. Adams, 108 Mo. 208, 18 S. W. 1000; Benjamin v. Wheeler, 8 Gray, 409; Panton v. Holland, 17 Johns. 92; Haycraft v. Creasy, 2 East, 92; 2 Thomp. Neg. 739; Estey v. Smith, 45 Mich. 402, 8 N. W. 83; Covanhovan v. Hart, 21 Pa. St. 495; Clinton v. Myers, 46 N. Y. 511; Frazier v. Brown, 12 Ohio, 294; Thomasson v. Agnew, 24 Miss. 93; Brothers v. Morris, 40 Vt. 460; Kiff v. Youmans, 86 N. Y. 324.

malice is not per se actionable.[218] Bad motive for conduct by itself is no tort. Wrongful intention cannot make lawful conduct unlawful,[219] or a proper intention make unlawful conduct lawful.[220] Malicious motives make a bad case worse, but that cannot make that wrong which in its own essence is lawful." [221] "The best intention cannot prevent an act from being a nuisance when it otherwise is such; and the worst intention cannot make an act a nuisance when it otherwise is not." [222]

To constitute a tort, there must also be a violation of a legal duty. Thus, malice does not make the diversion of subterranean waters actionable if such diversion would not be actionable if the motive were a proper one.[223] It cannot be said that this reasoning has been entirely abandoned. But in many cases it has not been followed, and there is a distinct tendency to determine liability by reference to the state of the defendant's mind. Like most a priori generalizations, this has been the basis of much dispute, and, perhaps, of much error.[224] As the law of torts tends to be regulated

[218] Norcross v. Otis Bros., 152 Pa. 481, 25 Atl. 575; Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492. And see post, p. 86, "Damnum Absque Injuria."

[219] Hunt v. Simonds, 19 Mo. 583; South R. Bank v. Suffolk Bank, 27 Vt. 505; Auburn & Cato P. R. Co. v. Douglass, 9 N. Y. 444; White v. Carroll, 42 N. Y. 161; Sterns v. Sampson, 59 Me. 568-572; Cunningham v. Brown, 18 Vt. 123; Dunlap v. Glidden, 31 Me. 435; Payne v. Railway Co., 13 Lea, 507; Humphrey v. Douglass, 11 Vt. 22; Prickett v. Greatrex, 7 Law T. 139.

[220] Amick v. O'Hara, 6 Blackf. 258; Porter v. Thomas, 23 Ga. 467; Moran v. Smell, 5 W. Va. 26; Ex parte Milligan, 4 Wall. 2.

[221] Heywood v. Tillson, 75 Me. 225; Phelps v. Nowlen, 72 N. Y. 39.

[222] Black, J., in Jenkins v. Fowler, 24 Pa. St. 308-310. And see Fowler v. Jenkins, 28 Pa. St. 176; Bonnell v. Smith, 53 Iowa, 281.

[223] Frazier v. Brown, 12 Ohio, 294; Chatfield v. Wilson, 28 Vt. 49. So in Mahan v. Brown, 13 Wend. 260, maliciously erecting a high fence on defendant's own premises was held not to be actionable. "The plaintiff in this case has only been refused the use of that which does not belong to her; and, whether the motive of defendant is good or bad, she had no legal cause of complaint." And see Smith v. Johnson, 76 Pa. St. 191; Thornton v. Thornton, 63 N. C. 211; Jenks v. Williams, 115 Mass. 217; Harwood v. Thompkins, 24 N. J. Law, 425; Panton v. Holland, 17 Johns. 92. Cf. Gallagher v. Dodge, 48 Conn. 387 (as to statutory prohibition of malicious erection).

[224] The confusion which has arisen as to when a wrongful intention is essential to a cause of action is well illustrated in the cases, subsequently considered, as to liability of election officers for their torts. Post, c. 2, "Execu-

by admitted general principles, it inclines to refer, for a basis of liability, to some mental element analogous to consent in contract and intent in crimes. There is recognized an increasingly large and important class of cases to which the principle referred to does not apply. Thus, there are uses of property resulting in damnum absque injuria if the motive of defendant be proper, but which may be the basis of recovery if defendant be guilty of malice.[225] And especially in the legal aspect of modern combinations of employers or of employés, and of vendors and of vendees, the question of motive is becoming of the utmost importance.[226]

20. The wrongdoer may be held liable in tort for his conduct, although he may not have been conscious of wrongdoing.

Thus, there may be intention to do the act which produces injury without intention of violating the rights of another, and despite the exercise of due care in the entire transaction. If a person buys and takes away property in violation of the rights of the owner, he is liable for the value thereof in an action for conversion.[227] If one by bona fide mistake, notwithstanding every precaution to keep within his own lines, goes upon the lands of another, he is liable in trespass.[228] Again, there may be intention to do a lawful act, and liability may attach for injuries because of unintended conse-

tive Officers." And see arrangement of rights and wrongs as interpreted by Mr. Austin (2 Jur. table 8), at page 312. Mr. Brice (1 Am. Com., 3d. Ed.) says: "He [Mr. Justice Blackstone], as was natural in a lawyer and a man of letters, described rather its theory than its practice, and by its theory was many years behind its practice."

[225] Thus, it was said in Chesley v. King, 74 Me. 164: "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." And see Stevens v. Kelley, 78 Me. 445, 6 Atl. 868. To induce one to break a contract, if there is neither malice nor fraud, is not actionable. McCann v. Wolff, 28 Mo. App. 447. But malicious interference with contract is a generally recognized tort. Lumley v. Gye, 2 El. & Bl. 216; post, p. 634.

[226] Post, p. 645, "Conspiracy."

[227] Hilbery v. Hatton, 2 Hurl. & C. 822.

[228] Blaen Avon Coal Co. v. McCulloh, 59 Md. 403; Hazelton v. Week, 49 Wis. 661, 6 N. W. 309; Cate v. Cate, 44 N. H. 211.

quences, without reference to the exercise of care. Thus, in an assault there may be unintentional injury from an intentional act. If, in sport, one throws something at another, and injury to a third person ensues, this is actionable.[229] As to this general line of thought, however, there is not a unanimity of opinion.

Again, there may be no intention of doing harm, but, for want of due care to guard against injury to others, conduct innocent in itself may become tortious. This want of advertence to natural and probable consequences attaches liability by what is called "negligence." Thus, if a person's servant drive so carelessly in a public street as to come into collision with a carriage, and thereby cause the horse attached to the same to take fright and run away, and injure another's person and property, the master is liable in tort.[231] If a druggist negligently delivers a harmful drug when a harmless one is asked for, the absence of intention is no excuse.[232] What is "due care" when the duty of exercising it exists will be subsequently discussed under "Negligence."

A distinction is sometimes drawn between negligence and rashness or heedlessness. Rashness or heedlessness is said to be such a disregard of the rights of others as is shown in the probability that harm will result being foreseen more or less clearly.[233] Thus, if an owner leaves a horse and cart in the streets without hitching the horse, or leaving some one to watch it, and the horse, being struck by a stranger, runs away, and does damage, the owner is liable, though the horse was a quiet one. "If a man chooses to leave a cart standing in the street, he must take the risk of any mis-

[229] Peterson v. Haffner, 59 Ind. 130; Perkins v. Stein, 94 Ky. 433, 22 S. W. 649. And see Corning v. Corning, 6 N. Y. 97; Wright v. Clark, 50 Vt. 130; Cogdell v. Yett, 1 Coldw. 230; Knott v. Wagner, 16 Lea (Tenn.) 481; Anderson v. Arnold, 79 Ky. 370; James v. Campbell, 5 Car. & P. 372; Ball v. Axten, 4 Fost. & F. 1019.

[231] McDonald v. Snelling, 14 Allen (Mass.) 290.

[232] Brown v. Marshall, 47 Mich. 576, 11 N. W. 392; Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350.

[233] Aust. Jur. lect. 3; Innes, Torts, p. 35, § 36; Whart. Neg. § 12. Negligence and rashness both suppose unconsciousness. In negligence the party does not think of a given act; in rashness the party does not think of a given consequence. Aust. Jur. lect. 3.

chief that may be done."[234] The distinction is a fine one at best. No useful purpose would seem subserved by its use. It has certainly not become embodied in current language of decision. When, however, the disregard for the rights of others amounts to wantonness, or a person ceases to be inadvertent, and intentionally injures another, then the wrong, according to what is perhaps the better opinion, ceases to be negligence, and becomes willful.

The truth of the matter would seem to be that negligence, so far as the mental attitude of the person charged with that kind of wrongdoing is concerned, is used in a double sense. It sometimes refers to a breach of duty unqualified in its nature, as the negligent keeping of fire,[235] negligent storage of water,[236] or the negligent keeping of dangerous animals.[237] In these cases, the conduct of the wrongdoer may have been perfectly reasonable and careful throughout, and yet he may be liable. But negligent driving, or the negligent handling of a gun, indicates a very different source of liability, arising, not from the nature of the thing done, but from want of forethought in the doing of it.[238]

21. There may also be an intention, not only to do an act, but also to violate a right in so doing; in other words, actionable conduct may be accompanied by consciousness of wrongdoing.[239]

Malice, in legal phraseology, signifies the contemplation of the doing of a wrongful act towards another person. In its legal sense, it ranges from malevolence, as in an injury committed in revenge, to the mere conscious violation of a right without just cause or

[234] Illidge v. Goodwin, 5 Car. & P. 190. And see Lake Shore & M. S. R. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692; Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412, 11 South. 262.

[235] Jones v. Festiniog R. Co., L. R. 3 Q. B. 733.

[236] Rylands v. Fletcher, L. R. 1 Exch. 265; L. R. 3 H. L. 330.

[237] May v. Burdett, 9 Q. B. 101. Blasting, injuring plaintiff's horse. Benner v. Atlantic Dredging Co., 58 Hun, 359, 12 N. Y. Supp. 181.

[238] Clerk & L. Torts, 11; Pol. Torts, "Duties to Insure Safety."

[239] Reeves v. State, 95 Ala. 31, 11 South. 158–163; U. S. v. Harper, 33 Fed. 471; U. S. v. Taintor, 11 Blatchf. 374, Fed. Cas. No. 16,428.

excuse, as in the case of a mere trespass.[240] Malice is said to have been present whenever the injurer contemplated harm to the person injured, though he may also have entertained a desire to benefit himself, and though the harm contemplated may be merely incidental to the fruition of that desire. It is present, therefore, though in different degrees, in the highwayman who murders a man for his purse, and the trespasser who gets over a fence to take an apple.[241] Of course, the malice need not always be for the benefit of the wrongdoer.[242] Whenever there is a sinister or improper motive actually present in the mind of the wrongdoer, the malice is said to be malice in fact, express malice, or actual malice.[243] This is proved by evidence as to the state of the mind of the wrongdoer. Malice in law, or implied malice, does not refer to the consciousness of the wrongdoer; nor to motive, but to knowledge of wrongdoing. It is the inference of law from facts in evidence. It is proved by showing actual occurrences.[244]

Malice in law or in fact is an essential ingredient of certain forms of specific wrongs or torts, such as malicious abuse of process, malicious prosecution, libel and slander, fraud and deceit.[245]

In fraud, it is sometimes contended that action lies only for false representations, but there is authority for sustaining such an action upon negligent representations.[246]

240 Innes, Torts, 41.

241 Id.

242 Chesley v. King, 74 Me. 164.

243 Smith v. Rodecap, 5 Ind. App. 78, 31 N. E. 479; Ramsey v. Cheek, 109 N. C. 270, 13 S. E. 775. Whether or not the fact that defendant's conduct complained of was intended as a joke may avail as a defense depends upon a reasonable expectation of a practical joke from antecedent conduct. Wartman v. Swindell, 54 N. J. Law, 589, 25 Atl. 356.

244 Townsh. Sland. & L.; post, p. 555, "Malicious Wrongs." Malice may be found either in a wrongful motive, or, in many cases, in a wrongful act, whatever the motive. Bigelow, Torts, 5, note 1. Malice in law may arise from an act done wrongfully and willfully, without reasonable excuse or probable cause, not necessarily only from an act done from ill feeling, spite, or desire to injure another. Tucker v. Cannon, 32 Neb. 444, 49 N. W. 435.

245 Post, pp. 632, 602, 512, 558.

246 Post, p. 560, "Deceit."

CONNECTION AS CAUSE.

22. Liability for conduct does not attach unless the conduct was the legal cause of the injury complained of.

As in nature every change is the result of some cause, so it is in the legal relations between man and man. The determination of legal cause has three principal objects: (a) that where there has been a wrong committed, for which liability should attach, the person who is to be held answerable in an action in a court of common law should be selected; (b) that if the person injured be himself a wrongdoer, in any respect, it can be determined whether or not his wrongdoing should disentitle him from recovering; and (c) that the extent of the injurious consequences for which the person thus ascertained to be responsible to such injured person, not disentitled, be fixed.

A man is responsible for his own conduct only. In determining liability for a given harm suffered, the fundamental question is, did the party charged cause the harm? In ascertaining this the courts naturally select the proximate as distinguished from a remote, cause. As Lord Bacon said, "It were infinite for the law to judge of cases and other impulsions one of another, and therefore contenteth itself with the immediate cause, and judgeth of acts by them, without looking to any further degree." [247] "In jure, non remota causa sed proxima spectatur." [248] So far as mere definition is concerned, that of Jenkins, J., in Goodlander Mill Co. v. Standard Oil Co.,[249] is as adequate as any: "The proximate cause of an injury is that which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. * * * The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof." But what is a proximate cause is a matter requiring great nicety to determine.

[247] Bac. Max. Reg. 1.

[248] Broom, Leg. Max. 216–228, 853; Hoag v. Railroad Co., 85 Pa. St. 293.

[249] 11 C. C. A. 253, 63 Fed. 400–407.

23. If the damage complained of would have ensued notwithstanding the conduct complained of, then such conduct is not a cause.

A cause is a necessary antecedent. It must be a causa sine qua non of the damage complained of. If, however, the damage would have occurred whether defendant had done his duty or not, then the defendant, even though a wrongdoer, is not the cause of the wrong. Therefore, where horses became frightened, and ran into a hole in the ice, near a highway, negligently left unguarded, and were drowned, it was held that their owner, though free from negligence, could not recover from the person whose duty it was to place a guard around the hole, if their speed was so great that a guard would not have prevented the casualty.[250] Conversely, plaintiff's own wrong does not bar his recovery, if the injury complained of would have happened just the same, notwithstanding his improper conduct.[251]

24. The defendant's wrongful conduct may have been so connected with the damage complained of that the damage would not have been done, except for the conduct, and still the conduct may not be the cause.

Defendant's conduct may be a necessary antecedent of the harm complained of, and may be wrongful, and still not be the juridical cause of the harm.[252] The rule of law is that negligence, to render defendant liable, must be the causa causans or proximate cause,

[250] Sowles v. Moore, 65 Vt. 322, 26 Atl. 629. The law is not different where defendant's duty to guard was statutory. Stacy v. Knickerbocker Ice Co., 84 Wis. 614, 54 N. W. 1091. Contrast Union St. Ry. Co. v. Stone, 54 Kan. 83, 37 Pac. 1012.

[251] Post, p. 959, "Contributory Negligence."

[252] Thus, an iron post used as a barber's sign stood on the sidewalk six inches from the curb. It was not fastened to the sidewalk, except by three prongs projecting from the base into holes drilled in the sidewalk. The post had stood there for 18 months, when defendant's servant negligently backed his wagon against the curb, so that the projecting end of the wagon knocked the post over upon plaintiff. It was held that the act of defendant's servant, and not the act of placing the post there, was the proximate cause of the accident. Wolff Manuf'g Co. v. Wilson, 152 Ill. 9, 38 N. E. 694.

of the injury, and not merely a causa sine qua non.[253] But the line as to this matter is often a fine one. Thus, where a person carelessly left another's bars down, in consequence of which the latter's sheep were destroyed by bears, the court denied the right to recover. The court, however, was much divided in reasoning.[254] The conclusion would not be accepted as law in many jurisdictions.[255] Essentially the same idea is often put in other words by saying that a defendant is not liable when his alleged wrongful conduct was a condition, and not a cause.[256]

Condition not Cause.

The courts are entirely agreed that when defendant's wrongful conduct is the condition of the harm complained of, and not the proximate cause, then defendant is not liable in tort.[257] But they are by no means agreed as to what is the difference between a cause and a condition. Thus, delay in performance of a contract,[258] or wrong in the performance of a contract, resulting in delay, whereby damage ensues,[259] which but for such delay would not have occurred,

[253] Per Kelly, C. B., in Lords Bailiffs v. Corporation of Trinity House, L. R. 5 Exch. 204, affirmed L. R. 7 Exch. 247. Here, however, plaintiff was held to be the proximate cause.

[254] Gilman v. Noyes, 57 N. H. 627.

[255] Damages are generally regarded as proximate if they are natural and probable consequences, whether they could or could not be foreseen. The court in the case argued that such consequences should have been anticipated. See opinion of Ladd, J., Gilman v. Noyes, 57 N. H. 631.

[256] "A condition is a mechanical antecedent without causal power. A cause is the responsible voluntary agent changing the ordinary course of nature." Cicero de Officii, lib. 1, cited in Whart. Neg. 824.

[257] Whart. Neg. §§ 85, 86.

[258] Thus, failure to gin cotton was held the condition of its subsequent burning. James v. James, 58 Ark. 157, 23 S. W. 1099; Chicago, St. L. & P. R. Co. v. Williams, 131 Ind. 30, 30 N. E. 696; Martin v. St. Louis, I. M. & S. Ry. Co., 55 Ark. 510, 19 S. W. 314; Deming v. Merchants' Cotton-Press & Storage Co., 90 Tenn. 306, 17 S. W. 89; Missouri Pac. Ry. Co. v. Cullers, 81 Tex. 382, 17 S. W. 19; Chicago, St. L. & P. R. Co. v. Barnes, 2 Ind. App. 213, 28 N. E. 328; St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554.

[259] In failing to transport in time. Reid v. Evansville & T. H. R. Co., (Ind. App.) 35 N. E. 703,—cited by counsel for the receivers of Railroad Co. v. Reeves, 10 Wall. 176; Morrison v. Davis, 20 Pa. St. 171; Denny v. Rail-

is a condition, not a cause. But there is much disagreement on the point. Perhaps the best illustration of what is commonly regarded as a condition, as distinguished from a cause, is to be found in the cases subsequently discussed, where the damage complained of could not have occurred, except for plaintiff's wrongdoing, and yet where plaintiff was allowed to recover because such wrong was not the legal cause of the damage complained of.[260] The distinction between cause and condition would be valuable, if there were any definite standard for determining what is a cause and what is a condition. The only standard by which this can be determined is the same as that which determines a proximate from a remote cause; for example, the test of natural and probable consequences. Accordingly, "condition" or "occasion," while affording a convenient verbal distinction, is, in use, likely to mislead thinkers into a conviction that they have something which they have not.

Inevitable Accident.

The English doctrine has been said, on high authority, to be that an accident not avoidable by any such precaution as a reasonable man could be expected to take is a good defense to an action for damages.[261] A more generally accepted view, however, is that:

road Co., 13 Gray, 481; St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554; New York Lighterage & Transp. Co. v. Pennsylvania R. Co., 43 Fed. 172; Hoadley v. Transportation Co., 115 Mass. 304.

[260] Chapter 2, post; and see Newcomb v. Boston Protective Department, 146 Mass. 596, 16 N. E. 555; post, "Contributory Negligence."

[261] Fraser, Torts, 17; Pol. Torts, c. 4, subds. 8, 9. And see Innes, Torts, 18, 19, to the effect that an inevitable accident has never been defined, and seems properly to mean that which is produced by unpreventable physical influence, which cannot be traced to the instrumentality of any person; citing Sharp v. Powell, L. R. 7 C. P. 253. In other words, When the harm complained of is the result of circumstances, the bringing of which cannot be traced to the conduct of any person, it is not an injury. Innes, Torts, 18. "No one is liable for a mischief resulting from accident or chance casus; that is to say, from some event, other than act of his own, which he was unable to foresee, or foreseeing, was unable to prevent. This, I think, is the meaning of the casus or accident, in the Roman law, and of chance, or accident, in our own law. 'By the common law,' says Lord Mansfield, 'a carrier is an insurer. It is laid down that he is liable for every accident, except by the act of God, or the king's enemies.' Here, the term accident

"An accident is an event or occurrence which happens unexpectedly from the uncontrollable operation of nature alone, and without human agency, as when a house is stricken and burned by lightning, or blown down by tempest, or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both; and a classification which will embrace all the cases of any authority may easily be made. In the first class are all those which are inevitable, or absolutely unavoidable, because effected or influenced by the uncontrollable operation of nature.[262]

includes the acts of men, namely, of the king's enemies. And in the Digest it is expressly said, 'Fortuitis casibus solet etiam adnumerari aggressura latronum.' In the language of the English law, an event which happens without the intervention of man is styled 'the act of God.' The language of the Roman law is nearly the same. Mischiefs arising from such events are styled damna fatalia, or detrimenta fatalia. They are ascribed to vis divina, or to a certain personage styled Fatum. Or the casus or accident takes a specific name, and is called fatalitias. The language of either system is absurd. For the act of man is as much the act of God as any event which arises without the intervention of man. And, if we choose to suppose a certain fate or destiny, we must suppose that she or it determines the acts of men, as well as the events which are not acts of men." 1 Aust. Jur. lect. 25, p. 336. But the legal acceptation of "accident" as meaning an event happening unexpectedly and without fault, or where the real cause cannot be traced (see Wabash, St. L. & P. Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391), is coming into general use. Accident is also used in the colloquial sense of mere occurrence of unexpected damage, as by machinery. Richards v. Rough, 53 Mich. 212, 18 N. W. 785.

[262] An act of God is such an inevitable accident as occurs without any intervention of man. 1 Am. & Eng. Enc. Law, 174; McGrew v. Stone, 53 Pa. St. 436. "The law furnishes every person a remedy by civil action to recover damages for injuries resulting to him from the negligence of another, even though such injury was accidental. To constitute a valid defense in such cases, the injury must be shown to have resulted from one controlling superior agency, and without defendant's fault." Knott v. Wagner, 16 Lea (Tenn.) 481; Chidester v. Consolidated Ditch Co., 59 Cal. 197; McGrew v. Stone, 53 Pa. St. 436; McCauley v. Logan, 152 Pa. St. 202, 25 Atl. 499; Express Co. v. Smith, 33 Ohio St. 511; Turner v. Haar, 114 Mo. 335, 21 S. W. 737; Siordet v. Hall, 4 Bing. 607; Crosby v. Fitch, 12 Conn. 410; Converse v. Brainerd, 27 Conn. 607; Sherman v. Wells, 28 Barb. 403; Michaels v. New York C. R. Co., 30 N. Y. 564; Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 U. S. (Lawy. Ed.) 909; Cook v. Gourdin, 2 Nott & McC. 19; Firth v. Bowling Iron Co., 3 C. P. Div. 254; Woodward v. Aborn, 35 Me. 271; Salisbury v. Herchen-

In the second class are those which result from human agency alone, but were unavoidable, under the circumstances.[263] And in the third class are those which were avoidable, because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such a lawful act, or because the accident was the result of actual negligence or folly, and might, with reasonable care adapted to the exigency, have been avoided.[264] Thus, to illustrate, if A. burn his own house, and thereby the house of B is burned, he is liable to B. for the injury; but if the house of A. is burned by lightning, and thereby the house of B. is burned, A. is not liable; the accident belongs to the first class, and was strictly inevitable, or absolutely unavoidable.[265] If A. should kindle a fire

roder, supra; Bostwick v. Baltimore & O. R. Co., 45 N. Y. 712; Holladay v. Kennard, 12 Wall. 254, 20 U. S. (Lawy. Ed.) 390; Sheldon v. Sherman, 42 N. Y. 484; Read v. Spaulding, 30 N. Y. 630; Chicago R. Co. v. Shea, 66 Ill. 471. Obstruction of running stream, occasioned by washing down bank, is not a nuisance, unless the obstruction is attributable to acts or agency of man. Mohr v. Gault, 78 Am. Dec. 687. And see City of Allegheny v. Zimmerman, 40 Am. Rep. 649. Where refuse was deposited by a coal-mining company in a stream where every flood, as well as the ordinary current, would carry it gradually down stream, it was held that the fact that an extraordinary flow quickened its descent, and gave the final impulse that lodged it on another's land, did not take away the company's liability. Elder v. Lykens Val. Coal Co., 157 Pa. St. 490, 27 Atl. 545; Jackson v. Wisconsin Tel. Co., 88 Wis. 243, 60 N. W. 430 (as to lightning). Post, p. 1061, "Common Carriers," "Exceptions from Liability." "The classical signification of 'vis major' is wider, for some purposes." Pol. Torts, 400, citing Nugent v. Smith, 1 C. P. Div. 423–429, per Cockburn, J.

[263] The contrary doctrine, laid down, or supposed to be laid down, in Weaver v. Ward, would seem to be at variance with the prevailing modern thought. In Holmes v. Mather, L. R. 10 Exch. 261, 44 L. J. Exch. 176, a horse, which was ordinarily quiet, was frightened by lightning, and ran away, injuring plaintiff. It was held that the lightning was the proximate cause of the damage, and that plaintiff could not recover of the driver. See Nitro-Glycerine Case, 15 Wall. 524; Brown v. Kendall, 6 Cush. 292; Gibbons v. Pepper, 1 Ld. Raym. 38; Hall v. Fearnley, 3 Q. B. 919; Wakeman v. Robinson, 1 Bing. 213; Wabash, St. L. & P. Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391; Boynton v. Rees, 9 Pick. 528.

[264] This is the basis of the law of negligence. Post, c. 12.

[265] But see Jackson v. Wisconsin Tel. Co., 88 Wis. 243, 60 N. W. 430,

in a long-unused flue in his own house, which has become cracked without his knowledge, and the fire should communicate through the crack, and burn his house, and thereby the house of B., the accident would be unavoidable, under the circumstances, and belong to the second class. But if A., when he kindled the fire, had reason to suspect that the flue was cracked, and did not examine it, and so was guilty of negligence, or knew that it was cracked and might endanger his house and that of B., and so was guilty of folly, he would be liable, although the act of kindling the fire was a lawful one, and he did not expect or intend that the fire should communicate." [266]

There would seem to be another class of cases, which arise where the injury is the result of so many fortuitous circumstances, no one of which can be fairly said to have been its proximate cause, that the damage may accordingly be referred to accident, and cannot be the basis of a judicial action.[267]

25. It is no defense, in an action for an injury resulting from negligence, that the negligence or willful wrong of third persons, or an inevitable accident, or an inanimate thing, contributed to cause the injury, if the negligence of the defendant was an efficient cause, without which the injury would not have occurred.[268]

"Negligence," post, p. 840, note 123: "Certainly a stroke of lightning is an 'act of God'; but that is not the question here presented, but rather another element—i. e. the negligence of man—is added to the question, which materially alters its scope. If I, owning a high mast or building, which I know is so situated as to be very likely to be struck by lightning, construct an attractive path for the lightning to my neighbor's roof, so that his house is destroyed by a bolt which strikes my mast or building, shall I escape liability for my negligent or wrongful act by pleading that the lightning was the act of God? Certainly not. I invited the stroke of one of the most destructive powers of nature, and negligently turned its course to my neighbor's property. The principle is the same as that involved in the case of Borchardt v. Boom Co., 54 Wis. 107, 11 N. W. 440. The lightning stroke is in no greater degree the act of God than the usual freshets occurring in a river."

[266] Morris v. Platt, 32 Conn. 75.

[267] Chicago, St. P., M. & O. Ry. Co. v. Elliott, 5 C. C. A. 347, 55 Fed. 949.

[268] City of Joliet v. Shufeldt, 144 Ill. 403, 32 N. E. 969; Salisbury v.

Sole Cause.

A juridical cause need not be a sole cause,[269] nor the nearest in time or space.[270] A wrongdoer who contributes to a damage cannot escape liability, for example, for a nuisance, because his proportional contribution to the result cannot be accurately measured.[271] A town or city may be liable for damages caused by a defect in a highway, although the innocent act of a third person is a concur-

Herchenroder, 106 Mass. 458; Pastene v. Adams, 49 Cal. 87. Post, pp. 959, 971, "Contributory Negligence," "Concurrent Cause." As applied to negligence, the rule is, where several causes combine to produce the injury complained of, defendant is not released from liability because he is not responsible for all of such causes, provided plaintiff is not guilty of contributory negligence. Chicago, R. I. & P. Ry. Co. v. Sutton, 11 C. C. A. 251, 63 Fed. 394; Board of Com'rs v. Mutchler, 137 Ind. Sup. 140, 36 N. E. 534; Stanley v. Union Depot R. Co., 114 Mo. 606, 21 S. W. 832; Herre v. City of Lebanon, 149 Pa. St. 222, 24 Atl. 207; Livingston v. Cox, 6 Pac. St. 360; Worms'orf v. Detr it City Ry. Co., 75 Mich. 472, 42 N. W. 1000; Webster v. Hudson River R. Co., 38 N. Y. 260; Eaton v. Railway Co., 11 Allen (Mass.) 500.

[269] "Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause." (Here defendant's obstruction on the highway concurred with its movement of train to produce death.) Lake Shore, & M. S. Ry. Co. v. McIntosh (Ind. Supp.) 38 N. E. 476. Where two fires, for one of which defendant was responsible, mingled, defendant was liable for damage thereafter ensuing. McClellan v. St. Paul, M. & M. Ry. Co. (Minn.) 59 N. W. 978; Louisville, N. A. & C. R. Co. v. Davis, 7 Ind. App. 222, 33 N. E. 451; post, p. 1050, "Concurring Negligence." And see note 262. It has, however, been held that in actions of tort, where the damage claimed may have resulted from two or more causes, for the consequences of one only of which defendant is liable, there can be no recovery unless the evidence shows that the cause for the consequences of which the defendant must answer most largely contributed to the damage claimed. Pierce v. Michel, 1 Mo. App. 74.

[270] Sanborn, J., in Missouri Pac. Ry. Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921–925; Pullman Palace Car Co. v. Laack, 143 Ill. 242–262, 32 N. E. 285; Union Pac. Ry. Co. v. Callaghan, 6 C. C. A. 205, 56 Fed. 988; Bish. Noncont. Law, 518, 519–684; Thomp. Neg. 981, § 10; Booth v. Boston & A. R. Co., 73 N. Y. 38; Cayzer v. Taylor, 10 Gray (Mass.) 274; Village of Carterville v. Cook, 129 Ill. 152, 22 N. E. 14; Mathews v. London, etc., Co., 60 Law T. (N. S.) 47.

[271] Learned v. Castle, 78 Cal. 454, 18 Pac. 872, and 21 Pac. 11 (the nuisance consisted of overflowing water).

ring cause of the harm.[272] But there is no unanimity of conclusions or reasoning in this class of cases.[273] In an action to recover for injuries to which the fault of another person contributed, the defendant's liability is not affected by the fact that the fault of such person was not negligence, but voluntary wrong, which they should have apprehended and guarded against.[274] And, in

[272] Hayes v. Hyde Park (1891) 153 Mass. 514, 27 N. E. 522; Houfe v. Town, 29 Wis. 296; Schillinger v. Town of Verona, 85 Wis. 589, 55 N. W. 1040. So if a horse shy and run into a train obstructing a crossing, Chicago & N. W. Ry. Co. v. Prescott, 8 C. C. A. 109, 59 Fed. 237; and it is immaterial if the bit of the bridle broke, Cairncross v. Village of Pewaukee, 86 Wis. 181, 56 N. W. 648. Where an injury is the combined result of a horse shying from a pile of rock beside the road and the failure of the county to provide a guard rail along the approach to a bridge, the county is liable therefor. Rohrbough v. Barbour County Court, 39 W. Va. 565, 20 S. E. 565. Lynch v. Railroad Co., 84 Wis. 348, 54 N. W. 610. And see Morgan v. Freemont Co. (Iowa) 61 N. W. 231. Defect in bridge caused damage to plaintiff in rescuing a horse; plaintiff recovered. La Duke v. Township of Exeter, 97 Mich. 450, 56 N. W. 851. And see Lewis v. Railway Co., 54 Mich. 55, 19 N. W. 744; Page v. Bucksport, 64 Me. 51; Stickney v. Town, 30 Vt. 738; Hembling v. City of Grand Rapids, 99 Mich. 292, 58 N. W. 310 (where plaintiff, walking on a defective sidewalk, stepped in a hole made by the jerking away of a board by a horse, it was held that the proximate cause of the damage plaintiff suffered was not the defect in the sidewalk, but the horse. Therefore, a town may be liable for a defect in a highway, although the innocent act of third person is a concurring cause of the damage complained of). And see Wilder v. Stanley, 65 Vt. 145, 26 Atl. 189.

[273] Bowes v. City, 155 Mass. 344, 29 N. E. 633; Stanton v. Louisville, etc., R. Co., 91 Ala. 382, 8 South. 798; Schaeffer v. Township, 150 Pa. St. 145, 24 Atl. 629; Worrilow v. Upper Chichester Tp., 149 Pa. St. 40, 24 Atl. 85; Kieffer v. Borough, 151 Pa. St. 304, 24 Atl. 1060; 31 Wkly. Notes Cas. 15; Brown v. Laurens Co., 38 S. C. 282, 17 S. E. 21; Mason v. Spartanburg Co., 40 S. C. 390, 19 S. E. 15; Bleil v. Street Railway Co., 98 Mich. 228, 57 N. W. 117. Defendant maintained a bridge, with side rails, across a railroad track. Plaintiff was driving across the bridge, when the horse fell against the rail, which broke, and precipitated horse, sleigh, and plaintiff to the track below. The horse was dead—either from heart disease or from choking by the harness—when he fell. Held that, even if there was a defect in the bridge, it was not the proximate cause of plaintiff's injury, and defendant is not liable therefor. McClain v. Incorporated Town of Garden Grove, 48 N. W. 1031.

[274] Lane v. Atlantic Works, 111 Mass. 136.

general, when the damage complained of is the result of simultaneous wrong both of the defendant and of a third person, and could not have been produced in the absence of either, the defendant's wrong is the proximate cause of the injury.[275] The fact that a natural cause contributed to produce the damages complained of, which would not have happened without defendant's wrong, does not enable defendant to make out the defense of the act of God.[276]

If a defendant charged with negligent damage has been guilty of such negligence as would have produced the damage complained of, he cannot excuse himself on the ground of inevitable accident by showing that the damage would have occurred through an unavoidable cause although he had done his duty. But, if he can show that a substantial and fairly ascertainable portion of the damage which actually happened is to be attributed solely to that unavoidable cause, the liability for damage will be apportioned.[277]

Intervening Cause.

If a person's wrong is a proximate cause of injury, he may be liable although there may have been an intervening efficient cause.

[275] McMahon v. Davidson, 12 Minn. 357 (Gil. 232); Griggs v. Fleckenstein, 14 Minn. 81 (Gil. 62); Johnson v. Northwestern Tel. Exch. Co., 51 Minn. 225, 51 N. W. 225.

[276] 2 Thomp. Neg. 1067; Whart. Neg. § 86; Romney Marsh v. Trinity House Corp., L. R. 5 Exch. 204; Ellet v. St. Louis, etc., Co., 76 Mo. 518; Piedmont & C. Ry. Co. v. McKenzie, 75 Md. 458, 24 Atl. 157; Polock v. Pioche, 35 Cal. 416, and cases cited; Chidester v. Consolidated Ditch Co., 59 Cal. 197; Rodgers v. Central Pac. R. Co., 67 Cal. 607, 8 Pac. 377; Southwestern Tel. Co. v. Robinson, 50 Fed. 810; Dickinson v. Boyle, 17 Pick. (Mass.) 78; Salisbury v. Herchenroder, 106 Mass. 458; George v. Fisk, 32 N. H. 32; McArthur v. Sears, 21 Wend. 189; Pittsburgh v. Grier, 22 Pa. St. 54; Scott v. Hunter, 46 Pa. St. 192; Livezey v. Philadelphia, 64 Pa. St. 106; Baltimore & O. R. Co. v. Sulphur Springs Dist., 96 Pa. St. 65; Couts v. Neer, 70 Tex. 468, 9 S. W. 40; Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 11 Sup. Ct. 859; 1 Am. & Eng. Enc. Law, 174.

[277] Fry, J., in Nitro-Phosphate, etc., Co. v. London, etc., Co., 9 Ch. Div. 503, 39 Law T. (N. S.) 433, 27 Wkly. Rep. 267. This was an action to recover damages for an injury caused to the plaintiff's property by an overflow of water from the defendant's dock, which, as the plaintiff alleged, resulted from the defendant's negligence in not having maintained the retaining wall of the dock at a sufficient height.

Judge Cooley has stated the rule with great conservatism. If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some others, and actually result, and does actually result, in injury, through the intervention of other causes, not wrongful, the injury shall be referred to the wrongful cause, passing through those which were innocent.[278] In Scott v. Shepherd,[279] defendant had thrown a lighted squib into the market house on a fair day. The squib was cast about by the persons on whom it was thrown until it struck the plaintiff in the eye. The intermediate persons who rid themselves of the squib were held to have acted in proper self-defense. "All the facts of throwing the squib must be considered as one single act, viz. the act of defendant." The intermediate persons acted involuntarily[280] or automatically.[281] In this case, accordingly, the intervening cause may have been innocent. In Milwaukee & St. P. R. Co. v. Kellogg,[282] the defendant was held liable for negligence in

[278] Cooley, Torts, 69.

[279] Willes, 303; Smith, Lead. Cas. 737; 2 Bl. Comm. 892.

[280] Ball. Lead. Cas. Tort. 258.

[281] See opinion of De Grey, C. J., Pig. Torts, 165. Under this general view may be placed the classical cases. Vanderburgh v. Truax, 4 Denio, 464 (boy and faucet); Guile v. Swan, 19 Johns. 381 (balloon). McDonald v. Snelling, 14 Allen (Mass.) 296. Where defendant, negligently driving, caused another team to run away, and by the latter plaintiff was damaged, it was held that plaintiff could recover. So, where a wagon, coming down an avenue, in attempting to get off the track out of the way of a rapidly approaching car, forced another wagon onto the track, so that it was injured by a collision, the driving of the wagon off the track was not the proximate cause of the injury. Thatcher v. Central Traction Co. (Pa. Sup.) 30 Atl. 1048. But, where horses on a ferryboat are frightened by the whistle of a steamer met by the ferry, and a horse jumps against and breaks a defective rail placed across the entrance to the ferry, and is drowned, the defective rail, and not the blowing of the whistle, is the proximate cause of the loss of the horse. Sturgis v. Kountz Id. 976.

[282] 94 U. S. 469; Louisville, N. A. & C. R. Co. v. Nitsche, 126 Ind. 229, 26 N. E. 51. And see Tyler v. Ricamore, 87 Va. 466, 12 S. E. 799; Smith v. Railway Co., L. R. 6 C. P. 14; Lords Bailiffs v. Corporation of Trinity House, L. R. 5 Exch. 204; L. R. 7 Exch. 247 (where a high wind drove a ship grounded by negligence against a wall, which it damaged). Change in the direction of the wind is no defense. Northern Pac. R. Co. v. Lewis, 7 U. S. App. 254, 2 C. C. A. 446, 51 Fed. 658. The separation of the fire complained of as wrong-

causing a fire, which by a high wind was carried to, and burned, the plaintiff's premises. Here the intervening agency was a natural one, and innocent.[283] So, the fact that a woman is pregnant, and by reason thereof is more liable to suffer from accident, is only a link in the chain of her injury, and will not exempt, for example, a street-car company from liability for injury to her.[284]

But a person may be liable although the intervening agency was a conscious, responsible person. Indeed, that person may be an

fully caused by defendant and the fire which damaged plaintiff by considerable time, great space of territory, or many intervening objects belonging to defendant or other owners does not prevent the connection of the original fire as the proximate cause of plaintiff's damage. Cincinnati, etc., R. Co. v. Barker, 94 Ky. 71, 21 S. W. 347; Simmonds v. Railroad Co., 52 Conn. 264; Martin v. Railroad Co., 62 Conn. 331, 25 Atl. 239; Frace v. Railroad Co., 68 Hun, 325, 22 N. Y. Supp. 958; East Tennessee, V. & G. R. Co. v. Hesters, 90 Ga. 11, 15 S. E. 828; East Tennessee, V. & G. R. Co. v. Hall, 90 Ga. 17, 16 S. E. 91; Chicago & E. R. Co v. Ludington (Ind. App.) 38 N. E. 342; Wiley v. Railway Co., 44 N. J. Law, 247; Fent v. Railway Co., 59 Ill. 349. But see Ryan v. New York Co., 35 N. Y. 210; Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353; Marvin v. Railroad Co., 79 Wis. 140, 47 N. W. 1123. Generally, as to liability notwithstanding intervention of natural contributing causes, see City of Albany v. Watervliet, etc., Co., 76 Hun, 136, 27 N. Y. Supp. 848; Kean v. Baltimore & O. R. Co., 61 Md. 154; Poepers v. Railway Co., 67 Mo. 715; Terre Haute, etc., Railroad v. Buck, 96 Ind. 346; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 25 N. E. 799; Miller v. Railroad Co., 90 Mo. 389, 2 S. W. 439; Bevan, Neg. 80, 81.

[283] Compare Kuhn v. Jewett, 32 N. J Eq. 647, with Hoag v. Railroad Co., 85 Pa. St. 293; and see Delaware, L. & W. R. Co. v. Salmon, 39 N. J. Eq. 299.

[284] Purcell v. St. Paul Ry. Co., 48 Minn. 134, 50 N. W. 1034; Mitchell v. Rochester Ry. Co., 30 Abb. N. C. 362, note, 371, 25 N. Y. Supp. 744; Barber v. Reese, 60 Miss. 906; Oliver v. Town, 36 Wis. 592; Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911. And generally, as to physical condition as a continuing cause, see Terre Haute & I. R. Co. v. Buck, 96 Ind. 346; Ohio & M. R. Co. v. Hecht, 115 Ind. 443, 17 N. E. 297, and cases collected at page 444, 115 Ind., and page 297, 17 N. E. So, if plaintiff's physical condition aggravate damage from kick. Vosburg v. Putney, 86 Wis. 278, 56 N. W. 480. Exposure of person during pregnancy contributory negligence. Salladay v. Town, 55 Me. 696. Cf. Edwards v. Village of Three Rivers (Mich.) 60 N. W. 454; Bovee v. Danville, 53 Vt. 183. Injury in ignorance of such condition by expelling from car. Mann Boudoir Car Co. v. Dupre, 4 C. C. A. 540, 54 Fed. 646. But plaintiff's previous physical condition, and not injuries, may cause death. Morrow v. Railway Co. (Ala.) 13 South. 775. And, further, see Briggs v. Rail-

innocent and successful plaintiff.[285] Thus, where a stranded vessel is voluntarily scuttled to save her from a storm which began several hours after she stranded, the proximate cause of loss arising from such scuttling is the storm, and not the scuttling. The owner may, accordingly, recover insurance on the vessel.[286] The intervening agency may be an innocent third person.[287] It may be a wrongdoing third person.[288] The intervening wrongdoer may be

way Co., 52 Minn. 36, 53 N. W. 1019; Louisville & N. R. Co. v. Northington, 91 Tenn. 56, 17 S. W. 880. Where a person, at the time of receiving a personal injury, has microbes in his system, which aggravate the injury, that fact does not relieve from responsibility the person whose negligence caused the injury, where it does not appear that the microbes would have done harm by themselves. Crane Elevator Co. v. Lippert, 11 C. C. A. 521, 63 Fed. 942. The wrongful act of the plaintiff in error subjected the injured party to other and dependent causes, which were set in motion by the original hurt. For this it is answerable. Ginna v. Railroad Co., 67 N. Y. 596; Drake v. Kiely, 93 Pa. St. 492; Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911; Terre Haute & I. Ry. Co. v. Buck, 96 Ind. 346; Bishop v. Railway Co., 48 Minn. 26, 50 N. W. 927; Jackson v. Railroad Co., 25 Am. & Eng. R. Cas. 327. Louisville & N. R. Co. v. Northington, 91 Tenn. 56, 17 S. W. 880, distinguished.

[285] If a person set a back fire to protect his property against a prairie fire which another negligently set and negligently permitted to escape, he can recover for such property thereby destroyed as would have been destroyed by the original fire had he remained idle. McKenna v. Baessler, 86 Iowa, 197, 53 N. W. 103; Pennsylvania Co. v. Congdon, 134 Ind. 226, 33 N. E. 795. And see Thoenlin v. Campbell, 45 Mass. 769. So, if a carrier's negligent driving of a coach cause a passenger to jump out to escape reasonably apprehended danger. Jones v. Boyce, 1 Starkie, 493; post, 966, "Contributory Negligence."

[286] Woolley v. Scovell, 3 Man. & R. 105; Binford v. Johnston, 82 Ind. 426; Northwest Transp. Co. v. Boston Marine Ins. Co., 41 Fed. 793.

[287] In an action against a gas company for injuries caused plaintiff's house by an explosion of gas in his cellar, resulting from a defective main, the fact that when defendant's servant went on plaintiff's premises to look for a leak a third person not defendant's agent accompanied him into the cellar, and struck the match that caused the explosion, does not relieve defendant from liability, as the presence of the gas through defendant's negligence contributed to cause the explosion. Koelsch v. Philadelphia, etc., Co., 152 Pa. St. 355, 25 Atl. 522. Cf. Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A. 253, 63 Fed. 400.

[288] A physician who makes a mistake in a prescription may be liable for damages consequent, although the druggist who filled it was also negligent. Murdock v. Walker, 43 Ill. App. 590. And see Brown v. Marshall, 47 Mich. 576, 11 N. W. 392; post, p. 975, "Contributory Negligence."

merely negligent, or may act willfully, and maliciously. Thus, if the owner leaves a horse and cart standing in the street, and a third person strike the animal, causing him to run away or otherwise do damage, the owner is liable. "If," said Lord Denman, in Lynch v. Nurdin,[289] "I am guilty of negligence in leaving anything so dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion, to the injury of a third party, and that injury should be so brought about, the sufferer may have redress by action against both or either of the two, but unquestionably against the first."

26. Conduct is a legal cause when, in the usual course of nature under the circumstances of the case, the damage complained of results as a natural and probable consequence.

A number of theories of causation have been favorably regarded by jurists. The one which has met with most general acceptance is that of natural and probable consequences.[290] A legal wrong, constituting an invasion of another's rights, will produce damages as the natural, necessary, and proximate result. But where an act or omission is not such a distinct legal wrong, and can only become a wrong to individuals through injurious consequences resulting

[289] 1 Q. B. Div. 36. And see Illege v. Goodwin, 5 Car. & P. 190; Burrows v. March Gas & Coke Co., L. R. 5 Exch. 67, L. R. 7 Exch. 96; Clark v. Chambers, 3 Q. B. Div. 327, 47 Law J. Q. B. 427; Collins v. Middle Level Com'rs, L. R. 4 C. P. 279; Wilder v. Stanley, 26 Atl. 189; Lane v. Atlantic Works, 111 Mass. 130. In an action against a township for injuries caused by a skittish horse plunging over an embankment left unprotected by a guard rail, where plaintiff knew of the danger, and there was another road which he might have traveled, the negligence of the township in leaving the embankment unguarded, and of plaintiff in not traveling the other road, are questions for the jury. Mechesney v. Unity Tp. (Pa. Sup.) 30 Atl. 263.

[290] An examination of any digest on proximate and remote damages will convince as to this point. "Natural and necessary consequences." Ryan v. New York Cent. Ry. Co., 35 N. Y. 210, reviewing Scott v. Shepherd, 2 W. Bl. 893; Vandenburgh v. Truax, 4 Denio (N. Y.) 464; Guille v. Swan, 19 Johns. (N. Y.) 381.

therefrom, such consequences must not only be shown, but both pleadings and evidence must show that the acts or omissions were the proximate and sufficient cause of the consequences.[201] This is an application of the familiar principle that a man is presumed to intend the natural and probable consequences of his own acts, and is held responsible therefor. Several standards have been suggested for determining what are natural and probable consequences. This matter will be considered subsequently under the subject of proximate and remote damages. The results of that consideration may be anticipated, so far as to point out that the courts have pursued no absolutely consistent line between two extreme views of the proper way for determining natural and probable consequences. At the one extreme they are said to be such as would ordinarily occur in the course and constitution of nature, whether it could or should have been foreseen by the wrongdoer at the time of the wrong or not. At the other extreme the test of what the wrongdoer can reasonably be held to have anticipated is regarded as the test. The tendency is to enlarge, rather than to limit, the range of natural and probable consequences.[202] In following the natural and probable effects of a wrongful action, the courts recognize that at some stage a cause becomes "remote," and the wrongful conduct ceases to be actionable. The force is exhausted.[203] But, as will be seen in the subsequent discussion of damages proximate or remote, there is great uncertainty as to where this point is reached. It is to be noted that the ordinary rules as to natural and probable consequences do not apply to cases when the defendant intended to produce the result complained of, when his conduct was illegal, and when the wrong complained of arises from fraud or malice.*

[201] Cooley, Torts, 69.

[202] Pol. Torts, 31.

[203] Whart. Neg.; Bish. Noncont. Law, §§ 44, 45. A vendor of gunpowder to an inexperienced boy may be held liable for damage caused by an explosion burning the boy. Carter v. Towne, 98 Mass. 567. But if, after the sale was made, the boy carried it home, and gave it to the custody of his parents, and part of it had been fired off, with their permission, before the explosion occurred by which he was injured, then the wrongful act of defendant in selling the gunpowder would not be the direct, proximate, or efficient cause of the injury. Carter v. Towne, 103 Mass. 507.

* Post, c. 5.

Last Human Wrongdoer.

Another theory suggested is that: "Whatever determines an alternative, which alternative so determined issues in the injury, is a cause, and, as no inanimate thing can so determine an alternative, it follows that the cause of the injury must be an animate conscious being."[294] This, so far as it distinguishes human conduct from accident, is sound sense and sound law. But until it goes one step further it does not determine the question at issue. The further step is taken when it is urged that the legal cause is the last human wrongdoer to whose conduct the injury complained of can be traced.[295] But this proposition, unless largely modified, is not true.[296] To determine who is the last personal tort feasor, the reasoning must be in a circle (i. e. he is the legal cause), or the personal actor last in time or space must be a proper defendant (which is not true), or the test must be so modified and explained as almost to lose its identity.

Conspicuous Antecedent.

The ideas of John Stuart Mill as to the relation of cause and effect, and his terminology of antecedent and subsequent, have been judicially recognized. "The cause of an event is the sum total of the contingencies of every description, which, being realized, the event invariably follows. It is rare, if ever, that the invariable sequence of events subsists between one antecedent and one consequent. Ordinarily, that condition is usually termed the cause whose share in the matter is the most conspicuous and is the most immediately preceding and proximate in the event."[297] Indeed, it has

[294] Innes, Torts, c. 4, on tracing tortious effects back to the conduct of the person responsible.

[295] As in Alexander v. Town of New Castle, 115 Ind. 51, 17 N. E. 200. And see Vicars v. Wilcocks, 8 East, 1.

[296] One modification of the test would be in cases where the conduct of the last human wrongdoer is the natural result of the original wrong, as in Scott v. Shepherd, supra; Vandenburgh v. Truax, supra. But the test furnishes no definite criterion for determining when the wrongdoer becomes a remote cause. Nor is it elastic enough to cover cases where the liability is totally disproportionate to the test, as in case of the Chicago fire.

[297] Appleton, C. J., in Moulton v. Sanford, 51 Me. 127, 134. "Efficient predominating." Dole v. Insurance Co., 2 Cliff. 431, Fed. Cas. No. 3,966; Baltimore & P. R. Co. v. Reaney, 42 Md. 117. "Proximate or efficient." North-

been the basis of an important line of decisions.[298] The difficulty with this case is not so much that such refinements are too minute for rules of social conduct,[299] nor that the philosophy involved is materialistic.[300] It lies rather in determining what is the conspicuous preceding antecedent. It would appear probable, however, that in a great many cases—perhaps in the majority of cases—the jury to whom the questions of connection as cause are finally referred will determine such questions by the use of this standard.

Cause a Question of Fact.

In determining the juridical cause, courts incline to decide each case on its own facts, so far as possible. In Insurance Co. v. Tweed,[301] it was said: "We have had cited to us a general review of the doctrine of proximate and remote causes as it has arisen and has been decided in the courts in a great variety of cases. It would be unprofitable labor to enter into an examination of these cases. If we could deduce from them 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." However, there are distinct groups of cases with respect to which courts are governed by the principle stare decisis.[302] And finally it is generally admitted that what is a proximate cause of an injury is a question of fact, ordinarily to be decided by the jury.[303] But

western Transp. Co. v. Boston Marine Ins. Co., 41 Fed. 802. For similar criticism on "proximate cause," post, 975, "Contributory Negligence."

[298] Sutton v. Wauwatosa, 29 Wis. 21. But see Jeffersonville R. Co. v. Riley, 39 Ind. 568; Gates v. Railroad Co., 39 Iowa, 45.

[299] Strong, J., in Milwaukee & C. R. Co. v. Kellogg, Burdick, Lead. Cas. 33. "The lawyer cannot afford 'to adventure himself with the philological and metaphysical controversies that beset the idea of cause." Pol. Torts, 33.

[300] Whart. Neg.

[301] 7 Wall. 49.

[302] Bosch v. Railroad Co., Burdick, Lead. Cas. 38.

[303] Pennsylvania R. Co. v. Hope, 80 Pa. St. 373; Pike v. Grand-Trunk Ry. Co., 39 Fed. 258; Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469. In determining the cause of an accident at a railroad crossing the jury may use their general knowledge as to the habits of horses and their liability to become frightened by moving trains. State v. Maine Cent. R. Co., 86 Me. 309, 29 Atl. 1086; Mechesney v. Unity Tp. Co., 30 Atl. 263; Fent v. Railway Co., 59 Ill. 349; Newcomb v. Boston Protective Department, 146 Mass. 604, 16 N. E.

the courts will sometimes determine the matter as a question of law,[304] especially where there is no proof of connection as cause, and all the jury is given to act upon is mere conjecture.[305]

DAMAGE AND DUTY.

27. Every violation of legal duty gives rise

(a) To a cause of action in tort, ordinarily only upon, but sometimes without, proof of actual damage:

(b) To an appropriate legal remedy.

555, collecting cases; Selleck v. Lake Shore & M. S. Ry. Co., 93 Mich. 375, 53 N. W. 556; Vaughan v. Taffvale R. Co., 3 Hurl. & N. 743; Smith v. London, etc., Co., L. R. 5 C. P. 98; Collins v. Middle Level Com'rs, L. R. 4 C. P. 279; Romney Marsh v. Trinity House Corp., L. R. 5 Exch. 204, affirming L. R. 7 Exch. 247; Sneesby v. Lancashire, etc., Co., L. R. 9 Q. B. 263; Byrne v. Wilson, 15 Ir. C. L. 332; The George & Richard, L. R. 3 Adm. & Ecc. 466; Jones v. Boyce, 1 Starkie, 493; Butler v. Wildman, 3 Barn. & Ald. 398; Fent v. Toledo, etc., Co., 59 Ill. 349; Marcy v. Merchants' Mut. Ins. Co., 19 La. Ann. 388; Perley v. Eastern R. Co., 98 Mass. 414; Lund v. Tyngsboro, 11 Cush. (Mass.) 563; Lane v. Atlantic Works, 111 Mass. 139; Gonzales v. City of Galveston, 84 Tex. 3, 19 S. W. 284; Jones v. George, 61 Tex. 346; St. Louis, A. & T. Ry. Co. v. McKinsey, 78 Tex. 298, 14 S. W. 645; Higgins v. Dewey, supra; Annapolis & E. R. Co. v. Gantt, 39 Md. 115; Brady v. Northwestern Ins. Co., 11 Mich. 425; Hoyt v. Jeffers, 30 Mich. 181; Weick v. Lander, 75 Ill. 93; Barton v. Home Ins. Co., 42 Mo. 156; Kuhn v. Jewett, 32 N. J. Eq. 647; St. John v. American Mut. Fire Ins. Co., 11 N. Y. 516; Louisiana Mut. Ins. Co. v. Tweed, 7 Wall. 44; 19 U. S. (Lawy. Ed.) 65; Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469; Union Pac. Ry. v. Novak, 61 Fed. 573; Aetna Ins. Co. v. Boon, 95 U. S. 117, 24 U. S. (Lawy. Ed.) 395; Kellogg v. Chicago & N. W. R. Co., 26 Wis. 223; Atkinson v. Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764; Kreuziger v. Chicago & N. W. R. Co., 73 Wis. 158, 40 N. W. 657; Baltzer v. Chicago, etc., R. Co., 83 Wis. 459, 53 N. W. 885.

[304] Carter v. Towne, 103 Mass. 507; Briggs v. Minneapolis St. Ry. Co., 52 Minn. 36, 53 N. W. 1019; Prue v. New York, etc., R. Co. (R. I.) 27 Atl. 450; Jeffs v. Railway Co., 9 Utah, 374, 35 Pac. 505; Union Pac. R. Co. v. Callaghan, 6 C. C. A. 205, 56 Fed. 998; McGahan v. Indianapolis Natural Gas Co. (Ind. Sup.) 37 N. E. 601.

[305] Littlehale v. Osgood, 161 Mass. 340, 37 N. E. 375 (diphtheria resulting from misrepresentation as to sanitary conditions of house).

Injuria Sine Damno.

The phrase of the civil law, "injuria sine damno," was at an early date applied to the common law. In Ashby v. White[306] it was held that a man who has the right to vote at an election for a member of parliament may maintain an action against the returning officer for refusing to record his vote, though the candidate for whom he offered to vote was elected. Said Lord Holt: "Surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary, for the damage is not merely pecuniary, but an injury imports a damage when a man is thereby hindered of his right." An "injuria"—that is, a prejudicial violation of or interference with a right—imports a "damnum," for damnum is said to be the prejudice, the loss, damage, or harm. Accurately speaking, there is said to be no injuria sine damno because wherever there is injuria there is damnum, wherever there is violation of legal right there is damage done.[307] The language of Story, J., in Webb v. Portland Manuf'g Co.[308] is constantly cited with approval:[309] "I can very well understand that no action lies in case where there is damnum absque injuria; that is, where there is damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said (in a legal sense) that an action will not lie even in a case of a wrong or violation of a right, unless it is fol-

[306] 2 Ld. Raym. 938; 1 Salk. 19; 3 Salk. 17; Holt, 524; 6 Mod. 45; 1 Smith, Lead. Cas. 268; Perring v. Harris, 2 Moody & R. 5; Mason v. Paynter, 1 Q. B. 974. An action will lie against a clergyman for refusing to perform a marriage ceremony. Davis v. Black, 1 Q. B. 900. And against a custom-house officer for refusing to sign a bill of entry without payment of excessive duty. Barry v. Arnaud, 10 Adol. & E. 646. It is questionable whether Ashby v. White would now be law. Clerk & L. Torts, p. 4. To maintain such an action, it would certainly be necessary to show malice. Post, c. 4, "Executive Acts."

[307] Innes, Torts.

[308] 3 Sumn. 189, Fed. Cas. No. 17,322.

[309] By Bayley, J., Embrey v. Owen, 6 Exch. 353–368. Generally, as to injuria and damnum, see Dixon v. Clow, 24 Wend. (N. Y.) 188; Blodgett v. Stone, 60 N. H. 167; Hall v. Mayor of Bristol, L. R. 2 C. P. 322; Smith v. Thackerah, L. R. 1 C. P. 564; Macomber v. Nichols, 34 Mich. 212; Thurston v. Hancock, 12 Mass. 220, Chase, Lead. Cas. 23.

lowed by some perceptible damage which can be established as a matter of fact; in other words, that injuria sine damno is not actionable. On the contrary, from my earliest reading I have considered it laid up among the very elements of the common law that wherever there is a wrong there is a remedy to redress it, and that every injury imports damage in the nature of it; and, if no other damage 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 a 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." It is perhaps not unfair to say that efforts at a proper construction of injuria and damnum have neither clarified the subject nor advanced thought. The simple truth is that sometimes plaintiff can recover when he has not shown damage, and sometimes he cannot. On the one hand, mere damage may not constitute a cause of action, in the absence of violation of duty. On the other hand, mere violation of duty may not constitute a cause of action, in the absence of damage. There may be no such thing as a legal "wrong without damage," [310] but sometimes there cannot be a legal wrong unless there has been damage. In some cases the law presumes damage, and in some cases damage must be proved. In other words, there are two kinds of rights,—one a simple right, the infringement of which is, in the absence of exceptional circumstances, necessarily actionable;

[310] Add. Torts, § 1, subd. 8.

the other is a right not to be harmed, the violation of which is actionable only when harm is suffered.[311]

Damages Presumed.

While there was much confusion in the use of trespass and case, in a general way, trespass lay for direct invasions of another's rights. In such cases, damage followed necessarily. The act was wrongful, and the law would not have defendant say that plaintiff suffered no harm in consequence. "If a man gives another a cuff on the ear, though it costs him nothing,—no, not so much as a little diachylon,—yet he shall have his action, for it is a personal injury. So a man shall have action against another for driving over his ground, though it do him no damage, for it is an invasion of his property, and the other has no right to come there." [312] Actual damages are not in general necessary to complete cause of action on part of public authorities.[313] And, in America at least, when public officers are guilty of a breach of duty to individuals, damage is generally presumed.[314] There is an essential reason for this rule in the case of property. "Whenever any act injures another's right, and would be evidence in future in favor of the wrongdoer, an action may be maintained for an invasion of the right * * *

[311] Pig. Torts, 126. And see introductory chapter. The use of the term "presumption of damage" has been severely criticised. Townsh. Sland. & L. 55. "Presumption is rather assumption." Burrell, Presump. Ev. 1043. On the other hand, the distinction between a simple right and a right not to be harmed is pronounced "as unsatisfactory a distinction as could well be devised." And it is insisted that "the true answer is to be found in the principles of presumption of damage." Pig. Torts, 126. It is, however, neither desirable nor feasible to abandon all terms which are subject to reasonable criticism. The fact would seem to be, in these cases, that the presumption of damages is a device adopted when the law desires to recognize a cause of action, although no actual harm has been suffered.

[312] Lord Holt in Ashby v. White, supra.

[313] Atty. Gen. v. Bridge Co., 21 Ch. Div. 752 (1882); 3 Pom. Eq. Jur. 1742; Newark Aqueduct Board v. Passaic, 45 N. J. Eq. 393, 18 Atl. 106; People v. Mining Co., 66 Cal. 138, 4 Pac. 1152; Burlington v. Schwarzman, 52 Conn. 181.

[314] Moore v. Floyd, 4 Or. 101; Patterson v. Westervelt, 17 Wend. 543; Hamilton v. Ward, 4 Tex. 356; Palmer v. Gallup, 16 Conn. 555; Loflin v. Willard, 16 Pick. (Mass.) 64; Crawford v. Andrews, 6 Ga. 244; Daggett v. Adams, 1 Me. 198; Rich v. Bell, 16 Mass. 294; cf. Stimson v. Farnham, 7 Q. B. 175. But see post, note 321.

without proof of any specific injury." [315] If no cause of action arose from a trespass to real estate, which inflicted no appreciable damage, a repetition of such trespass would not be easily prevented, and defendant, by his wrong, might acquire an adverse right,[316] and the owner be deprived of the charge for coming on the ground, which he would otherwise be entitled to make.[317] With respect to the extraordinary and unreasonable use of water rights, the general opinion is invasion of rights usufruct in running streams corresponds to trespass to land. It is not necessary, in actions upon such alleged wrong, to allege and prove actual damages.[318] The damages recoverable under such circumstances which are presumed are called "legal," as distinguished from "actual," that is, they are intangible, as distinguished from tangible; nominal, as distinguished from substantial.

[315] Note of Mr. Williams to Mellor v. Spateman, 1 Wms. Saund. 346b.

[316] Thus, if a person fish in another's fishery, and catch nothing, still a verdict against him will not be set aside, because his violation of the other's right might otherwise afterwards be exercised of right by him. Tunbridge Well's Dipper Case, 2 Wils. 414; Blofield v. Payne, 4 Barn. & Adol. 410; Bower v. Hill, 1 Bing. N. C. 549. An action on the case may be maintained against an intruder by one having a right of way, without proof of damage. Williams v. Esling, 4 Pa. St. 486; Appleton v. Fullerton, 1 Gray (Mass.) 186.

[317] Per Jessel, M. R., Cooper v. Crabtree, 20 Ch. Div. 589, 592.

[318] In English cases: Wells v. Watling, 2 W. Bl. 1233; Hobson v. Todd (1790) 4 Term R. 71; Pindar v. Wadsworth (1802) 2 East, 154; Marzetti v. Williams (1830) 1 Barn. & Adol. 415, per Taunton, J.; Harrop v. Herst, supra. And, generally, see Bower v. Hill, 2 S. C. 535. The burden of American authorities coincides: Gould, Easem. § 214; Crooker v. Bragg, 10 Wend. (N. Y.) 260; Parker v. Griswold, 17 Conn. 288, Davis v. Fuller, 12 Vt. 178; Munroe v. Stickney, 48 Me. 462; Lund v. New Bedford, 121 Mass. 286; Seeley v. Brush, 35 Conn. 424; Hulme v. Shreve, 4 N. J. Eq. 116; Gladfelter v. Walker, 40 Md. 1; Graver v. Sholl, 42 Pa. St. 58; Dumont v. Kellogg, 29 Mich. 420; Plumleigh v. Dawson, 1 Gilman (Ill.) 544; Stein v. Burden, 29 Ala. 127; Watson v. Van Meter, 43 Iowa, 76; Cory v. Silcox, 6 Ind. 39; Little v. Stanback, 63 N. C. 285; Chapman v. Copeland, 55 Miss. 476; Green v. Weaver, 63 Ga. 302; Creighton v. Evans, 53 Cal. 55; Smiths v. McConathy, 11 Mo. 517; Amoskeag Co. v. Goodale, 46 N. H. 53; Haas v. Choussard, 17 Tex. 588. Mr. Bigelow, however, denies that such right is capable of such exact definition as the rule involves (Lead. Cas. Torts, 518). And in 1 Eng. Ruling Cas. at p. 555, Mr. Irving Brown points out inconsistencies in Mr. Bigelow's reasoning.

Actual Damage.

But the damage may also be actual. If mere infliction of a wrong, without actual loss, constitutes a tort, a fortiori, when that wrong is also accompanied by considerable pecuniary damage, the person injured is entitled to compensation. The line between legal and actual damages is often a fine one. Substantial damages may be recovered although no actual damage be shown. Thus, if a bank throw out a draft of a customer, who had sufficient funds in bank, the wrongful act is injurious to the credit of the customer, and entitles him to a material verdict, though no actual damage be proved.*

Damage Proved.

On the other hand, case [319] lay, not for direct, but indirect or consequential, wrongs. It applies in general to conduct not actionable of itself, but because of consequences. If no actionable consequences, accordingly, are shown, then plaintiff cannot recover. While, on the one hand, an assault is always actionable (in absence of peculiar circumstances), on the other hand, negligence is actionable only when damages recognized by the law are shown.[320] An action does not lie against a sheriff for official misconduct unless actual damages have been caused plaintiff.[321] This is also true of malicious prosecution (case), as distinguished from false imprisonment [322] (trespass). Especially in cases where the duty, the breach of which is complained of, is also a public duty, is it necessary for plaintiff to show special damage in himself.[324] This is conspicuous in cases when a private action is brought for a public nuisance. The mere public wrong will

* Marzetti v. Williams, 1 Barn. & Adol. 415.

[319] Rolin v. Steward, 14 C. B. 595; Marzetti v. Williams, 1 Barn. & Adol. 415. And see Schaffner v. Ehrman, 139 Ill. 917, 28 N. E. 917; Patterson v. Marine Nat. Bank, 130 Pa. St. 419, 432, 18 Atl. 632. See Norcross v. Otis Bros. Co., 152 Pa. St. 481, 25 Atl. 575; Bank v. Goos, 58 N. W. 84.

[320] Post, p. 810, "Negligence."

[321] Blackburn, J., in Stimson v. Farnham, L. R. 7 Q. B. 175. And see Wylie v. Birch, 4 Q. B. 566; Williams v. Mostyn, 4 Mees. & W. 145; Bales v. Wingfield, 2 Nev. & McN. 831; Planck v. Anderson, 5 Term R. 37; Hirst v. London, etc., R. Co., 4 Exch. 188; Clifton v. Hooper, 6 Q. B. 468. But see ante, note 314.

[322] Trespass not case lay for false imprisonment. McKelvey, Com. Law Pl. 61; post, p. 630.

[324] Shearw. Torts, 21.

not entitle the plaintiff to recover. He must show some specific harm, as distinguished from that which the rest of the community suffered.[325] Perhaps the clearest cases in which actual perceptible damage is indispensable to the maintenance of an action are cases of slander. Here in three cases the law will presume damage from utterance of certain kinds of words; but in all other cases special damage must be proved. And such special damages exclude many kinds of harm which would naturally, perhaps, be thought actionable.[326] The consideration of what kinds of harm are recognized by the law as constituting damage to complete plaintiff's cause of action will be subsequently considered when the whole subject of damages is taken up. Special damages are always the gist of slander of title.[327] Even in trespass to land the difference may be found. A life tenant may sue for the slightest intrusion; but a reversioner can recover only when he shows actual damage to his inheritance.[328] So with respect to trespass to the person. The rule was laid down in "Marys' Case" [329] that, "if my servant is beat, the master shall not have an action * * * unless he lose the service; the servant shall for every small battery; the master has no damage but by a per quod; so that the original action is not the cause of the action, but the consequent upon it." Indeed, the truth would seem to be that, in general, proof of damage is essential to a cause of action in tort, and that cases in which an action will lie although no harm has been suffered are exceptional.[330]

[325] Ante, p. 9, note 20, "Distinction of Tort from Crime"; post, p. 782, "Nuisance." See Fay v. Prentice, 1 C. B. 828 (projecting cornice dropping water on plaintiff's land).

[326] Post, p. 366, "Nominal Damages," and post, p. 488, "Libel and Slander."

[327] Post, p. 553; Shearw. Torts, 21.

[328] Post, p. 553, "Trespass"; Baxter v. Taylor, 4 Barn. & Adol. 72; Young v. Spencer, 10 Barn. & C. 145; Jesser v. Gifford, 4 Burrows, 2141. The antiquity of the distinction appears in the doctrine of "surcharge by commoners." See notes to Mellor v. Spateman, 1 Wms. Saund. 346b.

[329] 9 Coke, 111a, 113a.

[330] Clerk & L. Torts, c. 6, p. 89; Pig. Torts, "Damage & Damages." In general, 3 Bl. Comm. 123; Laflin v. Willard, 16 Pick. (Mass.) 64; Carter v. Wallace, 2 Tex. 206; Parker v. Griswold, 17 Conn. 288; Appleton v. Fullerton, 1 Gray (Mass.) 186 (abuse of right of way); Alston v. Scales, 2 Moore & S. 5 (taking away soil, although a benefit result); Woodman v. Tufts,

Remedy.

Wherever there is a legal wrong, the law provides a remedy. The common law applied the maxim of the civil law, "ubi jus ibi remedium."[331] When it recognized new rights, it invented new remedies or adapted old ones. When the cause of action was entirely new, "never the like of which was heard before," the case was said to be "primæ impressionis." The newness of a tort is no insuperable objection to an action on it, if it come within any principle upon which the courts act; but the courts will grant no relief if it embrace some entirely new principle.[332] Thus, one who suborns witnesses to swear falsely to defamatory statements concerning another in a suit to which neither of them is a party is liable to an action by the person defamed; and the novelty of the action is no defense thereto.[333]

New actions on tort may be brought as often as new injuries and wrongs are repeated; not as often as new damages accrue.[334] There-

9 N. H. 88 (backing up water). And cf. Williams v. Morland, 2 B. & C. 910 (calm flow of water); Embrey v. Owen, 6 Exch. 353; Sampson v. Hoddinott, 1 C. B. (N. S.) 590.

[331] Pontiac v. Cortes, 32 Mich. 164–169; De May v. Roberts, 46 Mich. 160–166, 9 N. W. 146. Wherever the law gives a right, it gives the means necessary to its enjoyment. McDaniels v. Walker, 44 Mich. 83, 6 N. W. 112. "It is monstrous to talk of existing rights without applying corresponding remedies." Fowler v. Lindsay, 3 Dall. 413. And see Bank v. Owens, 2 Pet. 527, 539.

[332] Ashurst, J., in Pasley v. Freeman (1789) 3 Term R. 51, 61; Pollock, J., in Western Manure Co. v. Lawes Chemical Co., L. R. 9 Exch. 218; Stockdale v. Hansard, 9 Adol. & E. 1, 5. "It is said this action was never brought before. I wish never to hear this objection again. This action is for tort. Torts are infinitely various, not limited or confined. For there is nothing in nature but may be an instrument of mischief." Pratt, C. J., Chapman v. Pickersgill, 2 Wils. 145; Windsmore v. Greenbank, Willes, 577; Pasley v. Freeman, 2 Smith, Lead. Cas. (9th Ed.) 1300. And see Yates v. Joyce, 11 Johns. (N. Y.) 136; Sheldon v. Sheldon, 13 Johns. 325; Wardell v. Fosdick & Davis, 13 Johns. (N. Y.) 325; Monell v. Colden, 13 Johns. (N. Y.) 395; Adams v. Paige, 7 Pick. (Mass.) 542; Chisim v. Gadsden, 1 Strob. (S. C.) 220.

[333] Rice v. Coolidge, 121 Mass. 393. And see Hartfield v. Roper, 21 Wend. (N. Y.) 615 (a case of first impression); Beasley, J., in Newman v. Phillipsburg Horse-Car R. Co., 52 N. J. Law, 446, 19 Atl. 1102; Vaughan v. Menlove, 3 Bing. N. C. 468, 474 (as to whether there was a case of first impression or not the judges disagree).

[334] Denman, C. J., in Hodsoll v. Stallebrass, 11 Adol. & E. 301, 306; Ham-

fore, a declaration averring that the plaintiff is a resident of a certain school district, having children that he is desirous to have taught in said school, and that the defendants, directors of the school district, contriving to deprive him of the benefit of having his children therein educated, unlawfully admitted colored children into the school, whereby the plaintiff was deprived of the benefit and advantage of having his children taught in said school, is bad on demurrer. There was a new kind of damage, but no new kind of wrong.[335] Though it is not a conclusive objection that a case be of first impression, "it is a persuasive argument against its maintenance that in the multiform complexity of human concerns no similar action has been maintained. If a case in law have no cousin or brother, it is a sure sign that it is illegitimate."[336]

28. Conduct, though improper and causing a loss to another, does not constitute a tort unless—

(a) The damage conforms to the legal standard, except where it is presumed; and

(b) Thereby a legal as distinguished from a moral right is violated; and

(c) Such conduct be traced to a responsible human agent.

Damnum Absque Injuria.

The law does not undertake vain or impossible things. It has always recognized that in actual life many losses must go without compensation, much harm be suffered without redress. Not every damage in fact is damage in law.[337] There are in particular three classes

bleton v. Veere, 2 Wm. Saund. 169, 171b, note 1; Minter v. Swain, 52 Miss. 174; Herron v. Hughes, 25 Cal. 555.

[335] Stewart v. Southard, 17 Ohio, 402; citing Harman v. Tappenden, 1 East, 555. And see Anthony v. Slaid, 11 Metc. (Mass.) 290. So as to enticement of wife. Winsmore v. Greenbank, Willes, 577. And an action by a husband against a druggist for selling laudanum to his wife. Hoard v. Peck, 56 Barb. (N. Y.) 202. And see Harrison v. Berkeley, 1 Strob. (S. C.) 525.

[336] Bacon (Shedding's Ed.) 607; Lamb v. Stone, 11 Pick. (Mass.) 527; Anthony v. Slaid, 11 Metc. (Mass.) 290.

[337] 1 Hil. Torts, c. 3.

of cases, sometimes distinct, but constantly shading into each other, in which this admitted inadequacy arises.

In the first place, the law has its own definition of what harm constitutes damage which will have the sanction of courts of justice. There are many species of loss which would, according to popular notions, be substantial and important, which courts, for good reasons, decline to compensate. Thus, it will presently be seen that "sentimental damages" have not been deemed entitled to legal recognition, although in the popular mind this rule may work great practical injustice.[338] On the other hand, both the lay notions and legal standards agree in excluding in many cases petty and insignificant or merely nominal harm from judicial trial.

In the second place, a legal right must be invaded in order that an action of tort may be maintained. The mere fact that a complainant may have suffered a damage of the kind which the law recognizes is not enough. There must also be a violation of a duty recognized by law. In the language of the civil law, mere damnum is not enough; there must also be injuria; that is, "Ex damno absque injuria non oritur actio." [339] "You must have in our law injury as well as damage." [340] In Ashby v. White, above referred to,[341] where a person

[338] Post, p. 364.

[339] This maxim is not an explanation. It is only an abridgement or memoria technica of the things to be explained. Pol. Torts, c. 4, subd. 9. "We cannot pass the quotation of a so-called law maxim without entering our protest against the reception of law maxims as legal axioms. We believe not a single law maxim can be pointed out which is not obnoxious to objection." Townsh. Sland. & L. 71, note 1. "In English jurisprudence the chief purport of a principle seems to be to afford a nucleus for an enormous undergrowth of exceptions." London Times, March 16, 1880, quoted in Townsh. Sland. & L. p. 32.

[340] Jassell, M. R., in Day v. Brownsrigg, 10 Ch. Div. 294 (304); Backhouse v. Bonomi, 9 H. L. 903; Salvin v. Coal Co., 9 Ch. App. 705. It is an essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right. Merely that it will, however, do a man harm in his interests is not enough. Rogers v. Rajendro Dutt, 13 Moore, P. C. 209. At the foundation of every tort there must be some violation of a legal duty, and therefore some unlawful act or omission. Whatever, how numerous

[341] Ante, p. 79.

entitled to vote at an election was allowed to recover against the returning officer for refusing to record his vote, if the plaintiff had not had the right to vote, he could not have recovered, although the only duty of the officer was to satisfy himself as to the identity of persons claiming the right to vote.[342] There is no right of privacy in the enjoyment of premises, the invasion of which by opening of windows can constitute a cause of action.[343] "The violation of a moral right or duty, unless it also amounts to a legal right or duty, does not constitute a tort." [344] It may be wrong to lie and cheat, and prejudice may result, but a legal action of deceit will not succeed unless plaintiff has suffered actual harm.[345] On the same principle, a creditor cannot maintain an action for fraud against one who has fraudulently purchased from a debtor property of the latter subject to attachment, and aided him to abscond, thereby preventing the creditor from arresting the debtor, or attaching his property, or otherwise obtaining satisfaction of the debt,[346] where he has no lien or claim upon

or formidable, be the allegations of conspiracy, of malice, of oppression, or of vindictive purpose, they are of no avail. They merely pile up epithets, unless the purpose intended, or the means by which it was accomplished, are shown to be unlawful. Finch, J., in Rich v. New York Cent. & H. R. R. Co., 87 N. Y. 382.

[342] Pryce v. Belcher, 3 C. B. 58, 4 C. B. 866. And see Lee v. W. U. Tel. Co., 51 Mo. App. 375.

[343] Tapling v. Jones, 11 H. L. 290. Where P. and D. owned adjoining houses, between which there was no party wall, and water flowed from D.'s house to P.'s through a defective pipe, which supplied D. with water from waterworks, D. was held not liable for damage caused to P. in the absence of negligence on the part of D. Sutton & Ash v. Card, Wkly. Notes (1886) 120.

[344] Chase, Lead. Cas. 8; 1 Aust. Jur. lect. 5, "Conflict of Law and Morality," at page 99; Rex v. Smith, 2 Car. & P. 449.

[345] Feller v. Hodgdon, 25 Me. 243; Ide v. Gray, 11 Vt. 615; Alden v. Wright, 47 Minn. 225, 49 N. W. 767; Hutchins v. Hutchins, 7 Hill (N. Y.) 104; Randall v. Hazelton, 12 Allen (Mass.) 412.

[346] Lamb v. Stone, 11 Pick. (Mass.) 527; Bradley v. Fuller, 118 Mass. 239; Dawe v. Morris, 149 Mass. 188, 21 N. E. 313; Wellington v. Small, 3 Cush. (Mass.) 145. However, it has been held recently that a judgment creditor may maintain an action at law against the judgment debtor and another to recover damages for conspiring to prevent the collection of the judgment by removing and disposing of such debtor's property, and placing it beyond the reach of execution. Braem v. Bank, 127 N. Y. 508, 28 N. E. 597, distinguished. Hurwitz v. Hurwitz (City Ct. N. Y.) 30 N. Y. Supp. 208.

or interest in the property so purchased. When legal relief is denied to one who suffers damage conforming to the legal standard, the reason is to be found in the proposition that the law does not infer that merely because one man has suffered harm he must have compensation, and some other must pay. The monstrous task of insuring against all loss has not been undertaken. On the contrary, not only have large and important classes of losses been denied judicial recognition, but the very nature of many admitted rights necessitates that much harm should go uncompensated. Wrong can never be predicated on an act which the law permits.[347] Where a legislature authorizes certain conduct, damages directly resulting, or naturally and properly incident thereto, can never be recovered without reducing legal authority to a nullity.[348] In the management of property, most substantial harm may be caused to a neighboring owner. When the extent to which one may use his own is defined, it necessarily follows that damage incident to such authorized use is "absque injuria." [349]

[347] As in cases of fraud: Tucker v. Drake, 11 Allen (Mass.) 145; O'Donnell v. Segar, 25 Mich. 367; North v. Shearn, 15 Tex. 174; Cipperly v. Rhodes, 53 Ill. 346; Randall v. Buffington, 10 Cal. 491.

[348] In the exercise of the power of a municipality to grade streets, change grade, rebuild them, and the like, an individual property owner suffers inconvenience and expense that does not entitle him to recover damages. Smith v. Washington, 20 How. 135; City of Pontiac v. Carter, 32 Mich. 164; Northern Transp. Co. v. Chicago, 99 U. S. 635; Callender v. Marsh, 1 Pick. (Mass.) 418 et seq.; Radcliff's Ex'rs v. Mayor, etc., 4 N. Y. 195. Statutory authority to a railroad company to close streets renders damages suffered by the owner of property, less accessible from the direction of the gate built under such authority, damnum absque injuria. Buhl v. Fort Street Union Depot Co., 98 Mich. 596, 57 N. W. 829. Post, p 140, "Damages Incident to Authorized Act."

[349] Cumberland Telephone & Telegraph Co. v. United Electric R. Co., 42 Fed. 279. A lawful act may be the foundation of a tort. Post, p. 779, "Nuisance." It has been held in this country that no tort is created by obstruction to light and air, because no one has property in light and air. Guest v. Reynolds, 68 Ill. 478; Panton v. Holland, 17 Johns. (N. Y.) 92. But it is otherwise in England. There the easement of light and air is recognized, and interference with it is actionable. Yates v. Jack (1866) L. R. 1 Ch. App. Cas. 295; Scott v. Pope, 53 Law T. 598. Cf. Harris v. De Pinna, 80 Law T. 427. If by sinking and using a well on one's own premises the supply of water in a neighbor's well is substantially decreased, no action will lie, because such diversion of percolating and subterranean waters is a right necessarily

So, if one build up a profitable business without competition, and a rival destroy it by legitimate means, there is no remedy, for the law encourages competition.[350]

In the third place, there may be damage conforming to the legal standard, and a right violated, and still no recovery by the sufferer, because the cause of the harm is either (1) inevitable accident;[351] (2) an agent who is irresponsible because of natural status (as in the case of infants, lunatics, etc.), or peculiar circumstances (as in the case of agencies of the state, judges, legislators, etc.); or (3) is so remote that it would be immaterial and unreasonable to trace consequences so far back.

THE RIGHT OR DUTY VIOLATED.

29. Conduct to give rise to an action on the tort may consist of a violation of a duty prescribed by

(a) The common law;

(b) Contract;

(c) A statute or ordinance.

SAME—COMMON-LAW DUTIES.

30. The common law is composed of recognized customs, of which reported cases are exemplifications. The development of the common law is largely due to judicial legisla-

incident to the ownership of soil. Acton v. Blundell, 12 Mees. & W. 341-345; Humphreys v. Cousins, 46 L. J. C. P. 438; Chasemore v. Richards, 7 H. L. Cas. 349; Ocean G. C. M. A. v. Commissioners, 40 N. J. Eq. 447, 3 Atl. 168; Ballard v. Tomlinson, 29 Ch. Div. 115; Corning v. Troy Factory, 40 N. Y. 191; Stowell v. Lincoln, 11 Gray (Mass.) 434. As to rights and duties in constructing buildings, see Clemens v. Speed, 93 Ky. 284, 19 S. W. 660. As to lateral support, see Thurston v. Hancock, 12 Mass. 220.

[350] In the celebrated Gloucester Grammar School Case (1410-1411, Hilary Term) 11 Hen. IV. p. 47, pl. 21, it was held that two masters of that school could not sue a third person, who started a similar school in the same place, whereby they lost in the subtraction of scholars. No one has a right to a monopoly. Accordingly no action lies for damages resulting from competition in business. Post, p. 145, "Common Rights."

[351] Ante, p. 61, "Connection as Cause." Thus there may be no liability for a trespass where the act is unintentional or involuntary.

tion. The three main heads of common-law duty with which the law of torts is concerned are:

(a) To abstain from willful injury;

(b) To respect the property of others, and

(c) To use due diligence to avoid causing harm to others.[352]

English Common Law.

The common law of England was composed of the customs of the realm, or a system of adjudicated rules, of which reported cases are only exemplifications.[353] A simple illustration of the growth of a custom into common law is in the law of the road.[354] Again, with regard to a declaration against a carrier, "originally the practice was to set out a custom of the realm. That was discontinued because the custom of the realm became the law of the realm, and the courts take notice of it. * * * An action based on custom is in substance a tort."[355] Again, mining customs became valid laws because of the acquiescence of the people.[356]

[352] Pol. Torts, § 23.

[353] But it is commonly supposed by writers on jurisprudence (Roman, English, German, and others) that law shaped upon customs obtains as positive law, dependently of the sanction adjected to the customs by the state. It is supposed, for example, by Hale and Blackstone, and by other writers on English jurisprudence, that all the judiciary law administered by the common-law courts, excepting the judiciary law which they have made upon statutes, is customary law, and that, since this customary law exists as positive law by force of immemorial usage, the decisions of those courts have not created, but have merely expounded or declared it. 2 Aust. Jur. lect. 30, p. 27.

[354] Post, 877, "Negligence."

[355] Coggs v. Bernard, Smith, Lead. Cas. (9th Am. Ed.) 354, note.

[356] As in California, in case of erection of a dam flooding other claims. Stone v. Bumpus, 46 Cal. 218; Morton v. Solambo Copper Min. Co., 26 Cal. 527; Packer v. Heaton, 9 Cal. 569; Strang v. Ryan, 46 Cal. 34; St. John v. Kidd, 26 Cal. 264; Harvey v. Ryan, 42 Cal. 626. And see Sullivan v. Huese, 2 Colo. 424; Oreamuno v. Uncle Sam Co., 1 Nev. 215; Mallet v. Uncle Sam Co., Id. 188; Atchison v. Peterson, 20 Wall. 507–510; Rogers v. Brenton, 10 Q. B. 25; Carlyon v. Lovering, 1 Hurl. & N. 784; Madras Ry. Co. v. Zemindar, L. R. 1 Indian App. 364. So as to custom in booming logs. Saunders v. Clark, 106 Mass. 331. A uniform general custom as to the use of a stream by tanners ought to have a controlling force. Redfield, J., in Snow v. Parsons, 28 Vt. 459.

American Common Law.

The greatest part of the present American law of torts is derived from the common law of England. The early common-law reports are still the fountain head of learning on this subject. There is no national common law in the United States, distinct from that adopted by the several states, each for itself, except so far as the history of the English common law may be involved in the interpretation of the federal constitution. The judicial decisions, the usages and customs of the respective states, determine to what extent the common law has been introduced. What is common law in one state may not be so considered in another.[357] No state courts in this country derive their existence from the common law. They are all established either by the provisions of the organic law or by legislative enactment. Their jurisdiction is not uniform. Some of them have only a special jurisdiction, limited as to amounts or subjects in controversy.[358]

Judicial Legislation.

As clearer and enlarged conceptions of legal rights and duties came with increasing complexity of society, the law adjective was adapted and extended to meet recognized changes in the law substantive. As new rights were admitted, new remedies were provided. Part of this development is the result of statutory enactment, but in large measure it has been effected by the courts. The doctrine of fellow servant may be cited as an illustration. "There is no branch of the subject of torts which gives rise to so many decisions which are difficult to reconcile. It forms perhaps the purest example of judge-made law, and all such law is pervaded with some uncertainty." [359] The part which the courts have taken in this development, and judge-made law, has been severely criticised.[360]

[357] Wheaton v. Peters, 8 Pet. 591 (658); Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. 564.

[358] In re Dean, 83 Me. 489, 22 Atl. 385.

[359] Pig. Torts, 220.

[360] Amos, Jur. 50; Jervis, C. J., in York, etc., R. Co. v. Queen, 1 El. & Bl. 858–864; Gibson, C. J., in Ammant v. Turnpike Road, 13 Serg. & R. 210, 212, 213; Essay on Judicial Legislation, Wm. Rand, Jr., 8 Harv. Law Rev. 328; Cooley, Torts, "Judicial Developments of the Law," pp. 19–21. Mr. Austin (2 Jur. 103–116, incl.) considers, in Lecture 38, "Groundless Objections to Ju-

Common-Law Classification of Rights.

Unlike the civil law, the common law made no attempt at scientific classifications of duties and remedies. It knew no logical application of abstract principles of justice. Indeed, it did not distinguish clearly between the wrong done and the remedy provided therefor. The real question was not whether there was a tort, but whether legal means for redress could be found to fit the case. Accordingly the law adjective practically determined rights.

It would not seem that there has been any scientific division of rights which is entirely satisfactory.[361] The language and classification of Blackstone has passed into general thought and language. That familiar division was this: that the rights of persons are (1) absolute, viz. the enjoyment of (a) personal security, (b) personal liberty, (c) private property; and (2) relative, viz. (a) public, (b) private.[362] Mr. Austin recognizes absolute and relative duties. A duty is relative, he says, or answers to a right, where the sovereign commands that the act shall be done or forborne towards a determinate party, other than the obliged. All other duties are absolute.[363] However, in his "Analysis of Pervading Notions,"[364] he denies that there are corresponding rights. "'Absolute rights' and 'relative rights.' These expressions, as thus applied, are flatly absurd; for rights of both classes are relative, or, in other words, rights of both classes correlate with duties or obligations. The only difference is that the former correlate with duties which are incumbent upon the world at large; the latter correlate with obligations which are limited to determinated individuals." This general conclusion, as applied to the right of reputation, Mr. Townshend insists

dicial Legislation," and in Lecture 39 the "Disadvantages of Judicial Legislation."

[361] Perhaps as satisfactory a classification as any is that contained in note 3, ante, p. 3.

[362] 1 Bl. Comm. cc. 1–18, incl.; 2 Kent, Comm. 1–34; 1 Burrill, Prac. 30.

[363] 1 Aust. Jur. lect. 17, p. 278, sub. 579. "The notion of a legal duty involves something more than a tax on a certain course of conduct." O. W. Holmes, Jr., 6 Am. Law Rev. 723, 724.

[364] Aust. Jur. lect. 14, p. 264, sub. 539. "Rights are not absolute, but relative. Rights grow out of duty, and are limited by duty." Jenkins, J., in Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 60 Fed. 803 (812).

is necessary.[365] There is a corresponding dispute with reference to property rights, as in the case of the right to lateral support.[366]

Although it is impossible to lay down any general principles to which all common-law actions of tort may be referred,[367] it will be found that they are in the main directed to afford the simple remedy of pecuniary satisfaction for direct and obvious invasions of three elementary rights: (1) The right of personal liberty and security; (2) the right of reputation; and (3) the right of property.[368] Domestic duties have been treated as rights of property.[369] Breach of political rights has been made the subject of an action on a tort.[370] The law has gone to great extremes to fully recognize all private rights. It recognizes the right of privacy as distinct from rights of property and reputation,[371] and provides damages for its violation.[372] Therefore, where a physician took an unmarried, unprofessional friend with him to attend a woman in confinement, and without real necessity for his assistance, both the physician and his friend were held liable in damages, although it was not until a long time afterwards that the patient or her husband discovered that the intruder was not a professional man.[373]

[365] Townsh. Sland. & L. c. 3.

[366] Post, 752, "Nuisance," note 38. Cf. Gilfillan, C. J., in M'Cullough v. Railway Co., 52 Minn. 12–15, 53 N. W. 802, with Wood, Nuis. c. 5.

[367] The classification of the modern jurisprudence has for convenience been anticipated. Ante, note 3, p. 2.

[368] Clerk & L. Torts, p. 3.

[369] Id. And see Jaynes v. Jaynes, 39 Hun, 40; Warren v. Warren, 89 Mich. 123, 50 N. W. 842.

[370] Ashby v. White, 1 Salk. 19, 2 Ld. Raym. 938, 1 Smith, Lead. Cas. 464. Post, p. 135.

[371] Post, c. 5, "Injunction."

[372] 4 Harv. Law Rev. 193.

[373] De May v. Roberts, 46 Mich. 160, 9 N. W. 146; Schuyler v. Curtis, 27 Abb. N. C. 387, 15 N. Y. Supp. 787; Corliss v. E. W. Walker Co., 57 Fed. 434. For an article on the extension and development of the law of individual rights as particularly applicable to the rights of privacy, see Madras L. J., republished in 6 Green Bag, 498. Post, 356, "Injunction." That there is no invasion by opening windows, see Tapling v. Jones, 11 H. L. 290.

SAME—CONTRACT DUTY.

31. If a common-law duty result from the facts in a particular case, a party to a contract may be sued in tort for any negligence or misfeasance in the execution of the contract.[374]

While an action of tort will not lie for mere breach of contract, a contract, in connection with other circumstances, especially where certain conventional relationships are entered into, may create a duty, for the breach of which an action on the tort will lie.[375] Thus, as between master and servant, common carrier and passenger or shipper, a telegraph company and the sender of a message, the violation of the contract may give rise to a cause of action ex contractu or ex delicto.[376] And, indeed, a violation of a simple contract between two parties, not involving any such relationship, may give rise to a cause of action in tort.[377]

SAME—STATUTES AND ORDINANCES.

32. Where a statute, or a municipal ordinance authorized by statute, imposes on a person a duty designed for the protection of others, he is liable to those persons for whose protection it was imposed for any damages resulting proximately from neglect to perform such duty, and of the character which the statute or ordinance was designed to prevent.

Statute.

Criticised as the courts have been for rendering legislative decisions, they have not been able to meet the necessities of the years without the assistance of legislation. Legislatures are constantly called upon to abrogate or modify the ruling of courts of law. This

[374] Post, "Negligence," p. 897.

[375] Id.

[376] Ante, 26, "Quasi Contract." Post, p. 897, "Negligence," "Contract Duty."

[377] Rich v. New York Cent. & H. R. R. Co., 87 N. Y. 382.

appears in the earlier history of the common law.[378] When that system of jurisprudence was applied to a new and undeveloped country, like the United States, many doctrines underwent a change without much legislation. Thus, cutting down trees in England is held to damage the freehold, while in America it is not waste, but in many cases may be a valuable and expensive improvement.[379] With respect to the restraint of animals by fences, the changed conditions, especially on the great plains, were met by needed and varied legislative action. As, whereas under the common law the owner of domestic cattle was bound to restrain them, at his peril, so far as their trespasses were concerned, in America a great number and variety of statutes have been passed in recognition of the absence of fences on the plains, and governing the herding of cattle.[380] The scattered population, and the physical necessities of what was at one time described as the "Great American Desert," have led to radical changes in the law of waters and water courses, as to the respective duties and rights of the owners of the upper and lower tenement.[381]

As civilization has advanced, statutory enactments have multiplied for the protection of life and property against its necessary dangers.[382] The modern inverted street, the high building, calls for the exercise of the police powers of the state in the requirement of fire escapes, the regulation of elevators, and the like, for the protection of its inmates and the public. The introduction of steam and electricity, and the extension of the use of explosives, have also led to many statutory requirements as to the observance of specified precautions and prohibitions. Incidental to modern commerce are countless things of offense or annoyance to the community, in the

[378] As the statute of Anne as to fire, and St. Westm. II. as to pleading.

[379] Post, p. 701, "Waste."

[380] Post, p. 922, "Negligence," "Statutory Duty," "Fences." In both England and America there are many statutes regulating fences about railroads. For illustration of statute as to highways, see Carpenter v. Cook (Vt.) 30 Atl. 998. At common law, owners of cattle allowed animals to run at large at their peril. This rule is changed, for example, in Indiana. Welch v. Bowen, 103 Ind. 252, 2 N. E. 722.

[381] Post, 753, "Nuisance," "Water Rights."

[382] A curious instance is the right of a wife to recover damages against a saloon keeper for the intoxication of her husband. Black, Intox. Liq. §§ 283, 306-311.

enjoyment of comfort and property, with respect to which the common law of nuisance is exceeding vague, and with respect to which legislatures have defined rights and duties. Valuable kinds of property or privileges, like patents,[383] trade-marks,[384] and copyrights,[385] with their corresponding rights and duties, are almost purely matters of statutory regulations. These various statutes, in the great majority of cases, create both rights in rem and rights in personam, and give rise to correlative duties.

The statute of Westm. II. (1 Stat. 13; Edw. I. c. 50) expressly gave a remedy, by an action on the case, to all who are aggrieved by the neglect of any duty created by any statute.[386] What these duties are, depends upon an interpretation of the statutes, governed by principles of statutory construction.[387] The federal courts will always follow the construction given by the state supreme courts to the statutes of their respective states.[388] The mere fact, however,

[383] At common law, and independent of the act of congress, authors and inventors acquire no exclusive right to the benefit of their writings and discoveries. The character of the remedy to which a person who is injured by a breach of the statutory duty in these respects is entitled is determined by a construction of the statute. Dudley v. Mayhew, 3 N. Y. 9.

[384] Grah. Trade Marks.

[385] Walk. Pat.

[386] 2 Inst. 486. Com. Dig. "Action upon Statute," F, p. 452. And see Heeney v. Sprague, 11 R. I. 463. And see 12 Am. Law Rev. 189–191.

[387] An action against a county for damages under a statute must be brought while the statute is in force, as the repeal thereof takes away the right of action. Cope v. Hampton Co. (S. C.) 19 S. E. 1018. The construction of an order of a town council requiring a railroad company to keep a flagman at a crossing is for the court alone. An order by a town council requiring a railroad company to keep a flagman at a crossing, without specifying any time for so doing, requires a flagman by night as well as by day, if trains are then liable to pass. Wilson v. New York, N. H. & H. R. Co. (R. I.) 29 Atl. 300. Further as to construction and application of statutory duty, see Birmingham Mineral R. Co. v. Parsons (Ala.) 13 South. 602 (cattle guard); Kinard v. Columbia, N. & L. R. Co., 39 S. C. 514, 18 S. E. 119 (crossing collision); Louisville, E. & St. L. Consol. R. Co. v. Lee, 47 Ill. App. 384 (crossing signals); Whilton v. Richmond & D. R. Co., 57 Fed. 551. As to construction in state or United States courts, see Western & A. R. Co. v. Roberson, 9 C. C. A. 646, 61 Fed. 592, 604.

[388] Burgess v. Soligman, 107 U. S. 20, 2 Sup. Ct. 10; Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974. The construction of a state statute by the state supreme court is the rule of interpretation within the state for the federal

that the breach of a mere statutory duty has caused damage, does not vest a right of action in the person suffering damages, against the person guilty.[389]

The statutory remedy, in the first place, may exclude or limit the right of private action. The penalty provided by the statute under consideration must be carefully regarded. Where the statute provides no penalty, and merely "enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."[390] "Where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of the party grieved, and the offense is not against an individual, it belongs to the crown, and the crown alone can maintain suit for it."[391] That the statute may also provide a penalty for disobedience to its requirements does not prevent one injured by such disobedience from recovering against the wrongdoer.[392] If, however, the statute provides a penalty to the party aggrieved, either alone, or coupled with a penalty to the state or to the informer or relator, the penalty to the party aggrieved is always in lieu of his action.[393]

courts, although the statute was adopted from another state, where it had been differently construed. Chicago, R. I. & P. Ry. Co. v. Stahley, 11 C. C. A. 88, 62 Fed. 363.

[389] Philadelphia, W. & B. R. Co. v. Philadelphia, etc., Towboat Co., 23 How. 209; Maine, Dam. p. 4; Atkinson v. Newcastle, L. R. 6 Exch. 404, 2 Exch. Div. 441; Gray v. Pullen, 5 Best & S. 970. Post. p. 234, "Independent Contractors." This subject will be discussed at length under "Negligence."

[390] 1 Com. Dig. tit. "Action upon Statute," F, p. 452; Anon., 6 Mod. 27; Braithwaite v. Skinner, 5 Mees. & W. 313; Mitchell v. Knott, 1 Sim. 497. As to rights in rem, the English market cases are good illustrations,—Bridgland v. Shapler, 5 Mees. & W. 375; Horner v. Whitechapel District Board of Works, 51 Law T. (N. S.) 414. And see Hurrell v. Ellis, 15 Law J. C. P. 18; Rodgers v. McNamara, 23 Law J. C. P. 1. Rights in personam may be illustrated by the fencing cases which will be hereafter considered under "Negligence."

[391] Earl Selborne, C., in Bradlaugh v. Clarke, L. R. 8 App. Cas. 354 (358).

[392] Kidder v. Dunstable, 11 Gray (Mass.) 342; Hyde Park v. Gay, 120 Mass. 589; Hartnall v. Ryde Com'rs, 4 Best & S. 361; Rowning v. Goodchild, 2 Wm. Bl. 906. And see Turnpike Co. v. Brown, 2 Pen. & W. (Pa.) 462; Almy v. Harris, 5 Johns. (N. Y.) 175; Young v. Davis, 7 Hurl. & N. 760; 2 Hurl. & C. 197.

[393] Pig. Torts, 196, citing Doe v. Bridges, 1 Barn. & Adol. 847, in which the

In the second place, where a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss.[394]

And finally the duty created may be for the public, or for some other class of persons than that to which the plaintiff belongs. Under such circumstances, he cannot maintain his action.*

Ordinances.

It has been insisted that a municipal ordinance does not create a civil duty where none existed at common law, enforceable in a common-law action. "The national or state legislature may do this, for it is the supreme power, and, as such, can make that immoral which was before indifferent, and that neglect which was before prudence; but the city * * * has no such power."[395] This doctrine has been applied as between private individuals,[396] and especially to municipal corporations.[397] Where, however, a statute has authorized the municipal corporation to provide protection against injury to persons and property, it confers plenary power upon such corporations to require the performance of duties by ordinance. Thus, if a statute authorizes a city to require railroad companies to provide protection against injury, the corporation may require the company to erect a fence between the railroad and a park, and failure on the

following rule is laid down: "Where an act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

[394] Thus, where a statute was designed to prevent the spread of contagious disease among animals carried from a foreign port to England, it was held that a shipper could not recover for sheep washed overboard by reason of a failure to comply with statute. Gorris v. Scott, L. R. 9 Exch. 125.

* Post, p. 920.

[395] Mr. Justice Gordan, in Pennsylvania R. Co. v. Ervin, 89 Pa. St. 71. And see Fuchs v. Schmidt, 8 Daly (N. Y.) 317; Kirby v. Boylston Market, 14 Gray, 249.

[396] Pennsylvania R. Co. v. Ervin, 89 Pa. St. 71; Pennsylvania R. Co. v. Boyer, 97 Pa. St. 91; Adm'r of Chambers v. Trust Co., 1 Disn. (Ohio) 327. In this class of cases, where the ordinance requires the performance of a common-law duty, it is properly admissible in evidence. McNerney v. Reading City, 150 Pa. St. 611, 25 Atl. 57.

[397] Flynn v. Canton Co., 40 Md. 312; Van Dyke v. Cincinnati, 1 Disn. (Ohio) 532. Post, p. 175, "Municipal Corporations," "Negligence."

part of the company to comply with such a requirement may be actionable negligence.[398] A municipal charter is a sufficient statutory authority.[399]

LAWFUL AND UNLAWFUL CONDUCT.

33. Lawful conduct may become the foundation of a tort, and the doing of an unlawful act, or of a lawful act in an unlawful manner, is not necessarily or invariably a tort.[400]

Personal Conduct Actionable because of Injurious Consequences.

There is an important and recognized distinction between conduct which is in itself directly and necessarily a violation of a legal right, or conduct which necessarily produces actionable consequences, and conduct which may be innocent in itself, and actionable only when it results in damage as a natural and probable consequence. Thus unprovoked assault, seduction, or trespass on land are immediate invasions of rights. On the other hand, a nuisance is often only a consequence or a result of what is not directly injurious, but sometimes, like trespass, a nuisance is a direct wrong.[401] Before any step is taken under a conspiracy it may be indictable;[402] but it is in gen-

[398] Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 4 Sup. Ct. 369. It is difficult to suggest any difference in principle between an obligation imposed by statute and one imposed by ordinance in pursuance of statutory authority. Ruger, C. J., in City of Rochester v. Campbell, 123 N. Y. 405–416, 25 N. E. 937. This leading case is subsequently considered under "Negligence." Post, p. 919, "Municipal Corporations." Municipal ordinances often determine the rate of speed of trains and vehicles and determine duties as to flagmen, lights, gates, etc.

[399] Bott v. Pratt, 33 Minn. 323, 23 N. W. 237; Texas & P. Ry. Co. v. Nelson, 1 C. C. A. 688, 50 Fed. 814. Generally, as to breach of municipal ordinance, see Osborne v. McMasters, 12 Am. St. Rep. 698, and note. If the ordinance is void because unreasonable (Burg v. Chicago, R. I. & P. Ry. Co. [Iowa] 57 N. W. 680), or enacted without authority (Burrow v. President, 3 Lacq. Jur. 189), no statutory duty is created.

[400] Clerk & L. Torts, 328; Cumberland Telephone & Telegraph Co. v. Electric Co., 42 Fed. 273.

[401] Ang. Water Courses, 556. But see Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878; Delaware & R. Canal Co. v. Lee, 22 N. J. Law, 243.

[402] Post, p. 635, "Conspiracy"; 2 Bish. Cr. Law, § 171; Clark, Cr. Law, 117.

eral actionable only when the complaining party has sustained injury because of it.[403] A rightful act negligently done is a tort.[404] Slander in foreign and unintelligible words not understood is not actionable.[405]

Liability in Use and Management of Property.

Every person is bound in the management of his own property to avoid doing damage to others. He is bound so to use his own property as not to injure the rights of another. This is the real meaning of the maxim of the civil law, "Sic utere tuo ut alienum non lædas," [406] —"the paraphrase of the golden rule of the Christian." [407] The value of the maxim has been seriously questioned. Its futility is very strongly put by Earl, J., in Bonomi v. Backhouse.[408] "'Sic utere tuo' is mere verbiage. A party may damage the property of another when the law permits, and he may not when the law prohibits; so that the maxim can never be applied until the law is ascertained."

Unlawful Conduct.

The distinction between things mala in se and mala prohibita is no longer generally recognized.[409] Not all crimes or public wrongs are

[403] Savill v. Roberts, 1 Ld. Raym. 374. However, no special damage necessary to make out a cause of action in an indictable conspiracy. Arch. N. P. 450. And see Skinner v. Gunton, 1 Saund. 228; Hood v. Palm, 8 Pa. 237.

[404] Sisk v. Crump, 112 Ind. 504, 14 N. E. 381; Wambaugh, Study of Cases, 239; Howe v. Young, 16 Ind. 312; Baltimore & C. Ry. Co. v. Reaney, 42 Md. 117; Pig. Torts, 209, 210.

[405] Broderick v. James, 3 Daly, 481–484; post, p. 482, "Libel and Slander."

[406] Jeffries v. Williams, 5 Exch. 791. Mr. Broom has formulated the following propositions as to this maxim: (1) It is, prima facie, competent to any man to enjoy and deal with his own property as he chooses. (2) He must, however, so enjoy and use it as not to affect injuriously the rights of his fellow subjects. (3) Where rights are such as, if exercised, to conflict with each other, we must consider whether the exercise of the right claimed by either party be not restrained by the existence of some duty imposed on him towards the other. Whether such duty be or be not imposed must be determined by reference to abstract rules and principles of law. (4) A man cannot by his tortious act impose a duty on another. (5) But, lastly, a wrongdoer is not necessarily, by reason of his being such, disentitled to redress by action, as against the party who causes him damage; for sometimes the maxim holds that, "Injuria non excusat injuriam." Broom, Leg. Max. § 394.

[407] Eakin, J., in Little Rock & F. S. Ry. Co. v. Chapman, 39 Ark. 463, 480.

[408] 36 E. C. L. 653.

[409] Pol. Torts, p. 23. But in Massachusetts the distinction survives. See

convertible into torts.[410] One doing a lawful act in a manner forbidden by law is not absolutely liable for an injury caused to a third party by the act, nor is the violation of law in doing it conclusive evidence of actionable civil wrongs.[411] Therefore the averment in a declaration that defendant's sliding with boisterous demeanor in a street, contrary to the city ordinance, and to the damage and common nuisance of the public, whereby plaintiff's horses became frightened and ran away and were injured, sets out no cause of action.[412]

34. The wrongfulness of the conduct complained of as a cause of action in tort is determined—

(a) By the lex loci, and not by the lex fori, and ordinarily

(b) By the state of facts existing at the commencement of the action.

Lex Loci not Lex Fori.

The English rule as to the act itself is that, where torts are committed abroad, recovery can be had in English courts only when the act is a tort by the law of the country where it was committed,[413] and also by the English law.[414] In other words, the act must be

Knowlton, J., in Newcomb v. Boston Protective Department (1888) 146 Mass. 596, 16 N. E. 555.

[410] Ante, p. 11.

[411] Burbank v. Ross, 72 Me. 494.

[412] Jackson v. Castle, 20 Atl. 237.

[413] Phillips v. Eyre, L. R. 6 Q. B. 1; The M. Moxham, 1 Prob. Div. 107; The Halley, L. R. 2 P. C. 193. And see Scott v. Seymour, 1 Hurl. & C. 219; Phillips v. Eyre, 10 Best & S. 1004, L. R. 4 Q. B. 225, 6 Q. B. 1; 40 Law J. Q. B. 28.

[414] As between English and French actions, see Peruvian G. Co. v. Bockwoldt (1882) 23 Ch. Div. 225. As between England and Holland in proceedings, see The Christiansborg (1885) 10 Prob. Div. 141. As between English and American courts, see Hyman v. Helm (1883) 24 Ch. Div. 531; Mutrie v. Binney (1887) 35 Ch. Div. 614. Where the British owner of a British ship is proceeded against in an American court by both British and American cargo owners in respect to a loss of cargo occurring in British waters, the extent of his liability is determined by the statutes of the United States, and not those

wrongful by both laws.[415] In the United States it is generally recognized that damages recoverable in tort are controlled by the law of the place where the injury occurred, and, in case of contract, where the agreement was made.[416] Accordingly, if a servant be injured by the negligence of the master in Iowa, he can sue in Minnesota, and his rights of action are determined by the Iowa laws, including the statutory law as to damages in case of death by wrongful act.[417] The action may be maintained in another state without proof

of Great Britain. The State of Virginia, 60 Fed. 1018; In re State Steamship Co., Id.

[415] Pol. Torts, § 176; Whittiker v. Forbes, 1 C. P. Div. 51. In Mostyn v. Fabrigas, Cowp. 161, the governor of Minorca was sued in England for falsely imprisoning a native in Minorca. It was held that the injury was transitory, not local, in its nature, and that therefore the action lay. It is important, however, to distinguish tort itself from the evidence of the tort. Pig. Torts, 18.

[416] Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978. For a short article on the right of plaintiff in England, who has suffered a wrong abroad, to the same right and remedy as he would have in the place where he was injured, see 98 Law T. 104. Watson v. Railroad Co., 91 Ga. 222, 18 S. E. 306; Helton v. Railway Co., 97 Ala. 275, 12 South. 276; Alabama G. S. R. Co. v. Carroll, 97 Ala. 126, 11 South. 803; Torrance v. Third Nat. Bank, 70 Hun, 44, 23 N. Y. Supp. 1073. But in an American court an action against a British ship is determined by the statutes of the United States and not by those of Great Britain. The State of Virginia, 60 Fed. 1018. Courts in New York have been held to have no jurisdiction over an action of trespass on land situated in other states. American, etc., Co. v. Middleton, 80 N. Y. 408; Craigin v. Lovell, 88 N. Y. 258; Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703; Barrett v. Palmer, 135 N. Y. 336, 31 N. E. 1017. But its supreme court is not prohibited from entertaining an action for injury to real property in other states, and may, unless objection is made, hear and determine such cases. Sentenis v. Ladew, 140 N. Y. 466, 35 N. E. 650. Where, in an action prosecuted in Ohio by a servant against his master to recover for personal injury resulting to him from the negligence of a fellow servant, it appears that the accident causing the injury occurred in Pennsylvania; that the contract of employment was made in that state; and that all the stipulated services were to be performed therein,—no recovery can be had if by the laws of Pennsylvania no right of action arose from the transaction, though the laws of Ohio would give full relief had the transaction occurred within that state. Alexander v. Pennsylvania Co., 48 Ohio, 623, 30 N. E. 69.

[417] Herrick v. Minneapolis & St. L. R. Co., 31 Minn. 11, 16 N. W. 413; Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978. And see

of lex loci; the action on tort is a transitory action.[418] But one state is not bound by the rules of practice of another state in which the injury in issue arose, where such rules pertain merely to the weight of evidence, and not to the cause of action itself, if they are contrary to the rules of practice or public policy of the state in which the action is tried.[419] A cause of action founded upon a statute of one state conferring the right to recover damages for an injury resulting in death may be enforced in a court of the United States sitting in another state if it is not inconsistent with statutes or public policy of the state in which the right of action is sought to be enforced.[420]

Cause of Action as to Time.

"Every man shall recover according to the right which he hath at the time of bringing the action." It was accordingly held in a case of trover by five, one of whom died before verdict, and the others of whom obtained a verdict for the plaintiff, that granting judgment for the rest was error.[421] So far as regards the effect of death of parties,

Stone v. Groton B. & M. Co., 77 Hun, 99, 28 N. Y. Supp. 446. The law is determined, not by the place where death occurred, but by the place where the injury was received. De Harn v. Mexican Nat. Ry. Co., 86 Tex. 68, 23 S. W. 381. And, generally, see Chandler v. New York, N. H. & H. R. Co., 159 Mass. 589, 35 N. E. 89; Augusta Ry. Co. v. Glover (Ga.) 18 S. E. 406.

[418] For a short review of the interstate relations, so far as they affect the litigation of statutory damage acts, see 9 Nat. Corp. Rep. 184. And see 35 Cent. Law J. 185, 40 Cent. Law J. 206. But St. Ill. March 27, 1874, providing that a carrier cannot limit his common-law liability to safely deliver property received for transportation by any stipulation in the receipt given therefor, does not affect a contract made in Tennessee for the shipment of cotton to Massachusetts, though the charter of the carrier was granted in Illinois. Thomas v. Wabash, St. L. & P. Ry. Co., 63 Fed. 200. And Pub. St. Mass., making railroad companies liable for death by their wrongful act, and providing that in case deceased leaves no widow or child the damages shall go to his next of kin, is a penal statute, and hence an action thereunder cannot be brought in another state. Adams v. Fitchburg R. Co. (Vt.) 30 Atl. 687, 2 Am. Law Reg. & Rev. (N. S.) 78. See note to this case in Burdict v. Missouri Pac. Ry. Co., 123 Mo. 221, 27 S. W. 453. And see Walsh v. New York & N. E. R. Co., 160 Mass. 571, 36 N. E. 584 (inspection of foreign cars). Alabama G. S. R. Co. v. Fulgham, 87 Ga. 263, 13 S. E. 649.

[419] Johnson v. Chicago & N. W. Ry. Co. (Iowa) 59 N. W. 66.

[420] Texas & P. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905.

[421] Wedgewood v. Baily, T. Raym. 463. "As to the cases where trespass is brought against many and one dies, they differ much from this case, because

however, upon an action in tort, the matter is now largely statutory.[422] The more important question arises in connection with the definition of the right; that is to say, what is plaintiff's cause of action. If the injury is a direct invasion of a right, then the cause of action is complete upon defendant's wrongful conduct. Damages follow thereupon immediately as a necessary consequence.[423] Where, however, the law will not presume damage, and plaintiff's cause of action is complete only when damages conforming to legal requirements have been actually suffered, then the cause of action is complete upon the happening of such damage.[424] There is no inconsistency between this proposition and the further one that in the same proceeding a plaintiff can recover for both damages which arose prior to the commencement of his action and subsequent thereto.[425] New damage may create new causes of action,[426] but damages for one cause of action are indivisible.[427]

there the trespass is joint or several at the pleasure of plaintiff." Id. Generally, as to effect of release by death of one of several entitled to entire damages.

[422] "Death by Wrongful Act," post, p. 330.

[423] Mitchell v. Colliery Co., 10 Q. B. Div. 457, 52 Law J. Q. B. 394. But see City of Dallas v. Young (Tex. Civ. App.) 28 S. W. 1036. Post, p. 335, "Statute of Limitations."

[424] Bonomi v. Backhouse, 36 E. C. L. 653. Mr. Justice Brewer has stated the principle with great clearness. "Where the original act itself is no invasion of the plaintiff's rights, then there is no cause of action unless such act has caused damages; and the right of action dates from that time. On the other hand, * * * where the original act is unlawful, and an invasion of the plaintiff's right, the cause of action dates from that act, and a new cause does not arise from new damages resulting therefrom." Kansas Pac. Ry. Co. v. Mihlman, 17 Kan. 224.

[425] It is not so easy to reconcile the general proposition with the right of plaintiff in conversion to recover as damages the value of the thing converted into a more valuable form. Post, p. 737, "Conversion," "Remedies," "Compensatory Damages." This rule, however, goes rather to the extent to which plaintiff may recover, than to his right to recover.

[426] "Damages," post, p. 405.

[427] "Damages," post, p. 404.

GENERAL SUMMARY.

Tort Defined.

Mr. Pollock has summarized much of the substance of the foregoing discussion in the following remarkable (and elaborate) definition of a tort:

"A tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related to harm suffered by a determinate person in the following ways:

"(a) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of.

"(b) It may be an act in itself contrary to law, or an omission of specific legal duty which causes harm not intended by the person so acting or omitting.

"(c) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should, with due diligence, have foreseen and prevented.

"(d) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or with limits, to avoid or prevent.

"A special duty of this kind may be (1) absolute; (2) limited to answering for harm which is assignable to negligence."[428]

Elements Essential to Recovery in Tort.

Recovery can be had in tort, it would seem, only when the following elements of a cause of action are shown:

(a) Parties.

(1) Plaintiff not disentitled by his own wrong or consent.

(2) Defendant not personally irresponsible when personal responsibility is essential, and not within admitted exceptions or exemptions.

(b) A legal duty recognized by trial court as owed by defendant to plaintiff.

(c) A violation of that duty in fact by defendant.

[428] Pol. Torts, p. 19.

(d) Damage to plaintiff conforming to the standard of the law as the proximate result, except when, on proof of mere violation of duty, the law infers damages.

Classification of Torts.

Since the law of torts has reached a stage of development in which the general principles have been separated from specific torts, a number of bases of classification have been suggested.[429] The classification which will be substantially—not literally—followed in this book is that of Mr. Pollock, viz.:[430]

[429] This arrangement of Mr. Pollock conforms to his analysis of duties owed. Ante, p. 91, note 352. It has the great practical advantage of conforming also to current deeply-imbedded conceptions of rights and wrongs, and of using the terms which are familiar to the profession, constantly written by judges, and almost invariably employed by digesters and text writers. The objections to Mr. Bishop's original division of "noncontract law" is that it does not conform to this standard, and fails to cover quasi torts. And there is enough new and old law to master, without requiring the feat of acquiring an eccentric order. This criticism applies equally to the arrangement of Mr. Piggott. Mr. Innes' remarkable outline is subject to the same comment in perhaps even a greater degree, but it contains most material contributions to the advancement of the subject. All these systems pay tribute in greater or less degree to the fertile suggestions of Dr. O. W. Holmes, Jr. His arrangement in 7 Har. L. R. 48–663 (amplified in the "Common Law"), was specifically the basis of Mr. Bigelow's book on Leading Cases (see preface), and therefore of Ball's Leading Cases on Tort.

[430] The principal departures from this order are: (1) The omission of subdivision 2, in group B,—i. e. interference with patents, copyrights, et sim; (2) in the discussion of wrongs in group B, under (a) trespass and (b) conversion; (3) in the consideration of disturbance of easements under group C, as part of nuisance; and (4) in treating subdivisions 2 and 3 of group C—that is, negligence and breach of duty to insure safety—as one topic. The first change is necessitated by prescribed limits of this book. The second and third changes, whatever their theoretical defects may be, have been found by actual experience to conduce to clearness in the understanding of the average class. The change as to wrongs to easements avoids the "tendency of a book on torts to become a treatise on easements." Moreover, such wrongs partake of the nature of both trespass and nuisance, and can consequently be fully understood only when considered in connection with both of these subjects. The third change is made because of the degree to which American courts have denied the doctrine of Rylands v. Fletcher, L. R. 1 Exch. 265, and legislatures have modified it.

GROUP A.

Personal Wrongs.

1. Wrongs affecting safety and freedom of the person:
   Assault, battery, false imprisonment.
2. Wrongs affecting personal relations in the family:
   Seduction, enticing away of servants.
3. Wrongs affecting reputation:
   Slander and libel.
4. Wrongs affecting estate generally:
   Deceit, slander of title.
   Malicious prosecution, conspiracy.

GROUP B.

Wrongs to Property.

1. Trespass: (a) to land.
   (b) to goods.
   Conversion and unnamed wrongs ejusdem generis.
   Disturbance of easements, &c.

GROUP C.

Wrongs to Persons, Estate, and Property Generally.

1. Nuisance.
2. Negligence.
3. Breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings. This kind of liability results, as will be seen hereafter, partly from ancient rules of the common law of which the origin is still doubtful, partly from the modern development of the law of negligence.

CHAPTER II.

VARIATIONS IN THE NORMAL RIGHT TO SUE.

VARIATIONS BASED ON PRIVILEGE OF ACTOR, OR GENERAL EXEMPTION.

35. Under this head will be considered:

(a) Public acts, including

(1) Acts of state;

(2) Conduct of legislators;

(3) Conduct of judicial and quasi judicial officers;

(4) Conduct of executive officers.

(b) Private acts, authorized

(1) By statute;

(2) By common law.

PUBLIC ACTS—ACTS OF STATE.

36. The state, except by its own clearly-manifested consent, is not liable to individuals for injuries it may cause. This exemption applies alike to

(a) The United States government,

(b) The governments of the various states, and

(c) To foreign sovereignties.

Exemption in General.

The exemption of the state from liability for all torts is based upon its sovereign character. The duties the state performs are all public, and it cannot be held liable for any imperfections in their performance. Its exemption does not rest on the ground that there are no means provided for remedy against the state, but that there is no obligation on the part of the state for which an action lies.[1] "The king can do no wrong." [2] "The government," said Mr. Justice Story, "does not undertake to guaranty to any person the fidelity of the officers or agents whom it employs, since that would involve it, in all its operations, in endless embarrassments, difficulties, and losses, which would be subversive of the public interest." [3] Where the sovereign assumes the character of a trader, it has been held that the privilege of sovereignty is waived, and that legal liability follows.[4] The distinction, however, does not seem to be sustained by the better legal opinion. The government is not ordinarily bound in law, however it may be in morals, by an estoppel.[5] The exemp-

[1] Murdock Parlor-Grate Co. v. Com., 152 Mass. 28-31, 24 N. E. 854.

[2] Bl. Comm. 246, 4 Bl. Comm. 33. But see Buron v. Denman, 2 Ex. 167. Elaborate discussion and dissenting opinion in U. S. v. Lee, 106 U. S. 196, 1 Sup. Ct. 240; Laugford v. U. S., 101 U. S. 341.

[3] Beers v. State, 20 How. 527; Gibbons v. U. S., 8 Wall. 269; Galbes v. Girard, 46 Fed. 500; Dox v. Postmaster General, 1 Pet. 318; U. S. v. Kirkpatrick, 9 Wheat. 720; Whiteside v. U. S., 93 U. S. 247-251; Hart v. U. S., 95 U. S. 316-318; Moffat v. U. S., 112 U. S. 24-31, 5 Sup. Ct. 10.

[4] The Charkieh, L. R. 4 Adm. & Ecc. 59, (Here the khedive sent a vessel to trade. He was held to have waived the privilege which attached to it as the property of a sovereign. And see The Heinrich Bjorn, L. R. 10 C. P. 40.) Thomas v. Queen, L. R. 10 Q. B. 31; Chisholm v. Georgia, 2 Dall. 419-437.

[5] U. S. v. Clarke, 8 Pet. 436; Lake Superior Ship-Canal, Railway & Iron

tion, however, applies only to suits against the state. So far as concerns torts committed in the performance of ministerial duties, and generally as to acts injurious to the persons and property of others,[6] it is no defense that private individuals who are parties defendant acted as officers of the government; nor does this defeat jurisdiction.[7]

Consent to Liability.

The state may, however, consent to be impleaded in court, and to be held liable in damages for tortious conduct, by unqualified appearance in a judicial proceeding brought against it, or by legislative act or resolution.[8] Such consent is limited to claims and classes of claims within the language of the statute manifesting it expressly, or by clear implication.[9] Thus, merely giving a court jurisdiction of all charges against a state, whether in law or equity, does not cre-

Co. v. Cunningham, 44 Fed. 819–833; Curran v. Arkansas, 15 How. 304–309; The John Shillito Company v. McClung, 2 C. C. A. 526, 51 Fed. 868–875; The Davis, 10 Wall. 15; Carr v. U. S., 98 U. S. 433; Com. v. Andrews, 3 Pick. 224, 225; Pingree v. Coffin, 12 Gray, 288–321; Briggs v. Lightboats, 11 Allen, 157, 170, 176; Troy & G. R. R. v. Com., 127 Mass. 43.

[6] Thus, trespass may lie against the officers of the United States army. Mitchell v. Harmony, 13 How. 115; Bates v. Clark, 95 U. S. 204. So an officer of the United States is liable for infringement of a patent used under government order. Head v. Porter, 48 Fed. 481. And, generally, see In re Ayers, 123 U. S. 443, 8 Sup. Ct. 164; McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. 972; Grace v. Teague, 81 Me. 559, 18 Atl. 289; Benner v. Atlantic Dredging Co., 134 N. Y. 156, 31 N. E. 328; post, p. 125, "Executive Acts."

[7] Opinion of Mr. Justice Miller in Cunningham v. Macon & B. R. Co., 109 U. S. 446, 3 Sup. Ct. 292, 609, as to the three classes of judicial proceedings which affect a state, but do not constitute a suit against it. As to what is and what is not a suit against the state, see 30 Am. Law Reg. 1, 3.

[8] Curran v. Arkansas, 15 How. 304, 308; Hartman v. Greenhow, 102 U. S. 672; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962; Colman v. State, 134 N. Y. 564, 31 N. E. 902; State v. Torinus, 26 Minn. 1, 49 N. W. 259. While a voluntary general appearance is sufficient (Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878), a special appearance is not (Georgia v. Jessup, 106 U. S. 458, 1 Sup. Ct. 363).

[9] Lewis v. State, 90 N. Y. 71–74; Sipple v. State, 99 N. Y. 284, 1 N. E. 802, and 3 N. E. 657; Hyatt v. State, 121 N. Y. 665, 24 N. E. 1093; Locke v. State, 140 N. Y. 480, 35 N. E. 1076; Troy & G. R. Co. v. Com., 127 Mass. 43, 46; Coulterville & Y. Turnpike Co. v. State, 104 Cal. 321, 37 Pac. 1035.

ate an obligation to pay damages resulting from torts of officers or agents in the performance of their duties.[10] The consent of the state may be withdrawn without impairing the obligation of a contract.[11]

Exemption of the United States.

The courts of justice of the United States "are established, not only to decide upon controverted rights of the citizens, as against each other, but also upon rights in controversy between them and the government."[12] The United States has not, however, consented to be sued generally for torts committed by its officers;[13] but special acts have referred certain tort cases to federal courts and to the court of claims.[14] Thus, the government of the nation may be held liable in trespass for damages to the extent of the value of occupancy of land by it.[15]

Exemption of the Various States.

Under the original constitution, the various states composing the Union could be brought before the national courts by citizens of other states.[16] This was changed by the eleventh amendment.

[10] Murdock Parlor-Grate Co. v. Com., 152 Mass. 28, 33, 24 N. E. 854; Stone v. State, 138 N. Y. 124, 130, 33 N. E. 733.

[11] Beers v. Arkansas, 20 How. 527; Railroad Co. v. Alabama, 101 U. S. 832; In re Ayers, 123 U. S. 443–505, 8 Sup. Ct. 164.

[12] U. S. v. Lee, 106 U. S. 196, 220, 1 Sup. Ct. 240.

[13] Gibbons v. U. S., 8 Wall. 269; Hill v. U. S., 149 U. S. 593, 13 Sup. Ct. 1011; German Bank of Memphis v. U. S., 148 U. S. 573, 13 Sup. Ct. 702. The court of claims has no jurisdiction of claims against the government for torts. Schillinger v. U. S., 15 Sup. Ct. 85. Vide Act March 3, 1887, c. 359, § 2; 1 Supp. Rev. St. U. S. 559.

[14] Act Feb. 24, 1855, c. 122 (10 Stat. 612); Act March 3, 1863, c. 92 (12 Stat. 765); Act March 17, 1866, c. 19 (14 Stat. 9). As to concurrent jurisdiction of United States district and circuit courts, see Act March 3, 1887, c. 359, § 2 (Supp. Rev. St. U. S. 559).

[15] Johnson's Case, 2 Ct. Cl. 391; Pope v. U. S., 26 Ct. Cl. 11. Et vide Roettinger v. U. S., 26 Ct. Cl. 391. As to Indian depredation claims: Hyne v. U. S., 27 Ct. Cl. 113; Mitchell v. U. S., Id. 316; Falk v. U. S., Id. 321. Action by a state against the United States. State of New York v. U. S., 26 Ct. Cl. 467. So as to collision resulting from negligence charged in the management of public vessels. Sampson v. U. S., 12 Ct. Cl. 480; Walton v. U. S., 24 Ct. Cl. 372.

[16] Chisholm v. Georgia, 2 Dall. 419.

So that at the present time no state can be sued in any court, without its own consent, except by the United States, a sister state, or a foreign government.[17] Each state determines, accordingly, the extent to which it may be sued in its own courts,[18] and, in the absence of statutory authority extending the jurisdiction of courts to the determination of claims against the state, an appeal to the legislature is the only remedy of the citizen against it.[19] There is an increasing tendency to recognize that it is difficult to see on what solid foundation of principle the state's exemption of liability from suit rests.[20]

Exemption of Foreign Powers.

The same exemption applies to foreign powers. "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise, by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or

[17] Hans v. Louisiana, 134 U. S. 1, 10 Sup. Ct. 504; North Carolina v. Temple, 134 U. S. 22, 10 Sup. Ct. 500, and 11 Sup. Ct. 699; Pennoyer v. McConnaughy, 140 U. S. 1. Et cf. In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785; U. S. v. Texas, 143 U. S. 621, 12 Sup. Ct. 488. Virginia v. Tennessee, 148 U. S. 503, 13 Sup. Ct. 728. But, although a federal court has no jurisdiction of a suit against a state officer to coerce performance of a contract by the state, it may take jurisdiction of a suit against such an officer to enjoin a threatened injury to a vested right under authority of an unconstitutional statute of the state. President, etc., of Yale College v. Sanger, 62 Fed. 177. Et vide 32 Am. Law Reg. (N. S.) 997–1001, containing a valuable article by George A. King, Esq.

[18] Treasurer v. Cleary, 3 Rich (S. C.) 372; Coleman v. State, 134 N. Y. 564, 31 N. E. 902 (trespass of public contractor, consent of state); Hosner v. De Young, 1 Tex. 764; Williamsport & Almira R. Co. v. Com., 33 Pa. St. 288, 291.

[19] Stone v. State, 138 N. Y. 124, 33 N. E. 733. In the absence of statute, a state is not liable for the negligence of its officers in the discharge of their ordinary official duties. Chapman v. State, 104 Cal. 690, 38 Pac. 457.

[20] U. S. v. Lee, 106 U. S. 196–206, 1 Sup. Ct. 240. This will appear in the constitutions of Virginia (see Higginbotham v. Com., 25 Grat. 627, 637); of Massachusetts, as to actions ex contractu (see Sayre v. State, 128 N. Y. 622, 27 N. E. 1079; Sipple v. State, 99 N. Y. 284, 1 N. E. 892, and 3 N. E. 657; Splittorf v. State, 108 N. Y. 205, 15 N. E. 322); of Indiana, Idaho, Nevada; West Virginia, North Carolina, North Dakota, Mississippi, California.

embassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any embassador, though such sovereign, embassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." [21]

SAME—CONDUCT OF LEGISLATORS.

37. Members of the legislature are exempt from liability for anything said or done by them, as representatives, in the functions of their office, whether regular or irregular, and against the rule of the legislative bodies.

38. The agents or servants of the legislature, however, may be held personally responsible for conduct pursuant to the direction of the legislature, when such authority is not legal.

Freedom of speech and action is commonly derived from constitutional provisions, or bills of rights. Thus, in the constitution of Massachusetts of 1780, the twenty-first article of the bill of rights provides that "the freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people that it can not be the foundation of any accusation, prosecution, action or complaint in any other court or place whatsoever." The privilege is said to be rather the privilege of an individual member than of the house, as an organized body. The members are therefore entitled to it, even as against the will of the house. It is immaterial whether or not the conduct in question is according to the rules of the house. The representatives are not liable for words uttered in the execution of their official duties, although spoken maliciously. The exemption applies to a member while sitting on a committee in a lobby or in a convention of the two houses out

[21] The Parlement Belge, 5 Prob. Div. 214; Duke of Brunswick v. King of Hanover, 6 Beav. 1, 2 H. L. Cas. 1; Manning v. State of Nicaragua, 14 How. Prac. (N. Y.) 517; U. S. v. Trumbull, 48 Fed. 94; Foreign consuls: The Marie, 49 Fed. 286; Williams v. The Welhaven, 55 Fed. 80.

of the representative chamber.[22] In Stockdale v. Hansard,[23] however, it was held to be no defense in law to an action for publishing a libel that the defamatory matter was a part of a document which was, by the order of the house of commons, laid before the house, and which thereupon became part of the proceedings of the house, and was afterwards, by its authority, published by the defendant. Coleridge, J., considers the judgment pronounced as not invading the privilege of the citizens, but that "by setting them on the foundation of reason, and limiting them by the fences of the law, we do all that in us lies to secure them from invasion, and root them in the affection of the people." It is clear that under no circumstances will the courts inquire into the motives which govern members of the legislature in the enactment of a law, and that the parties complaining, to have any standing in court, must have suffered an injury apart from that experienced by the general community.[24]

While, on principles peculiar to itself, the English parliament has power to punish for contempt, the house of representatives of the United States has not.[25] Accordingly, where the house of repre-

[22] Coffin v. Coffin, 4 Mass. 1; State v. Burnham, 9 N. H. 34; Perkins v. Mitchell, 31 Barb. 461–468. An article as to the exemption of members of the legislature from service of civil process, with a special reference to the recent case of Rhodes v. Walsh, 55 Minn. 542, 57 N. W. 212, in which it was held that under article 4 of section 8 of the constitution of the state of Minnesota, providing as follows. "The members of each house shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest during the session of their respective houses, and in going to and returning from the same," a member of the legislature is not privileged from the service upon him of a summons in a civil action during a session of said legislature,—will be found in 10 N. Y. Law J. 1106. See briefs of counsel in Rhodes v. Walsh, supra. Further, see Cooley, Const. Lim. (6th Ed.) 160, and cases cited.

[23] (1839) 9 Adol. & E. 1.

[24] Wright v. Defrees, 8 Ind. 298; Bish. Noncont. Law, § 777, note 2, collecting cases.

[25] A court commissioner has no power to punish for contempt, In re Mason, 43 Fed. 510; nor a common council, Whitcomb's Case, 120 Mass. 118. Emery's Case, 107 Mass. 172; Burnham v. Morrissey, 14 Gray (Mass.) 226; Thompson's Case, 122 Mass. 428. As to judicial power over legislature, In re Pacific Ry. Commission, 32 Fed. 241; In re Investigating Commission, 16 R. I. 751, 753, 11 Atl. 429.

sentatives directed a committee to examine into the history and character of a real-estate pool in connection with the affairs of J. Cooke & Co., and its sergeant at arms, in accordance with instructions of the house, imprisoned the plaintiff for contempt as a witness, the order of the house afforded the sergeant at arms no protection in an action by the plaintiff for false imprisonment. The members of congress, however, were exempt from liability, because of the provision of the constitution that for any speech or debate in either house the members shall not be questioned in any other place.[26]

SAME—CONDUCT OF JUDICIAL OFFICERS.

39. No judge can be held personally liable to any one, in a civil action, for conduct, even if malicious and corrupt, occurring in the exercise of jurisdiction clearly conferred.

EXCEPTION—The exemption does not apply to conduct occurring in the performance of ministerial, as disguished from judicial, duty, and perhaps not to quasi judicial officers, when they act maliciously and corruptly. The duty is ministerial when the law governing its discharge prescribes and defines the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion.

"Jurisdiction" Defined.

Miller, J., in Cooper v. Reynolds,[27] said: "It is as easy to give a general and comprehensive definition of the word 'jurisdiction' as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to

[26] Kilbourn v. Thompson, 103 U. S. 168, overruling and rejecting some of the reasoning in Anderson v. Dunn, 6 Wheat. 204. Contra, Canfield v. Gresham, 82 Tex. 10, 17 S. W. 390. Compare Burdett v. Abbott, 14 East, 1; Thompson's Case, 8 How. St. Tr. 1; Beaumont v. Barrett, 1 Moore, P. C. 59.

[27] 10 Wall. 308-316; 19 Cent. Law J. 102-104; 25 Cent. Law J. 435.

the power of the court over the parties, over the subject-matter, over the res or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make. By 'jurisdiction over subject-matter' is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred. Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the res is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause."

Conduct within Jurisdiction.

The exemption of judicial officers from liability in tort for conduct within jurisdiction clearly conferred is well illustrated in Stewart v. Cooley.[28] Here a judge was charged with having conspired with the clerk of his court, willfully and maliciously, to cause the plaintiff to be charged with, and arrested and imprisoned for, the crime of perjury. A demurrer to complaint was sustained,

[28] 23 Minn. 347. And see Fray v. Blackburn, 3 Best & S. 576; Kemp v. Neville, 10 C. B. (N. S.) 523; Floyd v. Barker, 12 Coke, 23–25; Turpen v. Booth, 56 Cal. 65, 69; Weaver v. Devendorf, 3 Denio, 114, 120; Reid v. Hood, 2 Nott & McC. (S. C.) 168; Stone v. Graves, 8 Mo. 148. The classification of officers into judicial, legislative, and executive is not strictly accurate, however convenient for present purposes. However distinct the departments of government are maintained (Langenberg v. Decker, 131 Ind. 478), an officer is apparently a representative of more than one department, and of no one department distinctly or exclusively (Cooley, Torts, c. 13, "Classification"). Mr. Brice (1 Brice, Am. Com., 3d Ed., c. 21, p. 215) says that this separation of the legislative, executive, and judicial departments is "the fundamental characteristic of the American national government. * * * In Europe, as well as in America, men are accustomed to talk of legislation and administration as distinct. But a consideration of their nature will show that it is not easy to separate these two departments in theory by analysis, and still less easy to keep them apart in practice."

and the judge was held to be exempt. Even if, in the exercise of such judicial functions, the judge acts, not only wrongfully, but with a corrupt motive, he is not civilly liable.[29] Thus, it has been held that an action will not lie against a justice of the peace for issuing a writ in favor of a third person upon a false claim against the plaintiff, and secreting and destroying the writ after service thereof, and refusing to enter it, or to allow the defendant therein his costs.[30] Quasi judicial public officers, as township trustees, arbitrators, etc.,[32] are not liable in damages for erroneous interpretation or application of the law.[33] If they act fraudulently or maliciously, the exemption has been held to end. Thus, members of a school board may be held liable for maliciously dismissing a teacher, but not for such acts as the expulsion of children in good faith.[34] But municipal officers, acting in a quasi judicial capacity in determining the lowest legal bidder, are not responsible to an injured bidder, however wrong their decision, or malicious the motive which produced it.[35] An attorney for a party to an action referred by the court is liable to the adverse party for conspiracy with one of the arbitrators to ob-

[29] Irion v. Lewis, 56 Ala. 190; Kress v. State, 65 Ind. 106. But see Knell v. Briscoe, 49 Md. 414; Hitch v. Lambright, 66 Ga. 228; Garfield v. Douglass, 22 Ill. 100.

[30] Raymond v. Bolles, 11 Cush. 315, citing Elder v. Bemis, 2 Metc. 599; Pratt v. Gardner, 2 Cush. 63; Chickering v. Robinson, 3 Cush. 543. And see Weaver v. Devendorf, 3 Denio, 117; Stone v. Graves, 8 Mo. 148; Morrison v. McDonald, 21 Me. 550; State v. Copp, 15 N. H. 212; Taylor v. Doremus, 16 N. J. Law, 473; Morton v. Crane, 39 Mich. 520; Lenox v. Grant, 8 Mo. 254; Way v. Townsend, 4 Allen, 114; Bailey v. Wiggins, 5 Har. (Del.) 462; Gordon v. Farrar, 2 Doug. (Mich.) 411; Strickfaden v. Zipprick, 49 Ill. 286; Gregory v. Brooks, 37 Conn. 365.

[32] Stevenson v. Watson, 4 C. P. Div. 148; Pappa v. Rose, L. R. 7 C. P. 525; Jones v. Brown, 54 Iowa, 74, 6 N. W. 140. And see Gould v. Hammond, 1 McAll. (U. S. Cir. Ct.) 235; Muscatine, etc., Ry. v. Horton, 38 Iowa, 33; McDaniel v. Tebbetts, 60 N. H. 555; Wall v. Trumbull, 16 Mich. 228.

[33] State v. Hastings, 37 Neb. 96, 55 N. W. 774.

[34] Burton v. Fulton, 49 Pa. St. 151; Donahoe v. Richards, 38 Me. 379; Stewart v. Southard, 17 Ohio, 402; Billings v. Lafferty, 31 Ill. 318; Reed v. Conway, 20 Mo. 22.

[35] East River Gaslight Co. v. Donnelly, 93 N. Y. 557, distinguished; People v. Gleason, 121 N. Y. 631, 25 N. E. 4, approved; Erving v. City of New York, 131 N. Y. 133, 29 N. E. 1101. Cf. Ward v. Freeman, 2 Ir. Com. Law, 460.

tain an unjust award in favor of his client, although the arbitrator is not liable.[36]

Judicial Officers de Jure or de Facto.

To entitle a person to claim exemption as a judicial officer, it is not necessary that he should be such officer de jure. It is sufficient if he be de facto. The power to appoint such an officer, however, may not be delegated by the legislature; for example, to attorneys of record by means of stipulation.[37] Even a judge properly appointed, as to matter in which he is personally interested, may be disqualified so that he can have no jurisdiction, and his acts will be void. Thus, the acts of a judge of probate in the settlement of an estate in which he is interested as an executor are void.[38] The exemption applies, when the act is within the jurisdiction, alike to the highest judges in the land,[39] and to the most veritable Dogberry.[40] Members of the naval and military court-martials are not liable for their conduct while acting in such capacity.[41] It appears that coroners[42] and mayors of cities[43] are judges, in this sense.

[36] Hoosac Tunnel Co. v. O'Brien, 137 Mass. 424. Nor a coroner: Thomas v. Churton, 2 Best & S. 475.

[37] Van Slyke v. Trempealeau, etc., Co., 39 Wis. 390, 392; Attorney General v. McDonald, 3 Wis. 703, 705; Gough v. Dorsey, 27 Wis. 119; Cohen v. Hoff, 3 Brev. (S. C.) 500; In re Burke, 76 Wis. 357, 45 N. W. 24; Baker v. State, 80 Wis. 416, 50 N. W. 518.

[38] Bedell v. Bailey, 58 N. H. 63; Hall v. Thayer, 105 Mass. 219; Stockwell v. Township, 22 Mich. 341. But see In re Van Wagonen's Will, 69 Hun, 365, 23 N. Y. Supp. 636.

[39] Bradley v. Fisher, 13 Wall. 335; Dicas v. Lord Brougham, 6 Car. & P. 249; Fray v. Blackburn, 3 Best & S. 576; Lange v. Benedict, 73 N. Y. 12; Londegan v. Hammer, 30 Iowa, 508; Booth v. Kurrus, 55 N. J. Law, 370, 26 Atl. 1013; Banister v. Wakeman, 64 Vt. 203, 23 Atl. 585 (collecting cases).

[40] White v. Morse, 139 Mass. 162, 29 N. E. 539; In re Cooper, 32 Vt. 253; Weaver v. Devendorf, 3 Denio, 117 (collecting cases); Marks v. Sullivan, 9 Utah, 12, 33 Pac. 224. Judge municipal court: Rudd v. Darling, 64 Vt. 456, 25 Atl. 479. City recorder: Brunner v. Downs, 63 Hun, 626, 17 N. Y. Supp. 633.

[41] Dawkins v. Lord Rokeby, L. R. 7 Ind. App. 744; Dawkins v. Prince Edward of Saxe-Weimar, L. R. 1 Q. B. Div. 499.

[42] Garnett v. Ferrand, 6 Barn. & C. 619.

[43] Boutte v. Emmer, 43 La. Ann. 980, 9 South. 921; State v. Wolever, 127 Ind. 306, 318, 26 N. E. 762.

The exemption extends to grand and petit jurors in discharge of their duties,[44] and generally to all officers exercising judicial functions.[45]

Reason.

The reason for exemption has been very clearly stated by Mr. Justice Brewer:[46] "Nothing is more important, in any country, than an independent judiciary; and nowhere is it more important, so absolutely essential, as under a popular government. No man can be a good judge who does not feel perfectly free to follow the dictates of his own judgment, wheresoever it may lead him, and, in a country where popular clamor is apt to sway the multitude, nothing is more important than that the judges should be kept as independent as possible; and it is the universal experience, and the single voice of the law books, that one thing essential to their inde-

[44] Hunter v. Mathis, 40 Ind. 356; Turpen v. Booth, 56 Cal. 65.

[45] Weaver v. Devendorf, 3 Denio, 117; State Auditor v. Atchison, T. & S. F. R. Co., 6 Kan. 500; Van Steenbergh v. Bigelow, 3 Wend. 42; Jones v. Brown, 54 Iowa, 74, 6 N. W. 140; Hunter v. Mathis, 40 Ind. 356; Gould v. Hammond, 1 McAll. 235, Fed. Cas. No. 5,638; Hoggatt v. Bigley, 6 Humph. (Tenn.) 236; Turpen v. Booth, 56 Cal. 65; Harrington v. Commissioners, 2 McCord (S. C.) 400; Freeman v. Cornwall, 10 Johns. 470; Lilienthal v. Campbell, 22 La. Ann. 600; McDaniel v. Tebbetts, 60 N. H. 497; Gregory v. Brooks, 37 Conn. 365; Edwards v. Ferguson, 73 Mo. 686; Billings v. Lafferty, 31 Ill. 318; Donahoe v. Richards, 38 Me. 379; Shoemaker v. Nesbit, 2 Rawle (Pa.) 201; Wall v. Trumbull, 16 Mich. 228; Wasson v. Mitchell, 18 Iowa, 153; Pike v. Megoun, 44 Mo. 491; Walker v. Hallock, 32 Ind. 239; Downing v. McFadden, 18 Pa. St. 334; State v. Hastings, 37 Neb. 96, 55 N. W. 774; Johnston v. District of Columbia, 118 U. S. 19, 6 Sup. Ct. 923.

[46] Cooke v. Bangs, 31 Fed. 640, 641. The reason assigned by Mr. Justice Field in Bradley v. Fisher, 90 U. S. 335–347, is constantly quoted in this connection. For it is a general principle, of the highest importance to the proper administration of justice, that a judicial officer, in exercising the authority invested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to any one who might feel himself aggrieved by the act of the judge would be inconsistent with the possession of his freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. Taaffe v. Downs, note to 3 Moore, P. C. 41. Judge Cooley discusses the basis of the immunity at considerable length. Cooley, Torts, pp. 403–410.

pendence is that they should not be exposed to a private action for damages for anything they may do as judges."

40. No judge of the courts of record, having supreme or general jurisdiction, can be held liable, even for corrupt and malicious conduct, with respect to matters which are in excess of, but not in the complete absence of, jurisdiction. Under such circumstances, however, a judge of an inferior court, not of record, has been held personally liable.

A leading case illustrative of this principle is Bradley v. Fisher,[47] which grew out of circumstances connected with the trial of John A. Surratt for the murder of Abraham Lincoln. In that trial, during a recess, Bradley, one of the attorneys, insulted Fisher, the presiding judge, and threatened him with chastisement. Thereupon, the judge entered an order striking Bradley's name from the roll of attorneys practicing in the court. In the subsequent proceeding brought to test the validity of this act of the judge, the court held that while, before a lawyer should be disbarred, he was entitled to notice, still judges of courts of record, of supreme or general jurisdiction, are not liable to civil action for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done fraudulently and corruptly. The judge was accordingly not held to be liable.[48] This seems to have settled the law on this point, despite the contrary intimation in Randall v. Brigham.[49]

Mr. Justice Davis, with whom concurred Mr. Justice Clifford, dissented as to the rule laid down by the majority of the court, that a judge is exempt from liability where his proceeding was not only in excess of jurisdiction, but was also malicious and corrupt.

[47] 13 Wall. 335, 357. State v. Wolever, 127 Ind. 306, 26 N. E. 762; Pickett v. Wallace, 57 Cal. 555; Ackerley v. Parkinson, 3 Maule & S. 411. Compare Thompson v. Whipple, 54 Ark. 203, 15 S. W. 604.

[48] As to the power of the courts to disbar, see Ex parte Wall, 107 U. S. 265, 2 Sup. Ct. 569; Jefferies v. Laurie, 27 Fed. 198; Ex parte Robinson, 19 Wall. 505.

[49] 7 Wall. 523.

As to courts of inferior jurisdiction, not only must the jurisdiction be made to appear,[50] but it has been held that they are liable for acting maliciously and fraudulently in matters in excess of their jurisdiction.[51] There seems to have been no express adjudication in the supreme court of the United States on this point. It is, however, insisted with much force that in matters of this kind a justice of the peace should stand on the same footing with other courts. While, on the one hand, if the justice resolves all doubt against his jurisdiction, he can always be set right by the court having appellate authority over him, and he can have no occasion to take risks so long as his decision is subject to review,[52] on the other hand, the principle on which the exemption is maintained is founded in the interest of the public, and is established in order to secure independence in the judiciary. This principle is as applicable to an inferior judge as to one of superior and general jurisdiction.[53] Moreover, judges of inferior courts stand nearer to the people than judges of the supreme courts, and therefore it is more important that the exemption should be allowed, so that they may be accorded that immunity from suit which will lead to independence of action. Nor is there any danger that this exemption will render the judges superior to the law, or cause them to feel that they are above the law, and not amenable to it. This is ample protection and guaranty against misconduct on the part of a judicial officer, be he high or low.[54] The tendency of the courts is to extend to judges of inferior courts the same immunity from liability to a civil action as is given to judges of courts of record; and this is specially true where the error of the

[50] Wickes v. Clutterbuck, 2 Bing. 483; Hill v. Pride, 4 Cal. 107; Newman v. Earl of Hardwicke, 8 Adol. & E. 123.

[51] Rutherford v. Holmes, 66 N. Y. 368; Stearns v. Miller, 25 Vt. 20; Vaughn v. Congdon, 56 Vt. 111. But note dissension in opinions: De Courcey v. Cox, 94 Cal. 665, 30 Pac. 95 (cases collected page 666, 94 Cal., and page 95, 30 Pac.); Truesdell v. Combs, 33 Ohio St. 186; Bigelow v. Stearns, 19 Johns. 38; Piper v. Pearson, 2 Gray (Mass.) 120.

[52] Cooley, Torts, 420.

[53] Allec v. Reece, 39 Fed. 341.

[54] Brewer, J., in Cooke v. Bangs, 31 Fed. 640, 642, 644; Bish. Noncont. Law, 783. And see Scott v. Stansfield, L. R. 3 Exch. 220; Austin v. Vrooman, 128 N. Y. 229, 28 N. E. 477.

judge is in determining whether or not his authority extends over the matter at issue.[55]

41. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is usurped, and for its exercise, when the want of jurisdiction is known to the judge, no excuse is permissible.

Where there is a want of jurisdiction over the persons, or over the subject-matter of the cause of action, it is the same as if there were no court,—coram non judice.[56] Thus, where a commissioner in a bankruptcy had a debtor in bankruptcy arrested by a messenger for refusing to attend before such commissioner, both the commissioner and the messenger were held liable personally, inasmuch as the commissioner had no right to make the order.[57] So, if a justice of the peace were to arrest for murder, or a probate judge for a civil offense, there would be such an absence—as distinguished from mere excess—of jurisdiction as would attach liability.[58] To illustrate, by way of contrast, if a justice of the peace attempts to enforce an ordinance of a city which is void for want of authority of the city to enact it, he is not liable as a trespasser.[59] But if he undertakes

[55] Allec v. Reece, supra; Cooke v. Bangs, supra; Grove v. Van Duyn, 44 N. J. Law, 654, 658–660; Dusy v. Helm, 59 Cal. 188; Rains v. Simpson, 50 Tex. 495, 501; McCall v. Cohen, 16 S. C. 445; Henke v. McCord, 55 Iowa, 378, 7 N. W. 623; Burnham v. Stevens, 33 N. H. 247; Downer v. Lent, 6 Cal. 94; Jordan v. Hanson, 49 N. H. 199; Clarke v. Holridge, 58 Barb. 61; Bocock v. Cochran, 32 Hun, 521; Clark v. Spicer, 6 Kan. 440. See 15 Am. Law Rev. 441; Lange v. Benedict, 29 Am. Rep. 80.

[56] Marshalsea Case, 10 Coke, 68b, approved in Taylor v. Clemenson, 2 Adol. & E. (N. S.) 978. See Mitchell v. Foster, 12 Adol. & E. 472; Houlden v. Smith, 14 Adol. & E. (N. S.) 841; Piper v. Pearson, 2 Gray, 120; Van Slyke v. Insurance Co., 39 Wis. 394.

[57] Watson v. Bodell, 14 Mees. & W. 57. And see cases collected in Randall v. Brigham, 7 Wall. 531, note 1; Griffith v. Frazier, 8 Cranch, 9; Collamer v. Page, 35 Vt. 387.

[58] Dicta in Grumon v. Raymond, 1 Conn. 40. And see Austin v. Vrooman, 128 N. Y. 229, 28 N. E. 477; Calder v. Halket, 3 Moore, P. C. 28; Patzack v. Von Gerichten, 10 Mo. App. 424.

[59] Henke v. McCord, 55 Iowa, 378, 7 N. W. 623; Gifford v. Wiggins, 50 Minn. 401, 52 N. W. 904; Brooks v. Mangan, 86 Mich. 576, 49 N. W. 633.

to commit a person to prison for nonpayment of a fine for contempt, where the judgment for imposing the fine does not provide for imprisonment, he is liable, in an action of tort, to the person illegally committed.[60] As to process, however, the tendency is to exonerate the judge.[61] The language of the black-letter text is taken from the opinion in Bradley v. Fisher.[62] It does not appear that it is essential whether the judge knew, or did not know, of the want of jurisdiction,[63] though honesty of purpose may mitigate damages.[64]

Exemption as to Ministerial Acts.

The exemption from liability of judges applies only to acts which are judicial, hence discretionary in their nature. Where, however, the act is ministerial, and, in its performance, does not involve the exercise of judgment, judges are liable for their wrongful, malicious, or corrupt acts, as are individuals. Mere neglect of persons having judicial functions to perform also ministerial acts, where required, attaches liability.[65]

An act is ministerial when it is performed in a prescribed manner, in obedience to the law, without regard to, or the exercise of, the judgment of the individual as to the propriety of the acts done.[66] Thus, if a justice, in making up his docket, fraudulently and maliciously fails to mention an appeal, his failure is not a mistake of judgment, and he is personally liable.[67] The same principle has

[60] Lanpher v. Dewell, 56 Iowa, 153, 9 N. W. 101; Martin v. Marshall, Hob. 63; Entrick v. Carrington, 2 Wilies, 275; Grumon v. Raymond, 1 Conn. 40.

[61] Maguire v. Hughes, 13 La. Ann. 281, and supra, note 29; Austin v. Vrooman, 128 N. Y. 229, 28 N. E. 477.

[62] 13 Wall. 335, 357.

[63] Trusdell v. Combs, 33 Ohio St. 186.

[64] De Courcey v. Cox, 94 Cal. 665, 30 Pac. 95.

[65] Ferguson v. Earl of Kinnoull, 9 Clark & F. 215; Noxon v. Hill, 2 Allen (Mass.) 205; Jones v. Werden, 12 Cush. (Mass.) 133; Way v. Townsend, 4 Allen (Mass.) 114; Heriot's Hospital v. Ross, 12 Clark & F. 506, 518.

[66] Pennington v. Streight, 54 Ind. 376. The black-letter text is from Grider v. Talley, 77 Ala. 422. Et vide State v. Johnson, 4 Wall. 475–498; Sullivan v. Shanklin, 63 Cal. 247–251; Morton v. Comptroller, 4 S. C. 430–474; Commissioners v. Smith, 5 Tex. 471.

[67] Horne v. Pudil, 88 Iowa, 533, 55 N. W. 485; Brooks v. St. John, 25 Hun, 540; Peters v. Land, 5 Blackf. (Ind.) 12; Tompkins v. Sands, 8 Wend. (N. Y.) 462; Place v. Taylor, 22 Ohio St. 317; Rochester White-Lead Co. v. City of Rochester, 3 N. Y. 463.

been said to apply to the refusal of a judge to issue a writ of habeas corpus whenever a prima facie case of confinement is made out.[68] In Yates v. Lancing,[69] however, it was held that though a judge in vacation, who refuses to allow a writ of habeas corpus, is liable to an action under the statute making the judge liable in damages if he fails to obey the law, inasmuch as the allowance by him in vacation is not a judicial act, yet the judges of the supreme court, sitting as a court in term time, may, in their discretion, refuse a habeas corpus. Similarly, an action will lie to recover damages for making a false return to a writ of certiorari issued by the supreme court to the persons who had been appointed referees by a county judge upon an appeal from the order of a highway commissioner altering a highway.[70] In Ferguson v. Earl of Kinnoull,[71] it was held that the taking of his trial as presentee to a church in Scotland was a ministerial act, which the presentee was bound to perform, and that, for a neglect or refusal to perform that duty, every member of the presbytery was liable, collectively and individually, in damages, to the party injured.

SAME—CONDUCT OF EXECUTIVE OFFICERS.

42. Private individuals cannot recover damages resulting from conduct violating a duty owed solely to the public and imposed by the state on its executive officers, instrumentalities, or agents. Such damages are the results of a purely public wrong, and therefore are not subject to private action.

43. Damages may, however, be recovered against executive public officers—

(a) For conduct in the course of performance of public duties, provided

(1) Such conduct violates a duty to an individual, in the performance of which he has a partic-

[68] Cooley, Torts, p. 378.

[69] 5 Johns. (N. Y.) 282.

[70] Rector v. Clark, 78 N. Y. 21.

[71] 9 Clark & F. 215.

ular interest, even though that duty be also owed to the public; and

(2) The complainant suffers some special individual wrong, as distinguished from the wrong done the community generally.

(b) For unauthorized conduct in the course of performance of official duty.

Violation of Purely Public Duties.

In so far as a public officer or institution executes the authority or performs the functions of the government, the exemption of the state for wrong applies to him. Under municipal corporations, it will be seen that, when a city exercises governmental functions, it is not liable for torts; when it exercises private functions, it is. Many governmental agencies share even a more absolute exemption. Thus, an action will not lie against a state house of refuge for an assault on an inmate by one of its officers.[72] A purely charitable corporation established by the state is not liable for the negligent or malicious acts of its servants.[73] Similarly, persons directed by law to establish a penitentiary are not liable to one injured while working thereon.[74] And, generally, boards of trustees, and their individual members, exercising governmental functions, are agents of the state, and exempt from liability in their performance of public duties.[75]

[72] Perry v. House of Refuge, 63 Md. 20.

[73] Williamson v. Louisville Industrial School of Reform, 95 Ky. 251, 24 S. W. 1065. A religious corporation organized under Laws 1876, c. 176, providing that it shall not be lawful to divert the property to any purpose except the support of an object connected with the denomination to which such corporation shall belong, is not liable for the negligence of an employé, where due care was used in his selection. Haas v. Missionary Soc. of the Most Holy Redeemer (Com. Pl. N. Y.) 26 N. Y. Supp. 868. And see Farnham v. Pierce, 141 Mass. 203, 6 N. E. 830. A collection of cases will be found in Boyd v. Insurance Patrol, 113 Pa. St. 269–276, 6 Atl. 536. Priestly character no defense for assault in removing person from a room, who was lawfully there. Cooper v. McKenna, 124 Mass. 284.

[74] Alamango v. Supervisors, 25 Hun, 551. But see Breen v. Field (Mass.) 31 N. E. 1075.

[75] Hall v. Smith, 2 Bing. 156; Chamberlain v. Clayton, 56 Iowa, 331, 9 N. W. 237; Walsh v. Trustees, 96 N. Y. 427; Jordon v. Hayne, 36 Iowa, 9. 15; Nugent v. Levee Com'rs, 58 Miss. 197. And see Young v. Commissioners, 2

Thus, the trustees of the Brooklyn Bridge are not liable for error in judgment, in not providing a sufficient police force on the bridge.[76] The same exemption applies to school boards[77] and school directors.[78] And naval officers destroying property with the consent of their government are not personally liable to injured owners.[79]

Same—The Exemption Applies Generally to Persons Engaged in Judicial Proceedings.

The exemption from liability for torts extends to all persons connected as essential parts of judicial proceedings, as well as to judges. The purpose of the law, to promote justice by removing the restraint on the freedom of human action which would be imposed by fear of civil responsibility for conduct connected with judicial proceedings, would not be fulfilled if the exemption from such liability were confined to judges only. On the contrary, it extends to the officers of the court, the parties to the proceeding, and the witnesses who testify therein, and even to the persons who published a fair report thereof.[80] The exemption has been carried so far as to hold that a witness is not civilly responsible for damages caused by his perjury. Thus, no action lies by a creditor against a debtor committed on ex-

Nott & McC. (S. C.) 537; Lyons v. Adams, 2 Ind. 143; Bartlett v. Crozier, 17 Johns. (N. Y.) 439; Dunlap v. Knapp, 14 Ohio, 64. The members of the board of public works (Code Md. art. 72) are not personally liable for injuries to workman on vessel of state fishery force, caused by negligence of commander appointed by them. Riggin v. Brown, 59 Fed. 1005.

[76] Walsh v. Trustees, 96 N. Y. 427. And see Walsh v. Mayor, 107 N. Y. 220, 13 N. E. 911.

[77] Post, p. 178, "Municipal Corporations"; Donovan v. McAlpin, 85 N. Y. 85.

[78] Boardman v. Hague, 29 Iowa, 339; Smith v. District Township of Knox, 42 Iowa, 522.

[79] Buron v. Denman, 2 Exch. 167. A log inspector is not liable for mistakes in judgment. Gates v. Young, 82 Wis. 272, 54 N. W. 178.

[80] Jerome & Knight's Cases, 1 Leon. 107; Dawling v. Wenman, 2 Show. 446; Damport v. Sympson, Cro. Eliz. 520, Owen, 158; Eyres v. Sedgewicke, Cro. Jac. 601, 2 Rolle, 197; Wimberly v. Thompson, Noy, 6; Harding v. Bodman, Hut. 11; Taylor v. Bidwell, 65 Cal. 489, 4 Pac. 491; Bostwick v. Lewis, 2 Day (Conn.) 447; Grove v. Bradenburg, 7 Blackf. (Ind.) 239; Dunlap v. Glidden, 31 Me. 435; Severance v. Judkins, 73 Me. 376–379; Garing v. Fraser, 76 Me. 37; Phelps v. Stearns, 4 Gray (Mass.) 105; Curtiss v. Fairbanks, 16 N. H. 542; Smith v. Lewis, 3 Johns. (N. Y.) 157; Jones v. McCaddin, 34 Hun (N. Y.) 632; Cunningham v. Brown, 18 Vt. 123; Bell v. Senneff, 83 Ill. 122; post, p. 532, "Libel and Slander."

ecution, for perjury at the examination on his application to be admitted to take the poor debtor's oath, whereby he obtained his discharge from imprisonment.[81]

Violation of Private Duties.

In order that a person may recover damages, he must show, not only negligence in the performance of a public duty, but he must also show a breach of particular duty owing to him. Therefore, where the duty is entirely to the public at large, and not to any specific individual, he cannot recover.[82] The duty may, however, be both to the public and to the individual. In such cases he can recover alike for the nonfeasance, misfeasance, or malfeasance of the public officer.[83] The better opinion is that the courts will not apply "that plausible, but in reality sterile, verbal syllogization," the distinction drawn in the Six Carpenters' Case,[84] as to misfeasance and nonfeasance, to ministerial officers. The disobedient officer is privileged, whether he does, or refrains from doing.[85] While it is said that there can be no difficulty in determining what is a ministerial duty and what is a public duty,[86] this would not appear to be always the case. Thus, in Sage v. Laurain,[87] it was held that no action would lie against

[81] Phelps v. Stearns, 4 Gray (Mass.) 105. But see Rice v. Coolridge, supra.

[82] Whart. Neg. § 284; Shear. & R. Neg. §§ 167–177; Kahl v. Love, 37 N. J. Law, 5; Hall v. Smith, 2 Bing. 156.

[83] Rowning v. Goodchild, 2 W. Bl. 906; Amy v. Supervisors, 11 Wall. 136; Lane v. Cotton, 1 Salk. 17; Kendall v. U. S., 12 Pet. 524; Reed v. Conway, 20 Mo. 22; Keith v. Howard, 24 Pick. (Mass.) 292; Mech. Pub. Off. (collecting cases).

[84] 8 Coke, 146.

[85] Boston & M. R. Co. v. Small, 85 Me. 462, 27 Atl. 349–351, per Emery, J. Cf. Carter v. Allen, 59 Me. 296; Brock v. Stimson, 108 Mass. 521. And see note to Barrett v. White, 3 N. H. 210; post, p. 679, "Trespass ab Initio"; ante, p. 287, "Liability of Agent to Third Person." Cf. Orway v. Ferin, 3 N. H. 69.

[86] McCord v. High, 24 Iowa, 336.

[87] 19 Mich. 137; Moss v. Cummings, 44 Mich. 359, 6 N. W. 843. And see Smith v. Gould, 61 Wis. 31, 20 N. W. 369. But damages may be allowed against courts by statute. State v. Supervisors, 66 Wis. 199, 28 N. W. 140; Young v. Commissioners, 2 Nott & McC. (S. C.) 537; Dunn v. Mellon, 147 Pa. St. 11, 23 Atl. 210; Bartlett v. Crozier, 17 Johns. (N. Y.) 439, distinguishing Hover v. Barkhoof, 44 N. Y. 113; Lynn v. Adams, 2 Ind. 143; Dunlap v. Knapp, 14 Ohio, 64; Garlinghouse v. Jacobs, 29 N. Y. 297 (commissioners not liable). But

highway commissioners for laying out a highway, where they were acting within their jurisdiction, and violated no law. On the other hand, in New York a commissioner of a highway was held liable for omitting to erect barriers in dangerous places at the side of a highway, and for leaving the bed of the highway defective.[88] But it is a defense to an action for damages against a commissioner of highways, for injuries sustained in consequence of a defective highway, to show that he was without necessary funds to make repairs, and without power to raise them.[89]

While Judge Cooley correctly states the doctrine that (e. g.) a sheriff can only be liable to the person to whom a particular duty was owing,[90] in Raynsford v. Phelps [91] he holds a collector of taxes liable for an injury resulting to one who had purchased the equity of redemption to certain mortgaged lands after a tax had been assessed thereon, because of the return of nulla bona by the tax collector, whereby the tax became a lien on the land, from which the owner of the mortgage had to redeem after foreclosure.[92] This case is said to be in conflict with the rule as generally stated. But there is other good authority for holding that a collector of taxes is a

see Robinson v. Chamberlain, 34 N. Y. 389; Hover v. Barkhoff, 44 N. Y. 113 Held liable in Glasier v. Town of Hebron, 131 N. Y. 447, 30 N. E. 239. And see Bryant v. Town of Randolph, 133 N. Y. 70, 30 N. E. 657; Bennett v. Whitney, 94 N. Y. 302.

[88] Pomfrey v. Village of Saratoga Springs, 104 N. Y. 459, 11 N. E. 43; Piercy v. Averill, 37 Hun, 360, 366; Allen v. Sisson, 66 Hun, 143; Robinson v. Chamberlain, 34 N. Y. 389 (overruling Fish v. Dodge, 38 Barb. 163; Minard v. Mead, 38 Barb. 174); Turnpike Road v. Champney, 2 N. H. 199. And see Tearney v. Smith, 86 Ill. 391; Harris v. Carson, 40 Ill. App. 147; Bills v. Belknap, 36 Iowa, 583. The superintendent of streets of a city is liable for any damages resulting from his negligence in repairing a sewer, notwithstanding his official capacity. Butler v. Ashworth, 102 Cal. 663, 36 Pac. 922.

[89] Garlinghouse v. Jacobs, 29 N. Y. 297; Weed v. Ballston, 76 N. Y. 329; Hines v. Lockport, 50 N. Y. 236, 238; Boots v. Washburn, 79 N. Y. 207; Monk v. Town of New Utrecht, 104 N. Y. 552, 11 N. E. 268. And an action does not lie against a village when it would not lie against a commissioner of a highway. Clapper v. Town of Waterford, 131 N. Y. 382, 30 N. E. 240, and cases collected on page 389, 131 N. Y., and page 240, 30 N. E.

[90] Cooley, Torts, p. 394, note 1.

[91] 43 Mich. 342.

[92] State v. Harris, 89 Ind. 363.

ministerial officer, the abuse of whose legal authority may be corrected by an action.[93]

Special Injury.

Mere community of injury is not sufficient. The party complaining must show special injury peculiar to himself. I "consider the point beyond all dispute," said Spencer, C. J., "that, for a misbehavior of an officer in his office, * * * no one can maintain an action against him, unless he can show a special and particular damage to himself." [94] He therefore held that no action lay against the managers of a public lottery, at the suit of a dealer in lottery tickets who had purchased a large number of tickets to be sold at a profit, on the ground that, by the negligence and improper conduct of the defendants, public confidence was destroyed, and the plaintiff was unable to sell his tickets.[95]

Liability of Sheriffs, Constables, etc.

Sheriffs, constables,[96] and similar officers are exempt from liability for damages caused by execution of process whenever it appears that the writ is regular on its face, that it was issued by a

[93] Blanchard v. Dow, 32 Me. 557 (omission to render account in writing of sale and charges); Carter v. Allen, 59 Me. 296 (deduction of illegal fees from proceeds of sale); Seekins v. Goodale, 61 Me. 400 (selling of more goods than is necessary); Robbins v. Swift, 86 Me. 197, 29 Atl. 981 (demand of excessive fees).

[94] Butler v. Kent, 19 Johns. (N. Y.) 223.

[95] Wright v. Defrees, 8 Ind. 298; Eslava v. Jones, 83 Ala. 139; Harrington v. Ward, 9 Mass. 251; Strong v. Campbell, 11 Barb. 135. As by statute, where the sheriff is civilly responsible for the safe-keeping of prisoners committed to his care (Code Tenn. §§ 6238–6242), and any party aggrieved may sue on his official bond in the name of the state (Id. 3492–3494), the United States may, in such an action, recover for allowing the escape of a prisoner under indictment by a federal grand jury, the expenses of the arrest and keeping of the prisoner, and money expended in recapturing him. State v. Hill, 9 C. C. A. 326, 60 Fed. 1005.

[96] A constable will be protected in levying execution under a void judgment, unless the levy was made with intent to oppress the execution defendant. Thompson v. Jackson (Iowa) 61 N. W. 1004. Cf. Taylor v. Moore, 63 Vt. 60, 21 Atl. 919. And if he, while acting as such, wrongfully kills a person, he is liable therefor on his official bond. State v. Walford (Ind. App.) 39 N. E. 162. Cf. Berwald v. Ray, 165 Pa. Sup. 192, 30 Atl. 727.

court of competent jurisdiction as respects the subject-matter, although it does not disclose the want of jurisdiction in respect to the person, nor show whether the court ever acquired any jurisdiction over the person.[97] But for conduct under a defective writ, or for an unauthorized act, such public officers become liable to individuals.[98] Thus, they may become liable for making arrest under a defective warrant,[99] or for unlawfully breaking into a house to make a levy,[100] or for failure to sell property levied on,[101] to execute[102] or return,[103] or for making a false return[104] of, process and execution,[105] or for negligence in making sale,[106] or for selling exempt property.[107] The sheriff is liable where he intentionally takes property not covered by his writ. In such cases he is a trespasser ab initio, and is liable for all consequences of an unlawful entry and

[97] Orr v. Box, 22 Minn. 485; Savacool v. Boughton, 5 Wend. (N. Y.) 170.

[98] A collection of authorities as to suits on official bonds for trespasses, or unauthorized acts of officers done colore officii. McLendon v. State (Tenn.) 22 S. W. 200, 21 Lawy. Rep. Ann. 738, and note.

[99] Post, p. 426, "False Imprisonment."

[100] Welsh v. Wilson, 34 Minn. 92, 24 N. W. 327; Thompson v. State, 3 Ind. App. 371, 28 N. E. 996.

[101] Valentine v. Kwilecki, 89 Ga. 98, 14 S. E. 878.

[102] Hawkeye Lumber Co. v. Diddy, 84 Iowa, 634, 51 N. W. 2; Bachelder v. Chaves (N. M.) 25 Pac. 783; Steele v. Crabtree, 40 Neb. 420, 58 N. W. 1022; Mathis v. Carpenter, 95 Ala. 156, 10 South. 341; Denson v. Ham (Tex. App.) 16 S. W. 182; Crosson v. Olson, 47 Minn. 27, 49 N. W. 406; Zelinsky v. Price, 8 Wash. 256, 36 Pac. 28; De Yampert v. Johnson, 54 Ark. 165, 15 S. W. 363; Bittman v. Mize, 45 Kan. 450, 25 Pac. 875; Rogers v. Marlboro Co., 32 S. C. 555, 11 S. E. 383; Pierce v. Jackson, 65 N. H. 121, 18 Atl. 319.

[103] Hawkins v. Taylor, 56 Ark. 45, 19 S. W. 105; Atkinson v. Heer, 44 Ark. 174, followed in Wilson v. Young, 58 Ark. 593, 25 S. W. 870.

[104] Blair v. Flack, 62 Hun (N. Y.) 509, 17 N. Y. Supp. 64.

[105] Turner v. Page, 111 N. C. 291, 16 S. E. 174; Boyd v. Teague, 111 N. C. 246, 16 S. E. 338; Hood v. Blair, 95 Ala. 629, 10 South. 671. But see Union Stove & Mach. Works v. Caswell, 50 Kan. 787, 32 Pac. 362; Cleveland v. Tittle, 3 Tex. Civ. App. 191, 22 S. W. 8.

[106] Cramer v. Oppenstein, 16 Colo. 504, 27 Pac. 716; Russell v. Grimes, 31 Neb. 784, 48 N. W. 905.

[107] Kriesel v. Eddy, 37 Neb. 63, 55 N. W. 224. As to action against bond: Kennedy v. Smith, 99 Ala. 83, 11 South. 665. So where the sheriff sells property as belonging to another where the owner acquired title after levy and before sale. Kitchen v. McCloskey, 150 Pa. St. 376, 24 Atl. 688.

seizure.[108] The sheriff is, in general, liable for wrongful seizure,[109] and may be jointly liable with his deputy,[110] or with plaintiff in the action.[111] For reasons of public policy, the sheriff is absolutely liable for the forthcoming of all property levied on by him, unless deprived of it by the act of God, sudden accident, or the public enemy. He is therefore liable if it is stolen.[112] He may, however, not be liable for goods destroyed by fire.[113] He is liable for the escape of a prisoner lawfully arrested. He is also liable if the escape be due to the negligence of his deputy.[114] The officer may be liable to the plaintiff in the process, as where he refuses to obey the proper di-

[108] Grunberg v. Grant, 3 Misc. Rep. 230, 22 N. Y. Supp. 747. Et vide Williams v. Mercer, 139 Mass. 141, 29 N. E. 540.

[109] Francisco v. Aguirre, 94 Cal. 180, 29 Pac. 495; McAllaster v. Bailey, 127 N. Y. 583, 28 N. E. 591; Tillman v. Fletcher, 78 Tex. 673, 15 S. W. 161; Walker v. Wonderlick, 33 Neb. 504, 50 N. W. 445; Rogers v. McDowell (Pa. Sup.) 21 Atl. 166; Harris v. Tenney, 85 Tex. 254, 20 S. W. 82; Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906; Brown v. Mosher, 83 Mo. 111; Taylor v. Moore, 63 Vt. 60, 21 Atl. 919; Palmer v. McMaster, 10 Mont. 390, 25 Pac. 1056; Whitney v. Preston, 29 Neb. 243, 45 N. W. 619. Measure of damages: Collins v. Hutchinson (Ind. App.) 30 N. E. 12; Mitchell v. Corbin, 91 Ala. 599, 8 South. 810. Attachment: Brown v. Howard, 86 Me. 342, 29 Atl. 1094; Noyes v. Belding (S. D.) 59 N. W. 1069. The measure of damages, in an action to recover from a sheriff for his wrongful seizure of property on execution, and its sale thereunder, is the amount for which it was sold, with interest thereon from the date of sale. Kirkley v. Lacey (Del. Super.) 30 Atl. 994, 7 Houst. 213.

[110] Frankhouser v. Cannon, 50 Kan. 621, 32 Pac. 379; Luck v. Zapp, 1 Tex. Civ. App. 528, 21 S. W. 418; State v. Dalton, 69 Miss. 611, 10 South. 578.

[111] Jones v. Lamon, 92 Ga. 529, 18 S. E. 423, followed in Waldrup v. Almand (Ga.) 19 S. E. 994.

[112] Hartlieb v. McLane's Adm'r, 44 Pa. St. 510; Bond v. Ward, 7 Mass. 123. As to reimbursement by attaching creditor, see Russell v. Walker, 150 Mass. 531, 23 N. E. 383. As between officer levying and execution creditors, see Bowman v. First Nat. Bank, 36 Neb. 117, 54 N. W. 124.

[113] State v. Dalton, 69 Miss. 611, 10 South. 578.

[114] Winborne v. Mitchell, 111 N. C. 13, 15 S. E. 882. So as jailer. Saunders v. Perkins, 140 Pa. St. 102, 21 Atl. 257. Generally as to liability of sheriff, see Burnett v. Gentry, 32 S. C. 597, 11 S. E. 96; Hanchett v. Ives, 133 Ill. 332, 24 N. E. 396; Pierce v. Jackson, 65 N. H. 121, 18 Atl. 319; Etter v. O'Neil, 83 Iowa, 655, 49 N. W. 1013; Monahan v. Triumph Artificial Limb Co., 6 Ohio Cir. Ct. R. 150. As to amercement of sheriff, see Shufeldt v. Barlass, 33 Neb. 785, 51 N. W. 134; Sharp v. Ross, 7 Ohio Cir. Ct. R. 55. As to

rection of such plaintiff, e. g. as to the time or manner of its execution, or as to the property to be subjected to it.[115] So, also, if the plaintiff informs the officer of the danger of delay, in directing immediate service.[116] The officer may also be liable to the defendant in the process, as by refusing bail,[117] or subjecting him to oppression or undue hardship,[118] or for abusing process.[119] He, as well as his bondsmen, may be liable to third persons, for example, if he takes the goods of one person upon a writ against another.[120]

Liability of Other Officials.

Registers of deeds, or abstract clerks, whose duty it is to make certificates as to titles, are liable to employers, but not to strangers or third persons, between whom and them there is no privity, for errors in making the examination and certificate;[121] as where there is negligent omission to note recorded mortgages, assessments,[122] or releases.[123] Where, however, it is no part of statutory duty to make search of the records of his office and certify to the result of his search, a clerk is not liable for want of skill or honest errors of judgment.[124] He is liable for making an improper record of an

measure of damages: Collins v. Hutchinson (Ind. App.) 30 N. E. 12; Mitchell v. Corbin, 91 Ala. 599, 8 South. 810.

[115] Ranlett v. Blodgett, 17 N. H. 298; Rott v. Wagner, 30 N. Y. 9. It is otherwise, however, if plaintiff's instructions are unreasonable. McDonald v. Neilson, 2 Cow. (N. Y.) 139.

[116] Tucker v. Bradley, 15 Conn. 46; Smith v. Judkins, 60 N. H. 127.

[117] Berrer v. Moorhead, 22 Neb. 687, 36 N. W. 118.

[118] Wood v. Graves, 144 Mass. 365, 11 N. E. 567; Baldwin v. Weed, 17 Wend. (N. Y.) 224; Page v. Cushing, 38 Me. 523.

[119] Holley v. Mix, 3 Wend. (N. Y.) 350; post, p. 424, "False Imprisonment."

[120] Wellman v. English, 38 Cal. 583; Wise v. Jefferis (C. C. A.) 51 Fed. 641; Symonds v. Hall, 37 Me. 354; Griswold v. Boley, 1 Mont. 546; Id., 20 Wall. 486; Overbye v. McGee, 15 Ark. 459; Sweeney v. Lomme, 22 Wall. 213; Fonda v. Van Horne, 15 Wend. (N. Y.) 631.

[121] Dundee Mortgage & Trust Inv. Co. v. Hughes, 20 Fed. 39; Houseman v. Association, 81 Pa. St. 256, 262; Savings Bank v. Ward, 100 U. S. 195.

[122] Smith v. Holmes, 54 Mich. 104, 19 N. W. 767; McCaraher v. Com., 5 Watts & S. (Pa.) 21; Morange v. Mix, 44 N. Y. 315; Chase v. Heaney, 70 Ill. 268.

[123] Wacek v. Frink, 51 Minn. 282, 53 N. W. 633.

[124] Mallory v. Ferguson, 50 Kan. 685, 32 Pac. 410.

instrument filed with him,[125] or for not making an index as required.[126] Delay in indexing is prima facie evidence of negligence.[127] Clerks of court are liable for negligence or willfulness in the performance of their duties. These are largely ministerial. Thus, where a clerk has failed to issue an execution when ordered by the plaintiff's attorney an averment by the defendant that the papers are lost, and therefore the costs should not be taxed or execution issued, is not a sufficient defense.[128] Similarly, the clerk is liable for carelessly giving a false certificate,[129] or for negligently filing papers.[130] Notaries public are liable for negligence in presenting or protesting negotiable paper.[131] Such officer is liable for knowingly making a false acknowledgment,[132] for negligence in mistaking identity of parties,[133] certainly where there is a clear and intentional dereliction of duty.[134] He may be liable for a defective certificate, perhaps, when the defect is the result of negligence, but certainly where it is due to malice.[135] He has been held liable in favor of legatees for negligence in drawing a will.[136] If

[125] Sinclair v. Slawson, 44 Mich. 123, 6 N. W. 207

[126] Lyman v. Edgerton, 29 Vt. 305; Chatham v. Bradford, 50 Ga. 327.

[127] First Nat. Bank v. Clements, 87 Iowa, 542, 54 N. W. 107. As to action on bond: Joyner v. Roberts, 112 N. C. 111, 16 S. E. 917.

[128] Thouron v. Railway Co., 90 Tenn. 609, 18 S. W. 256; Benjamin v. Shea (Iowa) 49 N. W. 989; Toncray v. Dodge Co., 33 Neb. 802, 51 N. W. 235; People v. Bartels (Ill. Sup.) 27 N. E. 1091.

[129] Maxwell v. Pike, 2 Me. 8.

[130] Rosenthal v. Davenport, 38 Minn. 543, 38 N. W. 618.

[131] Commercial Bank v. Varnum, 49 N. Y. 269; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320; Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215.

[132] Hatton v. Holmes, 97 Cal. 208, 31 Pac. 1131; People v. Butler, 74 Mich. 643, 42 N. W. 273; Curtiss v. Colby, 39 Mich. 456. Compare with Com. v. Haines, 97 Pa. St. 228.

[133] State v. Meyer, 2 Mo. App. 413.

[134] Com. v. Haines, 97 Pa. St. 228; Henderson v. Smith, 26 W. Va. 829; Scotten v. Fegan, 62 Iowa, 236, 17 N. W. 491; Brigham v. Bussey, 26 La. Ann. 676; Fox v. Thibault, 33 La. Ann. 33; Schmitt v. Drouet, 42 La. Ann. 1064, 8 South. 396.

[135] Fogarty v. Finley, 10 Cal. 239. Compare Henderson v. Smith, 26 W. Va. 829.

[136] Weintz v. Kramer, 44 La. Ann. 35, 10 South. 416. Compare Schmitt v. Drouet, 42 La. Ann. 1064, 8 South. 396.

election officers perform ministerial duties, they do not come within the ordinary exemption from liability for tort which they enjoy while performing judicial duties within jurisdiction and in good faith.[137] If they do perform judicial functions, they would seem to come under the rule of quasi judicial officers, and not to be liable unless the conduct complained of is beyond their jurisdiction, and malicious.[138] A city ordinance providing for a building inspector, and requiring him to inspect buildings in the course of erection, and to "see" that the buildings are erected as provided by the ordinance, imposes on him the duty of requiring the buildings to be properly

[137] People v. Bell, 119 N. Y. 175, 23 N. E. 533, approving Goetcheus v. Matthewson, 61 N. Y. 420; Wilson v. Mayor, etc., 1 Denio, 595, 599; Rochester White Lead Co. v. City of Rochester, 3 N. Y. 463; Gillespie v. Palmer, 20 Wis. 572; People v. Pease, 30 Barb. 588; Goetcheus v. Matthewson, 61 N. Y. 420; Silvey v. Lindsay, 107 N. Y. 55, 13 N. E. 444; Spragins v. Houghton, 3 Ill. 377; Bernier v. Russell, 89 Ill. 60; Hyde v. Brush, 34 Conn. 451. Cf. State v. Gordon, 5 Cal. 235.

[138] As to acts in good faith within jurisdiction, see Carter v. Harrison, 5 Blackf. (Ind.) 138; Friend v. Hamill, 34 Md. 298; State v. Daniels, 44 N. H. 383; Weckerly v. Geyer, 11 Serg. & R. (Pa.) 34; Temple v. Mead, 4 Vt. 535; Fausler v. Parsons, 6 W. Va. 486. As to acts beyond jurisdiction and with malice of the essence of liability, see Tozer v. Child, 7 El. & Bl. 377; Jenkins v. Waldrom, 11 Johns. (N. Y.) 114; Nash v. Whitney, 39 Me. 341; Humphrey v. King, 5 Metc. (Mass.) 162; Starling v. Turner, 2 Lev. 50; Ashby v. White, 2 Ld. Raym. 938 (the question of malice not prominent; but see Harmon v. Tappenden, 1 East, 555, 563); Caulfield v. Bullock, 18 B. Mon. (Ky.) 494; Rail v. Potts, 8 Humph. (Tenn.) 225; Carter v. Harrison, 5 Blackf. (Ind.) 138; Bevard v. Hoffman, 18 Md. 470. And see People v. Bell, 119 N. Y. 175, 23 N. E. 533; People v. State Board of Canvassers, 129 N. Y. 360, 29 N. E. 345; State v. Gordon, 5 Cal. 235; Long v. Long, 57 Iowa, 497, 10 N. W. 875; Goetcheus v. Matthewson, 61 N. Y. 420; Chrisman v. Bruce, 1 Duv. (Ky.) 63; Morgan v. Dudley, 18 B. Mon. 693; Pike v. Megoun, 44 Mo. 491; That malice is not essential: Fausler v. Parsons, 6 W. Va. 486. Kilham v. Ward, 2 Mass. 236; Gardner v. Ward, 2 Mass. 244; Lincoln v. Hapgood, 11 Mass. 350; Capen v. Foster, 12 Pick. (Mass.) 485; Oakes v. Hill, 10 Pick. (Mass.) 333; Keith v. Howard, 24 Pick. (Mass.) 292; Gates v. Neal, 23 Pick. (Mass.) 308; Harris v. Whitcomb, 4 Gray (Mass.) 433; Anderson v. Millikin, 9 Ohio St. 568; Jeffries v. Ankeny, 11 Ohio, 372; Thacker v. Hawk, Id. 376; Monroe v. Collins, 17 Ohio, 665. And see Gillespie v. Palmer, 20 Wis. 544; Tozer v. Child (1857) 7 El. & Bl. 377, 26 L. J. Q. B. 151. But see Sanders v. Getchell, 76 Me. 158; Pierce v. Same, Id. 216; Osgood v. Bradley, 7 Me. 411.

constructed, and renders him liable to persons damaged by his nonperformance of the duty.[139]

Unauthorized Acts.

Whenever a person sued sets up as a defense that he was an officer of the government acting under color of law, he must show that the law authorized the act to be done, and that he acted in good faith.[140] Where his authority fails, his protection is gone. Thus, an agent of the United States in the service of the coast survey, doing injury to land, will be liable in an action of tort unless such entry and injury were reasonably necessary for the coast survey.[141] So where a board of state commissioners, disregarding the requirements of the city charter that all work for the city should be let by contract, undertook to repair a bridge themselves, they were held liable for an injury caused to a person by the negligence of employés engaged in doing the work, although the city was not.[142] That the wrongdoing of an officer is also punishable as a penal offense is no bar to the maintenance of an action by the individual injured.[143] Even where the authority of the officer fails because the law under which he acted, even in good faith, has been declared unconstitutional,[144] he is liable. So, also, where the court whose direction he obeyed had no jurisdiction.[145] A defective writ is no defense to an officer serving it, or an arrest under it.[146] For example, in

[139] Merritt v. McNally, 14 Mont. 228, 36 Pac. 44.

[140] Tweed's Case, 16 Wall. 504.

[141] Orr v. Quimby, 54 N. H. 590.

[142] Robinson v. Rohr, 73 Wis. 436, 40 N. W. 668; Bailey v. Mayor, 3 Hill, 531; Martin v. Mayor, 1 Hill, 545; Donovan v. McAlpin, 85 N. Y. 185; Fitzpatrick v. Slocum, 89 N. Y. 358.

[143] Hayes v. Porter, 22 Me. 371; Raynsford v. Phelps, 43 Mich. 342, 5 N. W. 403.

[144] Mech. Pub. Off. p. 445, § 662, collecting cases. Under such circumstances good faith may mitigate damages. Booth v. Lloyd, 33 Fed. 593. But see Henke v. McCord, 55 Iowa, 378, 7 N. W. 623; Dunn v. Mellon, 147 Pa. St. 11, 23 Atl. 210, collecting cases (page 16, 147 Pa. St., and page 210, 23 Atl.).

[145] Clark v. Woods, 2 Exch. 395. And see Mayor of London v. Cox, L. R. 2 H. L. 239.

[146] Post, p. 426, "False Imprisonment." But a constable may serve a writ regular on its face, but issued on a void judgment. Cornell v. Barnes, 7 Hill (N. Y.) 35; Burd, Lead. Cas. 86. Cf. O'Shaugnessy v. Baxter, 121 Mass. 515; Burd, Lead. Cas. 88. It has been held that the officer, to justify seizure of

replevin against an officer to recover attached property, the officer, to justify, must show his authority by a regularly issued writ of attachment.[147] In all cases where the liability is claimed because of negligence, motive and good faith are immaterial.[148]

44. A public officer not ministerial is not responsible for the tortious conduct of an official subordinate, unless in some way personal fault is attributed to him, as where he has—

(a) Been guilty of negligence; or

(b) Directed or participated in the wrong.

45. Ministerial officers are, in general, liable for wrongs caused by deputies, as distinguished from private servants.

Ministerial Officers.

The exemption of a public nonministerial officer from liability for the acts of his subordinates is an extension and application of the principles governing the exemption of the officers themselves. Where the subordinates perform a governmental function, they are not the representatives of their superior officer, but of the state. The exemption thus rests on the same consideration of public policy which exempts the superior officers themselves.[149] The postmaster general, his deputies, local postmasters, and their assistants perform public functions, and, while their wrongdoing in an official capacity may inflict damage on innocent persons, the exemption from liability of the state extends to them all alike.[150] So, a collector of customs is not

property by writ, must not only show that the writ is regular on its face, but that all preliminary proceedings were regular and sufficient. Palmer v. v. McMaster, 10 Mont. 390, 25 Pac. 1056. This does not, however, apply to the process and officers of the United States court. Mathews v. Densmore, 109 U. S. 216, 3 Sup. Ct. 126.

147 Spaulding v. Overmire (Neb.) 58 N. W. 736.

148 Hoover v. Barkhoof, 44 N. Y. 113; Amy v. Supervisors, 11 Wall. 136. Good faith as an excuse. Squiers v. Neenah, 24 Wis. 588; Hamilton v. Fond du Lac, 40 Wis. 47; Smith v. Gould, 61 Wis. 31, 20 N. W. 369.

149 City of Richmond v. Long, 17 Grat. (Va.) 375.

150 Keenen v. Southworth, 110 Mass. 474; Lane v. Cotton, 1 Ld. Raym. 646; Whitfield v. Lord Le Despencer, Cowp. 754; Dunlop v. Munroe, 7 Cranch,

personally liable for a tort committed by his subordinates in negligently keeping the trunk of an arriving passenger on the pier where it was destroyed by fire, instead of sending it to the public store, where there is no evidence to connect the collector personally with the wrong, or that the subordinates were not competent, or were not properly selected for their respective positions.[151] The same exemption from liability for the negligence of subordinates applies to public trustees and commissioners.[152] Where, however, the officer has been in some way guilty of negligence, as in the employment or retention of unfit or improper servants,[153] or failure in his duty to require of them due qualifications for office, as to take the oath prescribed by law,[154] or to execute a proper bond,[155] or where he carelessly conducts the business of his office,[156] he may be held liable as for his own wrong.[157] He is also liable where he has in

242; Schroyer v. Lynch, 8 Watts (Pa.) 253; Bishop v. Williamson, 11 Me. 495; Bolan v. Williamson, 1 Brev. (S. C.) 181; Wiggins v. Hathaway, 6 Barb. (N. Y.) 632. A postmaster may be liable for not acting judiciously in charging letter postage on a newspaper. Teall v. Felton, 1 N. Y. 537. Contractors for carrying mail are not liable for acts of subordinates. Sawyer v. Corse, 17 Grat. (Va.) 230; Foster v. Metz, 55 Miss. 77. But see, contra, Conwell v. Voorhees, 13 Ohio, 523; Hutchins v. Brackett, 22 N. H. 252. See comments in Thomp. Elec.

[151] Robertson v. Sichel, 127 U. S. 507, 8 Sup. Ct. 1286; Rubens v. Robertson, 38 Fed. 86. Et vide Brissac v. Lawrence, 2 Blatchf. 121, Fed. Cas. No. 1,888. So, a confederate district commissioner in Virginia is not responsible for the torts of his subagents unless he co-operated in or authorized the wrong. Tracy v. Cloyd, 10 W. Va. 19. So, also, in the case of a captain of a ship of war. Nicholson v. Mounsey, 15 East, 384.

[152] Holliday v. St. Leonard, 11 C. B. (N. S.) 192; Duncan v. Findlater, 6 Clark & F. 894; Humphreys v. Mears, 1 Man. & R. 187 (but see ante, p. 126, "Liability of Highway Commissioners"); Hall v. Smith, 2 Bing. 156; Harris v. Baker, 4 Maule & S. 27; Sutton v. Clark, 6 Taunt. 29, 34; Donovan v. McAlpin, 85 N. Y. 185; Walsh v. Trustees, 96 N. Y. 427; County Com'rs v. Duvall, 54 Md. 350.

[153] Wiggins v. Hathaway, 6 Barb. 632.

[154] Bishop v. Williams, 11 Me. 495; Bolan v. Williamson, 1 Brev. (S. C.) 181; Sawyer v. Corse, 17 Grat. (Va.) 230.

[155] Wasson v. Mitchell, 18 Iowa, 153, Burd, Lead. Cas. 93. As to liability for insufficient bond, Hubbard v. Switzer, 47 Iowa, 681.

[156] Dunlop v. Munroe, 7 Cranch, 242; Ford v. Parker, 4 Ohio St. 576.

[157] Ely v. Parsons, 55 Conn. 83, 10 Atl. 499.

any wise participated in the wrong. Where a public officer is sued for the tort of his personal employé, he may be held liable as any other master.[158]

Ministerial Deputies.

While the employé of a ministerial officer may not be a private servant, there is no more reason for exempting such officer for the conduct of his servant than for his own conduct. Accordingly, wherever recovery could be had against the executive for his own act, it can be had against him for the act of his subordinate.[159] Thus, a superintendent of repairs on the canals of the state, though an agent of the state, is personally liable for damages sustained by an individual through the negligence of workmen engaged in making such repairs.[160] A constable is civilly liable for the trespass of his deputy colore officii.[161] So, a deputy sheriff is acting within the scope of his employment in engaging a keeper to aid to keep safely property which he had levied on under warrants of attachment, and the sheriff is liable for his acts.[162]

PRIVATE ACTS.

46. Where there is no excess or abuse of authority, no action lies to recover damages incident to an act authorized—

(a) By statute, or municipal ordinance;

(b) By common law. These may be classified as:

(1) Ordinary rights;

(2) Disciplinary powers;

(3) Rights of necessity;

(4) Right of private defense.

[158] Wilson v. Peverly, 1 Am. Lead. Cas. 785; Ely v. Parsons, 55 Conn. 83, 10 Atl. 499.

[159] Mech. Pub. Off. §§ 797-801; Bassett v. Fish, 75 N. Y. 303; Cook v. Palmer, 6 Barn. & C. 739; Hazzard v. Israel, 1 Bin. (Pa.) 240; Knowlton v. Bartlett, 1 Pick. (Mass.) 270.

[160] Shephard v. Lincoln, 17 Wend. (N. Y.) 249.

[161] Frizzell v. Duffer, 58 Ark. 612, 25 S. W. 1111.

[162] Foster v. Rhinehart (City Ct. Brook.) 11 N. Y. Supp. 629.

SAME—EXERCISE OF STATUTORY RIGHTS.

47. No action lies for damages incident to acts authorized by statute.

No action lies for damage to property where such damage is expressly authorized by statute, or is, physically speaking, the necessary consequence of what is authorized. In other words, for damages resulting from the proper execution of statutory authority, no action lies.[163] Thus, the legislature may grant the right to maintain a local nuisance. Damages which would result from the maintenance of such nuisances are incident to the authorized act, and give no cause of action.[164] The annoyance from noise, smoke, and disturbances necessarily attending the operation of a railroad,[165] and its interference with property,[166] is damnum absque injuria, in

[163] Managers v. Hill, L. R. 6 App. Cas. 193; Gaslight & Coke Co. v. Vestry of St. Mary Abbott's, 15 Q. B. Div. 1, 5; J. S. Keator Lumber Co. v. St. Croix Boom Corp., 72 Wis. 62, 38 N. W. 529; Hamilton v. Railroad Co., 119 U. S. 280, 7 Sup. Ct. 206; Sedalia Gaslight Co. v. Mercer, 48 Mo. App. 644; Beseman v. Pennsylvania R. Co., 50 N. J. Law, 235, 20 Atl. 169; Durand v. Borough of Ansonia, 57 Conn. 70, 17 Atl. 283; Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 11 S. W. 705; Bell v. Norfolk S. R. Co., 101 N. C. 21, 7 S. E. 467; Jones v. St. Louis R. Co., 84 Mo. 151; Slatten v. Des Moines Valley R. Co., 29 Iowa, 148, 154; Richardson v. Vermont Cent. R. Co., 25 Vt. 465; Ellis v. Iowa City, 29 Iowa, 229; Hatch v. Vermont Cent. R. Co., 25 Vt. 49; Dodge v. Essex Co., 3 Metc. (Mass.) 380. Perhaps the best illustration of the absence of liability for damages incident to authorized act is to be found in the contrast of Rylands v. Fletcher, L. R. 3 H. L. 330, with the Zemindar Case, L. R. 1 Indian App. 364. Post, p. 835, "Negligence." When the legislature has sanctioned and authorized the use of a paricular thing, and it is used for the purpose for which it was authorized, and every reasonable caution is used to prevent the injury, the sanction of the legislature carries with it these circumstances or consequences, and if damage result from the use of the thing the party using it is not responsible. 3 Walsh, Students' Q. B. (Students' Ed.) 279.

[164] A charter to operate a fertilizing company is a sufficient license until revoked. Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659; Wood, Nuis. p. 781, c. 23; 4 Wait, Act. & Def. 728; post, p. 788, "Legalized Nuisance," note 455.

[165] Post, p. 790, "Legalized Nuisance"; Atchison & N. R. Co. v. Garside, 10 Kan. 552–567.

[166] Thus, where a legislature has authorized a railway company to lay down

the absence of statutory compensation,[167] whereas if there be no statutory authority there is ordinary liability.[168] And on the other hand, where the legislative authority binds those acting under it to make good specified damage, they are bound to make it good under all circumstances, and without any exceptions, even as to inevitable

a railway alongside of a public highway, it must be presumed to have contemplated the possibility that damages would result to persons using the highway. Such persons must submit to the inconvenience resulting from the working of the railway. King v. Pease, 4 Barn. & Adol. 30. And see Vaughan v. Taff Vale Ry. Co., 5 Hurl. & N. 679; London, B. & S. C. Ry. Co. v. Truman, 11 App. Cas. 45. But see Powell v. Fall, 5 Q. B. Div. 597, and Sadler v. South Staffordshire & B. D. G. T. Co., 23 Q. B. Div. 17. So, if an engine, carefully handled, frightens horses, the charter of a corporation affords legal justification. King v. Pease, 4 Barn. & Adol. 30; Beseman v. Pennsylvania R. Co., 50 N. J. Law, 235, 13 Atl. 164; Thompson v. Railroad Co., 51 N. J. Law, 42, 15 Atl. 833. Cf. Costigan v. Pennsylvania R. Co., 54 N. J. Law, 233, 23 Atl. 810; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 328, 2 Sup. Ct. 719, per Field, J.; Radcliff's Ex'rs v. Mayor, etc., 4 N. Y. 195; Crosby v. Railroad Co., 10 Bush (Ky.) 288; Pennsylvania R. Co. v. Lippincott, 116 Pa. St. 472, 9 Atl. 871.

[167] The leading case on this subject as to the right of abutting owners to recover compensation is Sperb v. Metropolitan El. Ry. Co., 32 N. E. 1050. It was here held, per Gray, J., that an elevated railway company, in acquiring the right to maintain its structure in a street to the injury of the easements of light, air, and access of the abutting owner, is liable for the incidental injuries caused by the future discharge of smoke, cinders, and noxious gases occasioned by the running of trains. 16 N. Y. Supp. 392, reversed; Suarez v. Railway Co., 15 N. Y. Supp. 222, approved. Hammersmith & City Ry. Co. v. Brand, L. R. 4 H. L. 171; Ricket v. Metropolitan Ry. Co., L. R. 2 H. L. 175, per Lord Cranworth. A statute may require insurance against harm, notwithstanding even inevitable accident on the part of the corporation to which it has granted privileges. But courts will, if possible, read into the statute the common-law exceptions of inevitable accident (River Weir Com'rs v. Adamson [1877] 2 App. Cas. 743), however, on the general principle that a statute is not to be construed as extinguishing any private right unless it appears by expressed words or by plain implication that it was intended to do so (Barrowington's Case, 8 Coke, 136b, 138a; Western Counties Ry. Co. v. Windsor & A. R. Co., 7 App. Cas. 178). Generally, as to compensation, see Gainesville, H. & W. Ry. Co., v. Hall, 78 Tex. 169, 14 S. W. 259; Moss v. Manhattan Ry. Co., 58 Hun, 611, 13 N. Y. Supp. 46; Omaha & N. P. R. Co. v. Janecek, 30 Neb. 276, 46 N. W. 478; Fox v. Baltimore & O. R. Co., 34 W. Va. 466, 12 S. E. 757.

[168] Jones v. Railway Co., L. R. 3 Q. B. 733.

accident, just as if they had entered into an express contract of insurance with the person suffering the damage.[169] Municipal corporations are not liable to landowners for consequential damages arising out of work done in pursuance of legislative authority, unless civil responsibility is created by the statute itself.[170] They are not ordinarily held responsible for damages resulting from establishing and changing the grade of streets, if reasonable care is exercised in performing the work.[171] Municipal license may be a defense for damage in conduct otherwise actionable. Abutting owners using streets or roads in accordance with municipal regulations are not, in the absence of negligence, liable for injury resulting from such use.[172] The necessary physical consequences of public authority may justify a trespass. Therefore, where a telephone company was required to

[169] Rothes v. Waterworks Com'rs (1882) 7 App. Cas. 694, 1 Eng. Ruling Cas. 351. Cf. Dodge v. Commissioners, 3 Metc. (Mass.) 380; Brown v. Railroad Co., 5 Gray (Mass.) 35; Sabin v. Railroad Co., 25 Vt. 363; Whitehouse v. Railroad Co., 52 Me. 208. And see post, 236, "Independent Contractors."

[170] Northern Transp. Co. v. City of Chicago, 11 Chi. Leg. News, 255; 2 Thomp. Neg. 692. Et vide Id. p. 743, § 9, discussing liability of municipal corporation for public improvement. Under Const. 1890, art. 3, § 17, declaring that private property shall not be taken "or damaged" for public use, except on due compensation, a city is liable for damages to abutting property for materially lowering the street grade, especially after valuable improvements had been put on the lot according to the prior established grade. City of Vicksburg v. Herman (Miss.) 16 South. 434.

[171] Radcliff's Ex'rs v. Brooklyn, 4 N. Y. 195; Cumberland v. Willison, 50 Md. 138; Henry v. Pittsburgh & A. B. Co., 8 Watts & S. 85; Governor of British Cast-Plate Manufacturers v. Meredith, 4 Term R. 794; Sutton v. Clarke, 6 Taunt. 29. Et vide Dill. Mun. Corp. § 990; 2 Thomp. Neg. p. 747, § 10. Cf. Akron v. Chamberlain Co., 34 Ohio St. 328. See ante, p. 89, "Damnum Absque Injuria," note 348. If defendant, assuming to act for a city, change the grade of a street, to the injury of plaintiff, and the city ratifies what he had done, even after suit was brought, the act of defendant was justified. Wolfe v. Pearson, 114 N. C. 621, 19 S. E. 267. But such exemption does not seem to apply to a railroad company authorized to change the grade of a highway. Pennsylvania R. Co. v. Stanley, 10 Ind. App. 421, 37 N. E. 288, and 38 N. E. 421.

[172] Denby v. Willer, 59 Wis. 240, 18 N. W. 169. The license may be implied. Korte v. St. Paul Trust Co., 54 Minn. 530, 56 N. W. 246. So where the damage is consequent upon the doings of cattle allowed to run at large by ordinance. Fritz v. Railroad Co., 22 Minn. 404. And see Alger v. Railroad Co., 10 Iowa, 268; Galpin v. Railroad Co., 19 Wis. 637.

move its poles, and in doing so trimmed trees, no liability attached.[173]

Abuse or Excess of Authority.

"The rightful and bona fide exercise of a lawful power or authority cannot afford a basis for an action. If the power or right is exercised carelessly, negligently, improperly, and maybe maliciously, the party so exercising it may be liable to respond in damages for any injury, direct or consequential, resulting to another from exercising the right or power; but such liability can only arise upon and for the manner of doing the act, and not for the act itself." [174] Where, however, the injury complained of is not properly the necessary result of the authorized act, the exemption does not apply.[175] Thus, ordinarily a railroad company cannot monopolize a street, in derogation of the public and private use to which it should be applied.[176] Un-

[173] Southern Bell Tel. & Tel. Co. v. Constantine, 9 C. C. A. 359, 61 Fed. 61. But see Memphis Bell Tel. Co. v. Hunt, 16 Lea (Tenn.) 456; Tissot v. Great Southern Tel. & Tel. Co., 39 La. Ann. 906, 3 South. 261. On the same principle, no action lies for damages incident to the use of property authorized by the consent of owners, Updegrove v. Railroad Co., 132 Pa. St. 540, 19 Atl. 283; nor for the proper exercise of a franchise, even though actual harm result, Keiser v. Gas Co., 143 Pa. St. 276, 22 Atl. 759; Pennsylvania R. Co. v. Lippincott, 116 Pa. St. 472, 9 Atl. 871; Jutte v. Keystone Bridge Co., 146 Pa. St. 400, 23 Atl. 235; Cleveland & P. R. Co. v. Speer, 56 Pa. St. 325.

[174] Slatten v. Des Moines R. Co., 29 Iowa, 148; Vaughan v. Taff Vale R. Co., 5 Hurl. & N. 679. City grading not liable for consequential damages, Radcliffe's Ex'rs v. Mayor, etc., 4 N. Y. 195. But a railroad's charter does not confer power to so excavate its own land as to cause an adjoining landowner's soil to slide into the excavation, Richardson v. Railway Co., 25 Vt. 465; Baltimore & P. Ry. Co. v. Reaney, 42 Md. 117; nor blasting, Georgetown, B. & L. Ry. Co. v. Doyle, 9 Colo. 549, 13 Pac. 699. And see Carman v. Railroad Co., 4 Ohio, 399; Stone v. Cheshire Co., 19 N. H. 427; Sabin v. Railway Co., 25 Vt. 363. But see Dodge v. Commissioners, 3 Metc. (Mass.) 380; Brown v. Railroad Co., 5 Gray (Mass.) 35; Whitehouse v. Railroad Co., 52 Me. 208. In building a bridge, cf. Rhea v. Railroad Co., 50 Fed. 16, with Memphis & O. R. Co. v. Hicks, 5 Sneed, 427.

[175] Canal Co. v. Lee, 22 N. J. Law, 243. Cf. Pumpelly v. Green Bay Co., 13 Wall. 166, 177, 178; Northern Transp. Co. v. Chicago, 99 U. S. 635–642; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317–331, 2 Sup. Ct. 719.

[176] Janesville v. Milwaukee & M. R. Co., 7 Wis. 410; Pennsylvania R. Co.

der an act of parliament, a railway company purchased a piece of land adjoining one of its stations, and used it for a cattle dock. It was held, however, that the act gave the company no authority to create a nuisance to the occupiers of houses near the cattle dock by herding cattle therein.[177] Statutory authority to do what would otherwise be an actionable wrong does not exempt from the requirement of the exercise of care, judgment, and caution.[178] When a railroad company can construct its work without injury to private rights, it is, in general, bound to do so.[179] And, generally, negligence and excess in the exercise of statutory authority attach liability.[180] Excavations made by authority must be properly guarded, and every means adopted for the protection of the public. Failure

v. Angel, 41 N. J. Eq. 316, 7 Atl. 432; Pennsylvania R. Co. v. Thompson, 45 N. J. Eq. 870, 19 Atl. 622; Baltimore & P. R. Co. v. First Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719; Burd, Lead. Cas. 97; post, p. 788, "Legalized Nuisance."

[177] Truman v. London, B. & S. C. R. Co., 29 Ch. Div. 89. Et vide Rapier v. London Tramways Co. (1893) 2 Ch. Div. 588. Contractor's authority to repave a street may not stop the running of cars while the work is being done. Milwaukee St. Ry. Co. v. Adlam, 85 Wis. 142, 55 N. W. 181.

[178] London & N. W. R. Co. v. Bradley, 3 Macn. & G. 341.

[179] Biscoe v. Great Eastern R. Co., L. R. 16 Eq. 636. That liability for burning property adjacent to right of way depends on negligence, see Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co., 70 Miss. 119, 12 South. 156, and post, p. 840, "Negligence."

[180] Thus, the city of Boston, authorized by statute to improve Stony brook, by its delay in providing a sufficient outlet into the sea to carry off the water, which, by its work upon the upper part of the stream, had been increased in volume beyond its natural flow, to plaintiff's damage, was held responsible because of the unskillful and negligent manner in which the work was done. Boston Belting Co. v. Boston, 149 Mass. 44, 20 N. E. 320. City of Bloomington v. Chicago & A. R. Co., 134 Ill. 451, 26 N. E. 366; Rockwood v. Wilson, 11 Cush. 221; Burcky v. Town of Lake, 30 Ill. App. 23; Georgetown, B. & L. Ry. Co. v. Doyle, 9 Colo. 549, 13 Pac. 699; Brewer v. Boston, etc., R. Co., 113 Mass. 52; Gudger v. Western N. C. R. Co., 87 N. C. 325; Hazen v. Boston & M. R. Co., 2 Gray, 574; Memphis & O. R. Co. v. Hicks, 5 Sneed (Tenn.) 427; Lake Shore & M. S. R. Co. v. Hutchins, 37 Ohio, 282; Cairo & St. L. R. Co. v. Woolsey, 85 Ill. 370; Shaw v. New York & N. E. R. Co., 150 Mass. 182, 22 N. E. 884; Thompson v. Pennsylvania R. Co., 51 N. J. Law, 42, 15 Atl. 833; Krug v. St. Mary's Borough, 152 Pa. St. 30, 25 Atl. 161; Martin v. Chicago, S. F. & C. Ry. Co., 47 Mo. App. 452; Leavenworth, N. & S. Ry. Co. v. Curtan, 51 Kan. 432, 33 Pac. 297; McNulta v. Ralston, 5 Ohio

so to do attaches liability for consequent damages. Thus, if one has been authorized to excavate in a street, he must provide, as far as human foresight can, against consequent perils.[181] And although a telephone company may be authorized to erect its poles in a street, if it erects them so as to dangerously obstruct the street, the license is no defense.[182] A statute giving a fire department "right of way while going to a fire" does not relieve it from liability for negligence.[183]

SAME—EXERCISE OF ORDINARY RIGHTS.

48. The exercise of ordinary rights for a lawful purpose and in a lawful manner is not actionable, even if it causes damages.[184]

Cir. Ct. R. 330; Griffin v. Shreveport & A. R. Co., 41 La. Ann. 808, 6 South. 624; Pennsylvania S. V. R. Co. v. Walsh, 124 Pa. St. 544, 17 Atl. 186; City of Durango v. Luttrell, 18 Colo. 123, 31 Pac. 853.

[181] Drew v. New River Co., 6 Car. & P. 754; Irvine v. Wood, 51 N. Y. 224; Irvin v. Fowler, 5 Rob. (N. Y.) 482; Chicago v. Robbins, 2 Black (U. S.) 418; Jones v. Bird, 5 Barn. & Ald. 837; Whitehouse v. Fellowes, 10 C. B. (N. S.) 765; Brownlow v. Metropolitan Board of Works, 13 C. B. (N. S.) 768; Cushing v. Adams, 18 Pick. (Mass.) 110; Homan v. Stanley, 66 Pa. St. 464; Hayes v. Gallagher, 72 Pa. St. 136; McCamus v. Citizens' Gaslight Co., 40 Barb. (N. Y.) 380.

[182] Wolfe v. Erie Tel. & Tel. Co., 33 Fed. 320; Sheffield v. Central Union Tel. Co., 36 Fed. 164 (where plaintiff's buggy collided with pole). And generally, as to liability of electric companies, authorized to erect poles and suspend wires, for negligence, see Pennsylvania Tel. Co. v. Varnau (Pa. Sup.) 15 Atl. 624; W. U. Tel. Co. v. Eyser, 2 Colo. 141; Thomas v. W. U. Tel. Co., 100 Mass. 156; Wilson v. Great South. Tel. & Tel. Co., 41 La. Ann. 1041, 6 South. 781; Dickey v. Maine Tel. Co., 46 Me. 483. Municipal franchise to build and operate a street railway in the streets of a city does not exempt a company from liability for injury caused by its negligence in the management of its property, or in the character of its duty proper. Local Rapid Transit Co. v. Nichols (Neb.) 55 N. W. 872. Et vide McKillop v. Duluth St. Ry. Co., 53 Minn. 532, 55 N. W. 739. It is no defense to an action against a street-railway company for injuries caused by an electric pole in the street that the pole was placed in accordance with the requirements of defendant's charter and the city ordinance. Cleveland v. Bangor St. Ry., 86 Me. 232, 29 Atl. 1005.

[183] Newcomb v. Boston Protective Department, 146 Mass. 596, 16 N. E. 555.

[184] Pol. Torts, c. 4, subd. 9.

If a man be injured by the exercise of another's ordinary rights, he has no action. This immunity in the exercise of common rights is a restatement, in a somewhat different form, of the doctrine embodied in the "damnum sine injuria." The right to transact lawful business is a universal one. Damages consequent upon competition are not actionable. "To say that a man is to trade freely, but that he is to stop short of any act which is calculated to harm other tradesmen, and which is designed to attract their business to his own shop, would be strange and impossible counsel. To draw a line between fair and unfair competition, between what is reasonable and what is unreasonable, passes the power of the courts. Competition exists where two or more persons seek to possess or to enjoy the same thing. It follows that the success of one must be the failure of the other, and no principle of law enables us to interfere with or to moderate that success or that failure, so long as it is due to mere competition. There is no restriction imposed by law on competition by one trader with another with the sole object of benefiting himself." "To attempt to limit * * * competition * * * would probably be as hopeless an endeavor as the experiment of King Canute." [185]

The right to use a personal or local name is a common right. To acquire property in a name sufficient to make interference with it a tort,—that is to say, to acquire a right to the exclusive use of a name, device, or symbol, as a trade-mark,—it must appear that it was adopted for the purpose of identifying the origin or ownership of that to which it is attached, or that such trade-mark points distinctively to the origin, manufacture, or ownership of the article on which it is stamped. A person cannot acquire a right to the exclusive use of a name, device, or symbol, as a trade-mark unless it is made to appear that it was adopted for the purpose of identify-

[185] Bowen, L. J., in Mogul Steamship Co. v. McGregor, 23 Q. B. Div. 598, affirming [1892] App. Cas. 25. And see 22 Hen. VI. p. 14, pl. 23, A. D. 1443; Rogers v. Rajendro Dutt, 8 Moore, Ind. App. 134; Com. v. Hunt, 4 Metc. (Mass.) 111; Payne v. Railroad Co., 13 Lea (Tenn.) 507; South Royalton Bank v. Suffolk Bank, 27 Vt. 505; Delz v. Winfree, 80 Tex. 402–405, 16 S. W. 111. The setting up of a new inn where there is no necessity for it, as where there are already a sufficient number, renders the inn so set up liable to indictment as a public nuisance. 1 Russ. Crimes; 3 Bac. Abr. tit. "Inns."

ing the origin or ownership of the article to which it is attached, or that such a trade-mark points distinctly to the origin, manufacture, or ownership of the article on which it is stamped, and is designed to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. Accordingly, a person cannot acquire a right to the exclusive use of the word "Columbia," as a trade-mark,[186] nor the words "Liver Medicine."[187] On the other hand, however, the memory of a person who voluntarily places himself before the public, either as a public officer, or by becoming a candidate for office, or as an artist or literary man, does not necessarily become public property. It is undoubtedly true that by occupying a public position, or by making an appeal to the public, a person surrenders such part of his personality or privacy as pertains to and affects the position which he fills or seeks to occupy, but no further. If, therefore, an association announces the project of placing a large statue of a private person, after her death, to be designated as the "Typical Philanthropist," on public exhibition, the relatives of such person may restrain such invasion of privacy, although they suffer no pecuniary damages.[188]

Use of Property.

"By becoming a member of civilized society, I am compelled to give up many of my natural rights, but I receive more than a compensation from the surrender of every other man of the same right, and the security, advantage, and protection which the law gives me. So, too, the general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state."[189] A blacksmith may operate his

[186] Columbia Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, collecting United States cases at page 463, 150 U. S., and page 151, 14 Sup. Ct., and commenting on others.

[187] C. F. Simmons Medicine Co. v. Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165. Et vide Fish Bros. Wagon Co. v. La Belle Wagon Works, 82 Wis. 546, 52 N. W. 595; Meneely v. Meneely, 62 N. Y. 427; Rogers v. Taintor, 97 Mass. 291; Candee v. Deere, 54 Ill. 439.

[188] Schuyler v. Curtis, 64 Hun, 594, 19 N. Y. Supp. 264. Cf. De May v. Roberts, 46 Mich. 160, 9 N. W. 146. And see 10 Law T. 227. Pollard v. Photographic Co., 40 Ch. Div. 345; 7 Harv. Law Rev. 492; post, p. 356.

[189] Earl, J., in Losee v. Buchanan, 51 N. Y. 476, 484.

forge,[190] and a merchant his store,[191] although his neighbor thereby suffers annoyance. A man may rid his land of surface water, and a neighbor may protect his land against it, in course of making reasonable repairs to or use of his own premises, without liability; but, beyond these limits, dealing with surface water will attach liability.[192]

It is convenient to postpone the consideration of just how far a man may use his own without making him liable in tort.

SAME—DISCIPLINARY POWERS.

49. The law recognizes disciplinary powers in private persons and associations, and damages consequent upon their reasonable exercise cannot be recovered.

Persons exercising quasi judicial powers, as the officers of universities, colleges, clubs, committees, beneficial associations, corporations, and the like, are not liable for removing a man from office or membership, or otherwise dealing with him to his disadvantage, providing (1) they act in good faith; (2) give him fair and sufficient notice of his offense; (3) give him an opportunity of defending himself; (4) observe rules, if any, laid down by the statute, or the particular body to which they belong.[193] If these conditions are satisfied, the court will not interfere, even if it thinks the decision wrong.[194] The statute may give absolute discretionary power.[195] An action for damages, however, may be sustained for illegal expulsion. The fact that after expulsion the person was discharged from the service in which he was employed will entitle him to damages.[196]

[190] Doellner v Tynan, 38 How. Prac. (N. S.) 182; Smith v. Ingersoll-Sergeant Rock Drill Co., 7 Misc. Rep. 374, 27 N. Y. Supp. 907, collecting cases.

[191] McGuire v. Bloomingdale, 8 Misc. Rep. 478, 29 N. Y. Supp. 580.

[192] Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406, 56 N. W. 946; Anheuser-Busch Brewing Ass'n v. Peterson, 41 Neb. 897, 60 N. W. 373.

[193] Fraz. Torts (2d Ed.) 13; Loubat v. Leroy, 65 How. Prac. (N. Y.) 138; Wachtel v. Noah Widows & O. B. Soc., 84 N. Y. 28; Com. v. St. Patrick's Ben. Soc., 2 Bin. (Pa.) 441.

[194] Dawkins v. Antrobus, 17 Ch. Div. 615.

[195] Hayman v. Governors of Rugby School, L. R. 18 Eq. 28.

[196] People v. Musical Mutual Protective Union, 118 N. Y. 101, 23 N. E. 129;

Private persons sometimes possess disciplinary powers, for the reasonable exercise of which they are not liable in tort. Thus, the master of a merchant ship may use summary force to preserve order and discipline.[197] Parents, guardians, teachers, and, generally, persons in loco parentis, may justify the enforcement of discipline, moderate correction, detention, and the like, by plea of authority.[198]

SAME—RIGHTS OF NECESSITY.

50. There is no liability for acts or omissions as to which a person has no option. "The rights of necessity are a part of the law."[199]

Necessity may justify the destruction of property for the general good. "For the commonwealth, a man shall suffer damage; as, for saving a city or town, a house shall be plucked down if the next one be on fire; and a thing for the commonwealth any man may do without being liable to an action." [200] A fortiori, peril to human life may

Ludowiski v. Polish Roman C. St. S. K. Ben. Soc., 29 Mo. App. 337; Inness v. Wylie, 1 Car. & K. 257. But see Wood v. Wodd, L. R. 9 Exch. 190; Ashby v. White, 2 Ld. Raym. 938. Compare Hardin v. Baptist Church, 51 Mich. 137, 16 N. W. 311. As to expulsion of members of corporations and societies, see 24 Am. Law Rev. 537. As to expulsion from clubs, see Com. v. Union League of Philadelphia, 135 Pa. St. 301, 19 Atl. 1030, distinguishing Evans v. Philadelphia Club, 50 Pa. St. 107.

[197] Per Lord Stowell in The Agincourt, 1 Hagg. Adm. 271–274.

[198] Where a student of a school is guilty of contumacious conduct, it is within the discretion of the faculty to refuse him his degree, and the fact that the objectionable conduct occurred between the final examination and the day of graduation is immaterial. Notwithstanding the right to refuse a contumacious student his degree, he is entitled to a certificate of attendance, and that he passed a satisfactory examination. People v. New York Law School (Sup.) 22 N. Y. Supp. 663.

[199] Respublica v. Sparhawk, 1 Dall. 357–362; Mouse's Case, 12 Coke, 63; Burton v. McClellan, 3 Ill. 434; American Print Works v. Lawrence, 23 N. J. Law, 604.

[200] Case of Prerogative, 12 Coke, 13; Maleverer v. Spinke, Dyer, 36b; McDonald v. City of Red Wing, 13 Minn. 38 (Gil. 25); Bowditch v. Boston, 101 U. S. 16; Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 277; Hyde Park v. Gay, 120 Mass. 590; Surocco v. Geary, 3 Cal. 70; American Print Works v. Lawrence, 23 N. J. Law, 590; Beach v. Trudgain, 2 Grat. (Va.) 219; Hale v. Lawrence, 23 N. J. Law, 590. And see Arundel

constitute such necessity as would excuse what would be otherwise wrongdoing. "If," said Lord Blackburn,[201] "a house in which a person ill of an infectious order lay bedridden took fire, and it was necessary to choose whether the sick person was to be left to perish in the flames, or to be carried out through the crowd, at the risk, or even at the certainty, of infecting some of them, no one could suppose that those who carried out the sick person could be punishable; and probably a much less degree of necessity might form an excuse." Similarly, in cases of negligence, one who imperils his personal safety in the discharge of a duty like saving human life is not prevented, because of such conduct as constituting contributory negligence, from recovering damages done to him.[202] On the same principle, where a highway becomes obstructed and impassable from temporary causes, as a snowdrift, a traveler has a right to go, extra viam, upon adjoining lands, without being guilty of trespass.[203] The authority of the master of a ship to use force for the preservation of discipline has also necessity for a basis.[204]

v. McCulloch, 10 Mass. 70; Campbell v. Race, 7 Cush. (Mass.) 408; Mouse's Case, 12 Coke, 63; Respublica v. Sparhawk, 1 Dall. 357; Taylor v. Plymouth, 8 Metc. (Mass.) 462. As to statutory changes, see Fisher v. Boston, 104 Mass. 87.

[201] Metropolitan Asylum Dist. v. Hill, L. R. 6 App. Cas. 193–205.

[202] Eckert v. Long Island R. Co., 43 N. Y. 502; Pennsylvania Co. v. Roney, 89 Ind. 453; Clark v. Famous Shoe & Clothing Co., 16 Mo. App. 463.

[203] Donahoe v. Wabash, St. L. & P. Ry. Co., 83 Mo. 560; Bullard v. Harrison, 4 Maule & S. 387–393; Campbell v. Race, 7 Cush. (Mass.) 408; Burd. Lead. Cas. 136. As to ways of necessity, see Bish. Noncont. Law, 872; Vossen v. Dautel, 116 Mo. 379, 22 S. W. 734; Camp v. Whitman (N. J. Ch.) 26 Atl. 917; Lankins v. Terwilliger, 22 Or. 97, 29 Pac. 268; post, p. 678, "Justification of Trespass."

[204] Pol. Torts, 108; Bangs v. Little, 1 Ware, 506, Fed. Cas. No. 839; U. S. v. Alden, 1 Spr. 95, Fed. Cas. No. 14,427; Cushman v. Ryan, 1 Story, 91, Fed. Cas. No. 3,515; Turner's Case, 1 Ware, 83, Fed. Cas. No. 14,248; Wilson v. The Mary, Gilp. 31, Fed. Cas. No. 17,823; Michaelson v. Denison, 3 Day (Conn.) 294; Brown v. Howard, 14 Johns. (N. Y.) 119; Sampson v. Smith, 15 Mass. 365; Flemming v. Ball, 1 Bay (S. C.) 3; Mathews v. Terry, 10 Conn. 455; State v. Board of Education, 63 Wis. 234, 23 N. W. 102; Allen v. Hallet, 1 Abb. Adm. 573; Payne v. Allen, 1 Spr. 304, Fed. Cas. No. 10,855; Schelter v. York, Crabbe, 449, Fed. Cas. No. 12,446; Jay v. Almy, 1 Woodb. & M. 262, Fed. Cas. No. 7,236; Butler v. McLellan, 1 Ware, 219, Fed. Cas. No. 2,242; Buddington v. Smith, 13 Conn. 334.

SAME—RIGHT OF PRIVATE DEFENSE.

51. The law recognizes the right to repel unlawful or dangerous force by force, in the defense of person and property or possession, whenever there is a real or an apparent necessity for the defense, honestly believed to be real; but the acts of defense must be confined to defense, and, in themselves, reasonable, careful, and not excessive.

No action lies for damages done in consequence of the exercise of the instinct common to all animate things, to protect themselves and their own, within the limits of such private defense as is determined by law. If a person, in lawful self-defense, fires a pistol at an assailant, and, missing him, wounds an innocent bystander, he is not liable for the injury, if guilty of no negligence.[205]

In Laidlow v. Sage,[206] the defendant placed the plaintiff between himself and impending danger from a bomb, and the plaintiff was injured. The defendant's liability, it was held, depended on whether the act of using the plaintiff as a shield was intentional, and did not depend entirely on whether such act was voluntary, since a voluntary act may be instinctive, and therefore not intentional. In the same way, the owner has the right to do anything that is apparently and reasonably necessary to be done for the protection of his property.[207] Thus, the owner of a stack of hay may burn grass around it, for the protection of his property, without liability for damages consequent thereon.[208] Indeed, it may be a duty to fight fire with

[205] Morris v. Platt, 32 Conn. 75; Paxton v. Boyer, 67 Ill. 132; Scott v. Shepherd, 2 W. Bl. 892; post, 435, "Assault and Battery." As to damage caused in trying to avoid missile, see Vallo v. United States Exp. Co., 147 Pa. St. 404, 23 Atl. 594.

[206] Laidlaw v. Sage, 80 Hun, 550, 30 N. Y. Supp. 496; 8 Harv. Law Rev. 225, and 7 Harv. Law Rev. 315.

[207] Walker v. Wetherbee, 65 N. H. 656, 23 Atl. 621, Doe, J., collecting cases at page 661, 65 N. H., and page 622, 23 Atl.

[208] Brown v. Brooks (Wis.) 55 N. W. 395, 21 Lawy. Rep. Ann. 255. Et vide note on "Fires," Id. No liability for setting fire to land of other, if due diligence is used in setting out a fire. Hanlon v. Ingram, 3 Iowa, 80. See cases

fire.[209] So, where the law provided that no fur-bearing animals should be killed within certain periods, and within such period a person killed a mink which was about to destroy his geese, it was held that such law did not interfere with the constitutional right to defend property, and could not prevent the killing of wild animals, where there was imminent danger that they would destroy private property.[210]

If there be actual necessity for exercise of right of defense, there is full justification for its exercise to the extremity the circumstances may demand. Thus, where a dog was killed in the act of taking fish which had been hung up to dry, it was said: "And his property, whether fish or meat, in his cellar, in his kitchen, or in his yard, it was lawful for him to preserve against any man's dog; and, if he could not otherwise protect it, he might kill the dog, when caught on his premises, in the act of destruction. Whether he could not preserve his property and the customary use of it without destroying the animal committing the depredation, when found in the act, ought to have been submitted to the jury by the court, as a question within its province to decide." [211] The mere fact that an animal is committing a trespass does not justify killing or wantonly abusing it.[212] But, to constitute the defense, the belief or apprehension of danger must be founded on sufficient circumstances to authorize the

pro and con on page 82. As to absolute liability under statute, see Conn v. May, 36 Iowa, 241.

[209] McKenna v. Baessler, 86 Iowa, 197, 53 N. W. 103.

[210] Aldrich v Wright, 53 N. H. 398; Taylor v. Newman, 4 Doct. & Stud. 89. And see Parrott v. Hartsfield, Id. 110; Hinckley v. Emerson, 4 Cow. (N. Y.) 351; Boecher v. Lutz, 13 Daly (N. Y.) 38; Dunning v. Bird, 24 Ill. App. 270; Lipe v. Blackwelder, 25 Ill. App. 119.

[211] King v. Kline, 6 Pa. St. 318.

[212] Johnson v. Patterson, 14 Conn. 1; Ford v. Taggart, 4 Tex. 492; Tyner v. Cory, 5 Ind. 216; Hobson v. Perry, 1 Hill (S. C.) 277; Clark v. Keliher, 107 Mass. 406; Livermore v. Batchelder, 141 Mass. 179, 5 N. E. 275; Sosat v. State, 2 Ind. App. 586, 28 N. E. 1017. Where one person kills the dog of another, which has been scared, and runs upon his premises, but has done no injury, or was attempting to do none, but simply because the party killing it suspects that the dog had previously interrupted his hens' nests, such an act is a trespass, for which the perpetrator is liable. Brent v. Kimball, 60 Ill. 211–215. And see Hubbard v. Preston, 90 Mich. 221, 51 N. W. 209; Tenhopen v. Walker, 96 Mich. 236, 55 N. W. 657.

opinion that the peril existed, and may at the time result in harm,[213] and the standard of apprehension is that of men of ordinary firmness and reflection.[214]

The justification of damages consequent upon the exercise of the right of self-defense depends upon the consideration whether the right was exercised in a reasonable manner, in view of all the circumstances of the case.[215] It is impossible to establish an ironclad rule of law that will meet the exigencies of any case that may possibly arise. Self-defense does not include the active assertion of a disputed right against an attempt to obstruct its exercise.[216] Excessive defense of the person may become an assault and battery.[217] So, in defense of property, as in the case of the defense of domestic animals from the attacks of other animals, the relative value of the animals may be proper for the jury to consider, in arriving at a conclusion whether the defense was a reasonable one under the circumstances.[218] And where a dog has been once driven away from a henhouse, and was again running towards it, the plaintiff was not justified in killing the dog.[219] So, negligently starting or keeping a

[213] Rippy v. State, 2 Head (Tenn.) 217; State v. Bryson, 2 Winst. Law (N. C.) 86.

[214] Woolf v. Chalker, 31 Conn. 121; Credit v. Brown, 10 Johns. (N. Y.) 365; Putnam v. Payne, 13 Johns. (N. Y.) 311; Maxwell v. Palmerton, 21 Wend. (N. Y.) 407. As to statutory alteration of the right, see Spaight v. McGovern, 16 R. I. 658, 19 Atl. 246.

[215] Where cattle are trespassing upon the premises of a party, he, and also the members of his family, have the undoubted right to use all reasonable means and sufficient force to remove them; and there is nothing illegal in driving such cattle from the premises with dogs, if no unnecessary injury is done to the stock. Spray v. Ammerman, 66 Ill. 309.

[216] Pol. Torts, c. 4, subd. 12; Id. (Webb's Ed.), and cases cited in note p. 203.

[217] Post, 442, "Assault and Battery."

[218] Cooley, Torts, 346; Anderson v. Smith, 7 Ill. App. 354; Simmonds v. Holmes, 61 Conn. 1, 23 Atl. 702; Parrott v. Hartsfield, 4 Dev. & B. (N. C.) 110; Hinckley v. Emerson, 4 Cow. (N. Y.) 351; Boecher v. Lutz, 13 Daly (N. Y.) 28; Dunning v. Bird, 24 Ill. App. 270; Lipe v. Blackwelder, 25 Ill. App. 123.

[219] Livermore v. Batchelder, 141 Mass. 179, 5 N. E. 275; Burd, Lead. Cas. 141. Cf. Marshall v. Blackshire, 44 Iowa, 475; Hinckley v. Emerson, 4 Cow. 351. One is not justified in killing a valuable dog, without notice to the owner, merely because the dog barks around his house at night, or chances

back fire to defend against a fire already existing will attach liability.[220]

VARIATIONS BASED ON STATUS.

52. Under this head will be considered the liability of—

(a) Natural persons, including

(1) Insane persons;

(2) Infants;

(3) Drunkards;

(4) Convicts;

(5) Alien enemies.

(b) Artificial persons, including

(1) Private corporations;

(2) Municipal and quasi municipal corporations;

(3) Corporations not municipal engaged in public works.

SAME—INSANE PERSONS.

53. Generally, an insane person is liable for his torts, to the extent of compensation for the actual loss sustained by the injured party; but when the wrong involves personal capacity, and such capacity is impossible, because of mental derangement, there can be no recovery.[222]

on one occasion to leave some tracks on a freshly-painted porch, or to have been detected in the henhouse, but not, however, doing any mischief. Bowers v. Horen, 93 Mich. 420, 53 N. W. 535; Cooley, Torts, § 347, note 4, collecting the various authorities and statutes as to injury by dogs. Bish. Noncont. Law contains a chapter (53) "Specially of Dogs." In the absence of the statute, killing a trespassing animal has often been held unjustifiable. Johnson v. Patterson, 14 Conn. 1; Ford v. Taggart, 4 Tex. 402; Tyner v. Cory, 5 Ind. 216; Hobson v. Perry, 1 Hill (S. C.) 277.

[220] Back fire negligently set attaches liability for such property as would not have been destroyed by original fire. McKenna v. Baessler, 86 Iowa, 197, 53 N. W. 103.

[222] As to nature of various kinds of mental derangement, see Hiett v. Shull, 36 W. Va. 563, 15 S. E. 146; Snyder v. Snyder, 142 Ill. 60, 31 N. E. 303; Brower v. Fisher, 4 Johns. Ch. (N. Y.) 441.

Absolute Liability.

The view of the law which held that men acted at their peril, and that liability for tortious conduct was absolute, logically recognized that so long as a duty was violated, and harm ensued, it was immaterial whether the damage was due to an accident, or to a person incapable of reason. Thus, it was said in Weaver v. Ward:[223] "If a lunatic hurt a man, he shall be answerable in trespass." It was an easy step from this to the general position that an insane person is universally liable for torts. The reasoning is further justified by the suggestion that such a ruling accords with public policy, recognized and enforced by the law to promote the general welfare, and to avoid escape from liability by use of specious pretense of mental incompetency,[224] and to apply the rule that, where one of two innocent persons must bear a loss, he must bear it whose act caused it. It is manifest that this reasoning ignores any analysis into the basis of liability in tort.[225]

Therefore destruction of property held by a lunatic as bailee, though the bailor knew of his mental condition at the time of delivery of goods, makes the demented person responsible; as where a lunatic killed an ox.[226] An insane person has been held liable in tort for causing death to another by an act which would have been felonious, except for the insanity.[227] An action of false imprisonment has been sustained against a lunatic, who, in his capacity as

[223] Hob. 134. Further, as to negligent use of infant's property by agent, see Harding v. Larned, 4 Allen (Mass.) 426; Harding v. Weld, 128 Mass. 587; Gross, J., in Leame v. Bray, 3 East, 593, 600. And see Holmes, Com. Law, 81, 82; Bevin, Neg. 15; 1 Hale, P. C. 15; 1 Hawk. P. C. c. 1, § 5; Bac. Abr. tit. "Idiots," etc., D, E.

[224] Cooley, Torts, § 100.

[225] See Busw. Insan. § 355; Cooley, Torts, pp. 98, 100; Reeve, Dom. Rel. p. 386, cited by Earl, J., in Williams v. Hays, 143 N. Y. 442, 38 N. E. 449.

[226] Morse v. Crawford, 17 Vt. 499. Et vide Cross v. Andrews, 2 Cro. Eliz. 622, case 13; Jewell v. Colby (N. H.) 24 Atl. 902; In re Heller, 3 Paige (N. Y.) 199; Williams v. Cameron, 26 Barb. (N. Y.) 172; Lancaster Bank v. Moore, 78 Pa. St. 407–412.

[227] Jewell v. Colby, supra; McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239; affirmed 24 Ill. App. 605. Insanity is no defense to assault. Taggard v. Innes, 12 U. C. C. P. 77. And see Ward v. Conatser, 4 Baxt. (Tenn.) 64.

justice of the peace, caused plaintiff to be wrongfully arrested.[228] Insanity is no defense to an action for trespass to real estate.[229]

Qualified Liability.

It is urged with great force, with the result of at least partial acceptance, that this conception is too radical. The early cases on accidental trespass have not been universally followed. It is insisted that they were unsound in reason,[230] and that, so far as their actual enunciation of the law is concerned, they are not authority for the position they are cited to sustain.[231] The public policy of the law justifies inquiry into the degree of mental derangement in crimes and contracts; so that this very argument seems to show that the same practice should apply to the law of torts.

It may, perhaps, clarify the condition to consider the liability of a lunatic with reference to the various ways in which liability for torts may attach.[232] With respect to liability for personal commission, it is denied that an insane person can be a legal cause,

[228] Krom v. Schoonmaker, 3 Barb. (N. Y.) 647; Crosse v. Kent, 32 Md. 581; Ward v. Conatser, supra; McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239; Jackson v. King, 15 Am. Dec. 368, note; Gates v. Miles, 3 Conn. 64–70; Amick v. O'Hara, 6 Blackf. (Ind.) 258, 259. Contra, Sedg. Dam. § 456.

[229] Amick v. O'Hara, supra; Weaver v. Ward, Hob. 134; Haycraft v. Creasy, 2 East, 92. In an action by the guardian of a person non compos mentis to recover for an assault upon his ward, in which defendant answered that such person had entered his garden, and was picking his flowers, it was not misleading to charge that, if plaintiff's ward was weak in mind, "he should not," as a matter of law, "be held to the same strictness" in doing what he did "as a person mentally sound would be"; the jury having also been charged that he had no right to enter the garden, and that defendant could have used reasonably necessary force in putting him out. Chapell v. Schmidt, 104 Cal. 511, 38 Pac. 892.

[230] It is insisted that the reason for liability assigned by the court in Weaver v. Ward is very strong ground for the absence of liability. Pig. Torts.

[231] While there are many dicta to the effect in England (see Bac. Abr. "Trespass," G; Maxims Reg. 7, note; 2 Rolle, Abr. 547; Weaver v. Ward, Hob. 134; Haycraft v. Creasy, 2 East, 92–104), it is said, on good authority, that there is no reported instance of an action for tort ever having been brought in England against a lunatic. Clerk & L. Torts, 33. Query, is not Cross v. Andrews, 2 Cro. Eliz. 622, such a case?

[232] Ante, p. 37.

and insisted that injuries attributable to such a person are really due to inevitable accident, or the act of God, for which no action lies. Therefore, it would seem that an irresponsible defendant cannot be held liable for negligent personal conduct.[233]

It would certainly seem reasonable to recognize this principle in that class of cases in which the mental attitude of the wrongdoer is an essential ingredient. Thus, where malice is a necessary element, an idiot can be guilty of the malice of a brute, but not of a sentient creature. Hence, it has been held that insanity will preclude responsibility for slander. The distinction is recognized more clearly by text writers than by decisions.[234] Much the same practical result is reached by making insanity a substantial defense by minimizing the amount of damage recoverable.[235]

The consideration that a person may be deranged, and still be sufficiently rational to be held responsible for his acts, like any other person, does not seem to have attracted as much attention as it deserves. Proof that an habitual drunkard or a lunatic had judgment and memory enough to understand what he was doing should be sufficient to sustain his contract or act.[236] It is insisted with good reason that limitation on responsibility for tort based on insanity should apply only to persons so far deranged as to be inca-

[233] Whart. Neg. § 88; Sedg. Dam. 455; 16 Am. & Eng. Enc. Law, tit. "Negligence"; post, p. 871, "Negligence." But in Williams v. Hays (1894) 143 N. Y. 442, 38 N. E. 449, it is distinctly held that for the negligence as well as for the active tort of an insane person, resulting in damage to others, his insanity constitutes no defense. The insanity of one who is the owner pro hac vice of a vessel does not relieve him from liability to the other owners for negligence in her management; at least, unless his insanity is produced wholly by efforts in behalf of the vessel. As to injuries to an insane person, see Willetts v. Railroad Co., 14 Barb. (N. Y.) 385; Texas & P. Ry. Co. v. Bailey, 83 Tex. 19, 18 S. W. 481.

[234] Pol. Torts, § 46; Cooley, Torts, § 103; Bish. Noncont. Law, 505; Townsh. Sland. & L. § 248; Gates v. Meredith, 7 Ind. 440; Bryant v. Jackson, 6 Humph. 199 (but see Ward v. Conatser, 4 Baxt. [Tenn.] 64); Yeates v. Reed, 4 Blackf. 463; Horner v. Marshall, 5 Munf. 466.

[235] Dickinson v. Barber, 9 Mass. 225.

[236] Noel v. Karper, 53 Pa. St. 97; In re Black's Estate, 132 Pa. St. 134, 19 Atl. 31.

pable of committing a voluntary act; that is, the derangement must extend so far as to make intent impossible.[237]

On the other hand, if liability attaches because of relationship or instrumentalities, no personal fault or capacity is involved. There would not seem to be any reason why a lunatic should not be held responsible as a sane man. It is generally recognized that a lunatic is liable under circumstances which would attach liability to a person compos mentis in the management of property. Thus, liability extends to injury occasioned by defective condition of a building belonging to an insane person, for the care and management of whose estate a guardian has been appointed.[238]

Only Actual Damages Recoverable.

In no case can more than actual damages be asserted against a person non compos. If greater damages, as vindictive or punitive damages, be sought, on account of the intent or motive of the defendant, insanity is a good defense, as an insane person has no will nor motive, and the measure of damages is compensatory.[239]

SAME—INFANTS.

54. Infants are generally liable in law for their torts in no wise connected with contract. They can neither escape liability because commanded by another to do wrong, nor create liability on their own part by authorizing or adopting the commission of the tort of another person.

54a. Tenderness of age, in proportion as it affects capacity to act intelligently, may be material to their liability, when intention to do wrong, or want of care, is an essential ingredient of the injury.

237 Pig. Torts, c. 7. As to Krom v. Schoonmaker, 3 Barb. 647, it is to be "presumed that the extent of the insanity was not great." Clerk & L. Torts, p. 34, note a. The defense in Cross v. Andrews, 2 Cro. Eliz. 622, was that defendant was sick and non compos.

238 Morain v. Devlin, 132 Mass. 87; Behrens v. McKenzie, 23 Iowa, 333–339.

239 Avery v. Wilson, 20 Fed. 856–858; Krom v. Schoonmaker, 3 Barb. 647;

Infancy Ordinarily no Defense.

The law with respect to liability of infants has proceeded rather on the theory of compensating the injured than of consistently maintaining any logical doctrine as to the mental attitude of the wrongdoer, and of basing the responsibility on the wrongful intention or inadvertence. The cases proceed on the propriety of holding all persons liable for actual damages committed by them, and of ignoring volition as a necessary element of a juridical cause. "If an infant commit an assault, or utter slander, God forbid that he should not be answerable for it in a court of justice." [240] Thus, an infant is liable in trespass to the extent of compensatory damages, as for breaking down and destroying shrubbery,[241] or in assault.[242] A minor is liable in damages for seduction,[243] even under promise of marriage, or for bastardy; [244] also, in trover; [245] also, liable in case, for negligently handling a gun,[246] or exploding firecrackers, causing a

Dickinson v. Barber, 9 Mass. 225; McDougald v. Cowan, 95 N. C. 368; Jewell v. Colby, 24 Atl. 902; Ward v. Conatser, 4 Baxt. (Tenn.) 64; McIntyre v. Sholty, 121 Ill. 660, 13 N. E. 239.

[240] Lord Kenyon in Jennings v. Rundall, 8 Term R. 335. Bing. Inf. 110; Scott v. Watson, 74 Am. Dec. 457. Cf. Campbell v. Stakes, 2 Wend. 137.

[241] Huchting v. Engel, 17 Wis. 237.

[242] Peterson v. Haffner, 59 Ind. 130; Campbell v. Stakes, 2 Wend. 137. And see Paul v. Hummel, 97 Am. Dec. 381; Conway v. Reed, 27 Am. Rep. 354; Baker v. Lovett, 4 Am. Dec. 88.

[243] Fry v. Leslie, 87 Va. 269, 12 S. E. 671; Becker v. Mason, 93 Mich. 336, 53 N. W. 361; Lee v. Heiley, 21 Ind. 98. Although he is not liable for breach of promise inducing seduction. Leichtweiss v. Treskow, 21 Hun, 487; Hamilton v. Lomax, 26 Barb. 615.

[244] Chandler v. Com., 4 Metc. (Ky.) 66.

[245] Freeman v. Boland, 14 R. I. 39; Ray v. Tubbs, 28 Am. Rep. 519; Towne v. Wiley, 56 Am. Dec. 85; Vasse v. Smith, 6 Cranch, 226; Oliver v. McClellan, 21 Ala. 675; Peigne v. Sutcliffe, 17 Am. Dec. 756; Ashlock v. Vivell, 29 Ill. App. 388; Lewis v. Littlefield, 15 Me. 233; Homer v. Thwing, 3 Pick. (Mass.) 492; Walker v. Davis, 1 Gray, 506; Wheeler & Wilson Manuf'g Co. v. Jacobs, 2 Misc. Rep. 236, 21 N. Y. Supp. 1006; Green v. Sperry, 16 Vt. 390; Baxter v. Bush, 29 Vt. 465; Mills v. Graham, 1 Bos. & P. N. R. 140; Bristow v. Eastman, 1 Esp. 172; West v. Moore, 14 Vt. 447; Campbell v. Perkins, 8 N. Y. 430.

[246] Conway v. Reed, 66 Mo. 346.

horse's death,[247] or for negligence in connection with his property in his agent's hands.[248]

The authority of parent is no excuse for the commission of a trespass by a child.[249] Liability of a parent for the tort of a child is governed by the ordinary principles of liability of a principal for the acts of his agent, or a master for his servant. It does not arise out of a mere relation of parent and child.[250] Infants cannot empower an agent or attorney to act for them, nor affirm what another may have assumed to do on their account.[251] They cannot be held liable for "torts by prior or subsequent assent, but only for their own act."[252]

Tenderness of Age as a Defense.

In certain classes of cases, however, the inability of very young infants to be intelligent actors, and therefore their inability to judicially cause a wrong, has been recognized. In such cases the wrong is considered due to unavoidable accident.[253] And where malice is a necessary element an infant may or may not be liable, according as his age and capacity may justify imputing malice to

[247] Conklin v. Thompson, 29 Barb. 218. And, generally, see, Reeves, Dom. Rel. 258; 2 Kent, Comm. 241; Mangan v. Allerton, L. R. 1 Exch. 239; Hughes v. Macfie, 2 Hurl. & C. 244; Schmidt v. Kansas City Distilling Co., 90 Mo. 284, 1 S. W. 865, and 2 S. W. 417.

[248] Harding v. Larned, 4 Allen, 426; Harding v. Weld, 128 Mass. 587.

[249] Humphrey v. Douglass, 10 Vt. 71; Scott v. Watson, 46 Me. 362; Huchting v. Engel, 17 Wis. 237; School Dist. v. Bragdon, 23 N. H. 507; Wilson v. Garrard, 59 Ill. 51.

[250] Tifft v. Tifft, 4 Denio (N. Y.) 175; Smith v. Davenport, 45 Kan. 423, 25 Pac. 851; Chandler v. Deaton, 37 Tex. 406; Wilson v. Garrard, supra; Baker v. Morris, 33 Kan. 580, 7 Pac. 267. Cf. Schlossberg v. Lahr, 60 How. Prac. (N. Y.) 450, with Schaefer v. Osterbrink, 67 Wis. 495, 30 N. W. 922. And see Strohl v. Levan, 39 Pa. St. 177.

[251] Whitney v. Dutch, 14 Mass. 457; Knox v. Flack, 22 Pa. St. 337; Robbins v. Mount, 4 Rob. (N. Y.) 553; Armitage v. Widoe, 36 Mich. 124. But see Sikes v. Johnson, 16 Mass. 389.

[252] Co. Litt. 180b, note; Burnham v. Seaverns, 101 Mass. 360; Robbins v. Mount, 33 How. Prac. (N. Y.) 24; Cunningham v. Railway Co., 77 Ill. 178. Sed vide Sikes v. Johnson, 16 Mass. 389; Smith v. Kron, 6 N. C. 392–398.

[253] Bullock v. Babcock, 3 Wend. (N. Y.) 391; Ames & S. Torts, 30; Whart. Neg. § 88.

him, or may preclude the idea of his indulging it.[254] However, infants have been held liable for frauds,[255] deceit,[256] and for slander.[257] Extreme youth may excuse a child from the exercise of ordinary care, when it is the plaintiff. Thus, a child 3½ years old was run over on the highway by a cart; it could recover, although a grown person, under the circumstances, might not have succeeded in such an action. Liability is graduated to capacity.[258] The line is often a fine one.[259]

To summarize: "Each of three different rules has found judicial sanction. One rule requires of children the same standard of care, judgment, and discretion in anticipating and avoiding injury as adults are bound to exercise. Another wholly exempts small children from the doctrine of contributory negligence. Between these extremes, a third and more reasonable rule has grown into favor, and is now supported by the great weight of authority, which is that a child is held to no greater care than is usually exercised by children of the same age." [260]

55. Infants, not being liable for their contracts, cannot be elected into responsibility by being sued ex delicto on a cause of action really ex contractu, where the law allows choice of form of action. The test of whether an action lies against an infant, under such circumstances, is whether the infant has done

[254] Cooley, Torts; Johnson v. Pie, 1 Sid. 258.

[255] Barham v. Turbeville, 57 Am. Dec. 782; Wallace v. Morss, 5 Hill (N. Y.) 391; Badger v. Phinney, 15 Mass. 359; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420; Catts v. Phalen, 2 How. (U. S.) 376–382. As to an infant partner, see Kemp v. Cook, 79 Am. Dec. 681.

[256] Fitts v. Hall; 9 N. H. 441; Word v. Vance, 1 Nott & McC. (S. C.) 197.

[257] Defries v. Davis, 1 Bing. N. C. 692; Hodsman v. Grissel, Noy, 129.

[258] Gardner v. Grace, 1 Fost. & F. 359; Chicago & A. Ry. Co. v. Gregory, 58 Ill. 226; Railroad Co. v. Gladmon, 15 Wall. 401; Chicago City Ry. Co. v. Wilcox, 138 Ill. 370, 27 N. E. 899; Neall v. Gillett, 23 Conn. 437.

[259] Lay v. Midland Ry. Co., 34 Law T. (N. S.) 30; Lynch v. Nurdin, 1 Q. B. 29, 36.

[260] Williams, J., in Cleveland Rolling Mill Co. v. Corrigan, 46 Ohio St. 283, 20 N. E. 466. And see Stone v. Dry-Dock, E. B. & B. R. Co., 115 N. Y. 104, 21 N. E. 712; post, p. 871, "Negligence"; "Capacity of Parties."

anything in excess of mere violation of a contract, and in breach of duty which the law has created or superinduced upon the contract. They may, however, in some cases, be sued ex contractu for cause of action ex delicto.

Election of Remedies—Tort or Contract.

The technicalities of common-law forms of action, as has already been shown, in many cases gave an election to the plaintiff to sue ex contractu or ex delicto. Where the wrong is both a tort and a breach of contract, this right of choice arises. When a cause of action against an infant is really founded upon contract, the plaintiff cannot avoid the defense of infancy by framing his action in tort. Great difficulty arises in ascertaining and agreeing upon some definite test of when the substantial cause of action is tort, and not contract, without reasoning in a circle. The language of the text is the distinction as formulated by Mr. Bishop.[261] Mr. Piggott suggests the rule, "Where the substantial ground of action rests on promises, the plaintiff cannot, by changing his form of action, render a person liable who would not have been liable on his promise."[262] In the application of this not very definite standard, even since the courts have escaped mere distinction of pleading, and have regarded more the substantial rights of parties, there does not seem to be any satisfactory consistency. The actual cases usually arise with respect to the contract of bailment, or in matters involving fraud.

Same—Bailment.

If infant bailee does any willful or positive act, amounting to an election on his part to disaffirm the contract, or to convert the property to his own use, or if he wantonly and intentionally commits a trespass, his infancy is no protection. Thus, infancy is a bar to an action by an owner against his supercargo for breach of instructions, but not to an action of trover for goods delivered to the infant under contract, even if not actually converted to his own use. A

[261] Bish. Noncont. Law, §§ 566, 567.

[262] Pig. Torts, 43. This does not differ materially from the test proposed by Mr. Wallace in note to Vasse v. Smith, 1 Am. Lead. Cas. 230, or by Mr. Ewell in his note to Gilson v. Spear, Ewell, Lead. Cas. 201, or by Mr. Bigelow on Fraud, 216–218.

fortiori, an infant is liable if he convert property to his own use.[263] There is much difference of opinion as to the circumstances under which, and in what form of action, an infant is liable for the abuse of, or use contrary to terms of the contract of hiring, a horse. Using the horse for a purpose not contemplated by contract, or abusing the animal, has been regarded as a trespass so far independent of contract as to give a cause of action ex delicto, to which infancy is no defense. Thus, where a boy hired a horse unfit, and agreed not to be used, for leaping, and allowed his friend to jump the animal to its death, an action ex delicto was sustained.[264] This would seem to be the proper view. In Pennsylvania, on the other hand, it has been insisted that, even if the horse were killed, the infant would not be liable.[265] In a leading New Hampshire case it was held that an infant could not be held liable for failure to drive skillfully, but that he can be held if he kills the horse by positive tortious act.[266]

Same—Fraud.

As to liability of infants for fraud, if an infant, at the time of obtaining goods, fraudulently concealed his minority, the vendor may rescind the contract, and recover the goods sold.[267] But if, before the discovery of the fraud, the infant sold the goods, the vendor is without remedy. He cannot recover the goods, for they are

[263] Vasse v. Smith, 6 Cranch, 226; Wheeler & Wilson Manuf'g Co. v. Jacobs (Com. Pl. N. Y.) 21 N. Y. Supp. 1006; Peigne v. Sutcliffe, 4 McCord (S. C.) 387; Moore v. Eastman, 1 Hun, 578; Root v. Stevenson, 24 Ind. 115.

[264] Burnard v. Haggis, 14 C. B. (N. S.) 45; Hall v. Corcoran, 107 Mass. 251; Ray v. Tubbs, 28 Am. Rep. 519; Green v. Sperry, 16 Vt. 390; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420; Freeman v. Boland, 14 R. I. 39; Campbell v. Stakes, 2 Wend. (N. Y.) 137; Woodman v. Hubbard, 25 N. H. 73; Fish v. Ferris, 5 Duer (N. Y.) 49; Homer v. Thwing, 3 Pick. (Mass.) 492; Towne v. Wiley, 23 Vt. 355; Moore v. Eastman, 1 Hun, 578; Cooley, Torts, *p. 109; Story, Sales, 28; 1 Pars. Cont. 316; Bish. Cont. 901.

[265] Penrose v. Curren, 3 Rawle (Pa.) 351; Ewell, Lead. Cas. 191; Wilt v. Welsh, 6 Watts (Pa.) 9.

[266] Eaton v. Hill, 50 N. H. 235. Et vide Jennings v. Rundall, 8 Term R. 337; Schenk v. Strong, 4 N. J. Law, 97; Lewis v. Littlefield, 15 Me. 233.

[267] Badger v. Phinney, 15 Mass. 359; Mills v. Graham, 1 Bos. & P. (N. R.) 140; Nolan v. Jones, 53 Iowa, 387, 5 N. W. 572; Neff v. Landis, 110 Pa. St. 204, 1 Atl. 177.

gone; he cannot sue in deceit, for damages, for that would be, in substance, a means of enforcing the contract to pay the price.[268] A bailor induced to make the contract of bailment by fraud of infant cannot recover his goods until the agreed term of bailment expires, or the bailment ceases by some act of infant so violating the contract as to determine it; as where the infant pledges goods.[269] An infant may take advantage of his own fraud, so far that an action of deceit cannot be maintained against him for his fraudulent misrepresentations made in a sale, for example, of a horse, even though the vendee may have tendered back the horse, and demanded back the purchase money.[270] That an infant induced a contract by fraudulent representation as to his being of age, or as to other matters, does not deprive him of the defense of his infancy; and bringing the action for damages, in deceit, instead of on the contract, does not enable the deceived person to succeed in his litigation.[271] But the opinions are not unanimous on this point.[272]

[268] Johnson v. Pie, 1 Sid. 258; Price v. Hewett, 8 Exch. 146; Mustard v. Wohlford, 15 Grat. (Va.) 329; Manning v. Johnson, 26 Ala. 446.

[269] Reg. v. McDonald, 15 Q. B. Div. 323, 325; Manby v. Scott, 1 Sid. 109.

[270] Gilson v. Spear, 38 Vt. 311; Nash v. Jewett, 61 Vt. 501, 18 Atl. 47; Ewell, Lead. Cas. 201; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420; Shirk v. Shultz, 113 Ind. 571, 15 N. E. 12; West v. Moore, 14 Vt. 447. But see, on the other hand, Word v. Vance, 1 Nott & McC. (S. C.) 197; Fitts v. Hall, 9 N. H. 441. This case will be found discussed in Burley v. Russell, 10 N. H. 184; 1 Am. Lead. Cas. p. 280, note to Tucker v. Moreland; Cooley, Torts, *p. 110; 1 Pars. Cont. (5th Ed.) 318. And see Gaunt v. Taylor (Sup.) 15 N. Y. Supp. 589; Manning v. Johnson, 26 Ala. 446.

[271] Conrad v. Lane, 26 Minn. 389, 4 N. W. 695; Johnson v. Pie, 1 Keb. 913; Millard v. Hobick, 110 Ill. 16; Grove v. Nevill, Id. 778; Cannam v. Farmer, 3 Exch. 698; Price v. Hewett, 8 Exch. 146; Liverpool Adelphi Loan Ass'n v. Fairhurst, 9 Exch. 422; Wright v. Leonard, 11 C. B. (N. S.) 258; De Roo v. Foster, 12 C. B. (N. S.) 272; Bartlett v. Wells, 1 Best & S. 836; Nash v. Jewett, 61 Vt. 501, 18 Atl. 47; McKamy v. Cooper, 81 Ga. 679, 8 S. E. 312; Sims v. Everhardt, 102 U. S. 300; Whitcomb v. Joslyn, 51 Vt. 79; Burley v. Russell, 10 N. H. 184; Merriam v. Cunningham, 11 Cush. (Mass.) 40; Earl of Buckinghamshire v. Drury, 2 Eden, 72; Beckett

[272] Harselm v. Cohen (Tex. Civ. App.) 25 S. W. 977; Burley v. Russell, 34 Am. Dec. 146; Rice v. Boyer (Ind. Sup.) 9 N. E. 420; Dillon v. Burnham, 43 Kan. 77, 22 Pac. 1016. And see Bradshaw v. Van Winkle, 133 Ind. 134, 32 N. E. 877; Lacy v. Pixler (Mo. Sup.) 25 S. W. 206.

Same—Election to Sue in Assumpsit.

An infant may, however, be sued ex contractu, in assumpsit, for a cause of action really ex delicto. Thus, if he convert the property of another, the latter can recover in assumpsit. This serves to show that the action of assumpsit still retains traces of the ex delicto character of its origin.[273]

SAME—DRUNKARDS.

56. Drunkards are liable for all damages committed by them. Their condition may, however, mitigate damages, and, when it amounts to insanity, perhaps operate as a full defense, as far as insanity is a defense to an action in tort.

While the acts of a drunkard are often involuntary, his condition is generally due to a voluntary act, and his acts become voluntary by reflection. "Drunkenness is no excuse to a crime. It cannot justify a tort. The making a beast of one's self may be likened to the keeping of a beast; and, as in some cases the scienter is presumed, so it will be presumed that a man knows that if he gets drunk he will be likely to commit acts which will produce injury to other people."[274] Therefore, if a drunken man say to another,

v. Cordley, 1 Brown, Ch. 353-358; Nelson v. Stocker, 4 De Gex & J. 458; Cory v. Gertcken, 2 Madd. 40. See, further, Conroe v. Birdsall, 1 Johns. Cas. 127; Curtin v. Patton, 11 Serg. & R. (Pa.) 305, 309; Stoolfoos v. Jenkins, 12 Serg. & R. (Pa.) 399, 403; Keen v. Coleman, 39 Pa. St. 299; Studwell v. Shapter, 54 N. Y. 249; Mathews v. Cowan, 59 Ill. 341; Densmore v. Cowan, Id. 347.

[273] Shaw v. Coffin, 58 Me. 254; Elwell v. Martin, 32 Vt. 217; Munger v. Hess, 28 Barb. (N. Y.) 75.

[274] Pig. Torts, §§ 216, 217; McKee v. Ingalls, 5 Ill. 30; Alger v. Lowell, 3 Allen (Mass.) 402; Welty v. Indianapolis & V. R. Co., 105 Ind. 55, 4 N. E. 410; Hubbard v. Town of Mason City, 60 Iowa, 400, 14 N. W. 772; O'Hagan v. Dillon, 42 N. Y. Supper. Ct. 456; Illinois Cent. R. Co. v. Cragin, 71 Ill. 177; Cramer v. Burlington, 42 Iowa, 315; Smith v. New York Cent. & H. R. R. Co., 38 Hun, 33; Little Rock Ry. v. Pankhurst, 36 Ark. 371; Monk v. Town of New Utrecht, 104 N. Y. 552, 11 N. E. 268; East Tennessee & W. R. Co. v. Winters, 85 Tenn. 240, 1 S. W. 790; Barbee v. Reese, 60 Miss. 906; Sullivan v. Murphy, 2 Miles (Pa.) 298. As to standard of drunkenness, see Standard Life & Acc. Ins. Co. v. Jones, 94 Ala. 434, 10 South. 530.

"He is a damned thief; he stole from me," his drunken condition is no defense.[275] So a drunkard is liable for damages done by negligent driving.[276] Drunkenness may, however, be evidence of absence of actual malice, and may thus mitigate damages.[277] Perhaps delirium tremens may be a defense, for it is a species of insanity, and, like other insanity, must affect responsibility for acts, criminally and civilly.[278] But drunkenness is not mental unsoundness.[279]

SAME—CONVICTS—ALIEN ENEMIES.

57. In England, neither a convict not lawfully at large, nor an alien enemy, can sue in tort. The rule is otherwise in America, as to a convict, and perhaps, also, to an alien enemy.

The English rule that a convict cannot recover in tort is the result of the common-law doctrine, that a convict is civiliter mortuus, enforced by statute.[280] The position of an alien enemy and a convict, Mr. Pollock thinks, must be the same.[281]

In America the right of a confined convict to sue for tort has been recognized and enforced.[282] Indeed, he is, in some respects, in a

[275] Reed v. Harper, 25 Iowa, 87.

[276] Cassady v. Magher, 85 Ind. 228. Compare Engleken v. Hilger, 43 Iowa, 563; Kearney v. Fitzgerald, Id. 580.

[277] Dawson v. State, 16 Ind. 428; Gates v. Meredith, 7 Ind. 440; Iseley v. Lovejoy, 8 Blackf. (Ind.) 462. And see Mix v. McCoy, 22 Mo. App. 488; McKee v. Ingalls, 5 Ill. 30. In an action against a surgeon for malpractice, defendant's condition, as to being intoxicated, at the time he treated plaintiff, may be shown. Merrill v. Pepperdine, 9 Ind. App. 416, 36 N. E. 921.

[278] Maconnehey v. State, 5 Ohio St. 77; O'Brien v. People, 48 Barb. (N. Y.) 275.

[279] In re Johnson's Estate, 57 Cal. 529. As to conversion by purchase from an intoxicated person, see Baird v. Howard (Ohio) 36 N. E. 732.

[280] Pol. Torts, c. 3, citing 33 & 34 Vict. c. 23, §§ 8, 30; De Wahl v. Braune, 1 Hurl. & N. 178, 25 Law J. Exch. 343. But see Barnard's Case, 4 Com. Dig. "Forfeiture," B, 2, p. 406; Flemming v. Smith, 12 Ir. C. L. 404; Mews, Com. Law Dig. "Forfeiture."

[281] Pol. Torts, c. 3, note c.

[282] Dade Coal Co. v. Haslett, 83 Ga. 549, 10 S. E. 435; Willingham v. King, 23 Fla. 478, 2 South. 851; Cannon v. Windsor, 1 Houst. (Del.) 143; Ex parte Garland, 4 Wall. 333–380 (as to effect of a pardon). But public officers,

more favorable position in a proceeding to enforce such a right than an unoffending citizen.[283] But, as far as the injury complained of affected the convict's ability to labor during the period of his imprisonment, he cannot recover therefor.[284] In McVeigh v. United States,[285]—a proceeding against a resident within the Confederate lines, and a rebel, for the forfeiture of lands,—Mr. Justice Swayne says, as to the claim that an alien enemy could have no locus standi in the forum: "If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot on our jurisprudence."

SAME—PRIVATE CORPORATIONS.

58. Private corporations are liable for their torts committed under such circumstances as would attach liability to natural persons. That the conduct complained of necessarily involved malice, or was beyond the scope of corporate authority, constitutes no defense to their liability.[286]

For a long time difficulties, due rather to considerations of procedure than to fancied obstacles arising from a corporation's arti-

having the custody of prisoners, are not liable to a prisoner for injuries caused by defective machinery with which he was put to work. O'Hare v. Jones, 161 Mass. 391, 37 N. E. 371.

[283] The rule forbidding the recovery by a servant who subjects himself to injury by going, without objection, into a place known by him to be dangerous, does not apply to a convict whose movements are controlled by a guard having power to compel obedience. Chattahoochee Brick Co. v. Braswell, 92 Ga. 631, 18 S. E. 1015. And see Dalheim v. Lemon, 45 Fed. 225–233. Cf. Porter v. Waters-Allen Foundry & Mach. Co., 94 Tenn. 370, 29 S. W. 227.

[284] Shiras, J., in Dalheim v. Lemon, 45 Fed. 225.

[285] 11 Wall. 259, citing Calder v. Bull, 3 Dall. 388; Bonaker v. Evans, 16 Adol. & E. (N. S.) 170; Capel v. Child, 2 Cromp. & J. 574. And generally, as to legal status of a public enemy, see McNair v. Toler, 21 Minn. 175; Miller v. U. S., 11 Wall. 268; Dean v. Nelson, 10 Wall. 158; Lasere v. Rochereau, 17 Wall. 437; University v. Finch, 18 Wall. 106; Windsor v. McVeigh, 93 U. S. 274. As to subjection of alien to law of contracts, see Milliken v. Barrow, 55 Fed. 148. And see article by Prentiss Webster in 24 Am. Law Rev. 616.

[286] A very full presentation and discussion of the principles underlying

ficial personality, were felt in admitting that a corporation could be sued for tort.[287] In 1812 it was held that trover lay against a corporation,[288] and in 1842, that trespass lay, also.[289] As clearly as liability not necessarily attributable to personal fault is thus recognized, responsibility is admitted for damages consequent upon negligence.[290] In cases, however, in which the mental attitude of the wrongdoer is peculiarly involved, as in fraud[291] or malice,[292] it has been contended that, inasmuch as a corporation had no soul, it could not be held liable. But it is now definitely settled that a corporation can be guilty of malice, in a legal sense.[293] Thus, it may be held liable for malicious prosecution,[294] or for libel.[295] And, as to

this statement of law are contained in the opinion of the supreme court of Nebraska in the case of Fitzgerald v. Fitzgerald & Mallory Const. Co., 41 Neb. 374, 59 N. W. 838.

[287] Pol. Torts, p. 51.

[288] Yarborough v. Bank of England, 16 East, 6.

[289] Maund v. Monmouthshire Canal Co., 4 Man. & G. 452.

[290] There is no negligence of a servant which is not the negligence of a corporation. Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293, 13 South. 57; Railway Co. v. Ryan, 56 Ark. 245, 19 S. W. 839.

[291] Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 145.

[292] Abrath v. North Eastern Ry. Co., 11 Q. B. Div. 440; Stevens v. Midland R. Co., 10 Exch. 351; Henderson v. Midland Co., 20 Wkly. Rep. 23; Childs v. Bank, 17 Mo. 213; Owsley v. Railway Co., 37 Ala. 560; post, p. 170, "Ultra Vires."

[293] Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426, 56 N. W. 9; Lathrop v. Adams, 133 Mass. 471–481; Salt Lake City v. Hollister, 118 U. S. 256–262, 6 Sup. Ct. 1055; Reed v. Home Savings Bank, 130 Mass. 443–445, and cases cited; Krulevitz v. Eastern R. Co., 140 Mass. 573, 5 N. E. 500; Bank of New South Wales v. Owston, 4 App. Cas. 270.

[294] Abrath v. North Eastern Co., 11 Q. B. Div. 440; Green v. London General Omnibus Co., 29 Law J. C. P. 13; Bank of New South Wales v. Owston, 4 App. Cas. 270; Edwards v. Railroad Co., 6 Q. B. Div. 287; Mor. Corp. § 727; Central Ry. Co. v. Brewer, 78 Md. 394, 28 Atl. 615. Hewett v. Swift, 3 Allen, 420; Ramsden v. Boston & A. R. Co., 104 Mass. 117; Frost v. Domestic Sewing Mach. Co., 133 Mass. 563; Jackson v. Second Ave. R. Co., 47 N. Y. 274; Pennsylvania R. Co. v. Vandiver, 42 Pa. St. 365; Chicago & N. W. R. Co. v. Williams, 55 Ill. 185; Owsley v. Montgomery R. Co., 37 Ala. 560; St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. 352; Philadelphia &

[295] See note 295 on following page.

fraud, a corporation will be held liable where an individual would.[296] There may, however, be an exception to this, where Lord Tenterden's act is in force.[297] Even exemplary damages have been awarded against corporations.[298]

R. R. Co. v. Derby, 14 How. 468; American Exp. Co. v. Patterson, 73 Ind. 430; Lynch v. Metropolitan El. Ry. Co., 90 N. Y. 77; Vance v. Erie R. Co., 32 N. J. Law, 334; Goodspeed v. East Haddam Bank, 32 Conn. 530; Copley v. Grover & Baker Sewing-Mach. Co., 2 Woods, 494, Fed. Cas. No. 3,213; Fenton v. Sewing-Mach. Co., 9 Phila. (Pa.) 189; Walker v. Southeastern R. Co., L. R. 5 C. P. 640; Edwards v. Midland Ry. Co., 6 Q. B. Div. 287; Williams v. Planters' Ins. Co., 57 Miss. 759; Morton v. Metropolitan Life Ins. Co., 34 Hun, 366; Pennsylvania Co. v. Weddle, 100 Ind. 138; Carter v. Howe Mach. Co., 51 Md. 290; Reed v. Home Sav. Bank, 130 Mass. 443.

[295] Rex v. Watson, 2 Term R. 199; Whitfield v. South Eastern Ry. Co., El., Bl. & El. 115–121, 27 Law J. Q. B. 229; Aldrich v. Press Printing Co., 9 Minn. 133 (Gil. 123); Fogg v. Boston & L. R. Corp., 148 Mass. 513, 20 N. E. 109; Samuels v. Evening Mail Ass'n, 75 N. Y. 604; Maynard v. Fireman's Ins. Co., 34 Cal. 48, 47 Cal. 207; Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202; Howe Machine Co. v. Souder, 58 Ga. 64; Buffalo Lubricating Oil Co. v. Standard Oil Co., 42 Hun, 153; Johnson v. St. Louis Dispatch Co., 2 Mo. App. 565; Borgher v. Life Ass'n, 75 Mo. 319; Payne v. Western & C. R. Co., 13 Lea (Tenn.) 507; Van Aernam v. McCune, 32 Hun, 316; Detroit & C. Co. v. McArthur, 16 Mich. 447; Vinas v. Merchants' Mut. Ins. Co., 27 La. Ann. 367; Lawless v. Anglo-Egyptian Cotton & Oil Co., L. R. 4 Q. B. 262; Carter v. Howe Mach. Co., 51 Md. 290; Green v. Omnibus Co., 7 C. B. (N. S.) 290–302; Gwynn v. South Eastern Ry. Co., 18 Law T. (N. S.) 738; Evening Journal Ass'n v. McDermott, 44 N. J. Law, 430; Tenck v. Great Western Ry Co., 32 U. C. Q. B. 452.

[296] Mackay v. Commercial Bank, L. R. 5 P. C. 394; National Exchange Co. v. Drew, 2 Macq. 103, 124, et seq.; Ranger v. Great Western R. Co., 5 H. L. Cas. 72; Barwick v. English Joint-Stock Bank, L. R. 2 Exch. 259; Kennedy v. Panama, N. Z. & A. R. M. Co., L. R. 2 Q. B. 589; Erie City Iron Works v. Barber, 106 Pa. St. 125; Peebles v. Patapsco Guano Co., 77 N. C. 233; Lamm v. Port Deposit Homestead Ass'n, 49 Md. 233; Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Butler v. Watkins 13 Wall. 456; Candy v. Globe Rubber Co., 37 N. J. Eq. 175; Fogg v. Griffin, 2 Allen, 1; Western Bank v. Addie, L. R. 1 H. L. Sc. 145–157; Concord Bank v. Gregg, 14 N. H. 331; Scofield Rolling-Mill Co. v. State, 54 Ga. 635; Fishkill Sav. Inst. v. National Bank, 80 N. Y. 162.

[297] Houldsworth v. City of Glasgow Bank, 5 App. Cas. 317 (per Lord Blackburn).

[298] Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261; Bass v. Chicago & N. W. R. Co., 42 Wis. 654; Eviston v. Cramer, 57 Wis.

poration, who is also its agent for transfer of stock, and authorized to countersign and issue stock, when signed by the president, forges the name of the latter, and fraudulently issues a certificate of stock, the corporation is liable to a bank which has accepted such certificate, in good faith, as collateral security for a loan.[308]

At the other extreme, the agents of a corporation are personally liable when they do wrong, even with respect to something connected with the corporation, in their purely individual capacities. Thus, if they, by misrepresentation, induce a stockholder to exchange his stock for certificates in a trust formed to control a given corporation, they, and not the corporation, are liable.[309]

Between these extremes, the test is by no means certain; but the tendency is to hold a corporation liable for all wrongs committed by agents, whether authorized or not, whether within the scope of employment or not, so long as they are committed in course of employment.[310] There would seem to be no difference between the principle which governs the liability of a corporation as a principal or master from those which control the liability of a natural person as principal and master.[311] It has, however, been claimed that an agent or servant cannot bind a corporation by committing an ultra vires tort, where its authority is not direct, but implied only.[312]

Corporators, by their acts, may make the corporation liable, on essentially the same principles as would any ordinary agent. Unlike cases of agency, the liability is not cumulative, but is alterna-

[308] Fifth Ave. Bank v. Forty-Second St. & G. St. F. R. Co., 137 N. Y. 231, 33 N. E. 378; Nevada Bank v. Portland Nat. Bank, 59 Fed. 338.

[309] Manhattan Life Ins. Co. v. Forty-Second St. & G. St. F. R. Co., 64 Hun, 635, 19 N. Y. Supp. 90; Tyler v. Savage, 143 U. S. 79–99, 12 Sup. Ct. 340; Aetna Life Ins. Co. v. Paul, 37 Ill. App. 439.

[310] Post, p. 257, "Liability of Master to Third Persons for Wrong of Servant."

[311] Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261; Ang. & A. Corp. § 311; Central Ry. Co. v. Brewer, 78 Md. 394, 28 Atl. 615; Salt Lake City v. Hollister, 118 U. S. 256–261, 6 Sup. Ct. 1055; Denver & R. G. Ry. Co. v. Harris, 122 U. S. 597–608, 7 Sup. Ct. 1286; Hamilton v. Railway Co., 53 N. Y. 25; Jeffersonville Ry. Co. v. Rogers, 38 Ind. 116; Allen v. Railway Co., L. R. 6 Q B. 65; Goddard v. Railway, 57 Me. 202; Sherley v. Billings, 8 Bush, 147; Bryant v. Rich, 106 Mass. 180.

[312] Green's Brice, Ultra Vires, 364.

tive. Either the corporation is liable, or the corporators,—not both.[313]

SAME—MUNICIPAL AND QUASI MUNICIPAL CORPORATIONS.

59. Municipal corporations are sometimes, but not ordinarily, liable for their torts. Their liability depends largely upon construction of the legislation creating them. In general, they are not liable for—

(a) Conduct in performance of governmental, as distinguished from merely corporate, functions;

(b) Unauthorized conduct of officers and agents;

(c) Authorized acts.

60. Involuntary quasi municipal corporations are subject to even a less extended liability for civil wrongs.

Acts in Performance of Governmental Functions.

A municipal corporation owes a two-fold duty,—one political, springing from its sovereignty; the other private, arising from its existence as a legal person. For conduct of its officers or agents in its former capacity, it is not liable; for their conduct in the latter, it is.[314] As to what are public and governmental duties, and what are private or corporate duties, the courts are not in harmony, and their decisions do not furnish any definite line of cleavage. It is important, in every case, to determine the liability by a true inter-

[313] Harman v. Tappenden, 1 East, 555; Mill v. Hawker, L. R. 9 Exch. 309; The King v. Watson, 2 Term R. 199; Houldsworth v. City of Glasgow Bank, 5 App. Cas. 317. As to liability of promoters to stockholders, Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303. A short article on the duties and liabilities of the "promoters" of corporations will be found in 1 Brief, 228. As to personal liability of officers for torts, see Nunnelly v. Southern Iron Co., 94 Tenn. 397, 29 S. W. 361. As to stockholders (under statute), Flenniken v. Marshall (S. C.) 20 S. E. 788. An extensive note on the duties and liability of promoter to the corporation and its members. Yale Gas-Stove Co. v. Wilcox, 25 L. R. A. 90 (Conn.) 29 Atl. 303.

[314] 29 Am. Law Rev. 209-218; City of Galveston v. Posnainsky, 62 Tex. 118; 15 Am. & Eng. Enc. Law, 1141, note 3, collecting cases; 2 Dill. Mun. Corp. § 966; O'Rourke v. City of Sioux Falls (S. D.) 54 N. W. 1044.

pretation of the statutes under which the corporation is created.[315] Indeed, it may occur that the liability of a municipality depends exclusively on the statute.[316]

At one extreme, the exemption of municipal corporations from liability for torts is clear. Thus, they are not liable for damages consequent upon conduct of fire,[317] police,[318] health,[319] or public

[315] Snider v. City of St. Paul, 51 Minn. 466, 53 N. W. 763; Mersey Docks v. Gibbs, 3 Hurl. & N. 164; City of Detroit v. Putnam, 45 Mich. 263, 7 N. W. 815. The courts of New England, New Jersey, Michigan, and Texas accepted the idea of nonliability at common law of municipal corporations to civil action. 2 Thomp. Neg. p. 735, note 11. This doctrine has been largely changed by the various statutes. Burt v. Boston, 122 Mass. 223.

[316] 2 Dill. Mun. Corp. § 948; Reed v. City of Madison, 83 Wis. 171, 53 N. W. 547; Kollock v. City of Madison, 84 Wis. 458, 54 N. W. 725; Stilling v. Town of Thorp, 54 Wis. 528, 11 N. W. 906; McLimans v. City of Lancaster, 63 Wis. 596, 23 N. W. 689; Workman v. Mayor, etc., of City of New York, 63 Fed. 298; Roberts v. City of Detroit (Mich.) 60 N. W. 450. Right to sue for tort is subject to limitation contained in municipal charter as to notice of injury and time within which action may be brought. Nichols v. City of Minneapolis, 30 Minn. 545, 16 N. W. 410; Morgan v. City of Des Moines, 54 Fed. 456; Berry v. Town of Wauwatosa, 87 Wis. 401, 58 N. W. 751. Cf. Barrett v. Village of Hammond, 87 Wis. 654, 58 N. W. 1053; and, generally, see Bacon v. City of Boston, 154 Mass. 100, 28 N. E. 9.

[317] Lawson v. City of Seattle, 6 Wash. 184, 33 Pac. 347; Wild v. Mayor, etc., of City of Paterson, 47 N. J. Law, 406, 1 Atl. 490; Alexander v. City of Vicksburg, 68 Miss. 564, 10 South. 62; Gillespie v. City of Lincoln, 35 Neb. 34, 52 N. W. 811; Dodge v. Granger, 17 R. I. 664, 24 Atl. 100; Thomas v. City of Findley, 6 Ohio Cir. Ct. R. 241; Grube v. City of St. Paul, 34 Minn. 402, 26 N. W. 228. The use by the fire department of a town of a person's hose, which had gotten mixed with the hose of the town, under the belief that it belonged to the town, does not render the town liable to the owner for its use. Dolloff v. Inhabitants of Ayer (Mass.) 39 N. E. 191. But see Workman v. Mayor, etc., of City of New York, 63 Fed. 298; Burrill v. City of Augusta, 78 Me. 118, 3 Atl. 177.

[318] Elliott v. Philadelphia, 75 Pa. St. 347; Atwater v. Baltimore, 31 Md. 462; Caldwell v. Boone, 51 Iowa, 687, 2 N. W. 614, 20 Alb. Law J. 376; Odell v. Schroeder, 58 Ill. 357; Bowditch v. Mayor, etc., of Boston, 101 U. S. 16; Givens v. City of Paris, 5 Tex. Civ. App. 705, 24 S. W. 974; Jolly's Adm'x v. City of Hawesville, 89 Ky. 279, 12 S. W. 313. A neglect of the city police to suppress a nuisance consisting of coasting on the public streets does not render the city liable for damages to a person passing along said streets by one coasting. City

[319] Forbes v. Board of Health, 28 Fla. 26, 9 South. 862.

park departments, or for the exercise or nonexercise of a discretionary, legislative, or judicial power, as distinguished from a ministerial power.[320]

At the other extreme, municipalities are generally held liable for negligence,[321] in construction, maintenance, or use of their streets,[322]

of Wilmington v. Vandegrift (Del. Err. & App.) 29 Atl. 1047. A city is not liable for the act of a police officer in killing a dog running at large contrary to ordinance. Julienne v. Mayor, etc., of City of Jackson, 10 South. 43; Moss v. City Council of Augusta, 93 Ga. 797, 20 S. E. 653; Van Hoosear v. Town of Wilton, 62 Conn. 106, 25 Atl. 457, distinguishing Town of Wilton v. Town of Weston, 48 Conn. 325. There is no liability on the part of a municipality for damages done by mobs. Western College v. Cleveland, 12 Ohio St. 375; 2 Dill. Mun. Corp. § 760. Cf. Wing Chong v. Los Angeles, 47 Cal. 531; Darlington v. Mayor, 31 N. Y. 164; Lowell v. Wyman, 12 Cush. (Mass.) 273; In re Hall, 5 Pa. St. 204. And, generally, see City of New Orleans v. Abbagnato, 10 C. C. A. 361, 62 Fed. 240.

[320] The city of Boston is not liable for injury occasioned to a person by reason of his horse becoming frightened, when being driven along an adjoining street, by the firing of a cannon on the common under a license granted in pursuance of a city ordinance. "The ordinance * * * is not the exercise of an owner's authority over his property, but is a police regulation of the use of a public place by the public, made by the city under its power to make needful and salutary by-laws, without regard to accidental ownership of the fee." Lincoln v. City of Boston, 148 Mass. 578, 580, 20 N. E. 329. A municipality is not liable for suspending an ordinance forbidding fireworks during the time plaintiff's house was destroyed by fireworks negligently used by boys. Hill v. Charlotte, 72 N. C. 55. And, generally, see City of Pontiac v. Carter, 32 Mich. 164; Griffin v. Mayor, 9 N. Y. 456; Dewey v. Detroit, 15 Mich. 307; Grant v. Erie, 69 Pa. St. 420.

[321] Duthie v. Town of Washburn, 87 Wis. 231, 58 N. W. 380. Generally, see Jones, Neg. Mun. Corp.; post, p. 798, "Nuisance," note 279. Et vide Cooley, Torts, § 625; Powers v. City of Chicago, 20 Ill. App. 178–181.

[322] A dangerous depression, however, has been held not to be an actionable defect. Witham v. Portland, 72 Me. 539. But a city is liable for injuries caused by a ditch dug in the street, and left without any protection or light. City of Americus v. Chapman (Ga.) 20 S. E. 3. Leaving a loose plank may be actionable negligence. Ledgerwood v. City of Webster (Iowa) 61 N. W. 1089. And see White v. City of San Antonio (Tex. Civ. App.) 25 S. W. 1131; Dempsey v. City of Rome (Ga.) 20 S. E. 335. In the absence of statutory provisions, however, city streets have been held to be public highways, and the duty of keeping them in repair is public, and not private, and cities, towns, and counties alike are not responsible for negligence in allowing them to be in a defective condition, resulting in dam-

sidewalks,[323] sewers,[324] and levees.[325] They are answerable in damages for trespass on private property.[326] While a city is not ordinarily liable for failure to exercise its corporate power to abate a

ages. City of Detroit v. Blackeby, 21 Mich. 84; Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. 1012. Et vide Mayor, etc., of City of Rahway v. Carter, 55 N. J. Law, 177, 26 Atl. 96. As to distinction in Michigan that cities are responsible for defects in cross walks, but not in sidewalks, see O'Neil v. Detroit, 50 Mich. 133, 15 N. W. 48; Detroit v. Putnam, 45 Mich. 263, 7 N. W. 815; Grand Rapids v. Wyman, 46 Mich. 516, 9 N. W. 833. The fact that 3 How. Ann. St. § 1446d, makes it the duty of cities to keep their streets in repair, so that they may be reasonably safe, etc., does not give every person injured by failure to perform such duty a right to maintain an action for the injury. Roberts v. City of Detroit (Mich.) 60 N. W. 450; Hennessey v. City of New Bedford, 153 Mass. 266, 26 N. E. 999; Prince

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[323] Harper v. City of Milwaukee, 30 Wis. 365; Reed v. City of Madison, 83 Wis. 171, 53 N. W. 547; Nichols v. City of St. Paul, 44 Minn. 494, 47 N. W. 168; City v. McInnis, 26 Ill. App. 338; Weare v. Fitchburg, 110 Mass. 334; Saulsbury v. Village, 94 N. Y. 27; Potter v. Castleton, 53 Vt. 435; Foxworthy v. City of Hastings, 25 Neb. 133, 41 N. W. 132; Orme v. Richmond, 79 Va. 86; Rochester White Lead Co. v. City of Rochester, 3 N. Y. 463; 2 Thomp. Neg. 673. The sidewalk doing damage and creating liability may be of earth instead of usual materials. Graham v. City of Albert Lea, 48 Minn. 201, 50 N. W. 1108 (collecting cases, page 204, 48 Minn., and page 1108, 50 N. W.). Street crossings: Hall v. Incorporated Town of Manson (Iowa) 58 N. W. 881.

[324] Stoddard v. Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030; New York Cent. & H. R. R. Co. v. City of Rochester, 127 N. Y. 591, 28 N. E. 416; Welter v. City of St. Paul, 40 Minn. 460, 42 N. W. 392; Tate v. City of St. Paul, 56 Minn. 527, 58 N. W. 158; Evers v. Long Island City, 78 Hun, 242, 28 N. Y. Supp. 825; Burton v. Syracuse, 36 N. Y. 54; Noonam v. Albany, 79 N. Y. 470. The duty of draining streets, however, has been held to be judicial in its nature. A municipal corporation has been exonerated from liability for the injurious consequences of an insufficient sewer. The error is in the plan, not in its execution. Post, p. 179, note 332. Where a city has built a sewer partly on private property, it is no excuse for failing to repair the same that it has no right to go on such property to make repairs. Netzer v. City of Crookston (Minn.) 61 N. W. 21. But see Streiff v. City of Milwaukee (Wis.) 61 N. W. 770. Cf. Mayor, etc., of City of Nashville v. Sutherland, 94 Tenn. 356, 29 S. W. 228.

[325] Barden v. City of Portage, 79 Wis. 126, 48 N. W. 210.

[326] Ashley v. Port Huron, 35 Mich. 296. Cf. Montgomery v. Gilmer, 33 Ala. 116, with Wilson v. City of New York, 1 Denio (N. Y.) 595. See Proprietors v. Lowell, 7 Gray (Mass.) 223; Emery v. Lowell, 104 Mass. 13; Conrad v. Ithaca, 16 N. Y. 158; Van Pelt v. Davenport, 42 Iowa, 308.

nuisance of some third party doing damage,[327] it is responsible for wrongful exercise of power to abate a nuisance,[328] and for maintaining a nuisance, of its own.[329]

v. City of Lynn, 149 Mass. 193, 21 N. E. 296. This doctrine has been adopted in Texas. City v. Pearce (1877) 46 Tex. 525. "It is painful to see an idea, destitute of any trace of justice, which means no more nor less than that one member of a community may be damnified without redress for any ease, convenience, or profit of the rest, adopted by the judiciary of a young state whose early jurisprudence received a generous leaven from the civil law." 2 Thomp. Neg. p. 735, note 11. Where a city that is under no statutory obligation to light its streets does so voluntarily, it is not liable if the lighting is insufficient to enable persons to see a hydrant in the street. City of Columbus v. Sims (Ga.) 20 S. E. 332. It is not necessary that an obstruction in a highway should endanger any particular modes of public travel in order to be a defect making a municipality liable in damage for negligence to one injured thereby. It is enough that such obstruction makes dangerous any mode which the public has a right to use. Applied to injury to a street-car conductor by collision with barrier guarding a cave in the street: Powers v. City of Boston, 154 Mass. 60, 27 N. E. 995. But the ordinary use of a highway does not include racing, McCarthy v. Portland, 67 Me. 167; Sindlinger v. City of Kansas City (Mo. Sup.) 28 S. W. 857; nor play. Blodgett v. Boston, 8 Allen, 237; Jackson v. City of Greenville (Miss.) 16 South. 382. As to use by bicycle, see Sutphen v. Town of North Hempstead (Sup.) 30 N. Y. Supp. 128, and McCarthy v. Portland, supra. And, generally, see Bieling v. City of Brooklyn, 120 N. Y. 98, 24 N. E. 389; Goodfellow v. City of New York, 100 N. Y. 15, 2 N. E. 462; Gerdes v. Foundry Co. (Mo. Sup.) 27 S. W. 615; Cleveland v. King, 132 U. S. 295, 10 Sup. Ct. 90; Weet v. Trustees, 16 N. Y. 161; 2 Thomp. Neg. 678; Kollock v. City of Madison, 84 Wis. 458, 54 N. W. 725; Barnes v. District of Columbia, 9 U. S. 540; District of Columbia v. Woodbury, 136 U. S. 450, 10 Sup. Ct. 990; Providence v. Clapp, 17 How. 161; City of Abilene v. Cowperthwait, 52 Kan. 324, 34 Pac. 795. Thus a city may be liable for injury done by fireworks exploded at the junction

[327] Davis v. Montgomery, 51 Ala. 139.

[328] Yates v. Milwaukee, 10 Wall. 497; Everett v. Council Bluffs, 46 Iowa, 66. But see City of Orlando v. Pragg, 31 Fla. 111, 12 South. 368.

[329] A pesthouse has been held a nuisance. Haag v. Board of County Com'rs, 60 Ind. 511; City of Hillsboro v. Ivey, 1 Tex. Civ. App. 653, 20 S. W. 1012; Miles v. City of Worcester, 154 Mass. 513, 28 N. E. 676; Pumpelly v. Green Bay, 13 Wall. 166–181; Harper v. Milwaukee, 30 Wis. 365; Eastman v. Meredith, 36 N. H. 284–296; Weet v. Brockport, 16 N. Y. 161–172; St. Peter v. Denison, 58 N. Y. 416–421; Mayor of Cumberland v. Willison, 50 Md. 138; Forsyth v. Mayor, 45 Ga. 152; Barthold v. Philadelphia, 154 Pa. St. 109, 26 Atl. 304. Generally, see 2 Thomp. Neg. p. 740.

Between these extremes, the line of distinction is often obscure. Thus, as to corporate property, the municipality is not liable for damages arising from its use, management, or condition, when the purpose of such property is purely public. A child injured by an unsafe staircase in a public school cannot recover against the city.[330]

of streets. Speir v. City of Brooklyn, 139 N. Y. 6, 34 N. E. 727. Cf. Lincoln v. City of Boston, supra. As to liability of city for blasting in highway, see post, p. 848, note 156, "Negligence"; for leaving glass on street, City of El Paso v. Dolan (Tex. Civ. App.) 25 S. W. 669; for a projecting water plug, Scranton v. Catterson, 94 Pa. St. 202; a box, City v. Tayloe, 16 South. 576; for leaving a manhole defectively covered on surface of street, Barr v. City of Kansas (Mo. Sup.) 25 S. W. 562; Lincoln v. City of Detroit (Mich.) 59 N. W. 617; for allowing a dangerous ridge of ice to remain, Cumisky v. City of Kenosha, 87 Wis. 286, 58 N. W. 395, distinguishing Ball v. Town of Woodbine, 61 Iowa, 83, 15 N. W. 846; Findley v. City of Salem, 137 Mass. 171; Hill v. Board, 72 N. C. 55; Smith v. City of Pella, 86 Iowa, 236, 53 N. W. 226; Decker v. City of Scranton, 151 Pa. St. 241, 25 Atl. 36; Dooley v. City of Meriden, 44 Conn. 117; West v. City of Eau Claire, 89 Wis. 31, 61 N. W. 313; Cook v. City of Milwaukee, 24 Wis. 270; Upham v. City of Salem, 163 Mass. 483, 39 N. E. 178; but mere slipperiness is not sufficient, Grossenbach v. City of Milwaukee, 65 Wis. 31, 26 N. W. 182; Cook v. City of Milwaukee, 27 Wis. 191; Chicago v. McGiven, 78 Ill. 347; Village of Gibson v. Johnson, 4 Ill. App. 288; Broburg v. City of Des Moines, 63 Iowa, 523, 9 N. W. 340; Smyth v. Bangor, 72 Me. 249; contra, Cloughessey v. City of Waterbury, 51 Conn. 405; Kinney v. City of Troy, 38 Hun, 285. And, generally, see Hughes v. City of Lawrence (Mass.) 36 N. E. 485, 9 Am. Ry. & Corp. R. 219; Village of Oak Harbor v. Kallager (Ohio) 39 N. E. 144; Hutchinson v. City of Ypsilanti (Mich.) 61 N. W. 279. While a municipal corporation is not ordinarily liable for damages caused by grading or changing the grade of a street, in the absence of gross lack of care and skill in devising the improvement (City of North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821; "Damage Incident to Authorized Act," ante, p. 142) it is liable for damages consequent upon negligence in doing the work (Keating v. Cincinnati, 38 Ohio, 141; Werth v. City of Springfield, 78 Mo. 107; Hendershott v. City of Ottumwa, 46 Iowa, 658; Mayo v. Springfield, 136 Mass. 10; Broadwell v. City of Kansas, 75 Mo. 213; Elgin v. Kimball, 90 Ill. 356). As to effect of grade on street on surface water, see post, p. 763, "Nuisance." The diminution in market value of property injured by a change of grade of a street is the correct measure of the damage. Chase v. City of Portland, 86 Me. 368, 29 Atl. 1104.

[330] Hill v. Boston, 122 Mass. 344; Howard v. City of Worcester, 153 Mass. 426, 27 N. E. 11; Snider v. City of St. Paul (Minn.) 53 N. W. 763. But compare Barron v. City of Detroit, 94 Mich. 601, 54 N. W. 273; Greenwood v.

Where, however, corporate property is not used for public, but for corporate, benefit, the city is liable for injury resulting. Thus, the city council of Augusta, as owner and keeper of a toll bridge over the Savannah river, was held liable for negligence in not keeping the abutments on the South Carolina side in safe condition. The corporation had gone into the state of South Carolina to engage in private business, and to enjoy the profits thereof.[331] The distinction of nonliability of municipal corporations when damages arise from errors in the plan,[332] and of liability in the execution,[333] of public

Town of Westport, 53 Fed. 824; Briegel v. City of Philadelphia, 135 Pa. St. 451, 19 Atl. 1038; Barthold v. Philadelphia, 154 Pa. St. 109, 26 Atl. 304.

[331] City Council v. Hudson, 88 Ga. 599, 15 S. E. 678; Doherty v. Inhabitants of Braintree, 148 Mass. 495, 20 N. E. 106. Similarly, a city is liable where it operates waterworks as a private corporation might, City of Philadelphia v. Gilmartin, 71 Pa. St. 140; Smith v. Philadelphia, 81 Pa. St. 38; or gas works, Scott v. Manchester, 2 Hen. & M. 204; or runs a poor farm with a view to profit, among other things, Neff v. Inhabitants of Wellesley, 148 Mass. 487, 20 N. E. 111. As to liability of private corporation owning public works: Parnaby v. Proprietors Lancaster Canal Co., 11 Adol. & E. 223; 1 Thomp. Neg. p. 541. A city which, pursuant to its charter powers, engages in the business of towing vessels for profit, is liable for a collision caused by the fault of the tug. The Giovanni v. City of Philadelphia, 59 Fed. 303, affirmed. City of Philadelphia v. Gavagnin, 10 C. C. A. 552, 62 Fed. 617.

[332] Mills v. Brooklyn, 32 N. Y. 489; Lynch v. City of New York, 76 N. Y. 61; Smith v. New York, 66 N. Y. 295; Carr v. Northern Liberties, 35 Pa. St. 324; Child v. Boston, 4 Allen (Mass.) 41; Allen v. City of Boston, 159 Mass. 324, 34 N. E. 519. Et vide Darling v. Bangor, 68 Me. 108. Thus a municipal corporation is not ordinarily liable for defect in plan of sewerage. The fact that a city engineer plans a defective drain, to be constructed by private parties, which caves in, and causes injury, does not impose any liability on the city. Horton, C. J., dissenting. City of Kansas City v. Brady, 52 Kan. 297, 34 Pac. 884, affirmed; Id., 53 Kan. 312, 36 Pac. 726; Rozell v. City of Anderson, 91 Ind. 591; Johnston v. District of Columbia, 1 Mackey, 427; City of Denver v. Capelli, 4 Colo. 25; City of Evansville v. Decker, 84 Ind. 325; Hardy v. City of Brooklyn, 7 Abb. N. C. 403; Collins v. City of Philadelphia, 93 Pa. St. 272; Mayor, etc., v. Eldridge, 64 Ga. 524; Springfield v. Spencé, 39

[333] Municipality is liable for failure to repair or complete the construction of its sewers, Savannah v. Spears, 66 Ga. 304; Winn v. Rutland, 52 Vt. 481; Hardy v. City of Brooklyn, 90 N. Y. 435; and for negligence in construction, Semple v. Mayor, etc., 62 Miss. 63; Elgin v. Kimball, 90 Ill. 356; Johnston v. District of Columbia, 118 U. S. 19, 6 Sup. Ct. 923.

works is judicially recognized, but has been pronounced "repugnant to justice, and destitute of any solid foundation in reason." [334]

Conduct ultra Vires.

Municipal corporations can be held liable for only such tortious conduct as occurs in the exercise of some power conferred on them by law, or the exercise of some duty imposed on them by law. If conduct be unauthorized by charter or statute, it cannot be the basis of a suit for damages against them. Thus, cutting a ditch outside of the city limits is an act ultra vires, for which the city is not liable to the owner of the lot damaged.[335] A municipality cannot commit libel.[336] A municipal corporation cannot be guilty of a wrong so gross and willful as to entitle to vindictive damages. Only compensatory damages can be recovered.[337]

Ohio St. 665; Aurora v. Love, 93 Ill. 521. Cf. City of North Vernon v. Voegler, 89 Ind. 77. Insufficient culvert, Ford v. Town of Braintree, 64 Vt. 144, 23 Atl. 633. Where a city, under the superintendence of a competent engineer, builds a culvert sufficient to discharge the ordinary quantity of surface water flowing through a definite channel, it is not liable when, because of a flood caused by an unusually heavy rain, the culvert is unable to discharge the water, and lands are overflowed. Los Angeles Cemetery Ass'n v. City of Los Angeles, 103 Cal. 461, 37 Pac. 375.

[334] 2 Thomp. Neg. p. 736, § 3. Et vide Lansing v. Toolan, 37 Mich. 152; Van Pelt v. Davenport, 42 Iowa, 308; Blyhl v. Village of Waterville (Minn.) 58 N. W. 817. The action of municipal authorities in determining the character of public works, like sewers, is not generally subject to revision by courts. Johnson v. District of Columbia, 118 U. S. 19, 6 Sup. Ct. 923; Child v. Boston, 4 Allen (Mass.) 41; Mills v. Brooklyn, 32 N. Y. 489. Defect in plan is not negligence as matter of law. City of Peru v. Brown, 10 Ind. App. 597, 38 N. E. 223.

[335] Loyd v. City of Columbus, 90 Ga. 20, 15 S. E. 818; City of Orlando v. Pragg, 31 Fla. 111, 12 South. 368; Mayor of City of Albany v. Cunliff, 2 N. Y. 165, reversing 2 Barb. 190; Browning v. Owen Co., 44 Ind. 11–13; Haag v. Board of Com'rs, 60 Ind. 511; Pekin v. Newell, 26 Ill. 320; Stoddard v. Village of Saratoga Springs, 127 N. Y. 261–267, 27 N. E. 1030; Smith v. City of Rochester, 76 N. Y. 506; Morrison v. Lawrence, 98 Mass. 219; Schumacher v. St. Louis, 3 Mo. App. 297.

[336] Howland v. Inhabitants of Maynard, 159 Mass. 434, 34 N. E. 515.

[337] McGary v. Lafayette, 12 Rob. (La.) 668–674, 4 La. Ann. 440; City of Chicago v. Kelly, 69 Ill. 475; City of Chicago v. Langlass, 52 Ill. 256, 66 Ill. 361; Hunt v. City of Boonville, 65 Mo. 620. As to liability of municipal cor-

Unauthorized Acts of Agents and Officers.

The statement that a municipal corporation acts only through its agents does not mean that it so acts through subordinate agents only. It may act through its mayor, its common council, its superintendent of streets or waterworks, or its board of public works.[338] A municipal corporation is not liable for the acts of its agents or officers, not previously authorized or subsequently ratified by it, nor done in good faith in pursuance of their general authority to act for the city in the matter to which they relate.[339] Thus a city is not liable for the act of a tax collector in bringing a malicious suit against a person, unless it has authorized or ratified such suit.[340] The ability of a municipal corporation to attach liability by ratification has been denied.[341] The liability of a municipal corporation for the acts of an independent contractor or his servants is governed by essentially the same principles as apply in the case of private individuals.[342]

porations for torts involving motive, see note to Abrath v. Northeastern R. Co., 25 Am. Law Reg. 757.

[338] Stoddard v. Inhabitants of Winchester, 157 Mass. 567, 32 N. E. 948; Elrgott v. Mayor, 96 N. Y. 264; Barnes v. District of Columbia, 91 U. S. 540; Barney Dumping-Boat Co. v. Mayor, 40 Fed. 51; Rollins Inv. Co. v. George, 48 Fed. 776.

[339] Thus, a town is not liable for the unauthorized acts of its officers, though done colore officii. In an action against a town for damages caused by the acts of its officers, the complaint must allege that such acts were within the scope of their authority. Kreger v. Township of Bismarck (Minn.) 60 N. W. 675.

[340] Horton v. Newell (R. I.) 23 Atl. 910; Donnelly v. Tripp, 12 R. I. 97, 98; New York & B. Sawmill & Lumber Co. v. City of Brooklyn, 71 N. Y. 580; Ham v. Mayor, etc., 70 N. Y. 459; Goddard v. Harpswell, 84 Me. 499, 24 Atl. 958; Fisher v. Boston, 104 Mass. 87; Alcorn v. Philadelphia, 44 Pa. St. 348; Reilly v. Philadelphia, 60 Pa. St. 467; Sewall v. City of St. Paul, 20 Minn. 511 (Gil. 459); Chicago v. Joney, 60 Ill. 383; City of Kansas City v. Brady, 52 Kan. 297, 34 Pac. 884; City Council of Sheffield v. Harris (Ala.) 14 South. 357. Police officers of a city are not servants in such a sense as to render it liable for their wrongful acts. Woodhull v. City of New York, 76 Hun, 39, 28 N. Y. Supp. 120.

[341] Mitchell v. Rockland, 52 Me. 118–125. Cf. Ross v. Madison, 1 Ind. 281; Thayer v. Boston, 19 Pick. (Mass.) 511. Et vide McGary v. Lafayette, 12 Rob. (La.) 668, 4 La. Ann. 440.

[342] 2 Thomp. Neg. 740; Goetz v. Borough of Butler (Pa. Sup.) 3 Atl. 763;

Damage Incident to Authorized Act.

A municipal corporation, on the same principles which exempt other corporations or private individuals, is not liable for damage incident to authorized act.[343]

Involuntary Quasi Corporations.

Involuntary quasi municipal corporations, such as counties,[344] townships, school districts,[345] and the New England towns,[346] as to liability for torts, are distinguished from voluntary chartered municipal corporations proper, such as cities or incorporated villages.

Borough of Susquehanna Depot v. Simmons, 112 Pa. St. 384, 5 Atl. 434. A town that contracts with an individual for the repair of a highway, including the destruction by fire of brush which has theretofore been cut and piled, is not liable for damages to a third person caused by the negligence of said contractor when burning the brush. Shute v. Town of Princeton (Minn.) 59 N. W. 1050. On the other hand, a contractor is not liable for damages caused by the bursting of a sewer, where he had completed the work, and the city had assumed control thereof, though it had not formally accepted it. First Presbyterian Congregation of Easton v. Smith (Pa. Sup.) 30 Atl. 279. As to liability for torts of independent contractor by county, see Smith v. Board of County Com'rs, 46 Fed. 340

[343] Ante, p. 170.

[344] In the absence of statutory provisions, a county is not liable for damages resulting from the failure of its officers to maintain its bridges. Pundeman v. St. Charles Co., 110 Mo. 594, 19 S. W. 733. Cf. Field v. Albemarle Co., 20 S. E. 954; Heigel v. Wichita Co., 84 Tex. 394, 19 S. W. 562. Cf. McCormick v. Washington Tp., 112 Pa. St. 185, 4 Atl. 164, followed in Clulow v. McClelland, 151 Pa. St. 583, 25 Atl. 147; Yordy v. Marshall Co., 80 Iowa, 405, 45 N. W. 1042, followed in Yordy v. Marshall Co., 86 Iowa, 340, 53 N. W. 298; Krug v. Borough of St. Mary's, 152 Pa. St. 30, 25 Atl. 161, 162; Power v. Borough of Ridgway, 149 Pa. St. 317, 24 Atl. 307: Allen Co. Com'rs v. Bacon, 96 Ind. 31.

[345] Finch v. Board of Education, 30 Ohio St. 37; Com'rs Hamilton Co. v. Mighels, 7 Ohio St. 109; Eastman v. Meredith, 36 N. H. 284; Kincaid v. Hardin Co., 53 Iowa, 430, 5 N. W. 589; Bank v Brainerd School Dist., 49 Minn. 106, 51 N. W. 814. As to New Jersey township statute, see Carter v. Mayor, etc., of Rahway, 30 Atl. 863; Shear. & R. Neg. (4th Ed.) 267.

[346] A town is not liable to a traveler injured by negligence of persons employed by selectmen in removing a dangerous flagstaff standing near a highway. Wakefield v. Newport, 62 N. H. 624, collecting cases; Bryant v. Inhabitants of Westbrook, 86 Me. 450, 29 Atl. 1109; Sargent v. Town of Gilford (N. H.) 27 Atl. 306; Brown's Adm'r v. Town of Guyandotte, 34 W. Va. 299, 12 S. E. 707; Riddle v. Proprietors (1810) 7 Mass. 169.

in being subjected to a much less extended responsibility. They are political divisions created for convenience, without the actual, immediate consent of the inhabitants of the territory involved.[347]

On the other hand, municipal corporations, properly speaking, are voluntary associations, to which there has been an actual, free consent on the part of the inhabitants. Moreover, the increased power of a municipal corporation proper naturally brings, at the same time, increased benefit and increased liability. And there is the additional argument from inconvenience,—that any other rule would bankrupt, for example, many sparsely-settled portions of the West.[348] The validity of the distinction has been denied.[349] "We

[347] 1 Thomp. Neg. 616; 2 Dill. Mun. Corp. § 961; 15 Am. & Eng. Enc. Law, 1143, note 1, collecting cases. Even a statutory town organized upon petition is within the rule. Altnow v. Town of Sibley, 30 Minn. 186, 14 N. W. 877, Templeton v. Linn Co., 22 Or. 313, 29 Pac. 795; Lorillard v. Town of Monroe, 11 N. Y. 392; Askew v. Hale, 54 Ala. 639; Clark v. Adair Co., 79 Mo. 536; Granger v. Pulaski Co., 26 Ark. 37; White v. County of Bond, 58 Ill. 297; White v. Commissioners, 90 N. C. 437; Brabham v. Supervisors, 54 Miss. 363; Downing v. Mason Co., 87 Ky. 208, 8 S. W. 264; Barnett v. Contra Costa Co., 67 Cal. 77, 7 Pac. 177; Scales v. Ordinary of Chattahoochee Co., 41 Ga. 225; Marion Co. Com'rs v. Riggs, 24 Kan. 255; Watkins v. County Court, 30 W Va. 657, 5 S. E. 654; Fry v. County of Albemarle, 86 Va. 195, 9 S. E. 1004; Woods v. Colfax, 10 Neb. 552, 7 N. W. 269; Hamilton Co. Com'rs v. Mighels, 7 Ohio St. 109; Smith v. Board, 46 Fed. 340; Barnes v. District of Columbia, 91 U. S. 552; Cooley, Const. Lim. (6th Ed.) 301; Dill. Mun. Corp. §§ 906, 907, 909; Elliott, Roads & S. p. 42; Baxter v. Turnpike Co., 22 Vt. 123; Ward v. County of Hartford, 12 Conn. 404; Commissioners of Niles Tp. v. Martin, 4 Mich. 557; Adams v. Bank, 1 Me. 361; Board of Chosen Freeholders of Sussex Co. v. Strader, 18 N. J. Law, 108; Farnum v. Concord, 2 N. H. 392; Morey v. Town of Newfane, 8 Barb. 645. And, for a full discussion of the question, see opinion of Mr. Justice Gray, in Hill v. Boston, 122 Mass. 344.

[348] Bailey v. Lawrence Co. (S. D.) 59 N. W. 219. A county is not liable for negligence in constructing a courthouse whereby the workmen employed thereon were killed. Hollenbeck v. Winnebago Co., 95 Ill. 148, reviewing cases. Where there is no statutory liability on a town for negligence in the care of sidewalks, one who, while going to the town hall, which has been

[349] And it may be, and undoubtedly is, true that too much importance was originally attached to the decision in the case of Russell v. Inhabitants, decided in 1788 by the court of king's bench of England, and reported in 2 Term R. 667. Bailey v. Lawrence Co. (S. D.) 59 N. W. 219. The doctrine rests on stare decisis. To change it would be judicial legislation. Id.

find it not only difficult, but absolutely impossible, to perceive any good reason why a person who sustains an injury by reason of a defect in a highway just beyond the corporate limits of a town or city has no right of action against the public authority charged with the duty of keeping such a highway in repair, while such a person would have a right of action if the injury he sustained had been received within the corporated limits of such a city or town." [350]

SAME—CORPORATIONS, NOT MUNICIPAL, ENGAGED IN PUBLIC WORK.

61. Where a corporation, not municipal or quasi municipal, is engaged in public work—

(a) Liability is determined by the rules applying to private corporations, whenever such works are operated for profit; and

(b) Its exemption is limited by rules as to municipal corporations, when it is a public charity.

Public Works Engaged in for Profit.

The authorities are generally agreed that a private corporation owning public works, and operating them for profit, is liable in tort, as any other private corporation, for breach of corporate duty.

rented for other than public purposes, is injured by a defect in the walk in front of it, cannot recover. Buchanan v. Town of Barre, 66 Vt. 129, 28 Atl. 878. Not liable for failure to repair bridge, Bailey v. Lawrence Co. (S. D.) 59 N. W. 219; People v. Queens Co. Com'rs, 142 N. Y. 271, 36 N. E. 1062; cf. Greenwood v. Town of Westport, 60 Fed. 560; or free gravel roads, Cones v. Board, 137 Ind. 404, 37 N. E. 272. A county is not liable for injuries caused by the negligence of the person in charge of a lunatic asylum maintained by the county, since in maintaining such asylum the county is engaged in the performance of the duty imposed on each county to support and care for its insane. Hughes v. Monroe Co. (Sup.) 29 N. Y. Supp. 495; Dosdall v. Olmsted Co., 30 Minn. 96, 14 N. W. 458. Cf. Kellogg v. Village of Janesville, 34 Minn. 132, 24 N. W. 359; Estelle v. Village of Lake Crystal, 27 Minn. 243, 6 N. W. 775; Barnett v. Contra Costa Co., 67 Cal. 77, 7 Pac. 177; Weet v. Trustees, 16 N. Y. 161, note; Mower v. Leicester, 9 Mass. 247; Smith v. Board of County Com'rs, 46 Fed. 340.

[350] Young v. City of Charleston, 20 S. C. 119. Et vide Arkadelphia v. Windham, 49 Ark. 139, 4 S. W. 450; Winbigler v. Los Angeles, 45 Cal. 36; County Com'rs v. Gibson, 36 Md. 229; Detroit v. Blackeby, 21 Mich. 84; Navasota v.

Thus, in Parnaby v. Lancaster Canal Co.,[351] Tindall, C. J., held that the duty of taking such care of a canal that all who properly use it may navigate without danger to their lives or property is, by law, "imposed upon the company, and that they are responsible for the breach of it, upon a similar principle to that which makes a shop keeper who invites the public to his shop liable for neglect in leaving a trapdoor open, without any protection, by which his customers suffer injury." "The general rule," says Mr. Thompson,[352] "is that when a corporation is clothed by charter, by the act of legislature, or by prescription which presumes a charter, with power to construct or improve turnpikes,[353] plank roads,[354] bridges,[355] ferries,[356]

Pearce, 46 Tex. 525; Pray v. Jersey City, 32 N. J. Law, 394; Mitchell v. Rockland, 52 Me. 118; Hyde v. Jamaica, 27 Vt. 443; Detroit v. Putnam, 45 Mich. 263, 7 N. W. 815; French v. City of Boston, 129 Mass. 592; Hill v. City of Boston, 122 Mass. 344. The doctrine has been judicially denied. Wilson v. Jefferson Co., 13 Iowa, 181; Commissioners v. Baker, 44 Md. 1; House v. Board, 60 Ind. 580; Rapho Tp. v. Moore, 68 Pa. St. 404; Shadler v. Blair Co., 136 Pa. St. 488, 20 Atl. 539; McCalla v. Multnomah Co., 3 Or. 424. But see Board of Com'rs v. Dally, 132 Ind. 73, 31 N. E. 531; Kincaid v. Hardin Co., 53 Iowa, 430, 5 N. W. 589. And see Raasch v. Dodge Co. (Neb.) 61 N. W. 725.

[351] 11 Adol. & E. 223; 3 Nev. & P. 523; 3 Perry & D. 162; Mersey Docks v. Gibbs, L. R. 1 E. & I. App. Cas. 93.

[352] Thomp. Neg. p. 555. Although the duty is not especially enjoined by statute, Kreider v. Lancaster, E. & M. Turnpike Co., 162 Pa. 537, 29 Atl. 721. As to angle of grading and compensation to abutting owner on change of grade and injunction, see Green v. City & Suburban Ry. Co., 78 Md. 294, 28 Atl. 626.

[353] 1 Thomp. Neg. p. 556; Brookville & C. Turnpike Co. v. Pumphrey, 59 Ind. 78; Zuccarello v. Nashville & C. R. Co., 62 Tenn. 365; Southworth v. Lathrop, 5 Day, 237—although the duty is not especially enjoined by statute.

[354] 1 Thomp. Neg. p. 556; Davis v. Lemoille County Plank-Road Co., 27 Vt. 602; Ireland v. Oswego Plank-Road Co., 13 N. Y. 526.

[355] 1 Thomp. Neg. p. 556; Watson v. Lisbon Bridge Co., 14 Me. 201; Tift v. Jones, 52 Ga. 538; Wayne County Turnpike Co. v. Berry, 5 Ind. 286; Hayes v. New York Cent. & H. R. R. Co., 9 Hun, 63; Rex v. Lindsey, 14 East, 317; Rex v. Kent, 13 East, 220; Grigsby v. Chappell, 5 Rich. Law, 443; Nichall v. Allen, 1 Best. & S. 915.

[356] 1 Thomp. Neg. p. 556; Murray v. Hudson River R. Co., 47 Barb. 196; Delzell v. Indianapolis & C. R. Co., 32 Ind. 45; Lowel v. Boston, 23 Pick. 31; Oakland R. Co. v. Fielding, 48 Pa. St. 321. As to persons to whom a corporation operating a ferry owes a duty, see Malloy v. Railway Co., 78 Hun, 166, 28 N. Y. Supp. 979. As to liability for assault of servant, Scanlon v. Suter,

railways,[357] telegraphs,[358] canals,[359] docks,[360] wharves,[361] waterworks,[362] gasworks,[363] to improve navigable streams,[364] or to do

158 Pa. St. 275, 27 Atl. 963. As to regulation by statute, Koretke v. Irwin (Ala.) 13 South. 943; Printup v. Patton, 18 S. E. 311.

[357] 1 Thomp. Neg. p. 556; Oakland R. Co. v. Fielding, 48 Pa. St. 321; Cumberland V. R. Co. v. Hughes, 1 Pa. St. 141; Inhabitants of Lowell v. Boston & L. R. Co., 23 Pick. 24.

[358] 1 Thomp. Neg. p. 556; Ward v. Atlantic & P. Tel. Co., 71 N. Y. 81.

[359] 1 Thomp. Neg. 356; Parnaby v. Proprietors of Lancaster Canal Co., 11 Adol. & E. 223; Steele v. President Western Inland Lock Nav. Co., 2 Johns. 283; Schuylkill Nav. Co. v. McDonough, 33 Pa. St. 73; Manley v. St. Helen's Canal Co., 2 Hurl. & N. 840, 27 L. J. Exch. 159. See, also, Binks v. South Yorkshire R. Co., 3 Best & S. 244, 32 L. J. Q. B. 26, 11 Wkly. Rep. 66, 7 Law T. (N. S.) 350; Hooker v. New Haven & Northampton Co., 14 Conn. 146; Delaware & R. Canal Co. v. Lee, 22 N. J. Law, 243; Weitner v. Delaware & H. Canal Co., 4 Rob. (N. Y.) 234; Pennsylvania R. Co. v. Patterson, 73 Pa. St. 491; Saylor v. Smith, 2 Wkly. Notes Cas. 687; Dunn v. Birmingham Canal Nav. Co., L. R. 8 Q. B. 42, 42 L. J. Q. B. 34, 21 Wkly. Rep. 286; Cockburn v. Erewash C. Co., 11 Wkly. Rep. 34; Reg. v. Delamere, 13 Wkly. Rep. 717; Walker v. Goe, 4 Hurl. & N. 350; Witherley v. Regent's Canal Co., 12 C. B. (N. S.) 2, 6 Law T. (N. S.) 255; Winch v. Conservators, 31 Law T. (N. S.) 128; Nield v. London & N. W. R. Co., 23 Wkly. Rep. 60; Harrison v. Great Northern R. Co., 3 Hurl. & C. 231, 10 Jur. (N. S.) 992. See, also, Delaware R. Co. v. Com., 60 Pa. St. 367; Pennsylvania R. Co. v. Graham, 63 Pa. St. 290; Hancock v. Sherman, 14 Wend. (N. Y.) 58.

[360] 1 Thomp. Neg. p. 556; Smith v. London & St. K. Docks Co., L. R. 3 C. P. 326, 37 L. J. C. P. 217; Gibson v. Inglis, 4 Camp. 72; Coggs v. Bernard, 2 Ld. Raym. 909; Mersey Docks & Harbour Board Co. v. Gibbs, L. R. 1 H. L. 93.

[361] 1 Thomp. Neg. p. 557; Wendell v. Baxter, 12 Gray (Mass.) 494; Radway v. Briggs, 37 N. Y. 256; Albany v. Cunliff, 2 N. Y. 165; Pittsburgh v. Grier, 22 Pa. St. 54; Buckbee v. Brown, 21 Wend. (N. Y.) 110; Mersey Docks & Harbour Board v. Gibbs, L. R. 1 H. L. 93; Prescott v. Duquesne, 48 Pa. St. 118; Jeffersonville v. Ferry Co., 27 Ind. 100, 35 Ind. 19; Winpenny v. Philadelphia, 65 Pa. St. 135; Seaman v. New York, 3 Daly (N. Y.) 147; John v. Bacon, L. R. 5 C. P. 437.

[362] 1 Thomp. Neg. p. 557; Matthews v. West London Water Works Co., 3 Camp. 403; Bayley v. Wolverhampton Water Works Co., 6 Hurl. & N. 241, 30 L. J. Exch. 57; Clothier v. Webster, 12 C. B. (N. S.) 790; Drew v. New River Co., 6 Car. & P. 754; Water Co. v. Ware, 16 Wall. 566; Athinson v. New Castle & G. Water Works Co., 2 Exch. Div. 441; Couch v. Steel, 3 El. & Bl. 402, 23 L. J. Q. B. 121.

[363] 1 Thomp. Neg. p. 557; Dillon v. Washington Gas Light Co., 1 MacArthur, 626; Ellis v. Sheffield Gas Consumers' Co., 2 El. & Bl. 767; Weld v. Gas Light Co., 1 Starkie, 189; People v. New York Gas Light Co., 64 Barb. 55. As to liability of natural gas companies under changed privilege, see Hague v. Wheeler, 157 Pa. St. 324, 27 Atl. 714; Ohio Gas Fuel Co. v. Andrews, 50 Ohio St. 695, 35 N. E. 1059.

[364] 1 Thomp. Neg. p. 557; Rex v. Kent, 13 East, 220; Harrison v. G. N. R. Co., 3 Hurl. & C. 231, 10 Jur. (N. S.) 992.

other like work of a public nature, and to take toll [365] therefor, it is bound to proceed in the construction and maintenance of such works with due regard to the safety of others, and to keep them in repair, and is liable in a civil action to an individual who has sustained damages in consequence of a failure of duty in either of these particulars."

Public Charity.

Following Holliday v. St. Leonard,[366] it was held in Massachusetts [367] that a corporation established for the maintenance of a public charity is not liable for injury caused by its servants, if it exercises due care in their selection. In a later decision [368] the responsibility of public charity is determined upon a more logical principle,—that where the charity is performing a purely public duty, without profit, it is "no more liable for the negligence of officers and agents than the city would be." The reason for this better opinion is stated in Fire Ins. Patrol v. Boyd,[369] by Mr. Justice Paxson, "that, when a public corporation has no property or funds but what have been contributed for a special charitable purpose, it would be against all law and all equity to apply the trust funds thus contributed to compensate injuries inflicted by the negligence of its agents and servants." This is the generally recognized rule.[370] However, in Glavin

[365] 1 Thomp. Neg. p. 557; Brown v. South Kennebec Agricultural Soc., 47 Me. 275.

[366] 11 C. B. (N. S.) 192. Commissioners of public works serving gratuitously were held not liable for negligence in carrying on the work resulting in damage unless they failed to exercise proper care in selecting those who actually performed the work.

[367] McDonald v. Massachusetts General Hospital, 120 Mass. 432 (a defendant held not liable for negligence of physician to patient for unauthorized assumption of hospital attendant to act as surgeon). Cf. Haas v. Missionary Soc. (1893) 6 Misc. Rep. 281, 26 N. Y. Supp. 868.

[368] Benton v. Boston City Hospital, 140 Mass. 13, 1 N. E. 836. This case is governed by the principle declared in Hill v. Boston, 122 Mass. 344. And see Tindley v. Salem, 137 Mass. 171; Doherty v. Inhabitants of Braintree, 148 Mass. 497, 20 N. E. 106; Howard v. City of Worcester, 153 Mass. 426, 27 N. E. 11.

[369] 120 Pa. St. 624, 15 Atl. 553; Id., 113 Pa. St. 269, 6 Atl. 536. It was accordingly held that a fire insurance patrol to save life and property, making and dividing no profits or dividends, and not discriminating between property insured and not insured, is not liable for the negligence of its employés.

[370] Riddle v. Proprietors of Locks, etc., 7 Mass. 187; McDonald v. Massachusetts General Hospital, 120 Mass. 432; Sproat v. Directors, 145 Pa. St. 598, 23 Atl. 380; Ford v. School Dist., 121 Pa. St. 543, 15 Atl. 812; Patter-

v. Hospital,[371] after an elaborate review of the authorities, it was determined that the analogy of ordinary public corporations should be followed; that there should be corresponding liability for nonperformance and misperformance of the duties imposed by its character; and that its general trust funds are liable to satisfy a judgment in tort recovered against it for the negligence of its officers or servants.

Courts are inclined to exercise strictness in the definition of a charity, within the meaning of this exemption. Thus, although the maintenance of a ferry by an educational corporation is ultra vires, such corporation is liable for injuries to a passenger for hire caused by negligence of employé in charge.[372] However, that a gift may have been prompted by an ulterior and selfish motive, as that a railroad company, by the establishment of hospitals, would protect itself from excessive claims for injuries resulting to its servants, does not destroy its character as a charity.[373]

son v. Pennsylvania Reform School, 92 Pa. St. 229; Erie v. Schwingle, 22 Pa. St. 384; Van Tassell v. Hospital, 60 Hun, 585, 15 N. Y. Supp. 620; Haas v. Missionary Soc., 6 Misc. Rep. 281, 26 N. Y. Supp. 868; Laubheim v. Steam Ship Co., 107 N. Y. 228, 13 N. E. 781; Maxmilian v. Mayor, 62 N. Y. 160; Richardson v. Coal Co., 6 Wash. 52, 32 Pac. 1012; Williams v. Industrial School, 95 Ky. 251, 24 S. W. 1065. And see 16 Am. & Eng. Enc. Law, 466; Id. 813; 29 Am. Law Reg. 209; 28 Am. Law Reg. 669; Secord v. Railway Co., 18 Fed. 229; Union Pac. Ry. Co. v. Artist, 9 C. C. A. 14, 60 Fed. 365; Russell v. Men of Devon, 2 Term R. 667; Feoffees of Heriot's Hospital v. Ross, 12 Clark & F. 506; Sherbourne v. Yuba Co., 21 Cal. 113; Brown v. Vinalhaven, 65 Me. 402; Mitchell v. Rockland, 52 Me. 118; Richmond v. Long's Adm'r, 17 Grat. 375; Ogg v. Lansing, 35 Iowa, 495; Murtaugh v. St. Louis, 44 Mo. 479; Hamilton Co. v. Mighels, 7 Ohio, 109.

[371] 12 R. I. 411.

[372] Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 35 N. E. 776.

[373] Sanborn, J., in Union Pac. Ry. Co. v. Artist, supra. And, generally, as to what is a public charity, see Fire Ins. Patrol v. Boyd, supra; Philadelphia v. Masonic Home, 160 Pa. St. 572, 28 Atl. 954; Episcopal Academy v. Philadelphia, 150 Pa. St. 565, 25 Atl. 55; Northampton Co. v. Lafayette College, 128 Pa. St. 132, 18 Atl. 516; Jackson v. Phillips, 14 Allen (Mass.) 539; Gooch v. Association, 109 Mass. 558.

VARIATIONS BASED ON CONDUCT OF PLAINTIFF.

62. Plaintiff may deprive himself of the right to relief—
(a) By his own wrongdoing;
(b) By his consent.

SAME—WRONGDOING BY PLAINTIFF.

63. The law will not interfere to do justice between, nor lend its aid to, those that have violated it. But, in order that plaintiff's wrongdoing shall bar his right to recover damages suffered at the hands of another, it must have been the legal cause of such damages.

64. While the mere fact that a person or his property are involved in wrongdoing does not create the duty on the part of another of exercising diligence to avoid doing harm, it does not justify the latter in—
(a) Malicious or wanton maltreatment, or in
(b) Failing to take proper care to avoid harm after the latter has, or ought to have, knowledge of impending and avertible danger.

It is a general principle of jurisprudence that courts will not aid a wrongdoer. "He who seeks equity must do equity." He must come into equity with clean hands.[374] "Ex turpi causa,[375] ex dolo malo non oritur actio,"[376] said the civil law. Therefore a Confederate officer, who, while taking reports to his superior, was injured by the negligence of the common carrier transporting him, cannot recover for negligence on the part of the carrier, because the injury occurred while both parties were violating public law.[377] The lim-

[374] Cooley, Torts, 157. Injunction to restrain nuisance refused. Topeka Water Supply Co. v. City of Potwin, 43 Kan. 404, 23 Pac. 578.

[375] Quirk v. Thomas, 6 Mich. 76–109. "He who sows must reap." McDaniels v. Walker, 44 Mich. 83–85, 6 N. W. 112.

[376] Pennington v. Todd, 47 N. J. Eq. 571, 21 Atl. 297.

[377] Turner v. Railroad Co., 63 N. C. 522–526. One who violates a reason-

its of this sort of doctrine are, upon the authorities, a little shadowy, and in places the decisions are in discord, and the reasoning inconsistent.[378] On the one hand, the law will neither apportion damages, nor reimburse those who willfully join in wrongdoing. "I know of no case in which a person who has committed an act declared by law to be criminal has been permitted to recover compensation against a person who acts jointly with him in the commission of a crime. * * * A person who is declared by the law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission."[379]

But, on the other hand, principals in a prize fight may recover from each other for damages done in their illegal battle.[380] If one cannot make out his case without showing part taken by him in an unlawful civil transaction, he is denied judicial redress. One wrongdoer can have no right against another.[381] Thus, a fraudulent transaction, in which both parties have knowingly participated, will not support a judgment for the plaintiff, nor a judgment for affirmative relief for the defendant.[382] Nor can one recover if he

able station regulation, the result of which is the damage complained of, cannot recover. Sullivan v. Railroad Co., 30 Pa. St. 234; Drake v. Pennsylvania R. Co., 137 Pa. St. 352, 20 Atl. 994.

[378] Bish. Noncont. Law, § 59.

[379] Lyndhurst, C. B., in Colburn v. Patmore, 1 Cromp. M. & R. 73–83; Fivaz v. Nicholls, 2 C. B. 501; Martin v. Wallace, 40 Ga. 52. In Riggs v. Palmer (N. Y. App.) 22 N. E. 188, 24 Am. Law Rev. 141, it was decided that a beneficiary who murders the testator cannot take under a will. In Owens v. Owens, 100 N. C. 240, 6 S. E. 794, it was held that a wife did not forfeit her right of dowry by assisting another person to murder her husband.

[380] Post, p. 203, "Consent."

[381] No action lies for pirating a libelously immoral book. Stockdale v. Onwhyn, 5 Barn. & C. 173, 2 Car. & P. 163; Lorrence v. Smith, Jac. 471; Turley v. Tucker, 6 Mo. 583; Hardman v. Wilcox, 9 Bing. 382; Stephenson v. Little, 10 Mich. 434; Winship v. Neale, 10 Gray, 382; Ridgely v. Bond, 17 Md. 14; Hurd v. Fleming, 34 Vt. 169; Hume v. Tufts, 6 Blackf. (Ind.) 136; Howe v. Farrar, 44 Me. 233; Muggridge v. Eveleth, 9 Metc. (Mass.) 233; Buckley v. Gross, 3 Best & S. 566; Merry v. Green, 7 Mees. & W. 623; Ransom v. State, 22 Conn. 153; Putnam v. Wyley, 8 Johns. (N. Y.) 337.

[382] Buchtella v. Stepanek, 53 Kan. 373, 36 Pac. 749. Et vide Peacock v Terry, 9 Ga. 137. And, generally, see Northwestern Mut. Life Ins. Co. v. Elliott, 5 Fed. 225; Thomas v. Brady, 10 Pa. St. 164; Northrup v. Foot, 14

knowingly participated in an attempt to defraud.[383] On the same principle there is authority for the statement that when the conductor of a train disobeys the rules of the company for which he is acting, in regard to the collection of fares from a traveler, or in respect to some other matters, such, for instance, as permitting him upon a forbidden part of the train, or upon a train not allowed to carry passengers, the traveler has all the rights of a passenger, if he has no notice, express or implied, of the rule, or of the conductor's disobedience. But if a person solicits and secures free transportation, or if he rides upon a part of the train from which passengers are excluded, or takes passage upon a train not allowed to carry passengers, knowing that his acts are against the rules of the carrier, and that in permitting it the conductor is disobedient, he is guilty of fraud, and not entitled to a passenger's rights.[384]

Connection as Cause.

In order that a person's wrongdoing may bar his recovery, it must have been connected as the legal cause of the wrong. It is not sufficient for the defendant to show merely that at the time the plaintiff was violating the law. Mere violation of the law (even upon conviction for a crime), or wrongdoing in some particular, does not make the offender an outlaw.[385] Thus, because one may have been

Wend. (N. Y.) 249. So no action lies for fraud in the sale of a lottery ticket. Kitchen v. Greenabaum, 61 Mo. 110. But cf. Catts v. Phelan, 2 How. 376. Et vide Robeson v. French, 12 Metc. (Mass.) 24; Gunderson v. Richardson, 56 Iowa, 56, 8 N. W. 683. A trespasser can obtain no property in bees. Rexroth v. Coon, 15 R. I. 35, 23 Atl. 37. Trover will not lie for a note given in a transaction by which statutes against the liquor traffic are intended to be avoided. Miller v. Lamery, 62 Vt. 166, 20 Atl. 199. And see Rogers v. Miller, 62 N. H. 131.

[383] Fisher v. Metropolitan Life Ins. Co., 160 Mass. 386, 35 N. E. 849.

[384] McVeety v. St. Paul, M. & M. R. Co., 45 Minn. 268, 47 N. W. 809; Toledo, W. & W. Ry. Co. v. Brooks, 81 Ill. 245; Toledo, W. & W. Ry. Co. v. Beggs, 85 Ill. 80; Robertson v. New York & E. R. Co., 22 Barb. 91; Union Pac. Ry. v. Nichols, 8 Kan. 505; Prince v. I. G. & N. Ry. Co., 64 Tex. 144; Gulf, C. & S. F. Ry. Co. v. Campbell, 76 Tex. 174, 13 S. W. 19. On the other hand, a passenger on a train with a limited ticket which has expired not a trespasser. Arnold v. Pennsylvania R. Co., 115 Pa. St. 135, 8 Atl. 213.

[385] Norris v. Litchfield, 35 N. H. 271. "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." Accordingly, the mere fact

riding a horse faster than an ordinance allowed, or because a boatman in a shell, or a student after a football game, may have been so insufficiently clad as to be guilty of indecent exposure, third persons are not justified in stoning him, as a violator of the law, nor would his wrong prevent his recovery from them.[386] The fact that a person was drunk at the time of his injury will not prevent his recovery, unless his condition is connected as the cause of his suffering.[387] Contributory negligence on the part of the plaintiff will bar his recovery of damages only when it is the legal cause of the harm.[388] Thus, ordinarily, servants who violate the rules of their master, which are in force, cannot, in the absence of error in such rules or orders,[389] recover against their master for consequent injuries, provided their disobedience is the proximate cause of the injury. But

that plaintiff was plotting for a wager contrary to law did not prevent his recovery from defendant for willfully running down his sleigh. Welch v. Wesson, 6 Gray, 505, per Merrick, J. Nor would the fact that plaintiff was on the wrong side of the road justify defendant into driving into him. Damon v. Scituate, 119 Mass. 66–68; Spofford v. Harlow, 3 Allen, 176. And see Steele v. Burkhardt, 104 Mass. 59, contrasting Welch v. Wesson, supra, with Gregg v. Wyman, 4 Cush. 322, and Way v. Foster, 1 Allen, 408. And see McGrath v. Merwin, 112 Mass. 467; Woodman v. Hubbard, 25 N. H. 67; Wentworth v. Jefferson, 60 N. H. 158; Lyons v. Child, 61 N. H. 72. And it will presently be seen that even a convict can recover damages for a tort committed against him while he was under sentence.

[386] Maguire v. Middlesex Ry. Co., 115 Mass. 239.

[387] Ward v. Chicago, St. P., M. & O. Ry. Co., 85 Wis. 771, 55 N. W. 771; Williams v. Edmunds, 75 Mich. 92, 42 N. W. 534. So one may not willfully run another down, though he be trotting for money contrary to statute. Welch v. Wesson, 6 Gray, 505. And see Gates v. Burlington, C. R. & N. R. Co., 39 Iowa, 45; Norris v. Litchfield, 35 N. H. 271. In an action by a woman for damages for personal injuries, evidence that she committed adultery after the accident is not admissible for the purpose of disproving her statement as to the extent of her injuries. Joliet St. Ry. Co. v. Call, 143 Ill. 177, 32 N. E. 389. If plaintiff has been riding on a platform contrary to rules, but after he has alighted is injured by the backing up of a car, he can recover; he is guilty of no contributory wrong. Western Ry. of Alabama v. Mutch, 97 Ala. 194, 11 South. 894, followed. Gadsden & A. U. Ry. Co. v. Causler, 97 Ala. 235, 12 South. 439. And, further, see Illinois Cent. R. Co. v. Godfrey, 71 Ill. 500; Bullard v. Mulligan, 69 Iowa, 416, 29 N. W. 404; Carter v. Railway Co., 98 Ind. 552.

[388] Post, p. 971, "Contributory Negligence."

[389] Enright v. Toledo, A. A. & N. M. Ry. Co., 93 Mich. 409, 53 N. W. 536; Greenway v. Conroy, 160 Pa. St. 185, 28 Atl. 692; Chicago, M. & St. P. Ry.

the mere violation of a rule by a servant does not constitute contributory negligence, if the injury would have happened just the same whether the servant was negligent or not.[390] But wherever one has violated the law, and such violation contributes directly or approximately to his alleged injury, he has never been permitted to recover for it.[391] Such an unlawful act is not merely evidence of contributory negligence, but is a conclusive bar to recovery. A plaintiff's violation of law, therefore, should not be discussed in connection with the exercise of due care, but treated from the point of view of connection as cause.[392]

As to how far what Mr. Bishop felicitously calls "collateral wickedness" will prevent one who travels on Sunday, not for "works of necessity or charity," from recovering for wrong done him, is much in dispute. On the one hand, it is held that the law will not lend its

Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184; Northern Pac. R. Co. v. Cavanaugh, 2 C. C. A. 358, 51 Fed. 517.

[390] White v. Railway Co. (Miss.) 16 South. 248; Horan v. Railway Co. (Iowa) 56 N. W. 507; Louisville & N. R. Co. v. Ward, 10 C. C. A. 166, 61 Fed. 927; Richmond & D. R. Co. v. Brown, 89 Va. 749, 17 S. E. 132; Louisville & N. R. Co. v. Pearson, 97 Ala. 211, 12 South. 176.

[391] "It will defeat an action for tort if the injured party, in making his case, must show that he was at the time of the injury violating a positive statute, or committing malum in se, provided such violation of law or crime contributed to the injury." Taft, C. J., in Louisville & N. R. Co. v. East Tennessee, V. & G. Ry. Co., 9 C. C. A. 314, 60 Fed. 993–998.

[392] Newcomb v. Boston Protective Department, 146 Mass. 596, 16 N. E. 555, where plaintiff recovered for injuries caused by defendant's careless driving while plaintiff was sitting in his cab. The evidence tended to show that plaintiff had not placed his horse and vehicle parallel with the sidewalk, as required by ordinance, so as to avoid obstructing the street. Cf. Neanow v. Uttech, 46 Wis. 581, 1 N. W. 221; Steele v. Burkhardt, 104 Mass. 59. Et vide post, p. 877, "Negligence," "Law of the Road," "Statutory Negligence." The confusion in the Massachusetts cases, it is said, may be reconciled by saying that a concurring violation of the Sunday laws is in itself a contributory cause, while the violation of any other law is not. Mr. Hallam, in 39 Cent. Law J. 279 et seq. An action for loss of goods by negligence against a common carrier may be maintained although the bill of lading involved a rebate, contrary to the provisions of the interstate commerce act. Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America, 151 U. S. 368, 14 Sup. Ct. 367. And see Insurance Cos. v. Carriers' Cos., 91 Tenn. 537, 19 S. W. 755.

assistance to one violating it, that failure to comply with statutory requirements is a species of negligence, and that, therefore, the law will deny redress to any one engaged in such violation.[393] On the other hand, it is urged, with apparent weight of reason and authority, that the wrong of a railroad, in not furnishing safe machinery, proper servants, and the like, or the wrong of a municipality, in neglecting to repair its streets, being disconnected from the wrong of the person who may elect to travel on Sunday, is the juridical cause of the injury, and that denial of the right to recover would encourage negligence and multiply accidents;[394] that mere proximity in time is no part of the definition of "proximate cause"; and that the wrong is to the state, without breach of any duty to the injured plaintiff.[395]

[393] Bucher v. Fitzburg R. Co., 131 Mass. 156. And see Davis v. Somerville, 128 Mass. 594, Bosworth v. Swansy, 10 Metc. (Mass.) 363; Jones v. Andover, 10 Allen, 18; Stanton v. Metropolitan R. Co., 14 Allen, 485; McGrath v. Merwin, 112 Mass. 467; Connolly v. Boston, 117 Mass. 64; Smith v. Boston & M. R. Co., 120 Mass. 490; Day v. Highland St. Ry. Co., 135 Mass. 113. The Massachusetts rule was changed by St. 1884, c. 37. This act does not, however, apply to injuries occurring before its passage. Read v. Boston & A. R. Co., 140 Mass. 199, 4 N. E. 227. Cf. reasoning of Massachusetts cases with that found in Olesen v. City of Plattsmouth, 35 Neb. 153, 52 N. W. 848; Cratty v. Bangor, 57 Me. 423; Johnson v. Irasburgh, 47 Vt. 28; Holcomb v. Danby, 51 Vt. 428.

[394] Sutton v. Town of Wauwatosa, 29 Wis. 21; Bigelow, Cas. Torts, 711; McArthur v. Green Bay & Mississippi Canal Co., 34 Wis. 139. And see Knowlton v. Milwaukee City Ry., 59 Wis. 278, 18 N. W. 17; Platz v. Cohoes, 89 N. Y. 219; Opsahl v. Judd, 30 Minn. 126, 14 N. W. 575; Piollet v. Simmers, 106 Pa. St. 95; Schmid v. Humphrey, 48 Iowa, 652 (reviewing cases); Tingle v. Chicago, B. & Q. Ry., 60 Iowa, 333, 14 N. W. 320; Kerwhaker v. Cleveland, C. & C. R., 3 Ohio St. 172; Philadelphia, W. & B. Ry. v. Philadelphia & Havre de Grace Steam Towboat Co., 23 How. (U. S.) 209; Baldwin v. Barney, 12 R. I. 392.

[395] Sutton v. Town of Wauwatosa, supra; 1 Shear. & R. Neg. 26. Et vide Carroll v. Staten Island R. Co., 58 N. Y. 126; Platz v. Cohoes, 89 N. Y. 219; Johnson v. Missouri Pac. Ry. Co., 18 Neb. 690, 26 N. W. 347; Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594; Baldwin v. Barney, 12 R. I. 392. Cf. Mohney v. Cook, 26 Pa. St. 342; Rauch v. Lloyd, 31 Pa. St. 358; Piollet v. Simmers, 106 Pa. St. 95. On the same principle, it is no defense to an action for negligent shooting that at the time of the injury plaintiff and defendant were unlawfully engaged in shooting on the Sabbath. Gross v. Miller (Iowa) 61 N. W. 385.

Wanton Injury.

The mere fact that a person has violated the law may not prevent him from recovering for a subsequent wrong done him,[396] but he does not stand on the same footing as an innocent person. Thus, no duty of diligence is owed to a trespasser, intruder, mere volunteer, or bare licensee. Such a person cannot recover under circumstances which would entitle a person lawfully in the same position to maintain an action for damages suffered.[397] Therefore, if a trespassing person, of full age, a child,[398] or an animal runs into a barrier, excavation, or other source of danger, there is no actionable wrong. The owner of the premises is not bound to provide safeguards.[399]

Merely that a man is a trespasser does not justify another in reck-

[396] Ante, pp. 192–194, "Connection as Cause." And see Fletcher v. Cole, 26 Vt. 170. See Gray v. Ayres, 7 Dana (Ky.) 375; Love v. Moynehan, 16 Ill. 277; Ogden v. Claycomb, 52 Ill. 365; Gizler v. Witzel, 82 Ill. 392; Jones v. Gale, 22 Mo. App. 637; Phillips v. Kelly, 29 Ala. 628. A convict may recover for injuries inflicted on him. See Chattahooche Brick Co. v. Braswell (Ga.) 18 S. E. 1015. Cf. O'Hare v. Jones (Mass.) 37 N. E. 371.

[397] Nave v. Flack, 90 Ind. 205; Philadelphia & R. R. Co. v. Hummell, 44 Pa. St. 375 (cf. Brown v. Hannibal & St. J. R. Co., 50 Mo. 461); Rosenbaum v. St. Paul & D. R. Co., 38 Minn. 173, 36 N. W. 447; Tonawanda R. Co. v. Munger, 49 Am. Dec. 239; McVeety v. St. Paul, M. & M. Ry. Co., 45 Minn. 268, 47 N. W. 809; Kirtley v. Railway Co., 65 Fed. 386; Lary v. Cleveland, C., C. & I. R. Co., 78 Ind. 323.

[398] Rodgers v. Lees, 140 Pa. St. 475, 21 Atl. 399; Mitchell v. New York, L. E. & W. R. Co., 146 U. S. 513, 13 Sup. Ct. 259; post, p. 890, "Negligence"; Hedin v. City & Suburban Ry. Co. (Or.) 37 Pac. 540. The rule requiring locomotive engineers and street-car drivers to exercise vigilance in looking out for dangers to passengers and persons on the track, and to use reasonable diligence to prevent injury to a person after his peril is discovered, has no application to a case where decedent not only assumed the attitude of a trespasser, but illegally interfered with the movement of the car by jumping on a moving car and whipping mules with driver's whip, and thereby caused his own death. Taylor's Adm'r v. South Covington & C. St. Ry. Co. (Ky.) 20 S. W. 275.

[399] Sweeny v. Old Colony & N. R. Co., 10 Allen, 368; Maynard v. Boston & M. R. Co., 115 Mass. 458; Trask v. Shotwell, 41 Minn. 66, 42 N. W. 690; Blatt v. McBarron, 161 Mass. 21, 36 N. E. 468 (where the trespass was committed by mistake); Mergenthaler v. Kirby (Md.) 28 Atl. 1065 (where a boy stealing lead was scalded by escaping steam); Augusta R. Co. v. Andrews, 89 Ga. 653, 16 S. E. 203, where the damage was caused by electricity. So trespassers on cars and engines are not ordinarily entitled to the exercise of

lessly or wantonly doing damage to him.[400] The rule has been stated (perhaps too broadly), "A trespasser is liable to an action for an injury he does, but he does not forfeit his right of action for an injury sustained."[401] Therefore, if a claimant of real estate, out of possession, resorts to force and violence amounting to a breach of peace, to obtain possession from another claimant, in peaceable possession, and personal injury arises thereupon to the latter, the former is liable in damages for the injury, without regard to the legal title, or right of possession.[402] In a similar manner, a trespasser may recover for damages done him by a spring gun.[403] On the same principle, where one allowed her horses to run at large, in violation of a city ordinance, and they strayed upon a railroad track, she could not recover for injuries done them by a passing train without showing that the railroad company's employés were not only negligent, but guilty of reckless and wanton misconduct, in

diligence to avoid harm. Andrews v. Ft. Worth & D. C. R. Co. (Tex. Civ. App.) 25 S. W. 1040; Vertrees v. Newport News & M. V. R. Co. (Ky.) 25 S. W. 1. So as to trespassing animals. Knight v. Albert, 6 Pa. St. 472. Et vide Bush v. Brainard, 1 Cow. 78; Hess v. Lapton, 7 Ohio, 216. But see Barnes v. Ward, 9 C. B. 392–420, approved by Lynch v. Nurdin, 1 Q. B. 29. Compare Howland v. Vincent, 10 Metc. (Mass.) 371, with Birge v. Gardner, 19 Conn. 507.

[400] Planz v. Boston & A. R. Co., 157 Mass. 377, 32 N. E. 356; Phillips v. Wilpers, 2 Lans. (N. Y.) 389. "Since the business of the courts is to enforce obedience to the law they cannot lawfully assist a suitor in any effort to break it. At the same time, a man's being a sinner, whether against the divine law or the human, does not authorize another sinner to maltreat him; so that in an action of torts a bad man stands on the same footing as a good one. But neither can have judicial assistance in breaking the law, or compensation for having broken it, or a refund of what he has expended in its breach." Bish. Noncont. Law, § 54.

[401] Barnes v. Ward, 9 C. B. 392; post, p. 890, "Negligence."

[402] Denver & R. G. Ry. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286, approved Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101–107, 13 Sup. Ct. 261; Ogden v. Claycomb, 52 Ill. 365; Trogden v. Henn, 85 Ill. 237.

[403] Bird v. Holbrook, 4 Bing. 628; Hooker v. Miller, 37 Iowa, 613. And see Aldrich v. Wright, 53 N. H. 398; Churchill v. Hulbert, 110 Mass. 42; post, p. 890, "Negligence." Generally, as to the right to protect private grounds against trespass by means of spring guns and land traps, see article in 28 Ir. Law T. 277.

causing the injury.[404] This case, however, states the law too strongly against the plaintiff.

Negligent Injury.

While it is said that wrongdoing cannot create a duty,[405] knowledge of peril to a wrongdoer may require the exercise on the part of the defendant of diligence to avoid harm. Thus, in what is called an extreme case,[406] a man so drunk as to be helpless, mentally and physically, was put off a railroad train by a conductor, who knew his condition. The passenger was severely frozen, and the company was held liable.[407] With respect even to a trespasser, for example,

[404] Vanhorn v. Burlington, C. R. & N. Ry. Co., 63 Iowa, 67, 18 N. W. 679. So a railroad company is not liable for injury to a person walking on its tracks unless its agents are guilty of willful wrong or wanton negligence. Verner v. Alabama G. S. R. Co. (Ala.) 15 South. 872; Maynard v. Boston & M. Ry., 115 Mass. 458; Dillon v. Connecticut R. R. Co., 154 Mass. 478, 28 N. E. 899; Newport News & M. V. R. Co. v. Howe, 6 U. S. App. 172, 3 C. C. A. 121, 52 Fed. 362; Nave v. Alabama G. S. R. Co., 96 Ala. 264, 11 South. 391; Chisholm v. Old Colony R. Co., 159 Mass. 3, 33 N. E. 927; Dooley v. Mobile & O. R. Co., 69 Miss. 648, 12 South. 956. Where defendant willfully set his dogs on plaintiff's colts, without taking any precaution to prevent injury to them, he is liable for damages resulting from their being driven into a barbed-wire fence, though they were in his pasture. Aspegren v. Kotas (Iowa) 59 N. W. 273. Plaintiff negligently went between defendant's railroad track and a high platform in front of moving cars. After being struck by one car, she threw herself on the ground to save herself from further injury, and one of the brakemen who saw her gave the engineer an additional signal to proceed, which he did. Held, that the trainmen's wantonness was a question for the jury. Esrey v. Southern Pac. R. Co., 88 Cal. 399, 26 Pac. 211.

[405] Lary v. Cleveland, C., C. & I. R. Co., 78 Ind. 323; Hestonville Pass. R. Co. v. Connell, 88 Pa. St. 520; Morrissey v. Eastern R. Co., 126 Mass. 377; McAlpin v. Powell, 70 N. Y. 126; Snyder v. Hannibal & St. J. R. Co., 60 Mo. 413; Brown v. European & N. A. Ry. Co., 58 Me. 384; Atchison & N. R. Co. v. Flinn, 24 Kan. 447.

[406] Indianapolis, P. & C. R. Co. v. Pitzer, 109 Ind. 179–185, 6 N. E. 310, and 10 N. E. 70.

[407] Louisville, C. & L. R. Co. v. Sullivan, 81 Ky. 624; Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 6 Pac. 877. In removing trespassers the company is bound to afford a reasonable opportunity to leave without exposing to unnecessary danger. Texas & P. Ry. Co. v. Mother, 5 Tex. Civ. App. 87, 24 S. W. 79. Where a volunteer, assisting defendant's servants, places him-

on a railroad track, the company is bound to exercise proper care to warn and to avoid striking such a person after its servants on the engine know the dangerous situation, although the company is not bound to keep a lookout for the benefit of trespassers.[408] And if the jury should find that after the discovery of such position the company, or its servant, could have avoided the damage complained of, but negligently failed to do so, the trespasser may maintain his action for consequent damages.[409] On the same principle, the mere fact that property was used for gambling purposes only is no defense to an action for a negligent injury to it.[410]

self in danger through his own negligence, and the servants, after discovering his position, fail to exercise reasonable care to avert the danger, defendant is liable. Evarts v. St. Paul, M. & M. Ry. Co., 56 Minn. 141, 57 N. W. 459.

[408] Scheffler v. Minneapolis & St. L. Ry. Co., 32 Minn. 518, 21 N. W. 711; Planz v. Boston & A. R. Co., 157 Mass. 377, 32 N. E. 356; Brown v. Lynn, 31 Pa. St. 510; Isbell v. New York & N. H. R. Co., 27 Conn. 393, and cases cited; Baltimore Traction Co. v. Wallace, 77 Md. 435, 26 Atl. 518; Louisville & N. R. Co. v. Kellem's Adm'x (Ky.) 21 S. W. 230; Curry v. Chicago & N. W. R. Co., 43 Wis. 665; Hepfel v. St. Paul, M. & M. Ry. Co., 49 Minn. 263, 51 N. W. 1049; Haden v. Sioux City & P. R. Co. (Iowa) 60 N. W. 537. So as to cattle running at large. Johnson v. Minneapolis & St. L. Ry. Co., 43 Minn. 207, 45 N. W. 152. But see Cincinnati & Z. R. Co. v. Smith, 22 Ohio St. 227.

[409] In an action against a street-car company for the death of a child, it was not error to charge that, though the child was negligent in going on the track, if defendant's servants saw her dangerous position, it was their duty to exercise all the diligence then possible to avoid injuring her. Wallace v. City & Suburban Ry. Co. (Or.) 37 Pac. 477. It is culpable negligence for the driver of street cars to approach without watchfulness a street crossing where he has reason to suppose that children may be coasting down a hill and across the car track, though such conduct on the part of children is unlawful. Strutzel v. St. Paul City Ry. Co., 47 Minn. 543, 50 N. W. 690; Virginia M. R. Co. v. White, 84 Va. 498, 5 S. E. 573; Guenther v. Railroad Co., 95 Mo. 286, 8 S. W. 371; Reilly v. Railroad Co., 94 Mo. 600, 7 S. W. 407; Texas & P. R. Co. v. O'Donnell, 58 Tex. 27; Isabel v. Railroad Co., 60 Mo. 475; Meeks v. Railroad Co., 56 Cal. 513; Atchison, T. & S. F. R. Co. v. Smith, 28 Kan. 541; Reyser v. Railway Co., 66 Mich. 390, 33 N. W. 867; Frick v. Railway Co., 75 Mo. 595.

[410] Gulf, C. & S. F. Ry. Co. v. Johnson (Tex. Civ. App.) 25 S. W. 1015.

SAME—CONSENT.

65. No action can be maintained for damages resulting from conduct suffered by consent. But this exemption is limited—

(a) To cases involving consent as distinguished from mere knowledge, and the exercise of option as distinguished from compulsion; and

(b) To cases coming within the limits fixed by the person assenting and permitted by law.

After a tort has been committed, the sufferer may waive it; may accept something in satisfaction of it, and then release it. Consent after the wrong may bar action. On the same principle, before the damage is done the person who endures the harm may, by his consent, put himself in such a position that he cannot complain. Harm suffered by consent is not, in general, the basis of a civil action. This is the meaning of the maxim, "Volenti non fit injuria."[411] The English phrase is, "Leave and license."[412]

"If the defendant is guilty of no wrong against the plaintiff, except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of the wrongful act should be permitted to profit by it." Accordingly, if one person procure another to publish defamatory matter concerning him, he cannot afterwards sue therefor.[413]

[411] Lord Esher said concerning this maxim: "I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading. They are for the most part so large and general in their language that they always include something which really is not intended to be included in them." Yarmouth v. France, 19 Q. B. Div. 647–653; Broom, Leg. Max. (8th Ed.) 267. A valuable article, with numerous citations, on the doctrine "Volenti non fit injuria," in actions of negligence, by Charles Warren, 8 Harv. Law Rev. 457.

[412] Pol. Torts, c. 4, subd. 10.

[413] Knowlton, J., in Howland v. Manufacturing Co., 156 Mass. 543, 570, 571, 31 N. E. 656; 1 Ames & S. Lead. Cas. 422, citing in note King v. Waring, 5 Esp. 13; Rogers v. Clifton, 3 Bos. & P. 587, 592; Weatherston v. Hawkins, 1 Term R. 110, 112; Smith v. Wood, 3 Camp. 323; Palmer v. Hummerston, 1 Cababe & El. 36; Gordon v. Spencer, 2 Blackf. (Ind.) 286; Sutton v. Smith, 13 Mo. 120 (85).

So, where a person under lawful arrest, at his own request, is confined in a jail other than that specified by law, he cannot recover for false imprisonment.[414]

Consent to commit what would otherwise be trespass carries with it exemption from the necessary results of what was consented to.[415] Where one impliedly or expressly invites or permits another to come upon his premises, or to use his premises in a way otherwise wrongful, he cannot complain of such conduct as a trespass.[416] On the same principle, risk may be assumed. The consent thus involved may bar right of action. A man who unnecessarily goes, or sends his dog, where he is advised there are dangers, like a spring gun, does so at his peril.[417]

Knowledge and Option.

The maxim is, "Volenti non fit injuria," not "scienti." Knowledge is not consent. If one both know of a danger or of a wrong, and then willingly, without duress, consent to it, he cannot be heard to claim damages consequent upon this conduct; but if he merely had knowledge, without either appreciation of risk, or opportunity to exercise an option, the maxim cannot be applied to him. There is no actual breach of a duty if the person injured, knowing and appre-

[414] Ellis v. Cleveland, 54 Vt. 437. So consent may bar a right to sue in malicious prosecution for abuse of process. Reams v. Pancoast, 111 Pa. St. 42, 2 Atl. 205.

[415] Thus consent to use land for right of way carries with it consent to drain or overflow land in the proper use of the right of way. Updegrove v. Pennsylvania S. V. R. Co., 132 Pa. St. 540, 19 Atl. 283; Hoffeditz v. Mining Co., 129 Pa. St. 264, 18 Atl. 125. And see Kemp v. Railroad Co., 156 Pa. St. 430, 26 Atl. 1074. But not to be negligent in construction or maintenance of right of way. McMinn v. Pittsburgh, V. & C. Ry. Co., 147 Pa. St. 5, 23 Atl. 325.

[416] Sweetzer v. Boston & M. R. Co., 66 Me. 583; Owens v. Lewis, 46 Ind. 488; Churchill v. Baumann, 104 Cal. 369, 36 Pac. 93, and 38 Pac. 43; Searing v. Saratoga, 39 Hun, 307.

[417] Jordin v. Crump, 8 Mees. & W. 781, and cases cited; Ilott v. Wilkes, 3 Barn. & Ald. 304; Stout v. Wren, 1 Hawks (N. C.) 420; Galbraith v. Fleming, 60 Mich. 403, 27 N. W. 581; Champer v. State, 14 Ohio St. 437; Duncan v. Com., 6 Dana (Ky.) 295; Smith v. State, 12 Ohio St. 466–470; State v. Beck, 1 Hill, 363; Harrison v. Marshall, 6 Port. (Ala.) 65; Illinois Cent. Ry. Co. v. Allen, 39 Ill. 205; Walker v. Fitts, 24 Pick. 191; Com. v. Parker, 9 Metc. (Mass.) 263.

ciating the danger, voluntarily elects to encounter it. There may, however, be knowledge of risk without appreciation of danger.[418]

When circumstances amount to such duress as to deprive an act of its voluntary character, where there is intentional exposure to known risk, is a matter of much dispute. Where the injured party can take his option to do or not to do a given thing, and is not subject to physical constraint, he has been held to do it voluntarily.[419] But one who, in an exigency, determines to take a risk is not held so strictly. Thus, a woman employed in a mill, in going down steps which were covered with ice,—there being for her no other exit from the mill,—carrying a dinner pail in one hand, and with the other holding to the railing, fell and was injured. It was held that the jury should decide whether she appreciated the risk, and whether she was acting under such an exigency as would justify her in going down the steps, and deprive her act of that voluntary character referred to in the maxim, "Volenti non fit injuria."[420] By way of contrast, a voluntary spectator, who is present merely for the purpose of witnessing a display of fireworks in a public highway of a city, must be held to consent to it; and he suffers no legal wrong, if accidentally injured, without negligence on the part of any one,[421] although the display is unauthorized.

Consent to a wrong, induced by fraud, duress, or conspiracy, is

[418] Thomas v. Quartermaine, 18 Q. B. Div. 685, commented on in Yarmouth v. France, 19 Q. B. Div. 647–657. "So that a dull man may recover damages where a man of intelligence may not." This subject is discussed at length under "Assumption of Risk," in the consideration of "Negligence," post, p. 1013. Employers' act does not change common-law rule. Mobile & B. Ry. Co. v. Holborn, 84 Ala. 133, 4 South. 146, and Highland Ave. & B. R. Co. v. Walters, 91 Ala. 435, 8 South. 357, overruled by Birmingham Railway & Electric Co. v. Allen, 99 Ala. 359, 13 South. 8.

[419] Lord Bramwell, in Membery v. Great Western Ry. Co., 14 App. Cas. 179. Dissenting opinion in Eckert v. Long Island Ry. Co., 43 N. Y. 502–506.

[420] Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155, 29 N. E. 464. Amusing comment in 5 Green Bag, 528; Anderson v. Clark, 155 Mass. 368, 29 N. E. 589; Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366; O'Maley v. South Boston Gas Light Co., 158 Mass. 135, 32 N. E. 1119.

[421] Scanlon v. Wedger, 156 Mass. 462, 31 N. E. 642. See dissenting opinion. On the other hand, mere presence at a display of fireworks has been held not to be contributory negligence. Dowell v. Guthrie, 99 Mo. 653, 12 S. W. 900.

no answer to an action upon the wrong by the party so consenting against the party so procuring the assent.[422]

Consent Limited by Parties.

Where one person has consented to conduct on the part of another, which but for such consent would be a tort, the conduct must fall within the limit of such consent, or liability will attach. Here is applied the general principle that, the authority ceasing, the exemption from liability ceases.[423] Thus, participants in a violent game have assumed the risk ordinarily incident to their sport, but such ordinary risk does not include wrongful and intentional inflictions of injury.[424] Being a mere onlooker, moreover, does not make one a participant. Accordingly, the unwilling victim of a college rush line can recover for assault.[425] Consent to the performance of a surgical operation for the cure or extirpation of disease will, in the law, justify the use of force; but such consent does not prevent suit by the patient for intentional violence or negligence on the part of the physician to his patient.[426]

Consent is sufficient, however reluctantly it may be given.[427] License to do what would otherwise be a nuisance or a trespass is, in the same way, coextensive with the limits of the authority conferred.[428]

[422] Johnson v. Girdwood, 7 Misc. Rep. 651, 28 N. Y. Supp. 151; post, "Effect of Fraud"; "Discharge and Release."

[423] Consent to operate a threshing machine with a damper down does not prevent recovery for damage caused by operating with the damper open in a high wind. Garrison v. Graybill, 52 Mo. App. 580.

[424] Pol. Torts, c. 4, subd. 10.

[425] Markley v. Whitman, 95 Mich. 236, 54 N. W. 763.

[426] Notice to the husband is not necessary before operating on the wife. M'Clallen v. Adams, 19 Pick. 333. Consent that a physician should conduct an autopsy at a tomb is not a license to remove any part of the remains,—for example, the skull. Palmer v. Broder, 78 Wis. 483, 47 N. W. 744. And see Caldwell v. Farrell, 28 Ill. 438.

[427] A servant reluctant (to the point of tears) consented to an examination by a physician, at the request of her mistress, to see if she was with child. She could not recover therefor. Latter v. Braddell, 50 Law J. Q. B. 448, affirmed Id. 166.

[428] Post, pp. 679–686, "Trespass"; "License." Capel v. Lyons (City Ct. N. Y.) 20 N. Y. Supp. 49; Brammell v. Eastern Ky. Ry. Co. (Ky.) 22 S. W. 646. And see McMinn v. Pittsburgh, V. & C. Ry. Co., supra, note 415.

Consent Limited by Law.

The exemption based on consent is not only thus limited by the parties themselves, but, notwithstanding the actual consent to a wrong, the law may still allow recovery by the injured one. There are limits to lawful consent. The law does not recognize consent to conduct unlawful, or forbidden by positive law, or for doing that to which a penalty is attached and announced. Principals in a prize fight may sue each other for damages done in the battle.[429] Consent does not justify assault.[430] Even under such circumstances, however, consent may limit recovery of damages to compensation.[431] On the same principle, one who has consented that another may carry a revolver can recover only compensatory damages on being injured by its discharge.[432] The distinction with respect to consent to the exercise of physical force would seem to be that the agreement will not justify causing, or endeavoring to cause, appreciable bodily harm for the mere pleasure of the parties.

But where "the wrong complained of is not forbidden by law, though it may be by morals, such as the seduction or debauch of a man's wife or daughter, slander, libel, or trespass on his real estate or to his personal property, agreement, consent or license is a good defense." [433] Seduction, however, is as much forbidden by positive law as is assault. Perhaps the true distinction is that a man cannot con-

[429] Boulter v. Clark, Bull, N. P. 16 (per Parker, C. B.); White v. Barnes, 112 N. C. 323, 16 S. E. 922; Dole v. Erskine, 35 N. H. 503; Grotton v. Glidden, 84 Me. 589, 24 Atl. 1008; Shay v. Thomson, 59 Wis. 540, 18 N. W. 473; Adams v. Waggoner, 33 Ind. 531; Logan v. Austin, 1 Stew. (Ala) 476; Bell v. Hansley, 3 Jones (N. C.) 131; Evans v. Waite, 83 Wis. 286, 53 N. W. 445; Jones v. Gale, 22 Mo. App. 637; Smith v. Simon, 69 Mich. 481, 37 N. W. 548. But a voluntary fighter cannot recover unless defendant beat him unreasonably or excessively. Galbraith v. Fleming, 60 Mich. 403, 27 N. W. 581. "The supreme court of Louisiana has thrown its protection about the great New Orleans industry of prize fighting." 7 Green Bag, 98, commenting on State v. Olympic Club, 46 La. Ann. 935, 15 South. 190.

[430] Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630; Christopherson v. Bare, 11 Q. B. 473.

[431] Adams v. Waggoner, 33 Ind. 531.

[432] Evans v. Waite, 83 Wis. 286, 53 N. W. 445; Shay v. Thomson, 59 Wis. 540, 18 N. W. 473; Knott v. Wagner, 16 Lea (Tenn.) 481.

[433] Adams v. Waggoner, 33 Ind. 531; Com. v. Colburg, 119 Mass. 350; McCue v. Klein, 60 Tex. 168; Shay v. Thompson, 59 Wis. 540, 18 N. W. 473.

sent to do anything which is a breach of public duty. An assault is a breach of the peace. Seduction, however, while it may be punished as a crime, involves personal, rather than public, duty. Therefore, neither the husband nor the father, nor the woman herself, who expressly or impliedly consents to that wrong, may recover for seduction.[434] It is otherwise, however, where the father and husband are innocent.[435]

[434] Barholt v. Wright, 45 Ohio St. 177, 12 N. E. 185; 4 Am. St. Rep. 535, note, quoting Cooley, Torts, § 163. And see Wyndham v. Wycombe, 4 Esp. 16; Reddie v. Scoolt, Peake, 240; State v. Cooper, 22 N. J. Law, 52; Rea v. Tucker, 51 Ill. 110; Paul v. Frazier, 3 Mass. 71; Thompson v. Young, 51 Ind. 599; Cline v. Templeton, 78 Ky. 550; Hamilton v. Lomax, 26 Barb. 615; Lawrence v. Spence, 90 N. Y. 669, 2 N. E. 145.

[435] Felt v. Amidon, 43 Wis. 467; Lunt v. Philbrick, 59 N. H. 59; Pence v. Dozier, 7 Bush (Ky.) 133; Hudkins v. Haskins, 22 W. Va. 645; Bennett v. Allcott, 2 Term R. 166.

NOTE.

Other Persons Whose Liability in Tort is Affected by Special Circumstances.

Persons Under Duress.

Mr. Cooley, true to his conception of liability in tort, as based on wrong to plaintiff, without reference to defendant's mental process, declares that, "in general, one cannot excuse a tort by showing that he committed it under duress." For this he adduces no authority. Authority for the position, however, is to be found. But, as would be naturally anticipated, it concerns trespass, in which the propriety of disregarding the mental element in tort is generally recognized. Thus, in Gilbert v. Stone (Trinity Term, 17 Car. Rot. 1703) Aleyn, 35 (Hob. 134c), defendant pleaded that "12 homines ignoti modo guerrino armati tantum muabantur ei quod de vitæ fuæ armissione dubitat," etc., "that, because of fear and threats, defendant was compelled to and did enter the said house." "And upon demurrer, without argument, it was adjudged no plea; for no one can justify a trespass upon another for fear." The cases cited by Mr. Cooley, indeed, are to the effect that torts committed by military authority, or ratified by the government, are not actionable, viz. McKeel v. Bass, 5 Cold. 151; Waller v. Parker, Id. 476. Cf. Mitchell v. Harmony, 15 How. 115. And see Buron v. Denman, 2 Exch. 167.

As to duress in connection with conversion, see Powell v. Hoyland, 6 Exch. 67–71; Summersett v. Jarvis, 3 Brod. & B. 2.

With respect to negligence, the law seems to have recognized that persons who act under stress of circumstances—as, for example, peril to human life—are not guilty of a wrong which can be attributed to such persons. Post, p. 969, "Negligence."

Executors and Administrators.

May be personally liable, for example, in negligence. An administrator who makes no active effort to collect money due to the estate is liable therefor. In re Child's Estate (Surr.) 26 N. Y. Supp. 721. And see In re Johnston's Estate, 74 Hun, 618, 26 N. Y. Supp. 966; In re Hart, Id.; In re Langan, Id.; In re Strong's Estate, 160 Pa. St, 13, 28 Atl. 480. Cf. In re Barker's Estate, 159 Pa. St. 518, 28 Atl. 365.

In Conversion.

Where the administrator of a donor wrongfully converts property of the donee to the use of the estate of the donor, upon the belief that the property was not legally given by the donor to the donee, he is personally liable to the donee for such conversion. Goulding v. Horbury, 85 Me. 227, 27 Atl. 127; Chapman v. Brite, 4 Tex. Civ. App. 506, 23 S. W. 514.

For Fraud.

Misrepresentation and concealment by an executor in making a sale of land are his personal acts, for which he is personally liable. Warren v. Banning, 21 N. Y. Supp. 883, affirmed 140 N. Y. 227, 35 N. E. 428. And, generally, as to personal liability, see Meyeringh v. Wendt, 86 Iowa, 465, 53 N. W. 414; Powell v. Hurt, 108 Mo. 507, 17 S. W. 985; Tallon v. Tallon, 156 Mass. 313, 31 N. E. 287.

RECEIVERS.

Personal Liability.

As an officer of the court, a receiver has no personal responsibility for conduct occurring in proper performance of his duty. Thus, where a receiver is directed by the court to take possession of property in the possession of a third person, and he demands possession thereof as a receiver, and possession is given to him as receiver, he is not personally liable for conversion. Tapscott v. Lyon, 37 Pac. 225; Rushworth v. Smith (Colo. App.) 34 Pac. 482; Heffron v. Rice, 149 Ill. 216, 36 N. E. 562; Wagner v. Swift's Iron & Steel Works (Ky.) 26 S. W. 720; Turner v. Cross, 83 Tex. 218, 18 S. W. 578, distinguished in Peoples v. Yoakum (Tex. Civ. App.) 25 S. W. 1001.

But he is responsible for personal misconduct in his office. Thus, a receiver of an insolvent is liable to the creditors for the value of property sold, by his collusion with the insolvent, to one who assigned it to the insolvent's wife for his benefit. Moon v. Wineman (Minn.) 59 N. W. 494. And see Connolly v. Davidson, 15 Minn. 519 (Gil. 428).

Official Liability—Damage after Appointment.

A receiver is liable in his official capacity on the same principle which governs the liability of any employer. "Where one is injured by a defect in a track of a railroad operated by a receiver, whose duty it was to keep the track in repair, the receiver is liable for the injury, whether the injured person was in his employ or not." Dillingham v. Crank (Tex. Civ. App.) 27 S. W. 93; Texas & P. Ry. Co. v. Gay, 86 Tex. 571, 26 S. W. 599; Eddy v. Lafayette, 1 C. C. A. 441, 49 Fed. 807; Hornby v. Eddy, 5 C. C. A. 560, 56 Fed. 461; Gowen v. Harley, 6 C. C. A. 190, 56 Fed. 973.

And liability attached to the person for whom he acts, although his appointment is obtained by collusion. Where the receiver of a railroad is appointed through collusion, the company is liable for injuries caused by his negligence, whether or not the court appointing him had jurisdiction. Texas & P. Ry. Co. v. Gay, 86 Tex. 571, 26 S. W. 599.

Where a person in the employ of a receiver is injured in the line of duty without negligence on the part of either, the court may order his wages paid for the time he was disabled, in the view that the officers of the court should act towards their employés as persons of ordinary humanity would act under similar circumstances; but such compensation should be confined to faithful and deserving employés. (Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.,

33 Fed. 701; Id., 41 Fed. 319,—limited.) Thomas v. East Tennessee, V. & G. Ry. Co., 60 Fed. 7.

Rev. St. Tex. art. 2899, giving a right of action for the death of any person caused by the negligence of "the proprietor, owner, charterer or hirer" of any railroad, or their servants, creates no right of action against a railroad receiver. (Turner v. Cross, 83 Tex. 218, 18 S. W. 578, followed.) Burke v. Dillingham, 9 C. C. A. 255, 60 Fed. 729.

Same—Damage before Appointment.

Ordinarily, an action for personal injuries sustained before the appointment of a receiver cannot be maintained against him, but must be brought against the corporation. Finance Co. of Pennsylvania v. Charlestown, C. & C. R. Co., 46 Fed. 508; Ex parte Bradford, Id.

As to the assets out of which a cause of action which accrued before the appointment of a receiver can be satisfied, there is interesting dispute.

Before affairs of a corporation will be put in the hands of a receiver by a court of equity, in the course of foreclosure of railroad bonds or mortgages, there must be good, sufficient, and especial reason. Farmers' Loan & Trust Co. v. Winona & S. W. Ry. Co., 59 Fed. 957; Sage v. Railway Co., 125 U. S. 361–376, 8 Sup. Ct. 887.

And just and equitable conditions of receivership will be imposed. Fosdick v. Schall, 99 U. S. 235, per Waite, C. J.; Union Trust Co. v. Souther, 107 U. S. 591, 2 Sup. Ct. 295.

One condition commonly enforced is that certain debts be "preferred," and paid out of funds in the hands of the receiver, or be made a charge on the corpus of the property. As to practice, see Central Trust Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. 551; Fosdick v. Schall, supra; Miltenberger v. Railway Co., 106 U. S. 286–311, 1 Sup. Ct. 140; Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 434, 457, 463, 6 Sup. Ct. 809.

As to what are preferred claims, there is dispute. The rule as laid down by Caldwell, J., in Dow v. Memphis & L. R. Co., 20 Fed. 260, is that, where the default in the payment of a mortgage debt occurred more than a year before the filing of the bill, the receiver should be required to pay all the debts and liabilities of the railroad company incurred in operating, repairing, and improving the road for the period of six months next before the filing of the bill, and that the debts which the receiver is required to pay, and all debts and liabilities incurred by him in operating the road, should be made a first lien on the mortgaged property, which should not be released until such liabilities are discharged.

The order in this case was held by Mr. Justice Brewer (Central Trust Co. v. Texas & St. L. Ry. Co., 22 Fed. 135) not to be "in excess of the proper powers and discretion of a court appointing a receiver."

In Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 182, in an opinion of marked clearness and force, Judge Caldwell further held

that, in railroad foreclosure proceedings, preferential debts, which may be given priority on the appointment of a receiver, are, in general, those which have aided to conserve the property, and have been contracted within a reasonable time, and there is no fixed rule barring claims contracted more than six months before the appointment, nor is the authority to give priority limited to cases in which there has been a diversion of income, and that the debts which the receiver is required to pay, and all debts and liabilities incurred by him in operating the road, should be made a first lien on the mortgage property, which should not be released until such liabilities are discharged.

However, in Farmers' Loan & Trust Co. v. Green Bay, W. & St. P. R. Co., 45 Fed. 664–666, Judge Jenkins said: "The principle is here sought to be extended to embrace a claim for death occurring in the operation of the road within the limited period. In an able and ingenious argument, the counsel for the petitioner insisted that, although the liability for the death here rests upon statute law, and is to a stranger to the contract of hiring, and arises from failure of duty enjoined by the law of master and servant, yet that the liability is imposed by the law upon, and constitutes a term of, the contract of hiring, and so must be regarded as a liability incurred in the operation of the road, having priority of payment over a precedent mortgage. This proposition finds support in the case of Dow v. Memphis & L. R. Co., 20 Fed. 260. There, Judge Caldwell, in appointing a receiver of a railroad, provided by his order for the payment of obligations incurred for injuries to persons within six preceding months. He states that failure by the trustee to take possession works and implies an assent that the earnings of the road should be applied to compensate those damaged in its operation, and asserts that the rulings of the supreme court furnish ample authority for such order. A careful reading of all the decisions of the supreme tribunal upon the subject convinces me that Judge Caldwell has either misconceived the underlying principle of these decisions, or seeks to extend it unduly." Accordingly, it was held that a claim against a railroad company for causing the death of plaintiff's intestate is a demand arising from a failure of duty, and could not, by its creation, benefit, preserve, or increase the corpus of the estate of the company, and is not entitled to priority upon the foreclosure of a mortgage thereof. There is good authority to sustain this position. Kneeland v. American Loan & Trust Co., 136 U. S. 89, 10 Sup. Ct. 950; Id., 138 U. S. 509, 11 Sup. Ct. 426; Dexterville Manuf'g & Boom Co. v. Case, 4 Fed. 873; Hiles v. Case, 14 Fed. 141; Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 28 Fed. 871; Davenport v. Receiver of A. & C. R. Co., 2 Wood, 519, Fed. Cas. No. 3,588; Easton v. Railroad Co., 38 Fed. 12; Central Trust Co. v. East Tennessee, V. & G. R. Co., 30 Fed. 895.

CHAPTER III.

LIABILITY FOR TORTS COMMITTED BY OR WITH OTHERS.

IN GENERAL.

66. Liability for torts committed by or with others is dependent on either—

(a) Concert in action, in which case the parties are joint tort feasors; or

(b) Relationship, as

(1) Husband and wife;

(2) Landlord and tenant;

(3) Independent contractor;

(4) Master and servant;

(5) Partners.

CONCERT IN ACTION—JOINT TORT FEASORS.

67. Where two or more persons participate in concerted action to commit a common tort, they are called "joint tort feasors."

There are several classes of cases wherein joint responsibility arises. In one class, the responsibility arises from relationship; as

where a husband and wife are held jointly liable for the wife's torts, or as where the master is held liable for the acts of his servant, the principal for his agent, the employer for his employé, and the partner for his copartner. In another class, two or more persons may be held liable because of personal participation, by consent to, or actual commission of, the wrong complained of; as where several persons execute a conspiracy to assault, steal from, or defraud another. Such persons are commonly called "joint tort feasors." These two classes often overlap. Husband and wife,[1] master and servant,[2] and partners may actually join in wrongdoing. Then the liability is because of personal commission or consent (or command), not because of relationship.

By way of distinction, joint tort feasors are held responsible, not because of any relationship existing between them, but because of concerted action towards a common end.[3]

Thus, where one of a firm, in the name of the others, wrongfully ejected a tenant, they being only sureties for the payment of his rent, but the act being clearly not in the ordinary course of business, the one partner had no power to bind the firm or involve the others in the mischief. The question, therefore, had to be determined, did all or any of the partners fall within the above definition by consenting to the act? for the firm was not liable, but only those members who had consented to the act.[4]

All persons who aid, counsel, direct, or join in committing a tort are joint tort feasors.[5] The liability of a joint tort feasor may attach by direct participation. Thus, where one person carries away a package of goods, while another is putting up a different package, which

[1] Post, p. 222. "Husband and Wife."

[2] As to master and servant, see Wright v. Wilcox, 19 Wend. 343; Blake v. Ferris, 5 N. Y. 48; post, p. 246, "Master and Servant."

[3] As to principal and agent, see Hilmes v. Stroebel, 59 Wis. 74, 17 N. W. 539; Hubbard v. Hunt, 41 Vt. 376; Brannock v. Boulden, 4 Ired. 61; Sutherland v. Ingalls, 63 Mich. 620, 30 N. W. 342.

[4] Petrie v. Lamont, Car. & M. 93. And see Moreton v. Hardern, 4 Barn. & C. 223; Grund v. Van Vleck, 69 Ill. 479.

[5] Tindel, C. J., in Petrie v. Lamont, Car. & M. 93–96. Common carriers as joint tort feasors: Chicago, R. I. & P. Ry. Co. v. Sutton, 11 C. C. A. 251, 63 Fed. 394; Atlantic & P. R. Co. v. Laird, 7 C. C. A. 489, 58 Fed. 760. Traffic association: Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9, 31 N. E. 412. Sev-

both take off together, they are jointly liable.[6] Or the liability may arise out of counsel, direction, or command by one to another to commit a tort. The liability here, however, does not arise out of mere relationship. But a person who merely gives leave for a tort to be committed is said not to be a joint tort feasor. "If the trespasser was authorized and ordered by me to go there, we are joint tort feasors; but if I only permitted him, as he had my leave and license, though I had no right, yet we are not joint tort feasors."[7] But the person ordered to do the wrong may or may not be liable.[8]

Mere presence at the commission of a wrong, as an assault, does not attach liability as principal;[9] but encouraging, inciting, and even presence without disapproval, in connection with other circumstances, may have that effect.[10] It is in this sense that those conspirators who do not actually commit a wrong are tort feasors.[11]

eral railway companies: Galveston, H. & S. A. Ry. Co. v. Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486; Omaha & R. V. Ry. Co. v. Morgan, 40 Neb. 604, 59 N. W. 81. Telephone company and railway companies: United El. Ry. Co. v. Shelton, 89 Tenn. 423, 14 S. W. 863; Southwestern Tel. & Tel. Co. v. Crank (Tex. Civ. App.) 27 S. W. 38. Cf. Dillingham v. Crank, 87 Tex. 104, 27 S. W. 93. As to members of association, see Johnson v. Miller, 63 Iowa, 529, 17 N. W. 34. As to judge and officer of court, attorney of record, and execution creditor, see Baker v. Secor, 51 Hun, 643, 4 N. Y. Supp. 303; Zeller v. Martin, 84 Wis. 4, 54 N. W. 330; Thompson v. Whipple, 54 Ark. 203, 15 S. W. 604; Jones v. Lamon, 92 Ga. 529, 18 S. E. 423. Sheriff and attaching creditor: Harris v. Tenney, 85 Tex. 254, 20 S. W. 82; Blakely v. Smith (Ky.) 26 S. W. 584. Sheriff and deputy: Frankhouser v. Cannon, 50 Kan. 621, 32 Pac. 379. A municipal corporation and an improvement company: City of Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706. Joint trespassers: Whitney v. Backus, 149 Pa. St. 29, 24 Atl. 51; Wilbur v. Turner, 39 Ill. App. 526; Kavanaugh v. Taylor, 2 Ind. App. 502, 28 N. E. 553; Southwestern Tel. & Tel. Co. v. Crank (Tex. Civ. App.) 27 S. W. 38; Printup v. Patton, 91 Ga. 422, 18 S. E. 311. City and company which has contracted, but fails, to keep a crossing clear: Union St. Ry. Co. v. Stone, 54 Kan. 83, 37 Pac. 1012. Creditors who direct an officer to levy property which the debtor has assigned are liable therefor, jointly with the officer, at the suit of the assignee. Blakely v. Smith (Ky.) 26 S. W. 584.

[6] Harris v. Rosenberg, 43 Conn. 227; Colegrove v. Railroad Co., 6 Duer, 382.

[7] Robinson v. Vaughton, 8 Car. & P. 252.

[8] Post, p. 286, "Master and Servant."

[9] Hilmes v. Stroebel, 59 Wis. 74, 17 N. W. 539.

[10] Willi v. Lucas, 110 Mo. 219, 19 S. W. 726.

[11] Post, p. 637, "Conspirators"; Cheney v. Powell, 88 Ga. 629, 15 S. E. 750.

The liability of joint tort feasors may arise out of ratification of an action done for a party's benefit although without his authority.[12]

Nor is mere similarity of design or conduct on the part of independent actors sufficient to constitute such actors joint tort feasors.[13] There is a marked distinction between a tort and liability arising from a tort. The liability, as between the plaintiff and the defendant, may always be treated as several, but the wrong itself may be jointly done or severally done by the defendants. If it be jointly done,—that is, in concert,—the defendants are joint tort feasors; if it be severally done,—that is, independently, though for a similar purpose and at the same time,—without any concert of action, they are several tort feasors.[14] Thus, where débris is deposited on lands of a person, by means of different ditches constructed and operated by several persons acting separately and apart from each other, while a joint injunction will lie to prevent them from continuing the wrong, a joint judgment in such action is error.[15]

[12] See ante, §§ 14–16.

[13] Clark & L. Torts, 43, comparing Hume v. Oldacre, 1 Starkie, 351, with Paget v. Birkbeck, 3 Fost. & F. 683.

[14] Williams v. Sheldon, 10 Wend. 654.

[15] Miller v. Highland Ditch Co., 87 Cal. 430, 25 Pac. 550; Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. 1000 (nuisance, collecting cases, page 79, 83 Iowa, and page 1002, 48 N. W.); Gallagher v. Kemmerer, 144 Pa. St. 509, 22 Atl. 970; Little Schuylkill Nav. R. & C. Co. v. Richard's Adm'r, 57 Pa. St. 142; Chipman v. Palmer, 77 N. Y. 51; Slater v. Mersereau, 64 N. Y. 138. Owner of building, and contractor constructing tank on roof, are jointly liable for negligence as to supports, resulting in damage to plaintiff. Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 25 N. E. 799. And see Carman v. Steubenville & I. Ry. Co., 4 Ohio St. 399. Landlord and tenant: Harris v. James, 45 Law J. Q. B. 545; Pig. Torts, 87, 88. Joint owner of stallion liable for negligence of one resulting in injury to mare: Newman v. Stuckey, 57 Hun, 589, 10 N. Y. Supp. 760. But, to constitute defendants joint tort feasors, there must be community of wrong,—concert of action. Bennett v. Fifield, 13 R. I. 139. Cf. Chipman v. Palmer, 77 N. Y. 51, with Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911. When a trespass is committed by the animals of several persons, those of one person cannot be sold to pay damage done by another's, when there is no common fault in keeping the animals, and no concert of action in the trespass. Dooley v. Seventeen Thousand Five Hundred Head of Sheep (Cal.) 35 Pac. 1011. And see Printup v. Patten, 91 Ga. 422, 18 S. E. 311. But in Westfield Gas & Milling Co. v. Abernathey, 8 Ind. App. 73, 35 N. E. 399, it was held that where the excavation causing the

For a similar reason, it is said that an action will not lie against two persons jointly for verbal slander. The words of one are not the words of another, and the injury resulted from words only.[16] So, where a libel has been successively repeated by several persons, an action will lie against each of those who circulated it. They are several, not joint, tort feasors.[17] None the less, ordinarily, both parties guilty of concurrent negligence may be sued jointly, though they had no common purpose and though there was no concert in action.[18]

SAME—LIABILITY OF JOINT TORT FEASORS.

68. Each, any, or all joint tort feasors are responsible in compensatory damages for joint wrongs without regard to degree of culpability or extent of participation. Exemplary damages, it is sometimes held, must be assessed according to the conduct of the most innocent.

The person injured by joint tort feasors may sue and recover against all, any number, or only one of them.[19] The liability is joint and sever-

damage was the separate tort of each defendant, and not the joint tort of all, for a single injury, as the result of all torts, plaintiff can recover against all jointly; damages will not be apportioned. And see City of Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 706; Booth v. Ratté, 21 Can. Sup. Ct. 637.

[16] Patten v. Gurney, 17 Mass. 182–186.

[17] Martin v. Kennedy, 2 Bos. & P. 69; Nicholl v. Glennie, 1 Maule & S. 588–592; post, p. 483. In order that defendants may be held liable, as joint tort feasors, in assault and battery, they must co-operate and act in concert in inflicting the injury. Thomas v. Werremeyer, 34 Mo. App. 665.

[18] Flaherty v. Minneapolis & St. L. Ry. Co., 39 Minn. 328, 40 N. W. 160. As in a railroad collision: Colgrove v. Railroad Co., 20 N. Y. 492. And see Slater v. Mersereau, 64 N. Y. 138.

[19] Merryweather v. Nixan, 8 Term R. 186; Mitchell v. Tarbutt, 5 Term R. 649; Brown v. Allen, 4 Esp. 158; Elliott v. Allen, 1 C. B. 18; Chaffee v. U. S., 18 Wall. 516; Albright v. McTighe, 49 Fed. 817; McFadden v. Schill, 84 Tex. 77, 19 S. W. 368; Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9, 31 N. E. 412; Slater v. Mersereau, 64 N. Y. 138; City of Kansas City v. Slangstrom, 53 Kan. 431, 36 Pac. 709; Bryant v. Carpet Co., 131 Mass. 491; Hilman v. Newington, 57 Cal. 56; North Pennsylvania R. Co. v. Mahoney, 57 Pa. St. 187. As between joint tort feasors in admiralty, see The City of Norwalk, 55

al.[20] Indeed, he may bring different forms of action against different participants—trespass against one, trover against another, and so on.[21] The law does not recognize degrees of culpability between wrongdoers, and will not apportion compensatory damages between them. They are alike guilty and alike responsible. Thus, where several persons were charged with assault and battery, and the whole damage was assessed at $700, of which one defendant was charged with $550 and another with $150, the plaintiff entered a nolle pros. as to the latter defendant and took his verdict against the former. This was sustained, inasmuch as the defendant was liable to the extent of $700, and he could not be heard to complain because he paid only $550.[22] Of the joint tort feasors, however, some may be liable for punitive damages, and some for compensatory damages; as, where the one was arrested by a police officer and another person, one acting in good faith, and the other maliciously, the true criterion of damages was the whole injury which plaintiff sustained from the joint trespass. He can recover punitive damages against the party who ought to be punished, but if he sue both for punitive damages he

Fed. 98; The Virginia Ehrman, 97 U. S. 309–317. Further, as to joint tort feasors, see Cooley, Torts (2d Ed.) 154.

[20] Rich v. Pilkington, Carth. 171; Mitchell v. Tarbutt, 5 Term R. 649, cited in McAvoy v. Wright, 137 Mass. 207. Cf. Stone v. Dickinson, 5 Allen, 29 (as in nuisance); Irvine v. Wood, 51 N. Y. 224; Slater v. Mersereau, 64 N. Y. 138; Klauder v. McGrath, 35 Pa. St. 128; 1 Shear. & R. Neg. (4th Ed.) § 122; Dubose v. Marx, 52 Ala. 506; Power v. Baker, 27 Fed. 396; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 25 N. E. 799.

[21] Lovejoy v. Murrey, 3 Wall. 1; Creed v. Hartman, 29 N. Y. 591; Peoria v. Simpson, 110 Ill. 294; Wright v. Compton, 53 Ind. 337; State v. Babcock, 42 Wis. 138.

[22] Warren v. Westrup, 44 Minn. 237, 46 N. W. 347; Chattahoochee Brick Co. v. Braswell, 92 Ga. 631, 18 S. E. 1015; Keegan v. Hayden, 14 R. I. 175; Post v. Stockwell, 34 Hun, 373; Huddleston v. West Bellevue, 111 Pa. St. 110, 2 Atl. 200; Price v. Harris, 10 Bing. 331, 25 E. C. L. 159. As to granting a new trial, Albright v. McTighe, 49 Fed. 817 (analyzing cases). Motion to modify remittitur of judgment, Chils v. Gronlund, 41 Fed. 505. Lord Mansfield held, in Hill v. Goodchild (1771) 5 Burrows, 2790, that, when a verdict found defendant guilty of a trespass jointly charged, the jury could not afterwards assess several damages. And in Massachusetts, in Halsey v. Woodruff (1850) 9 Pick. 555, this was applied on the theory that the sole inquiry opened to a jury "is what damages the plaintiff has sustained, not who ought to pay for them."

can recover against them only according to the acts of the most innocent defendant.[23] But while the sufferer may proceed separately against all tort feasors who injured him, or against them all jointly, he must elect to pursue one course or the other; and, having made his election, he is bound by it. If he sues all jointly and has judgment, he cannot afterwards sue them separately; or if he sues separately and has judgment, he cannot afterwards sue them in a joint action. The prior judgment against one is an election as to that one to pursue his several remedy; but it is ordinarily, in America, no bar to the suit for the same wrong against any one or more of the other wrongdoers.[24]

SAME—CONTRIBUTION BETWEEN JOINT TORT FEASORS.

69. There can be no contribution between joint tort feasors except when they neither knew nor are presumed to have known that a legal wrong was being done.[25]

In cases where the wrongdoers actually intend to do an unlawful act, or where they are presumed to know that they were doing an unlawful act, there is neither indemnity nor contribution between them. Thus, if the owner of premises leave a hatchway on the street open and unguarded, and is compelled to pay damages to a traveler injured thereby, he can not recover indemnity of another person who may have interfered with the hatchway so as to make it more dangerous.[26] Where, however, joint tort feasors in committing the tort do what is apparently lawful, in the belief that they are pursuing a lawful course, and the wrong inflicted upon another arises out of this conduct by construction or inference of the law, and is not the foreseen result of a wrongful act, the law will allow contribution between them. Thus, if two creditors together attack a sale

[23] McCarthy v. De Armit, 99 Pa. St. 63; Clark v. Newsam, 1 Exch. 131. But see Warren v. Westrup, supra.

[24] The Atlas, 93 U. S. 302, collecting cases at page 315; post, pp. 341–344, "Discharge of Tort by Judgment."

[25] Generally, see Keener, Quasi Cont. 492–504; Adamson v. Jarvis, 4 Bing. 66; Churchill v. Holt, 131 Mass. 67.

[26] Churchill v. Holt, 131 Mass. 67. Cf. Id., 127 Mass. 165.

of goods by their debtor to a third person, honestly believing the sale is fraudulent and void, one of them, after paying a judgment recovered against him by the debtor's vendee for wrongful seizure and sale of the goods, may enforce contribution from the other.[27] In many instances several parties may be liable in law to the person injured, while as between themselves some of them are not wrongdoers at all; and the equity of the guiltless to require the actual wrongdoer to respond for all damages, and the equally innocent to contribute his portion, is complete.[28] Indeed, the rule as to no contribution has so many exceptions that it can hardly with propriety be called a general rule.[29]

RELATIONSHIP—HUSBAND AND WIFE.

70. The common-law limitation as to the status of married women led to two principal consequences, so far as the law of torts is concerned:

(a) Inability of wife to sue or be sued in tort, and to the sole responsibility of her husband for torts committed by her before or after marriage, in an action in which she was joined with him as a party

[27] Vandiver v. Pollak, 97 Ala. 467, 12 South. 473 (Head, J., dissenting); Armstrong Co. v. Carrion Co., 66 Pa. St. 218, Burd. Lead. Cas. p. 166; Old Colony R. Co. v. Slavens, 148 Mass. 363, 19 N. E. 372; Simpson v. Mercer, 144 Mass. 413–415, 11 N. E. 720; Bailey v. Bussing, 28 Conn. 455; Nichols v. Nowling, 82 Ind. 488; Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320; Flaherty v. Minneapolis & St. L. Ry. Co., 39 Minn. 328, 40 N. W. 160; Janvrin v. Curtis, 63 N. H. 312; Goldsborough v. Darst, 9 Ill. App. 205; Nickerson v. Wheeler, 118 Mass. 295; Moore v. Appleton, 26 Ala. 633; Wooley v. Batte, 2 Car. & P. 417; Perason v. Skelton, 1 Mees. & W. 504. It has, however, been held that, a passenger on a street car having been injured by a collision with a railroad car, through the concurrent negligence of the two companies, neither can recover against the other. Texas & Pac. Ry. Co. v. Doherty (Tex. App.) 15 S. W. 44.

[28] Carpenter, J., in Nashua Iron & Steel Co. v. Worcester & N. R. Co., 62 N. H. 159, citing Pearson v. Sketton, 1 Mees. & W. 504; Wooley v. Batte, 2 Car. & P. 417; Belts v. Gibbons, 2 Adol. & E. 57; Adamson v. Jarvis, 4 Bing. 66; Avery v. Halsey, 14 Pick. 174; Gray v. Boston Gaslight Co., 114 Mass. 149; Churchill v. Holt, 127 Mass. 165, 131 Mass. 67; Smith v. Foran, 43 Conn. 244.

[29] Bailey v. Bussing, 28 Conn. 455; Nashua Iron & Steel Co. v. Worcester & N. R. Co., 62 N. H. 159.

defendant, ordinarily, but not invariably, and to his sole right to recover for any tort committed against her.

(b) The use of coverture as a defense to a cause of action really based on contract, but attempted to be enforced through the form of an action ex delicto to avoid her exemption from liability for her contract.

Liability at Common Law for Torts of Wife.

At common law the personality of a married woman was merged in that of her husband. Man and wife were one, and the man was that one. Therefore, even after a divorce, she could not sue him for a tort committed against her, e. g. for assault and battery.[30] All her property became his,—so did her debts. Her husband was held responsible for her torts whether committed before or after marriage.[31] Indeed, he might even have been arrested for his wife's tort.[32] It was impossible for the wife during coverture to be either sole plaintiff or sole defendant in action ex delicto, and by reason of this rule the husband was joined for conformity. It would seem there was doubt whether he was joined because he was liable, or whether this joinder made him liable to pay damages and cost of suit. But in either case it did not make him a tort feasor, either sole or joint, nor give any cause of action against him alone. If the wife died, the action abated; and, if the action was brought after sentence of divorce was pronounced, the husband could not have been joined.[33] If the husband died, the wife could then be sued as

[30] Abbott v. Abbott, 67 Me. 304; Phillips v. Barnet, 1 Q. B. Div. 436.

[31] Generally, as to liability of husband for torts of wife during coverture, see Baker v. Young, 44 Ill. 42-47; Wright v. Kerr, Add. (Pa.) 13; Vine v. Saunders, 5 Scott, 359; Ball v. Bennett, 21 Ind. 427; Hinds v. Jones, 48 Me. 348; Dailey v. Houston, 58 Mo. 361; Carleton v. Haywood, 49 N. H. 314; Fowler v. Chichester, 26 Ohio St. 9; Jackson v. Kirby, 37 Vt. 448; Brazil v. Moran, 8 Minn. 236 (Gil. 205).

[32] Solomon v. Wass, 2 Hilt. (N. Y.) 179.

[33] Com. Dig. tit. "B. & F."; Bac. Abr. tit. "B. & F."; Macq. Husb. & W. (3d Ed.) 92; Capell v. Powell, 17 C. B. N. S. 743; Head v. Briscoe, 5 Car. & P. 484; Phillips v. Barnet, 1 Q. B. Div. 436; Wright v. Leonard, 11 C. B. N. S. 258-266. But see Wainford v. Heyl, L. R. 20 Eq. 321; McKeown v. Johnson,

feme sole.[34] The husband, however, was liable for property converted by her alone, because the converted property necessarily became his, and the conversion was deemed to be for his use, and he could have been sued alone. Indeed, it appears that, even if the conversion had been the result of the joint act of both, he could have been sued alone.[35] When torts were committed by her in the presence of her husband, he was conclusively presumed to have coerced her, and was solely liable for consequent damages.[36]

Same—Coverture as a Defense to Actions in Form ex Delicto.

A married woman was by common law incapable of binding herself by contract, and therefore, like an infant, could not be made liable for a wrong in an action of deceit or the like when this would have in substance amounted to making her liable on contract. For example, an action could not have been maintained against a husband and wife for her false and fraudulent representation that she was a widow at the time she executed a bond and mortgage, in exchange for which another gave up to her promissory notes to a great amount against third persons.[37]

71. Modern statutory provisions, as they have extended the powers and rights of married woman, have increased her duties and liabilities. Their tendency is—

(a) As to torts committed by her, to attach to her liability jointly with her husband, or to the exclusion of her husband's responsibility by virtue of relationship alone, leaving cases where the husband

1 McCord (S. C.) 578; Cassin v. Delaney, 38 N. Y. 178; Baker v. Braslin, 18 R. I. 635, 18 Atl. 1039.

[34] 2 Cord, Mar. Wom. § 1149.

[35] 2 Cord. Mar. Wom. § 1147. But see Draper v. Fulkes, Yelv. 166; Keyworth v. Hill, 3 Barn. & Ald. 685; Heckle v. Lurvey, 101 Mass. 344; Kowing v. Manly, 49 N. Y. 192, 198, 199.

[36] Cooley, Torts, p. 132; Schouler, Husb. & W. § 174.

[37] Kean v. Coleman, 39 Pa. St. 299; Fairhurst v. Liverpool Ass'n, 9 Exch. 422, 23 Law J. 163; Cooper v. Witham, 1 Lev. 247; Woodward v. Barnes, 46 Vt. 332; Trust Co. v. Sedgwick, 97 U. S. 304; Kowing v. Manly, 49 N. Y. 192.

and the wife are joint tort feasors, or principal and agent, to ordinary rules.

(b) As to torts committed against her person and property to entitle her to recover damages in her own right, subject to her husband's right to recover for damages done him through wrongs to her.

(c) As between husband and wife to deny the right to sue in tort.

General Effect of English Statutes.

The English married women's act (1882) provided that a married woman may both sue and be sued in tort in all respects as if she were unmarried. The husband is liable only to the extent of the property acquired by him through his wife, so far as torts committed by her before marriage are concerned; but for the wife's torts committed during coverture his liability continues unlimited. She may sue her husband for a tort to her separate property, but he has no corresponding right of action against her for torts to his property. Neither husband nor wife can sue the other for any tort of any other kind.[38]

General Effect of American Statutes—Torts Committed by Wife.

In the United States, the common-law disabilities of a married woman, and liability of her husband for her torts, remain, except as modified by statute.[39] Rights, duties, and liabilities vary as legislation varies. No universal statement, therefore, can be made as to the general law. But in many, and perhaps most, states, the courts have been exceedingly conservative in adopting startling innovations in the common-law doctrine of liability of the husband for the acts of the wife, and require that the intention to make such changes be clearly and unambiguously expressed.[40] The tendency

[38] 45 & 46 Vict. c. 75, §§ 1, 12, 14, 15; Seroka v. Kaltenburg, L. R. 17 Q. B. 177, 23 Cent. Law J. 364; Weldon v. De Bathe, 14 Q. B. Div. 339, 28 Ir. Law T. 109. Liability under English act discussed, 24 Ir. Law T. 273.

[39] Dean v. Metropolitan El. Ry. Co., 119 N. Y. 540, 23 N. E. 1054.

[40] McElfresh v. Kirkendall, 36 Iowa, 224; Luse v. Oaks, 36 Iowa, 562; Stew. Husb. & W. §§ 14, 15, and cases; Wheeler & Wilson Manuf'g Co. v. Heil, 115 Pa. St. 487, 8 Atl. 616; Fitzgerald v. Quann, 33 Hun, 652; Id., 109 N. Y. 441, 17 N. E. 354; Kowing v. Manley, 57 Barb. 479; Fowler v. Chichester, 26 Ohio St. 9-14; McQueen v. Fulgham, 27 Tex. 463; Ferguson v. Brooks, 67 Me. 251-

erty she is liable in tort separate from her own husband, even if her husband be liable for her personal tort.[50]

Where the wife does an act not under her husband's coercion, but both of them act on their own accord, they may be sued jointly; as where they voluntarily join in conversion,[51] libel and slander,[52] assault and battery.[53] Where a husband, as agent of his wife, leased her land, and, with her knowledge, made her his coplaintiff in an attachment suit against the tenant for her rental part of the crops, prosecuting the suit for their joint benefit, it was held that the wife was jointly liable for the wrongful acts of the husband in carrying forward the action.[54] The husband may be liable for the acts of his wife as his agent. Thus, on a sale of business, where the wife represented the daily receipts as greatly in excess of what they really were, her husband, as principal, was held personally liable.[55] The wife may be held liable for the acts of her husband as her agent. Thus, she can be held liable for the fraud of her husband dealing as her agent with such property.[56]

[50] Vanneman v. Powers, 56 N. Y. 39–42; Quilty v. Battie, 135 N. Y. 201, 32 N. E. 247. Compare Flesh v. Lindsay, 115 Mo. 1, 21 S. W. 907.

[51] Estill v. Fort, 2 Dana (Ky.) 237; Peak v. Lemon, 1 Lans. 295. And see Blake v. Blackley, 109 N. C. 257, 13 S. E. 786; Wirt v. Dinan, 44 Mo. App. 583.

[52] McElfresh v. Kirkendall, 36 Iowa, 224; Fowler v. Chichester, 26 Ohio St. 9.

[53] Roadcap v. Sipe, 6 Grat. 213; Guffen v. Reynolds, 17 How. 609. And, generally, see Crow v. Manning, 45 La. Ann. 1221, 14 South. 122; Vine v. Saunders, 5 Scott, 359, 4 Bing. N. C. 96; Marshall v. Oakes, 51 Me. 308; Tobey v. Smith, 15 Gray, 535; Hoffman v. Whaleman, 8 Lanc. Law Rev. 217; (Pa.) Hart v. Mental, 26 Pa. Law J. 33; Heckle v. Lurvey, 101 Mass. 344, 345; Handy v. Foley, 12 Mass. 259; Miller v. Sweitzer, 22 Mich. 391; Carleton v. Haywood, 49 N. H. 314.

[54] Byford v. Girton (Iowa) 57 N. W. 588; Fogel v. Schmalz, 92 Cal. 412, 28 Pac. 444.

[55] Taylor v. Green, 8 Car. & P. 316.

[56] Ferguson v. Brooks, 67 Me. 251; Rowe v. Smith, 45 N. Y. 230; Baum v. Mullen, 47 N. Y. 577. As to liability of husband for negligence of wife's servant, see Ferguson v. Neilson, 17 R. I. 81, 20 Atl. 229. Where a married woman employs her husband to negotiate a sale of her land, and in such negotiation he makes false representations, and she afterwards completes the sale by making a deed, the representations will be held as though made by herself, since she cannot retain the benefits of his negotiations, and re-

Same—Torts Committed against the Wife.

A wife may now generally recover for her own use damages suffered from a personal tort committed against her. The right of the wife to sue for tort to her separate [57] or community [58] property is generally recognized. This entire subject will be subsequently considered at some length.

Torts as between Husband and Wife.

The policy of the law does not incline to admit that a husband and wife can commit torts against each other.[59]

SAME—LANDLORD AND TENANT.

72. Normally, the occupant, and not the owner or landlord, is liable to third persons for injuries caused by the failure to keep the premises in repair. The liability may, however, be extended to the landlord or owner—

(a) When he contracts to repair.

(b) Where he knowingly demises the premises in a ruinous condition, or in a state of nuisance.

(c) Where he authorizes a wrong.[60]

pudiate the means by which they were obtained. Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533.

[57] In a suit for the infringement of a copyright, where it is shown that the copyright was taken in the name of the complaining publisher as "proprietor," defendant cannot object that the author was a married woman, and that her husband was entitled to the fruits of her literary labor; for it will be presumed that the legal title of the author was properly vested in complainant. Scribner v. Clark, 50 Fed. 473. An action by a married woman for personal injuries received during coverture is not one concerning her separate property, which she can bring without the joinder of her husband. Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56.

[58] An action by a wife for mental suffering caused by defendant's failure to deliver telegrams announcing the shooting of her husband, whereby she was prevented from seeing him before he died, is not an action to recover community property. Western Union Tel. Co. v. Kelly (Tex. Civ. App.) 29 S. W. 408.

[59] Post, pp. 463, 464, "Injury to Family Relations" under "Husband and Wife."

[60] Adams v. Fletcher, 17 R. I. 137, 20 Atl. 263; Hart v. Cole, 156 Mass. 475, 31 N. E. 644; Caldwell v. Slade, 156 Mass. 84, 30 N. E. 87; McGrath v.

The general rule as to the liability, as between landlord and tenant, for injuries caused by the defective condition of the premises, is "that the tenant and not the landlord is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition." [61] Thus, a servant, while employed in removing from a building articles manufactured by the lessees for his employer, stepped into an uncovered and unguarded hole in the floor of the premises from which the articles were to be removed, and was injured. No cover was ever made for the hole, and no scuttle had been constructed to cover it; but it was usually covered by a piece of plank. It was held that the hole could not be said to be a nuisance of itself. It was the duty of the occupier of the premises to protect against injury by the hole. The liability, therefore, was his, and not that of the owner of the building.[62]

Walker, 64 Hun, 179, 18 N. Y. Supp. 915; Franke v. City of St. Louis, 110 Mo. 516, 19 S. W. 938; City of Denver v. Soloman, 2 Colo. App. 534, 31 Pac. 507; cases collected in Pell v. Reinhart, 12 Lawy. Rep. Ann. 843 (N. Y. App.) 27 N. E. 1077; Curtis v. Kiley, 153 Mass. 123, 26 N. E. 421.

[61] Thus, in Cheetham v. Hampson, 4 Term R. 318, it was held that an action on the case, for not repairing fences, to the injury of plaintiff, can only be maintained against occupier, and not against the owner of the fee, who is not in possession. Underh. Torts, *p. 129, rule 22; Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193 (collecting authorities); Sterger v. Van Sicklen, 132 N. Y. 499, 30 N. E. 987. Lessor of railroad is not liable for torts of lessee. Miller v. Railroad Co., 125 N. Y. 118, 26 N. E. 35. Landlord not liable for damage caused by want of ordinary repairs to privy vaults. Pope v. Boyle, 98 Mo. 527, 11 S. W. 1010. And see Texas & P. Ry. Co. v. Mangum, 68 Tex. 342, 4 S. W. 617, and Franke v. City of St. Louis, 110 Mo. 516, 19 S. W. 938. And, generally, see City of Chicago v. O'Brennan, 65 Ill. 160; Gridley v. City of Bloomington, 68 Ill. 47; City of Peoria v. Simpson, 110 Ill. 294; City of Lowell v. Spaulding, 4 Cush. (Mass.) 277; Brunswick-Balke Collender Co. v. Rees, 69 Wis. 442, 34 N. W. 732; Edwards v. Railway Co., 25 Hun, 197; Tayl. Landl. & Ten. § 539; 1 Atchinson, Torts, 197, 198.

[62] Caldwell v. Slade, 156 Mass. 84, 30 N. E. 87. Cf. Dalay v. Savage, 145 Mass. 38, 12 N. E. 841; Adams v. Fletcher, 17 R. I. 137, 20 Atl. 263; City of Denver v. Soloman, 2 Colo. App. 534, 31 Pac. 507; Franke v. City of St. Louis, 110 Mo. 516, 19 S. W. 938; McGrath v. Walker, 64 Hun, 179, 18 N. Y. Supp. 915; cases collected 12 Lawy. Rep. Ann. 843. As to responsibility of landlord for tenant's negligence with respect to gas, see Holden v. Liverpool New Gas & Coke Co., 3 Man. G. & S. 1; Bartlett v. Boston Gaslight Co., 122 Mass. 209; Fisher v. Thirkell, 21 Mich. 1; Bigelow, Lead. Cas. 627 (and see notes).

Contract to Repair.

If, however, the landlord lets the premises with a covenant to repair, even if the tenant is to pay for them, the landlord is liable. Under such circumstances, workmen negligently left the entrance to the cellar in the public hall uncovered during the night, and the plaintiff fell into it and was injured. The landlord was held liable.[63] On the other hand, if a tenant covenants to keep the premises in repair, the landlord cannot be said to authorize the continuance of a nuisance; and not he, but the tenant, will be liable.[64]

Letting Premises in Ruinous Condition or State of Nuisance—Authorizing Wrongs.

Moreover, if the landlord knowingly let the property in a condition of nuisance, he (and the tenant also) may be liable to third persons.[65] He is said to have authorized the continuance of the wrong

[63] Leslie v. Pounds, 4 Taunt. 649; Nelson v. Liverpool Brewery Co., 2 C. P. Div. 311. Cf. Pretty v. Bickmore, L. R. 8 C. P. 401, with Gwinnell v. Eamer, L. R. 10 C. P. 658. But reservation of right to enter premises to repair the same does not attach liability to landlord. Clifford v. Atlantic Mills, 146 Mass. 47, 15 N. E. 84, per Holmes, J., in opinion of great ability, collating cases. But a decayed stairway in the rear of leased premises is not a nuisance to the occupant of an adjoining house, so as to make the lessor responsible, under his covenant to repair, for an injury sustained by such neighbor while walking on the stairway. Timlin v. Standard Oil Co., 126 N. Y. 514, 27 N. E. 786, distinguishing Sterger v. Van Sicien (Sup.) 7 N. Y. Supp. 805; Id., 132 N. Y. 499, 30 N. E. 987. The landlord is under no implied obligation to make ordinary repairs. Medary v. Cathers, 161 Pa. St. 87, 28 Atl. 1012; Hollingsworth v. Atkins, 46 La. Ann. 515, 15 South. 77.

[64] Post, note 67. If the landlord undertakes to transmit power to adjacent buildings, he is liable for injury to an employé of one of the tenants by negligence in not keeping pulleys and shafts in safe condition, though the lease required tenant to keep shaft in repair. Poor v. Sears, 154 Mass. 539, 28 N. E. 1046; Pretty v. Bickmore, L. R. 8 C. P. 401. And see Gwinnell v. Eamer, L. R. 10 C. P. 658. Cases as to liability of landlord for the condition of a part of the premises not controlled by the tenant are collected at page 155, 23 Lawy. Rep. Ann. And see Jones v. Millsaps (Miss.) 14 South. 440.

[65] Both the owner, who constructs an offensive cesspool, and the tenant, who uses the premises, are liable for injury to adjoining occupant. Joyce v. Martin, 15 R. I. 558. Both may be liable for negligence,—the landlord, for negligence in construction; the tenant, for negligence in use of such prem-

only if he had notice of ruinous condition,[66] and not then if the tenant is bound to repair.[67] But where property is demised and at the time of the demise is not a nuisance, but becomes so only by the act of the tenant while in his possession, and the injury happens during such possession, the owner is not liable.[68] But where the owner of the premises leases premises which are in a condition of nuisance, or must in their nature of things become so by their user, and receives rent, he is liable for the injury resulting from such nuisance.[69] Thus, if landlord let premises with a stack of chimneys in a ruinous and fallen state, he is liable for damages;[70] but if he builds a chimney which by the act of the tenant becomes a nuisance, although the tenant could have built fires so that no nuisance would have resulted, the tenant is liable, and not the landlord.[71] But where the demise was of a lime kiln and quarry, the landlord was held liable for the nuisance resulting from smoke from the kiln, as being the necessary consequence of an act he authorized.[72] A fortiori, if the lessor of premises licenses the lessee to perform acts which amount to a nuisance, the lessor is liable.[73]

ises. Eakin v. Brown, 5 N. Y. 36; McDonough v. Gilman, 3 Allen (Mass.) 264; Todd v. Flight, 9 C. B. (N. S.) 377; Gandy v. Jubber, 5 Best & S. 485, 9 Best & S. 15; Rich v. Basterfield, 4 C. B. 783; Russell v. Shenton, 3 Q. B. 449; O'Connor v. Andrews, 81 Tex. 28, 16 S. W. 628.

[66] Welfare v. London & B. Ry. Co., L. R. 4 Q. B. 693; Southcote v. Stanley, 1 Hurl. & N. 247; Slight v. Gutzlaff, 35 Wis. 675. But such knowledge may be constructive. Timlin v. Standard Oil Co., 126 N. Y. 514, 27 N. E. 786; Dickson v. Chicago, R. I. & P. R. Co., 71 Mo. 575.

[67] Pretty v. Bickmore, L. R. 8 C. P. 401; Gwinnell v. Eamer, L. R. 10 C. P. 658. But see Ingwersen v. Rankin, 47 N. J. Law, 18.

[68] Owings v. Jones, 9 Md. 108; Rich v. Basterfield, 4 C. B. 783. Et vide Saxby v. Manchester, S. & L. Ry. Co., L. R. 4 C. P. 198.

[69] Roswell v. Prior, 12 Mod. 635; Godley v. Haggerty, 20 Pa. St. 387; Congreve v. Smith, 18 N. Y. 79; Clifford v. Dam, 81 N. Y. 52. Cf. Fisher v. Thirkell, 21 Mich. 1–20. Et vide Albert v. State, 66 Md. 325, 7 Atl. 697. The owner and the tenant may be jointly liable. Joyce v. Martin, 15 R. I. 558 (reviewing cases).

[70] Todd v. Flight, 9 C. B. (N. S.) 377.

[71] Rich v. Basterfield, 4 C. B. 783.

[72] Harris v. James, 45 Law J. Q. B. 545.

[73] White v. Jameson, L. R. 18 Eq. 303. And see Lufkin v. Zane, 157 Mass. 117, 31 N. E. 757.

Liability of Landlord to Tenant.[74]

An implied grant of whatever is necessary or beneficial to the thing granted has been recognized.[75] Therefore a tenant may sue his landlord for granting to a third person permission to construct a chimney obstructing such tenant's window.[76] The law does not, however, imply a warranty on the part of the landlord that the premises are fit for occupation or for the tenant's purposes.[77] Therefore, in the absence of fraud or misrepresentation, a landlord is not responsible for injuries happening to his tenant by reason of a snow-slide or avalanche.[78] If the master agrees to make repairs, damage consequent on failure to perform the covenant may be actionable ex contractu.[79] If damage result from negligence in making repairs under the agreement, recovery may be had ex delicto.[80]

[74] Trover lies by landlord against tenant for value of wood into which trees wrongfully severed from the premises have been converted. Brooks v. Rogers, 101 Ala. 111, 13 South. 386. Where a tenant's negligence caused the destruction of the premises by fire, the landlord may sue on the contract, without being compelled to resort to an action on the case for negligence. Stevens v. Pantlind, 95 Mich. 145, 54 N. W. 716.

[75] Doyle v. Lord, 64 N. Y. 432; Case v. Minot, 158 Mass. 577, 33 N. E. 700 (collecting Massachusetts cases); Tayl. Landl. & Ten. § 161; 2 Washb. Real Prop. 318, 319, 328-331.

[76] Case v. Minot, 158 Mass. 577, 33 N. E. 700.

[77] Buckley v. Cunningham (Ala.) 15 South. 826; Baker v. Holtpzaffell, 4 Taunt. 45; Dutton v. Gerrish, 9 Cush. (Mass.) 89; Bowe v. Hunking, 135 Mass. 380; Naumberg v. Young, 44 N. J. Law, 341-345. The law has been changed by statute in Ohio and Indiana. 33 Am. Law Reg. 114, 115.

[78] Doyle v. Railway Co., 147 U. S. 413, 13 Sup. Ct. 333; Booth v. Merriam, 155 Mass. 521, 30 N. E. 85. A landlord is not liable for a failure to disclose the existence of a defective drain, discovered by him during a tenancy at will, during which the tenant contracted typhoid fever and died. Bertie v. Flagg, 161 Mass. 504, 37 N. E. 572. Et vide Kern v. Myll, 94 Mich. 477, 54 N. W. 176. See Id., 80 Mich. 525, 45 N. W. 587. As to liability of landlord to tenant for damage done tenant's goods in consequence of repair to leased premises, see Toole v. Beckett, 67 Me. 544; Glickauf v. Maurer, 75 Ill. 289; Rosenfield v. Newman (Minn.) 60 N. W. 1085; Mumby v. Bowden, 25 Fla. 454, 6 South. 453. As to conversion between landlord and tenant, see post, p. 721, "Conversion."

[79] Clapper v. Kells, 78 Hun, 34, 28 N. Y. Supp. 1018. The fact that the landlord, after the cellar had become flooded with filth and water, gratuitously undertook to remove the same, and did so negligently, does not entitle the tenant to abandon the premises. Blake v. Dick (Mont.) 38 Pac. 1072.

[80] Callahan v. Loughran, 102 Cal. 476, 36 Pac. 835. As to liability of land-

SAME—INDEPENDENT CONTRACTOR.

73. An independent contractor is one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result. He is distinguished from a servant, who, on the other hand, is under the orders and control of his master in respect to the means and methods used to attain the end for which he is employed.

It is of great importance to determine whether in a particular case there exists the relationship of master and servant (in its broadest sense), or of employer and independent contractor. "For purposes of liability, no man can have two masters." And so far as the defendant is concerned, the question may involve his entire responsibility for damages. If he can show that the harm was done by an independent contractor, in many, perhaps in most, cases he can escape liability.[81]

lord to tenant's servant, see Perez v. Raband, 76 Tex. 191, 13 S. W. 177; Trinity & S. Ry. Co. v. Lane, 79 Tex. 643, 15 S. W. 477, and 16 S. W. 18. As to tenant's guests, see Eyre v. Jordan, 111 Mo. 424, 19 S. W. 1095.

[81] Singer Manuf'g Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175; Waters v. Pioneer Fuel Co., 52 Minn. 474, 55 N. W. 52; Sproul v. Hemmingway, 14 Pick. 1; Powell v. Virginia Const. Co., 88 Tenn. 692, 13 S. W. 691; Lawrence v. Shipman, 39 Conn. 586; Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. 1077; Cuff v. Railroad Co., 35 N. J. Law, 17; Long v. Moon, 107 Mo. 334, 17 S. W. 810; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Scarborough v. Railway Co., 94 Ala. 497, 10 South. 316; Hawver v. Whalen, 49 Ohio St. 69, 29 N. E. 1049; Charlebois v. Gogebic & M. R. Co., 91 Mich. 59, 51 N. W. 812; City & Suburban Ry. Co. v. Moores (Md.) 30 Atl. 643; Harris v. McNamara, 97 Ala. 181, 12 South. 103; Savannah & W. R. Co. v. Phillips, 90 Ga. 829, 17 S. E. 82; Larson v. Metropolitan Ry. Co., 110 Mo. 234, 19 S. W. 416; Welsh v. Parrish, 148 Pa. St. 590, 24 Atl. 86; Haley v. Jump River Lumber Co., 81 Wis. 412, 51 N. W. 321, 956; New Albany Forge & Rolling Mill v. Cooper, 131 Ind. 363, 30 N. E. 294; Piette v. Bavarian Brewing Co., 91 Mich. 605, 52 N. W. 152; Alabama Midland Ry. Co. v. Martin, 100 Ala. 511, 14 South. 401. See dissenting opinion (Dwight, C.) in McCafferty v. Railway Co., 61 N. Y. 178. Sadler v. Henlock, 4 El. & Bl. 570–578; Rourke v. White Moss Colliery Co., 2 C. P. Div. 205. As to relation of a tenant, as an independent contractor, to his landlord, vide Rosowell v. Pryer, 12 Mod. 635; Cheetham

Ordinarily it is regarded that the test of the relationship is "whether the defendant retained the power of controlling the work." [82] For example, a person buys standing timber, and a third person contracts to cut it into lumber at an agreed price per thousand feet, assuming entire control of the work and hiring and paying his men. Under such circumstances, the purchaser of the timber is not liable for injuries to adjoining land resulting from the negligence of such third person or his employés in the performance of the contract.[83]

But this standard of control is not absolute or inflexible. Certain control on the part of the employer may be retained, and the contractor be an independent contractor and not a servant. Thus, the fact that one doing work on a building is to be paid a round sum does not make him a servant of the owner; but he is an independent contractor if he is in the exercise of a distinct and independent employment, using his own means and methods for accomplishing the work, and is not under the immediate supervision and control of the owner. The mere fact that the architect of the owner directs certain things to be done by the contractor where he does not exercise control over him in his manner of doing the work or his choice of workmen, does not make the contractor a servant of the owner.[84]

v. Hampson, 4 Term R. 318; Leslie v. Pounds, 4 Taunt. 649; Pretty v. Bickmore, L. R. 8 C. P. 401; Nelson v. Liverpool Brewery Co., 2 C. P. Div. 311; Mahon v. Burns, 9 Misc. Rep. 223, 29 N. Y. Supp. 682; Gwinnell v. Eamer, L. R. 10 C. P. 658; Todd v. Flight, 9 C. B. (N. S.) 377; Curtis v. Kiley, 153 Mass. 123, 26 N. E. 421; Laugher v. Pointer, 5 Barn. & C. 547. Cf. Fenton v. Dublin Steam Packet Co., 8 Adol. & E. 835; Dalyell v. Tyrer, El., Bl. & El. 899. But see Illinois Cent. R. Co. v. King, 69 Miss. 852, 13 South. 824; Brow v. Railroad Co., 157 Mass. 399, 32 N. E. 362. And see post, p. 241 et seq., "Relationship of Master and Servant, When Established."

[82] Fulton Co. St. R. Co. v. McConnell, 87 Ga. 756, 13 S. E. 828; New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649–657; Painter v. Mayor, etc., 46 Pa. St. 213, and cases collected; Singer Manuf'g Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175; Norwalk Gas Light Co. v. Borough of Norwalk, 63 Conn. 495, 28 Atl. 32.

[83] Knowlton v. Holt (N. H.) 30 Atl. 346. Cf. Hughbanks v. Boston Inv. Co. (Iowa) 60 N. W. 640. A tug owner is an independent contractor, as to vessels in tow. McLoughlin v. New York Lighterage Transp. Co. (Com. Pl.) 27 N. Y. Supp. 248. Cf. Bissell v. Torrey, 65 Barb. 188. So a public carman. McMullen v. Hoyt, 2 Daly (N. Y.) 271.

[84] Morgan v. Smith, 159 Mass. 570, 35 N. E. 101. Cf. Linnehan v. Rollins, 137 Mass. 123. The French law on this point will be found in Bigelow, Lead.

Again, the right of a railway company to inspect, and in a considerable measure to regulate, by its engineer or other proper officer, the construction of way, by a contractor who nevertheless is independent, is generally recognized.[85] The cases are, however, by no means agreed as to what reservation of control in the contract is consistent with the relationship of employer and independent contractor.[86] The payment of wages, the power to dismiss, select, or compel obedience of the servant, to terminate, control, or to give directions as to the result of the work, afford a test (but not a conclusive or unfailing test) of whether the servant is the servant of the employer or the independent contractor.[87] Payment by the job instead of by the day does not make an employé an independent contractor.[88] But, on the other hand, if the contract excludes known methods of avoiding harm, the defense of an independent contractor does not avail.[89]

Cas. 659. But where one was engaged in the construction of a railroad for a lumber company under contract, and it does not appear how he was paid, or whether it devolved on him exclusively to furnish material for the work, and pay the hands in its accomplishment, or whether the company exercised control over it, the fact that it supervised the cutting of timber by him on the land through which the road was to pass renders him its servant in law. Waters v. Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718; Harding v. City of Boston (Mass.) 39 N. E. 411.

[85] The engineer of a railroad company may be allowed to inspect and approve construction of piers for a railroad bridge, the work on which was being done by independent contractors, without attaching liability to the railroad company. Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672. But see post, note 95; Alabama Midland Ry. Co. v. Martin (Ala.) 14 South. 401; Eby v. Lebanon Co. (Pa. Sup.) 31 Atl. 332; Hitte v. Republican Valley R. Co., 19 Neb. 620, 28 N. W. 284; Riedel v. Moran, Fitzsimons & Co. (Mich.) 61 N. W. 509.

[86] 31 Am. Law Reg. 352, considering cases; St. John's & H. R. Co. v. Shalley, 33 Fla. 397, 14 South. 890; Pierce, R. R. 289, notes 5, 6, 7, 8.

[87] Quarman v. Burnett, 6 Mees. & W. 499; Steel v. Southeastern Ry. Co., 16 C. B. 550; Reedie v. London & N. W. Ry., 4 Exch. 244; Fenton v. Dublin Steam Packet Co., 8 Adol. & E. 835; Larson v. Metropolitan St. Ry. Co., 110 Mo. 234, 19 S. W. 416; Brackett v. Lubke, 4 Allen (Mass.) 138; Forsyth v. Hooper, 11 Allen (Mass.) 419; Wood, Mast. & S. p. 630, § 317.

[88] Geer v. Darrow, 61 Conn. 220, 23 Atl. 1087.

[89] Collins v. Chartiers Val. Gas. Co., 139 Pa. St. 111, 21 Atl. 147 (applied to drilling well, whereby neighboring water was contaminated).

74. A person employing an independent contractor is not generally responsible for the latter's wrongful acts, or those of a subcontractor or servant of either, except when—

(a) He is negligent in the selection of the contractor.

(b) He personally interferes with, or undertakes to do, or has accepted, the contractor's work.

(c) The thing contracted to be done is tortious.

(d) There has been a failure to conform to a standard of duty which is required of the employer absolutely.

As a general rule, the contractor, and not the employer of the contractor, is liable for the tort of the contractor and of the contractor's servants.[90] Some doubt, however, has been expressed whether the same principles apply when the tort is the act of the contractor or of the subcontractor himself.[91] Where the contract is compulsory, as where a butcher is compelled to employ a licensed drover, the contractor and not the employer is liable.[92]

The employer is not liable for the negligence of the contractor's servants in the performance of a contract to do a lawful and proper thing. Thus, the owner of lands who employs a carpenter for a specific price to alter and repair a building thereon, and to furnish all the materials for this purpose, is not liable for damages resulting to a third person from boards deposited in the highway in front of the land by a servant in the employ of the carpenter, and intended to

[90] A turnpike company, lawfully permitting an independent contractor to operate an engine over railway tracks which lie on the pike, in performing his contract with the company, is not liable for an injury occurring to a traveler on the pike through the negligent operation of such engine. City & Suburban Ry. Co. v. Moores (Md.) 30 Atl. 643. A person who has hired a contractor to do certain work, and has no immediate control over the servants of the contractor, is not liable to a person injured through the negligence of one of such servants (De Forrest v. Wright, 2 Mich. 368, followed). Riedel v. Moran, Fitzsimons & Co. (Mich.) 61 N. W. 509.

[91] Pig. Torts, § 96.

[92] Milligan v. Wedge, 12 Adol. & E. 737; Case of The Maria, 1 W. Rob. Adm. 95. But see Sadler v. Henlock, 4 El. & Bl. 570; Martin v. Temperly, 4 Q. B. 298.

be used in such alteration and repair.[92] This merely pertains to the mode of doing the work.[94]

Negligence in Selection—Interference with Work.

If the employer is negligent in the selection of his independent contractor, or otherwise, this may be actionable fault.[95] Interference by the employer with the contractor's work attaches liability to him. Thus, where a contractor employed to make a drain left a heap of gravel by the roadside, the employer paid a navvy to cart it away. This was not properly done, and a third person was consequently upset as he was driving home. The employer was held

[92] Hilliard v. Richardson, 3 Gray, 349; Bigelow, Lead. Cas. 536, overruling Bush v. Steinman, 1 Bos. & P. 404. But see Massachusetts case, post, p. 232. (The cases citing, questioning, or overruling Bush v. Steinman will be found collected on p. xxviii. of the first volume of Thompson on Negligence.) Cf. Robbins v. Chicago City, 4 Wall. 657, with Water Co. v. Ware, 16 Wall. 566. And see Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755; Id., Chase, Lead. Cas. 240; Reagan v. Casey, 160 Mass. 374, 36 N. E. 58; Felton v. Deall, 22 Vt. 171; Bailey v. Troy & B. Ry. Co., 57 Vt. 252; McLoughlin v. Transportation Co., 7 Misc. Rep. 119, 27 N. Y. Supp. 248; Cunningham v. International R. Co., 51 Tex. 503; Atlantic & F. Ry. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277; St. Louis, A. & T. Ry. Co. v. Knott, 54 Ark. 424, 16 S. W. 9.

[94] Scammon v. Chicago, 25 Ill. 424; Steel v. Southeastern Ry. Co., 16 C. B. 550. An employer is not liable for the operation of a portable steam engine by an independent contractor in such a way as to be a nuisance, when, properly executed, no liability would attach. Wabash, St. L. & P. Ry. Co. v. Farver, 111 Ind. 195, 12 N. E. 296 (reviewing many cases). Cf. Skelton v. Fenton Electric Light & Power Co., 100 Mich. 87, 58 N. W. 609. And see Louisville & N. R. Co. v. Orr, 91 Ky. 169, 15 S. W. 8.

[95] Berg v. Parsons, 84 Hun, 60, 31 N. Y. Supp. 1091; Norwalk Gas Light Co. v. Borough of Norwalk, 63 Conn. 495, 28 Atl. 32. And see Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; Sturges v. Society, 130 Mass. 414; 14 Am. & Eng. Enc. Law, 826; 1 Lawson, Rights, Rem. & Prac. § 300; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Cuff v. Railroad Co., 35 N. J. Law, 17; Connors v. Hennessy, 112 Mass. 96; Ware v. St. Paul Water Co., 2 Abb. (U. S.) 261, Fed. Cas. No. 17,172. Cf. Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1052. Berg v. Parsons and Norwalk Gas Light Co. v. Borough of Norwalk supply the case Mr. Thompson was unable to find, "where a proprietor has been held answerable for the negligence of an independent contractor, upon this ground alone." 2 Thomp. Neg. 908. And see article by Charles W. Pierson, Esq., 29 Am. Law Rev. 229, and post, p. 991, "Negligence of Master in not Selecting Competent Coemployés"; post, "Negligence of Master and Servant."

liable.[96] But if the independent contractor abandons the work and the employer continues the enterprise, the latter is primarily responsible.[97] The effect is the same if the tort arises after an independent contractor has finished his work and his employer has accepted it. Thus, where an independent contractor had dug holes and they had been accepted, the employer was liable for injuries consequent on their being left unguarded.[98]

Liability where Thing Contracted to be Done is Tortious.

When the thing contracted to be done is tortious or unlawful, merely doing it by another person under any form of contract will not exonerate the employer. Thus, where a company without the necessary special powers employed a contractor to open trenches in the streets of a city, and a person was injured by falling over a heap of stones left by the contractor, the company was liable for the contractor's wrongful act.[99] Where a canal company contracts with

[96] Burgess v. Gray, 1 Man., G. & S. 578. Cf. Fisher v. Rankin, 78 Hun, 407, 29 N. Y. Supp. 143; Norwalk Gas Light Co. v. Borough of Norwalk, 63 Conn. 495, 28 Atl. 32. And see Woodman v. Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482; Steel v. Southeastern Ry. Co., 16 C. B. 550; Pendlebury v. Greenhalgh, 1 Q. B. Div. 36; Gourdier v. Cormack, 2 E. D. Smith (N. Y.) 254; King v. Railroad Co., 66 N. Y. 181; Eaton v. Railway Co., 59 Me. 520–532, 534; Long v. Moon, 107 Mo. 334, 17 S. W. 810; Clark v. Fry, 8 Ohio St. 358; Robinson v. Webb, 11 Bush (Ky.) 464–477, 480; Houston & G. N. Ry. Co. v. Meador, 50 Tex. 77; Hughes v. Railway Co., 39 Ohio St. 461. Where the owner of a building at the request of the contractor who was at work thereon furnished a man to run the elevator for the use of the contractor, the elevator man is still the servant of the owner, who is therefore liable for injuries to the servant of the contractor caused by the negligence of the elevator man. Higgins v. Western Union Tel. Co. (Super. N. Y.) 31 N. Y. Supp. 841.

[97] Savannah & W. R. Co. v. Phillips, 90 Ga. 829, 17 S. E. 82.

[98] Donovan v. Oakland & B. Rapid-Transit Co., 102 Cal. 245, 36 Pac. 517.

[99] Ellis v. Sheffield, etc., Co., 23 Law J. Q. B. 42; Creed v. Hartman, 29 N. Y. 591. A company which obtains leave to dig up streets and lay its pipes along them is liable for personal injuries caused by the defective filling of a trench, even though the work was being done by and under the exclusive control of another, who had contracted to do the work for the company. Colgrove v. Smith, 102 Cal. 220, 36 Pac. 411. And, generally, see Gorham v. Gross, 125 Mass. 232; Blessington v. Boston, 153 Mass. 409, 26 N. E. 1113; Sturges v. Society, 130 Mass. 414; Curtis v. Kiley, 153 Mass. 123, 26 N. E. 421; Woodman v. Metropolitan R. Co., 149 Mass. 335, 21 N. E. 482; Babbage v. Powers, 130 N. Y. 281, 29 N. E. 132; Wilson v. White, 71 Ga. 506. Cf. Brown v. Mc-

a third person for the repair of its canal, to be made with soil taken from certain land, the contract is in its nature injurious to the landowner, and the company is liable for the damages caused by its performance, under the doctrine of respondeat superior.[100]

Liability for Breach of Absolute Duty.

Where a person is bound to perform an act as a duty, or is held to a certain standard of conduct, he intrusts the performance of that act to another at his peril; and for failure of such person to perform such act, or to conform to that standard of conduct, whether he stood in the relationship of contractor or servant, the person on whom the duty rests is liable for his negligence, and it is immaterial whether the obligation be imposed by contract or general law.[101] The line in the cases with respect to things lawful in themselves, but likely to be attended by injurious consequences, is not entirely distinct.[102] The law recognizes that one who has a duty to perform cannot shift the duty on the shoulders of another, and is liable

Leish, 71 Iowa, 381, 32 N. W. 385; Bailey v. Railway Co., 57 Vt. 252; McCarthey v. City of Syracuse, 46 N. Y. 194–199; Eaton v. Railway Co., 59 Me. 520; St. Paul Water Co. v. Ware, 16 Wall. 566.

[100] Williams v. Fresno Canal & Irr. Co., 96 Cal. 14, 30 Pac. 961; Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. 1077. As to blasting in violation of an ordinance, see Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Brennan v. Schreiner (Super. N. Y.) 20 N. Y. Supp. 130.

[101] Mattise v. Consumers' Ice Manuf'g Co., 46 La. Ann. 1535, 16 South. 400; City & Suburban Ry. Co. v. Moores (Md.) 30 Atl. 643; Storrs v. City of Utica, 17 N. Y. 104; Colgrove v. Smith, 102 Cal. 220, 36 Pac. 411; Williams v. Fresno Canal & Irr. Co., 96 Cal. 14, 30 Pac. 961; Hole v. Sittingbourne R. Co., 6 Hurl. & N. 488. And see article by Mr. H. H. Bond, in 3 Alb. Law J. 261. Pye v. Faxon, 156 Mass. 471, 31 N. E. 640.

[102] Taking down a wall weakened by age and decay is not so intrinsically dangerous as to attach liability to the owner as well as to independent contractor. Engel v. Eureka Club, 137 N. Y. 100, 32 N. E. 1052; cf. Wilkinson v. Detroit Steel & Spring Works, 73 Mich. 405, 41 N. W. 490; Gorham v. Gross, 125 Mass. 232; Sturges v. Society, 130 Mass. 414; Sessengut v. Posey, 67 Ind. 408. The work of making a cellar in a building waterproof is not inherently dangerous because it is necessary to use the coal holes in the pavement for the purpose of ventilation, and for the introduction of materials, and the owner is not liable for the negligence of the contractor in using the coal holes. Maltbie v. Bolting, 6 Misc. Rep. 339, 26 N. Y. Supp. 903. Negligence on the part of independent contractor in laying a pipe in accordance with municipal ordinance attaches liability to the original employer. Col-

for its nonperformance although the fault be directly attributable to an independent contractor. The duty may be a common-law duty. Thus, the occupier of a house on whom devolved the duty of caring for a lamp overhanging a highway, and who employed an independent contractor to make the necessary repairs to it, was liable for damages done by its falling on a passer-by.[103] Blasting with dynamite, for example, would seem to be so intrinsically dangerous that in many cases the employer cannot excuse himself by showing a contract with another to do the work.[104] No man has a right so

grove v. Smith, 102 Cal. 220, 36 Pac. 115. In an action against a railroad company by a passenger for injuries resulting from an obstruction of the track by work being done thereon, it is no defense that defendant had placed the work in the hands of an independent contractor, and that his negligence caused the obstruction. Carrico v. West Virginia Cent. & P. Ry. Co. (W. Va.) 19 S. E. 571; Donovan v. Oakland & B. Rapid-Transit Co., 102 Cal. 245, 36 Pac. 517; Houston & G. N. R. Co. v. Meador, 50 Tex. 77; Pickard v. Smith, 4 Law T. (N. S.) 470; Wood, Mast. & S. p. 625, § 316; Pierce, R. R. 290; Lancaster Ave. Imp. Co. v. Rhoads, 116 Pa. St. 377, 9 Atl. 852.

[103] Tarry v. Ashton, 1 Q. B. Div. 314; Gleeson v. Virginia Midland Ry. Co., 140 U. S. 435, 11 Sup. Ct. 859. It is immaterial what time the accident happened, whether before, after, or during the work. Pig. Torts, 96. And see Roemer v. Striker (Super. N. Y.) 21 N. Y. Supp. 1090; Khron v. Brock, 144 Mass. 516, 11 N. E. 748; Railway Co. v. Hopkins, 54 Ark. 209, 15 S. W. 610; post, p. 836, "Negligence." As to party-wall cases, et sim., see Bower v. Peate, 1 Q. B. Div. 321; Dalton v. Angus, L. R. 6 App. Cas. 740; Hughes v. Percival, L. R. 8 App. Cas. 443; Gray v. Pullen, 5 Best & S. 970; Engel v. Eureka Club, 59 Hun, 593, 14 N. Y. Supp. 184; Ketcham v. Newman, 141 N. Y. 205, 36 N. E. 197; Hawver v. Whalen (Ohio Sup.) 29 N. E. 1049; Fowler v. Saks, 7 Mackey (D. C.) 570. An adjoining owner of a party wall has a right to increase its height; and where he contracts with an independent contractor to have this done in a lawful, proper, and usual way, so that the work does not become, in itself, dangerous or extraordinary, and does not subject the existing wall to overweight, he is not liable for the damage incident to the falling of the wall through some accident. Brooks v. Curtis, 50 N. Y. 639, distinguished; Engel v. Eureka Club, 59 Hun, 593, 22 N. Y. Supp. 986, reversed; Negus v. Becker, 143 N. Y. 303, 38 N. E. 290.

[104] Norwalk Gas Light Co. v. Borough of Norwalk, 63 Conn. 495, 28 Atl. 32. And see cases collected in note to Hawver v. Whalen, 14 Lawy. Rep. Ann. 828–830, 49 Ohio St. 69, 29 N. E. 1049. Thus, the owner of premises within a city who employs an independent contractor to do work thereon which involves blasting, through which a person not connected with the work is injured, the owner is liable, if he knew that blasting was necessary, or learned

to use his property that there will necessarily result a wrong to another,—as, for example, a nuisance.[105] The distinction between owners of real estate and owners of personalty in this respect is no longer recognized.[106]

And, generally, the performance of no duty owed to the public or to private individuals can be delegated so as to escape liability.[107] In Lebanon Light, Heat & Power Co. v. Leak,[108] a gas company, a contractor, to whom was let the contract for boring gas wells, and his subcontractor, were all held liable for injuries caused by the negligent manner in which the gas pipes were laid, although the plant had not been turned over to the company. Statutory obligations cannot be escaped by delegation of duties to a contractor.[109] "Where certain powers and privileges have been specifically conferred by the public upon an individual or corporation, for private emolument, in consideration of which certain duties affecting public health or safety of public travel have been expressly assumed, the individual in receipt of the emoluments cannot be relieved of responsibility by committing the performance of those acts to another. In such cases liability cannot be evaded by showing that the injury resulted from the fault or negligence of a third person employed to

that it was being done, and failed to take reasonably prompt and efficient measures to prevent injury to other persons. Jones v. McMinimy (Ky.) 20 S. W. 435. Et vide Brennan v. Schreiner (Super. N. Y.) 20 N. Y. Supp. 130; French v. Vix (Com. Pl.) 21 N. Y. Supp. 1016; Stone v. Cheshire R. Corp., 19 N. H. 427; City of Tiffin v. McCormack, 34 Ohio St. 638. But see Tibbetts v. Knox, 62 Me. 437; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; McCafferty v. Sputen Ry. Co., 61 N. Y. 178. Compare Cuff v. Newark R. Co., 35 N. J. Law, 17, with Carman v. Steubenville & I. Ry. Co., 4 Ohio St. 399.

[105] Cuff v. Newark R. Co., 35 N. J. Law, 17; Chicago v. Robins, 2 Black, 418; Vogel v. Mayor, 92 N. Y. 10.

[106] Reedie v. Railway Co. (1849) 4 Exch. 244. Cf. Bush v. Steinman (1799) 1 Bos. & P. 404, and Quarman v. Burnett (1840) 6 Mees. & W. 490.

[107] Carrico v. West Virginia R. Co. (W. Va.) 19 S. E. 571; Spence v. Schultz (Cal.) 37 Pac. 220; Hawver v. Whalen, 49 Ohio St. 69, 29 N. E. 1049.

[108] Lebanon Light, Heat & Power Co. v. Leap (Ind. Sup.) 39 N. E. 57.

[109] Hole v. Sittingbourne R. Co., 6 Hurl. & N. 488; Ketcham v. Newman, 141 N. Y. 205, 36 N. E. 197. Here the defendant was authorized by statute to make an opening over a navigable river. It was held liable, because its contractor made such bridge so that it would not open, and plaintiff's vessel was thereby prevented from navigating the river.

perform those duties.[110] It was held that a turnpike company lowering the grade of its road, while in receipt of tolls and maintaining the road ready for use, is bound to guard a threatened or dangerous obstruction, and by suitable devices to protect travelers. The performance of these duties it cannot escape by contracting with a third person to perform them.[111] On the same principle, where a

[110] Mr. Justice Clark, in Lancaster Ave. Imp. Co. v. Rhoads, 116 Pa. St. 377, 9 Atl. 852. And see cases collected in argument, page 380. Carson v. Leathurs, 57 Miss. 650; Wood, Mast. & S. pp. 621-624.

[111] Lancaster Ave. Imp. Co. v. Rhoads, 116 Pa. St. 377, 9 Atl. 852. General corporation laws, like special charters, are in the nature of a contract. In return for powers and franchise granted, the corporation is under obligation to perform certain duties to the public, and cannot without consent of the other party to the contract absolve itself from its obligation. A railroad lessor is therefore liable for its lessee's negligence. Abbott v. Railroad Co., 80 N. Y. 27; Langley v. Railroad Co., 10 Gray, 103; New York, etc., Ry. Co. v. Winans, 17 How. 30; Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 23, 9 Sup. Ct. 409; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 62, 11 Sup. Ct. 478; Quested v. Newburyport & A. H. R. Co., 127 Mass. 204. A railroad company may be held liable for the tort of the servant of independent contractor, in the exercise of some chartered privilege or power of corporation, with its assent, which he could not have exercised independently of the charter. Such liability exists, however, in favor of third parties only. It does not extend to servant of independent contractor. West v. Railway, 63 Ill. 545; Toledo, St. L. & K. C. R. Co. v. Conroy, 39 Ill. App. 351; Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559. Et vide Vermont Cent. Ry. Co. v. Baxter, 22 Vt. 365; Gardner v. Smith, 7 Mich. 410. Mr. Bailey, in his work on the Law of Master and Servant, at page 472, says "the rule is perhaps more liberal in respect to liability of railroad company," and cites Edmundson v. Railroad Co., 111 Pa. St. 316, 2 Atl. 404, and Hughes v. Railroad Co., 39 Ohio St. 461, in support of this proposition, and in support of the further statement that the difference is denied. Neither case would seem to reveal any especial liberality to railroad companies. In fact, the cases already cited seem to hold a railroad company to a peculiarly strict responsibility because of the delegation of the power of eminent domain. The cases do, however, recognize the doctrine of independent contractors of way. A railroad company is not liable for damage done by fires set by contractor in construction of road. Callaham v. Railway, 23 Iowa, 562; Eaton v. Railway Co., 59 Me. 520. But see St. Johns & H. R. Co. v. Shalley, 33 Fla. 397, 14 South. 890. Nor by neglectful operation of construction train. Miller v. Railway, 76 Iowa, 655, 39 N. W. 188. See Pierce, R. R. 241-290.

The duty of a city to keep its streets in reasonably safe condition cannot be delegated, and where it lets a contract for improving its streets, and the

building is being constructed on a city lot, and the excavation in the sidewalk is not protected as required by ordinance, the owner of the lot is liable to persons injured by falling therein, though the work is being done by an independent contractor.[112]

Liability for Acts of Subcontractors.

The rule as to contractors is extended to subcontractors.[113] The inquiry in both cases is whether the relationship of master and servant exists between the original contractors and the subcontractors. If it does not, then not the contractors but the subcontractors are liable for their own and for their servants' wrongs.[114] But one who has authorized the doing of an unlawful act is liable for any injury resulting therefrom, although immediately caused by the conduct of a subcontractor. Thus, one who without special authority makes an excavation in the sidewalk of a public street is liable for an injury resulting therefrom to a passer-by, though the injury was caused by the negligence of a subcontractor in not properly guarding the excavation.[115]

contractor makes excavations in the streets and fails to supply proper guards or lights, and a traveler is injured in consequence of such failure, the city is liable, and it is immaterial that the city had no notice that the ditch was not guarded or lighted. Wilson v. City of Troy, 60 Hun, 183, 14 N. Y. Supp. 721; Id., 135 N. Y. 96, 32 N. E. 44; City of Sterling v. Schiffmacher, 47 Ill. App. 141; City of Beatrice v. Reid, 41 Neb. 214, 59 N. W. 770; Kollock v. City of Madison, 84 Wis. 458, 54 N. W. 725; Hepburn v. City of Philadelphia, 149 Pa. St. 335, 24 Atl. 279. And see Bigelow, Lead. Cas. 654; Bish. Noncont. Law, § 605.

[112] Spence v. Schultz, 103 Cal. 208, 37 Pac. 220; Crenshaw v. Ullman, 113 Mo. 633, 20 S. W. 1077; Savannah & W. R. Co. v. Phillips, 90 Ga. 829, 17 S. E. 82.

[113] Cuff v. Railroad Co., 35 N. J. Law, 17; Railroad Co. v. Reese, 61 Miss. 581; The Harold, 21 Fed. 428; Rapson v. Curbitt, 9 Mees. & W. 710; Knight v. Fox, 5 Exch. 721; Overton v. Freeman, 11 C. B. 867. Cf. Ellis v. Gas Co., 2 El. & Bl. 767; Milligan v. Wedge, 12 Adol. & E. 737; Scarborough v. Railway Co., 94 Ala. 497, 10 South. 316.

[114] Pack v. Mayor, etc., 8 N. Y. 222. And see Johnson v. Ott, 155 Pa. St. 17, 25 Atl. 751; Dalyell v. Tyrer, 28 Law J. Q. B. 52; Rapson v. Curbitt, 9 Mees. & W. 710.

[115] Creed v. Hartman, 29 N. Y. 591.

SAME—MASTER AND SERVANT.

75. Liability for torts, as affected by the relation of master and servant, may for convenience be treated under the following heads:

(a) Master's liability to third persons for torts of servant.

(b) Master's liability to servant.

(c) Servant's liability to servant.

(d) Servant's liability to master.

(e) Servant's liability to third persons.

SAME—MASTER'S LIABILITY TO THIRD PERSONS.

76. The master is liable to third persons for torts of his servant only when the relationship of master and servant exists, and liability attaches to the master in any one or more of the five ways in which liability may attach to a defendant.[116]

Unless the relationship involved in a third person's attempt to fasten liability on a defendant is that of master and servant with respect to the wrong complained of, then the case does not fall within this category.[117] As has been seen, liability for tort may in general arise in one or more of five ways,—from personal commission, consent, relationship, instrumentality, and estoppel. It may assist in understanding a confused subject to apply this idea to cases of master and servant. In the first place, the master may assist the servant in performing a tortious act, and thus become, by personal participation, a joint tort feasor with him. Little trouble arises from so simple a case. Accurately speaking, here the master is not liable for his servant's tort; all the wrong is his own. In the second place, when a master authorizes his servant (or even an independent contractor)[118] to undertake a contract to do a tortious

[116] Ante, c. 1.

[117] Accordingly, the first matter subsequently considered is the establishment of relationship of master and servant.

[118] Ante, pp. 233, 234, "Independent Contractor." Exception where thing contracted to be done is tortious.

thing, the master is liable. This class of cases presents some questions not so easy of solution.[119] The liability which arises from ratification of an unauthorized wrong of a servant rests on similar principles.[120] In the third place, liability may arise from relationship of master and servant and of master to plaintiff (a third person) in an action against the master for the servant's tort.[121] In the fourth place, the instrumentality of the master may impose a duty on him, for the violation of which by his servant in connection with such instrumentality the master may be held liable.[122] And, in the fifth place, a master may so conduct his business and so profit by his servant's fraud that the law will not allow him to deny responsibility for the employé's wrong.

As a matter of fact, the four elements—consent, relationship, instrumentality, and estoppel—are, as cases arise in actual practice, very much confused, as sources of liability, both in fact and in the theory of law. Therefore, after consent proper has been considered, liability because of relationship (incidentally involving instrumentality) will naturally come up for attention. Liability because of instrumentality proper is determined by principles of negligence and of the duty to insure safety. Its consideration will therefore be postponed until those subjects come up in logical order as specific wrongs.

77. The doctrine of respondeat superior applies only where the peculiar relationship here to be described as that of master and servant is shown to exist.[123] It may be created expressly by agreement of parties or inferred from all the circumstances of a given case.

[119] Post, p. 245.

[120] Ante, c. 1, "Ratification or Adoption."

[121] Post, pp. 261–263.

[122] Post, pp. 264, 265.

[123] The early law knew only "servants." "Agent" is a later branching off of the same class. "Agent," as a commercial term, first appears in Marlowe and Shakespeare. Whatever distinction there may be between these terms, the relationship of master and servant, principal and agent, employer and employé,

The relationship must be established before the doctrine respondeat superior will be applied.[124] It has been seen that the employer is not ordinarily liable for the tort of an independent contractor or of his servant, but as to the liability of the independent contractor to third persons for the torts of his servant the same question arises.[125] The relationship is based on the peculiar contract of the master and servant. Mere contract of bailment does not create it.[126] The contract is usually express; but the consent involved may be also implied, ordinarily by the jury.[127] The privity does not exist

and the like, may be safely treated here as identical. 4 Harv. Law Rev. 361; 5 Harv. Law Rev. 6-9; 28 Am. Law Rev. 18; Murray, Dict. "Agent"; Innis, Torts, 58.

[124] Thorpe v. New York Cent. & H. R. R. Co., 76 N. Y. 402; Dwinelle v. New York Cent. & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319; Pennsylvania Co. v. Roy, 102 U. S. 451; Wood v. Cobb, 13 Allen (Mass.) 58; Kimball v. Cushman, 103 Mass. 194; Ward v. New England Fibre Co., 154 Mass. 419, 28 N. E. 299; Welsh v. Parrish, 148 Pa. St. 599, 24 Atl. 86; Wilson v. Clark, 110 N. C. 364, 14 S. E. 962. But see Linnehan v. Rollins, 137 Mass. 123, Burd, Lead. Cas. 68; Reagan v. Casey, 160 Mass. 374, 36 N. E. 58; Walker v. Hannibal & St. J. R. Co. (Mo. Sup.) 26 S. W. 360. Ejection of a trespasser from a car by a person carrying a lantern does not show relationship of master and servant. Corcoran v. Concord & M. R. Co., 6 C. C. A. 231, 56 Fed. 1014. Defendant constructed a proper gate. A horse was put into adjoining field. A stranger opened gate. Defendant not liable for injury to horse escaping. Peoria, etc., R. Co. v. Aten, 43 Ill. App. 68.

[125] Thus, it has been held that a contractor is not liable for an injury caused by bricks falling from a properly constructed wall, after its completion, through the intentional or negligent act of an employé not acting within the scope of his employment, though proper scaffolding or guards to prevent brick falling have not been erected. Mayer v. Thompson-Hutchison Bldg. Co. (Ala.) 16 South. 620; Thompson-Hutchison Bldg. Co. v. Mayer, Id.

[126] Sproul v. Hemmingway, 14 Pick. 1; Stevens v. Armstrong, 2 Seld. 435; Rapson v. Curbitt, 9 Mees. & W. 710; Carter v. Berlin Mills, 58 N. H. 52; Powles v. Hider, 6 El. & Bl. 207; Venables v. Smith, 2 Q. B. Div. 104, 279; King v. Spurr, 8 Q. B. Div. 104; Schular v. Hudson River R. Co., 38 Barb. 653.

[127] Cases sent to jury to determine question of relationship: Button v. Chicago, M. & St. P. R. Co., 87 Wis. 63, 57 N. W. 1110; Reens v. Mail & Exp. Pub. Co., 10 Misc. Rep. 122, 30 N. Y. Supp. 913; Sandifer v. Lynn, 52 Mo. App. 553; Evansville & T. H. R. Co. v. Claspell (Ind. App.) 36 N. E. 297; Reagan v. Casey, 160 Mass. 374, 36 N. E. 58; Consolidated Coal Co. v. Bruce

where the relationship has been terminated by either party. Therefore, if a discharged employé maliciously misplaces a switch and wrecks a train, the company may not be liable.[128]

Ordinarily a servant may not make another person a servant of his master,[129] but he may have authority so to do expressly or by implication from the nature of his position, the customary performance of his duty, or by ratification of his conduct by his master.[130] Necessity may also justify appointment of subagent.[131]

(Ill. Sup.) 37 N. E. 912. Cases when courts held no relationship of master and servant: Dean v. Railway Co., 98 Ala. 586, 13 South. 489; Flynn v. Campbell, 160 Mass. 128, 35 N. E. 453; Catlett v. Young, 143 Ill. 74, 32 N. E. 447; Hardy v. Railway Co. (N. J.) 31 Atl. 281; Kansas City, M. & B. R. Co. v. Phillips, 98 Ala. 159, 13 South. 65; Tennessee C., I. T. R. Co. v. Hayes, 97 Ala. 201, 12 South. 98; Sagers v. Nuckolls, 3 Colo. App. 95, 32 Pac. 187; Gaines v. Bard, 57 Ark. 615, 22 S. W. 570; Jones v. Iron Co., 96 Mich. 98, 55 N. W. 684; Tousignant v. Iron Co., 96 Mich. 87, 55 N. W. 681. Where railroad employés organize a voluntary fire company, and the railroad company furnishes apparatus for the use of the firemen, permits them to drill at regular intervals during work hours without deducting time, and allows the chief, a machinist, an hour each week to inspect the shops as a precaution against fire, it is the chief's duty, in case of fire, to aid in extinguishing it, and in so doing he acts as an employé. Collins v. Cincinnati, N. O. & T. P. Ry. Co. (Ky.) 18 S. W. 11.

[128] East Tennessee, V. & G. R. Co. v. Kane (Ga.) 18 S. E. 18.

[129] Morgan v. Smith (Mass.) 35 N. E. 101; Catlett v. Young, 143 Ill. 74, 32 N. E. 447; Dimmitt v. Railway Co., 40 Mo. App. 663; Glynn v. Houston, 2 Man. & G. 337; Lucas v. Mason, L. R. 10 Exch. 251.

[130] Evansville & T. H. R. Co. v. Claspell, 8 Ind. App. 685, 36 N. E. 297. Cf. Bowler v. O'Connell, 162 Mass. 319, 38 N. E. 498 (whether servant or policeman); Brill v. Eddy, 115 Mo. 596, 22 S. W. 488; Southern Pac. Co. v. Hamilton, 4 C. C. A. 441, 54 Fed. 468; St. Louis, I. M. & S. Ry. Co. v. Hackett, 58 Ark. 381, 24 S. W. 881; Norfolk & W. R. Co. v. Galliher, 89

[131] Benner v. Bryant, 79 Tex. 540, 15 S. W. 491. Cf. Sevier v. Birmingham, S. & T. R. Co., 92 Ala. 258, 9 South. 405. Where a factory owner is represented by an overseer, who allows a card grinder to give orders to other employés, or imposes on the card grinder work which he cannot do without assistance, and at his call an employé leaves his ordinary work, and assists him, such employé and the owner stand in the relation of servant and master while such assistance is being rendered. Patnode v. Warren Cotton Mills, 157 Mass. 283, 32 N. E. 161. 14 Am. & Eng. Enc. Law, 810, note 3; Mechem, Ag. § 749; Wood, Mast. & Serv. 306. As to where contract of service ends, and as to its continuity, see 32 Cent. Law J. 337.

While in many cases there may be no doubt that the relationship of master and servant exists, it is often no easy matter to determine who may be the proper person to be charged with liability as master. In many cases of this kind the master is to be determined by inspection of contract. Thus, where one sold and delivered fireworks, and sent a man to assist in their exhibition, the purchasers were held, under construction of the contract, not to have been the master of such person, and therefore not liable for the explosion resulting from such person's negligence. "The master is the person in whose business he is engaged at the time and who has the right to direct and control his conduct." [132]

Va. 639, 16 S. E. 935; Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, and 35 N. E. 1; Tolchester Beach Imp. Co. v. Steinmeier, 72 Md. 313, 20 Atl. 188; Golden v. Newbrand, 52 Iowa, 59, 2 N. W. 537; Jewell v. Grand Trunk Ry. Co., 55 N. H. 84; Haluptzok v. Great Northern R. Co., 55 Minn. 446, 57 N. W. 144; Cumberland Val. R. Co. v. Myers, 55 Pa. St. 288; Wichtrecht v. Fasnacht, 17 La. Ann. 166; McDaniel v. Railway Co., 90 Ala. 64, 8 South. 41. For complaint failing to show volunteer to be servant, see Hart v. Railway Co., 86 Wis. 483, 57 N. W. 91; and, generally, see Simons v. Monier, 29 Barb. 419; Suydam v. Moore, 8 Barb. 358; Mayor v. Bailey, 2 Denio, 433; Randleson v. Murray, 8 Adol. & E. 109; Wheatly v. Patrick, 2 Mees. & W. 650. But in certain cases a principal or an agent may not be liable for torts of subagent; and so one superintending the construction of a building, as agent of the contractor, is equally liable with his principal for an injury to a third person, resulting from a failure to erect proper scaffolding to prevent the fall of bricks, or from the negligent construction of the wall. Mayer v. Thompson-Hutchison Bldg. Co. (Ala.) 16 South. 620; Thompson-Hutchison Bldg. Co. v. Mayer, Id.

[132] Wyllie v. Palmer, 137 N. Y. 248, 33 N. E. 381. Compare Colvin v. Peabody, 155 Mass. 104, 29 N. E. 59. Compare Knight v. Fox, 5 Exch. 225, with Blake v. Thirst, 2 Hurl. & C. 20. That a packing company designates, in a contract to manufacture and ship goods, the particular person whom it intends putting in charge, does not relieve it from liability for the neglect or incompetency of such person, on the theory that he has thus become the agent of both parties. Paige v. Roeding, 96 Cal. 388, 31 Pac. 264. Where plaintiff was injured by the negligence of a truck driver in the employment of defendant, but who was on that day serving another company under a contract which defendant had made with the latter to furnish it daily with a horse, truck, and driver, defendant, and not the other company, is liable for the injury. Quinn v. Complete Electric Const. Co., 46 Fed. 506. Where the owner of a building, at the request of the contractor who was at work thereon, furnished a man to run the elevator for the use of the contractor, the elevator man is still the

In the case of common carrier where there are many connecting lines and many combinations and agreements between them, it is a matter of great difficulty to determine who are the proper parties to sue. This subject will be subsequently considered under the general subject of "Common Carriers."

A similar question arises as between a railroad company and a sleeping-car company. It seems that the porter is the servant of the railroad company sufficiently to attach liability to it for his torts.[133]

A messenger sent by a District Telegraph Company in response to a call from one of its boxes is the agent of the company, and the company is liable where the messenger carelessly loses a package which he was called to carry.[134]

A servant may remain the general servant of his original master and still be the servant of the person to whom he may be lent for particular employment.[135]

servant of the owner, and he is therefore liable for injuries to a servant of the contractor caused by the negligence of the elevator man. Higgins v. W. U. Tel. Co. (Super. N. Y.) 28 N. Y. Supp. 676.

[133] Dwinelle v. New York Cent. & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319; Pullman Palace Car Co. v. Mathews, 74 Tex. 654, 12 S. W. 744; Pullman Palace Car Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70. But see Illinois Cent. R. Co. v. Handy, 63 Miss. 609. But see Lemon v. Pullman Palace Car Co., 52 Fed. 262. Express messenger is not agent of railroad company. Louisville, N. O. & T. Ry. Co. v. Douglass, 69 Miss. 723, 11 South. 933. United States postal train agents are not servants of railroad company, Poling v. Railway Co., 38 W. Va. 645, 18 S. E. 782; may be entitled to rights of passenger, Mellor v. Missouri Pac. Ry. Co., 14 S. W. 758; Id., 105 Mo. 455, 16 S. W. 849; Gulf, C. & S. F. Ry. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280.

[134] Sanford v. American Dist. Tel. Co. (City Ct. N. Y.) 27 N. Y. Supp. 142. Gateman hired by several roads, Brow v. Boston & A. R. Co., 157 Mass. 399, 32 N. E. 362; landlord and tenant, or master and servant, Doyle v. Union Pac. Ry. Co., 147 U. S. 413, 13 Sup. Ct. 333.

[135] Donovan v. Laing [1893] 1 Q. B. 629; ante, p. 228, "Independent Contractor." A railroad company is not liable for negligence in the operation of an engine which, at the time of the accident, was rented to and under the control of another company. Byrne v. Kansas City, Ft. S. & M. R. Co., 9 C. C. A. 666, 61 Fed. 605.

78. The master is liable for the tort of his servant because of actual consent—

(a) When he has authorized its commission in the first instance or made it his own by adoption.

(b) When he has commanded the doing of a thing which necessarily or almost unavoidably results in damage to third persons.

Torts Authorized or Adopted.

The master is clearly liable for all torts which he commanded in the first instance, or which, having been done for his benefit, he has subsequently assented to. Thus, if a master directs his servant to commit a trespass, maintain a nuisance, perpetrate a fraud, or convert property of another to his own use, the master is certainly liable.[136] Such results are the direct outgrowth of the deliberate intention of the master, and he is as much to be charged with the responsibility as if he had performed the act in person. As to cases of this kind the maxim of "qui facit per alium facit per se,"—that is, the doctrine of identification of master and servant,—furnishes a sufficient reason. The same reasoning applies to the ratification by the master even of a servant's malicious conduct.[137]

The master alone may be liable, or he and his servant may be joint tort feasors. If a man, knowing his sheep to have rot, sends his son to market to sell them, fraudulently withholding from him the fact that they are diseased, and the son sells them on the representation that they are sound, the father is liable for his own fraud,[138]

[136] Southerne v. Howe, 2 Rolle, 5–26. And see State v. Smith, 78 Me. 260, 4 Atl. 412; Ketcham v. Newman (N. Y. App.; 1894) 36 N. E. 197; Carman v. Railway Co., 4 Ohio St. 399. If a landlord build a chimney, which, by the act of a tenant, becomes a nuisance, the landlord is not liable. Rich v. Basterfield, 4 C. B. 783. But if the use is contemplated and authorized by the landlord, he, as well as the tenant, is the author of the continuance of the nuisance. Harris v. James, 45 L. J. Q. B. 545; Vogel v. McAuliffe (R. I.) 31 Atl. 1 (to destroy furnace).

[137] International & G. N. Ry. Co. v. Miller (Tex. Civ. App.) 28 S. W. 233.

[138] Ludgater v. Love, 44 Law T. 694; Griffing v. Diller, 66 Hun, 633, 21 N. Y. Supp. 407; National Exch. Co. v. Drew, 2 Macq. H. L. Cas. 103–145, per Lord St. Leonards.

but the servant may also be liable.[139] The master who commands a trespass and the servant who commits it; the master who authorizes a false representation and the servant who makes it; and, generally, the master who authorizes a wrong and the servant who does the wrong,—are responsible as joint tort feasors.[140]

No amount of care will exonerate parties who authorize a wrongful act, if it result in damage.[141] As has been previously shown, one who orders the doing of an unlawful act, which produces injury, is liable, whether it has been done by his own servant or by a contractor or by a contractor's servant.[142] "Lawful authority," it is said, "is to receive a strict interpretation, and an unlawful authority a wide and extended interpretation."[143] Thus, if a person ask an editor to "show another up," and the editor of the newspaper does so in gross and unauthorized terms, the person so inciting the editor might be punishable for criminal libel, but not civilly responsible in damages. But if one request another to publish defamatory matter, and the latter publishes the matter, adhering to the sense and substance, but not to the language, the man making the request is liable to an action as publisher.[144] But one who requests a deputy sheriff to execute a writ is not liable for the latter's wanton or violent trespass in executing it, unless he orders or encourages the lawlessness.[145] In such cases, it is apparent that the very command or request establishes the relationship of master and servant.

Injurious Conduct Commanded.

Where the master has directed the servant to do something which may not be in itself a cause of injury, but which by its very nature cannot be done without necessarily or almost necessarily causing

[139] Lamm v. Port Deposit Homestead Ass'n, 49 Md. 233, 240; Duvall v. Peach, 1 Gill, 172; Lamborn v. Watson, 6 Har. & J. 252.

[140] Bates v. Pilling, 6 Barn. & C. 38; Peck v. Cooper, 112 Ill. 192; Lamm v. Port Deposit Homestead Ass'n, 49 Md. 233; Blaen Avon Coal Co. v. McCulloh, 59 Md. 403; Moore v. Appleton, 26 Ala. 633; Miller v. Staples, 3 Colo. App. 93, 32 Pac. 81.

[141] Congreve v. Smith, 18 N. Y. 79.

[142] Houston & G. N. R. Co. v. Meador, 50 Tex. 77; ante, pp. 233, 234, "Independent Contractor"; Pig. Torts, § 94; Shear. & R. Neg. § 84.

[143] Bac. Max. § 16.

[144] Parkes v. Prescott, L. R. 4 Exch. 169–183.

[145] Sutherland v. Ingalls, 63 Mich. 620, 30 N. W. 342.

damage to others, the master is liable. Thus, in a celebrated case, the right of way was disputed between adjacent occupiers, and the one who resisted the claim ordered a laborer to lay down rubbish to obstruct the way, but not so as to touch the other's wall. The laborer executed the order as nearly as he could, and laid the rubbish some distance from the wall, but it soon "shingled down," and ran against the wall. For this the employer was held to answer in trespass, not in case. The master in such case could no more disclaim responsibility for the act of his servant than if he had done the thing himself. In cases of this kind, it is often difficult to determine whether the master should be held responsible because of the command, or because the act was committed in course of the employment; but it would seem that trespass lies as for the master's direct, not case for his indirect, act.[146]

79. According to the early Germanic theory, the master was absolutely liable for the crimes and torts of his servants.

"The primitive Germanic idea was that the master was to be held liable absolutely for harm done by his slaves or servants. * * * In later Germanic times, the master could exonerate himself by surrendering the offending person and at the same time taking an exculpatory oath, 'se non conscium esse, quod pura sit conscientia sua.' * * * On English soil, in the early Anglo-Norman period, this idea of responsibility appears in the shape of exoneration for deeds of the servant not commanded nor consented to; had hardly begun to be applied to responsibility in what we now term its civil aspect; and, while common in penal matters, was by no means fixed in its scope." [147]

[146] Gregory v. Piper, 9 Barn. & C. 591. And see Sharrod v. Railway Co., 4 Exch. 581; Betts v. De Vitre, 3 Ch. App. 429; Drew v. Peer, 93 Pa. St. 234; W. U. Tel. Co. v. Satterfield, 34 Ill. App. 386. Gordon v. Rolt, 4 Exch. 365; Smith v. Lawrence, 2 Man. & R. 1; Sammell v. Wright, 5 Esp. 262; Dean v. Branthwaite, Id. 36; Morley v. Gaisford, 2 H. Bl. 442; Seymour v. Greenwood, 7 Hurl. & N. 355.

[147] Mr. J. H. Wigmore, in 7 Harv. Law Rev. 383. In Nos. 6, 7, and 8 of 7 Harv. Law Rev. will be found Mr. Wigmore's article, of exceptional value and ability, on "Responsibility for Tortious Acts." From this article a large

80. The English courts at an early date recognized the doctrine of particular command as a test of the master's liability.

But in England, even from a very early date, it was recognized that command (i. e. before the deed) or consent (i. e. before or after the deed) was in some vague way the condition of the master's criminal liability for the acts of his servant. This principle was extended to the civil liability, and confined the master's liability to cases

part of what follows as to the early tests of liability of the master is taken. The early history of responsibility of the master is to be found in volume 6 of Harvard Law Review. At page 319 Mr. Wigmore recognizes his obligation to Prof. Dr. Heinrich Brunner's article in the Proceedings of the Royal Prussian Academy of Sciences (volume 35: July 10, 1889). "Ueber absichtslose Missethat im Altdeutschen Strafrecht." It is common, and, perhaps, natural, to think of this criterion of liability as being a part of the crudity of legal conceptions current at the time; as being kin, for example, to wager of battle as a means of judicial determination of rights and wrongs. This opinion would lead to a recognition of the changes made as evolution in the law. As has been seen, there is a marked tendency throughout the general scope of the law of torts to regard some kinds of culpability as the basis of the law of torts, and to abandon the old standards of absolute liabilities without regard to any mental element. It is suggested, however, that this view of the law's development may not be entirely true. It may be that the vigorous Anglo-Saxon instinct, notwithstanding some manifest absurdities, regarded wrong done from the point of view of the sufferer, and wisely discarded many of the subtleties which have been subsequently introduced. The actual development of law was on the lines of the Lex Aquilia. But it must be remembered that there have been at least three infusions of the civil law into the common law,—the first, when Cæsar invaded Britain; the second, at the beginning of the Norman conquest; and the third, after the discovery of the treatise of Gaius. While thus the light of the civil law was neither constant nor pure, the darkness has increased by the barren subtleties of the scholastics of the Middle Ages. The effect of the philosophy of the Nominalists will be plainly apparent in the subsequent discussion, especially of the liability of the servant to third persons as to misfeasance, malfeasance, and nonfeasance. As the practical injustice in administration, and almost hopeless confusion of standards which the consequent refined and unnatural distinctions have produced, have forced themselves upon the observation of the people and of the jurists, there has been a reaction towards the earlier law. In the United States, this reaction has manifested itself in a vast quantity of legislation with respect to the rights of labor, the control of explosives, fire, et sim. There has been corresponding legislation in Eng-

where the command or consent was particular. Thus, according to Bacon (early in the seventeenth century), "in committing of lawful authority to another a party may limit it as strictly as it pleaseth him; and if the party authorized do transgress his authority, though it be but in circumstance expressed, yet it shall be void in the whole act." [148] This period is treated as beginning with "Edward I., time 1300, circa." [149] This carried the courts from the one extreme of universal responsibility for the conduct of servants to the other, of responsibility only when the conduct of the servant had been explicitly commanded by the master. Logically, the reason assigned for this test of the liability of the master was identification. The master was liable because the act of the servant was clearly his act.[150] "Qui facit per alium facit per se." The doctrine, however,

land. The crystallization of wandering cases of absolute liability, by Rylands v. Fletcher, into what Mr. Pollock would call "breaches of duty to insure safety," is another illustration. Perhaps the most marked case of return to the primitive standard is to be found in the very late German system of insurance against damage.

[148] Bac. Max. 16. Similarly, the master was liable for the act of his servant, in accordance with the master's command, for handling ungovernable horses. Michael v. Alestree (1677) 2 Lev. 172. In 1685, in Kingston v. Booth, Skin. 228, it was held that "if I command my servant to do what is lawful, and he misbehave himself, or do more, I shall not answer for my servant, but my servant for himself, for that it was his own act. Otherwise, it was in the power of every servant to subject his master to what actions or penalties he pleased. * * * If I command my servant to do a lawful act, as in this case, to pull down a little wooden house (wherein the plaintiff was * * *), and bid them take care they hurt not the plaintiff, if in this doing my servants wound the plaintiff, in trespass of assault and wounding brought against me, I may plead not guilty, and give this in evidence, for that I was not guilty of the wounding, and pulling down the house was a lawful act." The law on this point will be found set forth with great clearness and ability in the series of articles on "Responsibility for Tortious Acts," by John H. Wigmore, in the Harvard Law Review for February, March, and April, 1894.

[149] Mr. Wigmore, in 7 Harv. Law Rev. 383, citing, inter alia, Y. B. 30, 31 Edw. I. 532 (Roll's Ed.); Beaulieu v. Finglam, Y. B. 2 Hen. IV. p. 18, pl. 6; 9 Hen. VI. p. 53, pl. 37; 21 Hen. VII. p. 22, pl. 21; 2 Doct. & Stud. (Muchall's Ed.) c. 42, p. 233; Seaman v. Browning, 4 Leon. 123; Waltham v. Mulgar, Moore, 776; Southern v. How, 2 Rolle, 5, 26; Shelley v. Burr, 1 Rolle, Abr. 2, pl. 7; Noy, Max. c. 44; Cremer v. Humberton, 2 Keb. 352.

[150] Justice Holmes, 4 Harv. Law Rev. 345–364; 5 Harv. Law Rev. 23.

has not entirely disappeared. A specific command has in modern times been held to exclude liability for acts done in pursuance of it, but not included within it. Thus, where a servant was directed to drive cattle out of a certain field, and he drove them elsewhere than out of that field, and one of them died, the master was held not liable (1862).[151]

81. The test of liability was extended so as to include liability for conduct in pursuance of general authority expressed or implied.

The next test proposed was command, not only where the conduct of the servant was particularly or specifically authorized, but also when the command was implied from general authority. The period during which this reaction from the severe limitation of the particular command test arose, and liability for implied command came to be added, may be said to have commenced during Lord Holt's time, about 1700.[152] Thus, in Armory v. Delamirie,[153] a chimney sweeper's boy handed to an apprentice, to be weighed, a jewel which he had found. The apprentice kept the stone. And Pratt, C. J., held that the action well lay against the master, who gave credit to his apprentice, and is answerable for his neglect. Blackstone recognizes command as a test. "As for those things which the servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the acts of his servant if done by his command, either expressly given or implied,—'nam qui facit per alium facit per se.' Therefore, if a servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it. * * * In the same manner, however, what a servant is permitted to do in the usual course of his business is equivalent to a general command." [154]

[151] Oxford v. Peter (1862) 28 Ill. 434. And see Sagers v. Nuckolls, 3 Colo. App. 95, 32 Pac. 187; Pickens v. Diecker, 21 Ohio St. 212; Lyons v. Martin, 8 Adol. & E. 512; Bolingbroke v. Swindon, L. R. 9 C. P. 575.

[152] 7 Harv. Law Rev. 383, citing Boson v Sandford, 2 Salk. 440, 3 Mod. 321; Tuberville v. Stamp, Skin. 681; Middleton v. Fowler, 1 Salk. 282; Jones v. Hart, 2 Salk. 441; Boucher v. Lawson, Lee t. Hardw. 85, 194.

[153] 1 Strange, 505.

[154] 1 Bl. Comm. 429; Hern v. Nichols, 1 Salk. 289; Jones v. Hart, 2 Salk.

The terminology and teaching of the great commentator passed into general use and thought. It was employed, and assigned both the reason and the limit of the master's liability, long after the courts had passed beyond the doctrine thus enunciated. Its effect is still to be observed in the confusion at present existing in the cases on the subject.[155] The fiction of identification, "that master and servant are feigned to be all one person," [156] was retained "as a lazy and easy reason put forth to sanction and support a rule of whose practical expediency the courts were perfectly satisfied.[157] Respondeat superior was also used to account for the liability." [158] Its use, however, throws no light on the subject. It is a dogmatic statement, not an explanation.[159]

82. More extended liability on the part of the master is now recognized. But courts are not in harmony whether the limit of his responsibility is determined—

(a) By the scope of servant's authority; or

(b) By the course of his employment.

83. SCOPE OF AUTHORITY—The master is liable for the conduct of his servant within the scope of his authority—

(a) When liability would attach under test of particular or general command.[160]

441; Boucher v. Lawson, Lee t. Hardw. 85–194. And see Laugher v. Pointer, 5 Barn. & C. 547–553; Williams v. Jones, 3 H. & C. 602–609.

155 "A principal is not civilly liable for the act of his agent, unless the agent's authority be by the agent duly pursued." Parkes v. Prescott (1869) L. R. 4 Exch. 169–182. And see Mali v. Lord, 39 N. Y. 381; Chambers v. Trust Co., 1 Disn. (Ohio) 327.

156 Byington v. Simpson, 134 Mass. 170.

157 7 Harv. Law Rev. 799.

158 Ellis v. Turner, 8 Term R. 581. "Respondeat superior" is said to be a piece of local English law. 29 Am. Law Rev. 209. It arose, however, from the Roman law. Holmes, Com. Law, note at page 230. This objection, moreover, applies equally to the whole system of English real-estate law. 29 Am. Law Rev. 229.

159 Pol. Torts, § 67.

160 See ante, pp. 248–251 et seq.

(b) When the conduct was for the master's purpose or benefit, and not for the servant's private motives, whether it was an excessive or mistaken execution of authority or a direct violation of the master's command.

Includes Command Test.

The third test proposed was that the master was liable for the act of his servant for conduct within the scope of his authority. Early in the nineteenth century this was adopted to cover cases of liability recognized by courts, but not logically covered or accounted for by the doctrine of command. The master remained liable in all cases in which he would have been held responsible under the particular command test [163] and under the general (i. e. expressed or implied) command test.[164] Indeed, one of the commonest classes of cases is of the latter description,—negligence in the performance of admitted duty. Thus, one who undertakes the collection of a claim is liable for the negligence of the attorney employed by him, through whose fault the claim is lost.[165]

Includes Excessive or Mistaken Execution of Authority.

But, in addition, the master also became responsible for injuries inflicted by his servants in cases not thus attributable to him, but still within the scope of his servant's authority. The master became liable for excessive or mistaken execution of authority.[166] Thus, if the master authorized his servant to use force, he was held liable for the violence or misjudgment of his servant in the exercise of force, because he authorized its employment in the first instance.[167]

[163] Sharrod v. Railway Co., 4 Exch. 580; Gordon v. Rolt, Id. 365.

[164] Goodman v. Kennell, 1 Moore & P. 241; Patten v. Rea, 2 C. B. (N. S.) 606; Wright v. Wilcox, 19 Wend. 343.

[165] Siner v. Stearne, 155 Pa. St. 62, 25 Atl. 66; Bradstreet v. Everson, 78 Pa. St. 124; Morgan v. Tener, 82 Pa. St. 205; post, p. 915, "Negligence."

[166] Paley, Prin. & Ag. 1811; Nicholson v. Mounsey, 15 East, 384; Sleath v. Wilson (1839) 9 Car. & P. 607; Story, Ag. 1839; Smith, Mast. & Serv. 1852; Cornfoot v. Fowke (1840) 6 Mees. & W. 358; Coleman v. Riches, 16 C. B. 104; Bolingbroke v. Board (1874) L. R. 9 C. P. 575; Maier v. Randolph, 33 Kan. 340, 6 Pac. 625; Burd, Lead. Cas. 71.

[167] Rounds v. Railway Co., 64 N. Y. 129; Cohen v. Railway Co., 69 N. Y.

Includes Liability for Forbidden Conduct.

In the same way, implied authority may be strained to justify the use of all means necessary and designed to accomplish the master's purpose, however improper, and even unlawful. Thus a driver may convert hay to supply his master's horses so as to enable him to complete his journey, where none was provided.* Where, however, the act of the servant is willful, and forbidden by the master, it can hardly be said that the command test is sufficient to account for the master's liability. Under the command-test theory the master was not held responsible for such acts. Thus, in McManus v. Crickett† it was held that the master was not liable in trespass

170; Peck v. Railway Co., 70 N. Y. 587; Hewett v. Swift, 3 Allen, 420; Moore v. Railway Co., 4 Gray, 465; Levi v. Brooks, 121 Mass. 501; Fick v. Railway Co., 68 Wis. 469, 32 N. W. 527; Evansville & T. H. Ry. Co. v. McKee, 99 Ind. 519; Ft. Worth & N. O. Ry. Co. v. Smith (Tex. Civ. App.) 25 S. W. 1032; Baxter v. Railway Co., 87 Iowa, 488, 54 N. W. 350; Oakland City A. & I. Soc. v. Bingham, 4 Ind. App. 545, 31 N. E. 383; Rogahn v. Foundry Co., 79 Wis. 573, 48 N. W. 669; Moore v. Metropolitan Ry. Co., L. R. 8 Q. B. 36; Seymour v. Greenwood (1861) 7 Hurl. & N. 355; Poulton v. Railway Co., L. R. 2 Q. B. 534; Bolingbroke v. Board, L. R. 9 C. P. 575; Cosgrove v. Ogden, 49 N. Y. 255; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Chicago City Ry. Co. v. McMahon, 103 Ill. 485.

* Potulini v. Saunders, 37 Minn. 517, 35 N. W. 379; Walker v. Johnson, 28 Minn. 147, 9 N. W. 632; Levi v. Brooks, 121 Mass. 501; Voegeli v. Pickle Co., 49 Mo. App. 643; Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank, 16 N. Y. 125–133; People v. Roby, 52 Mich. 577, 18 N. W. 365; Pittsburgh, C. & St. L. Ry. Co. v. Kirk, 102 Ind. 399, 1 N. E. 849; Quinn v. Power, 87 N. Y. 535. But see Sagers v. Nuckolls, 3 Colo. App. 95, 32 Pac. 187; Cook v. Illinois Cent. R. Co., 30 Iowa, 202; Staples v. Schmid (R. I.) 26 Atl. 193–196; Crocker v. Railway Co., 24 Conn. 249; Thames Steamboat Co. v. Housatonic R. Co., Id. 40; Lyons v. Martin, 8 Adol. & E. 512; Poulton v. Railroad Co., L. R. 2 Q. B. 534; Knight v. Luce, 116 Mass. 586. The master is civilly liable if his bartender, in violation of instructions and law, sell liquors to excessive drunkards. George v. Gobey, 128 Mass. 289; Worley v. Spurgeon, 38 Iowa, 465; Peterson v. Knoble, 35 Wis. 80; Smith v. Reynolds, 8 Hun (N. Y.) 128; Kreiter v. Nichols, 28 Mich. 496; Kehrig v. Peters, 41 Mich. 475, 2 N. W. 801. Liability of master for exaction of usury: Payne v. Newcomb, 100 Ill. 611; Rogers v. Buckingham, 33 Conn. 81; Philo v. Butterfield, 3 Neb. 256; Cheney v. White, 5 Neb. 261; Cheney v. Woodruff, 6 Neb. 151; Scottish M. & L. Inv. Co. v. McBroom (N. M.) 30 Pac. 859.

† East, 107 (1800). And see Croft v. Alison, 4 Barn. & Ald. 590; Middleton v. Fowler, 1 Salk. 282.

[illegible] carriage against another [illegible] the master.

In 1862 [illegible] Limpus v. London General Omnibus Co. [illegible] where the driver of an omnibus drove [illegible] thereby over-turned [illegible] he had expressly for-bidden [illegible] question was, did the servant do it [illegible] his master's interests, or did he act merely from private spite and with the intention of injuring his enemy?" The master was held liable in the former, but not in the latter, case. What the servant did was [illegible] wanton and reckless, might have been for the master's benefit. But where the one let his shed to another, whose servant, by carelessness in lighting his pipe, caused the shed to burn down, the master was not held liable. The act was beyond the scope of his authority.[169]

Motive of Servant—Master's Benefit.

The introduction of the master's benefit as the test of liability antedated this period.[170] But in modern times its use has been greatly extended. In the cases adhering to the scope of authority

168 32 L. J. Exch. 34, 1 Hurl. & C. 526; British Mutual Banking Co. v. Charnwood Forest Ry. Co. (1887) 18 Q. B. Div. 714. In Bayley v. Manchester Ry. Co., L. R. 8 C. P. 148, the rule was laid down: "When a servant is acting within the scope of his authority, and in so acting he does something negligently or wrongfully, the employer is liable, even though the act done be the very reverse of that which the servant was directed to do. The master is not liable where the act is clearly outside the scope of authority." But see Walker v. South Eastern Ry. Co., L. R. 5 C. P. 640; Poulton v. London & S. W. Ry. Co., L. R. 2 Q. B. 534; Goff v. Great Northern Ry. Co., 30 L. J. Q. B. 148; Bolingbroke v. Board, L. R. 9 C. P. 575; Allen v. London & S. W. Ry. Co., L. R. 6 Q. B. 65; Edwards v. London & N. W. Ry. Co., L. R. 5 C. P. 445. The doctrine of English cases seems to be, in brief, that the master is liable for the express authority for his servant to do wrong, or for implied authority to take all steps necessary to protect property committed to his servant's care, and on the presumed command to do the work properly and without negligence, but the tort, in all cases, must flow out of the scope of authority. The benefit of the master and the servant's purpose, are important elements in determining this. Miller v. Great Northern Ry. Co., 30 L. R. 367.

169 Williams v. Jones (1864) 3 Hurl. & C. 256.

170 In Tuberville v. Stamp, 1 Ld. Raym. 264 (at the close of the seventeenth century), it was said that "it shall be intended that the servant had

test the duty which the master owes to third parties because of his relationship to them was not given controlling force. Thus it has been held that a cashier can rob a bank and the bank be not held liable for his theft.[171] Nor has the duty which the use of instrumentalities dangerous in themselves, or easily becoming dangerous, imposes, been allowed the effect it is commonly and properly given. Thus, if one be crossing a street-car track and the driver curses him, and says, "I will smash you anyhow," and then lets go the brakes whereby such person is damaged, the driver's employer is not to be held liable, if the act was willful on the part of the servant. The element of willfulness makes it the servant's personal tort.[172]

authority from his master, it being for his master's benefit." And see McManus v. Crickett, supra.

[171] Foster v. Essex Bank, 17 Mass. 479–510. And see Isaacs v. Railroad Co., 47 N. Y. 122; Jackson v. Railroad Co., Id. 274, and see Hoar, J., in Howe v. Newmarch, 12 Allen, 49–57. The owners of a vessel are not liable, even under the maritime law, for a willful and malicious assault by the captain of the vessel on a seaman who refuses to obey a command on the plea of sickness, since, in committing the assault, he exceeds his authority. His command does not extend over the persons of the seamen, beyond the infliction of the usual and necessary punishment in case of disobedience or infraction of rules. Maynard, Finch, and O'Brien, JJ., dissenting. Gabrielson v. Waydell (Super. N. Y.) 14 N. Y. Supp. 125, and 15 N. Y. Supp. 976, reversed. Id., 135 N. Y. 1, 31 N. E. 969.

[172] Wood v. Detroit City St. Ry. Co., 52 Mich. 402, 18 N. W. 124. And, generally, see Wright v. Wilcox, 19 Wend. 343; Pennsylvania Co. v. Toomey, 91 Pa. St. 256 (but see McClung v. Dearborne, 134 Pa. St. 396, 19 Atl. 698); Fraser v. Freeman, 43 N. Y. 566; Vanderbuilt v. Richmond Turnpike Co., 2 N. Y. 479; Maty v. Lord, post; Sanford v. Eighth Ave. Ry., 7 Bosw. (N. Y.) 122; Illinois Cent. Ry. v. Downey, 18 Ill. 259; De Camp v. Railway Co., 12 Iowa, 348; Marion v. Railroad Co., 59 Iowa, 428, 13 N. W. 415; Douglass v. Stephens, 18 Mo. 362; Moore v. Sanborne, 2 Mich. 519; Wood v. Railway Co., 52 Mich. 402, 18 N. W. 124; Snyder v. Railroad Co., 60 Mo. 413; Sutherland v. Ingalls, 63 Mich. 620, 30 N. W. 342; Harris v. Nichols, 5 Munf. 483; Cox v. Keahey, 36 Ala. 340; Alabama G. S. R. Co. v. Harris, 71 Miss. 74, 14 South. 263; Deihl v. Ottenville, 14 Lea, 192; Jackson v. Railway Co., 47 N. Y. 274; 1 Shars. Bl. Comm. 431, note; 2 Kent, Comm. §§ 259, 260. A railroad company is liable for the act of a conductor who, having ordered a trespasser from one of its trains, shot him while he was in the act of alighting, unless the shooting was not done for the purpose of forcing the trespasser to get off, but from personal resentment. Southern Pac. Co. v. Kennedy (Tex. Civ. App.) 29 S. W. 394. Cf. Thorburn v. Smith (Wash.) 39 Pac. 124. And see an interesting article, with numerous citations, on the liability of a master for

84. Scope of authority as a test of the master's liability depends for justification upon reasoning as to the authority of the servant and not the duty of the master, and is a limit assigned rather by public policy than consistent logic.

It appears that the really enlarged meaning of the term "scope of authority" made its way slowly, and despite the more or less apparent hostility of the courts to the increased liability of the master. The harshness of the rule holding one person responsible for the forbidden wrong of another had its due weight. Thus, it is said: "To visit a man with heavy damages when he is able to show that he has exercised all possible care and precaution in the selection of his servants is apt to strike the common mind as unjust." [173] "We never apply the rule respondeat superior without a sense of its hardships on the master." [174]

Moreover, the language of the particular command test, and especially the general command test,[175] and the doctrine of identification [176] as accounting for the master's liability, dropped out of thought very slowly. The futile restatement of the principle of liability, respondeat superior, continues to be used, through inertia perhaps, gravely, as though it advanced the reasoning. The benefit of the master and the mental attitude of the servant were given positions of great importance, because the courts apparently have permitted the cases to go not to the logical limit of any consistent theory, but to the extent of what seemed to be practically expedient. More-

personal injuries to third parties, caused by the willful or malicious acts of his servants, with reference to the recent case of Texas & P. Ry. Co. v. Scoville, 10 C. C. A. 479, 62 Fed. 730, by Thomas S. Gates, 34 Am. Law Reg. & Rev. 120.

[173] Hayes v. Miller, 77 Pa. St. 238, 242.

[174] Shea v. Reems, 36 La. Ann. 966.

[175] Hobbit v. London & N. W. Ry. Co., 4 Exch. 255; Ferguson v. Neilson, 17 R. I. 81, 20 Atl. 229; Rounds v. Delaware, etc., Co., 64 N. Y. 129,—which Mr. Chase considers a leading case (Chase, Lead. Cas. 287); Pickens v. Diecker, 21 Ohio St. 212; Phelon v. Stiles, 43 Conn. 426. The master is not liable when the servant does an act which he was not employed to do. Towanda Coal Co. v. Heeman, 86 Pa. St. 418; Mitchell v. Crassweller, 13 C. B. 237-247.

[176] Legal unity of principal and agent: 1 Suth. Dam. 750; Levi v. Brooks, 121 Mass. 501; Howe v. Newmarch, 12 Allen, 49, 56.

over, in many cases, the master's service does not put on him a duty to third persons; and, where it does not conduce to the commission of a wrong by the servant, the test is an eminently proper one. It is certainly valid wherever the theory of identity will furnish an adequate reason for the master's liability.[177]

85. COURSE OF EMPLOYMENT—Another conception of the master's liability rests on the proposition that in certain cases the liability arises—

(a) Not from relationship of the master and servant exclusively, but also from

(b) The duty owed to plaintiff by defendant in the particular case in issue.

In dealing with cases in which the question of the liability of the master for the tort of his servant is raised, reference should be had not alone to the relationship of the master and servant, but also to the relationship between the master and the third person complaining of injury. It would seem that the scope of authority test considers too exclusively the former relationship, and overlooks the latter. In fact, one's right infringed by the wrong of another may be in personam or in the nature of a right in personam; as where a passenger complains of the torts of a carrier's servant, or a customer of the torts of a proprietor's servant. Again, the duty violated may (with some latitude in expression) be said to be in rem; as where harm to a stranger is caused by another person's dangerous instrumentalities, as by explosion of engine. Accordingly, in the former class of cases part of the defendant's duty is derived from the contract or relationship existing between him and the person injured. In the latter class of cases, part of the defendant's duty is derived from the use or custody of the things likely to do harm. But in actual occurrence, in ordinary practice, both sources and other sources contribute to produce the duty, and the cause of action.

[177] See Deville v. Railroad Co., 50 Cal. 383.

86. The master is liable for the conduct of his servant within the course of his employment, not only—

(a) Where responsibility would attach under the test of scope of authority; but also

(b) Where the conduct is not intended to be for the master's benefit, but for the servant's malicious, capricious, or other private purpose; and

(c) Whenever a duty rests on the master to avoid doing harm to third persons and the servant violates that duty in the course of his employment.

General Meaning of "Course of Employment."

The latest stage of development seems to be to hold the master liable for all torts of his servants committed while in course of employment. The test is not very definitely used. While the doctrine and terminology is frequently accepted, it is constantly confused, both as to language and thought, with the scope of authority and the test of command.[178] The phrase "course of employment," while easily and fairly subject to criticism, would seem to be freer from ambiguity and otherwise less objectionable than essentially synonymous phrases. The term is not a new one, and has not always been, nor is it now always, used in this sense.[179]

Mr. Abbott, in his note to Mallach v. Ridley,[180] collects a large number of cases, and very clearly states this phase of the law, as follows: "Some say that it is only when the act of the servant is

[178] General scope: Young v. South Boston Ice Co., 150 Mass. 527, 23 N. E. 326; North Chicago City Ry. Co. v. Gastka, 128 Ill. 613, 21 N. E. 522; Chicago, M. & St. P. Ry. Co. v. West, 125 Ill. 320, 17 N. E. 788; Whatman v. Pearson, L. R. 3 C. P. 422. In respect to the very transaction: Wyllie v. Palmer, 137 N. Y. 248, 33 N. E. 381. Prosecution of business intrusted to him: Palmeri v. Railway Co., 133 N. Y. 265, 30 N. E. 1001. The phrases "scope" and "course of employment" are used interchangeably. Aycrigg's Ex'rs v. Railway Co., 30 N. J. Law, 460.

[179] Foster v. Bank (1821) 17 Mass. 479–510; Oxford v. Peter, 28 Ill. 434.

[180] (Sup.) 9 N. Y. Supp. 922; St. Louis, I. M. & S. Ry. Co. v. Hackett, 58 Ark. 381, 24 S. W. 881; Craker v. Railway Co., 36 Wis. 657; Mulligan v. Railway Co., 129 N. Y. 506, 29 N. E. 952; Heenrich v. Pullman Palace-Car Co., 20 Fed. 100; Fogg v. Boston & L. R. Corp., 148 Mass. 513, 20 N. E. 109; Yates v. Squires, 19 Iowa, 26; Mechem, Ag. 740, 577, note 1.

within the scope of employment of the master that the master is liable; others, that it is enough that it was in the course of employment. The principle now recognized is that while the employé is acting in the course of employment the employer is liable, even though the act was without the scope of employment,—that is to say, unauthorized; and a number of the cases go so far as to hold (and, it seems, justly) that if it was done in the apparent course of his employment, and with the implements and facilities of the employer's place and premises, the employer is liable, notwithstanding the act may have been in a service not stipulated for by the contract of employment, or during hours when the contract of employment did not require any service. In other words, the liability of the principal is not, as in the case of agency, tested by the scope of employment, but by the course of service."

Authority of Master not the Test of Liability.

The liability of the master for the conduct of his servant in the line of the latter's duty is unquestioned. The difficulty arises in cases where the act of the servant is not only unauthorized, but forbidden. The divorce of the law of the liability of the master for the torts of the servant from the test of authority appears in the generally recognized rule that the master cannot discharge his duty, nor limit his liability to third persons, by prescribing rules for the regulation of his servant's conduct, and by the exercise of diligence in securing their enforcement. He can discharge his duty only by actual performance. He is bound not only to make rules, but to see that they are enforced. He is liable for acts which he may have expressly forbidden. He cannot define or affect his liability for nonperformance of duty to third persons by limiting the authority of his servant. "To so qualify the maxim 'respondeat superior' would be in a measure to nullify it." [181] If the liability of the master for the tort of his servant be regarded from the point of view of the duty

[181] Philadelphia & R. R. Co. v. Derby, 14 How. (U. S.) 468. "Although among the numerous cases on the subject some may be found which have made some distinctions which are subtile and astute as to when the servant may be said to be acting in the employ of his master, no case is to be found which asserts the doctrine that a master is not liable for the acts of servants in his employment where the particular act causing injury was done in disregard of general orders or special commands of the master. Such quali-

of the master, it does not logically or necessarily depend on command or authority. "Authority to the servant to be negligent is not required to make the master liable." [183]

Hours of Employment not an Unfailing or Exclusive Test of Liability.

Hours of employment do not seem to determine the liability of the master absolutely. On the one hand, the servant may commit an independent tort during the hours of work,[183] and on the other hand he may do something outside of working hours which will make the master liable for his act. Thus, where a tollgate keeper ceases to collect tolls at 9 o'clock at night, but remains in charge as the proprietor's only servant, and a traveler was injured by the keeper's letting down the gate after that hour, it was held that the proprietor was liable for his act.[184] But an employer, of course, is

fication of the maxim 'respondeat superior' would, in a measure, nullify it. * * * Intrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders is itself an act of negligence,—the causa causam of the mischief,—while the proximate cause or the ipsa negligentia which produces it may truly be said in most cases to be the disobedience of orders by servants so intrusted. If such disobedience could be set up by a railroad company as a defense when charged with negligence, the remedy of the injured party would, in most cases, be illusive, discipline would be relaxed, and danger to life and limb be enhanced." Singer Manuf'g Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 25 N. E. 799; Pittsburgh, C. & St. L. Ry. Co. v. Kirk, 102 Ind. 399, 1 N. E. 849; Fitzsimmons v. Milwaukee, L. S. & W. Ry. Co., 98 Mich. 257, 57 N. W. 127; Ramsden v. Railway, 104 Mass. 117; Garretzen v. Duenckel, 50 Mo. 104; Hobbs v. Railway Co., 66 Me. 572; Harris v. Railway Co., 35 Fed. 116; Siegrist v. Arnot, 10 Mo. App. 197-201; French v. Cresswell, 13 Or. 418, 11 Pac. 62; Johnson v. Central Vt. Ry. Co., 56 Vt. 707; Philadelphia, W. & B. Ry. Co. v. Brannen (Pa. Sup.) 2 Atl. 429; Bruce v. Reed, 104 Pa. St. 408; George v. Gobey, 128 Mass. 289; Galveston, H. & S. A. Ry. Co. v. McMonigal (Tex. Civ. App.) 25 S. W. 341; Whatman v. Pearson, L. R. 3 C. P. 322; Gregory's Adm'r v. Ohio River R. Co., 37 W. Va. 606, 16 S. E. 819; Receivers Houston & T. C. Ry. Co. v. Stewart (Tex. Sup.) 17 S. W. 33; Pennsylvania Co. v. Weddle, 100 Ind. 141; Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590; Cosgrove v. Ogden, 49 N. Y. 255; Quinn v. Power, 87 N. Y. 555; McClung v. Dearborne, 134 Pa. St. 396, 19 Atl. 698.

[183] Gilfillan, C. J., in Ellegard v. Ackland, 43 Minn. 352, 45 N. W. 715.

[183] Post, p. 276.

[184] Nobelsville Ry. v. Gause, 76 Ind. 142.

not liable for the tort of his servant after the employment is ended.[185] The servant may be within the employment of the master while going and coming from work.[186] The mere fact that damage occurred during the noon hour will not prevent the master's liability. Thus, where a driver not permitted by his contract with his master to go home for dinner, or to leave his horses and cart, went home to dinner and left his horses unattended, the master was held liable for damages done by the running away of the horses.[187]

87. The duty owed by the master to third persons may arise from contractual or conventional relationship of the master to the person seeking to charge him for his servant's wrong, especially where the master's premises, instrumentalities, and facilities of business made the harm possible, or where the master will be held estopped to deny liability.

Where the duty arises out of a contract or some particular relationship between the parties, this is quite clear. Thus a common carrier not only owes a duty to a passenger of at least limited protection against violent insults of a stranger and copassenger, but he is also bound to see that the passenger does not suffer from the violence and assaults of his own servants. He cannot limit his liability by saying such acts were unauthorized; nor is it material that the conduct of his servant is not only reckless, but malicious and capricious. Therefore a railroad company is liable where its serv-

[185] Yates v. Squires, 19 Iowa, 26; Baird v. Pettit, 70 Pa. St. 477–483; Hurst v. Railway Co., 49 Iowa, 76; Baltimore & O. Ry. Co. v. State, 33 Md. 542–554. But see Ewald v. Chicago & N. Ry. Co., 70 Wis. 420, 36 N. W. 12, 591.

[186] Vick v. Railway Co., 95 N. Y. 267; Tunney v. Midland Ry., L. R. 1 C. P. 291; Wilson v. Railway Co., 18 Ind. 226; Gormley v. Railway Co., 72 Ind. 31.

[187] Whatman v. Pearson, L. R. 3 C. P. 422; Broderick v. Depot Co., 56 Mich. 261–268, 22 N. W. 802; Morier v. St. Paul, M. & M. Ry. Co., 31 Minn. 351, 17 N. W. 952. And see Russell v. Railway Co., 17 N. Y. 134; Rosenbaum v. St. Paul & D. R. Co., 38 Minn. 173, 36 N. W. 447; International & G. N. Ry. Co. v. Ryan, 82 Tex. 565, 18 S. W. 219; St. Louis, A. & T. Ry. Co. v. Welch, 72 Tex. 298, 10 S. W. 529; Evansville & R. R. Co. v. Maddux, 134 Ind. 571, 33 N. E. 345, and 34 N. E. 511; Wink v. Weiler, 41 Ill. App. 336.

ant kissed [188] a female passenger or indecently insulted her.[189] The nature of the duty owed where there is a contract between the party appears in the difference as to degree of protection to which a trespasser is entitled. Thus it is said that a trespasser in a train cannot recover for the willful conduct of a railway servant, especially while putting the trespasser off the train; [190] but a railway company

[188] Crakers v. Railway Co., 36 Wis. 657.

[189] Campbell v. Pullman Palace Car Co., 42 Fed. 484; St. Louis, I. M. & S. Ry. Co. v. Hackett, 58 Ark. 381, 24 S. W. 881; Bryant v. Rich, 106 Mass. 180; Sherley v. Billings, 8 Bush, 147; McKinley v. Chicago & N. W. Ry. Co., 44 Iowa, 314; Nieto v. Clark, 1 Cliff. 145, Fed. Cas. No. 10,262; New Orleans, St. L. & C. Ry. Co. v. Burke, 53 Miss. 200; Peeples v. New Brunswick & A. R. Co., 60 Ga. 282; Chicago & E. Ry. v. Flexman, 103 Ill. 546; Indianapolis Union Ry. Co. v. Cooper (Ind. App.) 33 N. E. 219; Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101–111, 13 Sup. Ct. 261; Pennsylvania Ry. Co. v. Vanduer, 42 Pa. St. 365; Citizens' St. Ry. Co. v. Willoeby (Ind. App.) 33 N. E. 637; Passenger Ry. v. Young, 21 Ohio St. 518; Hoffman v. New York Cent. & H. R. R. Co., 87 N. Y. 25; Dean v. Depot Co., 41 Minn. 360, 43 N. W. 54; Conger v. St. Paul, M. & M. Ry. Co., 45 Minn. 207, 47 N. W. 788; Cain v. Railroad Co., 39 Minn. 247, 39 N. W. 635; Goddard v. Grand Trunk Ry., 57 Me. 202 (cf. opinion of majority of court with that of Tapley, J., dissenting); Palmeri v. Railway Co., 133 N. Y. 261, 30 N. E. 1001; Stewart v. Brooklyn Ry. Co., 90 N. Y. 588 (distinguishing Isaacs v. Third Ave. Ry. Co., 47 N. Y. 122); Duggan v. Baltimore & O. Ry., 159 Pa. St. 248, 28 Atl. 182, 186; Baltimore & O. R. Co. v. Barger (Md.) 30 Atl. 560; Terra Haute & I. Ry. Co. v. Jackson, 81 Ind. 19. An extended note, with numerous citations, as to the liability of carriers for injuries caused by the negligence or torts of their servants, by H. Campbell Black, 10 C. C. A. 466. And more specifically the liability of the master to third persons caused by the malicious or willful acts of his servants will be found and considered by Thomas S. Gates in 34 Am. Law Reg. 130. The law does not require of a carrier, however, a rigid observance of the formal amenities of social life. It has no code of manners. A conductor may accordingly eject a passenger on a train by mistake roughly, but not violently, and the company not be made liable. New York, L. E. & W. Ry. Co. v. Bennett, 1 C. C. A. 544, 50 Fed. 496; Poulin v. Canadian Pac. Ry. Co., 3 C. C. A. 23, 52 Fed. 197.

[190] Alabama G. S. R. Co. v. Harris, 71 Miss. 74, 14 South. 263; Illinois Cent. R. Co. v. Latham (Miss.) 16 South. 757; Alabama & V. Ry. Co. v. McAfee, 71 Miss. 70, 14 South. 260; Case of Royston, 67 Miss. 376, 7 South. 320; compare Texas & P. Ry. Co. v. Mother, 5 Tex. Civ. App. 87, 24 S. W. 79. And see Smith v. Railroad Co., 95 Ky. 11, 23 S. W. 652. The responsibility of railroad companies is determined not by law of common carrier, but by that of agency. Farber v. Missouri Pac. Ry. Co., 116 Mo. 81, 22 S. W. 631. A short

has no right to inflict injury on him wantonly or recklessly.[191] The liability of a carrier is said to be the same as the liability of an innkeeper.[192] Similarly, a patron of a theater has a right to be protected while in the theater, and if the ticket agent should call on any one of the number in the theater to "put that nigger out," and some ruffian does so, the proprietor will be liable.[193] So, a landlord cannot escape liability for noxious gases because his servant neglects to do his work properly.[194] It was said at an early time that cases of this kind were "exceptions founded on public policy."[195] However, it is not only in cases where there is a contract between the party that the duty to protect against harm by servants exists. Thus, where a merchant invites a customer to enter his premises, he is responsible for the willful and malicious arrests,[196] or assaults of his servants.[197] Where an insane servant killed a person who was in the master's office for the transaction of business, the master was held liable.[198] So, where a ticket agent posts notices as to "an alleged ticket swindle" in a railroad office, the company is liable, though the

note as to the liability of railroad company for the acts of a brakeman in ejecting a trespasser. 9 Am. R. & Corp. R. 348.

[191] St. Louis, I. M. & S. Ry. Co. v. Hackett, 58 Ark. 381, 24 S. W. 881; Hahl v. Wabash R. Co., 119 Mo. 325, 24 S. W. 737; Planz v. Boston & A. R. Co., 157 Mass. 377, 32 N. E. 356; Georgia R. R. & B. Co. v. Wood (Ga.) 21 S. E. 288; Brill v. Eddy, 115 Mo. 596, 22 S. W. 488; Southern Pac. Co. v. Kennedy (Tex. Civ. App.) 29 S. W. 394; Bess v. Railway Co., 35 W. Va. 492, 14 South. 234; Mobile & O. R. Co. v. Seals (Ala.) 13 South. 917.

[192] Wade v. Thayer, 40 Cal. 578; Curtis v. Dinneer (Dak.) 30 N. W. 148; Bass v. Chicago & N. W. Ry. Co., 36 Wis. 450; Com. v. Powers, 7 Metc. (Mass.) 596.

[193] Drew v. Peer, 93 Pa. St. 234; Dickson v. Waldron, 135 Ind. 507, 34 N. E. 506, and 35 N. E. 1.

[194] Martin v. Richards, 155 Mass. 381–386, 29 N. E. 591.

[195] Foster v. Essex Bank, 17 Mass. 479–510.

[196] Geraty v. Stern, 30 Hun, 426; Staples v. Schmid (R. I.) 26 Atl. 193; Hershey v. O'Neil, 36 Fed. 168. But see Mali v. Lord, 39 N. Y. 381; Meehan v. Morewood (Sup.) 5 N. Y. Supp. 710; and Porter v. Railway Co., 41 Iowa, 358.

[197] Mallach v. Ridley (Sup.) 9 N. Y. Supp. 922; Christian v. Columbus & R. Ry. Co., 90 Ga. 124, 15 S. E. 701; Swinarton v. Le Boutillier (Com. Pl.) 28 N. Y. Supp. 53.

[198] Christian v. Columbus & R. Ry. Co., 90 Ga. 124, 15 S. E. 701. And see Sherley v. Billings, 8 Bush, 147; Bryant v. Rich, 106 Mass. 180.

act of the agent was in excess of authority.[199] A railroad company owes a duty to persons standing on the platform at a station.[200] Thus, if in a saloon an intoxicated person, in the presence of the proprietor, attach a burning piece of paper to his drunken companion's clothes the proprietor is liable for damages resulting from the burning.[201]

88. The master's duty to third persons may arise from ownership or custody of dangerous things, and it may extend to—

(a) The conduct of the servant, though forbidden, and for the servant's private purpose and not for the master's benefit; and to

(b) The unauthorized conduct of strangers or mere volunteers.

Conduct of the Servant.

Whoever owns, uses, or controls property which is in itself dangerous, or is likely to result in damage to others, is held by law to the duty of protecting others from injury therefrom.[202] Sometimes this duty amounts to insurance, at other times to the exercise of proportionate care. When the master owns, uses, or controls such instrumentalities, he is bound to perform that duty, and he cannot escape it by the exercise of care in the selection of his servants. Therefore the master was held liable for the forbidden act of his employés who frightened horses by blowing steam [203] from an engine

[199] Fogg v. Boston & L. R. Corp., 148 Mass. 515, 20 N. E. 109.

[200] Ohio R. Co. v. Sims, 43 Ill. App. 260.

[201] Rommel v. Schambacher, 120 Pa. St. 579, 11 Atl. 779; Brazil v. Peterson, 44 Minn. 212, 46 N. W. 331. Cf. Fortune v. Trainor (Sup.) 19 N. Y. Supp. 598. Thus, if servants allow thieves to rob a car, the railroad company is liable to the owner of the goods. Lang v. Pennsylvania R. Co., 154 Pa. 342, 26 Atl. 370.

[202] "Words may be as dangerous as firing a gun into the street. Therefore a master may be liable for the forbidden act of his servant in publishing a libel." Holmes, J., in Hanson v. Globe Newspaper Co., 159 Mass. 301, 34 N. E. 462. Dun v. Hall, 1 Ind. 344.

[203] Texas & P. Ry. Co. v. Scoville, 10 C. C. A. 479, 62 Fed. 730; Toledo, W. & W. Ry. Co. v. Harmon, 47 Ill. 298; Chicago, B. & Q. Ry. Co. v. Dickson, 83 Ill. 151; Cobb v. Columbia & G. Ry. Co., 37 S. C. 194, 15 S. E. 878. And

of which they had full charge. And for the same reason the owner of property is liable for the act of his servant in setting fire to grass whereby a neighbor is damaged.[204] The liability of the master is sometimes worked out on the line that he is responsible for negligence in the custody of a dangerous thing, rather than on the line of responsibility because of the act of the servant. Thus, in Railway Co. v. Shields,[205] servants for their own amusement, and under circumstances which the court was ready to conceive did not make their acts the acts of the master, put torpedoes, supplied them by the railroad company for use as signals, in front of the engine. The railroad was held liable, not for the act of the servant, but because the thing of danger, the torpedoes, occasioned a runaway. On the other hand, in Brunner v. Telephone Co.,[206] one of a gang of men who had to do only with placing poles for telephone line, tested, for his own amusement, a cartridge belonging to the gang which prepared the holes. The cartridge exploded to another's injury. The court held that the question of whether or not the servant was acting within the course of his employment was for the jury.

Conduct of Stranger or Volunteer.

Where, however, no such privity exists, where the servant stands in the attitude of an independent contractor, the principal is liable only in those cases in which he could be held responsible for the

see Ochscenheim v. Shapley, 85 N. Y. 214; Nashville R. Co. v. Starnes, 9 Heisk. 52; Receivers H. & T. C. R. Co. v. Stewart (Tex. Sup.) 17 S. W. 33; St. Louis, A. & T. R. Co. v. Triplett, 54 Ark. 289, 15 S. W. 831, and 16 S. W. 266; Akridge v. Atlanta & W. P. R. Co., 90 Ga. 232, 16 S. E. 81; Louisville, N. A. & C. R. Co. v. Stanger (Ind. App.) 32 N. E. 209. A collection of authorities on the liability for damages resulting from the frightening of horses by blowing whistles, emitting steam, etc. 9 Am. R. & Corp. R. 482. But see Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 Pac. 234; Gulf, C. & S. F. Ry. v. Kirkbride (Tex. Sup.) 15 S. W. 495; Carter v. Railroad Co., 98 Ind. 552; Fitzsimmons v. Railway Co., 98 Mich. 257, 57 N. W. 127.

[204] Johnston v. Barber, 10 Ill. 425.

[205] Smith v. New York Cent. & H. R. R. Co., 78 Hun, 524, 29 N. Y. Supp. 540. And see Harriman v. Railway Co., 45 Ohio St. 11, 12 N. E. 451. But cf. Slayton v. Fremont, E. & M. V. R. Co. (Neb.) 59 N. W. 510.

[206] Brunner v. American Tel. & Tel. Co., 151 Pa. St. 447, 25 Atl. 29. Et vide Neveu v. Sears, 155 Mass. 305, 29 N. E. 472; Fredericks v. Railroad Co., 157 Pa. St. 103, 27 Atl. 689.

acts of the servants or agents of any other individual contractor.[207]

The master may be liable for the act of a stranger or volunteer. The law is by no means clear or consistent as to this point. Very frequently the volunteer becomes by some implication of assent a servant of the master. Thus, if a volunteer assist in cutting trees on the line of the master's premises, to mark it with a brush fence, and commit a trespass on a neighbor's land while the master is present, the latter may be held liable.[208] In many cases, however, the true theory would seem to be that the master is held liable, not because the stranger is his agent or servant, but because the master fails in the performance of some duty owed to third persons, and it would appear to be immaterial whether the failure[209] be due to one in his service or not. The duty of the owner to exercise commensurate care in the use and custody of a dangerous instrumentality is such that the interference therewith by a complete stranger, intruder, or mere volunteer resulting in damage to an innocent person will make the owner liable. Thus, where a railroad company left a loaded car coupled with two empty cars standing on a switch which inclined towards their main track, the same being secured by brakes and a tie placed under the wheels of the loaded car, and a person was injured by the cars running down onto the main track, it was held that the company was responsible, as a matter of law, even though the cars would not have run onto the main track but for the wrongful act of a stranger in taking away the tie.[210] Similarly, if a man leaves a quiet horse standing in the streets unguarded, and a stranger strikes him, the owner is liable for damages done by his running away.[211] It has, however, been held that the grossly crim-

[207] Mechem, Ag. § 749.

[208] Hill v. Morey, 26 Vt. 178; Booth v. Mister, 7 Car. & P. 66; Andrews v. Boedecker, 126 Ill. 605, 18 N. E. 651; Hill v. Sheehan (Super. N. Y.) 20 N. Y. Supp. 529.

[209] Cleveland v. Spier, 16 C. B. (N. S.) 399.

[210] Smith v. Railroad Co., 46 N. J. Law, 7; Southern Pac. R. Co. v. Lafferty, 57 Fed. 536. Cf. Mars v. Delaware & H. Canal Co., 54 Hun, 625, 8 N. Y. Supp. 107; Althorf v. Wolfe, 22 N. Y. 355, opinion by Denio, J.; Lane v. Atlantic Works, 111 Mass. 136; Pastene v. Adams, 49 Cal. 87; East Tennessee, V. & G. R. Co. v. Kane (Ga.) 18 S. E. 18. But see Fredericks v. Railroad Co., 157 Pa. St. 103, 27 Atl. 689; Latch v Rumner Ry., 3 Hurl. & N. 930.

[211] Illidge v. Goodwin, 5 Car. & P. 190; Lynch v. Nurdin, 1 Q. B. 29; Dixon

inal act of a stranger in letting off the brakes on loaded cars standing on an open switch, and then closing the switch so that the cars ran out on the main track, causing a collision with a passenger train, will not render the company liable, in the absence of negligence in failing to discover the mischief or preventing its effect.[212]

Liability in Cases of Fraud.

Cases of liability for torts arising from fraud attributable to persons because of the conduct of other persons usually arise between principal and agent, rather than between master and servant. Accordingly, it is often loosely said that the rule is not as broad where the principal is held liable for the act of his agent as where the relationship is that of master and servant.[213]

v. Bell, 5 Maule & S. 198. The defendant was using on the streets of a city two heavy iron rollers drawn by mules. The driver of one left his team unhitched for a short time, and went to assist with the other roller. The mules were quiet and accustomed to stand. A boy five years old got on the roller, started the mules, and was fatally injured. Held, that the driver was negligent, and the defendant responsible as his master. Westerfield v. Levis, 43 La. Ann. 63, 9 South. 52.

[212] Fredericks v. Northern Cent. Ry. Co., 157 Pa. St. 103, 27 Atl. 689. And where a railroad company deposited torpedoes in its section house, and securely fastened the doors and windows thereof, the company is not liable for injuries to children who unfastened one of the windows, and removed and exploded one of the torpedoes. Slayton v. Fremont, E. & M. V. R. Co. (Neb.) 59 N. W. 510.

[213] The general discussion on this point found in Fraser, Torts, at page 131, is excellent. It follows in entirety:

Misrepresentation Made by Agents.

The agent himself is personally liable, according to the general rules governing the law as to fraud. The liability of the principal depends on several considerations. The following cases appear on this matter:

I. The Principal Knows the Representation to be False.

(i) He authorizes the making of it. In this case, whether the agent knows it to be false or thinks it to be true, the principal is liable.

(ii) The representation is made by the agent in the general course of his employment, but without any specific authorization from the principal. When

(a) The agent knows it to be false, the principal is liable; per Parke, B., in Cornfoot v. Fowke (1840) 6 Mees. & W. 358.

(b) The agent thinks it to be true. In this case the contract may

The liability of the principal for the fraud of his agent, in many cases, rests—a sort of an estoppel—upon the fact that he has put

always be rescinded,—but will an action for fraud lie against the principal? The two following distinctions must be remembered:

(a) When the principal fraudulently keeps the knowledge from the agent, he is no doubt liable. This was admitted by all the barons in Cornfoot v. Fowke, Id. 359, and followed in Ludgater v. Love (1881) 44 Law T. (N. S.) 694, where a father knowingly directed his son to make a false representation about the condition of some sheep.

(b) When the knowledge is held back by the principal through inadvertence. In this case it is probable that an action will lie against the principal, though this would be contrary to the decision in Cornfoot v. Fowke (1840) 6 Mees. & W. 359, where there was a misstatement by the agent in good faith, and there was no suggestion of fraud on the part of the principal, about the condition of a house, and it was held that the plaintiff could not get out of his agreement on the ground of fraud. "I think," said Alderson, B., "it is impossible to sustain a charge of fraud, when neither the principal nor agent has committed any,—the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made, nor even directed the agent to make it; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer bona fide." Abibger, C. B., dissented, and it is very probable that this case will be overruled,—if, indeed, it is even now law. Many dicta are to be found adverse to this decision, those of Willes, J., in Barwick v. Bank (1867) L. R. 2 Exch. 259, being especially worthy of notice.

II. THE PRINCIPAL THINKS THE REPRESENTATION TO BE TRUE.

(i) He authorizes it to be made. When

(a) The agent knows at the time, or finds out afterwards, that it is false, the principal is liable. Barwick v. Bank, supra.

(b) The agent thinks it to be true. Here the principal is not liable.

(ii) The agent makes the representation in the general course of his employment, but without any specific authorization. When

(a) The agent knows it is false, the principal is liable. Udell v.

the agent in a position to do wrong, and should therefore suffer rather than an innocent third party.[214] The principal is liable for the means the agent uses to accomplish the ends of the principal, whether such means be fair or unfair. Thus, in dealing with specific articles of property, a stranger can only be required to look to the acts of the parties as to the external indicia of the property, but not to the private communication which may pass between the principal and agent. The agent, therefore, may bind his principal within the limits, not of real, but of apparent, authority.[215] An agent's fraudulent representations as to the condition of uninspect-

Atherton (1861) 7 Hurl. & N. 171, and Barwick v. Bank, supra. It has been suggested that this liability is limited to the amount of profit made, though in Swire v. Francis (1877) 3 App. Cas. 106, the privy council held a principal liable who derived no profit at all. It is, however, possible that the limitation suggested would be held applicable if the defendant were a corporation (per Lord Cranworth in Western Bank of Scotland v. Addie (1867) L. R. 1 H. L. Sc., at pages 166, 167; and see per Bowen, L. J., in British Mutual Banking Co. v. Charnwood Forest Railway Co. (1887) 18 Q. B. Div., at page 719), though the point was not taken in Denton v. Great Northern Ry. Co. (1856) 5 El. & Bl. 860.

(b) The agent thinks it to be true, the principal is not liable. Thus we find that the principal is liable in all possible cases, except when both he and his agent believe the latter's misrepresentation to be the truth.

[214] Wolfe v. Pugh, 101 Ind. 293–304; Lamm v. Port Deposit Homestead Ass'n, 49 Md. 233–241; Halsell v. Musgraves, 5 Tex. Civ. App. 476, 24 S. W. 358; Independent Bldg. & Loan Ass'n v. Real Estate Title Co., 153 Pa. St. 181–193, 27 Atl. 62; Thompson v. Bell, 10 Exch. 10; Story, Ag. § 443; Bisp. Eq. § 217; Hern v. Nichols, 1 Salk. 289; Griswold v. Haven, 25 N. Y. 595; Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846; Pence v. Arbuckle, 22 Minn. 417; Moore v. Metropolitan Nat. Bank, 55 N. Y. 41; Voorhis v. Olmsted, 64 N. Y. 113; Lindauer v. Younglove, 47 Minn. 62, 49 N. W. 384; Palmer v. Bates, 22 Minn. 532; Judson v. Corcoran, 17 How. 612; Burgess v. Bragaw, 49 Minn. 462, 52 N. W. 45; Dun v. City Nat. Bank, 7 C. C. A. 152, 58 Fed. 174; Frielander v. Railway Co., 130 U. S. 416, 9 Sup. Ct. 570.

[215] Pickering v. Busk, 14 East, 43; Mackay v. Bank, L. R. 5 P. C. 394; Halsted's Ex'rs v. Colvin, 51 N. J. Eq. 387, 26 Atl. 928. Compare Udell v. Atherton, 7 Hurl. & N. 170; Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 146; Kennedy v. McKay, 43 N. J. Law, 288.

ed lands, inducing a trade, makes his principal liable.[216] So, if the agent points out the wrong land, and the purchase is made in the belief that the land shown is the land purchased, the principal is liable.[217] And where a knavish or blundering insurance solicitor induces an applicant for a policy to sign a statement which he did not make, and did not intend to make, the company cannot avoid the policy to the injury of the insurer.[218] The fact that the policy was accompanied by a copy of the application showing the fraud is for the consideration of the jury. The insurance company cannot escape the contract by repudiating the fraud of its agent,[219] nor can it do this by stipulating that the solicitor is the agent of the insurer and not of the insured, without putting the applicant on his guard in advance of the negotiations.[220]

The English rule seems to be quite clear that the principal is liable for the act of his servant in the course of the principal's business only when the act of his agent is for the principal's benefit; and for fraud beyond the scope of business, if the principal has derived a benefit, but only to the extent of the benefit received.[221] In America it is recognized that a "man cannot reap the fruit of his agent's fraud and escape liability by denying the agent's authority." [222]

[216] Rhoda v. Annis, 75 Me. 17; Wolfe v. Pugh, 10 Ind. 293; Lynch v. Mercantile Trust Co., 18 Fed. 486; Law v. Grant, 37 Wis. 548; Gunther v. Ullrich, 82 Wis. 222, 52 N. W. 88; Leavitt v. Sizer, 35 Neb. 80, 52 N. W. 832; Jewett v. Carter, 132 Mass. 335.

[217] McKinnon v. Vollmar, 75 Wis. 82, 43 N. W. 800; Burke v. Railway Co., 83 Wis. 410, 53 N. W. 692.

[218] Ellenberger v. Protective Mut. Fire Ins. Co., 89 Pa. St. 464. And see Hopkins v. Hawkeye Ins. Co., 57 Iowa, 203, 10 N. W. 605.

[219] Kister v. Insurance Co., 128 Pa. St. 553, 18 Atl. 447.

[220] Meyers v. Lebanon Mut. Ins. Co., 156 Pa. St. 420, 27 Atl. 39; Dettra v. Kestner, 147 Pa. St. 566, 23 Atl. 889. Where the agent, in selling a boat, falsely represents that there are no claims against it, both the agent and his principal are civilly liable for the deceit. Wheeler v. Baars, 33 Fla. 636, 15 South. 584.

[221] Barwick v. English Joint-Stock Bank, L. R. 2 Exch. 259 (commenting on Udell v. Atherton, 7 Hurl. & N. 171); Weir v. Bell, 3 Exch. Div. 238; Houldsworth v. City of Glasgow Bank, 5 App. Cas. 317.

[222] Jones v. Association, 94 Pa. St. 215; Sunbury Ins. Co. v. Humble, 100 Pa. St. 495. And see Albitz v. Railway Co., 40 Minn. 476, 42 N. W. 394; Mitch-

Moreover, the master may be held liable for the fraud of his servant, though forbidden by the master, and resulting in no benefit to him, and though willful and malicious. This principle has been applied to the case of a local agent of a telegraph company who was also the agent of an express company at the same place and who sent a forged dispatch to a merchant in a neighboring city, requesting him to forward money to his correspondent at the former place, to use in shipping grain. The message was duly received, and the money in good faith forwarded by express in response to the telegram, but was intercepted and appropriated by the agent. It was held that the transmission of the forged dispatch was the proximate cause of the loss, and that both companies could be sued, separately or jointly.[223] But, if the principal owes another no duty to protect against the fraud of his agent, he cannot be held liable for the agent's personal wrong. Thus, where a mercantile agency stipulates expressly that the veracity or correctness of the information is in nowise guarantied, a subscriber cannot recover damages resulting from the willful and fraudulent act of a subagent in furnishing information.[224]

89. The reason of the master's liability is not exclusively or finally—

(a) His authority, i. e. the identification of master and servant.

(b) His benefit, or the servant's motive.

(c) The lawfulness of the conduct, or its unlawfulness.

(d) Respondeat superior.

(e) The propriety of making the master rather than an innocent stranger suffer for the servant's wrong.

It is a matter of great difficulty to assign any definite single reason for holding the master liable for the act of his servant. Cer-

ell v. Donahey, 62 Iowa, 376, 17 N. W. 641; Leavitt v. Sizer, 35 Neb. 80, 52 N. W. 832; Continental Ins. Co. v. Insurance Co., 51 Fed. 884; Busch v. Wilcox, 82 Mich. 336, 47 N. W. 328; Ripley v. Case, 86 Mich. 261, 49 N. W. 46.

[223] McCord v. W. U. Tel. Co., 39 Minn. 181, 39 N. W. 315; Jasper Trust Co. v. Kansas City, M. & B. R. Co., 99 Ala. 416, 14 South. 546.

[224] Dun v. City Nat. Bank, 7 C. C. A. 152, 58 Fed. 174, overruling 51 Fed. 160.

tain negative propositions may be safely made. The authority of the master—that is, the doctrine of identification of the master and servant—answers sufficiently for a reason to torts consented to by the master, and perhaps as to torts committed in the course of authority, actual or implied. So far as this reason is sufficient, it would seem, on final analysis, to be logically no more than a clear case of the connection of the master as the juridical cause of the injury. But as to the large class of torts committed by the servant for which the master is liable, it is clearly insufficient. Thus, it wholly fails to account for the liability where the tort is forbidden, especially where the servant's conduct was for his own private purpose.

It appears also that the mental attitude of the servant is not the test of liability. The master may be liable for the malicious and capricious act of his servant,—where there is involved a special relationship, as that of a common carrier to its passenger; or the possession of property being dealt with, as an insurance policy; in a case of fraud; or the custody of a dangerous thing, as a torpedo. Where, however, the service of the master did not in some way make possible the wrongdoing of the servant, and where there was no special duty resting on the master, the matter of the master's benefit and the servant's motive is properly a matter to be considered by the jury in determining whether the given conduct was within or without the course of employment. It is not necessary that the act should be for the master's benefit. On the contrary, it may result in injury to him apart from the damage done to the person charging him with the servant's wrong (as where the servant willfully drives a vehicle against a person and injures both the person and his master's vehicle).

Nor is the unlawfulness of the conduct of the servant a test of the master's liability. On the contrary, if such conduct be in pursuance of the master's command, express or implied, the servant and master may be joint tort feasors. Respondeat superior is useless as a test, because it is a mere restatement of the rule. A similar (and not inconsistent) reason frequently assigned is that, the employé having done damage in course of his employment, the master rather than the third person should be liable.

In some cases, as conspicuously in fraud, the master may be es-

topped from denying his servant's authority. His liability upon the same state of facts may be regarded as a species of estoppel, based on his duty not to put it into his servant's power to do harm.[225] The general reasoning under consideration is, however, dangerous and unsound, in that it assumes that where damage is suffered some one must pay. It is elementary that mere damage to an innocent party is not actionable. In addition to such damage it must also be shown that there was a breach of duty, and that the defendant was the juridical cause of the wrong.

90. But while most of these considerations are entitled to weight in appropriate cases, the true general reasons for the master's liability would seem to be—

(a) That the master owes a duty to third persons which varies with circumstances;

(b) That he insures third persons against the violation of such duties; and

(c) If his servant in the course of his employment violates such duty, the master is the juridical cause of the consequent injury.

Duty.

The variation of the duty may depend, for example, upon contract or relationship, as in case of common carriers, innkeepers, storekeepers, and the like; or upon the custody, use, or control of dangerous instrumentalities, as engines, ferocious animals, and the like; or upon the custody, use, or control of innocent instrumentalities affording the opportunity of mischief by the servant, as the possession of property used to perpetrate fraud, or the facilities of business, and the like. This idea has been clearly put in the Wis-

[225] That negligence in clothing a person with title and authority may work estoppel to deny a responsibility for consequences, see Brainard v. Knapp, 9 Misc. Rep. 206, 29 N. Y. Supp. 678; Blaisdell v. Leach, 101 Cal. 405, 35 Pac. 1019; Girault v. A. P. Hotaling Co., 7 Wash. 90, 34 Pac. 471; Curtis v. Janzen, 7 Wash. 58, 34 Pac. 131; McFadden v. Lynn, 49 Ill. App. 166. Cf. Clarke v. Milligan (Minn.) 59 N. W. 955. Et vide Gould v. Wise, 97 Cal. 532, 32 Pac. 573, and 33 Pac. 323; Foreman v. Weil, 98 Ala. 495, 12 South. 815; Hollis v. Harris, 96 Ala. 288, 11 South. 377; Lawrence v. Investment Co., 51 Kan. 222, 32 Pac. 816; Dolbeer v. Livingston, 100 Cal. 617, 35 Pac. 328.

consin cases, to the effect that liability of the master is limited to those cases where the principal owes a duty to third persons. Being responsible for the performance of this duty, if he delegates it to an agent and the agent fails to perform it, it is immaterial whether the failure be accidental or willful, in the negligence or in the malice of the agent. The duty of the principal is equally broken by the negligent disregard or the malicious disregard of the right.[226] So, with respect to the liability of the employer in a case of independent contractor, it seems clear that he who has a duty to perform cannot shift the duty to the shoulders of another, and is liable for its nonperformance, although the fault may be directly attributable to another who has contracted to do the work.[227] Indeed, as has been shown, in some cases the master may be liable for the injurious consequences of the conduct of volunteers, interlopers, and mere trespassers.

Much misconception on the subject has arisen from the failure to realize that the master's responsibility is graduated according to the circumstances. "The degree of responsibility," says Mr. Pollock, "may be thus arranged, beginning with the mildest: (1) For one's self and specifically authorized agents (this holds always). (2) For servants or agents generally (limited to course of employment). (3) For both servants and independent contractors (duties as to safe repair, etc.). (4) For everything but vis major (exceptional: some cases of special risk, and, anomalously, certain public occupations)."

The Master an Insurer against Torts, not against Damage.

It is, perhaps, putting the duty of the master too strongly to say that he insures against commission of torts by his servants; but certainly no exercise of care on his part, either in the selection of his servants[228] or in the formulation, promulgation, or enforcement

[226] Buss v. Railway, 42 Wis. 654; Schaefer v. Osterbrink, 67 Wis. 495, 30 N. W. 922. Et vide Dillon, J., 24 Am. Law Rev. 177.

[227] Tarry v. Ashton, 1 Q. B. Div. 314; Pig. Torts, 94.

[228] Oakland City A. & I. Soc. v. Bingham, 4 Ind. App. 545, 31 N. E. 383; Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543. The fact that the negligence in employing a boy in a place of danger was that of the mine boss, who held a certificate as such, will not relieve the owner of liability, since a mine boss' duties, under the act of 1885, do not comprise the hiring or discharge of men. Weaver v. Iselin, 161 Pa. St. 386, 29 Atl. 49.

of rules, is sufficient to exonerate him from violation of the duty he may owe third persons. "The master," said Lord Cranworth, in Bartonshill Coal Co. v. Ried,[230] "is considered as bound to guaranty third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of business." The famous reason assigned by Chief Justice Shaw in Farwell v. Boston & W. R. Corp.[231] has met with universal approval. "The rule is obviously founded on the great principle of social duty that every man in the management of his own affairs, whether by himself, his agents, or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." The insurance, however, is against the commission of torts, not against the production of damages by his servant. Thus, to charge the master for the frauds of his servant the frauds must have all essential legal ingredients.[232]

Connection as Cause.

The courts which were satisfied with authority as the test, and identification as the reason, of the master's liability for his servant's torts, naturally did not devote much attention to the doctrine of the master's duty, or to the doctrine of connection of the master as cause. And while the cases in which the owner is held liable for the conduct of strangers dwelt on the master's original negligence, and on tracing it to him through the third person, such courts would perhaps seem to have overlooked the natural analogy of these cases and of the independent contractor cases to the liability of master and servant.

Mr. Innes has clarified the subject by insisting that a person may act directly by himself or indirectly through instrumentalities. Instrumentalities may be personal, as servant and agent, or imper-

[230] 3 Macq. 266–283.

[231] 4 Metc. (Mass.) 49; Bigelow, Lead. Cas. 688.

[232] Pol. Torts, § 65. In cases where not the master's premises, facilities, nor instrumentalities conduced to the wrong, as where there was no special relationship between the party, existing by contract or otherwise, the benefit of the master and the motive of the servant afford a more or less definite test of whether the act was within or without the employment. Smith v. Webster, 23 Mich. 297–300; Marion v. Railroad Co., 59 Iowa, 428–430, 13 N. W. 415; McClung v. Dearborne, 134 Pa. St. 396, 19 Atl. 698.

sonal, as a tiger or torpedo. If the right of another be violated, it is immaterial whether the violation was the direct act of the person sought to be charged or that of his instrumentality, whether animate or inanimate, rational or irrational. The servant is an instrumentality of the master. If a duty of the master be violated, he is liable alike whether he or his servant was guilty of the breach.

91. INDEPENDENT TORT—Under no test is the master liable for the independent tort of the servant. What is his independent tort is ordinarily a question of fact for the jury.

The servant acts in an individual capacity, as a servant or as an individual. For his torts in the latter capacity—for his really independent torts—the master is no more liable than would a parent be for the independent torts of his child.[233] But while the servant is in the employment and commits a tort, it is not clear what deviation from the course will so interrupt the relation as to make the conduct exclusively his own, and what deviation will not allow the master to escape liability. The early statement that a slight deviation is sufficient to exonerate the master has not now the sanction of most courts. The cases occur in classes quite distinctly marked. In cases of assault, for example, while a carrier may be liable for forbidden assaults upon passengers to whom a particular duty is owed,[234] the liability ceases when the duty ceases. Therefore an assault on a passenger after he had left the train creates no responsibility on the part of the railroad company.[235] Nor is the company responsible for the purely personal encounter of its employés with persons between whom and the corporation there is no privity.[236] Thus, if an engineer stops his train and pursues a boy into his father's house, seizes him and carries him off on the train, the act is not in the range of the engineer's employment, and the master

[233] Hower v. Ulrich, 156 Pa. St. 410, 27 Atl. 37.

[234] Baltimore & O. R. Co. v. Barger (Md.) 30 Atl. 560. Even although the assault was committed in resenting an insult. Texas & P. Ry. Co. v. Williams, 10 C. C. A. 463, 62 Fed. 440.

[235] Central Ry. Co. v. Peacock, 69 Md. 257, 14 Atl. 709.

[236] Cofield v. McCabe (Minn.) 59 N. W. 1005.

is not liable.[237] Nor is it liable for private quarrels between a brakeman and prospective passenger, or between its surgeon and his assistants.[238] But a master is liable for the act of his clerk in assaulting another because he refused to pay for the hire of a bicycle;[239] or of his barkeeper in ejecting a person from his saloon.[240] The authority of the master is not the test of liability.[241] The same distinction is drawn in the driving cases. Where the driver of the master's vehicle turns aside from the master's employment and engages in an independent journey, wholly foreign to his employment, and for a purpose exclusively his own, the master is not liable for his act. Thus, where a carman, having finished his work, returned to the shop with his vehicle and obtained the key of the stable, which was close at hand, but, instead of going at once and putting up the horse, as was his duty to do, he, without his master's knowledge or consent, took a fellow workman on a drive, in course of which he ran over a person, the master was not held responsible for his act, because at the time of the accident the serv-

[237] Gillian v. Railway Co., 70 Ala. 268,—and criticise McManus v. Crickett, 1 East, 106; Golden v. Newbrand, 52 Iowa, 59, 2 N. W. 537. In Candiff v. Railway Co., 42 La. Ann. 477, 7 South. 601, defendant's conductor, suspecting deceased to have robbed a train, killed him. Company held not liable.

[238] Little Miami Ry. v. Wetmore, 19 Ohio St. 110; Wise v. Railway Co., 91 Ky. 537, 16 S. W. 351; Campbell v. Railroad Co., 51 Minn. 488, 53 N. W. 768; Cofield v. McCabe (Minn.) 59 N. W. 1005; Louisville, N. O. & T. Ry. Co. v. Douglass, 69 Miss. 723, 11 South. 933; Williams v. Car Co., 40 La. Ann. 87, 3 South. 631; Lackat v. Lutz, 94 Ky. 287, 22 S. W. 218; Chicago Ry. v. Mogk, 44 Ill. App. 17. Compare Fowler v. Holmes (City Ct. Brook.) 3 N. Y. Supp. 816.

[239] Baylis v. Schwalbach Cycle Co. (City Ct. Brook.) 14 N. Y. Supp. 933.

[240] Fortune v. Trainor, 65 Hun, 619, 19 N. Y. Supp. 598; Brazil v. Peterson, 44 Minn. 212, 46 N. W. 331. Cf. Rogahn v. Foundry Co., 79 Wis. 573, 48 N. W. 669, with Smith v. Packet Co. (Tenn.) 1 S. W. 104. The latter case is manifestly at variance with the current of authority. 38 Cent. Law J. 417–419 (article by William L. Murfree). An assault on a passenger by a railway conductor, committed in resenting an insult provoked by his own language and conduct while acting as conductor, was within the scope of his employment. Texas & P. Ry. Co. v. Williams, 10 C. C. A. 463, 62 Fed. 440. So ejection, without excessive violence, by servants, under erroneous supposition that plaintiff was traveling wrongfully in carriage, is within the scope of servants' authority. Lowe v. Railway Co. (1893) 5 Reports, 535.

[241] 38 Cent. Law J. 447–449.

ant was not engaged in the business of his master.[242] But where a driver, delivering porter by the barrel to a customer, at the request of the customer drove to a store to get a faucet, and by reckless driving injured another, it was held to be for the jury to determine whether or not the driver was acting within the scope of his authority.[243]

The same distinction is apparent in cases of false arrest. In these cases, as a rule, neither the master's instrumentalities, facilities, nor property puts the servant in a position peculiarly enabling him to commit the wrong. It was early held in New York that the command of the master, actual or implied, was the test of liability.[244] It was, however, soon recognized that it was not the command of master, but the line or course of employment, which determined liability, and the master was held liable, although the conduct of the servant exceeded authority and was something the master had not authorized.[245] Thus, to illustrate what is and what is not in the course of employment, it was held that the ticket agent who received good money from one whom he suspected to be a counterfeiter, and thereupon caused his arrest, was acting in his capacity as a good citizen

[242] Mitchell v. Crassweller, 13 C. B. 237; Rayner v. Mitchell, 2 C. P. Div. 357; Storey v. Ashton, L. R. 4 Q. B. 476; Aycrigg's Ex'rs v. New York & E. Ry., 30 N. J. Law, 460; Douglass v. Stephens, 18 Mo. 362; Thorp v. Minor, 109 N. C. 152, 13 S. E. 702; Moore v. Sanborne, 2 Mich. 520; Courtney v. Baker, 60 N. Y. 1; Sheridan v. Charlick, 4 Daly (N. Y.) 338; Lee v. Nelms, 57 Ga. 253; Cavanagh v. Dinsmore, 12 Hun, 465; Stone v. Hills, 45 Conn. 44; Mott v. Consumers' Ice Co., 73 N. Y. 543; Joel v. Morrison, 6 Car. & P. 501.

[243] Guinney v. Hand, 153 Pa. St. 404, 26 Atl. 20. Where a servant sent to get a load, on his return, for the purpose of calling at a shop on his own account, goes somewhat out of his usual route, and leaves the team unhitched while he goes into the shop, the master will be liable for an injury to a person from the running away of the team; the servant's acts being in the execution of the master's business, though deviating somewhat from the line of his duty. Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29. Quinn v. Power, 87 N. Y. 535; Flint v. Norwich & N. Y. Transp. Co., 34 Conn. 554; Mulvehill v. Bates, 31 Minn. 364, 17 N. W. 959; Joslin v. Grand Rapids Ice Co., 50 Mich. 516, 15 N. W. 887; Venables v. Smith, 2 Q. B. Div. 279; Patten v. Rea, 2 C. B. (N. S.) 606; Whatman v. Pearson, L. R. 3 C. P. 422.

[244] Mali v. Lord, 39 N. Y. 381; Lafitte v. New Orleans, C. & L. R. Co., 43 La. Ann. 34, 8 South. 701.

[245] Lynch v. Railroad Co., 90 N. Y. 477.

desiring the punishment of crime, and not in the employment of the railroad company.[246] But where a ticket agent, having disputed with one as to the amount of change passed to her, followed her to the platform, charged her with passing counterfeit money and as being a prostitute, and detained her on the platform, it was held that the agent was engaged in the company's employment in endeavoring to protect and recover its property, that the tort was not his independent wrong, and that the company was liable.[247]

The question of what is within and what is without the course of employment, what is and what is not an independent tort of the servant, it seems, cannot be referred to any very definite rule. Each case rests on its own facts.[248] Whether the given conduct is within the course of employment is a question of fact ordinarily, for the jury;[249] but where there is no evidence that the given conduct was

[246] Mulligan v. New York & R. B. Ry. Co., 129 N. Y. 506, 29 N. E. 952; Davis v. Houghtelin, 33 Neb. 582, 50 N. W. 765; Allen v. Railroad Co., L. R. 6 Q. B. 65; Stevens v. Hinshelwood, 55 J. P. 341; Edwards v. Railroad Co., L. R. 5 C. P. 445.

[247] Palmeri v. Manhattan Ry. Co., 133 N. Y. 261, 30 N. E. 1001; Fortune v. Trainor (Sup.) 19 N. Y. Supp. 598 (assault and arrest); Smith v. Webster, 23 Mich. 298; Oakland City Agricultural & Industrial Soc. v. Bingham (Ind. App.) 31 N. E. 383; Barden v. Felch, 109 Mass. 154; Cameron v. Pacific Exp. Co., 48 Mo. App. 99; Kolzem v. Broadway & S. Ave. R. Co. (Com. Pl. N. Y.) 20 N. Y. Supp. 700; Duggan v. Baltimore & O. Ry., 159 Pa. St. 248, 28 Atl. 182, 186; Staples v. Schmid (R. I.) 26 Atl. 193.

[248] Smith v. Spitz, 156 Mass. 319, 31 N. E. 5; Haehl v. Wabash R. Co., 119 Mo. 325, 24 S. W. 737; Guinney v. Hand, 153 Pa. St. 404, 26 Atl. 20; Brunner v. Telegraph Co., 151 Pa. St. 447, 25 Atl. 29; Chicago v. Bixby, 84 Ill. 82.

[249] Lang v. New York, L. E. & W. R. Co. (Sup.) 30 N. Y. Supp. 137. Where railroad employés are charged, in addition to other duties, with seeing that refuse materials are properly disposed of, it cannot be said, as a matter of law, that such servants are not acting within the scope of their employment when engaged in placing old timbers, formerly used by the railroad, on a highway, the fee to which land is in the company. Tinker v. New York, O. & W. R. Co., 71 Hun, 431. Distinguishing Mulligan v. New York & R. B. Ry. Co., 129 N. Y. 506, 29 N. E. 952; Pittsburgh, F. W. & C. R. Co. v. Maurer, 21 Ohio St. 421; Dells v. Stollenwerk, 78 Wis. 339, 47 N. W. 431. Quoting Philadelphia & R. R. Co. v. Derby, 14 How. 482. Reviewing Quinn v. Power, 87 N. Y. 537; Dwinelle v. New York Cent. & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319; Johnson v. Armour, 18 Fed. 490; American Ins. Co. v. Crawford, 89 Ill. 62; Poulton v. Railway Co., L. R. 2 Q. B. 534; Pittsburgh, C., C. & St. L. Ry. Co. v. Henderson (Ind. App.) 36 N. E. 377; Goff v. Rail-

in course of employment, the court may take the case from the jury.[250]

SAME—MASTER'S LIABILITY TO SERVANT.

92. The master is liable in tort to his servant for any breach of duty to his servant resulting in damage not exclusively concerning payment of wages or other consideration involved in the relationship.

A master owes to the servant the same duty to respect his person, freedom of locomotion, reputation, property, and the like which he owes third persons, from the violation of which an action ex delicto arises. But he owes to the servant certain duties also peculiar to the relationship. If he fail to pay the consideration for which the service is rendered, the action is ex contractu. Between these two extremes, there are duties owed by the master to the servant for the violation of which the law inclines to determine the remedy according to the law of torts, not contracts. Most of the questions involved in this class of cases concern negligence. Accordingly, their consideration is postponed until that specific wrong is treated.

SAME—SERVANT'S LIABILITY TO SERVANT.

93. One servant may sue another for torts committed in the course of the common employment.

It was said in Southcote v. Stanley:[251] "Neither can one servant maintain an action against another for negligence whilst engaged in their common employment." In Massachusetts, it was distinctly

way Co., 30 L. J. Q. B. 148; Baylis v. Schwalbach Cycle Co. (City Ct. Brook.) 14 N. Y. Supp. 933; Wise v. Covington & C. St. Ry. Co., 91 Ky. 537, 16 S. W. 351.

[250] Towanda Coal Co. v. Heeman, 86 Pa. 418; Bank of New South Wales v. Owston, 4 App. Cas. 270.

[251] 1 Hurl. & N. 247 250 (1856). As to this case, see Watling v. Oastler, L. R. 6 Exch. 73; Tebbutt v. Bristol & Exeter Ry. Co., L. R. 6 Q. B. 73; Francis v. Cockrell, L. R. 5 Q. B. 184; Holmes v. Northeastern Ry. Co., L. R. 4 Exch. 254; Williams v. Groncott, 2 Bos. & P. (N. R.) 419; Submarine Tel. Co. v. Dixson, 3 Bos. & P. (N. R.) 572; White v. Philips, 15 C. B. (N. S.) 245.

held, in Albro v. Jaquith,[252] that one servant is not liable in action by another servant in the employment of the same master for damage occasioned by the negligence of the first in such employment. The court proceeded on the reasoning of Lord Abinger in the case of Winterbottom v. Wright,[253] and on the ground that there was no misfeasance, but merely nonfeasance, for which no action lay.[254] The doctrine of these cases has, however, been generally rejected.[255] It has been aptly pronounced "a judicial aberration." In Osborne v. Morgan,[256] it was distinctly overruled by the supreme court of Massachusetts. The true theory seems to be that the right of action does not rest in contract, but sounds in tort. It is based on a duty owed by members of a community to each other. In the little community of the employés of the same employer upon the same general undertaking, the common duties of man to man in society generally should continue to exist, and, as a consequence, liability for breaches of them.[257]

[252] 4 Gray, 99 (1855).

[253] 10 Mees. & W. 109, 115.

[254] How enduring are fallacies based on reasoning upon verbal distinctions will appear on the survival of the rule as to nonfeasance in Burns v. Pethcal, 75 Hun, 437, 27 N. Y. Supp. 499.

[255] Wiggett v. Fox, 11 Exch. 832; Degg v. Midland Ry., 1 Hurl. & N. 773; Swainson v. Railway Co., 3 Exch. Div. 341; Haddow v. Roxburgh, 2 Ct. Sess. Cas. (3d Ser.) 748; Rogers v. Overton, 87 Ind. 410; Hinds v. Harbou, 58 Ind. 121; Hinds v. Overacker, 66 Ind. 547; Griffiths v. Wolfram, 22 Minn. 185; Daves v. Southern Pac. Co., 98 Cal. 19, 32 Pac. 708; Hare v. McIntire, 82 Me. 240.

[256] 130 Mass. 102.

[257] Breen v. Field, 157 Mass. 277, 31 N. E. 1075; Hinds v. Harbou, 58 Ind. 121; 2 Thomp. Neg. 1062. Suit may be brought by a servant against the master's wife as fellow servant for injuries sustained in using, at the wife's bidding, a ladder known to the wife to be unsafe. Steinhauser v. Spraul, 114 Mo. 551, 21 S. W. 515, 859. Where the section crew of a railroad company side-track a hand car with which they are working to clear the main track for an approaching train, and the section foreman, who has unlocked the switch, negligently fails to close it, and the train enters on the side track, and kills a section hand, the section foreman is personally liable in damages for his death. Daves v. Southern Pac. Co., 98 Cal. 19, 32 Pac. 708.

SAME—LIABILITY OF SERVANT TO MASTER.

94. The servant is liable to the master for conduct wrongful to the master.

95. The servant is liable to the master for breach of duties peculiar to the relationship, consisting in failure—

(a) To be loyal to his trust.

(b) To obey instructions.

(c) To exercise due care.

(d) To account for money and property.

96. Where the master has been compelled to pay out money for the wrongful and forbidden conduct of the servant, he may by legal process compel reimbursement from the latter.

The liability of the servant to the master, apart from the liability peculiar to the relationship, is that of the servant to any third person.

The servant owes to the master the duty of being loyal to his trust.[259] Thus, in a contract for service there is an implied agreement on the part of the servant that he will do nothing injurious to his employer's interest, and that he will be guilty of no criminal misconduct. This duty is violated if the servant seduce the daughter of his employer.[260] Similarly an agent is liable for conversion.[261] The agent is bound to obey his instructions. If he fails so to do, he is liable for the injury which may ensue, unless the act be illegal or immoral.[262] Thus, if an agent who was instructed to collect a claim, in a certain prescribed way, ignores his instructions, tries other means, and the claim is lost, he must make such loss good in dam-

[259] This division of the servant's duties is taken from Mech. Ag. bk. 4. The remaining duties of the servant or agent, viz. to account for money and property, and to give notes, would not give rise to an action on the tort.

[260] Bixby v. Parsons, 49 Conn. 483.

[261] Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254.

[262] Brown v. Howard, 14 Johns. (N. Y.) 119; Davis v. Barger, 57 Ind. 54.

age.[263] The degree of skill which the servant is bound to exercise will be subsequently considered. The servant is liable to the master for his negligence, for example, in making loans.[264] So, if an agent to collect rent and rent premises fails to exercise reasonable care in so doing, he is liable.[265] Such agent may be liable for failure to effect insurance.[266] So recovery may be had against an agent for failure to collect, where it is shown that the debtor was solvent and that with proper exertion the claim could have been collected.[267] The agent is bound to account to the principal for the money and property of the latter intrusted to him.[268] And a proceeding against an agent for an accounting in equity may be joined with a charge of conversion of the principal's property.[269]

The servant is liable to the master for all damages which the master has been compelled to pay because of the wrongful act of the servant to a third person.[270] Thus, if a conductor maltreat and damage a female passenger, and the railroad company is compelled to pay for such damage, it can recover from the conductor the amount paid, including the costs and counsel fees involved in the proceedings.[271] Where two or more servants acting independently of each other are all at the same time guilty of a wrong which con-

[263] Butts v. Phelps, 79 Mo. 302; Leveson v. Kirke, Rolle, Abr. 105; Cro. Jac. 265.

[264] Inhabitants of Westfield v. Mayo, 122 Mass. 100; Kennedy v. McClain, 146 Pa. St. 63, 23 Atl. 322; Stewart v. Parnell, 147 Pa. St. 523, 23 Atl. 838; Brooklyn v. Railway Co., 47 N. Y. 475; Friesenhahn v. Bushnell, 47 Minn. 443, 50 N. W. 597.

[265] Kirkeys v. Crandall, 90 Tenn. 532, 18 S. W. 246; Fahy v. Fargo, 61 Hun, 628, 17 N. Y. Supp. 604; Id., 63 Hun, 625, 17 N. Y. Supp. 344.

[266] Storer v. Eaton, 50 Me. 219; Shoenfeld v. Fleisher, 73 Ill. 404.

[267] Wiley v. Logan, 95 N. C. 358; Buell v. Chapin, 99 Mass. 594; Reed v. Northrup, 50 Mich. 442, 15 N. W. 543.

[268] Mechem, Ag. §§ 522–537.

[269] Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254.

[270] Where a natural gas company pays judgments obtained against it for damages caused by an explosion resulting from leakage of its gas main, it may recover the amount thereof from a traction company which excavated about the main and filled the excavation in such a negligent manner as to allow the main to settle and cause the leakage. Philadelphia Co. v. Central Traction Co., 165 Pa. St. 456, 30 Atl. 934.

[271] Grand Trunk Ry. Co. v. Latham, 63 Me. 177.

tributes to the injury of the master, all, any, or either of them are liable to the master to the full extent. They are joint tort feasors.[272] The servant, however, is not liable if the principal is also negligent.[273] The master may use damage he may wrongfully have suffered because of his servant's conduct as a set-off to a claim held by the servant against him.[274]

97. Whether an agent is liable to the principal for the torts of a subagent depends principally on the nature of the contract. The tendency is to enlarge, not to narrow, the liability.

Where the agent or servant has employed a subagent or underservant, there is much confusion in the cases as to whether such intermediate contractor is liable for the wrong of his employés, or whether the responsibility is limited to the wrong-doing subagent and underservant and to the original master or principal.[275] Justice Blatchford, in Exchange Nat. Bank v. Third Nat. Bank,[276] has stated with clearness the true principle of the law on this point: "The distinction recurs between the rule of merely personal representative agency and the responsibility imposed by the law of commercial contracts. This solves the difficulty and reconciles the apparent conflict of decision in many cases. The nature of the contract is the test. If the contract be only for the immediate services of the agent and for his faithful conduct as representing his principal, the responsibility ceases with the limits of the personal services undertaken. But where the contract looks mainly to the thing to be done, and the undertaking is for the due use of all proper means to performance, the responsibility extends to all necessary and proper means to accomplish the object, by whomsoever used." It was accordingly held in this case that where a Pittsburg bank sent a draft to a New York bank, and the latter to a Newark bank

[272] Zulkee v. Wing, 20 Wis. 408. But see, as to independent public officer, White v. Inhabitants of Phillipston, 10 Metc. (Mass.) 108.

[273] Sioux City & P. Ry. Co. v. Walker, 49 Iowa, 273.

[274] Challiss v. Wylie, 35 Kan. 506, 11 Pac. 438.

[275] St. Nicholas Bank v. State Nat. Bank, 33 Cent. Law J. 266.

[276] 112 U. S. 276–290, 5 Sup. Ct. 141.

for collection, the New York bank was held liable to the Pittsburg bank for the carelessness of the Newark bank.

While there is much uncertainty in the litigated cases,[277] the general principle seems to be that a bank receiving commercial paper for collection is, in the absence of a special agreement, liable for loss occasioned by the wrong of a correspondent or agent selected by it to effect the collection.[278] A distinct line of cases, however, holds that where the nature of the business in which an agent is engaged requires for the purpose of a reasonable execution the employment of a subagent, the principal agent is not responsible for the default of the subagent, provided a proper subagent is selected.[279] Where a servant hires laborers for his master, he is not responsible for their negligence. Either the laborer who does the negligent act or the master, or both, may be sued, but not the servant hiring.[280] But a clerk who directs them, or a contractor who employs them, may be liable.[281]

[277] The cases are collected in Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, 5 Sup. Ct. 141. See, also, Montgomery Co. Bank v. Albany City Bank, 7 N. Y. 459–464; Marine Bank v. Rushmore, 28 Ill. 463; Ide v. Bremer Co. Bank, 73 Iowa, 58, 34 N. W. 749, distinguishing Guelich v. National State Bank, 56 Iowa, 434, 9 N. W. 328; Gheen v. Johnson, 90 Pa. St. 38; Naser v. First Nat. Bank, 116 N. Y. 492–498, 22 N. E. 1077; Corn Exch. Bank v. Farmers' Nat. Bank, 118 N. Y. 443, 23 N. E. 923; Wheatland v. Pryor, 133 N. Y. 97, 30 N. E. 652.

[278] National Exch. Bank v. Beal, 50 Fed. 355; Id., 5 C. C. A. 304, 55 Fed. 894; British & A. Mortg. Co. v. Tibballs, 63 Iowa, 468, 19 N. W. 319; Warren Bank v. Suffolk Bank, 10 Cush. 582. A mercantile agency that received a draft for collection is responsible for the failure of its agent to pay over the proceeds in the absence of any restriction on its liability. Bradstreet v. Everson, 72 Pa. St. 124; Morgan v. Tener, 83 Pa. St. 305; Siner v. Stearne, 155 Pa. St. 62, 25 Atl. 826.

[279] Fabens v. Bank, 23 Pick. 330; Dorchester & M. Bank v. New England Bank, 1 Cush. 177; Darling v. Stanwood, 14 Allen, 504; Barnard v. Coffin, 141 Mass. 37, 6 N. E. 364; Warren Bank v. Suffolk Bank, 10 Cush. 582; Dun v. City Nat. Bank of Birmingham, 7 C. C. A. 152, 58 Fed. 174.

[280] Stone v. Cartwright, 6 Term R. 411.

[281] Wilson v. Peto, 6 Moore, 47.

SAME—LIABILITY OF SERVANT TO THIRD PERSONS.

96. A servant is liable to third persons not in the employ of his master, for all violations of duty by him, whether arising from misfeasance, malfeasance, and, it would appear, from nonfeasance, and ordinarily whether authorized or unauthorized by his master. Actually undertaking to do what failure to do would not make the servant liable to such persons, may create a duty on his part to perform that work properly.

Liability for Misfeasance and Malfeasance.

The servant is clearly liable for misfeasance and for malfeasance. If his conduct is tortious, ordinarily the authority of his master is no defense.[282] "For the warrant of no man, not even of the king, can excuse the doing of an illegal act; for although the commanders are trespassers, so also are the persons who did the act."[283]

But where the mental attitude is of the essence of the wrong, ignorance on the part of the servant of the injury he was committing may exonerate him. Thus, in cases of fraud, if he make a false representation, not knowing it to be untrue, but because his master directed him, he will not be liable.[284] But if he make the representation knowing it to be false and fraudulent, he is liable in damages.[285] One who wrongfully assumes to sell land as the agent for the owner is liable in damages to the person whom he deceives, for any improvements made.[286]

[282] Perkins v. Smith, 1 Wils. 328; Stephens v. Elwall, 4 Maule & S. 259; Farebrother v. Ansley, 1 Camp. 343; Morse v. Slue, 1 Vent. 238; Nussbaum v. Hellbron, 63 Ga. 312; Knight v. Luce, 116 Mass. 586; McPheters v. Page, 83 Mo. 234, 22 Atl. 101; Kimball v. Billings, 55 Me. 147; Perminter v. Kelly, 18 Ala. 716; Josselyn v. McAllister, 22 Mich. 299; Wright v. Eaton, 7 Wis. 495; Thorp v. Burling, 11 Johns. 285; Burnap v. Marsh, 13 Ill. 535; City of Duluth v. Mallett, 43 Minn. 204, 45 N. W. 154; Cullen v. Trustees, 4 Macq. 424–432; Mechem, Ag. § 571, collecting cases.

[283] Sands v. Child, 3 Lev. 352, 4 Mod. 76.

[284] Ante, p. 272, "Torts Consented to by Master."

[285] Clark v. Lovering, 37 Minn. 120, 33 N. W. 776; Story, Ag. § 310.

[286] Skaarnas v. Flanegan, 32 Minn. 107, 19 N. W. 729. And see Clark v. Lovering, 37 Minn. 120, 33 N. W. 776.

As to liability of the servant for conversion, it is quite clear that if the owner of personal property consent to its taking by the servant, the latter is not liable. If, however, the master converts it,[287] and the agent or servant who, acting solely for his principal or master, and by him directed, and without knowing of any wrong, or being guilty of gross negligence in not knowing of it, disposes of, or assists the master in disposing of, the property, which the latter had no right to dispose of, he is not thereby rendered liable for the conversion.[288]

Liability for Nonfeasance.

According to Judge Story,[289] "The agent is also personally liable to third persons for his own misfeasances and positive wrongs. But he is not, in general (for there are exceptions), liable to third persons for his own nonfeasances or omissions of duty in course of his employment. His liability in these latter cases is solely to his principal, there being no privity between him and such third persons, but the privity exists only between him and his principal." [290] The rule comes from the famous saying of Lord Holt, in Lane v. Sir R. Colton: [291] "A servant or deputy cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not as a servant or deputy, but as a wrongdoer." Blackstone furnishes a favorite illustration: "If a servant * * * by his negligence does any damage to a stranger, the master shall answer for his neglect. If a smith's servant lames a horse while he is shoeing him, an action lies against

[287] Silver v. Martin, 59 N. H. 580.

[288] Leuthold v. Fairchild, 35 Minn. 99–111, 27 N. W. 503, and 28 N. W. 218. And see Porter v. Thomas, 23 Ga. 467.

[289] Story, Ag. c. 12, § 308.

[290] To the same effect, see Macdonnell, Mast. & S. 254; 2 Thomp. Neg. 1057; Harriman v. Stowe, 57 Mo. 93; Lottman v. Barnett, 62 Mo. 159; Henshaw v. Noble, 7 Ohio St. 226. And see Reid v. Humber, 49 Ga. 207; Guernsey v. Cook, 117 Mass. 548; Brown Paper Co. v. Dean, 123 Mass. 267; Dayton v. Pease, 4 Ohio St. 80; Henshaw v. Noble, 7 Ohio St. 226. But see Davis v. Vernon, 6 Q. B. 443; Cranch v. White, Bing. N. C. 414.

[291] 12 Mod. 796, 488. Et vide Woodward, J., in New York & W. P. Tel. Co. v. Dryburg, 35 Pa. St. 298–303. Et vide Ring. Torts, 50.

the master [illegible] the servant.[illegible] But the rule as there laid down has [illegible]

The [illegible] of the distinction between the misfeasance [illegible] an exceedingly [illegible] principle of liability. It [illegible] in the subsequent reasoning that [illegible] engaged in a solemn

[illegible] Cooley's [illegible] This, however, is doubted. Note to [illegible] Ed. As to the general rule of the liability of the servant in cases [illegible] the principle where the action sounds in tort, see Goddard v. Railway Co., [illegible] Mass. 160; Brokaw v. New Jersey R. & Transp. Co., [illegible] N. J. Law, [illegible]; [illegible] v. Railroad Co., [illegible] Cal. [illegible]; [illegible] v. Railway Co., 5 Exch. 341. And see Hay v. [illegible] Co., 2 Barb. [illegible]

[illegible] Mr. Mechem comments [illegible] Mechem, Ag. § [illegible] as follows: "Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for the injuries sustained by them, because he did not undertake the performance of some duty which he owed to his principal, and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent, the idea of not doing,—as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do, under the circumstances; does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing; but it is not the not doing of that which is imposed upon the agent merely by virtue of his relations, but of that which is imposed upon him by law, as a responsible individual, in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation." Mr. Wharton (Whart. Neg. § 535) insists that the distinction, in this class of cases, between nonfeasance and misfeasance, can no longer be sustained; that the true doctrine is that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such things, though the hurt is remotely due to the agent's negligence,—the reason being that the causal relation between the agent and the person hurt is broken by the interposition of the principal as a distinct center of legal responsibilities and duties, but that wherever there is no such interruption of casual connection, and the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury, then such stranger can recover from the agent damages for the injury. And see Busw. Pers. Inj. 398.

game of logomachy. Thus, in Bell v. Josselyn [294] it was said that failure of "defendant to examine the state of the pipes in a house before causing the water to be let on would be a nonfeasance; but if he had not caused water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts were, the nonfeasance caused the act done to be a misfeasance. The plaintiff suffered from the act done, which was no less a misfeasance by the reason of its being preceded by a nonfeasance."

The futility of such reasoning on the word "nonfeasance" appears fully from the lack of definitiveness of the meaning to be given the term.[295] This solemn legal jugglery with words will probably disappear "if the nature of the duty incumbent upon the servant be considered." [296] If the servant owe a duty to third persons, derived from instrumentality likely to do harm or otherwise, and he violates that duty, he is responsible. His responsibility rests on his wrongdoing, not on the positive or negative character of his conduct. A wrongful omission is as actionable as a wrongful commission. A driver who injures a third person by his negligence is liable.[297] So an engineer who negligently handles fire is liable to third persons for the damage done.[298] Selectmen of a town who ordered the building of a public sewer in one of the streets were liable for injuries occasioned to a person employed by them to lay a pipe in the bottom of a trench, by reason of their failure to provide a proper support for the sides of the trench. The fact that the town was also liable did not relieve them.[299] Agents who have possession, charge, and

[294] 3 Gray, 309.

[295] Cf. Blakeston's Case, 1 W. Jones, 82.

[296] Whittaker's Smith, Neg. p. 200, § 7.

[297] Phelps v. Wait, 30 N. Y. 78; Hewett v. Swift, 3 Allen, 420; Hutchinson v. Railway Co., 5 Exch. 341.

[298] Gilson v. Collins, 66 Ill. 136. And see Bacheller v. Pinkham, 68 Me. 253.

[299] Breen v. Field, 157 Mass. 277, 31 N. E. 1075; Kranz v. Long Island Ry. Co., 123 N. Y. 1, 25 N. E. 206; Eaglesfield v. Marquis of Londonderry, 4 Ch. Div. 693.

management of a wharf,[300] or of a building[301] which they rent to tenants, are liable to third persons for injuries done because of their omission to correct the old, worn, insecure, or dangerous condition of the premises. So where the privilege was given to the master to haul wood through another's land, and the master directed the servant to close the fence, and the servant passed through without closing it, and hogs escaped and were killed, the servant was held liable.[302]

But there are circumstances which impose no duty on defendant. If the servant do nothing, he is not liable. Thus, if the master has agreed with a third party to perform a certain duty, and the servant omits to perform that duty, the third party complains of the breach of contract by the master to which the servant is no party, and there is no duty to third persons for the servant to perform. Many cases cited in support of the distinction arise where privity existed between the master and the third person, but not between the servant and the third person. Thus Story cites cases of bailment and delivery of goods. So, for example, if a master directs his servant to perform a duty (not involving a contract) imposed on the master, but not on the servant (as, to repair a dangerous walk), and the servant merely forbear, he is not ordinarily liable to third persons for consequent harm. But, as has been seen, under some circumstances the duty to repair might become a personal one to him, with respect to which mere omission (or nonfeasance) will attach liability. But when the servant actually undertakes and enters upon the execution of a particular work, he is liable for any negligence in the manner of executing it. He cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffered injury by reason of his having so left it without proper safeguards.[303] Thus, even in cases of bailment,—for example where a mare was given

[300] Baird v. Shipman, 33 Ill. App. 503, affirmed 132 Ill. 16, 23 N. E. 384. But an agent in charge of a building, who fails to make necessary repairs, is not liable to a tenant injured by such failure. Dean v. Brock (Ind. App.) 38 N. E. 829.

[301] Campbell v. Portland Sugar Co., 62 Me. 552.

[302] Horner v. Lawrence, 37 N. J. Law, 46.

[303] Osborne v. Morgan, 130 Mass. 102.

into a party's keeping to be broken, and was killed by the negligence of such party's servant or agent,—the agent, as well as the principal, was liable.[304]

SAME—PARTNERS.

99. In order that responsibility be attached to a partner with respect to a tort, it is necessary either—

(a) That he should have authorized it or joined in its commission in the first instance;

(b) That he should have made it his own by adoption; or

(c) That it should have been committed by his copartner in the course and as a part of his employment.[305]

Where a partner authorizes the commission of a tort, he has done it himself, and is of course liable. So, where he joins in its commission, his liability is rather that of a joint tort feasor pure and simple, because of participation, than that of a partner because of relationship.[306] Indeed, the partnership relation would have no connection as cause of the wrongdoing. Retention of benefit derived from a partner's unauthorized tort will attach liability to all partners.[307] The only questions involving difficulty as to the liability of partners, therefore, are those where the liability arises from the relationship. It has been recognized generally by text writers that the law of partnership is a branch of the law of agency. Consequently it is said that a partner, like a principal, is not liable for the willful acts of his agent, if not done in course of his employment and as part of his business; and this is true not only of assault, battery, libel, and the like, but also of fraud.[308]

[304] Miller v. Staples, 3 Colo. App. 93, 32 Pac. 81. Compare 3 Chit. C. & N. 214; Lane v. Cotton, 12 Mod. 796, 488.

[305] Lindl. Partn. § 299.

[306] Graham v. Meyer, 4 Blatchf. 129, Fed. Cas. No. 5,673; 24 Myer, Fed. Dec. 131.

[307] Ante, p. 209, "Joint Tort Feasors"; U. S. v. Baxter, 46 Fed. 350; Bienenstok v. Ammidown (Super. N. Y.) 29 N. Y. Supp. 593.

[308] Lindl. Partn. § 299; Cooley, Torts, pp. 535, 536; Ewell's Evans on Agency, p. 180; Stockwell v. U. S., 3 Cliff. 284, Fed. Cas. No. 13,466.

As to what is so within and a part of the business as to attach liability to a copartner, the cases may not have gone as far towards holding to a mutual responsibility as in the case of master and servant. It has, however, been held that if one of several partners drive a coach negligently, a person injured thereby may sue the driver in trespass, or all the partners in case.[309] Partners are jointly liable for statements made by one of them in derogation of a competitor, in aid of their business,[310] for misrepresentation as to lands exchanged,[311] for abuse of trust funds,[312] for death by the wrongful act of a copartner,[313] and for an illegal agreement to pay rebate.[314] Similarly, where one partner acts for the firm in demanding illegal charges and detaining the goods until they are paid, every member of the firm is liable in damages.[315]

As to what is not within the course, and not a part, of partnership business, it would appear that a partner is not liable for the willful act of his partner, not because it is willful, but because it is outside of the partnership business.[316] Thus, one partner is not liable for malicious prosecution instituted by his copartner for the larceny of partnership property, unless he advised or participated in it, and then only in his individual capacity.[317] While, as has been shown, the partner may be liable for the libelous words of a copartner, still the copartner may, in connection with the business, publish a libel for which the only responsibility is his individually. Thus, where a furniture company placarded

[309] Moreton v. Hardern, 4 Barn. & C. 223; Ashworth v. Stanwix, 30 L. J. Q. B. 183. So, where two attorneys are in partnership, both are liable for the unsuccessful conduct of client's business. Warner v. Iriswold, 8 Wend. 665; Poole v. Gist, 4 McCord, 259.

[310] Haney Manuf'g Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073.

[311] Stanhope v. Swafford, 80 Iowa, 45, 45 N. W. 403. And see Gooding v. Underwood, 89 Mich. 187, 50 N. W. 818.

[312] Appeal of Rau, 144 Pa. St. 304, 22 Atl. 740. Cf. Hawley v. Tesch, 88 Wis. 213, 59 N. W. 670.

[313] Sagers v. Nuckolls, 3 Colo. App. 95, 32 Pac. 187.

[314] McEwen v. Shannon, 64 Vt. 583, 25 Atl. 661.

[315] Lockwood v. Bartlett, 130 N. Y. 340, 29 N. E. 257.

[316] 1 Bates, Partn. § 467.

[317] Marks v. Hastings, 101 Ala. 165, 13 South. 297; Farrell v. Freidlander, 63 Hun, 254, 18 N. Y. Supp. 215.

furniture: "Taken back from Doctor W., as he could not pay for it. For sale at a bargain. Moral: Beware of dead beats!"—this libel was held to be the act of the individual. It had nothing to do with the partnership. The partners other than the one actually publishing it were not liable, unless in some way they authorized the publication.[318] A copartner is, of course, not liable for the conversion by another partner to his own use of a third person's property.[319] In case several persons are sued as partners for a tort, and no partnership is established, the verdict may be against one only, if the tort is established against him.[320] Even for torts, where liability is attached to partners because of wrong done in course of partnership business, the injured party muy sue all the partners, or any one or more of them, at his election.[321]

[318] Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387; Blyth v. Fladgate (1891) 1 Ch. 337. But see Bienenstok v. Ammidown, supra.

[319] Stokes v. Burney, 3 Tex. Civ. App. 219, 22 S. W. 126. Liability in replevin. Tanco v. Booth (Com. Pl. N. Y.) 15 N. Y. Supp. 110.

[320] Austin v. Appling, 88 Ga. 54, 13 S. E. 955. And see Fay v. Davidson, 13 Minn. 523 (Gil. 491).

[321] Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9, 31 N. E. 412, collecting cases at page 16, 142 Ill., and page 412, 31 N. E.; Walker v. Trust Co., 72 Hun, 334, 25 N. Y. Supp. 432. Cf. Whittaker v. Collins, 34 Minn. 209, 25 N. W. 632.

By far the ablest and clearest discussion of the liability of a partner, general and special, for the torts of a copartner is to be found in chapter 9 of Principles of Partnership, by James Parsons (1889).

CHAPTER IV.

DISCHARGE AND LIMITATION OF LIABILITY FOR TORTS

IN GENERAL.

100. Liability for torts may be discharged or limited either—

(a) By voluntary act of the party; or

(b) By operation of law.

The distinction between discharge by act of parties and discharge by operation of law is open to criticism, inasmuch as the law only operates in conjunction with some act of the parties. Nevertheless the distinction is practically useful.

The discharge of torts may conveniently be divided, for consideration, into discharge of ordinary torts as distinguished from joint torts. Many considerations are common to both. Those peculiar to joint torts will be separately considered.

DISCHARGE OR LIMITATION BY VOLUNTARY ACT OF PARTY.

101. Liability for torts is discharged or limited by voluntary act of the party—

(a) By waiver; or

(b) By agreement.

SAME—BY WAIVER.

102. A tort may be discharged by waiver operating through consent or estoppel.

Much of the uncertainty and confusion which arises in connection with the doctrine of waiver might, it would seem, be eliminated by bearing in mind, in each case, that waiver may be based either upon contract or estoppel. If it is based upon contract, the questions are as to parties, construction, and consideration. These will be subsequently discussed. If it is based upon estoppel, the questions are of fact, especially with reference to the altered position of the parties consequent upon the conduct claimed to operate by way of estoppel. Knowledge of the existence of a right, and the intention to relinquish it, must concur, to create an estoppel by waiver.[1] Acceptance of a benefit, with knowledge of wrong done, may discharge

[1] Hamilton v. Home Fire Ins. Co., 42 Neb. 883, 61 N. W. 93. Generally, as to waiver and estoppel, see Matlock v. Reppy, 47 Ark. 148, 14 S. W. 546. In Ellis v. Newbrough (N. M.) 27 Pac. 490–494, Judge Freeman has discovered a new species of estoppel. The plaintiff brought an action of trespass on the case, to recover for labor expended, and damage because of humiliation, against defendants, who organized a community called "Faithists," to be conducted on the principle contained in the new bible Oahspe. "O, glorious Land of Shalam! O, beautiful Church of Tae! When the appellants, the appellee, Ada Sweet, and Nellie Jones, aforesaid, formed their inner circle, and, like the morning stars, sang together, it matters not whether they kept step to the martial strains of 'Dixie,' or declined their voices to the softer melody of 'Little Annie Rooney,' the appellee became forever estopped from setting up a claim for work and labor done; nor can he be heard to say that 'he has suffered great anguish of mind in consequence of the dishonor and humiliation brought on himself and children by reason of his connection with said defendant's community.' His joining in the exercises aforesaid constitutes a clear case of estoppel in Tae." The familiar objection to the division of Blackstone based upon the act of the party and the operation of law, that there is no act of the party which has effect without the operation of the law, and that the operation of the law does not exist save upon the acts of the party, would seem to be more verbal than real. As applied to torts, a release of a cause of action may be fairly said to be the voluntary act of the party. On the other hand, the discharge of a right of action sounding in tort by death may, with substantial propriety, be called discharged by operation of law.

a tort by waiving it. Thus, if a person who has been induced by fraud and deceit to enter into an executory contract for the purchase of personal property, to be delivered and paid for in the future, discover the fraud while the contract is still executory, and, notwithstanding, afterwards accepts the property, under the contract, and uses it, he cannot maintain an action for damage for the fraud, or recoup them in an action for the purchase price of the property.[2] Delay in proceeding to secure redress for the violation of rights may bar the action, even under circumstances which would not put into force the statutory limitations. Thus, with respect to proceedings to lay out a highway, public policy requires that such local business arrangements be closed up speedily.[3] Accordingly, where persons claim to have discovered fraud in the establishment of a highway, they waive the tort by delay.[4] It is, however, by no means established that such delay would have the effect of barring the right to recover damages. It seems quite clear that mere silence in the presence of a willful trespass permitted on one's property waives nothing, and consents to nothing.[5]

As has already been considered, there are many cases in which the person against whom the wrong has been committed may waive the tort and bring assumpsit.[6] For example, wherever a person

[2] Thompson v. Libby, 36 Minn. 287, 31 N. W. 52. And see Brewer v. Sparrow, 7 Barn. & C. 310; Lythgoe v. Vermon, 5 Hurl. & N. 180, 29 Law J. Exch. 164. A landlord does not waive conversion of timber by tenant, for timber wrongfully cut on the demised premises, by acceptance of rent for a period subsequent to such conversion. Brooks v. Rogers, 101 Ala. 111, 13 South. 386. A tort in taking property is waived by the owner, if, with knowledge of the facts, he accepts a receipt from the wrongdoer, and afterwards claims credit for the amount thereof. Singer Manuf'g Co. v. Greenleaf, 100 Ala. 272, 14 South. 109. In an action against a carrier for personal injuries received by plaintiff while riding on a free pass, plaintiff is estopped to assert that the pass was void, being issued to him as a public officer, in violation of the law. Muldoon v. Seattle City Ry. Co. (Wash.) 38 Pac. 995.

[3] Wilder v. Hubbell, 43 Mich. 487, 5 N. W. 673. And see Evans v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.) 28 S. W. 903; Mayor, etc., of City of Nashville v. Sutherland (Tenn.) 20 S. W. 228.

[4] Limming v. Barnett, 134 Ind. 332, 33 N. E. 1098, distinguishing Overton v. Rogers, 99 Ind. 595.

[5] Leber v. Minneapolis & N. W. Ry. Co., 29 Minn. 256, 13 N. W. 31.

[6] "Waiver of Tort, and Suit in Assumpsit," by Mr. Keener, in 6 Harv. Law

commits a wrong against the estate of another, with the intention of benefiting his own estate, the law will, at the election of the party injured, imply a contract on the part of the wrongdoer to pay the party injured the full value of all benefits resulting to such wrongdoer; and, in such case, the injured party may elect to sue upon the implied contract for the value of benefits received by the wrongdoer.[7] He may, however, have both an action of assumpsit and of tort in the same transaction. Thus, where one loans money on the faith of another's representation that he has property, and, the borrower failing to repay the money when due, the lender sues him for it in assumpsit, and recovers judgment, which remains unsatisfied, and afterwards sues in case for deceit on account of the representation, alleging it to have been false, the borrower cannot plead in bar the judgment in assumpsit.[8] Probably the true principle by which to determine discharge by waiver of tort in such cases is to refer them to estoppel by judgment.[9]

Rev. 223–268, and chapter 3, Keener, Quasi Cont. And see Township of Buckeye v. Clark, 90 Mich. 432, 51 N. W. 528; ante, c. 1.

[7] Bac. Abr. tit. "Assumpsit," 2; Clarence v. Marshall, 2 Cromp. & M. 495; Phillips v. Humfray, 24 Ch. Div. 439 (462); Lightly v. Clouston, 1 Taunt. 112; Shaw v. Coffin, 58 Me. 254; Staat v. Evans, 35 Ill. 455; Pearsoll v. Chapin, 44 Pa. St. 9; Jones v. Gregg, 17 Ind. 84; Cooper v. Berry, 21 Ga. 526; Goodenow v. Snyder, 3 Iowa, 599; Elliott v. Jackson, 8 Wis. 649; Hunnestone v. Smith, 22 Conn. 19; Stewart v. Balderston, 10 Kan. 131 (142); Stevens v. Able, 15 Kan. 584; Read v. Jeffries, 16 Kan. 534; Tightmeyer v. Mongold, 20 Kan. 90; Famson v. Linsley, Id. 235; 2 Greenl. Ev. 120; Nolan v. Manton, 46 N. J. Law, 231; Westcott v. Sharp, 50 N. J. Law, 392, 13 Atl. 243; Loomis v. O'Neal, 73 Mich. 582, 41 N. W. 701.

[8] Whittier v. Collins, 15 R. I. 90, 23 Atl. 47. On the other hand, an action in trover may not bar an action on breach of contract in same transaction. Snow v. Alley, 156 Mass. 193, 30 N. E. 691. Cf. Union Pac. Ry. Co. v. Kelley (Colo. App.) 35 Pac. 923. Owners of land on which plaintiff cut logs, of which he sold part, are not, by filing a bill to restrain further cutting, for an accounting as to the logs already sold, and for the sale under order of court of the unsold logs, estopped to set up title to the latter logs in a replevin suit against them by plaintiff. Hogan v. Hogan (Mich.) 61 N. W. 73.

[9] Post, p. 321. Where a landlord elects to sue for the destruction of the leased property, he cannot recover rent therefor after its destruction. Wilcox v. Cate, 65 Vt. 478, 26 Atl. 1105. Where a father sues for the wages of his infant son, employed without his consent, he thereby ratifies the hiring, and waives the tort involved in the harboring of the son. Hopf v. United States Baking Co. (Super. Buff.) 27 N. Y. Supp. 217. See, also, Huggins v.

SAME—BY AGREEMENT.

103. Discharge or limitation of liability by agreement will be considered with reference to the time of making the agreement, whether—

(a) Before damage; or

(b) After damage.

SAME—BY AGREEMENT BEFORE DAMAGE.

104. While freedom of the right to contract is fully recognized by the courts, parties to a contract are generally, but not universally,

(a) Denied ability to so contract as—

(1) To escape liability in tort for negligence or fraud, with respect to a duty based on contract; or

(2) To determine in advance the amount of damage which may result from such subsequent tort, except, particularly, as to unrepeated telegrams.

(b) Allowed to limit liability by agreement in such cases—

(1) By stipulating in advance the value of the property which may be involved;

(2) By prescribing certain reasonable duties to be performed by the injured party in the conduct involved under the contract, and as conditions precedent to right to maintain action for damages done; and

(3) By defining the physical extent of the undertaking.

Watford, 38 S. C. 504, 17 S. E. 363. The statement of a landowner, at a hearing before the board of health, that he should claim no damages if the board put a stone drain under ground through his premises, does not estop him from claiming damages caused by a drain on the surface of his land. Driscoll v. City of Taunton, 160 Mass. 486, 36 N. E. 495; Anvil Min. Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. 876.

On the one hand, the law recognizes the absolute right of any person to make any lawful contract he may desire to make.[10] On the other hand, the courts reason that it is not interfering with freedom of contract to deny, for reasons of public policy, the ability to execute certain contracts limiting liability for torts.[11]

Thus it has been generally regarded as unwise to allow any one to contract against his own negligence. The recklessness of consequences which would result from giving effect to such a provision affords a cogent reason. Moreover, in very many classes of cases the party to the contract insisting on limitations would be in a po-

[10] "It must not be forgotten that you are not to extend arbitrarily these rules which say that a given contract is void as being against public policy; because if there is one thing, more than another, public policy requires, it is that man of full age and competent of understanding shall have the utmost liberty of contracting them, that these contracts when entered into fully and voluntarily shall be held sacred. Therefore you have this paramount public policy to consider; that you are not likely to interfere with their freedom of contract." Thus, under a stipulation in a bill of lading that the company "agree to forward" and deliver the freight to the consignee, the damages incident to railroad transportation, and loss or damage by fire or the elements while at depot, excepted, the company is not liable for damages from those causes at depots where the cars containing freight stop while in transit. E. O. Stanard Milling Co. v. White Line Cent. Transit Co., 121 Mo. 258, 26 S. W. 704. So, a condition in a bill of lading exempting the carrier from liability for loss of fires, except such as occur by his own negligence, is reasonable, and binds the consignor, though he has neglected to read its terms. Davis v. Central Vt. R. Co., 66 Vt. 290, 29 Atl. 313. Similarly, where a steamship company provides a wharf with a covered warehouse, into which cargo is discharged, and the time and place of discharge are easily ascertainable by consignees, an exemption in its bill of lading from liability for fire happening after unloading is reasonable and valid. Constable v. National S. S. Co., 154 U. S. 51, 14 Sup. Ct. 1062. A valuable note on the extension of the power of a railway company to make restricted contracts in the transportation of live stock, not involving questions of negligence, with numerous citations, by Percy Edwards, will be found in 38 Cent. Law J. 94. A review of recent labor legislation and statutory limitations of freedom of contract between employer and employé, by Frederick C. Woodward, will be found in 29 Am. Law. Rev. 236.

[11] The defense is allowed, not for sake of defendant, but for the law itself. Oscanyan v. Arms Co., 103 U. S. 261, 268. So a shipowner. Schulze-Berge v. The Guildhall, 58 Fed. 796; The Hugo, 57 Fed. 403. An express company. Armstrong v. United States Exp. Co., 159 Pa. St. 640, 28 Atl. 448.

sition to dictate absolutely to the party whose right to damages was being contracted away; so that such a contract would really lack the vital element of agreement,—volition. If carriers, telegraph companies, and employers generally were allowed unrestricted freedom to evade responsibility in tort by agreement, the public would be practically compelled to submit; and the questions of legal right and wrong would be settled, not in courts, but by counsel. The cases on this point arise under contract relationships, affording further reasons peculiar to each relationship. It is accordingly maintained that the ability to contract against negligence varies with the relationship involved.

Common carriers have been allowed to contract against negligence in some jurisdictions.[12] This right, however, has been almost universally denied them.[13] Indeed, in Willock v. Pennsylva-

[12] McCawley v. Railway Co., L. R. 8 Q. B. 57. But see Manchester S. & L. R. Co. v. Brown, 8 App. Cas. 703, per Blackburn, J.; Peek v. Railroad Co., 10 H. L. Cas. 473; Magnin v. Dinsmore, 56 N. Y. 168; Kinney v. Railway Co., 32 N. J. Law, 407, 34 N. J. Law, 513; Farmers' & Mechanics' Bank v. Champlain Transp. Co., 23 Vt. 186; Griswold v. Railway Co., 53 Conn. 371, 4 Atl. 261; Baltimore & O. Ry. v. Skeels, 3 W. Va. 556; Rathbone v. Railway Co., 140 N. Y. 48–51, 35 N. E. 418.

[13] Pavitt v. Lehigh Val. R. Co., 153 Pa. St. 302, 25 Atl. 1107. Compare Ohio & M. R. Co. v. Selby, 47 Ind. 471, with Indianapolis, D. & W. Ry. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138. Et vide Kansas City, St. J. & C. B. R. Co. v. Simpson, 30 Kan. 645, 2 Pac. 821; Coward v. Railway Co., 16 Lea (Tenn.) 225; Woodburn v. Railway Co., 40 Fed. 731; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397–441, 9 Sup. Ct. 469. In Railroad Co. v. Lockwood, 17 Wall. 357, the following propositions were laid down: (1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable. (2) It is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. (3) These rules apply both to the carrier of goods and to the carrier of passengers for hire, and with special force to the latter. Phœnix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176; Providence Ins. Co. v. Morse, 150 U. S. 99, 14 Sup. Ct. 55. And see Alabama G. S. R. Co. v. Thomas, 83 Ala. 343, 3 South. 802; The Portuense, 35 Fed. 679; Doyle v. Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770; Adams Exp. Co. v. Harris, 120 Ind. 73, 21 N. E. 340, note; Johnson's Adm'r v. Richmond & D. R. Co., 86 Va. 975, 11 S. E. 829; Hudson v. Railroad Co. (Iowa) 60 N. W. 608; Thomas v. Railway Co., 63 Fed. 200; State v. Western Maryland Ry. Co., 63 Md. 433; Jones v. Railway Co., 28 S. W. 883; Hutch.

nia R. Co.,[14] the court went so far as to hold that a stipulation in a bill of lading that the owner, shipper, and consignee severally shall cause the goods to be insured, and that in case of loss the carrier shall have the benefit of the insurance, if such loss "shall occur from any cause which shall be held to render this line or any of its agents liable therefor," is a contract intended to protect the carrier

Carr. § 260 (collecting cases in great number); Mobile & O. R. Co. v. Hopkins, 41 Ala. 486; Alabama G. S. R. Co. v. Little, 71 Ala. 611; Welch v. Railroad Co., 41 Conn. 333; Louisville & N. R. Co. v. Owen, 93 Ky. 201, 19 S. W. 590; Abrams v. Railroad Co., 58 N. W. 780; M'Mannus v. Railway Co., 4 Hurl. & N. 327; Kerby v. Railway Co., 18 Law. T. (N. S.) 658; Peek v. Railway Co., 10 H. L. Cas. 473; Louisville & N. R. Co. v. Grant, 99 Ala. 325, 13 South. 599 (where a release except for willful negligence did not release for negligence of carrier or servant); Armstrong v. United States Exp. Co., 159 Pa. St. 640, 28 Atl. 448; The Hugo, 57 Fed. 403; Atchison, T. & S. F. R. Co. v. Lawler, 40 Neb. 356, 58 N. W. 968. A stipulation that the goods shipped shall be insured, and that the carrier shall have the benefit thereof, if the loss occurs from any cause which shall render the carrier liable, is void, Willock v. Pennsylvania R. Co. (Pa. Sup.) 30 Atl. 948; although the carriage of goods be between different states, St. Joseph & G. I. R. Co. v. Palmer, 38 Neb. 463, 56 N. W. 957. But where, in another state, goods are delivered to a common carrier for transportation into Iowa, under a contract limiting its liability, valid where made, but void under the laws of Iowa, the contract is valid, and governs the liability of the carrier, though the loss occurs in Iowa. Hazel v. Chicago, M. & St. P. Ry. Co., 82 Iowa, 477, 48 N. W. 926. As to statutory regulation, see Griswold v. Illinois Cent. R. Co. (Iowa) 57 N. W. 843; Missouri Pac. Ry. Co. v. International Marine Ins. Co., 84 Tex. 149, 19 S. W. 459. While a condition in a free pass exempting a common carrier from liability has been held valid, as in Rogers v. Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069, the general opinion is otherwise. See Jacobus v. St. Paul & C. R. Co., 20 Minn. 125 (Gil. 110).

[14] (Pa. Sup.) 30 Atl. 948, citing, inter alia, Farnham v. Railroad Co., 55 Pa. St. 53. McManus v. Railway Co., 4 Hurl. & N. 327; Kirby v. Railway Co., 18 Law T. (N. S.) 658; Peck v. Railway Co., 10 H. L. Cas. 473. Beckman v. Shouse, 5 Rawle, 179; Bingham v. Rogers, 6 Watts & S. 495; Laing v. Colder, 8 Pa. St. 479; Goldey v. Railroad Co., 30 Pa. St. 242; Powell v. Railroad Co., 32 Pa. St. 414; American Exp. Co. v. Sands, 55 Pa. St. 140; Pennsylvania R. Co. v. Miller, 87 Pa. St. 395; Grogan v. Express Co., 114 Pa. St. 523, 7 Atl. 134; Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577, 13 Atl. 324; Western Union Tel. Co. v. Stevenson, 128 Pa. St. 442, 18 Atl. 441; Phœnix Pot Works v. Pittsburgh & L. E. R. Co., 139 Pa. St. 284, 20 Atl. 1058; Buck v. Railroad Co., 150 Pa. St. 171, 24 Atl. 678; Chicago & N. W. Ry. Co. v. Chapman, 133 Ill. 96, 24 N. E. 417.

against the consequences of its own negligence, and is void a fortiori. A provision in a contract of shipment limiting the extent of the carrier's liability is ineffectual where the injury is caused by his gross negligence.[15] The public character of the service rendered, and the possibility of connivance between the carrier and his servants, or between either and a third person, are considerations of public policy particularly applicable to this relation.

It has been attempted to draw a distinction in this respect as to telegraph companies. They have been said to be liable only for willful default or gross negligence, and not to be measured by the standard of a common carrier, although it is conceded that the rule is otherwise when the message is repeated.[16] The true principle would seem to be that, while they may limit liability for errors and delays resulting from atmospheric changes, or from disarrangements of line or instruments from causes which reasonable care could not avoid, they may not stipulate against their own negligence.[17]

As between employer and employé it is the generally accepted rule that an employer cannot provide by contract against damages by negligence to his employé.[18] In New York it does not ap-

[15] Wabash Ry. Co. v. Brown, 152 Ill. 484, 39 N. E. 273; Root v. New York & N. E. R. Co., 83 Hun, 111, 31 N. Y. Supp. 357.

[16] Grinnell v. W. U. Tel. Co., 113 Mass. 209; Kiley v. W. U. Tel. Co., 109 N. Y. 231, 16 N. E. 75; Ellis v. American Tel. Co., 13 Allen, 226; 3 Suth. Dam. 295. That a telegraph or telephone company is a common carrier: Delaware & A. Tel. & Tel. Co. v. State, 3 U. S. App. 30–105, 2 C. C. A. 1, 50 Fed. 677; Shear. & R. Neg. §§ 554, 555. That it is not: Express Co. v. Caldwell, 21 Wall. 264–270; Telegraph Co. v. Texas, 105 U. S. 460–464; Primrose v. W. U. Tel. Co., 154 U. S. 1–14, 14 Sup. Ct. 1098; Leonard v. Telegraph Co., 41 N. Y. 544; Breese v. United States Tel. Co., 48 N. Y. 132; Tyler v. W. U. Tel. Co., 60 Ill. 421.

[17] Brown v. Postal Tel. Co., 111 N. C. 187, 16 S. E. 179; Fleischner v. Cable Co., 55 Fed. 738 (collecting cases, page 741); W. U. Tel. Co. v. Linn, 87 Tex. 7, 26 S. W. 490; Id. (Tex. Civ. App.) 23 S. W. 895.

[18] Bank of Ky. v. Adams Exp. Co., 93 U. S. 174; Richmond & D. R. Co. v. Jones, 92 Ala. 218, 9 South. 276; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 South. 360; Fulton Bag & Cotton Mills v. Wilson, 89 Ga. 318, 15 S. E. 322; Railway Co. v. Spangler, 44 Ohio St. 471, 8 N. E. 467; Johnson's Adm'x v. Richmond & D. R. Co., 86 Va. 975, 11 S. E. 829; Kansas Pac. Ry. Co. v. Peavey, 29 Kan. 169. As to limitation on liability of mercantile agencies

pear that public policy forbids the exaction by a railway from its employés of such a contract; but, in the absence of a new consideration, the contract is void for that reason.[19]

A limitation contained in a contract which stipulates that the damages to be recovered in cases of negligence of one of the parties to the contract shall not exceed a certain sum, is regarded as a discharge from a part of the liability of negligence, and is therefore invalid in those jurisdictions in which the right to contract against negligence is denied.[20] Accordingly, where a horse worth $1,500 was shipped under a contract providing that "the liability of the company for valuable live stock shall not exceed $100 for each animal," it was held that this was not merely an agreed value of the animal, but an attempt to limit the carrier's responsibility for negligence, and was therefore void.[21] However, a stipulation on a telegram blank that the company will not be responsible in damages beyond

by contract with subscriber, see Dun v. City Nat. Bank, 7 C. C. A. 152, 58 Fed. 174, overruling 51 Fed. 160; Roesner v. Herrmann, 8 Fed. 782; Little Rock & F. S. Ry. Co. v. Eubanks, 48 Ark. 460, 3 S. W. 808.

[19] Purdy v. Rome, W. & O. R. Co., 125 N. Y. 209, 26 N. E. 255; Brewer v. New York, L. E. & W. R. Co., 124 N. Y. 59, 26 N. E. 324. Compare Georgia Pac. Ry. Co. v. Dooley, 86 Ga. 294, 2 S. E. 923.

[20] Moulton v. St. Paul, M. & M. Ry. Co., 31 Minn. 85, 16 N. W. 497; Louisville & N. Ry. Co. v. Sowell, 90 Tenn. 17, 15 S. W. 837; Louisville & N. R. Co. v. Owen, 93 Ky. 201, 19 S. W. 590; Eells v. St. Louis, K. & N. W. Ry. Co., 52 Fed. 903; Louisville & N. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311.

[21] Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 151 (a leading case). Et vide Railroad Co. v. Lockwood, 17 Wall. 357; Grogan v. Adams Exp. Co., 114 Pa. St. 523, 7 Atl. 134; Lawrence v. New York, P. & B. Ry., 36 Conn. 63; Baughman v. Railroad Co., 94 Ky. 150, 21 S. W. 757; Eells v. St. Louis, K. & N. W. Ry. Co., 52 Fed. 903 (a leading case); Adams Exp. Co. v. Stettaners, 61 Ill. 184. Cf. Western Transp. Co. v. Newhall, 24 Ill. 466; Boscowitz v. Adams Exp. Co., 93 Ill. 523; Abrams v. Milwaukee, L. S. & W. Ry. Co., 87 Wis. 485, 58 N. W. 780; Rosenfeld v. Peoria, D. & E. Ry. Co., 103 Ind. 121, 2 N. E. 344; Hart v. Chicago & N. W. R. Co., 69 Iowa, 485, 29 N. W. 597 (statute); McCune v. Railroad Co., 52 Iowa, 600, 3 N. W. 615; Kansas City, St. J. & C. B. R. Co., v. Simpson, 30 Kan. 645, 2 Pac. 821; Orndorff v. Adams Exp. Co., 3 Bush (Ky.) 194; McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343, 4 S. W. 689 (a leading case); Richmond & D. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749; St. Louis, A. & T. Ry. Co. v. Robbins (Tex. App.) 14 S. W. 1075. In the following cases, however, such limitation has been allowed: Belger v. Dinsmore, 51 N. Y. 166; Louisville & N. R. Co. v. Wynn

the price of the message unless the message be repeated at the sender's expense has been sustained by the supreme court of the United States as reasonable and valid.[22] But this applies only to the sender, not to the recipient.[23] The wrong of which the sender complains is a quasi tort; the recipient's wrong is a tort pure and simple.[24]

The responsibility may be limited by an express agreement made at the time the contract is executed, provided the limitation be

(Jan. 2, 1890) 88 Tenn. 320, 14 S. W. 311 (where a limitation to a specific sum was sustained because of statement in freight charges); Coward v. Railroad Co., 16 Lea (Tenn.) 225; Ballou v. Earle, 17 R. I. 441, 22 Atl. 1113; Pacific Exp. Co. v. Foley, 46 Kan. 457, 26 Pac. 925. A lengthy collection of authorities on the effect of the limitation of liability to a specified amount, with a review of the decisions of the courts of the several states. Alair v. Northern Pac. R. Co., 8 Am. R. & Corp. R. 452 (Minn.) 54 N. W. 1072.

[22] Primrose v. W. U. Tel. Co., 154 U. S. 1, 14 Sup. Ct. 1098. Cf. Francis v. W. U. Tel. Co. (Minn.) 50 N. W. 1078. That a telegraph company may not limit liability, for negligence in sending a message, to its cost, see Wertz v. W. U. Tel. Co., 8 Utah, 499, 33 Pac. 136; Wertz v. W. U. Tel. Co., 7 Utah, 446, 27 Pac. 172; Ayer v. W. U. Tel. Co., 79 Me. 493, 496, 498, 10 Atl. 495; or to 50 times such sum, Brown v. Postal Tel. Co., 111 N. C. 187, 16 S. E. 179. A review of the decisions of the several states in relation to the effect of limiting the liability for unrepeated messages. 9 Am. Ry. & Corp. Rep. 748. And where the sender of an unrepeated telegram signed the company's blank form, releasing it from liability for delay in the delivery of such a telegram, he cannot recover on the ground that the delay would have occurred if the message had been repeated. Birkett v. W. U. Tel. Co. (Mich.) 61 N. W. 645. But such a stipulation does not protect the company against liability for damages which such repetition could have no tendency to prevent. Therefore, notwithstanding such a stipulation, the company will be held liable for the failure of its operator to inform the sender of an important message that its line was down, or to send it by a competing line. Fleischner v. Pacific Postal Tel. Cable Co., 55 Fed. 738. And see W. U. Tel. Co. v. Lyman, 3 Tex. Civ. App. 460, 22 S. W. 656.

[23] New York & Washington Printing Tel. Co. v. Dryburg, 35 Pa. St. 298; Tobin v. W. U. Tel. Co., 146 Pa. St. 375, 23 Atl. 324; W. U. Tel. Co. v. Lowrey, 32 Neb. 732, 49 N. W. 707.

[24] Ante, chapter 1; post, p. 897, "Negligence"; "Contractual Duties." However, the receiver of a message, as well as the sender, is bound by a condition in the contract requiring claims for damages to be presented to the telegraph company within 60 days after the day the message is filed for transmission. Findlay v. W. U. Tel. Co. (C. C.) 64 Fed. 459.

such as the law can recognize as reasonable and not inconsistent with sound public policy. A contract by a common carrier stipulating in advance the value of the property carried, with the rate of freight, based on the conditions that the carrier assumes liability only to the extent of the agreed value, even in cases of loss or damage by the negligence of the carrier, has been sustained,[25] and again held not binding.[26] The value must be fixed at the shipping

[25] Hart v. Pennsylvania R. Co., 112 U. S. 331, 5 Sup. Ct. 113 (the leading case). This doctrine would seem to be accepted more or less clearly in the following cases, in many cases as the result of statutory construction: Louisville & N. R. Co. v. Sherrod, 84 Ala. 178, 4 South. 29 (but willful and wanton negligence will avoid limitation); St. Louis, I. M. & S. Ry. Co. v. Weakly, 50 Ark. 397, 8 S. W. 134 (in the absence of deceit); Scammon v. Wells, Fargo & Co., 84 Cal. 311, 24 Pac. 284 (under the Code); Ormsby v. Union Pac. R. Co. (Colo.) 2 McCrary, 48, 4 Fed. 170; Overland Mail & Exp. Co. v. Carroll, 7 Colo. 43, 1 Pac. 682; Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870; Hartwell v. Northern Pac. Exp. Co., 5 Dak. 463, 41 N. W. 732 (but see Hazel v. Chicago, M. & St. P. R. Co., 82 Iowa, 477, 48 N. W. 926); Oppenheimer v. United States Exp. Co., 69 Ill. 62; Rosenfeld v. Peoria & E. Ry. Co., 103 Ind. 121, 2 N. E. 344; Adams Exp. Co. v. Harris, 120 Ind. 73, 21 N. E. 340; Kallman v. United States Exp. Co., 3 Kan. 205; Pacific Exp. Co. v. Foley, 46 Kan. 457, 26 Pac. 665; Little v. Boston & M. R. Co., 66 Me. 239; Hill v. Boston, H. I. & W. R. Co., 144 Mass. 284, 10 N. E. 836 (et vide Graves v. Railroad Co., 137 Mass. 33); Brehme v. Dinsmore, 25 Md. 328; How. Ann. St. Mich. § 3418; Hutchinson v. Chicago, St. P., M. & O. Ry. Co., 37 Minn. 524, 35 N. W. 433 (statute); Snider v. Adams Exp. Co., 63 Mo. 376; Harvey v. Terre Haute & I. R. Co., 74 Mo. 538; Atchison & C. R. R. v. Washburn, 5 Neb. 117; Westcott v. Fargo, 61 N. Y. 542; Zimmer v. New York Cent. & H. R. R. Co., 137 N. Y. 460, 33 N. E. 642 (this is a fortiori true where the property is of a special value); Rathbone v. New York Cent. & H. R. R. Co., 140 N. Y. 48, 35 N. E. 418; Starnes v. Louisville & N. R. Co., 91 Tenn. 675, 19 S. W. 675; Zouch v. Chesapeake & O. Ry. Co., 36 W. Va. 524, 15 S. E. 185 (dissenting opinion of Lucas, J.); Ballou v. Earle, 17 R. I. 441, 22 Atl. 1113; Richmond & D. R. Co. v. Payne, 86 Va. 481, 10 S. E. 749 (cf. Virginia & T. R. Co. v. Sayers, 26 Grat. 328); Browning v. Goodrich Transp. Co., 78 Wis. 391, 47 N. W. 428; Boorman v. Adams Exp. Co., 21 Wis. 154 (but see Black v. Goodrich Transp. Co., 55 Wis. 319, 13 N. W. 244); Johnstone v. Richmond & D. R. Co., 39 S. C. 55, 17 S. E. 512; Alair v. Northern Pac. R. Co., 53 Minn. 160, 54 N. W. 1072. These cases sustain the proposition. They are to be classified according to state. Et vide Lord Blackburn in Manchester, S. & L. Ry. Co. v. Brown, 8 App. Cas. 703–712.

[26] In Pennsylvania, on the other hand, it has been held that, notwithstanding the fact that rates were based on a stipulated value, the owner may

point and not at the point of destination.[27] Courts will, however, look into attempts to limit the carrier's responsibility for negligence by stipulation as to agreed value, and will often avoid them.[28]

There are many regulations for the conduct of business which the law will recognize and enforce. Thus a common carrier may require a passenger to conform to reasonable rules, as to turn to the right on leaving a car,[29] and a master may require his servant to obey his instructions in dangerous employments, as to make couplings with a stick.[30]

The parties to a contract may specify certain reasonable requirements of the party complaining of a tort, after it has occurred, as necessary preliminaries to his right to recover. Thus, the claim for damages may be required to be made within a certain reasonable time after the alleged injury.[31] If, however, the stipulation is unreasonable, as to require bringing of suit within 40 days after in-

recover the actual value in excess of such stipulated value. Weiller v. Pennsylvania R. Co., 134 Pa. St. 310, 19 Atl. 702 (dissenting opinion of Mitchell, J.); Farnham v. Camden & A. R. Co., 55 Pa. St. 53. The same position would seem to have been held—not always very distinctly—in the folowing cases: Southern Exp. Co. v. Seide, 67 Miss. 609, 7 South. 547; Southern Exp. Co. v. Moon, 39 Miss. 822; Chicago, St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017; United States Exp. Co. v. Backman, 28 Ohio St. 144; The Lydian Monarch, 23 Fed. 298; M. P. R. Co. v. Barnes, 2 Willson, Civ. Cas. Ct. App. 507; Piedmont Manuf'g Co. v. Columbia & G. R. Co., 19 S. C. 353 (statute; but see Levy v. Southern Exp. Co., 4 S. C. 234); Baughman v. Louisville, E. & St. L. R. Co. (Ky.) 21 S. W. 757. Et vide Louisville & N. R. Co. v. Owen, 93 Ky. 201, 19 S. W. 590.

27 Taylor, B. & H. R. Co. v. Montgomery (Tex. App.) 16 S. W. 178–182; International & G. N. R. Co. v. Anderson, 3 Tex. Civ. App. 8, 21 S. W. 691; Ft. Worth & D. C. R. Co. v. Greathouse, 82 Tex. 104, 17 S. W. 834. And see Rogan v. Wabash R. Co., 51 Mo. App. 665.

28 See ante, note 21.

29 Post, p. 1086, "Negligence"; "Common Carriers." A common carrier may limit its liability for goods sent C. O. D., while in its possession for purpose of collection, to that of a warehouseman. Pacific Exp. Co. v. Wallace (Ark.) 29 S. W. 32.

30 Post, p. 1001, "Negligence"; "Master and Servant"; "Rules."

31 Lewis v. Great Western Ry., 5 Hurl. & N. 867; W. U. Tel. Co. v. James (Ga.) 16 S. E. 83 (60 days within which to present claims sustained); Express Co. v. Caldwell, 21 Wall. 264; Selby v. Wilmington & W. R. Co., 113 N. C. 588, 18 S. E. 88; Wolf v. W. U. Tel. Co., 62 Pa. St. 83; Young v. W. U.

jury, it will not be enforced.[32] So the time limited within which to present claims may not unreasonably consume the whole time allowed for presenting claims.[33] Notice to the agent before the removal of live stock is a reasonable requirement.[34] Such requirement as notice of claim may, however, be waived by the carrier.[35] The burden is on the carrier to show that the loss or injury resulted from an excepted cause.[36]

Tel. Co., 65 N. Y. 163; Western Ry. Co. v. Harwell, 91 Ala. 340, 8 South. 649; Cole v. W. U. Tel. Co., 33 Minn. 227, 22 N. W. 385; Armstrong v. Railway Co., 53 Minn. 83, 54 N. W. 1059; Southern Exp. Co. v. Hunnicutt, 54 Miss. 566; Heimann v. W. U. Tel. Co., 57 Wis. 562, 16 N. W. 32; Express Co. v. Caldwell, 21 Wall. 264; W. U. Tel. Co. v. James, 90 Ga. 254, 16 S. E. 83; Lester v. W. U. Tel. Co., 84 Tex. 313, 19 S. W. 256; Louisville, N. A. & C. R. Co. v. Widman (Ind. App.) 37 N. E. 554. A collection of authorities as to the validity of stipulations requiring notice of claim for damages. Central Railroad & Banking Co. v. Hasselkus, 8 Am. Ry. & Corp. Rep. 401 (Ga.) 17 S. E. 838. But a telegraph company cannot refuse to send a telegram because the sender refuses to sign a contract with such stipulation. Kirby v. W. U. Tel. Co. (S. D.) 55 N. W. 759. The institution of an action for damages, and service of citation, within 60 days, is a sufficient compliance with a requirement that a claim for damages for delay in the delivery of a telegram shall be presented in writing within that time. W. U. Tel. Co. v. Piner (Tex. Civ. App.) 29 S. W. 66. However, on the principle that the attempt, so often indulged in by insurance and telegraph companies, to prescribe for themselves a law, is not one that appeals to the judgment or commends itself to the conscience of this court (Tyler, Ullman & Co. v. W. U. Tel. Co., 60 Ill. 421; W. U. Tel. Co. v. Crall, 38 Kan. 679, 17 Pac. 309; Gillis v. W. U. Tel. Co., 61 Vt. 461, 17 Atl. 736, and cases there cited; Johnston v. W. U. Tel. Co., 33 Fed. 362; W. U. Tel. Co. v. Longwill [N. M.] 21 Pac. 339), it was held in Pacific Tel. Co. v. Underwood, 37 Neb. 315, 55 N. W. 1057, that a requirement of presentation of claim within 60 days was an unsuccessful attempt to limit liability on the part of a telegraph company. See section 12, p. 835, c. 89a, Comp. St. Neb.

[32] Gulf, C. & S. F. Ry. Co. v. Hume, 6 Tex. Civ. App. 653, 24 S. W. 915, 27 S. W. 110; Gulf, C. & S. F. Ry. Co. v. Elliott (Tex. Civ. App.) 26 S. W. 636. And see McCarty v. Gulf, C. & S. F. Ry. Co., 79 Tex. 33, 15 S. W. 164; Francis v. W. U. Tel. Co. (Minn.) 59 N. W. 1078; 10 days' time reasonable, Case v. Cleveland, C., C. & St. L. Ry. Co. (Ind. App.) 39 N. E. 426.

[33] Central Vt. Ry. v. Soper, 8 C. C. A. 341, 59 Fed. 879.

[34] Selby v. Wilmington & W. R. Co., 113 N. C. 588, 18 S. E. 88.

[35] Galveston, H. & S. A. Ry. Co. v. Silegman (Tex. Civ. App.) 23 S. W. 298; Harned v. Missouri Pac. R. Co., 51 Mo. App. 482; Galveston, H. & S. A. Ry. Co. v. Ball, 80 Tex. 602, 16 S. W. 441.

[36] Johnson v. Railway Co., 69 Miss. 191, 11 South. 104. And see Western

The law allows in some cases the determination of the physical extent of a contract or undertaking.[37] Thus, intermediate carriers may limit their liability to injuries occurring to through freight to the time it is on its own line.[38]

105. But a limitation, when allowed by law to be binding, must have been assented to by the parties to the contract. It is strictly construed, and must be proved by the party claiming advantage under it.

There is, however, an important distinction between a special contract limiting liability, formally executed or assented to by the parties, and a mere issuance or publication by one of the parties[39] of a notice containing such restrictions. To have binding effect the terms of limitations must be assented to. Neither a public nor general notice by one of the parties, standing by itself, will vary the duties or limit the responsibility existing apart from such notice. Thus, a notice by a common carrier that a certain shipment

Ry. v. Harwell, 91 Ala. 340, 8 South. 649. The contract is governed by lex loci contractus. Fairchild v. Railway Co. (Pa. Sup.) 24 Atl. 79.

[37] A stipulation in a contract of shipment that the carrier shall not be liable for loss and injuries after the property has left its control is binding on the shipper. Rogers v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.) 28 S. W. 1024.

[38] Coles v. Louisville, E. & St. L. R. Co., 41 Ill. App. 607; Gulf, C. & S. F. Ry. Co. v. Thompson (Tex. Civ. App.) 21 S. W. 186; International & G. N. R. Co. v. Thornton (Tex. Civ. App.) 22 S. W. 67; Gulf, C. & S. F. Ry. Co. v. Tennant, 3 Tex. Civ. App. 197, 22 S. W. 761; Dunbar v. Railway Co., 36 S. C. 110, 15 S. E. 357; McCarn v. International & G. N. R. Co., 84 Tex. 352, 19 S. W. 547, following Texas & P. Ry. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, and disapproving Gulf, C. & S. F. Ry. Co. v. Vaughn (Tex. App.) 16 S. W. 775. As to conversion by a connecting road, see McEacheran v. Michigan Cent. R. Co., 101 Mich. 264, 59 N. W. 612. As to receiving carrier, however, see Gulf, C. & S. F. Ry. Co. v. Wilbanks (Tex. Civ. App.) 27 S. W. 302; Wehmann v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.) 59 N. W. 546; Southard v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.) 62 N. W. 442. And, generally, see McCann v. Eddy (Mo. Sup.) 27 S. W. 541; Atchison, T. & S. F. R. Co. v. Richardson, 53 Kan. 157, 35 Pac. 1114.

[39] A condition on the back of a steamship passenger ticket, relieving the carrier from its common-law liability for perils at sea, referred to merely by notice on the face of the ticket to "See back," is not binding on the passenger. Potter v. The Majestic, 9 C. C. A. 161, 60 Fed. 624.

will be taken at the owner's risk only will not vary the carrier's liability.[40] If, however, such notice becomes actual notice, the contract, if not forbidden by law, will be enforced. The essential thing is that the restriction should come to the knowledge of the person sought to be bound by the restriction.[41] The limitation must be expressly and unequivocally set forth. General words are not sufficient. Therefore, even where a carrier is allowed to contract against negligence, provisions in the contract to the effect that the carrier will not be responsible for delay in the transit of the property will not relieve him from the consequence of delay occasioned by negligence. To constitute such an exception it must be expressly stated.[42] The burden of proof is on the party claiming the benefit of limitations to show knowledge on the part of the other party of such limitations, and assent thereto.[43]

[40] Southern Exp. Co. v. Newby, 33 Ga. 635; Hollister v. Nowlen, 19 Wend. 234; Sager v. Portsmouth, S. & P. & E. R. Co., 31 Me. 228. Merely pinning stipulations to telegram, without knowledge of addressee or sender of message, does not make it part of the contract. Anderson v. W. U. Tel. Co., 84 Tex. 17, 19 S. W. 285. And see Capehart v. Seaboard & R. R. Co., 81 N. C. 438. Mere acceptance of bill of lading is not assent to its conditions. Central Railroad & Banking Co. v. Hasselkus, 91 Ga. 382, 17 S. E. 838; Merchants' Dispatch Transp. Co. v. Furthmann, 149 Ill. 66, 36 N. E. 624. Cf. Zimmer v. New York Cent. & H. R. R. Co., 137 N. Y. 460, 33 N. E. 642. (A collection of authorities on the effect of a receipt or bill of lading limiting the liability of the carrier. Merchants' Dispatch Transp. Co. v. Furthmann, 149 Ill. 66, 9 Am. Ry. & Corp. Rep. 25 [Ill. Sup.] 36 N. E. 624.) But signing a contract is. Johnstone v. Richmond & D. R. Co., 39 S. C. 55, 17 S. E. 512; Coles v. Louisville, E. & St. L. R. Co., 41 Ill. App. 607. As to duress of shipper, see Little Rock & Ft. S. Ry. Co. v. Cravens, 57 Ark. 112, 20 S. W. 803.

[41] Verner v. Sweitzer, 32 Pa. St. 208. Compare with Camden & N. A. R. Co. v. Baldauf, 16 Pa. St. 67; Merchants' Dispatch Transp. Co. v. Furthermann, 149 Ill. 66, 36 N. E. 624. So, where the notice was special. McMillen v. Michigan S. & N. I. R. Co., 16 Mich. 79.

[42] Magnin v. Dinsmore, 56 N. Y. 168; Mynard v. Syracuse, B. & N. Y. R. Co., 71 N. Y. 180; Nicholas v. New York Cent. Ry. Co., 89 N. Y. 370. Such a contract with a railway company does not apply to the negligence of an express company. Brewer v. New York, L. E. & W. R. Co., 124 N. Y. 59, 26 N. E. 324; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438, 28 N. E. 394.

[43] Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438, 28 N. E. 394; Blossom v. Dodd, 43 N. Y. 264; Baltimore & O. Ry. Co. v. Brady, 32 Md. 333; W. U. Tel. Co. v. Arwine, 3 Tex. Civ. App. 156, 22 S. W. 105; Lawrence v. New York,

SAME—AGREEMENT AFTER DAMAGE.

106. A cause of action sounding in tort may be settled and discharged by agreement of the wrongdoer and the sufferer. In order that such an agreement may operate as a bar to the suit in tort of the sufferer, three things are necessary:

(a) It must be executed by all necessary parties, and by the legal representatives of persons incapacitated, or by the legal representatives whenever required by statute, as in cases of death by wrongful act.

(b) It must be founded on a sufficient consideration.

(c) It must show a completed intention to discharge the particular cause of action in issue.

Form of Agreement.

The agreement discharging a cause of action in tort may take one or more of several not essentially different forms. It may be a compromise,[44] or an accord and satisfaction,[45] or a formal release.

P. & B. R. Co., 36 Conn. 63; Clement v. W. U. Tel. Co., 137 Mass. 463; McMillan v. Michigan S. & N. I. R. Co., 16 Mich. 79; Judson v. Western Ry. 6 Allen, 486. Compare Wolf v. W. U. Tel. Co., 62 Pa. St. 83, with Belger v. Dinsmore, 51 N. Y. 166, and Pearsall v. W. U. Tel. Co., 124 N. Y. 256, 26 N. E. 534. For presumption, Thomas v. Railway Co., 63 Fed. 200.

[44] Shaw v. Chicago, R. I. & P. Ry. Co., 82 Iowa, 199, 47 N. W. 1004; Dunbar v. Tirey (Tex. App.) 17 S. W. 1116. Compromise of claim to prevent litigation is binding, although such claim is not legal. Bement v. May, 135 Ind. 604, 34 N. E. 327.

[45] The plea of accord and satisfaction raises an issue upon the delivery or acception of something in satisfaction of debt or damages demanded. Bouv. Law Dict. tit. "Accord and Satisfaction." 2 Greenl. Ev. § 28. A master of a vessel received from the charterer a check, which charterer claimed was in full payment of the master's claim for demurrage. The master retained the check, but notified the charterer that it was not sufficient, and that he would sue. *Held*, that his retaining the check was not an accord and satisfaction. McKeen v. Morse, 1 C. C. A. 237, 49 Fed. 253. A receipt in full is not an accord and satisfaction merely because it reads, "In full payment." Ahrens v.

with or without seal,[46] or a covenant not to sue,[47] or a ratified settlement, even if fraudulent.[48] The agreement claimed to operate as a discharge, in whatever form it exists, is a matter of affirmative defense, and must be specially pleaded.[49]

Parties.

The agreement releasing a cause of action based on tort must be executed by all the necessary, and by only the competent, parties. A lunatic, injured in a wreck, cannot execute a release for damages suffered.[50] Even drunkenness, taking away knowledge of what the drunkard is doing, or that he was signing a release,

United Growers Co. (City Ct. N. Y.) 31 N. Y. Supp. 997. Ball v. McGeoch, 81 Wis. 160, 51 N. W. 443.

[46] Phillips v. Clagett, 11 Mees. & W. 84. A collection of authorities as to the effect of a release from liability for personal injuries. Richmond & D. R. Co. v. Butler, 60 Am. & Eng. R. Cas. 265 (Ga.) 16 S. E. 222.

[47] Ford v. Beech, 11 Q. B. 840 (871). And see post, p. 341, "Release of Joint Tort Feasor." But agreement not to prosecute for seduction is illegal. Baird v. Boehner, 77 Iowa, 622, 42 N. W. 454. Cf. Ringle v. Pennsylvania R. R., 164 Pa. St. 529, 30 Atl. 492; Foakes v. Beer, L. R. 9 App. Cas. 605. This rule in some places has been changed by statute.

[48] Where plaintiff agreed to a settlement of a claim for injuries while in a condition of physical pain which rendered the agreement voidable, and there was no evidence that the agreement was procured by fraud, an acceptance of the amount of such settlement by her attorney, with her consent, at a time when she fully understood what she was doing, is a ratification of the settlement. Drohan v. Lake Shore & M. S. Ry. Co., 162 Mass. 435, 38 N. E. 1116. Plaintiff, through the defendant railroad company's fraud, released his claim of damages for injuries, and did not learn of it until two weeks afterwards. He took steps, two weeks after that, to employ counsel, and in about three weeks thought counsel had been engaged. He was confined to his bed during all said time, and spent all the money paid him for executing the release. Held, that the question whether he ratified such release was for the jury. Jones v. Alabama & V. Ry. Co. (Miss.) 16 South. 379.

[49] Grunwald v. Freese (Cal.) 34 Pac. 73; Niggli v. Foehry (Sup.) 31 N. Y. Supp. 931; Jacobs v. Day (Com. Pl.) 25 N. Y. Supp. 763; Heath v. Doyle (R. I.) 27 Atl. 333. And see Maness v. Henry, 96 Ala. 454, 11 South. 410; Forbes v. Petty, 37 Neb. 899, 56 N. W. 730. As to burden of proof, Pederson v. Seattle Consol. St. Ry. Co., 6 Wash. 202, 33 Pac. 351, and 34 Pac. 665.

[50] Missouri Pac. Ry. Co. v. Brazzil, 72 Tex. 233, 10 S. W. 403; Texas & P. Ry. Co. v. Crow, 3 Tex. Civ. App. 266, 22 S. W. 928; Johnson v. Merry Mount Granite Co., 53 Fed. 569. Cf. Louisville, N. A. & C. R. Co. v. Herr, 135 Ind. 591, 35 N. E. 556, following Ashmead v. Reynolds, 127 Ind. 441, 26 N. E. 80.

may vitiate it.[51] Capacity to execute a release is ordinarily a question of fact for the jury.[52] A wife may not release a claim for personal injuries caused by alleged negligence, when not allowed to make such contract by the laws of the place of injury, however it may be in the state where she resides.[53] But her release of a cause of action peculiarly her own, arising out of injuries to her person, does not discharge liability to her husband for the same wrong.[54] Ordinarily, an infant may avoid any release he may execute, as he may any other contract. Release by a parent of personal injury to a minor can operate only as a release of damage suffered by the parent, not by the minor.[55] To fully satisfy all causes of action, a release should be obtained, not only from the parents, as to their separate causes of action, but also from the legally appointed guardian of the infant. On the same principle, where, upon death by tort, a right of action accrues to the next of kin, or other statutory beneficiaries, only legally constituted authorities can execute a release. A brother-in-law cannot;[57] nor the widow.[58] The person authorized by statute to sue for the injuries complained of (as the special administrator for widow and next of kin of a man killed by wrongful act, or a guardian ad litem of an infant or insane person), and the attorney of record in the suit

[51] Houston & T. C. Ry. Co. v. Tierney, 72 Tex. 312, 12 S. W. 586. One under the influence of opiates at time of executing a release for torts may avoid it. Chicago, R. I. & P. R. Co. v. Lewis, 109 Ill. 120.

[52] In an action for personal injuries, where a release of plaintiff's claims is pleaded in defense, plaintiff's capacity to execute such release is a question for the jury. Gibson v. Western New York & P. R. Co., 164 Pa. St. 142, 30 Atl. 308.

[53] Snashall v. Met. R. Co., 19 D. C. 309.

[54] Schouler, Dom. Rel. § 77. The husband may release the damages for his wife's injuries, and then recover for the loss arising to himself alone.

[55] International & G. N. Ry. Co. v. Hinzie, 82 Tex. 623, 18 S. W. 681; Horgan v. Pacific Mills, 158 Mass. 402, 33 N. E. 581.

[57] Stuber v. McEntee, 142 N. Y. 200, 36 N. E. 878, overruling (Super. N. Y.) 19 N. Y. Supp. 900.

[58] Knoxville, C. G. & L. R. Co. v. Acuff, 92 Tenn. 26, 20 S. W. 348; Yelton v. Railroad Co., 134 Ind. 414, 33 N. E. 629.

brought, may undoubtedly execute a proper release, or satisfy a judgment entered after trial or on stipulation, or may execute a release, especially when directed so to do by the court appointing such person executor or guardian.[59] Acceptance by a widow of benefits from a railroad relief association does not bar action by her, as administratrix, on behalf of her children.[60]

Consideration.

There must be a consideration. A mere gratuity is not sufficient.[61] Thus, the voluntary payment of wages, merely as wages, by a master to an employé injured by the master's alleged negligence, does not constitute a satisfaction of the cause of action.[62] But a receipt of a stated sum of money, even in the absence of an express agreement that it shall be in satisfaction of such a cause of action, will be presumed to be a full recompense for the injury.[63] A promise to re-employ or to keep in employment is a sufficient consideration.[64] Where the injured person becomes a member of a relief association, and as a condition of membership, and in con-

[59] 2 Chit. Pl. (16th Am. Ed.) 455; Maness v. Henry, 96 Ala. 454, 11 South. 410.

[60] Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120. And see State v. Baltimore & O. R. Co., 36 Fed. 655. In Fuller v. Baltimore & O. E. R. Ass'n, 67 Md. 433, 10 Atl. 237, it was held that if the wife and child recover damages, the mother cannot recover benefits. This, however, is rank injustice. The two claims rest on different footings. 34 Am. Law Reg. 234.

[61] Sieber v. Amunson, 78 Wis. 679, 47 N. W. 1126. Post, p. 314, note 65.

[62] Sobieski v. St. Paul & D. R. Co., 41 Minn. 169, 42 N. W. 863. Further, as to what is not sufficient, Richmond & D. R. Co. v. Walker, 92 Ga. 485, 17 S. E. 604; Landon v. Hutton, 50 N. J. Eq. 500, 25 Atl. 953; Davidson v. Burke, 143 Ill. 139, 32 N. E. 514.

[63] Hinkle v. Minneapolis & St. L. Ry. Co., 31 Minn. 434, 18 N. W. 275.

[64] Hobbs v. Electric Light Co., 75 Mich. 550, 42 N. W. 965; Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E 802; Conner v. Dundee Chemical Works (N. J. Ch.) 17 Atl. 975; White v. Richmond & D. R. Co., 110 N. C. 456, 15 S. E. 197. But not where the retention in employment is for such time as may suit the employer. Gulf, C. & S. F. Ry. Co. v. Winton (Tex. Civ. App.) 26 S. W. 770. A parol promise to re-employ him is a sufficient consideration for a release, executed by an employé, of a claim for personal injuries. In an action on a promise to give plaintiff employment, which, with the payment of $100, formed the consideration of plaintiff's release of a claim for personal injuries, the fact that the written release executed by him recites only the money con-

sideration of the contributions of a railroad company to said association, and of its guaranty of the payment of benefits, signs a contract releasing the company from liability by reason of any acts that may happen to him in course of employment, an action will not lie against the company where, both before and after beginning the action, he received money from the association on account of the injury.[65] This would seem to be true even where the employé was a minor at the time of executing the contract.[66] To constitute accord and satisfaction, there must be both accord and satisfaction. Mere accord is not sufficient.[67] A binding contract may, however, be taken in satisfaction.[68] Where a sum certain is

sideration does not prevent recovery on the parol contract for employment. Pennsylvania Co. v. Dolan (Ind. App.) 32 N. E. 802. And see Smith v. St. Paul & D. Ry. Co. (Minn.) 62 N. W. 392. Cf. Myron v. Union R. Co. (R. I.) 32 Atl. 165.

[65] State v. Baltimore & O. R. Co., 36 Fed. 655; Chicago, B. & Q. R. Co. v. Bell (Neb.) 62 N. W. 314; Johnson v. Philadelphia & R. R. Co., 163 Pa. St. 127, 29 Atl. 854; Spitze v. Railroad Co., 75 Md. 162, 23 Atl. 307; Lease v. Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423. Cf. Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120 (under statute); but see Clements v. London & N. W. Ry. (1894) 70 Law T. (N. S.) 531; Miller v. Chicago, B. & Q. Ry. Co., 65 Fed. 305. And, generally, see Martin v. Baltimore & O. R. Co., 41 Fed. 125; Graft v. Baltimore & O. R. Co. (Pa. Sup.) 8 Atl. 206. And see ante, 60. An agreement by an employé of a railway company, on joining a "relief department," that, in consideration of certain contingent payments by the company to the funds of such department, which payments are of trivial amount, his acceptance of benefits from such department shall operate as a release of the company from claims for damages, does not bar his action against the company for injuries caused by its negligence. Miller v. Chicago, B. & Q. Ry. Co. (C. C.) 65 Fed. 305; ante, note 60, p. 313.

[66] Martin v. Baltimore & O. R. Co., 41 Fed. 125-127, and cases cited; Lease v. Pennsylvania Co., 10 Ind. App. 47, 37 N. E. 423. Cf. Johnson v. Railroad Co., 163 Pa. St. 127, 29 Atl. 854; Graft v. Railroad Co. (Pa. Sup.) 8 Atl. 206; Donald v. Chicago, B. & Q. R. Co. (Iowa) 61 N. W. 971; Griffiths v. Earl of Dudley, 9 Q. B. Div. 357.

[67] Braunn v. Keally, 146 Pa. St. 519, 23 Atl. 389; Giboney v. German Ins. Co., 48 Mo. App. 185; Rogers v. City of Spokane, 9 Wash. 168, 37 Pac. 300; Yazoo & M. V. R. Co. v. Fulton, 71 Miss. 285, 14 South. 271; Lynn v. Bruce, 2 H. Bl. 317; Wray v. Milestone, 5 Mees. & W. 21; Gabriel v. Dresser, 15 C. B. 622; Hardman v. Bellhouse, 9 Mees. & W. 596.

[68] Flockton v. Hall, 14 Q. B. 386. And see Lavery v. Turley, 6 Hurl. & N. 239. An accord and satisfaction may be self executing. Jones v. Sawkins, 5 C. B. 142; Crowther v. Farrer, 15 Q. B. 677. Cf. James v. David, 5 Term R.

to be paid, a lesser sum cannot be paid by the debtor [69] in satisfaction of a greater; [70] but where the claim is for unliquidated damages, or is uncertain, a less sum may be paid and accepted in satisfaction.[71] But, even with respect to unliquidated damages, the amount of the consideration, under special circumstances, may become material.[72] A seal sufficiently imports a consideration,[73] but may be inquired into upon an allegation of fraud.[74]

Intent to Discharge Wrong in Issue.

An agreement as to satisfaction of a claim based on a tort is governed by ordinary principles of contract. Words employed in a release will receive a fair construction, but will not be extended beyond the consideration. Otherwise, a release would be made for the parties where they never intended or contemplated one.[75]

141. Arbitration and award may operate as an accord and satisfaction. Allen v. Milner, 2 Cromp. & J. 47; Harris v. Reynolds, 7 Q. B. 71.

[69] As to obligation of and accord by a third person, see Bidder v. Bridges (1887) 37 Ch. Div. 406; Clark v. Abbott, 53 Minn. 88, 55 N. W. 542; Fowler v. Smith, 153 Pa. St. 639, 25 Atl. 744. Cf. Marston v. Bigelow, 150 Mass. 45, 22 N. E. 71.

[70] Pinnel's Case, 3 Coke, 117a, 238; Foakes v. Beer, 9 App. Cas. 605; Jaffray v. Davis, 124 N. Y. 164, 26 N. E. 351. Cf. Perkins v. Lockwood, 100 Mass. 249, with Weber v. Couch, 134 Mass. 26; Bird v. Smith, 34 Me. 63. But see Schweider v. Lang, 29 Minn. 254, 13 N. W. 33; Thurber v. Sprague, 17 R. I. 634, 24 Atl. 48. Cf. Savage v. Everman, 70 Pa. St. 315.

[71] Adams v. Tapling, 4 Mod. 88; Hinkle v. Railway Co., 31 Minn. 434, 18 N. W. 275; Preston v. Grant, 34 Vt. 201; Stockton v. Frey, 4 Gill (Md.) 406; Donohue v. Woodbury, 6 Cush. 148; Renihan v. Wright, 125 Ind. 536, 25 N. E. 822; Fuller v. Kemp, 138 N. Y. 231, 33 N. E. 1034.

[72] Thus, where a woman's husband and her only son were killed in the same accident, and she was in such poverty that she had to give away her remaining child, a release of damages, made by her in ignorance of her rights, in consideration of $70 and a ticket worth $3.25, is of no effect. Byers v. Nashville, C. & St. L. Ry. Co., 94 Tenn. 345, 29 S. W. 128; Allston v. Nashville, C. & St. L. R. Co., Id.

[73] Spitze v. Baltimore & O. R. Co. 75 Md. 162, 23 Atl. 307.

[74] Waln v. Waln, 53 N. J. Law, 429, 22 Atl. 203.

[75] Codding v. Wood, 112 Pa. St. 371, 3 Atl. 455. Damages from fire. Fidelity Title & Trust Co. v. People's Natural Gas Co., 150 Pa. St. 8, 24 Atl. 339. Malprosecution. Kirchner v. New Home Sewing Mach. Co., 62 Hun, 620, 16 N. Y. Supp. 761; Id., 59 Hun, 186, 13 N. Y. Supp. 473; Id., 135 N. Y. 182, 31 N. E. 1104; Duff v. Hutchinson, 57 Hun, 152, 10 N. Y. Supp. 857. And see Up-

The agreement may be conditional. If a receipt is given for an amount received in discharge of damage, with the understanding, although not expressed in the document, that the person injured should not thereby exclude himself from further compensation if his injury turned out more serious than was supposed at the time, he will not be debarred from suing for damages in respect to injuries which have subsequently developed.[76] It may fail to cover cause of action in issue.[77] A release of all claims and demands, "from the beginning of the world to this day," does not cover injuries not therein mentioned, and not known to exist at the time the release was executed.[78] But a simple receipt in full—for example, "$15 in full for damages sustained by a bull hooking a horse"—is a sufficient discharge.[79]

107. The person executing the agreement claimed as a release of a cause of action sounding in tort may, notwithstanding it, maintain his action if he can show that the release had been obtained by such fraud of the defendant as will entitle him to have it set aside (in many jurisdictions, without return of what

degrove v. Pennsylvania S. V. R. Co., 132 Pa. St. 540, 19 Atl. 283; Cory v. Chicago, B. & K. C. R. Co., 100 Mo. 282, 13 S. W. 346. And see Robertson v. Hunter, 29 S. C. 9, 6 S. E. 850; Heller v. Charleston Phosphate Co., 28 S. C. 224, 5 S. E. 611. An agreement to compromise a pending suit will not be enforced where the writing makes no mention of the suit, but simply releases all claims against defendant. Lampkins v. Vicksburg, S. & P. R. Co., 42 La. Ann. 997, 8 South. 530.

[76] Lee v. Lancashire & Y. R. Co., 6 Ch. App. 527.

[77] Where a blast by defendant injures plaintiff's building, and the damage done by such trespass quare clausum fregit has been settled, the defendant may still recover for the interruption of his business and the loss of time of his workmen. Hunter v. Farren, 127 Mass. 481.

[78] Union Pac. R. Co. v. Artist, 9 C. C. A. 14, 60 Fed. 365. A short note, with numerous authorities, on the effect of a release executed by the person injured, of all claims for damages, will be found in 40 Cent. Law J. 236.

[79] Currier v. Bilger, 149 Pa. St. 109, 24 Atl. 168; Battle v. McArthur, 49 Fed. 715; Guldager v. Rockwell, 14 Colo. 459, 24 Pac. 556. A collection of authorities on the validity of releases to railroads for damages through personal injuries. Bliss v. New York Cent. & H. R. R. Co., 9 Am. R. & Corp. R. 493 (Mass.) 36 N. E. 65.

was paid under it by the tort feasor), if he act without laches in asking for a rescission. Such an agreement may be rescinded in the same action which awards damages for the wrong done.

"Fraud vitiates all it touches." While a release of a cause of action sounding in tort, containing proper words of release, or for a sufficient consideration, executed by proper parties, is a bar to an action,[80] such release may be set aside for fraud, like a receipt,[81] in the same suit in which claim for damages is made.[82] A fraud, to vitiate a release, must have been perpetrated by the defendant, or some one representing him. If, for example, the signature to a release of a claim for seduction was obtained by some third person, not connected by evidence with the defendant, the fraud does not vitiate;[83] but the defendant's attorney is his agent in the sense that the attorney's fraud in procuring a release in such a case is the defendant's fraud.[84] The release, if void for one purpose, is void for all. Therefore, if a release is void as to inspectors' fees, it is void as to damage occasioned by plaintiff's work, for which work those fees were charged, being delayed by the municipality.[85]

A release is not impeached merely because the releaser could not read or understand its contents, since his signing in such a case

[80] Chicago, W. & V. Coal Co. v. Peterson, 39 Ill. App. 114; Stone v. Weiller, 128 N. Y. 655, 28 N. E. 653; Virdin v. Stockbridge, 74 Md. 481, 22 Atl. 70.

[81] Hartshorn v. Day, 19 How. (U. S.) 211; George v. Tait, 102 U. S. 564–570. As to fraudulent representations and practice in avoidance of contract, see Bell v. Byerson, 11 Iowa, 233; Freedley v. French, 154 Mass. 339, 28 N. E. 272; Illinois Cent. R. Co. v. Welch, 52 Ill. 183; Schultz v. Chicago & N. W. R. Co., 44 Wis. 638; Chicago, R. I. & P. R. Co. v. Doyle, 18 Kan. 58; Michigan Cent. R. Co. v. Dunham, 30 Mich. 128; Davis v. Wood, 56 Hun, 648, 10 N. Y. Supp. 460.

[82] Girard v. St. Louis Car-Wheel Co., 46 Mo. App. 79; Id., 123 Mo. 358, 27 S. W. 648 (resort to equity unnecessary); Bussian v. Milwaukee, L. S. & W. Ry. Co., 56 Wis. 325. Accord procured by fraud, Ball v. McGeoch, 81 Wis. 160, 51 N. W. 443; Hayes v. East Tennessee, V. & G. R. Co., 89 Ga. 264, 15 S. E. 361.

[83] Meka v. Brown, 84 Iowa, 711, 45 N. W. 1041, and 50 N. W. 46; Vandervelden v. Chicago & N. W. R. Co., 61 Fed. 54.

[84] Gurley v. People, 31 Ill. App. 465.

[85] Newell v. City of New York, 61 Hun, 356, 15 N. Y. Supp. 911.

raises the presumption of gross negligence, which he has the burden to disprove.[86] But there are many circumstances under which misrepresentation as to the contents of a release may entitle the sufferer in tort to have it set aside. Thus, where the contents of a paper which the injured person was unable to read, because of dizziness, caused by injury to his face and head, were misrepresented to him, such a release does not prevent his recovery for personal injury suffered.[87] So, where a release is misrepresented to be a receipt [88] for wages,[89] or a hospital regulation,[90] pay roll,[91] or voucher for expenditures.[92] Indeed, the courts have gone so far as to say that "where false and fraudulent representations are made to a person, in order to induce him to sign an instrument other than the one he supposed he was signing, and such fraudulent party afterwards claims benefit of the fraud, it does not lie in his mouth to claim that the party defrauded might have protected himself from such imposition by greater precaution. Such a rule shocks the moral sense, and we do not think any consideration of public policy requires it to be established here." [93] Mere mistake as to the extent of an injury, where no misrepresentation

[86] Albrecht v. Milwaukee & S. R. Co., 87 Wis. 105, 58 N. W. 72; Mateer v. Missouri Pac. Ry. Co., 105 Mo. 320, 16 S. W. 839; Jenkins v. Clyde Coal Co., 82 Iowa, 618, 48 N. W. 970. And see Fuller v. Madison Mut. Ins. Co., 36 Wis. 599; Sanger v. Dun, 47 Wis. 615, 3 N. W. 388. As to consequences of failing to read over to an illiterate person writing executed by them, see Suffern v. Butler, 18 N. J. Eq. 220; Selden v. Myers, 20 How. 506; Trambly v. Ricard, 130 Mass. 259; O'Neil v. Lake Superior Iron Co., 63 Mich. 690, 30 N. W. 688.

[87] Lusted v. Chicago & N. W. Ry. Co., 71 Wis. 391, 36 N. W. 857. And see National Syrup Co. v. Carlson, 47 Ill. App. 178; Girard v. St. Louis Car-Wheel Co., 123 Mo. 358, 27 S. W. 648; Jones v. Alabama & V. Ry. Co. (Miss.) 16 South. 379.

[88] Bliss v. New York Cent. & H. R. R. Co., 160 Mass. 447, 36 N. E. 65. For damages to clothes, see Smith v. Steamship Co., 99 Cal. 462, 34 Pac. 84.

[89] Cleary v. Municipal Electric Light Co. (Sup.) 19 N. Y. Supp. 951; Bean v. Western N. C. R. Co, 107 N. C. 171, 12 S. E. 600.

[90] Pederson v. Seattle Consolidated St. Ry. Co., 6 Wash. 202, 33 Pac. 351.

[91] Butler v. Richmond & D. R. Co., 88 Ga. 594, 15 S. E. 668.

[92] Eagle Packet Co. v. De Fries, 94 Ill. 598–602.

[93] Chicago, R. I. & P. Ry. Co. v. Lewis, 13 Ill. App. 166–170, citing Anderson v. Field, 6 Bradf. 307–312; Butler v. Regents, 32 Wis. 122; Schultz v. Chicago & N. W. Ry. Co., 44 Wis. 645; Eagle Packet Co. v. De Fries, 94 Ill. 598; Illi-

can be charged to the defendant, or to his physician, and no artifice is used on the part of the tort feasor to prevent the injured person from ascertaining the true nature of the injury, will not avoid an accord and satisfaction.[94] A mistaken opinion as to the cure of the injury, expressed in good faith by the physician of the wrongdoer, is not a fraud which will avoid the release.[95] But where false representations are made to a person suffering from an accident, as to the medical opinion given as to his state, inducing him to accept an almost nominal sum for satisfaction, he can recover, notwithstanding.[96] A case of personal injury already begun may be settled by the injured person, without the consent of the attorney of record;[97] but such settlements are scrutinized severely, and will be set aside where there is any appearance of fraud or undue influence.[98] Undue influence may vitiate a release for torts on much the same principle as it would a will. Thus, upon the commencement of a suit by a married woman against a railroad company for injuries sustained by her through its negligence, the company's station agent, assisted by a physician, who was also a lawyer, induced her uncle to interview her regarding a settlement. He told her it would be a great disgrace to be brought into court, that the suit would be repeatedly put off, and that she would get nothing in the end. Her husband was absent, her children were sick, and she was very poor. The court set aside the release on the ground of undue influence.[99]

nois Cent. R. Co. v. Welch, 52 Ill. 187; Mulber v. Old Colony Ry., 127 Mass. 86; Linington v. Strong, Chi. Leg. News (April 7, 1883) 243; Sheanon v. Pacific Mut. Life Ins. Co., 83 Wis. 507–527, 53 N. W. 878.

[94] Hayes v. East Tennessee, V. & G. Ry. Co., 89 Ga. 264, 15 S. E. 361; Eccles v. Union Pac. Ry. Co., 7 Utah, 335, 26 Pac. 924.

[95] Doty v. Chicago, St. P. & K. C. Ry. Co., 49 Minn. 499, 52 N. W. 135; Vandervelden v. Chicago & N. W. R. Co., 61 Fed. 54–56.

[96] Stewart v. Great Western Ry. Co., 2 De Gex & S. 319.

[97] Dolloff v. Curran, 59 Wis. 332, 18 N. W. 266.

[98] Voell v. Kelly, 64 Wis. 504, 25 N. W. 536; Bussian v. Milwaukee, L. S. & W. Ry. Co., 56 Wis. 325, 14 N. W. 452.

[99] Stone v. Chicago & W. M. Ry. Co., 66 Mich. 76, 33 N. W. 24. And see Flummerfelt v. Flummerfelt, 51 N. J. Eq. 432, 26 Atl. 857. As to what is not sufficient, see Alabama & V. Ry. Co. v. Turnbull, 71 Miss. 1029, 16 South. 346; In re Rockey's Estate, 155 Pa. St. 453, 26 Atl. 656.

Where the settlement of the wrong done was induced by fraud, it is not necessary for the plaintiff to return to the defendant what he has recovered under the terms of the settlement before he is entitled to pursue his action. Thus, if the defendant obtains a signature of the plaintiff to a paper, purporting to be a settlement and discharge of the cause of action, by fraudulent representations that it is merely a receipt for a gratuity, the plaintiff may maintain his action without returning the money paid him, and the jury will deduct from its award the amount already received.[100] But on this point the authorities are not agreed.[101] This principle applies, a fortiori, where the cause of action sued on was not included in the release.[102]

A court will not readily set aside a formal settlement of a matter in dispute. The burden to avoid a satisfaction or discharge of a tort rests on the party attacking it.[103] A party defrauded is bound to use active diligence to allow no avoidable delay in complaining of the wrong done him in fraudulently procuring a settlement. Any delay which is not reasonably necessary under the circumstances is fatal.[104]

[100] Mullen v. Old Colony Ry., 127 Mass. 86. Cf. Bliss v. New York Cent. & H. R. R. Co., 160 Mass. 447, 36 N. E. 65; Cleary v. Municipal Electric Light Co., 65 Hun, 621, 19 N. Y. Supp. 951 (distinguishing McGlynn v. Railway Co., 93 N. Y. 655; Dixon v. Railway Co., 100 N. Y. 170, 3 N. E. 65); Shaw v. Webber, 79 Hun, 307, 29 N. Y. Supp. 437; Girard v. St. Louis Car-Wheel Co., 46 Mo. App. 79; Id., 123 Mo. 358, 27 S. W. 648; O'Brien v. Railway Co. (Iowa) 57 N. W. 425; Butler v. Richmond & D. R. Co., 88 Ga. 594, 15 S. E. 668. And see Knoxville, C. G. & L. R. Co. v. Acuff, 92 Tenn. 26, 20 S. W. 348. See Duff v. Hutchinson, 57 Hun, 52, 10 N. Y. Supp. 857.

[101] However, where an accord and satisfaction is fully executed, the party receiving money from the other cannot rescind on the ground of fraud, or of his own mental incompetency to make a contract, without refunding, or offering to refund, the money received. Strodder v. Stone Mountain Granite Co., (Ga.) 19 S. E. 1022. But see Vandervelden v. Chicago & N. W. R. Co., 61 Fed. 54–56, citing Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311; Billings v. Smelting Co., 3 C. C. A. 69, 52 Fed. 250.

[102] Kirchner v. New Home Sewing Mach. Co., 135 N. Y. 182, 31 N. E. 1104.

[103] Addyston Pipe & Steel Co. v. Copple, 94 Ky. 292, 22 S. W. 323; Pederson v. Railway Co., 6 Wash. 202, 33 Pac. 351; Helling v. United Order of Honor, 29 Mo. App. 309.

[104] Lewless v. Detroit, G. H. &. M. Ry. Co., 65 Mich. 292–302, 32 N. W. 790, citing cases. International & G. N. Ry. Co v. Brazzil, 78 Tex. 314, 14 S. W.

DISCHARGE OR LIMITATION BY OPERATION OF LAW.

108. Liability for torts may be discharged by operation of law by—

(a) Judgment;

(b) Death of either party;

(c) Statutes of limitation;

(d) Compliance with statutory provisions.

SAME—DISCHARGE BY JUDGMENT.

109. A tort is discharged by a judgment rendered in a former action, although the form of action may have been different, provided—

(a) The court had jurisdiction;

(b) The action was between the same parties, and on the same cause of action; and

(c) The judgment was on the merits, and final.

Reason.

When an action is brought, and the plaintiff recovers judgment, the original right in respect to which he sues is merged in the higher and better right which he attains by his judgment. It being gone, the party may proceed to obtain its fruits by execution, or to revive it by a fresh action on his judgment. "For you shall not bring the same cause of action twice to a final determination; 'Nemo debet bis vexari pro eadem causa;' and what is the same cause of action is where the same evidence will support both actions." [105] "Interest reipublicæ ut sit finis litium." [106]

The judgment of a foreign court is not in force, in the sense that it destroys the cause of action, although it may estop the party from disputing the matter of facts it has decided.[107] If the judgment be

609; Chicago, St. P. & K. C. Ry. Co. v. Pierce, 12 C. C. A. 110, 64 Fed. 293; Fist v. Fist, 3 Colo. App. 273, 32 Pac. 719.

[105] Kitchen v. Campbell, 3 Wils. 304. The principle does not apply to ejectment. Eichert v. Schaffer, 161 Pa. St. 519, 29 Atl. 393.

[106] Broom, Leg. Max. 331, 343; 2 Co. Litt. 303.

[107] Higgen's Case, 3 Coke, 344; Smith v. Nicolls, 5 Bing. N. C. 208; Aus-

satisfied, however, this is otherwise.[108] In America a domestic judgment on the merits is conclusive between the same parties on all issues actually tried and passed on.[109]

But a judgment rendered without jurisdiction does not establish the plea res judicata.[110] A judgment in another suit must be pleaded specially.[111]

tralasia Bank v. Harding, 9 C. B. 661. But see Dunstan v. Higgins, 63 Hun. 631, 17 N. Y. Supp. 887. As to effect of foreign judgment in rem, see Castrique v. Imrie, L. R. 4 H. L. 414; Wright v. Omnibus Co., 2 Q. B. Div. 271. In England a judgment in a county court is a bar to an action for the same cause of action in any other court. Austin v. Mills, 9 Exch. 288. Compare Brunsden v. Humphrey, 14 Q. B. Div. 141.

[108] Barber v. Lamb, 8 C. B. (N. S.) 95. The judgment of a state supreme court reversing a judgment in favor of a railway employé for personal injury, and granting a new trial, does not preclude such employé, on subsequently taking a nonsuit, from maintaining a like suit in a federal court, or from offering therein evidence tending to show a like state of facts to that which was shown by the evidence before the state supreme court. Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 14 Sup. Ct. 140. The finding and judgment made by the church in the trial of the clergyman on the charges is not competent evidence for either party, in a suit for damages for the libel, and is properly stricken out of the answer of the deacons. Piper v. Woolman, 43 Neb. 280, 61 N. W. 588.

[109] Lord v. Thomas (Cal.) 36 Pac. 372; Johnson v. Johnson (Minn.) 58 N. W. 824. The constitution of the United States ordains that full faith and credit shall be given in each state to the judicial proceedings of every other state, and also that congress may prescribe the effect which judicial proceedings had in one state shall be given in each of the others. Congress, in the exercise of this power, after prescribing how such proceedings shall be authenticated to render them admissible in evidence, has declared that, when so authenticated, they "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." Rev. St. U. S. p. 170, § 905. As to judgment in state court which has been transferred to United States circuit court, see Roberts v. Railway Co., 48 Minn. 521, 51 N. W. 478. As to judgment of courts of same state, see Johnson v. Johnson (Minn.) 58 N. W. 824.

[110] Attorney General for Trinidad & Tobago v. Eriché [1893] App. Cas. 518; Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884; Wright v. Wright, 99 Mich. 170, 58 N. W. 54; Winchester v. County Com'rs, 78 Md. 266, 27 Atl. 1075. Cf. In re Ellis' Estate, 55 Minn. 401, 56 N. W. 1056.

[111] Norton v. Norton (Ky.) 25 S. W. 750; Spargur v. Romine, 38 Neb. 736, 57 N. W. 523; Field v. Sims, 96 Ala. 540, 11 South. 763; McCreary v. Jones

Identity of Parties and Cause of Action.

It is only when the causes of action in two suits are identical that the recovery of judgment in one can be a bar to the other.[112]

A judgment in an action against the lessee for a breach of the covenant to pay rent is not a bar to an action for damages for negligence in the care of the premises.[113]

It is generally true that where a party, claiming to have been injured, has an option of using one of several modes of legal redress, elects to take one, which is adequate, and prosecutes the same to a final judgment, he cannot subsequently resort to another legal proceeding for the same wrong.[114] But if he seek in vain to rescind a contract, for fraud, he may subsequently sue for damages.[115]

However, the subject-matter may be the same, but the causes of action (and not merely the forms of procedure) may be different.[116]

96 Ala. 592, 11 South. 600; Dunklee v. Goodenough, 65 Vt. 257, 26 Atl. 988; Lynde v. Columbus, C. & I. C. Ry. Co., 57 Fed. 993; Bryson v. St. Helen, 79 Hun, 167, 29 N. Y. Supp. 524; Kilpatrick v. Railroad Co., 38 Neb. 620, 57 N. W. 664; David Bradley Manuf'g Co. v. Eagle Manuf'g Co., 7 C. C. A. 442, 58 Fed. 721.

[112] Where a physician sues for services and defendant confesses judgment, the latter cannot subsequently sue the former for malpractice. Bellinger v. Craigue, 31 Barb. 534; Gates v. Preston, 41 N. Y. 113; Blair v. Bartlett, 75 N. Y. 150. And, generally, see Cromwell v. County of Sac, 94 U. S. 351; Featherston v. President, etc., of Newburgh & C. Turnpike Road, 71 Hun, 109, 24 N. Y. Supp. 603. A judgment, on the other hand, may be conclusive evidence against parties. Thus, in an action against a city for personal injuries caused by an obstruction placed in the street by a contractor who was constructing a sewer therein, notice was given to the contractor to defend. It was held that a judgment for plaintiff was an adjudication that the contractor's wrongful act caused the injury, and was conclusive on defendant in an action by the city on the contractor's bond to recover the amount of such judgment. City of New York v. Brady (Sup.) 30 N. Y. Supp. 1121.

[113] Wright v. Tileston (Minn.) 61 N. W. 823.

[114] Thomas v. Joslin, 36 Minn. 1, 29 N. W. 344; Sanger v. Wood, 3 Johns. Ch. 416; Washburn v. Insurance Co., 114 Mass. 175; Terry v. Munger, 121 N. Y. 161, 24 N. E. 272; Conrow v. Little, 115 N. Y. 387, 22 N. E. 346.

[115] Cf. Marshall v. Gilman, 47 Minn. 131, 49 N. W. 688; Savings Bank of St. Paul v. Arthier, 52 Minn. 98, 53 N. W. 812. And see Strong v. Strong, 102 N. Y. 69, 5 N. E. 799.

[116] Spear v. Tidball, 58 N. W. 708; Ahl v. Goodhart, 161 Pa. St. 455, 29 Atl. 82. A recovery by wife for personal injury to herself does not bar her

Therefore, judgment in an action for false imprisonment may not be a bar to an action for malicious prosecution arising from the same [illegible]. A fortiori, this is true where the wrongful conduct may be the same, but the parties to the judicial proceeding are different, or parties [illegible] different rights.[117] In the same way, where one suffers several damages, as where both his person and his property are negligently injured by another, there are two independent causes of action, and after recovering judgment on one he may proceed on the other.[118]

While, however, ordinary damages, not several, afford the basis

awarded. Watson v. Texas & P. Ry. Co. (Tex. Civ. App.) 27 S. W. 924; Texas & P. Ry. Co. v. Nelson (Tex. Civ. App.) 29 S. W. 78. Plaintiff had recovered a judgment against the agent for the amount he had received from the seller of the land as being a secret profit made by connivance of the latter, to which plaintiff, as principal, was entitled, and this judgment was satisfied. It was held that this did not operate as a satisfaction of a former judgment against the agent for damages for his deceit, and is no bar to an action for deceit against the present defendant, the seller of the lands. The damages were essentially different. Glaspie v. Keator, 5 C. C. A. 474, 56 Fed. 203. Cf. Keator v. St. John, 42 Fed. 585.

117 Post, p. 620, distinction between false imprisonment and malicious prosecution.

118 Furlong v. Banta, 80 Hun, 465, 29 N. Y. Supp. 985. A judgment for trespass in cutting trees on lands of a church, recovered by one who sued as a deacon of the church, cannot be pleaded by defendant as an adjudication in an action for the same trespass by the trustees of the church. Allison v. Little, 93 Ala. 150, 9 South. 388. The right of a posthumous child to recover damages for the death of his father, caused by wrongful negligence, is not barred by a previous recovery by other parties of the damages sustained by them. Nelson v. Galveston, H. & S. A. Ry. Co., 78 Tex. 621, 14 S. W. 1021. Recovery by a husband for injuries to himself is not a bar to a subsequent action for injuries to his wife, sustained at the same time, as a result of the same negligence. Texas & P. Ry. Co. v. Nelson (Tex. Civ. App.) 29 S. W. 78. And, generally, see Burgin v. Raplee, 10 Ala. 433, 14 South. 205; Stanton v. Hennessey, 78 Hun, 287, 28 N. Y. Supp. 855, and 29 N. Y. Supp. 615; Norton v. Norton (Ky.) 25 S. W. 750; Malsky v. Schumacker (Com. Pl.) 27 N. Y. Supp. 331; Guy v. Fisher & Burnett Lumber Co., 93 Tenn. 213, 23 S. W. 972.

119 Guest v. Warren, 9 Exch. 379, 23 L. J. Exch. 121. Cf. Phillips v. Berryman, 3 Doug. 286. A cause of action for damages for the negligent killing of two horses, at the same time and place, is entire and indivisible, and a recovery in a separate action for the death of one is a bar to a subsequent ac-

of but a single suit, fresh damages may create a fresh cause of action. Thus, in an action for slander, for the utterance of slanderous words on a particular occasion, only one action can be brought, but any fresh slander creates a fresh cause of action. So each successive act of trespass may constitute a distinct cause of action. The test is whether, on the cause alleged in the action on which the judgment is founded, the damage sued for in the second could have been recovered.[120] The mere fact that the injured person at the time of recovery of judgment, did not recover all the damage consequent upon the wrong, will not save him from the bar of the first judgment. Thus, where, after the first judgment was rendered in an action of assault and battery, a piece of the injured person's skull came out, the original judgment was a bar to another action.[121]

Final Judgment on the Merits.

A mere common-law nonsuit is not a determination of the cause on the merits, and therefore does not bar another action;[122] nor does a judgment of dismissal, on the plaintiff's own motion, without

tion for the death of the other. St. Louis S. W. Ry. Co. v. Moss (Tex. Civ. App.) 28 S. W. 1038. Punitive damages will be allowed for assault and battery, although defendant has been convicted and fined in a criminal court for same wrong. Rhodes v. Rodgers, 151 Pa. St. 634, 24 Atl. 1044; Virgo v. Virgo, 69 Law T. 460; Morch v. Raubitschek, 159 Pa. St. 559, 28 Atl. 369; Marceau v. Travelers' Ins. Co., 101 Cal. 388, 35 Pac. 856, and 36 Pac. 813; People v. Leland, 73 Hun, 162, 25 N. Y. Supp. 943; Johnson v. Girdwood (Com. Pl.) 28 N. Y. Supp. 151; Thisler v. Miller, 53 Kan. 515, 36 Pac. 1060; Govin v. De Miranda, 79 Hun, 329, 29 N. Y. Supp. 347. A judgment for damages, recovered in a civil action for assault and battery, is not a bar to a criminal prosecution against the plaintiff therein, since both he and defendant may have been guilty. People v. Kenyon, 93 Mich. 19, 52 N. W. 1033.

[120] Clerk & L. Torts, 120.

[121] Fetter v. Beale, 1 Ld. Raym. 339, 692. So, where the owner of a patent obtained a decree for a perpetual injunction against infringement, and was awarded damages and profits for infringements occurring prior to a certain time, it was held that he could not maintain a second suit against the same defendant to recover damages and profits arising from other acts of infringement committed during the same period, but of which no evidence was given in the former suit, and no recovery asked. Horton v. New York Cent. & H. R. R. Co. (C. C.) 63 Fed. 897.

[122] Merrick v. Hill (Sup.) 28 N. Y. Supp. 237. A nonsuit is but like the blowing out of a candle, which a man, at his own pleasure, may light again. Clapp v. Thomas, 5 Allen (Mass.) 158, 160. And see Harvey v. Large, 51

the defendant's consent, bar another action for the same purpose.[122] If, before the final submission of the case to the jury, the court dismiss it, this, it seems, is a common-law nonsuit, and does not bar subsequent action. Therefore, where one was injured in a rolling mill, and at the close of his case the court granted a motion to dismiss, it was held the plaintiff could subsequently sue for the same injury.[124] A judgment cannot be pleaded in bar during the time for appeal therefrom, and while a motion for a new trial is pending.[125] No judgment operates as an estoppel unless it is a judgment on the merits.[126] A judgment by consent for the defendant, after a plea in abatement has been sustained, is not on the merits.[127]

SAME—DISCHARGE BY DEATH.

110. At common law, the death of either (a) the person who did the wrong, or (b) who suffered the wrong, discharged liability in tort. The death of a human being would not support an action, even by persons who stood to the deceased in the relation of

Barb. (N. Y.) 222; Lindvall v. Woods, 47 Fed. 195; Audubon v. Excelsior Ins. Co., 27 N. Y. 216; Brown v. Kirkbride, 19 Kan. 588; Wanzer v. Self, 30 Ohio, 378.

[123] Pierce v. Hilton (Cal.) 36 Pac. 595. As to common-law retraxit, see Walker v. St. Paul City R. Co., 52 Minn. 127–130, 53 N. W. 1068; Chit. Gen. Prac. 1515.

[124] Craver v. Christian, 34 Minn. 397, 26 N. W. 8; Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387; Andrews v. School Dist. No. 4, 35 Minn. 70, 27 N. W. 303. However, questions once determined by a court of competent jurisdiction, if the judgment has become final, are conclusive on the parties and their privies, without regard to the form in which the questions were raised. McNeely v. Hyde (La.) 15 South. 167.

[125] Fresno Milling Co. v. Fresno Canal & Irrigation Co. (Cal.) 36 Pac. 412. But dismissal by the trial court, at the end of plaintiff's case, on the ground that plaintiff's testimony failed to show his right to recover, and a subsequent appeal to the supreme court of the state, and an affirmance by that court, is not an adjudication on the merits that can be pleaded in bar when an action on the same wrong is commenced in the federal courts. Lindvall v. Woods, 47 Fed. 195.

[126] Taylor v. Larkin, 12 Mo. 103; Bell v. Hoagland, 15 Mo. 360; Houston v. Musgrove, 35 Tex. 594; Verhein v. Schultz, 57 Mo. 326.

[127] Gorden v. Siefert, 126 Mass. 25.

master and servant, parent and child, or husband and wife, for the recovery of damages for loss of service or society. Exceptions to this principle created by the early statutes, or by the courts, did not substantially modify it.

History of Rule.

In 1606, in Higgins v. Butcher,[128] where the defendant had assaulted and beaten the plaintiff's wife, from which she died, it was held that the plaintiff could not recover. All the case decided was that, where the person to whom a wrong is done dies, the action dies.[129] The question was not raised again in England until 1808, when, in Baker v. Bolton,[130] Lord Ellenborough laid down his famous proposition, that "in a civil court the death of a human being could not be complained of as an injury." The law was extended in Osborne v. Gillott,[131] by holding that while a master can sue for injury done his servant by wrongful act or negligence, whereby the service of the servant is lost to his master, still, if the injury result in the servant's death, the master's compensation is gone.

The early American cases were not in accord with Baker v. Bolton.[132] The common-law rule, however, has been unanimously accepted by the courts of the various states and of the United States.[133]

[128] Yelv. 89.

[129] Tiff. Death Wrongf. Act, c. 1.

[130] 1 Camp. 493.

[131] L. R. 8 Exch. 88.

[132] Tiff. Death Wrongf. Act, § 6; Cross v. Guthery (1794) 2 Root, 90; Ford v. Monroe (1838) 20 Wend. 210; Plummer v. Webb (1825) 1 Ware, 69, Fed. Cas. No. 11,234; Carey v. Berkshire Ry. Co. (1848) 1 Cush. 475. See Palfrey v. Portland, S. & P. R. Co., 4 Allen, 55; Eden v. Lexington & F. R. Co. (1853) 14 B. Mon. 165; James v. Christie (1833) 18 Mo. 162; Shields v. Yonge, 15 Ga. 349; Chick v. Railway Co., 57 Ga. 357; McDowell v. Railway Co., 60 Ga. 320; Sullivan v. Union Pac. R. Co., 3 Dill. 334, Fed. Cas. No. 13,599; McGovern v. New York Cent. & H. R. R. Co., 67 N. Y. 417; Cutting v. Seabury, 1 Spr. 522, Fed. Cas. No. 3,521.

[133] Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265; City of Eureka v. Merrifield (Kan.) 37 Pac. 113; Green v. Hudson River R. Co., 28 Barb. 9; Insurance Co. v. Brame, 95 U. S. 754; Asher v. Cabell,

Reason of Rule.

None of the many reasons assigned for the rule has been generally accepted as satisfactory.

It has been suggested as a reason that process in tort was a substitute for private war, and was against the man, not against the estate. The difference in practice has also been referred to as providing an explanation. "If one doth a trespass to me, and dieth, the act is dead, also, because it should be inconvenient to recover against one who was not a party to the wrong." [134]

In England it has been urged that the rule is based on the merger of the wrong resulting in death into the felony involved. The sufficiency of this reason has been denied in England, and in America the doctrine has been generally repudiated.[135] Forfeiture,[136] as an explanation, is as objectionable.[137] "Actio personalis moritur cum persona" is a restatement, and not an explanation, of the rule. Moreover, it does not apply to any one not a party to the action, as the master, parent, or husband.[138] Public policy, that enlightened nations are unwilling to set a price on human life, that the value of life is too great to be estimated in money, or that the law refuses to recognize the interest of one person in the death of another, are all unsatisfactory, if not absurd, reasons.[139] It is of no practical utility to search further for the reason of the rule.[140] The rule is barbarous, and rests on adjudication, in fact.[141]

1 C. C. A. 693, 50 Fed. 818–824; The Corsair, 145 U. S. 335–344, 12 Sup. Ct. 949; Hyatt v. Adams, 16 Mich. 180–185 (collecting cases); Tiff. Death Wrongf. Act, §§ 11, 13, 14 (collecting cases).

134 Y. B. (1440) 19 Hen. VII.

135 Hyatt v. Adams, 16 Mich. 180; Carey v. Berkshire R. Co., 1 Cush. 475; 2 Bish. Cr. Law (2d Ed.) § 270.

136 Shields v. Yonge, 15 Ga. 349.

137 Grosso v. Delaware, L. & W. R. Co., 50 N. J. Law, 317, 13 Atl. 233.

138 Green v. Hudson River R. Co., *41 N. Y. 294, 28 Barb. 9.

139 Osborne v. Gillett, L. R. 8 Exch. 88; Smith, Neg. (2d Ed.) 256; Hyatt v. Adams, 16 Mich. 180; Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265.

140 Leonard, J., in Green v. Hudson River R. Co., *41 N. Y. 294.

141 Pol. Torts, 53. The rule rests more on artificial distinction than any real principle, and savors more of the logic of the schoolmen than of common sense. Hyatt v. Adams, 16 Mich. 180.

Application of Rule.

At common law, subject to the exceptions to be noted, death discharged a tort, not only as to the sufferer who might die, so far as his or her estate, master, parent, husband, or wife is concerned, but it also operated as a discharge when the tort feasor died.[142]

A number of early English statutes modified the rule so far as to allow executors or administrators the same action for injury done to the personal estate of the deceased in his lifetime, whereby it has become less beneficial to executors or administrators, as the deceased might have had.[143] This right was extended to cases where injury was done to the freehold of the person who subsequently dies.[144] Apart from these statutes, a remedy for the wrongful act can be pursued against the estate of the person by whom the act was committed when the property or proceeds of the property belonging to another have been appropriated by the deceased person.[145] Indeed, the English courts have gone very far towards limiting the discharge by death to cases of mere personal torts.[146] The maxim does not apply where the cause of action arises ex contractu.[147] In cases of quasi tort,—as, for example, where death is caused by the breach of a carrier's contract for safe carriage,—the executor or administrator of deceased, although he could not sue in tort, might sue in contract, and recover damages.[148] Nor did it apply to damage to property, as distinguished from person.

[142] 2 Inst. 301; Williams, Ex'rs (8th Ed.) pt. 4, bk. 2; Overend v. Gurney, L. R. 4 Ch. App. 701.

[143] 4 Edw. III. c. 725; 5 Edw. III. c. 5.

[144] 3 & 4 Wm. IV. c. 42; Hatchard v. Mege, 18 Q. B. Div. 771; Kirk v. Todd, 21 Ch. Div. 484–488.

[145] Powell v. Rees, 7 Adol. & E. 426; Phillips v. Homfray, 24 Ch. Div. 439 (Baggallay, L. J., dissenting); Ashley v. Taylor, 10 Ch. Div. 768. Compare with Hambly v. Trott, 6 Mod. 127; Bailey v. Birtles, T. Raym. 71; Perkinson v. Gilford, Cro. Car. 539.

[146] Pulling v. Great Eastern Ry. Co., 9 Q. B. Div. 110 (commenting on Twycross v. Grant, 4 C. P. Div. 40).

[147] Williams, Ex'rs (8th Ed.) p. 87.

[148] Knights v. Quarles, 2 Brod. & B. 102; Potter v. Metropolitan Dist. Ry. Co., 30 Law T. (N. S.) 765; Bradshaw v. Lancashire Ry., L. R. 10 C. P. 189; Leggott v. Great Northern Ry. Co., 1 Q. B. Div. 599. Doctrine sustained in The City of Brussels, 6 Ben. 370, Fed. Cas. No. 2,745; Winnegar's Ad'mr v. Central Passenger Ry. Co., 85 Ky. 547, 4 S. W. 237. It was held not to

111. Except as modified by statute, the common-law rule as to discharge by death remains in force. But, almost universally, direct legislation has practically abrogated it by creating a new action.

The English statute ("Lord Campbell's Act") for compensating the families of persons killed by accident was passed in 1846. Statutes similar to this have been passed by most of the states of the United States of America and by many of the provinces of Canada.[149]

These acts do not repeal nor create an exception to the common law. "A totally new action," said Lord Blackburn,[150] "is given against the person who would have been responsible to the deceased if the deceased had lived,—an action which * * * is new in its species, new in its quality, new in its principle, in every way new, and which can be brought by a person answering the description of the widow, parent, or child who, under such circumstances, has suffered pecuniary loss."

The constitutionality of the various acts giving a remedy in case of death has not been seriously questioned,[151] but generally sustained; even where the remedy was made to apply exclusively to railroad corporations.[152]

apply to personal injury inflicted by a deceased surgeon. Vittum v. Gilman, 48 N. H. 416; Jenkins v. French, 58 N. H. 532. Et vide Cregin v. Brooklyn Crosstown R. Co., 75 N. Y. 192, 83 N. Y. 595; Crowley v. Panama Ry., 30 Barb. 99; Hyde v. Wabash, St. L. & P. R. Co., 61 Iowa, 441, 16 N. W. 351.

[149] Tiff. Death Wrongf. Act, p. xvii. (Analytical Table of Statutes).

[150] Seward v. Vera Cruz, L. R. 10 App. Cas. 59; Blake v. Midland Ry. Co., 18 Q. B. 93, 21 Law J. Q. B. 233; Whitford v. Panama R. Co., 23 N. Y. 465; Littlewood v. Mayor, etc., 89 N. Y. 24; Russell v. Sunbury, 37 Ohio St. 372; Hamilton v. Jones, 125 Ind. 176, 25 N. E. 192; Hulbert v. City of Topeka, 34 Fed. 510; Mason v. Union Pac. R. Co., 7 Utah, 77, 24 Pac. 796.

[151] South Western Ry. Co. v. Paulk, 24 Ga. 356; Board of Shelby Co. v. Scearce, 2 Duv. (Ky.) 576; Georgia Railroad & Banking Co. v. Oaks, 52 Ga. 410.

[152] Boston, C. & M. R. v. State, 32 N. H. 215; Louisville Safety-Vault & Trust Co. v. Louisville & N. R. Co., 92 Ky. 233, 17 S. W. 567. Compare Smith v. Louisville Ry., 75 Ala. 449. And, generally, see Denver, S. P. & P. Ry. Co. v. Woodward, 4 Colo. 162; Chicago, St. L. & N. O. R. Co. v. Pounds, 11 Lea. (Tenn.) 127.

The authorities are about equally divided as to whether these statutes are to be liberally or strictly construed. On the one hand, it is said that they are remedial, and should consequently receive a liberal construction.[153] On the other hand, it is said that they are in derogation of the common law, and should consequently receive a strict interpretation.[154]

Except so far as modified by statute, the common-law rule as to effect of death on causes of action sounding in tort remains in full effect. Accordingly, unless the statute expressly provides to the contrary, a cause of action sounding in tort, and not falling within the common-law exceptions, abates on the death of the wrongdoer, and cannot be maintained against his personal representatives.[155]

The Statutory Action.

In order that a cause of action under Lord Campbell's act and similar statutes shall exist, it is ordinarily necessary that the following circumstances concur: (1) That the death shall have been caused by such wrongful act, neglect, or default of the defendant that an action might have been maintained therefor by the party injured, if death had not ensued;[156] (2) that there be in existence some one

[153] Tiff. Death Wrongf. Act, c. 2, § 32, collecting cases.

[154] Tiff. Death Wrongf. Act, c. 2, § 32, collecting cases.

[155] Green v. Thompson, 26 Minn. 500, 5 N. W. 376; Hamilton v. Jones, 125 Ind. 176, 25 N. E. 192; Pennsylvania Co. v. Davis, 4 Ind. App. 51, 29 N. E. 425. Compare Yertore v. Wiswell, 16 How. Prac. 8, and Doedt v. Wiswell, 15 How. Prac. 128, with Norton v. Wiswell, 14 How. Prac. 42, and Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787; Moriarity v. Bartlett, 99 N. Y. 651, 1 N. E. 794. Et vide Pessini v. Wilkins, 54 N. Y. Super. Ct. 146; Davis v. Nichols, 54 Ark. 358, 15 S. W. 880; Russell v. Sunbury, 37 Ohio St. 372; Moe v. Smiley, 125 Pa. St. 136, 17 Atl. 228. But an action for personal injury does not abate after verdict by death of plaintiff. Cooper v. Railway Co., 55 Minn. 134, 56 N. W. 588. And see Lyons v. Third Ave. Ry. Co. (1867) 7 Rob. (N. Y.) 605; Wood v. Philips (1871) 11 Abb. Prac. (N. S.) 1; Kelsey v. Jewett, 34 Hun, 11; Corbett v. Twenty-Third St. Ry. Co., 114 N. Y. 579, 21 N. E. 1033.

[156] Therefore, where an owner of land wrongfully held by another is not civilly liable for the killing of the occupant while resisting the owner's attempt to regain possession without the use of more force than was reasonably necessary. Burnham v. Stone, 101 Cal. 164, 35 Pac. 627. As to willful homicide, see Rome R. Co. v. Barnett (Ga.) 20 S. E. 355. But the variations in statutory enactments appear conspicuously in this: That sometimes the statutory plaintiff (as the widow or next of kin) can recover when the deceased

of the persons for whose benefit the action may be brought; (3) that the actual party plaintiff be such a one as the statute prescribes; (4) that the time within which the action must be brought has not elapsed; and (5) according to some authorities, that the beneficiaries, or some one of them, shall have suffered pecuniary loss by reason of the death.[157]

In order that recovery may be had by statutory parties, the conduct complained of, and producing the death, must have the essential elements of a tort, so that the party injured might himself have maintained the action. There must be a breach of duty by the defendant. The duty may be created by common law, as where death results from the use, custody, or control of dangerous property.[158] The duty may arise out of a state of facts of which a contract is a part, as where the master has been guilty of a breach of duty to the servant, resulting in the servant's death;[159] so as between common carrier and passenger,[160] landlord and tenant,[161] vendor and purchaser.[162] The duty may be prescribed by statute;[163] nor is it material that such statute was enacted subsequently to the action

could not had he been merely hurt, not killed. Clark v. Railway Co., 160 Mass. 39, 35 N. E. 104.

[157] Tiff. Death Wrongf. Act, § 60.

[158] Klix v. Nieman, 68 Wis. 271, 32 N. W. 223; Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911; Trask v. Shotwell, 41 Minn. 66, 42 N. W. 699. Thus, if a vicious dog caused a runaway, and thereby death of deceased, its owner is liable under the statute. Mann v. Wieand, 81 Pa. St. 243, 4 Wkly. Notes Cas. 6. So, where death was produced by explosion of blast. Munro v. Reclamation Co., 84 Cal. 515, 24 Pac. 303.

[159] Hutchinson v. York N. & B. R. Co., 5 Exch. 341; Kumler v. Junction R. Co., 33 Ohio St. 150; Congrave v. Southern Pac. R. Co., 88 Cal. 360, 26 Pac. 175; De Forest v. Jewett, 88 N. Y. 264; Titus v. Bradford, B. & K. R. Co., 136 Pa. St. 618, 20 Atl. 517.

[160] Sheridan v. Brooklyn Ry., 36 N. Y. 39.

[161] Moore v. Steel Co. (Pa. Sup.) 7 Atl. 198; Albert v. State, 66 Md. 325, 7 Atl. 697; State v. Boyce, 73 Md. 469, 21 Atl. 322.

[162] Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350; Brunswig v. White, 70 Tex. 504, 8 S. W. 85.

[163] Thus, railroad companies are liable for death resulting from failure to give signals as required by statute. Becke v. Missouri Pac. Ry. Co., 102 Mo. 544, 13 S. W. 1053; Palmer v. New York Cent. & H. R. R. Co., 112 N. Y. 234, 19 N. E. 678; Galveston, H. & S. A. Ry. Co. v. Cook (Tex. Sup.) 16 S. W. 1038. So druggist is liable for clerk's failure to label poison resulting in

creating a right of action for injury resulting in death.[164] The breach of duty must be the proximate legal cause of the death.[165] The plaintiff must not have disentitled himself by his own act.[166]

In order that there may be a recovery, it is necessary that the statutory beneficiaries exist at the time the action is brought.[167] These beneficiaries are usually the widow and next of kin. It is sufficient if there be either the widow or next of kin. It is not nec-

death. Osborne v. McMaster, 40 Minn. 103, 41 N. W. 543; Nugent v. Vanderveer, 39 Hun, 323.

[164] Merkle v. Bennington Tp., 58 Mich. 156, 24 N. W. 776. Compare, contra, All v. Barnwell Co., 29 S. C. 161, 7 S. E. 58.

[165] Jackson v. St. Louis, I. M. & S. Ry. Co., 87 Mo. 422; Railway Co. v. Valleley, 32 Ohio St. 345; Haley v. Chicago North Western Ry. Co., 21 Iowa, 15.

[166] Thus, if it be charged that death was caused by assault and battery, self-defense might be a justification. Besenecker v. Sale, 8 Mo. App. 211. Compare Nichols v. Winfrey, 79 Mo. 544; Brooks v. Haslam, 65 Cal. 421, 4 Pac. 399. And see Fraser v. Freeman, 56 Barb. 234; Meyer v. King (Miss.) 16 South. 245; White v. Maxey, 64 Mo. 552; Morgan v. Durfee, 69 Mo. 469. So, in order to recover where death is charged to have been occasioned by negligence, the beneficiaries cannot recover, unless they show a breach of duty on the part of defendant. Post, p, 918. If the deceased has been guilty of contributory negligence, it is generally held that the statutory beneficiaries cannot succeed. In Kentucky, however, contributory negligence is no defense where the life of any person is lost by willful negligence. Gen. St. c. 57, § 3; Pennsylvania R. Co. v. Bell, 122 Pa. St. 58, 15 Atl. 561; Central Railroad & Banking Co. v. Kitchens, 83 Ga. 83, 9 S. E. 827; Gay v. Winter, 34 Cal. 153; Quinn v. New York, N. H. & H. R. Co., 56 Conn. 44, 12 Atl. 97; Newman v. Railway Co., 80 Iowa, 672, 45 N. W. 1054. Contributory negligence of beneficiaries has generally been held a bar, although not in Iowa, Virginia, and Ohio. Tiff. Death Wrongf. Act, §§ 69–71. Contributory negligence of personal representatives, unless they are the sole beneficiaries, is no bar. Indiana Manuf'g Co. v. Millican, 87 Ind. 87. Contributory negligence of parents, in an action by them, is a bar. Tiff. Death Wrongf. Act, § 70. But see Clark v. Railway Co., 160 Mass. 39, 35 N. E. 104.

[167] Woodward v. Railway Co., 23 Wis. 400; Wiltse v. Town of Tilden, 77 Wis. 152, 46 N. W. 234; State v. Baltimore & O. R. Co. (Md.) 17 Atl. 88; Westcott v. Central Vt. R. Co., 61 Vt. 438, 17 Atl. 745; Loague v. Railroad, 91 Tenn. 458, 19 S. W. 430; Tiff. Death Wrongf. Act, § 80, note 2, collecting cases; Schwarz v. Judd, 28 Minn. 371, 10 N. W. 208; Barnum v. Chicago, M. & St. P. Ry. Co., 30 Minn. 461, 16 N. W. 364. It is otherwise, however, in West Virginia and North Carolina. Tiff. Death Wrongf. Act, § 81.

essary that there should be both.[168] A posthumous child is next of kin.[169] An illegitimate child is generally not within the act;[170] nor is its mother.[171] It would seem that the husband is not included in the next of kin, unless the statute expressly give him the right of action.[172] It is not necessary that the beneficiaries should be residents of the state under whose law the remedy is sought.[173]

The statutes usually provide who shall be the party plaintiff. When the personal representatives of the deceased are so named, and bring suit, they have no beneficial interest in the recovery, but are merely conduits for the transmission of money recovered on the judgment to the persons beneficially entitled to recover.[174] The right to sue is confined to the persons authorized by statute. The beneficiaries cannot sue when the statute authorizes suit by personal

[168] City of Chicago v. Major, 18 Ill. 349; McMahon v. City of New York, 33 N. Y. 642; Haggerty v. Central R. Co., 31 N. J. Law, 349.

[169] The George and Richard, 24 Law T. (N. S.) 717; Nelson v. Galveston, H. & S. A. Ry. Co., 78 Tex. 621, 14 S. W. 1021; Texas & P. Ry. Co. v. Robertson, 82 Tex. 657, 17 S. W. 1041.

[170] Dickinson v. Railway Co., 33 Law J. Exch. 91; Good v. Towns, 56 Vt. 410; Marshall v. Wabash R. Co., 46 Fed. 269. Compare Muhl's Adm'r v. Michigan Southern R. Co., 10 Ohio St. 272.

[171] Gibson v. Midland Ry. Co., 2 Ont. 658; Harkins v. Philadelphia & R. R. Co., 15 Phila. 286.

[172] Compare Dickins v. New York Cent. R. Co., 23 N. Y. 158, with Drake v. Gilmore, 52 N. Y. 389. And see Warren v. Englehart, 13 Neb. 283, 13 N. W. 401; Steel v. Kurtz, 28 Ohio St. 191; Bream v Brown, 5 Cold. 168; Trafford v. Adams Exp. Co., 8 Lea, 96; East Tennessee, V. & G. Ry. Co. v. Lilly, 90 Tenn. 563, 18 S. W. 243. Parties, heirs at law, St. Louis, I. M. & S. Ry. Co. v. Needham, 3 C. C. A. 129, 52 Fed. 371. Parent, Grimsley v. Hankins, 46 Fed. 400 (Code Ala. 1886, § 2588). Widower not, Gen. St. Kan. 1889, par. 4518; W. U. Tel. Co. v. McGill, 6 C. C. A. 521, 57 Fed. 609. Mother, for death of bastard child, Marshall v. Railroad Co., 46 Fed. 269 (Rev. St. Mo. 1889, § 4425). Personal representative of nonresident, Maysville St. R. & T. Co. v. Marvin, 8 C. C. A. 21, 59 Fed. 91; Cf. Id., 49 Fed. 436.

[173] Philpott v. Missouri Pac. Ry., 85 Mo. 164; Luke v. Calhoun Co., 52 Ala. 115; Chesapeake Ry. v. Higgins, 85 Tenn. 620, 4 S. W. 47.

[174] Leggott v. Great Northern Ry., 1 Q. B. Div. 599; Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787; Lamphear v. Buckingham, 33 Conn. 237; Stewart v. Terre Haute & I. R. Co., 103 Ind. 44, 2 N. E. 208. In Maine, and in certain cases in Massachusetts, the remedy is by indictment. In Maryland, the action is not in the name of the state. Tiff. Death Wrongf. Act, § 90.

representatives;[175] and, on the other hand, the personal representatives cannot sue when the beneficiaries are the statutory plaintiffs.[176]

The time within which an action may be commenced is usually prescribed by the statute. In the absence of such special limitation, the period in which the action may be commenced is governed by the general provisions regulating the limitation of actions, so far as they may be applicable.[177]

SAME—STATUTES OF LIMITATION.

112. Liability for torts is discharged or barred by the running of the statute of limitations.[178]

113. The statute begins to run against a cause of action in tort—

(a) From the time the law presumes damage; or

(b) From the time of the happening of damage, when not presumed, except in case of fraud.

Both the cases to which a statute of limitations is applicable[179] and the time it begins to run depend in a large measure upon the

[175] Scheffler v. Minneapolis & St. L. Ry. Co., 32 Minn. 125, 19 N. W. 650; Wilson v. Bumstead, 12 Neb. 1, 10 N. W. 411; Weidner v. Rankin, 26 Ohio St. 522.

[176] Miller v. South Western Ry. Co., 55 Ga. 143; Gibbs v. Hannibal, 82 Mo. 143.

[177] Schlichting v. Wintjen, 25 Hun, 626. The time from which the statute limitation begins to run is determined by the statute. It is sometimes the period at which it accrues,—that is, death. Kennedy v. Burrier, 36 Mo. 128; Hanna v. Jeffersonville Ry., 32 Ind. 113. It sometimes commences to run upon the appointment of an administrator. Andrews v. Hartford & N. H. R. Co., 34 Conn. 57; Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230, 14 Sup. Ct. 579. Indiana statute, two years. Rev. St. Ind. 1881, § 284.

[178] Roberts v. Read, 16 East, 215; Gillon v. Boddington, 1 Russ. & M. 161; Nicklin v. Williams, 10 Exch. 259; Backhouse v. Bonomi, 9 H. L. Cas. 503; Whitehouse v. Fellowes, 10 C. B. (N. S.) 765; Lamb v. Walker, 3 Q. B. Div. 389; Mitchell v. Darley Main Colliery Co., 14 Q. B. Div. 125.

[179] Martin v. W. U. Tel. Co., 6 Tex. Civ. App. 619, 26 S. W. 136 (injury to person); Jorgensen v. Minister, etc. (Com. Pl.) 26 N. Y. Supp. 876 (injury to

construction of the particular enactment under consideration.[180] This will account for much, but not for all, of the confusion on the cases on this point.[181] The statute of limitations of the forum governs, unless the statute giving the right of action prescribes the limitation.[182] But it is a general principle, of common application to statutes of limitations as to contracts and torts, that the bar commences when the cause of action accrues.[183] Accordingly, in the

person); Ft. Worth & D. C. Ry. Co. v. McNulty (Tex. Civ. App.) 26 S. W. 414 (trespass); Van Horn v. Van Horn (N. J. Err. & App.) 28 Atl. 669 (conspiracy to injure business).

[180] Where a statute provides that actions against a municipal corporation for not keeping a highway in proper repair must be brought within three months after the damages have been sustained, and the plaintiff's mare fell through a bridge, and died four months after the injury received, it was held that the statute began to run from the occurrence of the accident, not from the death. Miller v. North Fredericksburgh, 25 U. C. Q. B. 31. And see Weiser v. McDowell (Iowa) 61 N. W. 1094.

[181] A state statute not pleadable in bar of an action for infringement of patent, McGinnis v. Erie Co., 45 Fed. 91 (prescription).

[182] In an action for death, Munos v. Southern Pac. Co., 2 C. C. A. 103, 51 Fed. 188. But, an action for bodily injuries caused by a train wreck being good wherever the common law prevails, the period of limitations is fixed by the law of the forum, not by that of the place of injury. Williams v. St. Louis & S. F. Ry. Co., 123 Mo. 573, 27 S. W. 387. An action for death by wrongful act, occasioned in a state which gives three years for suing therefor, may be maintained in another state, which gives only two years, at any time within three years. Theroux v. Northern Pac. R. Co., 12 C. C. A. 52, 64 Fed. 84. A state statute (Rev. St. Wis. 1858, c. 138) limiting actions on judgments of courts of the state to a certain time, and on judgments of courts of any state or of the United States to a shorter time, held not to bar an action on a judgment of a federal court within the state by the shorter period of limitation. Metcalf v. City of Watertown, 153 U. S. 671, 14 Sup. Ct. 947.

[183] Wood, Lim. § 117; Moline Plow Co. v. Webb, 141 U. S. 616, 12 Sup. Ct. 100; New Holland Turnpike Co. v. Farmers' Ins. Co., 144 Pa. St. 541, 22 Atl. 923. And see Hanlon v. Union Pac. Ry. Co., 40 Neb. 52, 58 N. W. 510. Nuisance, Delaware & R. Canal Co. v. Wright, 21 N. J. Law, 469; Powers v. Council Bluffs, 45 Iowa, 652; Meiners v. Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. 430; continuing nuisance, Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co., 79 Wis. 297, 48 N. W. 371; Austin & N. W. Ry. Co. v. Anderson, 79 Tex. 427, 15 S. W. 484; City of North Vernon v. Voegler, 89 Ind. 77. Statute of limitation as to waste, Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588; Powell v. Dayton, S. & G. R. Co., 16 Or. 33, 16 Pac. 863; in case of death, Nestelle v. Northern Pac. Co., 56 Fed. 261. That feebleness of mind and body

case of a single trespass to land, inasmuch as the law presumes damages the moment the close of another is broken, the bar of the statute commences then.[184] In conversion, on the other hand, the wrong to his chattels, of which an owner can successfully complain, is often not complete until he has demanded them of the person who has taken them.[185] Under such circumstances, the cause of action arises, and the statute commences to run, when such person, on demand, refuses to deliver up the goods.[186] But if demand is not essential to create liability (which, in many instances, it is not), then the bar of the statute starts whenever the right to sue is complete.[188] In general, the statute runs from the time of the conversion, whenever that may be.[189] In the case of any other improper inter-

does not prevent the running of statute, see Rugan v. Sabin, 10 U. S App. 519, 3 C. C. A. 578, 53 Fed. 415. Generally, see Gains v. Engel, 19 D C. : 2:; Bell v. Railway Co., 68 Miss. 19, 8 South. 508; Churchill v. Pacific Imp. Co., 96 Cal. 940, 31 Pac. 560 (against innkeeper).

[184] Herreshoff v. Tripp, 15 R. I. 92, 23 Atl. 104; Hunter v. Burlington, C. R. & N. R. Co., 84 Iowa, 605, 51 N. W. 64. But cf. W. U. Tel. Co. v. Moyle, 51 Kan. 203, 32 Pac. 895. And see Zumwalt v. Dickey, 12 Cal. 156, 28 Pac. 212 (animals); Strickler v. Midland Ry. Co., 125 Ind. 412, 25 N. E. 455; Cass v. Pennsylvania Co., 159 Pa. St. 23, 28 Atl. 161 (obstructing abutter's right of street). See Omaha & R. V. R. Co. v. Moschel, 38 Neb. 281, 56 N. W. 875. But see (passage of time does not bar right of city to restrain obstruction of a highway) Reed v. City of Birmingham, 92 Ala. 339, 9 South. 161; post, p. 804, "Nuisance." And see State v. Railway Co., 54 Ark. 608, 16 S. W. 657. Further, as to wrongful use of street, see Porter v. Midland Ry. Co., 125 Ind. 476, 25 N. E. 556.

[185] Tidd v. Overell [1893] 3 Reports, 657, 3 Ch. 154; Muller v. Dell [1891] 1 Q. B. 468; Edwards v. Clay, 28 Beav. 145; City v. Goff, 38 Ill. App. 362; Moore v. Williams (City Ct. Alb.) 26 N. Y. Supp. 766; Fuller v. O'Neall, 82 Tex. 417, 18 S. W. 481; Munnerlyn v. Augusta Sav. Bank, 88 Ga. 313, 14 S. E. 554; County Board of Education v. State Board of Education, 107 N. C. 366, 12 S. E. 452.

[186] Haire v. Miller, 49 Kan. 270, 30 Pac. 482.

[188] One who collects money on a policy of insurance, for the beneficiary, without any right to retain it, or any trust duty to discharge in respect to it, is liable to an action by the beneficiary, for its recovery, without any previous demand. And hence the beneficiary's right of action accrues when the money is collected. Wood v. Young, 141 N. Y. 211, 36 N. E. 193. Cf. Adams v. Olin, 140 N. Y. 150, 35 N. E. 448.

[189] Kelsey v. Griswold, 6 Barb. (N. Y.) 436; Haire v. Miller, 49 Kan. 270, 30

ference with property, prescription runs against an action for damage from the time of trespass.[190] On the same principle, the statute of limitations begins to run against an action for damages by a father for the seduction of his minor daughter from the time of the seduction, that being the cause of action; subsequent results not giving a new cause of action, but only affecting the damages.[191] In many actions on quasi tort, the cause of action arises, and the bar of the statute commences, upon the breach of the contract.[192]

If, however, the cause of action cannot, under any circumstances, rest on the doing of the thing alone, but depends also, necessarily, upon the resulting damage, then the statute commences to run, not from the time of the wrongful conduct, but of the occurrence of the harm.[193] Thus, where one owned houses built upon land contiguous to the land of other persons, and the owner of the mines under the land of all these persons so worked the mines that the land of one of such other persons sank, and, after more than six years (the period of limitation in actions on the case), their sinking caused an injury to the plaintiff's houses, it was held that his right of action was not barred, as the tort to him was the damage caused by the working of the mines, and not the working itself.[194] And so, where

Pac. 482; Jefferson School Tp. of Green Co. v. School Town of Washington, 5 Ind. App. 586, 32 N. E. 807; Shuffler v. Turner, 111 N. C. 297, 16 S. E. 417; Davenport v. Prince, 56 Fed. 186; Quinn v. Gross, 24 Or. 147, 33 Pac. 535; Gregory v. Fichtner (Com. Pl.) 14 N. Y. Supp. 891.

[190] As to wrongful seizure, Crow v. Manning, 45 La. Ann. 1221, 14 South. 122; Wilkinson v. Verity, L. R. 6 C. P. 206.

[191] Dunlap v. Linton, 144 Pa. St. 335, 22 Atl. 819. See, also, Davis v. Young, 90 Tenn. 303, 16 S. W. 473; Hogan v. Wolf, 57 Hun, 588, 10 N. Y. Supp. 896 (enticement); Edwards v. Woodbury, 156 Mass. 21, 30 N. E. 175 (furnishing liquor to husband).

[192] Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545; Russell & Co. v. Polk County Abstract Co., 87 Iowa, 233, 54 N. W. 212. And see Fadden v. Satterlee, 43 Fed. 568 (malpractice). So, in actions against common carrier, it has been held that the cause of action commences at the time of negligent conduct, not of damage. Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545; Pennsylvania Co. v. Chicago, M. & St. P. R. Co. (Ill. Sup.) 33 N. E. 415, 44 Ill. App. 132.

[193] Mitchell v. Darley Main Colliery Co., 14 Q. B. Div. 125, reviewing cases.

[194] Underh. Torts, c. 4, p. 66; Backhouse v. Bonomi, 9 H. L. Cas. 503; Whitehouse v. Fellowes, 10 C. B. (N. S.) 765; Devery v. Grand Canal Co., 8 Ir. C. L. 511.

crops are overflowed by reason of a railway embankment, if the nature of the embankment was such that the injury complained of was uncertain and contingent, such as might never happen, the damage was not original, in the sense that it necessarily resulted from the erection of the embankment, and consequently the statute of limitations did not begin to run until the crops were destroyed.[195] So, in ordinary actions for negligence, the cause of action and the running of the statute date from damage, not from the conduct.[196]

Slander affords a peculiarly marked illustration of the principle under discussion. In five cases (of which four are slander proper, and one is libel) the law presumes damage to follow from the act of speaking or writing the words, and the cause of action arises immediately when the words are uttered. In all other cases the law does not presume that damage must have followed from speaking the words, and therefore the cause of action does not arise until damage has in fact followed. In both cases, the cause of action is none the less the resulting damage, and consequently the time of limitation runs in both cases from precisely the same point, namely, the happening of the damage.[197] Slander of a person's business is not the conventional wrong of slander, so far as the statute of limitations is concerned.[198]

[195] St. Louis, I. M. & S. Ry. Co. v. Biggs, 52 Ark. 240, 12 S. W. 331 (followed in St. Louis, I. M. & S. Ry. Co. v. Yarborough, 56 Ark. 612, 20 S. W. 515); Bonner v. Wirth, 5 Tex. Civ. App. 560, 24 S. W. 306; Bunten v. Chicago, R. I. & P. R. Co., 50 Mo. App. 414; Baker v. Leka, 48 Ill. App. 353; King v. U. S., 59 Fed. 9. See, also, Ohio & M. R. Co. v. Neutzel, 143 Ill. 46, 32 N. E. 529. But overflowing of lands is sometimes regarded as a trespass. It is, accordingly, regarded that the statute commences to run at the first overflowing. Hunt v. Iowa Cent. R. Co., 86 Iowa, 15, 52 N. W. 668; Clark v. Dyer, 81 Tex. 339, 16 S. W. 1061. Cf. Hempstead v. Cargill, 46 Minn. 141, 48 N. W. 558.

[196] Board of Com'rs of Wabash Co. v. Pearson, 120 Ind. 426, 22 N. E. 134. And in an action against a railroad company for personal injuries caused by its negligence, an amendment alleging that the acts of defendant were willfully done does not materially alter the cause of action, so as to make a plea of limitations available. Esrey v. Southern Pac. Co., 103 Cal. 541, 37 Pac. 500. But a cause of action against attorney for negligence arises at time of negligence, though damage arises later. Wilcox v. Plummer's Ex'rs, 4 Pet. 172.

[197] Saunders v. Edwards, 1 Sid. 95.

[198] Van Horn v. Van Horn, 53 N. J. Law, 514, 21 Atl. 1069; Mitchell v. Darley Main Colliery Co., 14 Q. B. Div. 125-137; Pig. Torts, 31.

In cases of actual fraud, the usual rule is that the statute of limitations against judicial action commences to run at the time of the discovery of the wrong, or at the time when the injured party was, by circumstances, sufficiently put upon such inquiry that he could and should have discovered the wrong, but not from the time of the wrong, or of the harm suffered.[199] But the statute begins to run against an action to recover money obtained by a constructive fraud from the date of act committed.[200]

SAME—COMPLIANCE WITH STATUTORY REQUIREMENTS.

114. Compliance with statutory requirements may constitute a full discharge of a tort.

As has been considered, no action lies for damages incident to authorized act. On the same principle, if an alleged wrongdoer has complied with specific requirements of law as to the conduct resulting in damage complained of, no action lies. The cases in which such matters arise are almost always in connection with specific wrongs; so that they must be dismissed here with mere reference. An illustration of a limitation before damage is to be found in the multitude of enactments that an innkeeper is not liable for the loss of his guests' valuables, not delivered to him, if he has provided a safe and suitable place in the office for their keeping, and has posted notice so advising the guests.[201] An illustration of discharge after damage occurs is the common legislative provision that a newspaper which has published a libel may rid

[199] St. Paul, S. & T. F. R. Co. v. Sage, 4 U. S. App. 160, 1 C. C. A. 256, 49 Fed. 315 (reversing 44 Fed. 817, and 32 Fed. 821); Lincoln v. Judd, 49 N. J. Eq. 387, 24 Atl. 318; Hickham v. Hickham, 46 Mo. App. 496; Myers v. Center, 47 Kan. 324, 27 Pac. 978; Jacobs v. Frederick, 81 Wis. 254, 51 N. W. 320; Horbach v. Marsh, 37 Neb. 22, 55 N. W. 286; Northrop v. Hill, 57 N. Y. 351; Knox v. Yow, 91 Ga. 367, 17 S. E. 654; Harrell v. Kea, 37 S. C. 369, 16 S. E. 42; Walker v. Pogue, 2 Colo. App. 149, 29 Pac. 1017; Chicago, T. & M. C. R. Co. v. Titterington, 84 Tex. 218, 19 S. W. 472; Clausen v. Meister, 93 C 1 555, 29 Pac. 232; Morgan v. Tener, 83 Pa. St. 305; Bates v. Preble, 151 U. S. 149, 14 Sup. Ct. 277.

[200] Davis v. Hawkins, 163 Pa. St. 228, 29 Atl. 746.

[201] Post, p. 901, "Negligence"; "Contract Duty," note 400.

itself of at least a portion of its responsibility by publishing a retraction.[202]

DISCHARGE OF JOINT TORTS—JUDGMENT.

115. THE ENGLISH RULE is that a judgment recovered in an action brought against one of several joint tort feasors is a bar to an action against the others, although the judgment is not satisfied.

116. THE AMERICAN RULE is that the injured party who has elected to sue joint tort feasors separately may prosecute the same until the amount of damages is ascertained by verdict and entered in judgment; that a judgment against one joint tort feasor is no bar to a suit against another for the same wrong; but that the injured party can have only one satisfaction. Such party, however, may take his election de melioribus damnis, which, when made, is conclusive as to all subsequent proceedings. While the satisfaction of one judgment is the satisfaction of the cause of action, the plaintiff may collect costs in other judgments.

The English Rule.

The English rule, as stated in the black-letter text, was laid down in Brown v. Wooton.[203] It is said that the earlier English doctrine was the other way.[204] The rule as stated, however, is undoubtedly in force at the present time. The reason for this rule is that the damages are reduced to a certainty, that the cause of action is changed into a matter of record, which is of a higher nature, and the inferior is merged in the higher. Although there are several defendants, there is only one cause of action. "The judgment of a court of record changes the nature of that cause of ac-

[202] Post, p. 520, "Libel & Slander"; "Statutory Defenses."

[203] Cro. Jac. 73; Term 3, Jac. I.

[204] 2 Kent, Comm. 388.

tion, and prevents its being the subject of another suit; and the cause of action, being single, cannot afterwards be divided."[205]

The American Rule.

In 1806, Chief Justice Kent[206] overruled Brown v. Wooton. The courts of Virginia, without much consideration, have held to the English doctrine.[207] Rhode Island also holds to the same rule.[208] The general American doctrine, however, is as stated in the black-letter text.[209] The supreme court of the United States has accepted it fully. In Lovejoy v. Murray,[210] Mr. Justice Miller reviews the

[205] King v. Hoare, 13 Mees. & W. 594; Brinsmead v. Harrison, L. R. 7 C. P. 547; Buckland v. Johnson, 15 C. B. 145. Clifford, J., in Sessions v. Johnson, 95 U. S. 347–351, citing Heydon's Case, 11 Coke, 50; White v. Philbrick, 5 Greenl. (Me.) 147; Nickerbocker v. Colver, 8 Cow. (N. Y.) 111; O'Shea v. Kirker, 4 Bosw. 120; Lovejoy v. Murray, 3 Wall. 1.

[206] Livingston v. Bishop, 1 Johns. 290.

[207] Wilkes v. Jackson, 2 Hen. & M. (Va.) 355.

[208] Hunt v. Bates, 7 R. I. 217.

[209] Cooley, Torts, 138, citing Livingston v. Bishop, 1 Johns. 290; Elliott v. Porter, 5 Dana (Ky.) 299; Thomas v. Rumsey, 6 Johns. 291; Barrett v. Third Ave. R. Co., 45 N. Y. 628; Woods v. Pangburn, 75 N. Y. 495; Gross v. Pennsylvania P. & B. R. Co., 65 Hun, 191, 20 N. Y. Supp. 28; Sharp v. Gray, 5 B. Mon. (Ky.) 4; United Society v. Underwood, 11 Bush (Ky.) 265; Elliott v. Hayden, 104 Mass. 180; Knight v. Nelson, 117 Mass. 458. See Stone v. Dickinson, 5 Allen (Mass.) 29; Brown v. Cambridge, 3 Allen (Mass.) 474; Griffe v. McClung, 5 W. Va. 131; Morgan v. Chester, 4 Conn. 387; Ayer v. Ashmead, 31 Conn. 447; Wright v. Lathrop, 2 Ohio, 33; Sanderson v. Caldwell, 2 Aikens (Vt.) 195; Stewart v. Martin, 16 Vt. 397; Turner v. Hitchcock, 20 Iowa, 310; McGehee v. Shafer, 15 Tex. 198; Union, etc., Co. v. Shacklett, 19 Ill. App. 145; Allen v. Wheatley, 3 Blackf. (Ind.) 332, approved in Fleming v. McDonald, 50 Ind. 278; White v. Philbrick, 5 Me. 147; Golding v. Hall, 9 Port. (Ala.) 169; Blann v. Crocheron, 20 Ala. 320; Page v. Freeman, 19 Mo. 421; Boardman v. Acer, 13 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; in federal courts, see Albright v. McTighe, 49 Fed. 817; Birdsell v. Shallol, 112 U. S. 485, 5 Sup. Ct. 244; Jennings v. Dolan, 29 Fed. 861; Power v. Baker, 27 Fed. 396; Child v. Boston & F. H. Iron Works, 19 Fed. 258; Collard v. Delaware, L. & W. R. Co., 6 Fed. 246; Barnes v. Viall, 6 Fed. 661–671.

[210] Snapp v. Roche, 94 N. Y. 329. And see Thompson v. Halbert, 109 N. Y. 329, 16 N. E. 675.

English and American cases in answer to this question: "Did the plaintiff, by suing the sheriff alone, recovering judgment for about $6,000, and receiving from him $830 on said judgment, thereby preclude himself from maintaining a suit against the defendants for the same trespass? Is the judgment, or the judgment and part payment, in that case, a bar to this action?" The conclusion was reached that nothing short of full satisfaction, or that which the law must consider as such, can make such judgment a bar. A partial satisfaction by one of the wrongdoers for damages occasioned by the joint wrongful act of both is, however, properly received in evidence to mitigate damages. While the plaintiff can have only one satisfaction, the satisfaction of the judgment must be the one which he has elected to take. In Knickerbacker v. Colver [211] it was distinctly held that, where there were two separate suits for the same trespass, the plaintiff may elect de melioribus damnis, but can have only one satisfaction. The plaintiff may make his election (e. g. to take the larger judgment or to pursue the solvent party); but, when he has made his election, he is concluded.[212] Satisfaction of one judgment, however, will not preclude him from collecting his costs on other judgments; and he may take out execution for such costs.[213] The bringing of an action and the recovery of judgment against one of a number of wrongdoers, who are jointly and severally liable, is not an election of remedies as to the others, and does not sever their joint and several liability; but the wrongdoer who had been sued has a personal right to object to making him a party to the joint action.

Judgment does not Divest Property.

Under both English and American law, a judgment against one of several joint tort feasors, without satisfaction, does not vest

[211] 8 Cow. 111.

[212] Power v. Baker, 27 Fed. 396.

[213] Windham v. Wither, 1 Strange, 515; Livingston v. Bishop, 1 Johns. (N. Y.) 290–293; Knickerbacker v. Colver, 8 Cow. 111; First Nat. Bank v. Indianapolis Piano Manuf'g 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.

the property in the chattel in dispute, or bar a subsequent action against the other for continuing to detain it.[214] "It would be an absurdity," says Mr. Justice Willes, [215] "that the mere obtaining judgment, especially for nominal damages, could vest property, of which the plaintiff had been deprived, in defendant." On the same principle, judgment for a payment of nominal damages, by a patentee, without joining his licensee, against one who has made and sold a machine in violation of the patent, is no bar to a bill in equity, by the patentee and licensee together, for the benefit of the licensee, against another person for afterwards using the same machine.[216]

SAME—RELEASE.

117. A release of one joint tort feasor does not release the others. But the injured person is entitled to only one satisfaction. If he receives that from one tort feasor, he cannot sue other joint tort feasors. Wherever the person injured by the wrong of several joint tort feasors has settled his claim for damages, and received satisfaction, from one of them, the cause of action is discharged as to all.

While separate suits, as has been seen,[217] may be brought against several defendants for a joint trespass, and while there may be recovery against each, there can be but one satisfaction. It is immaterial whether the satisfaction is obtained after judgment,[218] or by amicable adjustment, without any litigation, of the claim for damages. The essential thing is the satisfaction.[219]

[214] Morris v. Robinson, 5 Dowl. & R. 34–48, 3 Barn. & C. 196–206; Ex parte Drake, 5 Ch. Div. 866.

[215] Brinsmead v. Harrison, L. R. 6 C. P. 584–588.

[216] Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244; Consolidated Roller-Mill Co. v. Coombs, 39 Fed. 803–806; Kelly v. Ypsilanti Dress-Stay Manuf'g Co., 44 Fed. 19–21; Campbell Printing-Press & Manuf'g Co. v. Manhattan Ry. Co., 49 Fed. 930; Hobbie v. Jennison, 149 U. S. 355–363, 13 Sup. Ct. 879.

[217] Livingston v. Bishop, 1 Johns. 290.

[218] Ante, pp. 341–343, "Discharge by Judgment"; Co. Litt. § 376.

[219] Babcock & Wilcox Co. v. Pioneer Iron Works, 34 Fed. 338; Eastman v. Grant, 34 Vt. 387.

Therefore, where a passenger, injured in a street-car collision, for a sum paid released the carrier company from all liability for the injury, he thereby discharged the liability of the other company also. The rule was applied notwithstanding evidence that the other company was really to blame, and although the right of action against it was expressly reserved.[220] The reasoning of the English cases is that the cause of action against joint tort feasors is one and indivisible, and, having been released as to one person consequently is released as to all persons otherwise liable. The American cases recognize only satisfaction as a bar to suit against joint tort feasors. When the cause of action is once satisfied, it ceases to exist.[221] Where, however, there is a wrong in which several persons join without concert, the release of one is not the release of all. They are not, strictly speaking, joint tort feasors.[222] Therefore, a release of one of two coal-mine owners, both of whom had thrown refuse into a stream, is not a release of the other.[223]

A covenant not to sue may not amount to a release.[224] Thus, while a release of one of several joint and several debtors is a discharge of all,[225] a covenant not to sue is not so, in general.[226] The

[220] Seither v. Philadelphia Traction Co., 125 Pa. St. 397, 17 Atl. 338. A similar case is Tompkins v. Railroad Co., 66 Cal. 165, 4 Pac. 1165. Et vide Spurr v. Railroad Co., 56 N. J. Law, 346, 28 Atl. 582; Cooke v. Jennor, 5 Hob. 66; Brinsmead v. Harrison, L. R. 7 C. P. 547; Kentucky & I. Bridge Co. v. Hall, 125 Ind. 220, 25 N. E. 219; City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271; Horsley v. Moss, 5 Tex. Civ. App. 341, 23 S. W. 1115.

[221] Spurr v. Railroad Co., 56 N. J. Law, 346, 28 Atl. 582. Cf. Derosa v. Hamilton, 14 Pa. Co. Ct. R. 307.

[222] Ante, p. 212, "Joint Tort Feasors."

[223] Little Schuylkill, N. R. & C. Co. v. Richards' Adm'r, 57 Pa. St. 142; Gallagher v. Kemmerer, 144 Pa. St. 509, 22 Atl. 970.

[224] 2 W. Saund. 47–99, note; Ford v. Beech, 11 Q. B. 852. The dismissal of an action against one of two joint tort feasors, together with the execution, for a valuable consideration, of an agreement not to sue him, does not operate as a release of the other tort feasor. City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271.

[225] Co. Litt. 232; Cocks v. Nash, 9 Bing. 341; Nicholson v. Revill, 4 Adol. & E. 675; Brooks v. Stuart, 9 Adol. & E. 854.

[226] Dean v. Newhall, 8 Term R. 168; Twopenny v. Young, 3 Barn. & C. 208; Hutton v. Eyre, 6 Taunt. 289; Duck v. Mayeu [1892] 2 Q. B. 511; Sharpe v. Williams, 41 Kan. 56, 20 Pac. 497; City of Chicago v. Babcock, supra. But see Comstock v. Hopkins, 61 Hun, 189, 15 N. Y. Supp. 908. And see

same distinction is applied to joint tort feasors. A covenant not to sue one of two joint tort feasors does not operate as a release of the other from liability.[227]

SAME—WAIVER.

118. In England, waiver of the tort as to one of several joint tort feasors, and suit against him in assumpsit, releases the other tort feasors. In America, the rule is otherwise.

In Buckland v. Johnson[228] the plaintiff recovered judgment in trover against one of two joint tort feasors for conversion of property. Not being able to realize on his judgment, he sued the other tort feasor for money had and received. It was held that the former judgment was a bar to the latter proceeding. This is consistent with the English rule as to the effect of a judgment against one of several tort feasors upon a subsequent action against the others. The rule on this point being otherwise in America, it was properly said in Huffman v. Hughlett[229] (where an original action

Whittemore v. Oil Co., 124 N. Y. 565, 27 N. E. 244. As to the rule of construction, determining whether a document be a release, or a covenant not to sue, see Price v. Barker, 4 El. & Bl. 760–777; Bateson v. Gosling, L. R. 7 C. P. 9.

[227] Duck v. Mayeu [1892] 2 Q. B. 511. Dismissal of an action against one or more joint tort feasors, together with the execution, for a valuable consideration, of an agreement not to sue him, does not operate as a release of the other tort feasor. City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271.

[228] Buckland v. Johnson, 15 C. B. 145. Mr. Keener (Quasi Contracts, 209) points out a further inconsistency of the law in this case with American doctrines, in that it was here taken for granted that by the judgment the title was invested in the defendant in the first action as of the time of the conversion. The rule is otherwise in America. Dow v. King, 52 Ark. 282, 12 S. W. 577; Atwater v. Tupper, 45 Conn. 144; United Soc. v. Underwood, 11 Bush (Ky.) 265.

[229] Huffman v. Hughlett, 11 Lea (Tenn.) 549. Cf. Floyd v. Brown, 1 Rawle (Pa.) 121. Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, Mr. Keener points out, was decided by an unjustifiable use of the fiction in assumpsit. It has, however, been cited with approval. Crossman v. Rubber Co., 127 N. Y. 34–37, 27 N. E. 400; Roberge v. Winne, 144 N. Y. 709–712, 39 N. E. 631. In

had been brought in assumpsit against one tort feasor, and discontinued, and subsequently an action in conversion was brought against another tort feasor): "If the action be in contract, it is not strictly a waiver of the tort, for the tort is the very foundation of the action; but, as Nicholson, C. J., has more accurately expressed it, a waiver of the 'damages for the conversion,' and a suing for the value of the property.[280] It is simply an election between remedies for an act done, leaving the rights of the injured party against the wrongdoer unimpaired, until he has obtained legal satisfaction. If it were otherwise, the suing of any one of a series of tort feasors, even the last, on an implied promise, where there was clearly no contract, would give him a good title and release all the others. No authority has been produced sustaining such a conclusion, and we are not inclined to make one."

both these cases it is regarded as having decided that the plaintiff in Terry v. Munger had elected to resort to another and inconsistent remedy, and was therefore bound to that election. It was distinguished in Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, as being a case where the owner of property had elected to treat its conversion as a sale, commenced his action, and was accordingly bound. It was insisted that there was an inconsistency between such election and a subsequent suit. In this case it was distinctly held that where a surviving partner misappropriated the assets of the firm, the legal title to which came to him, not as the full and absolute owner, but charged with trusts, and an equitable action has been brought against him by the personal representatives of the estate of the deceased partner, and a judgment obtained therein for an accounting and payment of the amount found due the estate, this, unless the amount so found due is paid, is not a bar to an action against the others, who, by intermeddling with the assets and sharing in the misappropriation, have rendered themselves liable therefor, as trustees de son tort. Until satisfaction of the judgment, it gives the surviving partner no greater rights over the assets than he had before its rendition.

[280] Kirkman v. Phillips, 7 Heisk. 222–224.

CHAPTER V.

REMEDIES.

IN GENERAL.

119. Remedies for torts may be either—

(a) Statutory; or

(b) Common-law.

STATUTORY REMEDIES.

120. Whenever a statute creates a right, a duty, or an obligation, then, although it has not in express terms given a remedy, the remedy which by law is properly applicable to the right or obligation follows as an incident.[1]

Mr. Cooley[2] has stated, as between common-law and statutory remedies, three principles:

(1) Where a remedy exists at the common law, and a new remedy is given by statute, and there are no negative words in the statute indicating that the new remedy is to be exclusive, the presumption is that it 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.[3] For example, the common law gives to one whose property is seized on an attachment sued out

[1] Maule, B., in Braithwaite v. Skinner, 5 Mees. & W. 313.

[2] Cooley, Torts, pp. 781–783.

[3] Cooley, Torts, p. 781, and cases cited in note. This is an application of the general principle that, "if there are concurring effectual remedies, the choice and uninterrupted prosecution of the one excludes the other." Hack-

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.[4]

(2) But the common-law remedy may be excluded by implication as well as by express negative words; and where that which constitutes the actionable wrong is permitted on public grounds, but on condition that compensation be made, and the statute provides an adequate remedy whereby the party injured may obtain redress, the inference that this was intended to be the sole remedy must generally be conclusive.[5] It has been so held in many cases where land or other property has been taken for public use under eminent domain.[6]

(3) Where the statute imposes a new duty, where none existed before, and gives a specific remedy for its violation, the presumption is that this remedy was meant to be exclusive, and the party complaining of a breach is confined to it.[7] 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.[8]

ney, C. J., in American Furniture Co. v. Town of Batesville (Ind. Sup.) 38 N. E. 408, and cases cited. Statutes do not, as a rule, take away previous remedies at common law, unless such an intention is declared, but they are held to be cumulative remedies. Hart v. Mayor, etc., of Albany, 9 Wend. 571; Renwick v. Morris, 7 Hill, 575; People v. Vanderbilt, 26 N. Y. 287; American Furniture Co. v. Town of Batesville (Ind. Sup.) 38 N. E. 408.

[4] Lawrence v. Hagerman, 56 Ill. 68; Spaids v. Barrett, 57 Ill. 289; Donnell v. Jones, 13 Ala. 490; Petit v. Mercer, 8 B. Mon. 51.

[5] Fuller v. Edings, 11 Rich. Law, 239; Calking v. Baldwin, 4 Wend. 667; Null v. White Water Valley Canal Co., 4 Ind. 431.

[6] Renwick v. Morris, 7 Hill, 575; Babb v. Mackey, 10 Wis. 371; Smith v. McAdam, 3 Mich. 506.

[7] Almy v. Harris, 5 Johns. (N. Y.) 175; Edwards v. Davis, 16 Johns. (N. Y.) 281; Smith v. Lockwood, 13 Barb. 209; Thurston v. Prentiss, 1 Mich. 193; Smith v. Drew, 5 Mass. 514.

[8] Chestnut Hill Turnpike Co. v. Martin, 12 Pa. St. 361; Kidder v. Boom Co., 24 Pa. St. 193.

COMMON-LAW REMEDIES.

121. Common-law remedies may be divided into—
(a) Extrajudicial remedies; and
(b) Judicial remedies.

SAME—EXTRAJUDICIAL REMEDIES.

122. Extrajudicial remedies for tort arise in cases where the law justifies self-help.

While it has always been insisted that it is contrary to best public policy to allow parties to take the law into their own hands, in certain well-marked cases the right of self-help has been recognized. Thus, there are circumstances under which one may, without doing wrong, abate a nuisance,[9] peaceably recapture his own goods,[10] re-enter on his own land,[11] or exercise the right of defense of person or property,[12] or of distraint.[13] However, as civilization advances, necessity for and recourse to such remedies becomes less and less frequent.

[9] Post, p. 799, "Nuisance."

[10] Post, p. 696.

[11] Post, p. 690, "Trespass."

[12] Ante, p. 439, "Private Defense." But while an animal caught flagrante delicto may be killed by the owner of the threatened property (ante, p. 152), a dog chasing animals feræ naturæ cannot be shot without liability. Vere v. Lord Cawdor, 11 East, 568.

[13] Distress is a remedy given by common law, whereby a party, in certain cases, is entitled to enforce a right or obtain redress for a wrong in a summary manner, by seizure of chattels and detaining them as a pledge until satisfaction is obtained. Clerk & L. Torts, c. 12 (discussing "Distress" at length). So, if a man find a chattel of another unlawfully on his land, and doing damage, he may seize and detain it, impounded, in order to compel the owner of the offending chattel to make compensation for the damage done. Id. 237. Generally, as to distress damage feasant, see Bunch v. Kennington, 1 Q. B. 679 (hunting dog); Hannam v. Mockett, 2 Barn. & C. 934 (domestic pigeons); Simpson v. Hartopp, Willes, 515.

SAME—JUDICIAL REMEDIES.

123. The law applies any remedy known to it, whenever such remedy is suitable. Judicial remedies for torts may be—

(a) Extraordinary.[15]

(b) Ordinary.

Extraordinary Remedies.

In many cases tortious conduct may be regarded also as criminal, and may be the basis of an indictment.[16] Mandamus will lie to compel the performance of public official duty, although an action for damages would be sustained upon the same state of facts.[17] It is also becoming an important proceeding in settlements of strikes.[18] And it may issue to compel the assessment of damages, as in case of damages caused by blasting in the construction of a railroad.[19]

One who suffers from the actionable wrong of another with respect to movable property, instead of asking for pecuniary compensation, may seek to recover possession of property of which he has been wrongfully deprived; that is to say, he can have recourse to replevin,[20] or, as it is commonly called in Code states, to the "ac-

[15] This classification is adopted for the sake of convenience, notwithstanding its variance from the conventional classification of extraordinary remedies. Attachment, replevin, detinue, and the like are not ordinary remedies for torts.

[16] Ante, c. 1. As seduction, assault and battery, certain kinds of libel, of nuisance, et sim.

[17] Re-election certificate: People v. State Board of Canvassers, 129 N. Y. 360, 29 N. E. 345. See People v. Board of Assessors of Brooklyn, 137 N. Y. 201, 33 N. E. 145; Rosenthal v. Circuit Judge, 98 Mich. 208, 57 N. W. 112 (to that effect). But the process of courts of justice can never be used for inquisitorial purposes or for oppression, and such use be sustained. Ministerial officers: Attorney General v. Lum, 2 Wis. 371; Fulton v. Hanna, 40 Cal. 278. Executive officers: State v. Chase, 5 Ohio St. 528; Gray v. State, 72 Ind. 567. Cf. Miles v. Bradford, 22 Md. 170; Tennessee & C. R. Co. v. Moore, 36 Ala. 371. Legislative officers: Ex parte Pickett, 24 Ala. 91. Cf. Ex parte Echols, 39 Ala. 698. Taxing officers: Queen v. Commissioners of the Land Tax for Barnwell, 11 Mod. 206; Hyatt v. Allen, 54 Cal. 353.

[18] 1 Am. Law Reg. & Rev. (N. S.) 102.

[19] Dodge v. County Com'rs, 3 Metc. (Mass.) 380.

[20] As to common-law replevin, see Gotobed v. Wool, 6 Maule & S. 128;

tion for claim and delivery." [21] Indeed, the judgment for the plaintiff in such a case is commonly in the alternative, for the return of the goods or damages.[22] This is also true where the anomalous action of detinue survives.[23] Again, attachment may be brought in connection with a state of facts which may be the basis of an ordinary action ex delicto.[24]

Shannon v. Shannon, 1 Schoales & L. 324; Galloway v. Bird, 4 Bing. 299; Mennie v. Blake, 6 Esp. 842. Replevin seems to have been devised by Glanvil, C. J., in the time of Henry II. 3 Bl. Comm. 145.

[21] In England, replevin is now largely a statutory remedy. 51 & 52 Vict. (L. R. St.) c. 43, §§ 133–137; Young v. Waterworks Co., 1 Best & S. 675. As to replevin in America, with respect to when the action lies, see Flanagan v. Newman (Colo. App.) 38 Pac. 431; Shackelford v. Hargreaves, 42 Neb. 680, 60 N. W. 951. Who may maintain, Reeder Bros. Shoe Co. v. Prylinski (Mich.) 60 N. W. 969; necessity of demand, Simmons v. Jenkins, 76 Ill. 479 (followed in Keller v. Robinson [Ill. App.] 38 N. E. 1072); pleading, Town of Andrews v. Sellers (Ind. App.) 38 N. E. 1101; pleading and proof, Randall v. Persons, 42 Neb. 607, 60 N. W. 898; evidence, Eaton v. Sims, 59 Ark. 611, 28 S. W. 429; Hutchinson v. Hutchinson (Mich.) 61 N. W. 60; Griswold v. Sundback (S. D.) 60 N. W. 1068; judgment, Chase Co. Nat. Bank v. Thompson, 54 Kan. 307, 38 Pac. 274; Jameson v. Kent, 42 Neb. 412, 60 N. W. 879; Olin v. Lockwood (Mich.) 60 N. W. 972; damages, Hutchinson v. Hutchinson (Mich.) 61 N. W. 60; Chase Co. Nat. Bank v. Thompson, 54 Kan. 307, 38 Pac. 274; Jameson v. Kent, 42 Neb. 412, 60 N. W. 879.

[22] Roberson v. Reiter, 38 Neb. 198, 56 N. W. 877; Goodwin v. Potter, 40 Neb. 553, 58 N. W. 1128; French v. Ginsburg (Minn.) 59 N. W. 189. As to measure of damages in replevin, see Gardner v. Brown (Nev.) 37 Pac. 240; Jenkins v. Mitchell, 40 Neb. 664, 59 N. W. 90; Burnett v. Bealmear (Md.) 28 Atl. 898; Gray v. Robinson (Ariz.) 33 Pac. 712; Brunell v. Cook, 13 Mont. 497, 34 Pac. 1015. And see, also ("the value of the time consumed by plaintiff in an action of claim and delivery in recovering the property in dispute, and his railroad and hotel expenses and attorney's fees, are speculative damages, which cannot be recovered in such action"), Loeb v. Mann, 39 S. C. 465, 18 S. E. 1.

[23] McCullough v. Floyd (Ala.) 15 South. 848. The writ of trespass, at common law, was based upon a wrongful taking of the goods, and therefore could not be maintained where the defendant had come into possession lawfully, notwithstanding his refusal to redeliver them. Detinue supplied this defect, to some extent. 3 Bl. Comm. 152; 2 Reeves, Eng. Law, 564; Bigelow, Lead. Cas. 420. As to damage in detinue, see Eastman v. Commissioners, 19 S. E. 599. As to abolition of detinue, and substitution of replevin, see 1 Burrill, Prac. 124.

[24] E. g. in action for negligence. But negligence must be sufficiently al-

Same—Injunction.

An injunction will always be granted to restrain the commission or continuance of actionable wrongs whenever the circumstances justify it. Thus, although there is much discussion,[25] and the weight of authority is against it on the point,[26] courts have sometimes issued injunction to restrain the publication of a libel.[27] So trespass,[28] waste,[29] and nuisance [30] may be restrained.

leged. McCrea v. Muskegon Circuit Judge, 100 Mich. 375, 58 N. W. 1118. And see (injury to personal property generally; by statute) Newbern Gaslight Co. v. Lewis Mercer Const. Co., 113 N. C. 549, 18 S. E. 693. Fraud, West Side Bank v. Meehan (Sup.) 20 N. Y. Supp. 766; May v. Newman, 95 Mich. 501, 55 N. W. 364; Hall v. Kintz, 13 Pa. Co. Ct. R. 24; conversion, Condoures v. Imperial Turkish Tobacco & Cigarette Co. (Com. Pl.) 22 N. Y. Supp. 695; issuance of capias when action is in tort, Sawyer v. Nelson, 44 Ill. App. 184; arrest in civil action for seduction, Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397; for fraud, Davis v. Cardue, 38 S. C. 471, 17 S. E. 247. And see White v. Campbell (R. I.) 26 Atl. 40; Newbern Gaslight Co. v. Lewis Mercer Const. Co., 113 N. C. 549, 18 S. E. 693 (for torts generally); McCrea v. Muskegon Circuit Judge, 100 Mich. 375, 58 N. W. 1118; May v. Newman, 95 Mich. 501, 55 N. W. 364 (fraud).

[25] Schuyler v. Curtis, 64 Hun, 594, 19 N. Y. Supp. 264; Boston Diatite Co. v. Florence Manuf'g Co., 114 Mass. 69; Brandreth v. Lance, 8 Paige, 23. As to Dixon v. Holden, L. R. 7 Eq. 488, see Prudential Assur. Co. v. Knott, 10 Ch. App. 142; Kidd v. Horry, 28 Fed. 773. But see Mayer v. Journeymen Stone Cutters' Ass'n (N. J. Ch.) 20 Atl. 492.

[26] Townsh. Sland & L. (4th Ed.) § 417 et seq., notes, with cases cited; High, Inj. (3d Ed.) § 1015; Kerr, Inj. § 502; Singer Manuf'g Co. v. Domestic Sewing Mach. Co., 49 Ga. 70.

[27] Sherry v. Perkins, 147 Mass. 212, 17 N. E 307 (and see cases collected and considered in 31 Am. Law Reg. 782); Bonnard v. Perryman [1891] 2 Ch. 269; Collard v. Marshall [1892] 1 Ch. 571, discussing Bonnard v. Perryman. Injunction against the use of piano in saloon disturbing plaintiff's sleep in adjoining building, Feeney v. Bartoldo (N. J. Ch.) 30 Atl. 1101. Bell v. Singer Manuf'g Co., 65 Ga. 452; Croft v. Richardson, 59 How. Prac. 350.

[28] Post, p. 704, "Trespass and Waste"; Miller v. Lynch, 149 Pa. St. 469, 24 Atl. 80 (as to trial of title at law); Wadsworth v. Goree, 96 Ala. 227, 10 South. 848 (Id.); Bierer v. Hurst, 162 Pa. St. 1, 29 Atl. 98; Hanly v. Watterson, 39 W. Va. 214, 19 S. E. 536; Southern Pac. R. Co. v. City of Oakland, 58 Fed.

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[29] Pulteney v. Shelton, 5 Ves. 260, note, Brock v. Dole, 66 Wis. 142, 28 N. W. 334; Mutual Life Ins. Co. v. Bigler, 79 N. Y. 508; Watson v. Hunter, 5 Johns. Ch. 169; Lavenson v. Standard Soap Co., 80 Cal. 245, 22 Pac. 184.

[30] Post, p. 803, "Nuisance."

Injunction and mandamus are not appropriate remedies in the same case.[31] A cause of action for damages in tort, as for a trespass, may be joined with an injunction to restrain a threatened repetition of the wrong.[32]

50; Sisson, Crocker & Co. v. Johnson (Cal.) 34 Pac. 617. A land-grant railroad company has such an interest in the unsurveyed lands as will entitle it to maintain alone (the government having refused to join with it) a suit to enjoin trespassers who are cutting timber thereon. Northern Pac. R. Co. v. Hussey, 9 C. C. A. 463, 61 Fed. 231. To prevent or remove obstruction to right of way: Starkie v. Richmond, 155 Mass. 188, 29 N. E. 770; Chicago, B. & Q. R. Co. v. Chicago, Ft. M. & D. Ry. Co. (Iowa) 58 N. W. 918. Against agents of interior department about to unlawfully eject an occupant: Caldwell v. Robinson, 59 Fed. 653. Against obstructing drains: Inhabitants v. Cutter, 159 Mass. 461, 34 N. E. 695. Overflowing lands: Collins v. City of Keokuk (Iowa) 59 N. W. 200. And if the court have jurisdiction of the person it may restrain a trespass on lands in another jurisdiction. Jennings Bros. & Co. v. Beale, 158 Pa. St. 283, 27 Atl. 948. Against casting cloud on title: Quinby v. Slipper, 7 Wash. 475, 35 Pac. 116. And, generally, see First Baptist Church v. Syms, 51 N. J. Eq. 363, 28 Atl. 461; Jackson v. Barry Ry., 2 Reports, 207 [1893] 1 Ch. 238; Ades v. Levi, 137 Ind. 506, 37 N. E. 388; Savannah & O. Canal Co. v. Suburban & W. E. Ry. Co., 93 Ga. 240, 18 S. E. 824; Union Water Co. v. Kean (N. J. Ch.) 27 Atl. 1015; Moore v. Lima Nat. Bank, 8 Ohio Cir. Ct. R. 287. See, also, Flood v. Van Wormer, 70 Hun, 415, 24 N. Y. Supp. 460; Bollman v. Wamer, 38 S. C. 464, 17 S. E. 223; Wilson v. Dondurant, 142 Ill. 645, 32 N. E. 498; Wagoner v. Wagoner, 77 Md. 189, 26 Atl. 284; Rutland Electric Light Co. v. Marble City Electric Light Co., 65 Vt. 377, 26 Atl. 635; Troe v. Larson, 84 Iowa, 649, 54 N. W. 179; Ramsdell v. Tama Water Power Co., 84 Iowa, 484, 51 N. W. 245; United States Trust Co. of New York v. O'Brien (City Ct. N. Y.) 18 N. Y. Supp. 708; Carson v. Electric Light & Power Co., 85 Iowa, 44, 51 N. W. 1144; Sprague v. Locke, 1 Colo. App. 171, 28 Pac. 142.

[31] Whigham v. Davis, 92 Ga. 574, 18 S. E. 548.

[32] Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119. And see Watterson v. Saldumbehere, 101 Cal. 107, 35 Pac. 432 (as to water rights); Bowman v. Chicago, St. P. & K. C. Ry. Co., 86 Iowa, 490, 53 N. W. 327 (laying track on street); Lamming v. Galusha, 135 N. Y. 239, 31 N. E. 1024 (Id.). As to damages incident to injunction, see Melrose v. Cutter, 159 Mass. 461, 34 N. E. 659; Watterson v. Saldumbehere, 101 Cal. 107, 35 Pac. 432; Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119. But, in an action to recover damages for a conspiracy, one of its fruits will not be canceled. Haskell County Bank v. Bank of Santa Fé, 51 Kan. 39, 32 Pac. 624. As to award of damages on dissolution of injunction, see Armstrong v. Fresz (Miss.) 16 South. 532. Cf. Harter v. Wescott (City Ct. Brook.) 32 N. Y. Supp. 111.

But courts will interfere by injunction only when sufficient appeal is made to the discretion of the chancellor. Equity will not lightly put in force preventive remedies. It will, unless clear reason for interference is shown, leave the parties to their legal, as distinguished from their equitable, remedies. It inclines to presume innocence and to allow wrong to go unpunished when it is not proved to have been committed.[33] Especially will equitable interference be denied where any wrong on the plaintiff's part is involved. Thus, an injunction should not be granted to protect the use of words as the trade-mark of a medical preparation which assert a manifest falsehood or physiological impossibility.[34]

Whoever seeks an injunction must show a right in himself,[35] a wrong or imminent danger of wrong on the part of defendant,[36] and some special reason for equitable interference.[37]

[33] Cooley, Torts, *p. 22.

[34] Kohler Manuf'g Co. v. Beeshore, 8 C. C. A. 215, 59 Fed. 572. Query, whether equity will intervene by injunction to protect the use of words claimed as a trade-mark, between owners of quack medicines. Id. He who seeks equity must do equity. You must come into equity with clean hands, etc.

[35] Jackson v. Barry Ry., 2 Reports, 207 [1893] 1 Ch. 238; Collins v. City of Keokuk (Iowa) 59 N. W. 200.

[36] Where defendant has been guilty of repeated trespasses on plaintiff's land, in spite of warnings from the latter, and has protracted a hopeless litigation for the land, and has interfered with plaintiff's attempts to cultivate the land, an injunction will issue to restrain further trespasses; it appearing that defendant is insolvent, that he is threatening to remove plaintiff's crop, and that, unless he is restrained, plaintiff will suffer irreparable damage. Lee v. Watson (Mont.) 38 Pac. 1077. A preliminary injunction is properly refused when there exists no reasonable ground for apprehending that the injury against which the injunction is sought will be attempted. National Docks & N. J. J. C. Ry. Co. v. Pennsylvania R. Co. (N. J. Err. & App.) 30 Atl. 580. And see Edison Electric Light Co. v. Buckeye Electric Co., 64 Fed. 225; Union Terminal R. Co. v. Board of Railroad Com'rs, 54 Kan. 352, 38 Pac. 290. On the other hand an injunction may be granted to restrain a navigation company from towing barges through the draw of a railroad bridge in such a negligent manner as to endanger the bridge, though there has been no trial at law to settle the rights of the parties. 45 Fed. 5, reversed. Texas & P. Ry. Co. v. Interstate Transp. Co., 15 Sup. Ct. 228.

[37] "It has been often adjudged that whenever, respecting any right violated, a court of law is competent to render a judgment affording a plain, adequate, and complete remedy, the party aggrieved must seek his remedy in such court,

The right of the plaintiff infringed by the defendant's wrong may be ... In a multitude of cases involving an infringement of the right of privacy. Thus a court will refuse to enjoin the publication of the biography of a public man like Corliss, the "foremost ... of his time,"[39] but will prevent the erection of a monument to a private individual like Mrs. Schuyler, the philanthropist, at request of her surviving family.[40] "There is a great difference between a public and a private person."[41] So, equity has both compelled[42] and refused[43] to restrain publication of a portrait. Interference with private property, for example, by misleading advertisements[44] or wrongful use or divulgence of trade secrets,[45] will be prevented by injunction.

... only because the defendant has a constitutional right to a trial by jury, but because of the provisions of the act of congress to pursue his remedy in such cases in a court of equity. * * * All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a pecuniary judgment for breach of a simple contract, or as damages for injury to person or property are legal actions, and can be brought in the federal courts only of their law side." Field, J., in Scott v. Neely, 140 U. S. 106-110, 11 Sup. Ct. 712. And see Williams v. McNeely, 36 Fed. 265.

[38] Corliss v. E. W. Walker Co., 57 Fed. 434, 64 Fed. 280. And see review of cases in 2 Am. Law Prot. & Rev. 1.

[39] Schuyler v. Curtis, Sup., 15 N. Y. Supp. 787.

[40] Per Matthew, J., in Monson v. Madame Tussaud, 10 Times L. R. 227, 7 Harv. Law Rev. 402.

[41] Marks v. Jaffa, 6 Misc. Rep. 290, 26 N. Y. Supp. 908.

[42] Murray v. Gast Lithographic & Engraving Co. (Com. Pl. N. Y.) 28 N. Y. Supp. 271.

[43] Defendant advertised a reprint of the 1847 edition of Webster's Dictionary, the copyright having expired, as "latest edition, 10,000 new words," etc., old price $8, and that the new low price of $1 was made possible by improvements in machinery, etc. It was held, on application of the owner of the copyright of subsequent editions, that defendant be enjoined against the further circulation of such misleading advertisements, and that, because of their already extensive circulation, a printed slip must thereafter be attached to each book, stating it to be a reprint of the edition of 1847. Merriam v. Texas Siftings Pub. Co., 49 Fed. 944. Cf., as to right of a corporation to be protected in the use of its name, "Madam Tussaud," 24 Am. Law Reg. 672.

[44] Plaintiff employed defendant in the manufacture of certain oils and greases. Before defendant entered such employment, he agreed not to divulge or to use any secrets of the business plaintiff might make known to him. Subsequently, he left plaintiff's employ, and began the manufacture of sim-

Plaintiff, having delivered a series of lectures, caused part of them to be reported in a journal. Defendant copied partially, and incorrectly, the published reports, and sold them in book form under a title importing that the whole series of lectures was there presented in the author's language. It was held that plaintiff, but not his assignee, was entitled to an injunction, independently of the copyright law.[45] So, to recover in trespass to land one must show possession or right of possession.[46] It is accordingly fatal, as a general rule, to an application for an injunction, that plaintiff was unsuccessful at law on the same cause of action.[47]

The defendant's wrong in cutting growing timber, constituting the principal value of property involved, is sufficient ground for interference by injunction.[48] And so is the insolvency of the defendant.[49] And, generally, that the injury is irreparable, or that an award of damages would not be adequate protection against imminent danger, that the bringing of a multiplicity of actions will thereby be prevented,[50] and other similar considerations, are sufficient.[51]

ilar oils and greases, using plaintiff's secrets therein. It was held that a permanent injunction was properly issued to restrain him from so doing. Fralich v. Despar, 165 Pa. St. 24, 30 Atl. 521.

[45] Pott v. Altemus, 60 Fed. 339.

[46] Hanly v. Watterson, 39 W. Va. 214, 19 S. E. 536; Kellar v. Bullington (Ala.) 14 South. 466; Jennings Bros. & Co. v. Beale, 158 Pa. St. 283, 27 Atl. 948. Cf. Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760; Cramer v. Kester (Cal.) 36 Pac. 415; Excelsior Brick Co. v. Village of Haverstraw, 142 N. Y. 146, 36 N. E. 819.

[47] Bierer v. Hurst, 162 Pa. St. 1, 29 Atl. 98.

[48] Butman v. James, 34 Minn. 547, 27 N. W. 66; Miller v. Lynch, 149 Pa. St. 460, 24 Atl. 80. But see Carney v. Hadley, 32 Fla. 344, 14 South. 4.

[49] Hanly v. Watterson, 39 W. Va. 214, 19 S. E. 536; Cœur d'Alene C. & M. Co. v. Miners' Union, 51 Fed. 260. And see Bolton v. McShane, 67 Iowa, 207, 25 N. W. 135; Ladd v. Osborne, 79 Iowa, 93, 44 N. W. 235; Price v. Baldauf, 82 Iowa, 669, 46 N. W. 983, and 47 N. W. 1079.

[50] Before a court of chancery will interfere to prevent a multiplicity of suits, there must be several persons controverting the same right, and each

[51] As to injunctions against threatening circulars, see Sinsheimer v. United Garment Workers of America (Sup.) 26 N. Y. Supp. 152, reversed in 77 Hun, 215, 28 N. Y. Supp. 321. But see Shoemaker v. South Bend Spark-Arrester Co., 135 Ind. 471, 35 N. E. 280. Cf. New York Filter Co. v. Schwarzwalder, 58 Fed. 577.

But the proud boast of equity is, "Ubi jus ibi remedium." This maxim forms the root of all equitable decisions.[52] "Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was therefore, in its time, without precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constant and varying demands for equitable relief." [53] Accordingly, injunction against conspiracies by employés, against boycotts, and against similar wrongs which are also torts, has become a conspicious feature of our government.[54] The time-honored rule

standing upon his own pretension. Carney v. Hadley, 32 Fla. 344, 14 South. 4. Whenever the complainant's title is disputed in cases of trespass, a court of equity will not interfere by injunction on the ground of multiplicity of suits, until he has successfully established his title by trial at law. Carney v. Hadley, supra; Lake Erie & W. R. Co. v. Young, 135 Ind. 426, 35 N. E. 177; Smith v. Bivens, 56 Fed. 352; Chadbourne v. Zilsdorf, 34 Minn. 43, 24 N. W. 308 (trespass, way).

[52] Ross, J., in U. S. v. Clune, 62 Fed. 798.

[53] Toledo, A. A. & N. M. Ry. v. Pennsylvania Co., 54 Fed. 746.

[54] An injunction will issue against interference in restraint of interstate commerce for the passage of the mails. Thomas v. Railway Co., 62 Fed. 803–824; U. S. v. Elliott, Id. 801; Sisson v. Johnson (Cal.) 34 Pac. 617. An injunction will issue against threatened violence. Cœur d'Alene Consol. & Min. Co. v. Miners' Union of Wardner, 51 Fed. 260; Longshore Printing & Pub. Co. v. Howell (Or.) 38 Pac. 547. An injunction will issue to prevent parties to a contract—for example, actors—violating their contract by acting elsewhere. Montague v. Flockton, L. R. 16 Eq. 189. And see 24 Am. Law Rev. 661, as to enticement of. An injunction will not be granted, under normal conditions, to prevent the enticement of servants. Reynolds v. Everett, 67 Hun, 204, 22 N. Y. Supp. 306, collecting cases; Id., 144 N. Y. 189, 36 N. E. 72. But no injunction will compel the affirmative performance of a contract of personal services, as an agreement to sing, act, or play. Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co., 9 App. Cas. 331. Therefore, an injunction will not issue to compel employés of a railway company to continue to work and not to strike. Jenkins, J., in Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 60 Fed. 803, overruled by Harlan, J., which is Minnesota law, in Arthur v. Oakes, 11 C. C. A. 209, 63 Fed. 310. Cf. Blindell v. Hagan, 54 Fed. 40, affirmed 6 C. C. A. 86, 56 Fed. 696 (crew of a ship). Courts have gone so far as to issue an omnibus injunction—that is, against all persons generally—to refrain from commission of public nuisance. U. S.

that the jurisdiction of equity is exercised only to protect rights in property is not only shaken,[55] but almost shattered.

Same—Receivers.

On proper conditions,[56] a court of equity will appoint a receiver for the prevention of further wrong[57] and the preservation of the subject of litigation.

v. Debs, 64 Fed. 724; In re Debs, 15 Sup. Ct. 900. A timely and valuable article on the legal restraint of labor strikes, by William P. Aiken, will be found in 4 Yale Law J. 13, and an interesting article on the Western Union Telegraph Company as an accomplice of Debs, in 28 Am. Law Rev. 765. A collection of authorities on what will constitute a conspiracy by employés of railroad companies, engaged in the transportation of mails and interstate commerce, will be found in Arthur v. Oakes, 59 Am. & Eng. R. Cas. 671, 11 C. C. A. 209, and 63 Fed. 310.

The act "to protect trade and commerce against unlawful restraints and monopolies" (Act Cong. July 2, 1890) confers no right upon a private individual to sue in equity for the restraint of the acts forbidden by such statute, an action at law for damages being the only remedy provided for private persons, and the right to bring suits in equity being vested in the district attorneys of the United States. Pidcock v. Harrington, 64 Fed. 821. The rule as to injunctions against boycotts is thus stated in Barr v. Essex Trades Council (N. J. Ch.) 30 Atl. 881: "Even when there is a legal remedy, equity will interfere by injunction to prevent (1) an injury which threatens irreparable damage, and (2) a continuing injury, when the legal remedy therefor may involve a multiplicity of suits. The criterion of the application of this jurisdiction is the inadequacy of the legal remedy, depending on whether (1) the injury done or threatened is of such a nature that, when accomplished, the property cannot be restored to its original condition, or cannot be replaced by means of compensation in money; (2) whether full compensation for the entire wrong can be obtained without resort to a number of suits."

[55] Fetter, Eq. 297–310.

[56] Ante, c. 2, p. 205, note "Receivers."

[57] Thus a scheme for issuing and selling bonds, the practical effect of which was to enrich a few at the expense of an ignorant and confiding people, may be deception, and fraudulent in its nature,—simply gambling. In re National Endowment Co., 142 Pa. St. 450, 21 Atl. 879; U. S. v. McDonald, 59 Fed. 563; Horner v. U. S., 147 U. S. 449, 13 Sup. Ct. 409. Under such circumstances, the fund in the treasury of the company, being obtained through fraud, and in danger of misapprehension, will be put in the hands of a receiver to prevent further fraud, and for its own preservation. McLaughlin v. Investment Co., 64 Fed. 908.

Ordinary Remedies.

The ordinary, and by far the most usual, remedy for torts is a civil action to recover a pecuniary indemnity from the wrongdoer,—that is, an action for damages.

SAME—DAMAGES.

124. Damages recoverable in tort may be considered with reference as to whether they are—

(a) Designed to compensate;

(b) Designed to do more or less than to compensate;

(c) In award disproportionate;

(d) In award divisible or indivisible;

(e) In award determined by statute.

125. It is naturally and legally proper that the compensation should be equivalent to the injury.[58]

Ordinary damages are a sum awarded as a measure of compensation. They should be precisely commensurate to the injury, —neither more nor less,—whether the injury is to the person or to the estate.[59] The subject of damages is too intimately connected with the cause of action in tort, especially when the right violated is a right not to be harmed, to be summarily remitted to books on Damages. But each specific wrong has, to a considerable extent, a measure of damages peculiar to itself. It will therefore be convenient to consider ordinary damages under each specific wrong, in order. However, one general principle has been emphasized by Mr. Pollock: "Compensation, not restitution, is the proper test." Thus, where a tenant for years carried away a large quantity of valuable soil from his holding, the reversioner could recover, not what

[58] Bussey v. Donaldson, 4 Dall. (U. S.) 194, 206. And see Dexter v. Spear, 4 Mason (U. S.) 115, Fed. Cas. No. 3,867; 7 Am. & Eng. Enc. Law, 449; 2 Bl. Comm. 248.

[59] 2 Greenl. Ev. § 250; 1 Suth. Dam. c. 3; 1 Sedg. Dam. c. 2; Baker v. Drake, 53 N. Y. 211; Noble v. Manufacturing Co., 112 Mass. 492; Brewster v. Van Liew, 119 Ill. 554, 8 N. E. 842; South Covington & C. S. Ry. Co. v. Gest, 34 Fed. 628; Northrup v. McGill, 27 Mich. 234; Reynolds v. Franklin, 44 Minn. 30, 46 N. W. 139; Peltz v. Eichele, 62 Mo. 171; Cressey v. Parks, 76 Me. 532.

it would cost to replace the soil, but the diminution in the value of the reversion.[60] One asking compensatory damages for a wrong-

[60] Pol. Torts, c. 5, citing Whitham v. Kershaw, 16 Q. B. Div. 613; Gwaltney v. Land Co., 115 N. C. 579, 20 S. E. 465 (compensation with reference to property interest). The difference between the market value of a house and lot before and after a fire, by which the house is destroyed, is the measure of the damage occasioned by the fire, where there is any evidence that the house and lot together have a market value. Pacific Exp. Co. v. Smith (Tex. Sup.) 16 S. W. 998. But in an action by a lot owner for damage done by water thrown from a public street on his land by a ditch dug by a city, plaintiff is entitled to recover the cost of filling up his lot, where the flooding of the lot is continuous, and the filling is necessary in order to keep out the water. Weir v. Plymouth Borough, 148 Pa. St. 566, 24 Atl. 94. And further as to damages to land or crops, see Pope v. Benster, 42 Neb. 304, 60 N. W. 561; Terre Haute & L. R. Co. v. Walsh (Ind. App.) 38 N. E. 534; Colorado Consol. Land & Water Co. v. Hartman (Colo. App.) 38 Pac. 62. Cf. City of Nashville v. Sutherland, 94 Tenn. 356, 29 S. W. 228; Chicago & E. R. Co. v. Barnes, 10 Ind. App. 460, 38 N. E. 428. It has been held, however, that in an action to recover damages resulting from negligence in the construction of defendant's railroad in obstructing ditches and destroying fences, the measure of damages is the cost of removing those obstructions and replacing the fences. Waters v. Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718. Where one sells land by fraudulently misrepresenting the value thereof, the grantee may recover, as his measure of damages, the difference between the real value of the land at the date of his purchase and what it would have been worth at that time if the representations had been true. Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 496. As to measure of damages, see Davenport v. Anderson (Tex. Civ. App.) 28 S. W. 922. As to damages in personal injury cases, see Board Com'rs of Jackson Co. v. Nichols (Ind. Sup.) 38 N. E. 526; Omaha & R. V. Ry. Co. v. Ryburn, 40 Neb. 87, 58 N. W. 541; Healy v. Visalia & T. R. Co., 101 Cal. 585, 36 Pac. 125; Edwards v. Common Council (Mich.) 60 N. W. 454; Dooner v. Delaware & H. Canal Co., 164 Pa. St. 17, 30 Atl. 269; Haden v. Sioux City & P. R. Co. (Iowa) 60 N. W. 537. Where an attorney is paid his fee in advance, its amount is not the measure of damage for breach of professional duty. Quinn v. Van Pelt, 56 N. Y. 417; Denver, T. & Ft. W. R. Co. v. Dotson (Colo. Sup.) 38 Pac. 322; Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Manuf'g Co., 27 Fla. 1, 157, 9 South. 661; Todd v. Railway Co., 39 Minn. 186, 39 N. W. 318; Karst v. St. Paul, S. & T. F. Ry. Co., 22 Minn. 118; Baldwin v. Railway Co., 35 Minn. 354, 29 N. W. 5; Barnett v. Water-Power Co., 33 Minn. 265, 22 N. W. 535. The measure of damages for breaking a wagon is the difference between its value just before and just after the injury, and a reasonable sum for the loss of use for a period necessary to repair it. Hoffman v. Metropolitan St. Ry. Co., 51 Mo. App. 273.

ful act must give the jury means of ascertaining the amount thereof.[61]

Interest is generally not allowed in uncertain and unliquidated

[61] Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 19 S. E. 521. In an action for malicious prosecution, nothing can be recovered for attorney's fees incurred when their value is not proved. Mitchell v. Davies, 51 Minn. 168, 53 N. W. 363. In an action for the value of property wrongfully detained, and for damages for such detention, plaintiff cannot be allowed to testify, as a conclusion, the amount of damages she has sustained, independently of the value of such property. Wellington v. Moore, 37 Neb. 560, 56 N. W. 200; Landrum v. Wells (Tex. Civ. App.) 26 S. W. 1001. Plaintiff was properly permitted to state to the jury that his farm was worth $1,200 less after than before the fire, and to give the reason for his opinion. Chicago & E. R. Co. v. Kern, 9 Ind. App. 505, 36 N. E. 381; Little Rock & M. R. Co. v. Barry, 58 Ark. 198, 23 S. W. 1097 (medical expenses); Atchison, T. & S. F. Ry. Co. v. Click, 5 Tex. Civ. App. 224, 23 S. W. 833 (medical expenses); Cousins v. Lake Shore & M. S. Ry. Co., 96 Mich. 386, 56 N. W. 14 (medical expenses); Salt River Canal Co. v. Hickey (Ariz.) 36 Pac. 171 (refusal to deliver certificate of stock); La Duke v. Township of Exeter, 97 Mich. 450, 56 N. W. 851 (damage to plaintiff's horse). As to evidence of market price and value, McLennan v. Lemen (Minn.) 59 N. W. 628; Greenebaum v. Taylor, 102 Cal. 624, 36 Pac. 957; Aulls v. Young, 98 Mich. 231, 57 N. W. 119; Den Bleyker v. Gaston, 97 Mich. 354, 56 N. W. 763; Dorr v. Beck, 76 Hun, 540, 28 N. Y. Supp. 206; Galveston, H. & S. A. Ry. Co. v. Silegman (Tex. Civ. App.) 23 S. W. 298; Glovinsky v. Cunard S. S. Co., 6 Misc. Rep. 388, 26 N. Y. Supp. 751; Constant v. Lehman, 52 Kan. 227, 34 Pac. 745; Galveston, H. & S. A. Ry. Co. v. Williams (Tex. Civ. App.) 25 S. W. 1019; Union Pac. D. & G. Ry. Co. v. Williams, 3 Colo. App. 526, 34 Pac. 731; Bassett v. Shares, 63 Conn. 39, 27 Atl. 421; Gulf, C. & S. F. Ry. Co. v. Matthews, 3 Tex. Civ. App. 493, 23 S. W. 90. And see, also, Brusch v. Railway Co., 52 Minn. 512, 55 N. W. 57; Olson v. Sharpless, 53 Minn. 91, 55 N. W. 125; Mitchell v. Davies, 51 Minn. 168, 53 N. W. 363; Stiff v. Fisher, 2 Tex. Civ. App. 346, 21 S. W. 291; Chicago & E. R. Co. v. Smith, 6 Ind. App. 262, 33 N. E. 241; Gentry v. Railroad Co., 38 S. C. 284, 16 S. E. 893; Martin v. Railroad Co., 62 Conn. 331, 25 Atl. 239. Generally, as to burden of proof and necessity of proof, see Green v. Barney (Cal.) 36 Pac. 1026; Littlehale v. Osgood, 161 Mass. 340, 37 N. E. 375; Gulf, C. & S. F. Ry. Co. v. Rossing (Tex. Civ. App.) 26 S. W. 243; Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 19 S. E. 521; Metropolitan St. R. Co. v. Johnson, 91 Ga. 466, 18 S. E. 816; Schriver v. Village of Johnstown, 71 Hun, 232, 24 N. Y. Supp. 1083; Campbell v. Alston (Tex. Civ. App.) 23 S. W. 33; Ohio & M. Ry. Co. v. Hill, 7 Ind. App. 255, 34 N. E. 646. As to sufficiency of evidence, Texas & P. R. Co. v. McDowell (Tex. Civ. App.) 27 S. W. 177; Texas & P. R. Co. v. Bailey (Tex. Civ. App.) 27 S. W. 302; Stephenson v. Flagg, 41 Neb. 371, 59 N. W. 785; Norfolk & W. R. Co. v. Draper,

causes of action.[62] Thus, it cannot be allowed in actions ex delicto, based upon simple negligence of a party to whom no pecuniary benefit could accrue by reason of the injury inflicted,[63] nor where the loss of profits is the measure of damage.[64] There are, however, many torts in which interest from the time of accrual of cause of action is ordinarily allowed. Thus, the measure of damages in case of a common carrier is the value of goods intrusted to him for transportation with interest from the time they ought to have been delivered.[65] But where the highest court of a state has, because of statute, held the rule to be otherwise, the United States court will follow the holding of the state court.[66] Interest has also been allowed in trespass[67] for taking goods, and in

90 Va. 245, 17 S. E. 883; Netherland-American Steam Nav. Co. v. Hollander, 8 C. C. A. 169, 59 Fed. 417; Pill v. Brooklyn Heights R. Co., 6 Misc. Rep. 267, 27 N. Y. Supp. 230; Hartman v. Pittsburg Incline Plane Co., 159 Pa. St. 442, 28 Atl. 145; Crow v. Manning, 45 La. Ann. 1221, 14 South. 122; Gainesville, H. & W. R. Co. v. Lacy, 86 Tex. 244, 24 S. W. 269; St. Louis & S. F. R. Co. v. Farr, 6 C. C. A. 211, 56 Fed. 994; Orsor v. Metropolitan Cross Town R. Co., 78 Hun, 169, 28 N. Y. Supp. 966; Missouri, K. & T. R. Co. v. Reynolds (Tex. Civ. App.) 26 S. W. 879; Carney v. Brome, 77 Hun, 583, 28 N. Y. Supp. 1019. Weight of expert testimony as to damage is not conclusive in the court. Isear v. Burstein (Super. N. Y.) 24 N. Y. Supp. 918.

[62] Anon., 1 Johns. 315.

[63] Marshall v. Schricker, 63 Mo. 308; Kenney v. Railroad Co., Id. 99; Galveston, H. & S. A. R. Co. v. Dromgoole (Tex. Civ. App.) 24 S. W. 372; Meyer v. Railroad Co., 64 Mo. 542; De Steiger v. Railroad Co., 73 Mo. 33; Wade v. Railroad Co., 78 Mo. 362.

[64] Wiggins Ferry Co. v. Chicago & A. R. Co. (Mo.) 27 S. W. 568.

[65] Mobile & M. R. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566. And see Gulf, C. & S. F. R. Co. v. Dunman, 6 Tex. Civ. App. 101, 24 S. W. 995; International & G. N. R. Co. v. Dimmitt Co. Pasture Co., 5 Tex. Civ. App. 186, 23 S. W. 754. The award of interest may be regulated by statute. Thus, in South Dakota, award of interest on damage to property, caused by negligence, is left to the discretion of the jury. Uhe v. Railway Co. (S. D.) 57 N. W. 484. Measure of damages from delay in transportation. Gulf, C. & S. F. Ry. Co. v. Gilbert, 4 Tex. Civ. App. 366, 23 S. W. 320. And see note by Victor Levy in 1 Am. Law Reg. (N. S.) 220.

[66] New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591, 13 Sup. Ct. 444.

[67] Beals v. Guernsey, 8 Johns. 446. So, where plaintiff recovers judgment for destruction of his crops by an overflow, he is entitled to interest on their value. Gulf, C. & S. F. R. Co. v. Calhoun (Tex. Civ. App.) 24 S. W. 362; Gulf, C. & S. F. R. Co. v. Dunlap (Tex. Civ. App.) 26 S. W. 655.

trover,[68] on the value of chattels from the time of trespass or of conversion.

126. Compensatory damages may be—

(a) Such as the law presumes from the invasion of a simple right, or

(b) Such as the law, in all other cases, requires to be proved as a condition precedent to recovery.

127. Whenever the law presumes damages, the character of the damages suffered is immaterial to the right of the plaintiff to sue, however it may affect the extent of his recovery.

128. Whenever the law does not presume damages, before the plaintiff can recover he must plead and prove damages which conform to the legal standard; that is, such damages must not be—

(a) Trivial or fanciful,

(b) Merely sentimental, or

(c) Remote, as distinguished from proximate.

Compensatory damages may be of many kinds. As to quantity, they may be substantial or nominal; as to origin, direct or consequential; as to cause, proximate or remote; as to pleading, general or special. These various kinds of damages may conveniently be considered in this order.

Direct and Consequential Damages.

There is an unfortunate ambiguity in the use of the terms "direct" and "consequential," with respect to damages. On the one hand, they are sometimes employed as indicating the character of the connection of defendant's conduct, as the cause of the damages complained of. Here "consequential" is equivalent to "indirect."[69] On the other hand, the same terms frequently define

[68] Eddy v. Lafayette, 4 U. S. App. 247, 1 C. C. A. 441, 49 Fed. 807; Bissell v. Hopkins, 4 Cow. 53; Hyde v. Stone, 7 Wend. 354; Baker v. Wheeler, 8 Wend. 505; First Nat. Bank v. Lynch, 6 Tex. Civ. App. 590, 25 S. W. 1042. And see damages in conversion, post, 737.

[69] Suth. Dam. c. 2, pp. 19, 20.

the old distinction between trespass and case, and the same idea therein involved, as it survives the repeal of mere forms of action. In cases of trespass, in the old phraseology, or of the violation of simple or absolute rights, in the modern, the damages are direct; in cases of trespass on the case, in the old phraseology, or of the violation of a right not to be harmed, in the new, the damages are consequential. Here "consequential" is used to describe, not the relationship of cause and effect, but to set forth the very nature of the wrong. Such damages must be alleged and proved. Direct damages may be presumed. If a man run an umbrella into another's eye intentionally, the damage is direct, not consequential. The remedy was trespass, not case. The right violated is a simple or absolute one. But if the same act be done carelessly the remedy was case, not trespass. The damage was consequential, and the right violated was a right not to be harmed.*

Consequential damages are also sometimes confused with special damages.[70]

It may conduce to simplicity of treatment, perspicuity of language, and clearness of thought, to apply only the terms "proximate" and "remote" (with the convenient subdivision into "direct" and "indirect") to damages so far as connection as cause is concerned, and, in discussing damages as an element essential to recovery on the part of the person injured, to consider (1) damages which the law will presume, and (2) damages which the law will not presume.

* This serves to illustrate the unsatisfactory classification of the law as to rights. As a matter of fact, decisions on this point were reached because the judges regarded not so much the nature of the right as the nature of the wrong. The difference between the conduct of a man who commits an assault and another who, by his carelessness, does damage, is a real one. Speaking with strict accuracy in both cases, the right of the sufferer which was violated is the right not to be harmed.

[70] Mr. Sutherland (volume 1, §§ 14, 15) defines "direct damages" as including damages for all such injurious consequences as proceed immediately from the cause which is the basis of the action; and "consequential damages," as those which the cause in question naturally, but indirectly, produced. He cites, as an illustration of consequential damages, Teagarden v. Hetfield, 11 Ind. 522, which was a case of trespass, in which the damages were necessarily direct, and not consequential; but the damages were special, as distinguished from general.

When Damages are Presumed.

Nominal damages are those awarded when, from the nature of the case, some injury has been done the amount of which the proof entirely fails to show.[71]

Nominal damages, it has been seen,[72] are those which the law presumes to follow the invasion of another's simple rights, as distinguished from his rights not to be harmed. Accordingly, in such cases, the law refuses to apply the maxim, "De minimis non curat lex."[73] Thus, in an English case, a court directed a verdict to be entered for one penny damages.[74] The maxim will not be applied to trespass to land.[75] So, when a person, as a joke, took reins worth $3 from another's horse, it was held error to dismiss an action therefor.[76] The slightest willful injury to the person, on the same

[71] Bellingham Bay & B. C. R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144. In contracts, "nominal damages" are defined to mean a sum of money which has no existence, in point of quantity,—a mere peg on which to hang costs. Beaumont v. Greathead, 52 E. C. L. 498. And see Farmer v. Crosby, 43 Minn. 459, 462, 45 N. W. 866; Eaton v. Lyman, 30 Wis. 41; Hickey v. Baird, 9 Mich. 32; Jennings v. Loring, 5 Ind. 250; Willson v. McEvoy, 25 Cal. 170, and cases. But this distinction can hardly be applicable to cases in tort. Pig. Torts, 125.

[72] Ante, c. 1, "Injuria sine Damno"; c. 4, "Statute of Limitations." And see Cowley v. Davidson, 10 Minn. 392 (Gil. 314); Woods' Mayne, Dam. 7; Quin v. Moore, 15 N. Y. 432; Mitchell v. Mayor, etc., 49 Ga. 19; Smith v. Whiting, 100 Mass. 122; Fitzpatrick v. Railway Co., 84 Me. 33, 24 Atl. 432; Munroe v. Stickney, 48 Me. 462; Bagby v. Harris, 9 Ala. 173; Champion v. Vincent, 20 Tex. 811.

[73] As to refusal to assess nominal damages, see Funk v. Evening Post Pub. Co., 78 Hun, 497, 27 N. Y. Supp. 1089; Shipps v. Atkinson, 8 Ind. App. 505, 36 N. E. 375; Schwartz v. Davis (Iowa) 57 N. W. 849; Ady v. Freeman, Id. 879; Kenyon v. W. U. Tel. Co., 100 Cal. 454, 35 Pac. 75. See the answer of Holt, C. J. (Ashby v. White, 2 Ld. Raym. 953), to Powys, J. (2 Ld. Raym. 944), and Whitcher v. Hall, 5 Barn. & C. 269–277; Pindar v. Wadsworth, 2 East, 154; Seneca R. Co. v. Auburn & R. R. Co., 5 Hill, 170. "De minimis non curat lex" does not apply to trespass on land, because it might be evidence of title. Bragg v. Laraway, 65 Vt. 673, 27 Atl. 492.

[74] Feize v. Thompson, 1 Taunt. 121 (case cited by Heath, J.); Wright v. Freeman, 40 Ill. App. 421; Warden v. Sweeney, 86 Wis. 161, 56 N. W. 647.

[75] Bragg v. Laraway, 65 Vt. 673, 27 Atl. 492.

[76] Wartman v. Swindell (N. J. Err. & App.) 25 Atl. 356; 1 Hil. Torts, 90; Seneca Road Co. v. Auburn & R. R. Co., 5 Hill, 171.

principle, is a sufficient basis for recovery.[77] One court, however, has gone so far as to refuse to hold a sheriff liable for unlawfully using a person's pitchfork to remove hay properly attached, when the pitchfork was returned uninjured.[78] When damages are thus presumed from conduct, they may not strictly be called "compensatory."[79] Indeed, they may be awarded although the injury results in an actual benefit to the complainant.[80] On the other hand, they may be strictly coincident with the actual extent of the harm suffered, and if the same state of facts convince the jury that the plaintiff suffered more, he can recover substantial damages.[81] Accordingly, they sometimes are, and sometimes may not be, strictly compensatory.

When Damages are not Presumed.

Where the damages for which recovery is sought are not presumed, but must be proved,—that is, where the right violated is not a simple right, but a right not to be harmed,—the law requires proof of damages which comes up to the legal standard. If the damage thus required and proved be so small as to show that the suit was trivial, vexatious, or hard, the courts will not sustain the claim.[82] In such cases the law will not refuse to apply the maxim, "De minimis non curat lex."[83] It would seem, however, that if the

[77] Holt, C. J., in Ashby v. White, 2 Ld. Raym. 955, approved; Brent v. Kimball, 60 Ill. 211. And see Tatnall v. Courtney, 6 Houst. (Del.) 434.

[78] Paul v. Slason, 22 Vt. 231. But see Fullam v. Stearns, 30 Vt. 443. And see Kullman v. Greenebaum, 92 Cal. 403, 28 Pac. 674.

[79] Pig. Torts, 127.

[80] Rich v. Bell, 16 Mass. 294; Stowell v. Lincoln, 11 Gray, 434; Gile v. Stevens, 13 Gray, 146; Jewett v. Whitney, 43 Me. 242; Hibbard v. W. U. Tel. Co., 33 Wis. 558; Francis v. Schoellkopf, 53 N. Y. 152.

[81] There is no rule limiting the recovery for wrongful assault to nominal damages, but the amount thereof is a question for the jury. Caldwell v. Central Park, N. & E. R. R. Co. (Com. Pl.) 27 N. Y. Supp. 397. And see Wampach v. Railway Co., 22 Minn. 34.

[82] Potter v. Mellen, 36 Minn. 122, 30 N. E. 438; Steinbach v. Hill, 25 Mich. 78; Kenyon, C. J., in Wilson v. Rastall, 4 Term R. 753; Williams v. Mostyn, 4 Mees. & W. 144; Young v. Spencer, 10 Barn. & C. 145.

[83] Pig. Torts; Clerk & L. Torts. And see Mietzsch v. Berkhout (Cal.) 35 Pac. 321. "It is not only to those who are greatly damnified by the illegal act of another to whom the law gives redress; but its vindication extends to every person who is damnified at all, unless, indeed, the loss sustained is

complaint shows that the plaintiff is entitled to nominal damages, it is not demurrable.[84] Probably the clearest illustration of the principle is in the case of nuisance, in which the courts require the harm complained of to be substantial, not merely fanciful.[85]

Mental Suffering.

Again, some courts have refused to recognize mental suffering unaccompanied by actionable injury as sufficient harm to be entitled to legal recognition.[86] The broadest argument against the award of such damages is—First, that the mental suffering cannot, as a matter of fact, be sufficiently traced as a natural and probable consequence, in the ordinary course of things, of the wrongful conduct complained of; and, second, that if the connection as cause and effect can be traced, the difficulty of determining whether the injuries were caused by the negligent act would be greatly increased, and a wide field would be opened for imaginative claims, and purely speculative litigation encouraged.[87] Sometimes, however, the case is said to rest on the limitation as to natural and probable consequences of defendant's conduct,[88] and some-

so small as to be unnoticeable, by force of maxim, 'De minimis non curat lex.'" Beasley, J., in Beseman v. Railroad Co., 50 N. J. Law, 235, 13 Atl. 104. And see Freeman v. Venner, 120 Mass. 424. A rare and trifling injury, necessarily resulting from a lawful business, will not sustain an action at law. Price v. Grantz, 118 Pa. St. 402, 11 Atl. 794. Cf. Brown v. Watson, 47 Me. 161.

[84] Tort, Larson v. Chase, 47 Minn. 307, 50 N. W. 238; Hudson v. Archer (S. D.) 55 N. W. 1099; contract, Burns v. Jordan, 43 Minn. 25, 44 N. W. 523.

[85] Kenyon v. W. U. Tel. Co., 100 Cal. 454, 35 Pac. 75; post, p. 808, "Nuisance."

[86] "Mental pain and anxiety the law cannot value, and does not pretend to redress, where the unlawful act complained of causes that alone." Lynch v. Knight, 9 H. L. 577–598. Wyman v. Leavitt, 71 Me. 227, per Virgin, J.; Levy v. Railway Co., 59 Tex. 543, 12 Cent. Law J. 534–536; Indianapolis & St. L. Ry. Co. v. Staples, 62 Ill. 313; Canning v. Williamstown, 1 Cush. 451. See note by Mr. Campbell Black, on "Mental Anguish," in 11 C. C. A. 109; Duggan v. Baltimore & O. R. R., 159 Pa. St. 248, 28 Atl. 182, 186.

[87] Victorian Ry. Com'rs v. Coultas, 13 App. Cas. 222; Beven, Neg. 66–71; 2 Sedgw. Dam. 642, 643; The Corsair, 145 U. S. 335–338, 12 Sup. Ct. 949.

[88] Phillips v. Dickerson, 85 Ill. 11. A charge which allows damages for the pain and suffering which plaintiff "may endure hereafter," and for the loss of such time as the evidence shows "she will be likely to suffer here-

times "on the difficulty of the character of the damages." [89]

While the general analogy from other actions in tort, and other potent considerations, justify such actions,[90] the general trend of decision denies, in the absence of statute, the right to recover for mental suffering, unaccompanied by other injury resulting from failure to deliver a telegraph message.[91] Where, however, one has established his cause of action for harm to his person, property, or reputation, he may then recover for injured feelings and mental suffering.[92] Thus, where there has been an injury to the body,

after," is erroneous, as allowing the jury to go into the field of mere probability. Hardy v. Milwaukee St. Ry. Co., 89 Wis. 183, 61 N. W. 771.

[89] Canty, J., in Francis v. W. U. Tel. Co. (Minn.) 59 N. W. 1082. And see 8 Harv. Law Rev. 205; Rowell v. W. U. Tel. Co., 75 Tex. 26, 12 S. W. 534 ("intolerable litigation"). As to the grief of a mother whose miscarriage had been brought on by defendant's negligence, it was said in Bovee v. Danville, 53 Vt. 190: "If, like Rachel, she wept for her children, and would not be comforted, a question of continuing damages is presented, too delicate to be weighed by any scales which the law has yet invented." Cf. Oliver v. Lavalle, 36 Wis. 592; ante, c. 1, "Connection as Cause," note.

[90] Francis v. W. U. Tel. Co. (Minn.) 59 N. W. 1078. A telegram stating that: "Grace is very low. Can you come, and bring Maude?"—informs the company that the addressee has a serious interest in Grace's condition, and of the consequences of a failure to promptly deliver it. W. U. Tel. Co. v. Linn (Tex. Civ. App.) 23 S. W. 895, affirmed 87 Tex. 7, 26 S. W. 490.

[91] Summerfield v. W. U. Tel. Co., 87 Wis. 1, 57 N. W. 973; Gulf, C. & S. F. Ry. Co. v. Trott (Tex. Civ. App.) 25 S. W. 431; Francis v. W. U. Tel. Co. (Minn.) 59 N. W. 1078; Chapman v. Telegraph Co., 88 Ga. 763, 15 S. E. 901; Tyler v. W. U. Tel. Co., 54 Fed. 634; Kester v. W. U. Tel. Co., 55 Fed. 603.

[92] Morgan v. Curley, 142 Mass. 107, 7 N. E. 726 (assault and battery); Wyman v. Leavitt, 71 Me. 227 (assault and battery); Goddard v. Railway Co., supra (malicious prosecution); Beach v. Hancock, supra (malicious prosecution); Phillips v. Hoyle, 4 Gray, 568 (malicious prosecution); Hatch v. Fuller, 131 Mass. 574. And see Pennsylvania Co. v. Graham, 63 Pa. St. 290; Smith v. Railroad Co., 23 Ohio St. 10; McMahon v. Railroad Co., 39 Mo. 438. The federal courts have not recognized mental anguish pure and simple as making out a cause of action. W. U. Tel. Co. v. Wood, 6 C. C. A. 432, 57 Fed. 471; Kester v. W. U. Tel. Co., 55 Fed. 603; Gahan v. W. U. Tel. Co., 59 Fed. 433 (under Minnesota statute); Tyler v. W. U. Tel. Co., 54 Fed. 634 (common law of Virginia). However, in Crawson v. W. U. Tel. Co., 47 Fed. 544, the rule is limited to cases where the mental suffering is unaccompanied with other injuries, and where there has been no wanton or malicious purpose on the part of the company's agent in not delivering the message.

damages for incidental and future mental suffering may be recovered.[93] But mental suffering induced by the plaintiff's crippled or repulsive appearance is not a basis for damages.[94]

While mere peril,[95] or fright,[96] as a distinct element of damage, may not be recovered, still peril and fright, as a part of mental agony,[97] may be considered by the jury,—as fear of hydrophobia from the bite of a dog.[98]

Humiliation consequent on being ejected from a car,[99] or being

[93] Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696; W. U. Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577; Kennedy v. Sugar Co., 125 Mass. 90; Nourse v. Packard, 138 Mass. 307; Smith v. Bagwell, 19 Fla. 117; Curtis v. Railroad Co., 18 N. Y. 534; Stewart v. Ripon, 38 Wis. 584; Fry v. Railroad Co., 45 Iowa, 416; Reinke v. Bentley (Wis.) 63 N. W. 1055; Robinson v. Simpson, 8 Houst. (Del.) 398, 32 Atl. 287; Atchison, T. & S. F. R. Co. v. Midgett (Kan. App.) 40 Pac. 995. In an action for personal injuries, plaintiff's expressions of present existing pain, and its locality, are competent evidence. Louisville, N. A. & C. Ry. Co. v. Miller (Ind. Sup.) 37 N. E. 343; Demann v. Railway Co. (Com. Pl.) 30 N. Y. Supp. 926; Allen v. Railway Co. (Tex. Civ. App.) 27 S. W. 943 (mental anguish from fright); Stutz v. Chicago & N. W. R. Co., 73 Wis. 147, 40 N. W. 653; Renner v. Canfield, 36 Minn. 90, 30 N. W. 435; Phillips v. Dickerson, 85 Ill. 11. Coffin v. Varila (Tex. Civ. App.) 27 S. W. 956 (physical and mental suffering from false imprisonment).

[94] Bovee v. Danville, 53 Vt. 183; Chicago, B. & Q. R. Co. v. Hines, 45 Ill. App. 299; Chicago, R. I. & P. R. Co. v. Caulfield, 11 C. C. A. 552, 63 Fed. 396. Where, however, a boy nine years old is injured so as to be crippled for life, it is proper to allow him for his mental anguish arising from this act. Schmidt v. St. Louis, I. M. & S. Ry. Co., 119 Mo. 256, 24 S. W. 472. And it has been held that, in an action for personal injuries, the jury may consider the pain received at the time of the injury, any pain afterwards endured from such injuries, or which may result from such injuries as the natural cause; and any disfigurement to the person. St. Louis S. W. Ry. Co. v. Dobbins (Ark.) 30 S. W. 887.

[95] American Waterworks Co. v. Dougherty, 37 Neb. 373, 55 N. W. 1051. Actual damages cannot be recovered for mental anguish caused by fright, unaccompanied by physical injury. Chicago, R. I. & T. Ry. Co. v. Hitt (Tex. Civ. App.) 31 S. W. 1084.

[96] Southern Pac. Co. v. Ammons (Tex. Civ. App.) 26 S. W. 135.

[97] San Antonio & A. P. Ry. Co. v. Corley (Tex. Sup.) 29 S. W. 231.

[98] Warner v. Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638.

[99] Post, p. 392, "Exemplary Damages." As to damages for mental suffering on being carried beyond destination, see Trigg v. Railway Co., 74 Mo. 147. No recovery can be had for great "distress of mind, anxiety, mortifica-

excluded because of color or other reason,[100] is a proper element for a jury's consideration. Injury to the good name and character of a family, and the shame, mortification, and mental suffering of a parent because of the seduction of a child, are proper elements of damage.[101] Indeed, courts have gone so far as to recognize the right to recover for injured sensibilities in cases of unlawful interference with dead bodies.[102]

A person's recovery for mental anguish is confined to his feelings as to himself, and does not extend to his anxiety for third persons.[103]

It is required, in actions for injuries to the reputation, that the damage complained of must be based on a temporal or material loss, capable of being estimated in money; that is to say, the damage must be pecuniary.[104]

Proximate and Remote Damages.

Where damages are of the gist of a cause of action, the action will not lie if they are remote.[105] If damages are not of the gist of the plaintiff's cause of action, even then he cannot recover remote damages.

tion, and suspense" consequent on failure to run special train to enable plaintiff to see his sick father. Wilcox v. Railroad Co., 3 C. C. A. 73, 52 Fed. 264.

[100] West Chester & P. R. Co. v. Miles, 55 Pa. St. 209; Chicago & N. W. Ry. Co. v. Williams, 55 Ill. 185; Pleasants v. Railroad Co., 34 Cal. 586.

[101] Garretson v. Becker, 52 Ill. App. 256; Phelin v. Kenderdine, 20 Pa. St. 354; Suth. Dam. (2d Ed.) § 1283. In an action by a wife for the alienation of her husband's affections, she can recover damages, without proof of loss of support. Rice v. Rice (Mich.) 62 N. W. 834.

[102] Meagher v. Driscoll, 99 Mass. 281; ante, p. 13, "Ecclesiastical Courts"; Smith v. Railroad Co., 23 Ohio St. 10; Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Baltimore & O. R. Co. v. Kean, 65 Md. 394, 5 Atl. 325.

[103] Keyes v. Railway Co., 36 Minn. 290, 30 N. W. 888.

[104] "It is well settled that, in an action for libel on them in their business by two or more partners, damages cannot be recovered for any injury to their feelings." Donaghue v. Gaffy, 53 Conn. 43–49, 2 Atl. 397. And post, p. 808, "Libel and Slander."

[105] 1 Suth. Dam. 50; Lamb v. Stone, 11 Pick. (Mass.) 527; Bradley v. Fuller, 118 Mass. 239; Harrison v. Redden, 53 Kan. 265, 36 Pac. 325.

129. In determining what is a proximate and what a remote consequence, the English courts incline to accept the measure of damage in cases of contracts, and to award such damages as (a) directly and necessarily result from the wrong complained of; and (b) such further damages as should have been foreseen by the wrongdoer, in view of his knowledge, actual or constructive, of the special circumstances of the case.

130. The American courts do not seem to have determined very definitely whether the test is—

(a) What a reasonably prudent man would or should have foreseen under the circumstances; or

(b) What follows as a natural result in the ordinary course and constitution of nature.

131. A much wider liability is recognized when the wrong complained of arises from illegal, fraudulent, or malicious conduct.

English Rule.

As has been seen, a person is held liable for the natural and probable consequences of his conduct. But there is much dispute as to how such consequences are to be determined, and when the damage is proximate and recoverable, or when it is remote and not actionable.[107] The English courts incline to hold that "the rule with regard to the remoteness of damage is precisely the same whether the damages are claimed in actions of contract or of tort."[108] Accordingly, the measure of damages in torts follows the rule for damages in contracts laid down in Hadley v. Baxendale.[109] Therefore, a wrongdoer is liable for damages resulting directly from his conduct, and for such consequential damages as were, or in reason should have been, contemplated by him.[110] Thus, where a woman alleged spe-

[107] Ante, c. 1, "Connection as Cause."

[108] The Notting Hill (1884) 9 Prob. Div. 105–113, per Lord Esher, M. R.

[109] 23 L. J. Exch. 179. And see Paine v. Sherwood, 21 Minn. 225; Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88; Freeman v. Dempsey, 41 Ill. App. 554.

[110] Sharpe v. Powell, L. R. 7 C. P. 253; ante, p. 61, "Connection as Cause." But see Hydraulic Engineering Co. v. McHaffie, 4 Q. B. Div. 670. And see

cial damages from slander, whereby she lost the consortium of her husband, Lord Wensleydale said: "To make the words actionable by reason of special damages, the consequences must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking the words, not what would reasonably follow or we think ought to follow." [111] However, to correspond to the rule in contract, the rule in torts is more accurately said to be that the wrongdoer is liable for the natural and probable consequences of his conduct, and for any special consequences which may ensue, if he has at the time of his wrongdoing notice of the special circumstances by reason whereof those consequences will naturally and probably ensue as to the result of his wrongdoing.[112] Thus, a man is responsible for the ordinary consequences likely to result from his act, but not when a fresh train of circumstances are set on foot, and the natural course of events is altered by some other impelling agency; for that agency then becomes the causa proxima, unless, indeed, a reasonable man could have foretold that new cause. Thus, where D., in breach of statute, washed a van in the public street, and the waste water ran towards a grating choked with ice, and then ran to the street and froze, and C.'s horse slipped on the ice, D. was held not liable. How could he expect the frozen accumulation at the grating? [113] There is, however, authority for referring actionable consequences to the connection existing in the course and constitution of nature,—that is, normally or likely or probable of occurrence in the ordinary course of things,—whether in fact foreseen, or whether they should reasonably have been foreseen; it being sufficient if they followed naturally.[114]

Smith v. Railway Co., L. R. 6 C. P. 14 (per Pollock, B.); Cattle v. Waterworks, L. R. 10 Q. B. 453; Greenland v. Chaplin, 5 Exch. 243; Osborne v. London & N. W. R. Co., 21 Q. B. Div. 220; 57 L. J. Q. B. 618; Pig. Torts, 164.

[111] Lynch v. Knight, 9 H. L. Cas. 577. Cf. Lord Ellenborough, in Townsend v. Wathen, 9 East, 277. "A man must be taken to contemplate the probable consequence of what he does." Fraser, Torts, 164, 165.

[112] Clerk & L. Torts, 97. And see cases cited in Mayne, Dam. (4th Ed.) 45–59.

[113] Shearw. Torts, p. 53; Sharpe v. Powell, L. R. 7 C. P. 253.

[114] Grove, J., in Smith v. Green, 1 C. P. Div. 92-96; Allsop v. Allsop, 5

American Rule.

In America, there is no absolute unanimity of opinion on the subject.[115] On the one hand, there is a class of cases which incline to test the extent to which consequences are actionable by the degree to which they could and should have been foreseen. "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by force applied to the other end, that force being the proximate cause of the movement. The question always is, was there an unbroken connection between the wrongful act and the injury,—a continuous operation? Did the fact constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is a proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."[116] Thus, where a common carrier undertook to transport freight from Philadelphia to Pitts-

Hen. & M. 534. Cf. Lord Ellenborough, in Vicars v. Wilcocks, 8 East, 1, with Lord Wensleydale, in Lynch v. Knight, 9 H. L. Cas. 577.

[115] See Earl, J., in Ehrgott v. Mayor, 96 N. Y. 264–280. In Chicago, M. & St. P. R. Co. v. Elliott, 5 C. C. A. 347, 55 Fed. 949, the distinction between the two standards does not seem to have been recognized.

[116] Milwaukee, etc., R. Co. v. Kellogg, 94 U. S. 469; Scheffer v. Railroad Co., 105 U. S. 249; Gilman v. Noyes, 57 N. H. 627. But see opinion of Ladd, J. "Damage is too remote if, according to usual experience of mankind, the result ought to have been apprehended." Lane v. Atlantic Works, 111 Mass. 136, per Colt, J. Hill v. Winsor, 118 Mass. 251; Lowery v. W. U. Tel. Co., 60 N. Y. 198; Jackson v. Wisconsin Tel. Co., 88 Wis. 243, 60 N. W. 430; Pearson v. Cox, 2 C. P. Div. 369. "The ordinary and natural consequences are regarded, sometimes, as those which should have been foreseen." Hoag v. Railroad Co., 85 Pa. St. 293. Cf. Henry v. Southern P. R. Co., 50 Cal. 176–183, Chicago & A. R. Co. v. Pennell, 110 Ill. 435, and Fent v. Railroad Co., 59 Ill. 349, 357–362. It is not essential that such consequences should not have been foreseen in fact. Alabama G. S. R. Co. v. Chapman, 80 Ala. 615, 2 South. 738.

burg by canal, and by reason of lame mules lost his cargo by flood, it was held that his negligence in having lame horses was a condition, not a natural and probable cause. Human foresight could not have foreseen the consequences of the lameness. It could not know the time of flood or danger. Chief Justice Lowry supposes a case: "A blacksmith pricks a horse by careless shoeing. Ordinary foresight might anticipate lameness and unfitness for use for some time to come, but could not anticipate that by lameness the horse would be delayed passing through a forest until a tree fell and killed his rider." Such injury would not be the measure of the blacksmith's liability.[117]

It is to be remembered, however, with respect to many actions of this kind, that they are based on quasi contracts or quasi torts. The cases, accordingly, reason much after the contract measure of damages.[118] But there is an increasingly strong tendency to refer natural and probable consequences to the ordinary course and constitution of nature. The introduction of the capacity to foresee (even of the law's beloved, the ordinarily prudent man) is either a useless

[117] Morrison v. Davis, 20 Pa. St. 171.

[118] Denny v. New York Cent. R. R., 13 Gray, 481. As to the test that damages are proximate only when they are natural and probable, in the sense that a man of ordinary intelligence and prudence might reasonably have expected that they would result from his conduct complained of, see Newman, J., in Block v. Milwaukee St. Ry. Co., 89 Wis. 371, 61 N. W. 11 1–1103, citing Atkinson v. Goodrich Transp. Co., 60 Wis. 141–163, 18 N. W. 764; Barton v. Pepin County Agricultural Soc., 83 Wis. 19, 52 N. W. 1129. And see Travelers' Ins. Co. v. Melick, 12 C. C. A. 544, 65 Fed. 178. Therefore the purchase by a father, for his son 11 years of age, of an air gun, intended and commonly used as a toy or plaything, is not, per se, an act of culpable negligence, and cannot be held to have been made in reasonable anticipation of an injury caused by the use of the gun by another boy to whom the son had loaned it. Harris v. Cameron, 81 Wis. 239, 51 N. W. 437. But see Brown v. Chicago, M. & St. P. Ry. Co., 54 Wis. 342, 11 N. W. 356, 911; Pennsylvania R. Co. v. Hope, 80 Pa. St. 373; Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354; Poeppers v. Missouri, K. & T. R. Co., 67 Mo. 715; Maher v. Winona & St. P. R. Co., 31 Minn. 401, 18 N. W. 115; Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353; Morrison v. Davis, 20 Pa. St. 171; Lynch v. Knight, 9 H. L. Cas. 577; Crater v. Binninger, 33 N. J. Law, 513; McGrew v. Stone, 53 Pa. St. 436; Henry v. Southern Pac. R. Co., 50 Cal. 176; Doggett v. Richmond & D. R. Co., 78 N. C. 305; Stanley v. Union Depot R. Co., 114 Mo. 606, 21 S. W. 832; Welck v. Lander, 75 Ill. 93; Daniels v. Bal-

circuity or deviation in reasoning or it serves to lessen materially consequences producing actionable damages. If a prudent man should be held to foresee what would ordinarily happen under the circumstances, then nothing is gained by introducing him into the test. He could not be held to foresee more. There is neither authority nor reason for holding that he should see less. Indeed, the modern tendency is to widen rather than narrow the consequences of conduct for which a man is held responsible.[119] So, there are many cases holding that liability extends to those injuries which are direct and immediate consequences of the wrongful conduct, but also to such consequential injuries as, according to common experience, are likely to, and in fact do, result from his act.[120] Therefore, it is not essential that the wrong complained of could or could not have been foreseen.[121] While the injury complained of must have been the result of the conduct attributed, the rule is that whoever commits a tort is liable for all the injury he does, although the injury could not have been contemplated as the result of the act done. Damages are not too remote if, according to the usual experience of mankind, the result ought to have been apprehended. It is enough if the injury now appears to have been a natural consequence.

lantine, 23 Ohio St. 532; Fent v. Toledo, etc., Co., 59 Ill. 349; Greenland v. Chaplain, 5 Exch. 243; Atkinson v. Goodrich Transp. Co., 60 Wis. 141, 18 N. W. 764; 1 Shear. & R. Neg. 29; Submarine Tel. Co. v. Dickson, 15 C. B. (N. S.) 759; Higgins v. Dewey, 107 Mass. 494; Lowery v. Manhattan R. Co., 99 N. Y. 158.

[119] Davis v. Garrett, 6 Bing. 716, per Tuedall, C. J.; Cate v. Cate, 70 N. H. 144.

[120] Lane v. Atlantic Works, 111 Mass. 136; Hill v. Winsor, 118 Mass. 251. This is the rule in criminal law. Why should civil responsibility be less extensive? Lord Campbell, in Gerhard v. Bates, 2 El. & Bl. 490, quoted by Whart. Neg. § 78, said: "If the wrong and legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

[121] Brown v. Chicago, M. & St. P. Ry. Co., 54 Wis 342, 11 N. W. 356, 911 (as in cases of assault); Vosburg v. Putney (Wis.) 50 N. W. 403; Eten v. Luyster, 60 N. Y. 252 (conversion); Harrison v. Berkley, 1 Strob. (S. C.) 525 (selling liquor to slave, resulting in death); Henry v. Railway Co., 50 Cal. 176.

Hence, where a passenger, by reason of the wreck of a caboose, caused by negligence of the railroad company, was left nine miles from a station, on a cold winter night, from which he suffered, then and afterwards, from rheumatism, the company was held liable.[122]

While, on the one hand, under the test of consequences which should have been foreseen, a suicide is too remote to be the proximate result of physical injuries caused by another's negligence,[123]

[122] Schumaker v. St. Paul & D. R. Co., 46 Minn. 39, 48 N. W. 559. Compare Drake v. Kiely, 93 Pa. St. 492, where the court left the case under similar circumstances to the jury to determine the question of proximate cause. "The rule laid down in the Squib Case is applicable to all cases of negligence. Not an author nor a decision confines it to the case of intentional tort." Elliott, J., in Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409–433, 3 N. E. 389, and 4 N. E. 908. In Ehrgott v. Mayor, etc., 96 N. Y. 264, it was said: "When a party commits a tort resulting in a personal injury he cannot foresee or contemplate the consequences of his tortious act. He may knock a man down, and his act may, months after, end in paralysis or in death, results which no one contemplated or could have foreseen. A city may leave a street out of repair, and no one anticipate the possible accident which may happen or the injury which may be caused." "If one is legally responsible for an act, he is chargeable with the direct results of the act, however surprising." Prof. J. H. Beale, Jr., in The Langdell, "Twenty-Fifth Anniversary Number" of the Harvard Law Review (vol. 9, pp. 80, 81); citing Harrison v. Berkley, 1 Strob. 525; Tice v. Munn, 94 N. Y. 621; Cunnington v. Railway Co., 49 Law T. (N. S.) 392; Eten v. Luyster, 60 N. Y. 252. And see Stevens v. Dudly, 56 Vt. 158, 166; Louisville, N. O. & T. R. Co. v. Durfree, 69 Miss. 439, 13 South. 697 (obstructing a crossing). Cf. St. Louis S. W. R. Co. v. Thomas (Tex. Civ. App.) 27 S. W. 419; Texas & P. Ry. Co. v. Ludlam, 2 C. C. A. 633, 52 Fed. 94. And see Whart. Neg. § 77; 1 Suth. Dam. § 16, and cases cited; Baltimore & O. R. Co. v. Kemp, 61 Md. 619; Brown v. Chicago, M. & St. P. R. Co., 54 Wis. 342, 11 N. W. 356, 911 (cf. Phillips v. Dickerson, 85 Ill. 11); International & G. N. R. Co. v. Terry, 62 Tex. 380; Cincinnati, H. & I. R. Co. v. Eaton, 94 Ind. 474; Klein v. Receiver, 26 N. J. Eq. 474; Matteson v. Railroad Co., 62 Barb. 364; Memphis & C. R. Co. v. Whitfield, 44 Miss. 466; Spicer v. Railroad Co., 29 Wis. 580 (but cf. Trigg v. Railroad Co., 74 Mo. 147); Pullman v. Barker, 4 Colo. 344; Lewis v. Flint & P. M. R. Co., 54 Mich. 55, 19 N. W. 744.

[123] Sheffer v. Railroad Co., 105 U. S. 249; Haile's Curator v. Texas & P. Ry. Co., 9 C. C. A. 134, 60 Fed. 557; Southern Pac. Co. v. Ammons (Tex. Civ. App.) 26 S. W. 135. Cf. hypothetical cases of Cockburn, C. J., in Hobbs v. Railway Co., L. R. 10 Q. B. 111.

on the other hand, paralysis,[124] or death by contagion,[125] according to the natural consequence criterion, may be the proximate result of such harm so caused.

In New York, L. E. & W. R. Co. v. Estill,[126] a common carrier without notice that cows were with calf undertook to ship them. The unborn calves were lost through premature birth induced by a collision. The carrier was held liable for such deterioration in value, notwithstanding the objection that such damages were too remote, —that "it was something the defendant could not anticipate or know anything about." The only limit to the inquiry, the court held, is "whether or not the subsequent development of the animal is traceable directly to the injury inflicted by the carrier. The difficulty in proof is one of fact, not one of law." [127]

Illustrations of Remote Damages.

At one extreme are cases in which the connection between the wrongful conduct and the harm complained of is so contingent that the damages are said to be merely possible (as distinguished from natural and probable) or speculative. Thus, if a steamboat run down a fisherman's net, a recovery may be had for property destroyed, but not for fish which might otherwise have been caught.[128] On essentially similar principles, anticipated profits of a business, of which the plaintiff charges he was deprived by the

[124] Bishop v. Railroad Co., 48 Minn. 26, 50 N. W. 927. And see Ehgott v. Mayor, 96 N. Y. 264.

[125] State v. Fox (Md.) 29 Atl. 601.

[126] 147 U. S. 591, 13 Sup. Ct. 444.

[127] Generally, as to the test that the proximate cause is determined by the ordinary course of nature, or in accordance with common experience, or the normal or likely or probable consequences in the ordinary course of things. East Tennessee, V. & G. R. Co. v. Lockhart, 79 Ala. 315; Gerhard v. Bates, 2 El. & Bl. 476; Henry v. Southern Pac. Co., 50 Cal. 176; Smethurst v. Barton Square Ind. Cong. Church, 148 Mass. 261, 19 N. E. 387; Hoadley v. Northern Transp. Co., 115 Mass. 304; Derry v. Flitner, 118 Mass. 131; Hoey v. Felton, 11 C. B. (N. S.) 143; Lane v. Atlantic Works, 111 Mass. 136; Smith v. Green, L. R. 1 C. P. 92; McDonald v. Snelling, 14 Allen, 290; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544, 14 N. E. 572, and 16 N. E. 197; Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568; Whart. Neg. § 77.

[128] Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045. And see Rhines v

defendant's wrongful act, as by blocking up access to his place of business,[129] are generally,[130] but not always,[131] regarded as too remote to justify recovery, unless the defendant's conduct was an injury of a simple right, and constituted an invasion of the plaintiff's property.[132] So a bank that wrongfully refuses to honor a check drawn on it by a depositor is not liable in damages for the arrest and imprisonment of the drawer of the check, on complaint of the payee, for issuing a false check, but is liable only for injuries

Royalton, 61 Hun, 624, 15 N. Y. Supp. 944; Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 9 South. 363; Broussard v. Railway Co., 80 Tex. 329, 16 S. W. 30.

[129] Todd v. Minneapolis & St. L. Ry. Co., 39 Minn. 186, 39 N. W. 318; Simmer v. City of St. Paul, 23 Minn. 408.

[130] The Lively, 1 Gall. 315–325, Fed. Cas. No. 8,403, per Sorty, J.; Boyd v. Brown, 17 Pick. 453; City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686; Smith v. Condry, 1 How. (U. S.) 28; Blanchard v. Ely, 21 Wend. 342. Preventing a directors' meeting, Martin v. Deetz, 102 Cal. 55, 36 Pac. 368. Or by a malicious prosecution, O'Neill v. Johnson, 53 Minn. 439, 55 N. W. 601; Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, and 37 N. E. 14; Williams v. Wood, 55 Minn. 323, 56 N. W. 1066; Homan v. Franklin Co. (Iowa) 57 N. W. 703 (unless specially pleaded). In an action for misrepresentations on the sale of a horse, allegations as to the amount the horse would have been able to earn if sound and capable of trotting at a certain rate of speed are too remote and speculative to constitute a proper element of damage. Williamson v. Brandenberg, 133 Ind. 594, 32 N. E. 834; Silsby v. Michigan Car Co., 95 Mich. 204, 54 N. W. 761. But profits which would have been made on an abandoned contract are ascertainable and not speculative. Lee v. Briggs, 99 Mich. 487, 58 N. W. 477; Jackson v. Stanfield, 137 Ind. 572, 36 N. E. 345, and 37 N. E. 14. And see, Rio Grande W. Ry. Co. v. Rubenstein (Colo. App.) 38 Pac. 76; Dickinson v. Hart, 142 N. Y. 133, 36 N. E. 801; Stoffiet v. Stoffiet, 160 Pa. St. 529, 28 Atl. 857. Loss of profits from infringement of patents has been allowed. Seabury v. Am Ende, 152 U. S. 561, 14 Sup. Ct. 683. Damages resulting from plaintiff's failure to obtain a modification of a contract that might have been made if his telegram had been delivered promptly are too remote for recovery against a telegraph company for failure to deliver the telegram. W. U. Tel. Co. v. Watson (Ga.) 21 S. E. 457.

[131] Rose v. Groves, 5 Man. & G. 613 (although there was no proof of special instance of customers going away); White v. Mosely, 8 Pick. (Mass.) 356; Tarlton v. M'Gawley, Peake, 205.

[132] But must be clearly proved. Crow v. Manning, 45 La. Ann. 1221, 14 South. 122.

resulting to the drawer's credit.[133] Nor is the probability that one would have been promoted in his employment an element of damages in an action for personal injury.[134] If a person be ejected from a car, proximate damages would include annoyance, vexation, and indignity; and, as circumstances, the jury would determine presence or absence of malice, actual violence, threatening or insulting language. But that he lost a job at his destination, through the delay, is too remote. There might have been several other independent causes to which such result could be referred.[135] Courts incline to regard subsequent insanity as too remote a damage to result from personal injury.[136]

Illustrations of Damages not too Remote.

But the mere fact that the damage complained of is not present, but future, will not necessarily make it remote. Thus, in an action for personal injuries, one may recover for future damages, when the evidence justifies a finding that such damages will inevitably and necessarily result.[137] There is no certain standard for the measurement of damages for permanent personal injury, and fu-

[133] Bank of Commerce v. Goos, 39 Neb. 437, 58 N. W. 84. And see Brooke v. Bank, 69 Hun, 202, 23 N. Y. Supp. 802. The imprisonment of one for an act committed while intoxicated is not the proximate consequence of the liquor dealer's unlawful negligence in selling to him while intoxicated; the law having intervened, and become the proximate cause. Bradford v. Boley (Pa. Sup.) 31 Atl. 751.

[134] Richmond & D. R. Co. v. Elliott, 149 U. S. 266, 13 Sup. Ct. 837.

[135] Carsten v. Northern Pac. R. Co., 44 Minn. 454, 47 N. W. 49. And see Glover v. Railroad Co., L. R. 3 Q. B. 25, 37 Law J. Q. B. 57; Moore v. Adam, 2 Chit. 198. Further, as to remote damages, see Boyle v. Brandon, 13 Mees. & W. 738 (seduction); Donnell v. Jones, 13 Ala. 490 (malicious prosecution); Lincoln v. Railroad Co., 23 Wend. 425 (negligence); Anthony v. Slaid, 11 Metc. (Mass.) 290 (assault and battery); Swinfin v. Lowry, 37 Minn. 345, 34 N. W. 22 (assault and battery); Boyce v. Bayliffe, 1 Camp. 58 (false imprisonment). In an action by a wife for injuries resulting in a miscarriage, damages will not be allowed for the society, enjoyment, and prospective services of the child. Tunnicliffe v. Bay Cities Consol. Ry. Co. (Mich.) 61 N. W. 11.

[136] Sheffer v. Railroad Co., 105 U. S. 249; Halle's Curator v. Texas & P. Ry. Co., 9 C. C. A. 134, 60 Fed. 557.

[137] Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 13 Sup. Ct. 557; Ross v. Kansas City, 48 Mo. App. 440.

ture pain resulting therefrom, and the matter is largely within the sound discretion of the jury.[138] Indeed, the true test would seem to be that the plaintiff should be compensated for time lost[139] and suffering endured, or which he would probably lose or endure, as a direct result of the injuries recovered.[140] Diminished capacity to earn money is a proper element of damages.[141]

With respect to damages to property, the courts have gone to a

[138] Bigelow v. Metropolitan St. Ry. Co., 48 Mo. App. 367; Ward v. Blackwood, 41 Ark. 295; Gorham v. Railway Co., 113 Mo. 408, 20 S. W. 1000; Chicago v. Elzeman, 71 Ill. 131; Eddy v. Wallace, 1 C. C. A. 435, 49 Fed. 801; Mason v. Ellsworth, 32 Me. 271; Waterman v. Railroad Co., 82 Wis. 613, 52 N. W. 247, 1136; McLaughlin v. Corry, 77 Pa. St. 109; Village of Sheridan v. Hibbard, 119 Ill. 307, 9 N. E. 901.

[139] Stafford v. City of Oskaloosa, 64 Iowa, 251, 20 N. W. 174; Masterson v. Mt. Vernon, 58 N. Y. 391; Ehrgott v. Mayor, 96 N. Y. 264 (where plaintiff was allowed to show amount of annual earnings for six or nine years anterior to the injury complained of). Cf. Baltimore & O. R. Co. v. Boteler, 38 Md. 568 (where evidence was admitted to show that plaintiff's time was not spent in useful occupation). Drinkwater v. Dinsmore, 80 N. Y. 390. Cf. Blackman v. Gardner Bridge, 75 Me. 214.

[140] Woodard v. City of Boscobel, 84 Wis. 226, 54 N. W. 332 (where there was a predisposition to disease). As to injury aggravated by disease, see Baltimore City Passenger Ry. Co. v. Kemp, 61 Md. 74; Jeffersonville Ry. Co. v. Riley, 39 Ind. 568; Allison v. Railway Co., 42 Iowa, 274; Houston v. Traphagen, 47 N. J. Law, 23.

[141] Central Railroad & Banking Co. v. Dottenheim, 92 Ga. 425, 17 S. E. 662; City of Joliet v. Conway, 119 Ill. 489, 10 N. E. 223; New Jersey Express Co. v. Nichols, 33 N. J. Law, 435; Fordyce v. Withers, 1 Tex. Civ. App. 540, 20 S. W. 766; George v. Haverhill, 110 Mass. 506; McLaughlin v. Corry, 77 Pa. St. 109; Seaboard Manuf'g Co. v. Woodson, 98 Ala. 378, 11 South. 733 (where plaintiff was entitled to only nominal damages). As to recovery when earning capacity is not diminished, see Savannah, F. & W. Ry. Co. v. Howard, 91 Ga. 99, 16 S. E. 306. As to future earning of a child, Rosenkranz v. Railway Co., 108 Mo. 9, 18 S. W. 890; Bartley v. Trorlicht, 49 Mo. App. 214. Cf. Stewart v. Ripon, 38 Wis. 584. As to mortality tables in evidence, shortened life, consequent diminished earning capacity, see City of Columbus v. Sims (Ga.) 20 S. E. 332; Atlanta & W. P. R. Co. v. Smith, Id. 763. Where an injury to a horse affected his steadiness and gentleness, so that he could not thereafter, as before, be driven by ladies, and his value was appreciably diminished thereby, an instruction that the injury was too remote and uncertain for consideration was properly refused. Oliphant v. Brearley, 54 N. J. Law, 521, 24 Atl. 660.

considerable length in tracing the consequences of a wrongful act. This is especially true as to damages originating from negligence with fire. Thus, where fire was carelessly allowed to escape from a locomotive, and, as the weather was dry and windy, spread continuously to property 10 miles away, the damage to such property was not so remote, nor so much the result of a mere possibility, as to release the railroad company from liability.[142]

With respect to wrongs of fraud, it is said, on good authority, that damages are limited to losses within the reasonable contemplation of the wrongdoer at the time of the wrong.[143] On the other hand, however, it would seem to be more generally thought that a cause is not remote, in wrongs of fraud, malice, wantonness, or willfulness, when it would be in other kinds of tortious conduct.[144] The theory is that want of proximateness is supplied by intention.[145] "The jury is not bound to weigh in golden scales how much injury a party has sustained by a trespass." [146]

[142] Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354, followed. Chicago, R. I. & P. Ry. Co. v. McBride, 54 Kan. 172, 37 Pac. 978.

[143] Bigelow, Fraud, 614.

[144] Langridge v. Levy, 2 Mees. & W. 519; approved, 4 Mees. & W. 337; Lumley v. Gye, 2 El. & Bl. 216, 22 Law J. Q. B. 463; Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568; Suth. Dam. 71; Bigelow, Torts, 313, note 4; 5 Am. & Eng. Enc. Law, 11, and cases cited; Morgan v. Curley, 142 Mass. 107, 7 N. E. 726; Smith v. Goodman, 75 Ga. 198; West v. Forrest, 22 Mo. 344; Hawes v. Knowles, 114 Mass. 519; Bish. Noncont. Law, §§ 16–142; Day v. Woodworth, 13 How. (U. S.) 363; Drake v. Kiely, 93 Pa. St. 495; Carter v. Louisville, N. A. & C. R. Co., 98 Ind. 555; Sauter v. New York Cent. & H. R. R. Co., 66 N. Y. 50; Brown v. Chicago, M. & St. P. Ry. Co., 54 Wis. 342, 11 N. W. 356, 911. So, in libel and slander, Gathercole v. Miall, 15 Mees. & W. 318 (per Pollock, B.). Cf. Parkes v. Prescott, L. R. 4 Exch. 169–177. And see Chamberlain v. Boyd, 11 Q. B. Div. 407.

[145] Clerk & L. Torts, 97, citing Cattle v. Stockton Water Works, L. R. 10 Q. B. 453. But see Chamberlain v. Boyd, 11 Q. B. Div. 407.

[146] Gillard v. Brittan, 8 Mees. & W. 575.

132. With respect to questions of pleading, damages are divided into two classes:

(a) General and

(b) Special.

133. General damages are such as are ordinarily and commonly the consequence of the conduct complained of.

134. Special damages are such as are the natural, but not the necessary, consequence of the conduct complained of, and arise from the peculiar circumstances of the case. The term is, however, currently used in two senses:

(a) Its technical sense, as meaning particularized damage, as distinguished from general damage; and

(b) As meaning such special injury as will enable plaintiff to recover when damages are not presumed.

What are General Damages.

General damages are such as the law implies to have accrued from the wrong complained of.[147] Or, more accurately, general damages are such as are ordinarily and commonly the consequences of the conduct complained of.[148] Thus, where a person collided with another's sleigh, the expenses involved in remedying the injuries so caused to the latter person were general damages.[149] General damages may be direct, as where the ordinary and imme-

[147] Chit. Pl. (16th Am. Ed.) 396, 515; 2 Sedg. Dam. (7th Ed.) 606; 1 Suth. Dam. 163; Dumont v. Smith, 4 Denio (N. Y.) 319.

[148] Swayne, J., in Roberts v. Graham, 6 Wall. (U. S.) 578. The phrase, "The law will presume damages," is ambiguous. It sometimes means that the law presumes that damages do flow from wrongful conduct (as in cases of invasion of a simple or absolute right); but it may also mean what damages flow from given wrongful conduct (although the conduct be not actionable per se). What is meant by saying general damages are such as the law presumes to follow (i. e. general damages) would be clearly put by saying that such damage inevitably follows, as pain from a wound (whether caused by negligence or assault and battery). But "inevitable" is too strong a word, and too much limits the scope of general damage. It is better to say that general damages are such as naturally follow in the ordinary course of events.

[149] Parker v. Burgess, 64 Vt. 442, 24 Atl. 743; Hutchinson v. Granger, 13

diate consequences of a trespass are recovered;[150] or they may be indirect, as where the cause of action depends upon proof of consequential damages.[151]

What are Special Damages.

But where damages, though the natural consequences of the act complained of, are not a necessary result of it, they are termed "special damages."[152] That is, damages which can be particularized.[153] Here the damage may be derived from the peculiar character, circumstance, or condition of the person wronged, or also of the wrongdoer. Thus, the cost of procuring a new wooden leg, in consequence of injury to one by another's actionable wrong, is special damage.[154] So, knowledge of one that an article which he converts has a peculiar value to the owner, may entitle the latter to special damage.[155] Special damages may be direct. Thus,

Vt. 386. Plaintiff, in an action for damages sustained while riding a bicycle, by a collision with a buggy, was not entitled to show what he paid out for doctor bills, medicine, and for repairs to his bicycle, without showing the value of each article. Schimpf v. Sliter, 64 Hun, 463, 19 N. Y. Supp. 644.

150 Denver & R. G. Ry. v. Harris, 122 U. S. 597–608, 7 Sup. Ct. 1286 (loss of power to procreate, as the proximate result of a wound); Wade v. Leroy, 20 How. 34–44.

151 Smith v. Railway Co., 30 Minn. 169, 14 N. W. 797.

152 2 Greenl. Ev. § 254; Chamberlain v. Porter, 9 Minn. 260 (Gil. 244).

153 Pig. Torts, 150.

154 North Chicago St. Ry. Co. v. Cotton, 41 Ill. App. 311. In an action against a railroad company in trespass for laying tracks in front of plaintiff's lot, the law does not presume that plaintiff has a family, a house on the lot, that the said house is plastered and papered, and that said plastering and painting, etc., were injured, or that more time and attention to children were required. This is special damage, and must be so pleaded. Spencer v. Railway Co., 21 Minn. 362. Damage to plaintiff's well from an overflow of defendant's privy is special. Solms v. Lias, 16 Abb. Prac. 311. So is loss of breeding capacity of a mare. Stevenson v. Smith, 28 Cal. 103; Shaw v. Hoffman, 21 Mich. 151; Patten v. Libbey, 32 Me. 378. And, generally, see Adams v. Gardner, 78 Ill. 568; Chicago, B. & Q. Ry. Co. v. Hale, 83 Ill. 360; Chicago v. O'Brenan, 65 Ill. 160.

155 Post, p. 737, "Trover and Conversion." See Bodley v. Reynolds, L. R. 8 Q. B. 779, explaining France v. Gaudet, L. R. 6 Q. B. 199. In an action by a husband for the alienation of his wife's affection, that he contracted venereal disease as the result of his wife's wrong is special damage. Dowdell v. King, 97 Ala. 635, 12 South. 405.

in trespass for killing a mare, the value of the mare would be direct, general damage, but the value of an unweaned colt, killed through death of mare, would be special.[156] Special damages may be consequential, as in a nuisance [157] or negligence.[158] So, in many cases of slander, the only ground of recovery is special damage.[159] But special damages can be recovered only when they are proximate,[160] not when they are remote.[161]

The term "special damage," as commonly employed, is ambiguous.[162] It may be used in the sense just considered, viz. as technical, particularized damage. But it is also applied distinctively to the damage which must be proved in order to make out a cause of action on the part of the person claiming that a tort has been committed against him. In many such cases it is said that the party plaintiff must prove "special damage." Conspicuously in nuisance; for example, if the wrong be a public one, then no private individual can recover unless he can show that he has suffered some peculiar individual harm, as distinguished from the community in general.[163] The damage a sufferer from a failure to

[156] Teagarden v. Hetfield, 11 Ind. 522. So, in trover, supra. Moon v. Raphael, 2 Bing. N. C. 310; Sedg. Dam. 475, "Trover."

[157] Ante, c. 1.

[158] Ante, c. 1.

[159] Post, p. 486, "Slander."

[160] Ashley v. Harrison, 1 Esp. 48; Vicars v. Wilcocks, 8 East. 1.

[161] Moore v. Adam, 2 Chit. 198; Myer v. King (Miss.) 16 South. 245.

[162] Pig. Torts, 150.

[163] This is, indeed, only a branch of the general proposition that, where the cause of action arises from a breach of public duty, plaintiff can recover only when he suffers a special injury particular to himself. Such duty, in the absence of such special injury, is owned by all to all. O. W. Holmes, Jr., 7 Am. Law Rev. 652. In many of such cases, the wrong is also indictable, and "where an indictment may be maintained, there is no remedy by action without proof of individual damage." But this does not apply where the injury complained of is not one affecting the public generally, but only a particular class or section of persons. Harrop v. Hirst, L. R. 4 Exch. 43. And see Mary's Case, 9 Coke, 113a. "The law abhors multiplicity of suits for nominal damages, but not for substantial damages." Pig. Torts, 155. Accordingly, an indictment is a sufficient remedy where the harm is general, but not where the harm affects plaintiff especially. See Baxter v. Turnpike Co., 22 Vt. 114.

repair a highway must show, in order to recover, is "special." Mere inconvenience or delay of business is not sufficient special injury. In this sense, "special damage" may be either particularized (i. e. technical special damage) or general.[164] For example, if one man publish libelous words concerning another, which are actionable in themselves (i. e. from which the law presumes damage) the latter can recover general damages without proof of actual loss;[165] but he can recover for consequent defeat in an election (if at all)[166] only on due allegation and proof, in detail, of such particularized damage.[167] But suppose the words are not actionable in them-

[164] Hartley v. Herring, 8 Term R. 130; Iveson v. Moore, 1 Ld. Raym. 486. But cf. Westwood v. Cowne, 1 Starkie, 172.

[165] Post, p. 485, "Libel and Slander."

[166] So to charge that a candidate was bribed in a former contest with another person to give up the contest, is not actionable, as charging an indictable offense, or as spoken in the way of the candidate's office or business; nor would an allegation of special damage—i. e. that he had been thereby defeated, lost the emoluments of the office, and been brought into bad repute—render it such, as said damage is too remote and speculative. Field v. Colson, 93 Ky. 347, 20 S. W. 264.

[167] Holston v. Boyle, 46 Minn. 432, 49 N. W. 203. So a charge of unchastity on the part of a woman at common law was not actionable, unless special injury (as loss of marriage) resulted. Accordingly, such peculiar loss must have been specially pleaded. Newell, Defam. 779. However, in Burt v. McBain, 29 Mich. 260, the publication imputed to the plaintiff a want of chastity. The plaintiff was permitted to show that, because of the publication, she was excluded from society, and was affected in mind and health. This was held not to be error, although the declaration did not claim special damages. The court say: "These results are the natural, and we might say the inevitable, results, of the slander of a virtuous young woman, and they might be shown without setting them out in the declaration. It is to be borne in mind that our statute makes the imputation of a want of chastity actionable per se, so that the necessity for the averment of special damage in order to show a cause of action is not requisite here, as it otherwise would be; and some decisions, to which we were referred, which were made in states where no such statute exists, are for this reason not applicable." "The rule there laid down is that, under the declaration, which set out a libel which is actionable per se, it is necessary, in order to introduce evidence of so-called special damages, to show that the results which naturally flow upon the publication did in fact appear. But, in an action for such libel, testimony that plaintiff's associates ridiculed him, and that he left his employment temporarily in consequence of it, is not admissible unless such

selves, but become so only on proof of damage (i. e. special injury); then, also, the damage may be general or special. Thus, in Ashley v. Harrison[168] where a libel led a performer on the stage to refuse to act, her employer, if he could recover at all, could recover only because of injurious consequences. It was held in that case that the plaintiff could show diminished receipts of the house as general damages, but not that particular individuals had given up their boxes, because such damages were special (i. e. technically), and had not been specially laid in the declaration.[169]

To avoid this ambiguity, various terms have been suggested. It

damages are averred in the declaration; since they are not within the necessary consequences of the publication, and are therefore special, and not general, damages." Montgomery, J., in Hatt v. Evening News Ass'n, 94 Mich. 114, 53 N. W. 952; Id., 94 Mich. 119, 54 N. W. 766. But see 3 Suth. Dam. § 1215 (in which the conventional rule is stated); Warner v. Clark, 45 La. Ann. 863, 13 South. 203 (in which natural lines are followed as to slander); Mitchell v. Bradstreet, 22 S. W. 724 (in which natural lines are followed in libel, especially as to loss of business); Daniel v. New York News Co., 67 Hun, 649, 21 N. Y. Supp. 862; Bradstreet v. Gill, 72 Tex. 117, 9 S. W. 753; Brown v. Durham, 3 Tex. Civ. App. 244, 22 S. W. 868. In Radcliff v. Evans [1892] 2 Q. B. 524, an action was brought for intentionally publishing a malicious falsehood concerning plaintiff's business, not actionable as a personal libel, nor defamatory in itself. Evidence that a general loss of business had been the direct and natural consequences of such falsehood was held to be admissible, and sufficient, if uncontradicted, to maintain the action. So a plaintiff, in an action for libel, who alleges that he has suffered special and general damages, as the result of certain letters sent out by defendants, may question the parties who received the letters, or heard their contents discussed, as to the effect thereby produced upon them, where such evidence is offered, not to prove the meaning of the word used, or the innuendo charged, but the substantive fact of damage sustained. 29 Mich. 260.

[168] 1 Esp. 48; Evans v. Harries, 1 Hurl. & N. 251. But see Kelly, C. B., in Riding v. Smith, 1 Exch. Div. 91. Cf. Westwood v. Cowne, 1 Starkie, 172.

[169] Kelly, C. B., in Harrop v. Hirst, L. R. 4 Exch. 43: "The question is whether, under these circumstances, an action lies for the infringement of the (water) right without—I will not say special, but—without individual and particular damage sustained by the plaintiff." Damages: Distinction between special damages, as counterpart of general damages, and as meaning special injury, see Bowen, L. J., in Radcliff v. Evans, L. R. 2 Q. B. 524; Law v. Harwood, Cro. Car. 140; Tasbrough v. Day, Cro. Jac. 484. "Special or peculiar" damage, e. g. complement to nuisance; Mitchell, J., in Aldrich v. Wetmore, 52 Minn. 168, 53 N. W. 1072.

would seem that the phrase "special injury" would best meet the requirements.[170]

135. General damages may be recovered under the ad damnum, or general allegation of damages, but special damages must be specially pleaded.

Questions must always arise under the principle that general damages can be recovered under the ad damnum, and special damages must be pleaded specially. The reason of this rule is that special damage, not being implied in law from the act, should be so pleaded, in order to avoid surprise to the defendant.[171]

General damages need not be specially pleaded.[172] Thus, mental sufferings, the natural consequences of personal injuries, are not special damages, and need not be pleaded nor specially proved.[173]

[170] Pig. Torts, 153.

[171] Sanford v. Peck, 63 Conn. 486, 27 Atl. 1057; Alabama G. S. R. Co. v. Tapia, 94 Ala. 226, 10 South. 236; 2 Sedg. Dam. (8th Ed.) § 1261. And see 1 Chit. Pl. 236; Rice v. Coolidge, 121 Mass. 393; Hooper v. Armstrong, 69 Ala. 343; Pollock v. Gantt, Id. 373. The truth would seem to be that the definition of "special damages" and this rule as to pleading is a clear case of reasoning in a circle. What are special damages? Such as must be specially pleaded. What damages must be specially pleaded? Special damages. To avoid this, tests to distinguish special from general damages are adopted (ante, pp. 384, 385), which are objectionable not so much in formula, perhaps, as in application. Enough cases are cited in this book, it would seem reasonable to say, to satisfy that the courts have followed no uniform, consistent, or intelligible rule. One thing, however, seems reasonably clear,—the pleader fails to plead specially at his peril. And there is good reason for this. If there is anything a complainant can be said to know, and a wrongdoer not to know, it is the extent of the harm the latter has caused the former. To insist that the sufferer should inform the tort feasor fully as to his damage is reasonable and fair to both parties. Conversely, it will often happen that knowledge as to many facts constituting the wrong charged lies peculiarly within the wrongdoer's knowledge; so that it is alike unfair to an innocent sufferer, and useless to the defendant, to set forth such facts at length. Accordingly, negligence may be charged generally. It is not necessary for the party injured to specify the specific negligence or omission. It must be admitted, however, that the courts have not adhered to this simple and natural view.

[172] But see Omaha Coal, Coke & Lime Co. v. Fay, 37 Neb. 68, 55 N. W. 211.

[173] McCoy v. Milwaukee St. Ry. Co., 88 Wis. 56, 59 N. W. 453; Caldwell

This is also true of future pains of mind and body, and other reasonably certain future results of permanent injury.[174] So, loss of earnings is commonly,[175] but not universally,[176] part of the general damages to an injured person, and may be proved under the general allegation. So, where one sought to recover damages for the wrongful overflow of water on his land, of which the natural results would be deposits of earth, clay, etc., on the land, evidence of such deposits was properly admitted, though they were not specially pleaded.[177]

v. Railway Co., 7 Misc. Rep. 67, 27 N. Y. Supp. 397; Texas & P. Ry. Co. v. Curry, 64 Tex. 85; Buchanan v. Railway Co., 52 N. J. Law, 265, 19 Atl. 254. As to humiliation, loss of reputation and social position resulting from an assault, Kelley v. Kelley, 8 Ind. App. 606, 34 N. E. 1009. So, matter of aggravation need not be specially pleaded (post, p. 400, "Exemplary Damages"), as in malicious prosecution. Jackson v. Bell (S. D.) 58 N. W. 671.

[174] Gerdes v. Foundry Co., 124 Mo. 347, 25 S. W. 557.

[175] Flanagan v. Railway Co., 83 Iowa, 639, 50 N. W. 60; Gurley v. Missouri Pac. Ry. Co., 122 Mo. 141, 26 S. W. 953; Doherty v. Lord, 8 Misc. Rep. 227, 28 N. Y. Supp. 720.

[176] In an action for personal injuries, where the only allegation in the petition which has any relation whatever to loss of earnings is that plaintiff "has been permanently disabled from labor," plaintiff cannot testify as to what his earnings were before he sustained the injuries. Coontz v. Missouri Pac. Ry. Co., 115 Mo. 669, 22 S. W. 572. Cf. Doherty v. Lord, 8 Misc. Rep. 227, 28 N. Y. Supp. 720; Tomlinson v. Town, 43 Conn. 562; Baldwin v. Railroad Co., 4 Gray, 333; Dickinson v. Boyle, 17 Pick. 78; Boyden v. Burke, 14 How. 575. It has, moreover, been distinctly held that loss of earnings will not be presumed by the law to be a necessary consequence of injury, but must be specially pleaded. Mellor v. Railroad Co., 105 Mo. 455, 16 S. W. 849; Slaughter v. Railroad Co., 116 Mo. 269, 23 S. W. 760; Mellwitz v. Manhattan Ry. Co., 62 Hun, 622, 17 N. Y. Supp. 112; Wabash Western Ry. Co. v. Friedman (Ill.) 30 N. E. 353. As to special allegation of loss of earnings, see Gerdes v. Foundry Co., 124 Mo. 347, 25 S. W. 557; Galveston, H. & S. A. R. Co. v. Templeton (Tex. Civ. App.) 25 S. W. 135; Campbell v. Wing, 5 Tex. Civ. App. 431, 24 S. W. 360; Miller v. Manhattan Ry. Co., 73 Hun, 512, 26 N. Y. Supp. 162. But proof of loss of earnings has been held to be admissible under an allegation in the petition that plaintiff has been deprived of the means of support. Smith v. Chicago & A. R. Co., 119 Mo. 246, 23 S. W. 784. And see Bartley v. Trorlicht, 49 Mo. App. 214 (infants). As to distinction between earning capacity and profit, see Malone v. Pittsburgh & L. E. R. Co., 152 Pa. St. 390, 25 Atl. 638; Huchel v. Same, 152 Pa. St. 394, 25 Atl. 639.

[177] Hunt v. Iowa Cent. R. Co., 86 Iowa, 15, 52 N. W. 668.

In pleading such general damages, the plaintiff may safely rely upon the common-law ad damnum, unless a motion to correct the pleading be made before trial.[178] Thus, without specific allegation, the plaintiff can show that he had fits as a result of an assault.[179] On the other hand, if he choose to specify the injuries of which he complains, he is confined in proof to matter relevant to allegations.

Thus, it is not necessary, in an action for nuisance, to detail all the injury which results therefrom; but, if it is attempted to particularize the resulting injuries, all that are designed to be proved should be specially pleaded.[180] So, under an allegation in the declaration that the plaintiff sustained injuries to her spine, and was otherwise bruised, wounded, and injured, she could not recover damages for injury to her breast.[181] So, evidence that one's power of sexual intercourse was impaired by the injury is not admissible under allegations that he was severely injured in the back, bowels, hips, and legs, and other parts and members of the body.[182] But under an averment that he was greatly injured in his limbs and abdomen, as well as shocked in his nervous system, evidence that since his injury he had a weakness and pain in his back, similar to pains suffered prior to the injury, but much aggravated, requiring the constant use of porous plasters, is admissible.[183] Medicines, expense of medical attendance, and the like may be generally alleged.[184]

[178] Parker v. Burgess, 64 Vt. 442, 24 Atl. 743; Richter v. Meyer, 5 Ind App. 33, 31 N. E. 582; Oliver v. Perkins, 92 Mich. 304, 52 N. W. 609; Gray v. Bullard, 22 Minn. 278.

[179] Tyson v. Booth, 100 Mass. 258.

[180] Pinney v. Berry, 61 Mo. 359. In Kalembach v. Michigan Cent. R. Co., 87 Mich. 509, 49 N. W. 1082, it was held that an allegation that plaintiff was greatly and permanently injured, suffered great physical and mental pain, and became sick, sore, and languished, is not sufficiently specific to admit evidence of permanent injury.

[181] Fuller v. City of Jackson, 92 Mich. 197, 52 N. W. 1075.

[182] Campbell v. Cook (Tex. Civ. App.) 24 S. W. 977, reversed in 86 Tex. 630, 26 S. W. 486; Carron v. Clark, 14 Mont. 301, 36 Pac. 178 (trespass). Cf. Babcock v. Railway Co., 36 Minn. 147, 30 N. W. 449.

[183] City of Ft. Wayne v. Duryee (Ind. App.) 37 N. E. 299. And see Wabash Ry. Co. v. Savage, 110 Ind. 157, 9 N. E. 85; Gurley v. Missouri Pac. Ry. Co., 122 Mo. 141, 26 S. W. 953; La Duke v. Exeter Tp., 97 Mich. 450, 56 N. W. 851; Finn v. City of Adrian, 93 Mich. 504, 53 N. W. 614.

[184] Sheehan v. Edgar, 58 N. Y. 631; Folson v. Underhill, 36 Vt. 580; Lind-

Special damages should be specially pleaded.[186] Thus, special damage for loss of profits on merchandise by wrongful attachment, not alleged in the petition, cannot be recovered.[186] So, in personal injury cases[187] loss of mental powers cannot be proved if there is no claim to that effect in the complaint.[188] In trespass de bonis asportatis, the law will not imply as damage the cost of recovering possession of the property. This must be specially pleaded.[189] Ev-

holm v. City of St. Paul, 19 Minn. 245 (Gil. 204); Allis v. Day, 14 Minn. 516 (Gil. 388); Bast v. Leonard, 15 Minn. 304 (Gil. 235); Collins v. Dodge, 37 Minn. 503, 35 N. W. 368; Goodno v. Oshkosh, 28 Wis. 300. Cf. Chicago & A. R. Co. v. Wilson, 63 Ill. 167; Klein v. Thompson, 19 Ohio St. 569; Fox v. Railway Co., 86 Iowa, 368, 53 N. W. 259. The allegation that plaintiff was forced and obliged to "pay, lay out, and expend," is equivalent to alleging that she did pay, lay out, and expend. Parker v. Burgess, 64 Vt. 442, 24 Atl. 743. Such expense must be specially proved. Mental sufferings are the natural consequences of personal injuries, and are not special damages, and need not be pleaded nor specially proved. McCoy v. Milwaukee St. Ry. Co., 88 Wis. 56, 59 N. W. 453. Though expenses of medical attendance are not specially pleaded as damages, the jury may consider such expenses as an element of damages when the complaint alleges that the injuries consisted of broken hips and ribs. Evansville & T. H. R. Co. v. Holcomb, 9 Ind. App. 198, 36 N. E. 39. And the proof need not show that plaintiff actually did pay doctor's, nurse's, drug bills and the like. It is enough that they were incurred. Lunsford v. Walker, 93 Ala. 36, 8 South. 396; Reynolds v. City of Niagara Falls, 30 N. Y. Supp. 950; City of Friend v. Ingersoll, 30 Neb. 717, 58 N. W. 281. But see Hunter v. City of Mexico, 49 Mo. App. 17; Little Rock & M. R. Co. v. Barry, 58 Ark. 198, 23 S. W. 1097; Hewitt v. Eisenbart, 36 Neb. 794, 55 N. W. 252; Cousins v. Railway Co., 96 Mich. 386, 56 N. W. 14. Expenses for medical attendance are sometimes required to be specially pleaded. Houston City St. R. Co. v. Richart (Tex. Civ. App.) 27 S. W. 920.

[186] Hitchcock v. Turnbull, 44 Minn. 475, 47 N. W. 153; Bradley v. Borin, 52 Kan. 628, 36 Pac. 977. And see Homan v. Franklin Co. (Iowa) 57 N. W. 703; Squier v. Gould, 14 Wend. 159. Further as to case, see Bogert v. Burkhalter, 2 Barb. 525. But see Alabama & V. Ry. Co. v. Hanes, 69 Miss. 160, 13 South. 246. But not in justice court. Glenville v. Railroad Co., 51 Mo. App. 629. As to special pleading of damages in land flooding cases, Gentry v. Railroad Co., 38 S. C. 284, 16 S. E. 893.

[186] Chit. Pl. 399. Cf. Bloomington v. Chamberlain, 104 Ill. 268.

[187] As to measure of damages in personal injury cases, see Baker v. Pennsylvania Co., 12 Lawy. Rep. Ann. 698 (Pa. Sup.) 21 Atl. 979.

[188] Comaskey v. Railway Co., 3 N. D. 276, 55 N. W. 732.

[189] Lazard v. Merchants' & Miners' Transp. Co., 78 Md. 1, 26 Atl. 897; Gul',

idence of special damage arising from loss of reputation, credit, or business cannot be given unless specially alleged.[190] In false imprisonment, that plaintiff suffered in health,[191] or from want of food,[192] while in prison, is special damage, and must be specially pleaded.

136. Damages may be designed to—

(a) Afford more than mere actual compensation or exemplary damages; or

(b) Afford less than the wrongdoer would ordinarily be entitled to recover, or mitigated damages.

Exemplary Damages.

Exemplary damages are punitive or vindictive damages inflicted in view of the grossness of the wrong done, rather than as a measure of compensation. They are "smart money" added to proper compensation.[193] They are allowed whenever a case of tort shows wanton invasion of another's right, or any circumstance of oppression, outrage, or insult.[194] In many cases the motive is the mate-

C. & S. F. Ry. Co. v. Jones, 1 Tex. Civ. App. 372, 21 S. W. 145. Cf. Parker v. Lake Shore & M. S. Ry. Co., 93 Mich. 607, 53 N. W. 834. And see Abbott v. Heath, 84 Wis. 314, 54 N. W. 574 (conversion).

190 Donnell v. Jones, 13 Ala. 490; Rowand v. Bellinger, 3 Strobh. (S. C.) 373.

191 Pettit v. Addington, Peake, 87.

192 Lowden v. Goodrick, Peake, 46. And see Holtum v. Lotum, 6 Car. & P. 726; Westwood v. Cowne, 1 Starkie, 172.

193 Day v. Woodworth, 13 How. 363.

194 Amer v. Longstreth, 10 Pa. St. 145; Abbott, J., in Sears v. Lyons, 2 Starkie, 317; Huxley v. Berg, 1 Starkie, 98; Seeman v. Feeney, 19 Minn. 79 (Gil. 54); Cameron v. Bryan (Iowa) 56 N. W. 434 (vicious dog); Texarkana Gas & Electric Light Co. v. Orr, 59 Ark. 215, 27 S. W. 66 (live electric wire); Paddock v. Somes, 51 Mo. App. 320 (continued discharge of sewage); Hanewacker v. Ferman, 47 Ill. App. 17 (sale of liquor to habitual drunkard); Steel v. Metcalf, 4 Tex. Civ. App. 313, 23 S. W. 474 (wrongful levy). And see State v. Jungling, 116 Mo. 162, 22 S. W. 688 (Id.); Trammell v. Ramage, 97 Ala. 666, 11 South. 916 (Id.); Eisenhart v. Ordean, 3 Colo. App. 162, 32 Pac. 495 (Id.); Cronfelt v. Arrol, 50 Minn. 327, 52 N. W. 857 (Id.); Com. v. Magnolia, V. L. & I. Co., 163 Pa. St. 99, 29 Atl. 793 (wrongful attachment); Frank v. Tatum (Tex. Civ. App.) 26 S. W. 900 (conversion of goods); San Antonio & A. P. Ry. Co. v. Kniffin, 4 Tex. Civ. App. 484, 23 S. W. 457 (Id.); Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020 (libel and slander); Fulkerson v. Murdock,

rial element. If a pauper's hair is cut off, to "take down pride," not for the sake of cleanliness, malice is a consideration in determining the amount of damage.[195] So, in an action for killing shade trees by trimming, where it appeared that the trees were trimmed severely, and at an improper season, and, of all those trimmed, only those died which obstructed the defendant's view; and there was evidence that he had asked the person doing the work to trim them so that they would die,—the court properly submitted the question of punitive damages to the jury.[196] In some cases, inference of evil motive follows from the nature of an act. Thus, in Tullidge v. Wade,[197] the defendant secured the confidence of the plaintiff's family, and seduced his daughter under her father's roof. It was held that damages "for example's sake" could be recovered. Such damages are allowed in cases of extreme negligence, but only for negligence of a gross and flagrant character, evincing reckless disregard of human life and safety;[198] and it is error to instruct the jury that such damages are recoverable for "gross negligence," as that term does not necessarily imply an extreme degree of negligence.[199] The court determines when such damages are to be

53 Mo. App. 151 (Id.); Cooper v. Sun Printing & Publishing Ass'n, 57 Fed. 566 (Id.). And see Bracegirdle v. Oford, 2 Maule & S. 77; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501 (malicious trespass); Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101 (malicious prosecution). Trespass quære clausum fregit: Illinois & St. L. R. & Coal Co. v. Ogle, 92 Ill. 353; Craig v. Cook, 28 Minn. 232, 9 N. W. 712. Cf. Michaelis v. Michaelis, 43 Minn. 123, 44 N. W. 1149. Error in permitting the jury to allow punitive damages is cured when the verdict awards the compensatory and punitive damages separately, and the latter are disallowed on motion for new trial. Stone v. Chicago, St. P., M. & O. Ry. Co., 88 Wis. 98, 59 N. W. 457.

[195] Ford v. Skinner, 4 Car. & P. 239. In estimating the amount of punitory damages, defendant's wealth may be considered by the jury. Spear v. Sweeney, 88 Wis. 545, 60 N. W. 1060.

[196] Huling v. Henderson, 161 Pa. St. 553, 29 Atl. 276.

[197] 3 Wils. 18.

[198] In Kentucky, for example, courts are generous in this matter to complainants. Central Pass. Ry. Co. v. Chatterson (Ky.) 29 S. W. 18; Louisville & N. R. Co. v. Greer (Ky.) 29 S. W. 337.

[199] Leahy v. Davis, 121 Mo. 227, 25 S. W. 941; Atchison, T. & S. F. R. Co. v. McGinnis, 46 Kan. 109, 26 Pac. 453; Waters v. Greenleaf Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718. Clark, J., in Purcell v. Richmond & D.

awarded,[200] the jury their extent, subject to revision by the court.[201] They are awarded alike upon conduct punishable as a crime and conduct not so punishable.[202]

The award of exemplary damages is not designed merely to compensate. The jury "may" render a verdict for such sum as seems reasonable and proper to them in order to accomplish the following purposes: (a) To make compensation to the plaintiff for the injury he had sustained; (b) to deter the defendant from committing the like crime in time to come; (c) to deter other persons from committing the same crime; (d) to punish the defendant for this crime;[203] and (e) to restrain the plaintiff from taking the law into his own hands, and getting justice according to natural, not legal, standards. The award of more than compensation, it is urged in justification, rests sufficiently on either, and, in fact, on both, expediency and natural justice. If, for example, the actual loss of service of wife or daughter were the limit of the father's or husband's recovery for an injury to either, the remedy of the law would be dangerously inadequate, and exceedingly unjust. This would also be true of libel and slander, assault and battery, aggravated trespass, and generally of wrongs of fraud and malice and violence.

On the other hand, it is argued that the doctrine is not sustained on careful examination of authorities; that, while the jury may be allowed to assess liberally in cases of aggravation, they must not punish, else there will be either a double recovery, or, where tort is also punished criminally, there will be a double punishment, whereas the law allows no man to be twice vexed for the same cause; and that the true rule is to keep criminal and civil practice separate.[204]

R. Co., 108 N. C. 414, 12 S. E. 954–956 (disapproved in Hansley v. Jamesville & W. R. Co., 115 N. C. 602, 20 S. E. 528).

[200] Heil v. Glanding, 42 Pa. St. 493; Murphy v. New York, etc., Ry. Co., 29 Conn. 496; Chiles v. Drake, 2 Metc. (Ky.) 146; Chicago v. Martin, 49 Ill. 241; Texas & Pacific R. Co. v. Volk, 151 U. S. 73, 14 Sup. Ct. 239.

[201] Post, p. 400, "Damages Disproportionate in Award."

[202] Boetcher v. Staples, 27 Minn. 308, 7 N. W. 263; Carli v. Union Depot, etc., Co., 32 Minn. 101, 20 N. W. 89.

[203] Williams, J., in Cornelius v. Hambay, 150 Pa. St. 359–368, 24 Atl. 515 (in an action for criminal conversation by defendant with plaintiff's wife).

[204] Smith v. Pittsburg, Ft. W. & C. R. Co., 23 Ohio St. 10; Stovall v. Smith,

And, finally, it is contended that the true solution of the difficulty is to be found in allowing, not a civil punishment, but an enlarged and generous statement of ordinary damages,—aggravated as distinguished from mitigated damages,[205] or consolatory as distinguished from penal.[206]

Same — Who Liable.

A master may be held liable for the torts of his servant committed within the course of his employment, although such conduct be not previously authorized or subsequently ratified, provided the servant violate a duty which the master owed to the plaintiff, in such a way as to justify the award of such damages against the servant.[207] Some difficulty has been experienced in extending this liability to the principal, as distinguished from a master, for the unauthorized and unratified tort of the agent,[208] as distinguished from a servant; but unnecessarily, except as the particular cir-

4 B. Mon. (Ky.) 378; Albrecht v. Walker, 73 Ill. 69; Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119; Fay v. Parker, 53 N. H. 342; Stowe v. Heywood, 7 Allen, 118; note 2, Greenl. Ev. § 253. And see 1 Suth. Dam. (2d Ed.) p. 835 et seq. But see Corwin v. Walton, 18 Mo. 71; Roberts v. Mason, 10 Ohio St. 277; Kimball v. Holmes, 60 N. H. 163.

[205] Hendrickson v. Kingsburry, 21 Iowa, 379; Lucas v. Flinn, 35 Iowa, 9; Wetherbee v. Green, 22 Mich. 310; Tenhopen v. Walker, 96 Mich. 236, 55 N. W. 657–658.

[206] Clerk & L. Torts, 94.

[207] Fogg v. Boston & L. R. Corp., 148 Mass. 513–518, 20 N. E. 109; Hawes v. Knowles, 114 Mass. 518; Gulf, C. & S. F. Ry. Co. v. Reed, 80 Tex. 362, 15 S. W. 1105 (ratification); 1 Sedg. Dam. § 380, and note; Parsons v. Winchell, 5 Cush. 592; Atlantic & G. W. Ry. Co. v. Dunn, 19 Ohio St. 162; Hopkins v. Atlantic & St. L. R. Co., 36 N. H. 9; New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss. 200; Perkins v. M., K. & T. R., 55 Mo. 201; Singer Manuf'g Co. v. Holdfodt, 86 Ill. 455; Bass v. Chicago & N. W. Ry. Co., 36 Wis. 450; Sullivan v. Philadelphia & Reading R. Co., 30 Pa. St. 324. Conceding that a passenger agent selling tickets both for railroad fare and for sleeping car berths acted as the agent of the sleeping car company, the latter would not be liable for punitive damages because of his refusal to sell a sleeping car berth to a passenger, on the ground that the latter had not a first-class ticket, unless the passenger was treated insultingly or with malice. Lemon v. Pullman Palace Car Co. (C. C.) 52 Fed. 262.

[208] Hagan v. Providence & W. R. Co., 3 R. I. 88; Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261; Staples v. Schmid (R. I.) 26 Atl 193; Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760.

cumstances under consideration may have justified.[209] Punitive damages are now frequently awarded against private corporations.[210] Thus, they may be awarded against such a corporation for violent seizure of a railroad.[211] It is commonly,[212] but not universally,[213] held that a railroad company is liable for exemplary dam-

[209] Rucker v. Smoke, 37 S. C. 377, 16 S. E. 40; ante, p. 239, "Master and Servant."

[210] Goddard v. Grand Trunk Ry. Co., 57 Me. 202-223; Haines v. Schultz, 50 N. J. Law, 481, 14 Atl. 488; Detroit Daily Post Co. v. McArthur, 16 Mich. 447. And see cases collected in considerable number in 5 Am. & Eng. Enc. Law, at page 23. However, in its late remarkable decision (Lake Shore & M. S. R. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261), the supreme court of the United States is said, in 29 Am. Law Rev. 268, to have held, "in substance, that exemplary damages cannot be given against a corporation, except where the corporation has authorized the doing of the injurious act; meaning, we suppose (for the court does not explain itself on this point), where the board of directors have authorized the doing of it." This was the case of wrongful arrest of passenger by conductor. The true view of that case would seem, however, to be that it is "not authority for the position that exemplary damages cannot be recovered against a corporation for the reckless, willful, and malicious act of its agent; the opinion of the supreme court expressly pointing out that there was no proof that the conductor was known to the defendant to be an unsuitable person, in any respect." But such damages are awarded by the federal courts, for example, in libel cases. Press Pub. Co. v. McDonald, 11 C. C. A. 155, 63 Fed. 238; Hallam v. Post Pub. Co., 55 Fed. 456; Post Pub. Co. v. Hallam, 8 C. C. A. 201, 59 Fed. 530. And see Railroad Co. v. Quigley, 21 How. 202; Cooper v. Sun Printing & Publishing Ass'n, 57 Fed. 566; Morning Journal Ass'n v. Rutherford, 2 C. C. A. 354, 51 Fed. 513.

[211] Denver & R. G. Ry. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286.

[212] Lucas v. Michigan Cent. R. Co., 98 Mich. 1, 56 N. W. 1039; Richmond & D. R. Co. v. Greenwood, 99 Ala. 501, 14 South. 495. See, also, Kansas City, M. & B. R. Co. v. Phillips, 98 Ala. 159, 13 South. 65; Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293, 13 South. 57; Chicago, B. & Q. Ry. Co. v. Bryan, 90 Ill. 126. So for putting off passenger at wrong place. New Orleans Ry. v. Hurst, 36 Miss. 660 (Lake Shore, etc., Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261, followed); Pittsburgh, C., C. & St. L. Ry. Co. v. Russ, 6 C. C. A. 597, 57 Fed. 822; Muckle v. Rochester R. Co., 79 Hun, 32, 29 N. Y. Supp. 732.

[213] Pittsburgh, C., C. & St. L. Ry. Co. v. Russ, 6 C. C. A. 597, 57 Fed. 822. It has been loosely said that exemplary damages are not awarded against corporations for injuries resulting from gross negligence of a servant. Illinois Cent. R. Co. v. Hammer, 72 Ill. 347, per Walker, C. J.

ages on account of the malice, wantonness, or oppression of its conductor in ejecting a passenger from a train, or for an assault by him on a passenger.[214] Indeed, ratification of a servant's wrong may attach liability on part of a private corporation for exemplary damages.[215] "The city is not a spoliator, and should not be visited by vindictive damages. Where aggression and malice are absent the damages cannot exceed compensation for the injury done. In other words, they cannot be punitive." [216] And willful injury can scarcely, by any possibility, be proved as to this class of corporations.[217] Such damages have, however, been allowed, in cases which must be regarded as exceptional.[218] And, in general, an award of punitive damages against a city will not be sustained.[219]

Matters of Practice.

As to the function of the court and the jury, the rule is that in an action on a tort, sounding in exemplary damages, the question whether the plaintiff is entitled to exemplary damages may be properly submitted to the jury, wherever the trial court thinks there is some testimony, on the issues raised by the pleadings.[220] But, for example, where only nominal damages are shown, exemplary damages cannot be recovered.[221] As to pleading, it has been held, in an action for exemplary damages, no recovery can be had for actual damages,[222] but matters of aggravation need n

[214] Baltimore & O. R. Co. v. Barger (Md.) 30 Atl. 560. Ante, p. 257, "Master and Servant—Course of Employment."

[215] International & G. N. Ry. Co. v. Miller (Tex. Civ. App.) 28 S. W. 233, 5 Am. & Eng. Enc. Law, 24, citing, inter alia, Nashville & C. R. Co. v. Starnes, 9 Heisk. (Tenn.) 52; Illinois Cent. R. Co. v. Hammer, 72 Ill. 347; Milwaukee & M. R. Co. v. Finney, 10 Wis. 388. Ante, c. 1, "Ratification by Retention of Servant."

[216] Chicago v. Martin, 49 Ill. 241, per Breese, C. J.

[217] Chicago v. Kelly, 69 Ill. 475. And see Chicago v. Langlass, 52 Ill. 256; Chicago v. Jones, 66 Ill. 349; Decatur v. Fisher, 53 Ill. 407.

[218] Whipple v. Walpole, 10 N. H. 130; Wallace v. New York, 18 How. Prac. 169; Myers v. San Francisco, 42 Cal. 215.

[219] Chicago v. Langlass, 52 Ill. 256, 66 Ill. 361; Chicago v. Martin, 49 Ill. 241; Chicago v. Kelly, 69 Ill. 475.

[220] Samuels v. Richmond & D. R. Co., 35 S. C. 493, 14 S. E. 943.

[221] Girard v. Moore, 86 Tex. 675, 26 S. W. 945.

[222] McIver, C. J., dissenting. Cobb v. Columbia & G. R. Co., 37 S. C. 194, 15 S. E. 878.

be pleaded.[223] The scope of evidence admissible under allegations which would entitle the plaintiff to such damages is very wide,—much broader than, for example, an action for mere negligence. Thus, in the former case, the plaintiff is sometimes allowed to show the pecuniary condition of the defendant.[224] In the latter, he cannot.[225]

137. Mitigated damages are the counterpart of exemplary damages.

Circumstances which fall short of a complete justification, and do not amount to a defense to an action, may be given in evidence as establishing a less aggravated case against the defendant.[226] Thus, where one destroyed a picture called "Beauty and the Beast," which was being exhibited by the owner, and showed in mitigation that it was a nuisance, and a scandalous libel on a gentleman of fashion and defendant's sister, the owner of the picture was allowed to recover only for the value of the paint and canvas, and not for the picture as a work of art.[227]

Provocation is a mitigating circumstance in libel, slander, as-

[223] 1 Suth. Dam. (2d Ed.) § 422; Wooden-Ware Co. v. U. S., 106 U. S. 432, 1 Sup. Ct. 398; U. S. v. Baxter, 46 Fed. 347-353. Cf. Allen v. Hitch, 2 Curt. 147, Fed. Cas. No. 224; Stanfield v. Phillips, 78 Pa. St. 73; Plumb v. Ives, 39 Conn. 120; Thayer v. Sherlock, 4 Mich. 173; Ogden v. Gibons, 5 N. J. Law, 598; McConnell v. Kibbe, 33 Ill. 175; Clark v. Bardman, 42 Vt. 667.

[224] Beck v. Dowell, 111 Mo. 506, 20 S. W. 209. But not in assault and battery. Roach v. Caldbeck, 64 Vt. 593, 24 Atl. 989.

[225] The pecuniary condition of defendant has an important bearing in determining what will be an adequate punishment, as an amount which would not be felt by a rich man might be a very great punishment to a poor man. But where compensation only, i. e. indemnity, is to be recovered, it is manifestly immaterial whether defendant is rich or poor.

[226] Tindal, C. J., in Perkins v. Vaughan, 4 Man. & G. 989. It may not be strictly accurate to classify mitigated damages as being designed to do less than compensate. But the award of such damages in many instances proceeds upon the recognition of the propriety of punishing plaintiff (in a manner) by diminishing the extent of his recovery. In effect, such damages are not designed to compensate plaintiff in the same sense that ordinary damages are.

[227] Du Bost v. Berresford, 2 Camp. 511. The ordinary view of this case is

sault and battery, and similar wrongs.[228] So, a criminal prosecution and conviction for an assault and battery is not a bar to the recovery of punitive damages in a civil action for the same offense, but may be shown in mitigation of damages.[229]

A person is entitled to recover whatever damages the law allows, under the circumstances of the case, without reference, ordinarily, to contracts or relationships with third persons, which may, in fact, diminish or remove his actual loss. An employé may recover from one who injures him for the resulting loss of time, even though the employer may have continued his salary during the time so lost.

"Damages are assessed on uniform principles, and are not to be affected by incidental business relations."[230] The fact that a person injured has received the proceeds of an accident insurance policy is no defense to an action against the person whose negligence caused the injury.[231]

The defendant is not allowed to avail himself of any reduction

that the picture, being illegal, is regarded in law as not being property at all. The law will not protect one in the possession of that which it is illegal to possess.

[228] Quinby v. Tribune Co., 38 Minn. 528, 38 N. W. 623. Drinking habits do not mitigate damage when there is no issue as to plaintiff's capacity to earn a livelihood. Union Pac. Ry. Co. v. Reese, 5 C. C. A. 510, 56 Fed. 288.

[229] Rhodes v. Rodgers, 151 Pa. St. 634, 24 Atl. 1044. But cf. Boetcher v. Staples, 27 Minn. 308, 7 N. W. 263. But see post, p. 413, "Statutory Damages.

[230] Ohio & M. R. Co. v. Dickerson, 59 Ind. 317. But see, contra, Drinkwater v. Dinsmore, 80 N. Y. 390. And see Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582; Duke v. Missouri Pac. Ry. Co., 99 Mo. 351, 12 S. W. 636. On a reference to ascertain the damages caused by an injunction against the sale of an option on real estate, evidence that defendant, by a further speculation with regard to the realty, might have reduced his loss, is properly excluded. O'Connor v. New York & Y. Land Imp. Co., 8 Misc. Rep. 243, 28 N. Y. Supp. 544. On much the same principle damages for malicious prosecution of suits for unlawful detainer cannot be set off or recouped in an action for rent, since such damages do not arise out of contract, and are not connected with the subject-matter of the suit. Dietrich v. Ely, 11 C. C. A. 266, 63 Fed. 413. And see Winder v. Caldwell, 14 How. 434, 443; Dushane v. Benedict, 120 U. S. 630, 7 Sup. Ct. 696.

[231] Althorf v. Wolfe, 22 N. Y. 355; Harding v. Townshend, 43 Vt. 536; Danleavy v. Stockwell, 45 Ill. App. 230; Shear. & R. Neg. (3d Ed.) § 609;

to the plaintiff by outside arrangements (as a popular subscription) of the expenses to which the wrong has put the plaintiff in the way of medical services,[232] nursing, and the like.[233]

Partial payment is frequently regarded as a mitigation of damages.[234] Thus, on the same principle under which a satisfaction by one joint tort feasor is available as a bar to an action against the other, evidence that partial satisfaction has been made by one of the wrongdoers is admissible in mitigation of damages.[235]

138. Damages may be disproportionate in award, because—

(a) Excessive; or

(b) Inadequate.

Excessive Damages.

In cases in which from the nature of things there is no fixed standard of compensation, a court will set aside a verdict which is so excessive that it cannot be accounted for on any other ground than that the jury was misled by passion, prejudice, or ignorance, or when the verdict bears other internal evidence of intemperance in the minds of the jury.[236] Where the amount of a judgment against

Yates v. Whyte, 4 Bing. (N. C.) 272; Bradburn v. Great Eastern R. Co., L. R. 10 Exch. 1. But see Congdon v. Howe Scale Co., 66 Vt. 255, 29 Atl. 253.

[232] Klein v. Thompson, 19 Ohio St. 569; Indianapolis v. Gaston, 58 Ind. 224.

[233] Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874; Norristown v. Moyer, 67 Pa. St. 355 (where money was raised by subscription). But it has recently been held, in an action against a minor, that damages cannot be recovered for medical expenses which were voluntarily paid by another. Peppercorn v. City of Black River Falls, 89 Wis. 38, 61 N. W. 79.

[234] Livingston v. Bishop, 1 Johns. 290; Thomas v. Rumsey, 6 Johns. 26; Barrett v. Third Ave. R. Co., 45 N. Y. 628.

[235] Daniels v. Hallenbeck, 19 Wend. 408; Bush v. Prosser, 11 N. Y. 347; Wilmarth v. Babcock, 2 Hill (N. Y.) 194; Knapp v. Roche, 94 N. Y. 329.

[236] 1 Wood, Ry. Law, 1266; Pratt v. Press Co., 30 Minn. 41, 14 N. W. 62; Id., 32 Minn. 217, 18 N. W. 836, and 20 N. W. 87 (libel); Mangel v. O'Neill, 51 Mo. App. 35 (Id.); Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127 (false imprisonment); Brosde v. Sanderson, 86 Wis. 368, 57 N. W. 49 (Id.); New Orleans & C. R. Co. v. Schneider, 8 C. C. A. 571, 60 Fed. 210 (personal injury); Cameron v. Bryan (Iowa) 56 N. W. 434 (Id.); McCoy v. Milwaukee St. Ry. Co., 88 Wis. 56, 59 N. W. 453 (Id.); Kelley v. Kelley, 8 Ind. App. 606, 34 N. E. 1009 (assault). And see Dwyer v. Railroad Co., 52 Fed.

a railroad company for killing a cow exceeded the market value of the animal, as testified to by any of the witnesses including the plaintiff, the judgment was set aside as excessive.[237]

It is said that no verdict for criminal conversation has ever been set aside as excessive.[238]

The common practice in cases of excessive verdicts is for the court to enter an order granting a new trial, unless the plaintiff consents to a reduction to such sum as the court shall not deem excessive.[239] But courts interfere reluctantly with a verdict on the mere ground of excessive damages, and never except in a clear case.[240] Each case must depend on its own circumstances. Thus, in one case over $4,000 was not considered excessive for an unmannerly ejection from a car.[241] In another simple case, however, an order was entered setting aside a verdict of $800, unless $400 was remitted by

87; Wiggin v. Coffin, 3 Story, 1, Fed. Cas. No. 17,624; 1 Suth. Dam. 810; 2 Sedg. Dam. 652; Wood, Mayne, Dam. 798. In Huckle v. Money, 2 Wils. 207, Lord Camden said: "It is very dangerous for the judge to intermeddle in damages for torts. It must be a glaring case, indeed, of outrageous damages in a tort, and which all mankind, at first blush, must think so, to induce a court to grant a new trial for excessive damages." And see Gilbert v. Burtenshaw, Cowp. 230.

[237] Jacksonville, T. & K. W. Ry. Co. v. Garrison, 30 Fla. 431, 11 South. 932. So, where the evidence fails to show that the personal injuries sought to be recovered for are of a permanent character, the verdict of $26,000 is excessive, although they resulted from gross negligence on part of defendant. Louisville & N. R. Co. v. Long, 94 Ky. 410, 22 S. W. 747.

[238] 5 Am. & Eng. Enc. Law, 61, citing, as to this wrong and seduction, Riddle v. McGinnis, 22 W. Va. 253; Cross v. Rutledge, 81 Ill. 266; Wilford v. Berkley, 1 Burrows, 609; Smith v. Masten, 15 Wend. 270; Nortin v. Warner, 6 Conn. 172; Shattuck v. Hammon, 46 Vt. 466; Rea v. Tucker, 51 Ill. 110; Conway v. Nickle, 34 Iowa, 533; Harrison v. Price, 22 Ind. 16.

[239] Stickney v. Bronson, 5 Minn. 215 (Gil. 172); Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Hardenberg v. Railroad Co., 41 Minn. 200, 42 N. W. 933.

[240] Whipple v. Cumberland Manuf'g Co., 2 Story, 661, Fed. Cas. No. 17,516; Wiggin v. Coffin, 3 Story, 1, Fed. Cas. No. 17,624; Thurston v. Martin, 5 Mason, 497, Fed. Cas. No. 14,018; Berry v. Vreeland, 21 N. J. Law, 183; Gilbert v. Burtenshaw, Cowp. 230.

[241] Missouri Pac. R. Co. v. Peay (Tex. Civ. App.) 26 S. W. 768; Nicholds v. Crystal Plate-Glass Co. (Mo.) 27 S. W. 516; Campbell v. Cornelius (Tex. Civ. App.) 23 S. W. 117; Lynch v. Lerche, 73 Hun, 553, 26 N. Y. Supp. 96; Smith v. Philadelphia & R. R. Co., 57 Fed. 903. Conductor, without provoca-

plaintiff.[242] Twenty-five thousand dollars has been held not excessive for injuries to a child,[243] nor to a man rendered a hopeless cripple for life.[244] Indeed, a verdict of $31,700 in an action for malicious prosecution, and a verdict in a personal injury case for $45,000,[245] have been sustained. On the other hand, a verdict of

tion, called a passenger a "God damn son of a bitch," threatened to kill him, pulled him roughly to the end of the car, appeared to draw a pistol on him, and spit tobacco juice in his face. East Tennessee, V. & G. Ry. Co. v. Fleetwood, 90 Ga. 23, 15 S. E. 778. And see Richmond & D. R. Co. v. Jefferson, 89 Ga. 554, 16 S. E. 69.

[242] Hardenbergh v. St. Paul, M. & M. R. Co., 41 Minn. 200, 42 N. W. 933. And see Toomey v. Railway Co., 2 Misc. Rep. 82, 21 N. Y. Supp. 448 (nominal damages for arrest).

[243] Dunn v. Burlington, C. R. & N. R. Co., 35 Minn. 73, 27 N. W. 448.

[244] Hall v. Chicago, B. & N. R. Co., 46 Minn. 439, 49 N. W. 239; Willard v. Holmes, 2 Misc. Rep. 303, 21 N. Y. Supp. 998.

[245] Robinson v. Railroad Co., 48 Cal. 410, and in Worthen v. Railroad Co., 125 Mass. 49. In Smith v. Whittier, 95 Cal. 279–283, 30 Pac. 529, will be found a collection of small verdicts, and at page 284, 95 Cal., and page 529, 30 Pac., of large verdicts. In the following cases verdicts have been held not excessive: Knee hurt, but external recovery, $5,000: Coggswell v. Railway Co., 5 Wash. 46, 31 Pac. 411. Broken rib and roughened pleura, $500: Evans v. City of Huntington, 37 W. Va. 601, 16 S. E. 801. Broken thigh, $2,000: McDowell v. The France, 53 Fed. 843. Collar bone broken and other injuries, $7,500: Galveston, H. & S. A. R. Co. v. Wesch (Tex. Civ. App.) 21 S. W. 313. Right arm and shoulder, $15,000: Morgan v. Southern Pac. R. Co., 95 Cal. 501, 30 Pac. 601. Displacement of womb, $15,000: City of Chicago v. Leseth, 43 Ill. App. 480. Helpless invalid for life, $15,000: Sears v. Seattle Consolidated St. R. Co., 6 Wash. 227, 33 Pac. 389. Spinal injury, $3,000: Wabash Western Ry. Co. v. Friedman, 41 Ill. 270 (reversed on another point [Ill.] 30 N. E. 353). Finger of left hand, $2,750: Haynes v. Erk, 6 Ind. App. 332, 33 N. E. 637. Permanent injury to lung, $5,000: Fordyce v. Culver, 2 Tex. Civ. App. 569, 22 S. W. 237. Broken leg, thereafter stiff and short: $5,000, Town of Fowler v. Linquist (Ind. Sup.) 37 N. E. 133; $6,500, Selleck v. J. Langdon Co., 59 Hun, 627, 13 N. Y. Supp. 858. Broken skull, crushed hip, and damaged urinary organs, $15,000: Texas & P. R. Co. v. Hohn, 1 Tex. Civ. App. 36, 21 S. W. 942. Fracture of hip, woman of 60, $5,000: City of Kansas City v. Manning, 50 Kan. 373, 31 Pac. 1104. Injury to eyes, ears, shoulder, and arm, $3,000: Sabine & E. T. R. Co. v. Ewing, 1 Tex. Civ. App. 531, 21 S. W. 700. Amputation of left arm, etc., $10,000: Baltzer v. Chicago, M. & N. R. Co., 89 Wis. 257, 60 N. W. 716. In cases of willful violence: $9,000, Townsend v. Briggs (Cal.) 32 Pac. 307; $2,000, Wohlenberg v. Melchert, 35 Neb. 803, 53 N. W. 982. Damages not excessive: $10,000, hand, Flanders v.

$60,000, recovered against the sergeant at arms of the house of representatives of the United States for a false imprisonment under the orders of the house, and lasting 35 days, has been held excessive.[246]

Inadequate Damages.

The same principle which renders courts unwilling to set aside verdicts as being excessive causes them to hesitate to annul verdicts as being too small.[247] Therefore, in an action for an injury to a person's ankle, alleged to have resulted from another's negligence, where the evidence as to the extent of the injury was conflicting, a judgment for $1,000 was not reversed as being so inadequate as to indicate that it was the result of passion or prejudice.[248] So a verdict of six cents for improper detention long enough to have walked across the street was not set aside as inadequate.[249] But if the

Chicago, St. P., M. & O. R. Co., 51 Minn. 193, 53 N. W. 544; $25,000, loss of leg, Ehrman v. Railroad Co., 131 N. Y. 576, 30 N. E. 67.

[246] Kilburn v. Thompson, 4 MacArthur, 401; Wheeler & W. Manuf'g Co. v. Boyce, 36 Kan. 350, 13 Pac. 609. Foot: $12,000, Kroener v. Chicago, M. & St. P. R. Co., 88 Iowa, 16, 55 N. W. 28; $3,000, Kennedy v. St. Paul City R. Co. (Minn.) 60 N. W. 810. Two fingers, $5,000: Louisville & N. R. Co. v. Foley, 94 Ky. 220, 21 S. W. 866. Fracture of smaller bone of ankle, $1,100: Bronson v. Forty-Second St. Ry. Co., 67 Hun, 649, 21 N. Y. Supp. 695. Temporary injury, $6,000: Louisville & N. Ry. Co. v. Survant (Ky.) 27 S. W. 999. Amputation of first joint of left thumb, $2,000: Louisville & N. R. Co. v. Law (Ky.) 21 S. W. 648. In case of willful violence, $5,000: Roades v. Larson, 66 Hun, 635, 21 N. Y. Supp. 855. For dishonor of a check, $450: Schaffner v. Ehrman (Ill.) 28 N. E. 917.

[247] Townsend v. Hughes, 2 Mod. 150. And see Hamilton v. The William Branfort, 48 Fed. 914; Id., 3 C. C. A. 155, 52 Fed. 390. Indeed, it was said in Pritchard v. Hewitt, 91 Mo. 547, that "a new trial will not be granted solely on the ground of the smallness of the damages recovered." A judgment will not be set aside for failure to assess merely nominal damages where no question of permanent right is involved. Knowles v. Steele (Minn.) 61 N. W. 557.

[248] Barclay, J., dissenting. Boggess v. Metropolitan St. Ry. Co., 118 Mo. 328, 23 S. W. 159, and 24 S. W. 210.

[249] Henderson v. McReynolds (Sup.) 14 N. Y. Supp. 351; Boggess v. Metropolitan St. Ry. Co., 118 Mo. 328, 23 S. W. 159, and 24 S. W. 210; Michalke v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 27 S. W. 164; Kalembach v. Michigan Cent. R. Co., 87 Mich. 500, 49 N. W. 1082. A verdict of a dollar has been allowed to stand. Allison v. Railway Co. (Tex. Civ. App.) 29 S. W. 425.

verdict be so manifestly insufficient as to indicate bias, prejudice, or ignorance on the part of the jury, it will be set aside and a new trial granted.[250] Thus, an omnibus ran over a man and broke his thigh. He paid £50 to a doctor to set his leg. The jury gave a farthing damages, and he got a new trial.[251] So, where a candidate for office circulated a false report that a girl of unquestioned virtue had been delivered of a bastard child, of which such candidate's rival for office was the father. In an action for this slander, the jury returned a verdict for $5. It was held that the sum allowed was so obviously inadequate as to warrant a reversal.[252]

139. A cause of action is an entirety, and all the damages resulting therefrom must be recovered in one suit. It cannot be split, and separate actions be maintained to recover each separate item of damage. But the same state of facts may give rise to different causes of action, either in the same or different persons; in which case a separate action may be maintained to recover the damages caused by each separate cause of action.

Entirety of Demand.

The ordinary rule is that damages resulting from one and the same cause of action must be assessed and recovered once and for all;[253] that is to say, ordinary damages are indivisible.[254] A sufficient reason is, "Interest reipublicæ ut sit finis litium."[255] Accord-

[250] Henderson v. St. Paul & D. Ry. Co., 52 Minn. 479, 55 N. W. 53; Chesapeake, O. & S. W. R. Co. v. Higgins, 85 Tenn. 621, 4 S. W. 47; Nicholson v. New York & N. H. R. Co., 22 Conn. 74; McDonnald v. Walter, 40 N. Y. 551.

[251] Armytage v. Haley, 4 Q. B. 918. And see Phillips v. London & S. W. R. Co., 5 Q. B. Div. 78; Cook v. Beale, 3 Salk. 115; Brown v. Seymour, 1 Wils. 5; Austin v. Hilliers, Hardres, 408; Traylor v. Evertson (Tex. Civ. App.) 26 S. W. 637.

[252] Blackwell v. Landreth (Va.) 19 S. E. 791.

[253] Fraser, Torts, 165.

[254] Colvin v. Corwin, 15 Wend. 557; Miller v. Covert, 1 Wend. 487; Wagner v. Jacoby, 26 Mo. 532; Smith v. Jones, 15 Johns. 229; Butler v. Wright, 2 Wend. 369; Cornell v. Cook, 7 Cow. 310; Brazier v. Banning, 20 Pa. St. 345; Ross v. Weber, 26 Ill. 222; Logan v. Caffery, 30 Pa. St. 196.

[255] Clerk & L. Torts, 95.

ingly, one judicial award of damages discharges a tort.[256] If the injured party has made any mistake as to the extent of his injury, this does not entitle him to subsequently come into court and ask for more. Thus, where a man recovered for assault and battery, resulting in the fracture of his skull, and afterwards another piece of his skull came out, this was a part of his original injury, and could not be the basis of a new recovery.[257]

In an ordinary trespass, the breaking and entry of another's close is the substantial injury, and the subsequent damage a mere aggravation thereof. The cause of action, therefore, is single and entire, and the statute of limitation and a release or judgment refer to the original entry, and the alleged subsequent wrong does not give a new cause of action.[258] A plaintiff can generally recover in one proceeding all the damage arising out of his cause of action, alike prior and subsequent to the commencement of the cause of action.[259]

[256] Ante, p. 321 et seq., "Discharge by Judgment."

[257] Fetter v. Beale, 1 Salk. 11.

[258] Lamb v. Walker, 3 Q. B. Div. 389; Underh. Torts, 396; 3 Suth. Dam. 372. A cause of action arising from the wrongful use of a street by a railway company is barred in six years. Each day's continuance does not give rise to a fresh cause of action. Porter v. Midland Ry. Co., 125 Ind. 476, 25 N. E. 556. But see Knox v. Metropolitan El. Ry. Co., 58 Hun, 517, 12 N. Y. Supp. 848. And see Wells v. New Haven & N. Co., 151 Mass. 46, 23 N. E. 724. An allegation of acts done by plaintiff "for the period of one year prior to the commencement of said cause" will not admit evidence of trespasses since suit begun. Corliss v. Dunning, 8 Wash. 332, 35 Pac. 1074. In Texas, to avoid multiplicity of suits, all damages, even from a continuing nuisance, sustained upon the date of trial, may be recovered. Comminge v. Stevenson, 76 Tex. 642, 13 S. W. 556. "It is the rule that where a thing directly wrongful in itself is done to a man, and is in itself a cause of action, he must, if he sues in respect of it, do so once for all. So, if he is beaten or wounded, if he sues he must sue for all his damages, past, present, and future, certain and contingent. He cannot maintain an action for a broken arm and subsequently for a broken rib, though he did not know of it when he commenced his first action." Mitchell v. Darley Main Colliery Co. (1884) 14 Q. B. Div. 125. 53 Law J. Q. B. 471; Id. (1886) 11 App. Cas. 127, 55 Law J. Q. B. 529, per Lord Bramwell.

[259] Delie v. Chicago & N. W. R. Co., 51 Wis. 400, 8 N. W. 265; Mitchell v. Darley Main Colliery Co., 14 Q. B. Div., at page 134, per Brett. But see Dorman v. Ames, 12 Minn. 451 (Gil. 347). Thus, in personal injury cases plaintiff

Severable Damages.

But this principle applies only when the causes of action are the same. The same state of facts may give rise to several causes of action, for each of which there is an appropriate and separate action at law. This right of action may reside in different persons. Where a child is injured, it has one cause of action, and its parent another, against the wrongdoer.[260] Where a wife is injured, she has one ground of complaint for the tort, her husband another.[261] Again, the right of action may be severable with respect to one person. Severable damages arise when the same facts give rise to more than one distinct cause of action, though between same parties.[262] The same act by the same person may constitute trespass to goods and to the person, and the cause of action be severable. If your carriage be run down by a truck, and both it and you are hurt, you can sue (1) for injury to carriage, and (2) in another action for injury to yourself. But, having once sued for injury to self, on discovering injury to have been greater than supposed, you cannot sue again.[263]

recovers for past injury, present suffering, and future damages. Curtiss v. Rochester & S. R. Co., 20 Barb. 282; City of Atchison v. King, 9 Kan. 550; Welch v. Ware, 32 Mich. 77; Birchard v. Booth, 4 Wis. 85; Morely v. Dunbar, 24 Wis. 183; Wilson v. Young, 31 Wis. 574; Goodno v. Oshkosh, 28 Wis. 300; Spicer v. Chicago Ry. Co., 29 Wis. 580; Karasich v. Hasbrouck, 28 Wis. 569; Pennsylvania R. Co. v. Dale, 76 Pa. St. 47; Tomlinson v. Derby, 43 Conn. 562; Fulsome v. Concord, 46 Vt. 135; Nones v. Northouse, 46 Vt. 587; Metcalf v. Baker, 57 N. Y. 662; New Jersey Exp. Co. v. Nichols, 33 N. J. Law, 434; Walker v. Erie R. Co., 63 Barb. 260; Bradshaw v. Lancashire Ry. Co., L. R. 10 C. P. 189; Collins v. Council Bluffs, 32 Iowa, 324; Russ v. Steamboat War Eagle, 14 Iowa, 363; Dixon v. Bell, 1 Starkie, 287. But only the present worth of such future damages can be assessed. Fulsome v. Concord, 46 Vt. 135. As of a growing crop, see Taylor v. Bradley, 39 N. Y. 129; People's Ice Co. v. Steamer Excelsior, 44 Mich. 229, 6 N. W. 636; Smith v. Chicago R. Co., 38 Iowa, 518; Richardson v. Northrup, 66 Barb. 85; Folsom v. Apple River Log Driving Co., 41 Wis. 602.

[260] Post, p. 456, "Injury to Family Relations"; ante, p. 311, "Release."

[261] Post, p. 469.

[262] 1 Sedgw. Dam. § 91, and cases cited.

[263] Brunsden v. Humphrey, 14 Q. B. Div. 141. Questions of this kind are involved not only with respect to discharge by agreement, judgment, statute of limitation, and the like, but also with respect to many matters of practice, especially the allied cases, which are described more accurately, per-

In general, however, the common practice, for considerations of convenience, is to join all possible causes of action in one suit. The law allows a settlement of all damages done by one circumstance to be litigated at the same time. Therefore, where the first count of the complaint in an action against a railroad company was for killing an ox, and the second for killing a horse, and in the claim for damages therefor there was included freight paid on the horse to the company, it was held that the claim for freight arose ex delicto, and that the causes of action were not improperly joined.[264]

Continuing Torts.

The more difficult and uncertain question is as to the disposition of cases where the parties are the same, but the conduct and the consequent damage are continuing.[265] Thus, if a trespasser put up a permanent structure on another's land, or persist in maintaining a nuisance, it is not easy to determine whether the damages are indivisible, and therefore must be recovered, both as to those accruing prior to the commencement of the suit and those which may arise in the future, in the pending action, or whether in the pending action only the damages to its commencement can be recovered, and subse-

haps, as involving separable controversies. Thus, in Fergason v. Railway Co., 63 Fed. 177, in an action by a switchman against a railroad company, S., and P., for personal injuries sustained by being run over by the company's switch engine, the petition alleged that the engine was improperly constructed; that after plaintiff fell on the track, having been thrown down in an effort to step on the defective footboard, he was pushed along the track; and that such company, together with the engineer, S., and yardmaster, P., were negligent in that they did not keep a proper lookout, and did not heed plaintiff's signals to stop. It was held that the controversy as to injury because of improper construction of switch was between the plaintiff and the railway company, and that under the circumstances the case was therefore properly removed to the United States court.

[264] Rideout v. Milwaukee, L. S. & W. R. Co., 81 Wis. 237, 51 N. W. 439; La Duke v. Township of Exeter, 97 Mich. 450, 56 N. W. 851.

[265] No very clear idea is to be obtained from many current statements on the subject. "Every continuance of a trespass is a fresh one." "The continuance of a trespass from day to day is considered in law a several trespass each day." Earl of Manchester v. Vale, 1 Wm. Saund. 24, citing Monckton v. Pashley, 2 Ld. Raym. 976. See article in 98 Law T. 87. Any continuance of a nuisance is a fresh one, and therefore a fresh action will lie. 3 Bl. Comm. 220. "Where one creates a nuisance upon his own land

quent proceedings instituted upon subsequent harm suffered; that is, one action for all damages, or successive actions for successive damages.[266]

As a solution of the difficulty, Lord Bramwell has suggested that the question whether successive actions would lie depends upon whether the act complained of was actionable without proof of damage.[267] And excellent American authority has developed this into

which affects another, the nuisance is continuing, and the party injured, not being bound to enter and abate it, may maintain an action against the party so inflicting an injury upon him as often as he has sustained an actual injury therefrom." Underhill on Torts, 395. "The continuance of a nuisance gives rise to two causes of action." Pig. Torts, 148.

[266] In contracts the same questions here discussed in torts have arisen. The same principle is involved with respect to breach of continuing contract. The law requires the parties in litigation to bring forward their whole case, and will not ordinarily permit them to open the same subject of litigation in respect to matters which might have been brought forward as part of contest. Henderson v. Henderson, 3 Hare, 100–115. Accordingly, where a contract upon an entire consideration stipulates for the performance of several acts in favor of the same person at the same time, it is entire, and separate suits cannot be maintained to recover for the failure to perform each several act. This was applied to recovery of damages for failure of the railroad company to construct crossings as a bar to an action for failure to construct fences. Indiana, B. & W. Ry. Co. v. Koons, 105 Ind. 507, 5 N. E. 549. But, on the other hand, it has been held that a continuance of a breach of a continuing covenant, after the commencement of a suit of damages therefor, is in law a renewal thereof, for which another action may be maintained, and a recovery in the former is no bar to the latter. This was applied to breach of covenant to repair contained in a written lease. Block v. Ebner, 54 Ind. 544. Generally, on this subject, see Thistle v. Union F. & Ry. Co., 29 U. C. C. P. 76; Cole v. Buckle, 18 U. C. C. P. 286; Smith v. Great Western Ry. Co., 6 U. C. C. P. 151; Knapp v. Great Western Ry. Co., Id. 187; Wood v. Michigan Air Line R. Co., 90 Mich. 212, 51 N. W. 265; Beach v. Crain, 2 N. Y. 86, 2 Barb. 120; Maunsell v. Hort, L. R. 1 Ir. 89; Baker v. Frick, 45 Md. 337; McIntosh v. Lown, 49 Barb. (N. Y.) 550–554, and cases cited; Shaffer v. Lee, 8 Barb. (N. Y.) 418; Benkard v. Babcock, 2 Rob. (N. Y.) 175–183; Fish v. Folley, 6 Hill (N. Y.) 54; Jex v. Jacob, 7 Abb. N. C. 452; Kissecker v. Monn, 36 Pa. St. 313. Et vide post, as to damage for constructing railroad on land without right.

[267] In Darley Main Colliery Co. v. Mitchell, 11 App. Cas. 127–145, overruling Lamb v. Walker, L. R. 3 Q. B. 389. And see Crumbie v. Wallsend Local Board [1891] 1 Q. B. 503, 60 Law J. Q. B. 392.

four propositions: (a) As to trespasses, the cause of action being complete without proof of injury or loss, damage must be recovered in a single action; (b) as to nuisances (being acts wrongful only when causing damage), successive actions must be brought for any consequences accruing after the institution of the first suit; (c) as to trespasses, resulting in continuing nuisances (the institution of the wrong being treated as a trespass, and its continuance as a nuisance), damages for the original act of trespass are to be recovered in the first action, but successive actions must be brought to recover damages for continuing the wrongful act; (d) as to permanent injuries not the result of trespass, all damages may be recovered in a single suit.[268]

This classification is more philosophical than consistent or sufficient. It involves the contradiction of assuming in its second rule that a nuisance is wrongful only when causing damage; and in its third rule, that a continuing trespass becomes a nuisance. As a matter of fact, a nuisance may be an invasion of an absolute (or simple) right, and not be wrongful only when causing damage.[269] It may fairly be called a radical treatment to regard all continuing trespasses as nuisances. The distinction between cases under the first and the fourth rules is often shadowy. In many cases both the rule of damages and the wrongful conduct are essentially the same. This view of the law, moreover, will not fit the cases.[270]

Whenever conduct is completed, and legal damages have been suffered, or are presumed by law, a cause of action has accrued. Recovery can be had on this only once,—for all harm. It is immaterial whether the conduct will or will not be actionable without proof of damages.[271] Conduct is complete if the means of prevention would involve the violation of another's right. If a man digs a hole in another's land, his conduct is complete, although a continuing source of damage may be created; but damages must be recovered once for all.[272] A person may be responsible, as a continuing wrong-

[268] 26 Am. Law Reg. (N. S.) 281, 345. And see Brewer, J., in Kansas Pac. Ry. Co. v. Mihlman, 17 Kan. 224–230.

[269] Post, p. 778, "Nuisance."

[270] Clerk & L. Torts, 45, note d.

[271] Fitter v. Veal, 12 Mod. 542; Clerk & L. Torts, 45.

[272] Clegg v. Dearden, 12 Q. B. 576.

doer, for permitting a nuisance to remain upon his land; but no one can be charged as such continuing wrongdoer who has not the right, and is not under the duty, to terminate that which caused the injury; and a party who enters another's lands, and commits a trespass by digging a ditch, does not thereby acquire a right to re-enter and fill up the ditch, and will be held liable as a trespasser if he does so re-enter.[273]

Where conduct is necessarily injurious, as where a nuisance assumes a permanent character, which will continue without change from any cause but human labor, it is regarded as completed. There the damage is an original damage, and may be at once so compensated. And a person is not entitled to successive actions for a continuing nuisance.[274] Thus, where the injury to one's well by the collection of injurious and offensive matter on adjacent premises is permanent in character, he may recover in one action all damages, both present and prospective.[275]

Where, however, there are both continuing damage and continuing conduct, the rule must be otherwise. There are, inter alia, four conspicuous objections to insisting upon recovery of all damages in one proceeding, viz.: (1) That it is not only unjust to assume,[276]

[273] Kansas Pac. Ry. Co. v. Mihlman, 17 Kan. 224–230. Further, on this subject, see 4 Cent. Law J. 108. Van Hoozier v. Hannibal & St. J. R. Co., 70 Mo. 145; Vedder v. Vedder, 1 Denio, 257; Mayor, etc., v. Lord, 17 Wend. 285; Stone v. Mayor, 25 Wend. 157. But see Thompson v. Gibson, 7 Mees. & W. 456. Cf. Morris v. Ryerson, 27 N. J. Law, 457; Cumberland & O. Canal Corp. v. Hitchings, 65 Me. 140.

[274] Troy v. Cheshire R. Co., 23 N. H. 83; Smith v. Railroad Co., 23 W. Va. 451; Fifth Nat. Bank v. New York El. R. Co., 28 Fed. 231; Seely v. Alden, 61 Pa. St. 302; Fowle v. New Haven & N. Co., 107 Mass. 352, 112 Mass. 334; Bizer v. Ottumwa Hydraulic Power Co., 70 Iowa, 145, 30 N. W. 172; Tucker v. Newman, 11 Adol. & E. 40; Schlitz Brewing Co. v. Compton, 142 Ill. 511, 32 N. E. 693, citing and commenting on many cases; Powers v. Council Bluffs, 45 Iowa, 652; Chicago, F. & B. Co. v. Sanche, 35 Ill. App. 174. Cf. Ohio & M. Ry. Co. v. Wachter, 123 Ill. 440, 15 N. E. 279. Some confusion arises on this point with respect to damages arising from impairment of the market value of property, and of the value of the use of such property during its continuance. Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62; Harmon v. Railroad Co., 87 Tenn. 614, 11 S. W. 703; Decatur G. L. & C. Co. v. Howell, 92 Ill. 19.

[275] Beatrice Gas Co. v. Thomas, 41 Neb. 602, 59 N. W. 925.

[276] Mansfield, J., in Robinson v. Bland, 2 Burrows, 1077–1087.

but it is also impossible to tell, how long the wrongdoer will continue his conduct, and consequently what damage the complainant suffers;[277] (2) that such a rule would deprive the court of the power, by one verdict to be followed by another, to "quicken his [defendant's] steps in removing the wrongful state of things";[278] (3) that the wrongdoer cannot thus acquire a right in the land to continue his wrong;[279] and (4) that, when the wrong is complete only on accrual of damage, the plaintiff has no cause of action until such harm has happened,—he has no cause of action for future damage. "Accordingly, in trespass and tort, a new action may be brought as often as new injuries and wrongs are repeated, and therefore damages shall be assessed only up to the time of the wrong complained of.[280] It was therefore held in Darley Main Colliery Co. v. Mitchell,[281] that, where the support to land was wrongfully withdrawn, a fresh action could be brought as each subsidence occurred; for under such circumstances there is not merely an original act, the results of which remain, but a state of things continued."[282] So, where there

[277] There is no presumption that the wrong will continue forever. Whitmore v. Bischoff, 5 Hun, 176.

[278] Ante, p. 409, note 268.

[279] Recovery with satisfaction for erecting a structure without authority on another's land does not operate as a purchase of the right to continue such erection. Russell v. Brown, 63 Me. 203. And see Brakken v. Railway Co., 31 Minn. 45, 16 N. W. 459; Adams v. Railroad Co., 18 Minn. 260 (Gil. 236); Hartz v. Railroad Co., 21 Minn. 358; Sherman v. Railroad Co., 40 Wis. 645; Anderson, L. & St. L. R. Co. v. Kernodle, 54 Ind. 314; Holmes v. Wilson, 10 Adol. & E. 503. Compare Hudson v. Nicholson, 5 Mees. & W. 436, with same case used as illustration in 10 Adol. & E. 509. Et vide Winterbourne v. Morgan, 11 East, 395; Rosewell v. Prior, 2 Salk. 459; Johnson v. Long, 1 Salk. 10; Rex v. Pedly, 1 Adol. & E. 822; Bowyer v. Cook, 4 C. B. 236; Battishill v. Reed, 18 C. B. 696; Thompson v. Gibson, 7 Mees. & W. 455; Shadwell v. Hutchinson, 4 Car. & P. 333; Cumberland v. Hitchings, 65 Me. 140; Morris v. Ryerson, 27 N. J. Law, 457; Dill v. McCloskey, 9 Phila. 76.

[280] Note to Hambleton v. Veere, 2 Saund. 161. And see Galway v. Metropolitan El. Ry. Co., 128 N. Y. 132, 28 N. E. 479 (a leading case on statute of limitation), and cases collected in great number at page 134, 128 N. Y., and page 479, 28 N. E.; American Bank Note Co. v. New York El. R. Co., 129 N. Y. 264, 29 N. E. 302; Doyle v. Railway Co., 136 N. Y. 512, 32 N. E. 1008; Rumsey v. Railroad Co., 133 N. Y. 82, 30 N. E. 654; Rosewell v. Prior, 2 Salk. 459 (ancient light).

[281] 11 App. Cas. 127.

[282] Per Bowen, L. J., Mitchell v. Darley Main Colliery Co., 14 Q. B. Div. 125–138.

is a continuing illegal obstruction to use of water, "the general rule is that successive actions may be brought as long as the obstruction is maintained. A recovery in the first action establishes the plaintiff's right. Subsequent actions are to recover damages for a continuance of the obstruction." [283] And, generally, "new actions may be brought as often as new damages arise." [284] To constitute a con-

[283] Mercur, J., in Bare v. Hoffman, 79 Pa. St. 71. And see Earl, J., in Uline v. New York Cent. & H. R. R. Co., 101 N. Y. 98, 4 N. E. 536, a leading case. So, obstruction of ditch draining farmer's land, Steinke v. Bentley, 6 Ind. App. 663, 34 N. E. 97. Et vide St. Louis, A. & T. H. R. Co. v. Launch, 41 Ill. App. 592; so, obstructing a ditch discharging on plaintiff's land, Wendlandt v. Cavanaugh, 85 Wis. 256, 55 N. W. 408; diversion of a bed by construction of a roadbed, George v. Wabash Western R. Co., 40 Mo. App. 433; obstruction of water course, each continuance a fresh one, Ohio & M. Ry. Co. v. Thillman, 143 Ill. 127, 32 N. E. 529; as to erection of buttress, Holmes v. Wilson, 10 Adol. & E. 503. So, if a railroad company, by excessive and improper use, substantially destroy the easement of way of ingress and egress appurtenant to an abutting lot, the owner of such lot can maintain successive action for such nuisance, recovering the damages that have accrued up to the time the action was brought, and a recovery in one action will not bar a subsequent one brought for a continuance of such wrong. Harmon v. Railroad Co., 87 Tenn. 614, 11 S. W. 703; Uline v. New York Cent. & H. R. R. Co., 101 N. Y. 98, 4 N. E. 536. Damages for overflowing and washing land by the construction of a boom in the river on which it abuts can be recovered only to the date of commencing action therefor, as the continuance of the trespass gives a new cause of action. Rogers v. Coal River Boom & Driving Co., 39 W. Va. 272, 19 S. E. 401. Cf. Russell v. Brown, 63 Me. 203; Lackland v. North Missouri Ry. Co., 31 Mo. 180; Hopkins v. Western Pac. Ry. Co., 50 Cal. 190; Carl v. The Sheboygan & F. du L. Ry. Co., 46 Wis. 625, 1 N. W. 295; Pinney v. Berry, 61 Mo. 359; Cumberland v. Hitchings, 65 Me. 140; Park v. Railway Co., 43 Iowa, 636; Frith v. City of Dubuque, 45 Iowa, 406; Savannah & O. Canal Co. v. Bourquin, 51 Ga. 378; Hatfield v. Central Ry. Co., 33 N. J. Law, 251; Brakken v. Minneapolis & St. L. Ry. Co., 29 Minn. 41, 11 N. W. 124; Gould v. McKenna, 86 Pa. St. 297; Bare v. Hoffman, 79 Pa. St. 71; Westbourne v. Mordant, Cro. Eliz. 191; Penruddock's Case, 5 Coke, 205; Same v. Barwith, Cro. Jac. 231; Shadwell v. Hutchinson, 4 Car. & P. 333.

[284] Troy v. Cheshire Ry. Co., 23 N. H. 83; Hicks v. Herring, 17 Cal. 563; Phillips v. Terry, *42 N. Y. 313; Hopkins v. Western Pac. R. Co., 50 Cal. 190–194; Patterson v. Great Western Ry. Co., 8 U. C. C. P. 89; Cumberland & O. Canal Corp. v. Hitchings, 65 Me. 140, and cases cited; Hodges v. Hodges, 5 Metc. (Mass.) 205; Freudenstein v. Heine, 6 Mo. App. 287; Pinney v. Berry, 61 Mo. 359; Van Hoozler v. Hannibal & St. J. R. Co., 70 Mo. 145; Delaware & R. Canal Co. v. Wright, 21 N. J. Law, 469; Blunt v. McCormick, 3 Denio,

tinuing nuisance, however, there must have been an original nuisance.[285]

The jury may not consider judgments recovered for the earlier maintenance of the same nuisance, for the purpose of reducing damages.[286] On the contrary, "very exemplary damages will probably be given if, after one verdict against him, the defendant has the hardiness to continue the nuisance."[287] Recovery of a judgment not only does not bar plaintiff's right to recover in a subsequent action for a continuance of the same nuisance,[288] but, also, such judgment cannot be collaterally attacked in an action for continuance of the same nuisance. If the defendant in such action admits the continuance of the nuisance, the only question for the jury is the amount of damages.[289] The defendant is, however, entitled to a reasonable time after notice within which to abate; and, if he abates within a reasonable time after such notice, the plaintiff has no cause of action for a continuing nuisance.[290]

140. Legislation has generally changed the common law as to damages, both as to—

(a) The extent of recovery; and

(b) The wrong for which recovery can be had.

Extent of Recovery.

Of the many instances in which the common-law rule as to the extent damages are recoverable has been changed by statute, what are ordinarily known as double or treble damages afford a good illustration. Common-law damages were always single.[291] It is al-

283; Thayer v. Brooks, 17 Ohio, 489; Bare v. Hoffman, 79 Pa. St. 71; Duncan v. Markley, Harp. (S. C.) 276; Hazeltine v. Case, 1 N. W. 66.

285 Atkinson v. City of Atlanta, 81 Ga. 625, distinguishing Smith v. City of Atlanta, 75 Ga. 110.

286 Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 Sup. Ct. 185, collecting cases page 575, 137 U. S., and page 185, 11 Sup. Ct.

287 3 Bl. Comm. § 220; McCoy v. Danley, 57 Am. Dec. 680.

288 Byrne v. Minneapolis & St. L. R. Co., 38 Minn. 212, 36 N. W. 339; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451.

289 Paddock v. Somes, 102 Mo. 226, 14 S. W. 746.

290 As applied to draining of surface water on plaintiff's ground, Rychlicki v. City of St. Louis, 115 Mo. 662, 22 S. W. 908.

291 1 Burrill, Prac. 237.

most universally provided by statute that, as to certain trespasses, —conspicuously, where ornamental shrubs and trees are injured,— double or treble damages may be awarded.[292] Similar provisions are common with respect to killing stock.[293] The legislature has the power to provide for the recovery of a certain sum, as punitive damages, where an injury is caused by an illegal act, though the same illegal act may subject the offender to a criminal prosecution.[294]

Where a general verdict is returned under such a statute, the presumption is that it includes all the damages to which the plaintiff is entitled.[295] However, it has been held that the better practice is for the jury to find for single damages in terms, and for the court, on motion, to double or treble them, as the case may require.[296] Such statutes are penal. Therefore they are strictly construed.[297]

Damages for Death by Wrongful Act.

Where damages are awarded for death by wrongful act, ordinarily both the cause of action and the extent of recovery are created and determined by statute.[298] The ordinary statutory extent of recovery is the reasonable expectation of pecuniary benefit of the statutory beneficiaries.[299] It is commonly (but not invariably) provided

[292] Yocum v. Zahner, 162 Pa. St. 468, 29 Atl. 778; Brown v. State, 100 Ala. 92, 14 South. 761; Humes v. Proctor, 73 Hun, 265, 26 N. Y. Supp. 315. Berg v. Baldwin, 31 Minn. 541, 18 N. W. 821; Potulni v. Saunders, 37 Minn. 517, 35 N. W. 319.

[293] Spealman v. Missouri Pac. R. Co., 71 Mo. 434; Scott v. St. Louis, I. M. & S. R. Co., 75 Mo. 136; Henderson v. Wabash R. Co., 81 Mo. 605.

[294] State v. Schoonover, 135 Ind. 526, 35 N. E. 119. Cf. State v. Stevens, 103 Ind. 55, 2 N. E. 214. But see dissenting opinion of Judge Elliott.

[295] Tait v. Thomas, 22 Minn. 537; Livingston v. Platner, 1 Cow. (N. Y.) 175.

[296] Cross v. U. S., Gall. 26, Fed. Cas. No. 3,434; 1 Sedg. Dam. (7th Ed.) 588; 1 Suth. Dam. 826; Royse v. May, 93 Pa. St. 454; Chipman v. Emeric, 5 Cal. 239; Palmer v. York Bank, 18 Me. 166; Shrewsbury v. Bawtlitz, 57 Mo. 414; Osburn v. Lovell, 36 Mich. 246. It would seem that, to entitle plaintiff to double or treble damages, the complaint must distinctly refer to the statute. Livingston v. Platner, supra. And see Strange v. Powell, 15 Ala. 452.

[297] Sedg. St. & Const. Law, 284.

[298] Ante, p. 330, "Death by Wrongful Act."

[299] Kelley v. Central R. Co., 48 Fed. 663; Boden v. Demwolf, 56 Fed. 846. Loss of companionship or society, e. g. of a husband, is not an element of damage. Schaub v. Railroad Co., 106 Mo. 74, 16 S. W. 924; Atchison, T. &

that the recovery shall, under no circumstance, exceed a stated amount.[300] Of such a statute, Judge Parker said in Dwyer v. Railway Co.:[301] "When we have a statute so barbaric, and almost brutal, as to prohibit the consideration by the jury of that terrible agony, grief, and suffering of the faithful wife and her children for their loss by death of such a husband and father as Dwyer, we should award fairly compensatory damages. The award should be made with a reasonably liberal spirit. Under this statute, man is considered only an animal,—a beast of burden, like a horse or a mule,—with nothing to be considered, when he is killed by negligence, but his earning capacity. Then, under such a condition, when his earning power is fairly shown, and manifestly the jury have not gone beyond it, in giving damages to his wife and children, we cannot infer that they have done that which is shocking to its sense of justice, or that they acted from passion or prejudice."

S. F. R. Co. v. Wilson, 4 U. S. App. 25, 1 C. C. A. 25, 48 Fed. 57. But see Harkins v. Car Co., 52 Fed. 724. Nor can damages be given for the pain and suffering of deceased, nor the wounded feelings or grief of his relatives. Kelley v. Central R. Co., 48 Fed. 663; Cheatham v. Red River Line, 56 Fed. 248; The Corsair, 145 U. S. 335, 12 Sup. Ct. 949.

[300] Cooley, Torts, 319; 5 Am. & Eng. Enc. Law, 128, note 2.

[301] 52 Fed. 87–90. As in California. Code Civ. Proc. Cal. § 377; In re Humboldt Lumber Manuf'rs' Ass'n, 60 Fed. 428. In Colorado a parent may recover damages for the death of a child, although the latter never contributed to the parent's support. Mollie Gibson Consolidated Mining & Milling Co. v. Sharp (Colo. App.) 38 Pac. 850. The limit in many of the state statutes, as well as that of congress, in such cases should have weight in fixing the amount of damages to be recovered. Cheatham v. Red River Line, 56 Fed. 248–250. In this case Billings, J., said: "There are no tables of productive lives. It is human experience that some lives are almost worthless to those dependent on them, and some which are and which promise to be support and comfort come to produce nothing but shame and sorrow. In fixing the value of human life, and in trying to be just alike to the injured and the injurer, no chimerical estimate should be made, but rather should there be a resort to sober judgment." Limiting jury to certain mathematical calculations is erroneous. St. Louis, I. M. & S. Ry. Co. v. Needham, 10 U. S. App. 339, 3 C. C. A. 129, 52 Fed. 371. In Harkins v. Car Co., 52 Fed. 724, it was held that the wife's maximum of recovery was not necessarily limited to a sum which would produce an annual income equal to one-half his annual earnings. Accordingly, a verdict of $7,000 for the death of a day laborer was sustained.

Civil Damage Acts.

In many states it is expressly enacted that liquor dealers may be held liable in civil damages for harm caused by the sale of intoxicants.[302]

[302] Black, Intox. Liq. c. 13; Cooley, Torts, pp. 283-307. Among the more recent illustrative cases on this subject are State v. Cox (Kan. App.) 40 Pac. 816; Cornelius v. Hultman (Neb.) 62 N. W. 891; Franklin v. Frey (Mich.) 63 N. W. 970; Ford v. Cheever, Id. 975; Plucknett v. Tippey (Neb.) 63 N. W. 845.

Part II.

SPECIFIC WRONGS.

CHAPTER VI.

WRONGS AFFECTING SAFETY AND FREEDOM OF PERSON.

FALSE IMPRISONMENT.

141. False imprisonment is the unlawful and total restraint of the liberty of the person.

Legality of Restraint.

The restraint must be illegal, but need not be malicious. Lawful authority to restrain the freedom of locomotion of another person is a full defense to an action for false imprisonment.[1] At common law, the arrest of a privileged person was not the basis for an action of false imprisonment, because such arrest is voidable only, and not void. It could not constitute a trespass, and so was unavailable and insufficient as a foundation for the action.[2] The arrest of

[1] Diehl v. Friester, 37 Ohio St. 473. Post, p. 424, "Legal Authority as Justification." Where a firm holds property in trust, a misappropriation by one partner, with the knowledge and assent of the other, is a misappropriation by the latter, so far as the right to arrest him in a civil action for a breach of the trust is concerned. Boykin v. Maddrey, 114 N. C. 89, 19 S. E. 106. Patteson, J., in Bird v. Jones, 7 Adol. & E. (N. S.) 742–752, 7 Q. B. 742. And see Bauer v. Clay, 8 Kan. 580, and Come v. Knowles, 17 Kan. 440.

[2] Deo v. Van Valkenburgh, 5 Hill, 242; Kreiser v. Scofield, 10 Misc. Rep. 350, 31 N. Y. Supp. 23; Smith v. Jones, 76 Me. 138; 7 Am. & Eng. Enc. Law, 694, and notes; 3 Lawson, Rights, Rem. & Prac. 1067, and note; Cooley, Const. Lim. (5th Ed.) 162, note.

the person may have been entirely proper, but subsequent detention, as for an unreasonable time, or refusal to accept any or reasonable bail, may constitute false imprisonment.[3] At common law, trespass, not case, lay for false imprisonment.[4] Accordingly, liability proceeded, not on the theory of evil motive or of negligence, but of acting at peril.[5] Therefore, to entitle the plaintiff to recover, it is not necessary for him to allege or prove either malice or want of probable cause.[6] Malice is material only so far as the question of damage is concerned.[7] It is immaterial whether the detention be accomplished with or without legal process.[8]

[3] Manning v. Mitchell, 73 Ga. 660; Ocean Steamship Co. v. Williams, 69 Ga. 251; Gibbs v. Randlett, 58 N. H. 407. But it is not an actionable trespass for a sheriff to arrest the accused on a warrant procured by defendant in one county, take him into a second for identification, and finally into a third,—his own county. Knight v. International & G. N. Ry. Co., 9 C. C. A. 376, 61 Fed. 87. Cf. Kent v. Miles, 65 Vt. 582, 27 Atl. 194.

[4] 1 Chit. Pl. (14th Am. Ed.) p. 185; Withers v. Henley, Cro. Jac. 379; Maher v. Ashmead, 30 Pa. St. 344; Bebee v. Steel, 2 Vt. 314; Kent v. Miles, 65 Vt. 582, 27 Atl. 194; Knight v. International & G. N. Ry. Co., 9 C. C. A. 376, 61 Fed. 87; Castro v. De Uriarte, 12 Fed. 250; Holly v. Carson, 39 Ala. 345; Platt v. Niles, 1 Edm. Sel. Cas. (N. Y.) 230; Price v. Graham, 3 Jones (N. C.) 545. In Michigan, trespass on the case lies for false imprisonment (by statute), and the two may be joined in one action. Moore v. Thompson, 92 Mich. 498, 52 N. W. 1000. And see Barhydt v. Valk, 12 Wend. 145; Nebenzahl v. Townsend, 61 How. Prac. 353.

[5] State v. Hunter, 106 N. C. 796, 11 S. W. 366; Landrum v. Wells (Tex. Civ. App.) 26 S. W. 1001.

[6] Cunningham v. East River Electric Light Co. (Super. N. Y.) 17 N. Y. Supp. 372; King v. Johnston, 81 Wis. 578, 51 N. W. 1011; Rich v. McInery (Ala.) 15 South. 663; Boaz v. Tate, 43 Ind. 60; Akin v. Newell, 32 Ark. 605; Boeger v. Langenberg, 97 Mo. 390, 11 S. W. 223; Rosen v. Stein (Sup.) 7 N. Y. Supp. 368. See Smith v. Botens, 59 Hun, 617, 13 N. Y. Supp. 222; Clow v. Wright, Brayt. (Vt.) 118; Krebs v. Thomas, 12 Ill. App. 266; Neall v. Hart, 115 Pa. St. 347, 8 Atl. 628; Firestone v. Rice, 71 Mich. 377, 38 N. W. 885; Olmstead v. Doland (Sup.) 6 N. Y. Supp. 130; Mitchell v. Malone, 77 Ga. 301; Going v. Dinwiddie, 86 Cal. 633, 25 Pac. 129; Murray v. Friensberg (Sup.) 15 N. Y. Supp. 450.

[7] Johnson v. Bouton, 35 Neb. 898, 53 N. W. 995; Hewitt v. Newburger, 66 Hun, 230, 20 N. Y. Supp. 913. But see Beebe v. De Baum, 8 Ark. 510; Akin v. Newell, 32 Ark. 605; Chrisman v. Carney, 33 Ark. 316; Ruffner v. Williams, 3 W. Va. 243; Frazier v. Turner, 76 Wis. 562, 45 N. W. 411.

[8] Lynch v. Metropolitan El. Ry. Co., 90 N. Y. 77; Hildebrand v. McCrum, 101 Ind. 61.

Sufficiency of Restraint.

The restraint must be total, not partial. A man is not imprisoned who has an escape opened to him. A mere partial obstruction of his will does not constitute an actionable restraint of his liberty. "A prison may have its boundary, large or narrow, visible or tangible, or, though real, still in the conception only. It may be movable or fixed, but a boundary it must have, and that boundary the party imprisoned must be prevented from passing. He must be prevented leaving that place within the ambit of which the party imprisoning would confine him, except by prison breach." Thus, where one entered an enclosure by which another had appropriated a part of the public highway for seats to view a boat race, and was prevented from going onward, but was allowed to remain or go back as he chose, it was held that there was no total restraint, or forcible detention against his will, constituting false imprisonment.[9]

Every confinement of the person is an imprisonment, whether it be in a common prison or a private house, or in the stocks, or even by forcibly detaining one in the public street.[10] Detention within railway gates until fare is paid may constitute such restraint.[11] So, where conspirators enticed a man into a room to see their sister, and then charged him with having agreed to pay a large sum for breach of promise to marry her, and intimidated him into admitting it, his suit for false imprisonment was sustained.[12] A fortiori, keeping a suspect in confinement an unreasonable time, without taking him to a magistrate, is actionable restraint.[13] And the

[9] Bird v. Jones, 7 Q. B. 742, 7 Adol. & E. (N. S.) 742, 752; Hill v. Taylor, 50 Mich. 549, 15 N. W. 899; Wright v. Wilson, 1 Ld. Raym. 739; Mowry v. Chase, 100 Mass. 79; Hart v. Flynn, 8 Dana (Ky.) 190; French v. Bancroft, 1 Metc. (Mass.) 502.

[10] 3 Bl. Comm. p. 127; Year Book, Book of Assizes, fol. 104, p. 85.

[11] Lynch v. Metropolitan El. Ry. Co., 90 N. Y. 77.

[12] Hildebrand v. McCrum, 101 Ind. 61. So, where a cashier locked plaintiff in a bank, Woodward v. Washburn, 3 Denio, 369.

[13] Cochran v. Toher, 14 Minn. 385 (Gil. 293); Lavina v. State, 63 Ga. 513; Anderson v. Beck, 64 Miss. 113, 8 South. 167; Hayes v. Mitchell, 69 Ala. 452; Hopner v. McGowan, 116 N. Y. 405, 22 N. E. 558.

plaintiff may recover although only a portion of the time of the imprisonment was illegal.[14]

Actual manual touching of the body is not necessary to constitute false imprisonment. "It is absurd to contend that every imprisonment involves a battery."[15] Thus, if the officer tells defendant that he arrests him, and locks him in a room, there is an arrest.[16] So, to make one, through fear, pay fare on a public ferry, by threatening not to allow him to leave otherwise, is false imprisonment, although the detention was only for 10 or 15 minutes.[17]

Even so slight an interference with freedom of locomotion as being shadowed by a detective is sufficient restraint to be the basis of an action for false imprisonment.[18]

While, in general, no actual force or compulsory seizure is necessary to constitute an arrest or seizure, there must be words used and acts done, towards the person to be arrested, clearly showing an intention to arrest, and his submission must be to a threatened and reasonably apprehended force.[19] There must be detention against the will of the plaintiff. "For," said Earl, J., in Moses v. Dubois,[20] "if he voluntarily place himself in a situation where another may lawfully do that which has the effect of restraining liberty, especially if he refuses to depart when he may, he cannot complain that he is unlawfully imprisoned against his will." It is, therefore, absolutely essential that plaintiff should know of the imprisonment. Hence, a schoolboy, who was detained from his family by his schoolmaster, to enforce payment of tuition fees, could not recover in trespass for assault and false imprisonment when it was

[14] Bauer v. Clay, 8 Kan. 580. A police officer who arrests a person on a criminal charge without a warrant, and detains him an unreasonable time without arraigning him before a magistrate, and without any direction of a magistrate, is liable as a trespasser ab initio. Pastor v. Regan, 9 Misc. Rep. 547, 30 N. Y. Supp. 657.

[15] Emmett v. Lyne (1805) 1 Bos. & P. (N. R.) 255; Genner v. Sparks (1704) 1 Salk. 79; Searls v. Viets, 2 Thomp. & C. 224, commenting on earlier cases.

[16] Williams v. Jones, Hardw. Cas. Temp. 298.

[17] Smith v. State, 7 Humph. (Tenn.) 43. Et vide McNay v. Stratton, 9 Ill. App. 215.

[18] Fortheringham v. Adams Exp. Co., 36 Fed. 252.

[19] Greathouse v. Summerfield, 25 Ill. App. 296.

[20] 1 Dudley (S. C. Law) 209; Spoor v. Spooner, 12 Metc. (Mass.) 281.

not shown that he knew of the restraint upon his person.[21] There must be some sort of personal coercion. Merely to inform a man that he is under arrest and not take him into custody does not constitute false imprisonment.[22] If an officer informs a man that he is under arrest, and thereupon the arrested person volunteers to go with the officer and meet the charge, there is no false imprisonment;[23] but it would be otherwise if he went upon compulsion.[24] Detention against desire, prevention from going where one may wish, is false imprisonment.[25]

SAME—WHO LIABLE.

142. All persons who accomplish, procure, aid, or assist in an unlawful detention are liable as principals. Liability may also attach by ratification, or by virtue of relationship of parties.[26]

Where one has directly and unlawfully restrained another, as in case of an officer who improperly arrests, he is the immediate

[21] Herring v. Boyle, 1 Cromp., M. & R. 377.

[22] Hill v. Taylor, 50 Mich. 549, 15 N. W. 899; Greathouse v. Summerfield, 25 Ill. App. 296; Brushaber v. Stegemann, 22 Mich. 267.

[23] Cf. Genner v. Sparks, 1 Salk. 79; Homer v. Battyn, Bull. N. P. 62; Warner v. Riddiford, 4 C. B. (N. S.) 180 (205); Chinn v. Morris, 2 Car. & P. 361; Russen v. Lucas, 1 Car. & P. 153,—with Williams v. Jones, Hardw. Cas. Temp. 298; Arrowsmith v. Le Mesurier, 2 Bos. & P. (N. R.) 211; Lawson v. Buzines, 3 Har. (Del.) 417; Coppinger v. Bradley, 5 Ir. Law T. 282; Peters v. Stanway, 6 Car. & P. 737; Grainger v. Hill, 4 Bing. N. C. 212; Strout v Gooch, 8 Greenl. (Me.) 126; Marshall v. Heller, 55 Wis. 392, 13 N. W. 236; Moore v. Thompson, 92 Mich. 498, 52 N. W. 1000 (see dissenting opinion by Grant, J.); Gold v. Bissell, 1 Wend. 210; Emery v. Chesley, 18 N. H. 202; Mooney v. Chase, 109 Mass. 79.

[24] Pike v. Hanson, 9 N. H. 491.

[25] Wood v. Lane, 6 Car. & P. 774; Chinn v. Morris, 2 C. B. 361; Pocock v. Moore, Ryan & M. 321. Wherefore, when plaintiff was hoaxed into a paid ride for a horse thief, he could not complain, because he went voluntarily. State v. Lunsford, 81 N. C. 528; Hawk v. Ridgway, 33 Ill. 473; Sorenson v. Dundas, 50 Wis. 335, 7 N. W. 259; Comer v. Knowles, 17 Kan. 436.

[26] In 7 Am. & Eng. Enc. Law, 665, the cases on false imprisonment are collected by Mr. James Kerr, as to liability of parent, guardian, teacher, and other persons, under direct titles. It is beyond the scope of this book to go into particulars on this point.

wrongdoer, and is, of course, liable.[27] He may be liable alone, or jointly with others.[28] It has been said that false imprisonment is an act of trespass, a direct wrong in which the defendant must have personally participated.[29] The defendant, however, is liable if he directed the arrest.[30] But merely giving testimony as a com-

[27] In an action for false imprisonment, against a sheriff, an instruction is misleading which states that if defendant had good reason to and in good faith did believe that plaintiff was guilty of adultery he was warranted in making the arrest on such charge, and holding him therefor, since a prosecution for adultery can only be instituted by the husband or wife of one of the guilty persons, and an officer, whatever his suspicions may be, has no right to make such an arrest. Filer v. Smith, 96 Mich. 347, 55 N. W. 999; Twilley v. Perkins, 77 Md. 252, 26 Atl. 286; Landrum v. Wells (Tex. Civ. App.) 26 S. W. 1001. And, see, in Busteed v. Parsons, 54 Ala. 393, 25 Am. Rep. 688, seven rules are formulated by the editor as to the liability of judges and magistrates.

[28] Where a mittimus is void for not properly stating the cause of commitment, the person who at the request of the justice draws up the commitment, as well as those who arrest him thereunder, and take him to and imprison him in jail, are liable for false imprisonment. Clyma v. Kennedy, 64 Conn. 310, 29 Atl. 539. As to an attorney advising, and the sheriff executing, a void warrant, see Tenney v. Harvey, 63 Vt. 520, 22 Atl. 659; sheriff and deputy, Wolf v. Perryman, 82 Tex. 112, 17 S. W. 772; sheriff and judge, Zeller v. Martin, 84 Wis. 4, 54 N. W. 330; father and son, Carson v. Dessau (Super. N. Y.) 13 N. Y. Supp. 232; Id., 142 N. Y. 445, 37 N. E. 493. Where plaintiff was arrested without a warrant by an officer at the request of defendant, the fact that in an action against both for false imprisonment the officer was found not guilty, and defendant guilty, is no ground for setting aside the verdict. Burroughs v. Eastman, 101 Mich. 419, 59 N. W. 817.

[29] Brown v. Chadsey, 39 Barb. 253–261.

[30] Hopkins v. Crowe, 7 Car. & P. 373, 4 Adol. & E. 774. Compare Davis v. Russell, 5 Bing. 354; Ball v. Horrigan, 65 Hun, 621, 19 N. Y. Supp. 913. But merely calling attention to violation of ordinance does not attach liability. Veneman v. Jones, 118 Ind. 41, 20 N. E. 644. Compare Barthe v. Larquie, 42 La. Ann. 1312, 7 South. 80; McGarrahan v. Lavers, 15 R I. 302, 3 Atl. 592. Et vide Hawkins v. Manston (Minn.) 59 N. W. 309. Thus, where defendant went to the magistrate's office, said he wanted a warrant for plaintiff, stated the facts, swore to the information, procured the warrant, and handed it to the officer to serve "right away," offered to provide a "rig," and later sent word to the officer where he could (and did) find plaintiff, the information and warrant being void, as failing to state a crime, defendant was liable for plaintiff's false imprisonment thereunder. Hewitt v. Newburger, 141 N. Y. 538, 36 N. E. 593; Id., 66 Hun, 230, 20 N. Y. Supp. 913.

plaining witness, or honestly making a complaint, does not attach liability. Such a witness may be liable if he has directed the officer to take the plaintiff into custody.[31] Liability may attach because of ratification or adoption of the false imprisonment.[32] It may arise out of relationship of master and servant, from application of respondeat superior, on principles already considered.[33] It is subject to exemptions previously discussed.[34]

[31] Lock v. Ashton, 12 Q. B. 870; Hopkins v. Crowe, 7 Car. & P. 373, 4 Adol. & E. 774; Brown v. Chapman, 6 C. B. 365; West v. Smallwood, 3 Mees. & W. 418; Barber v. Rollinson, 1 Cromp. & M. 330; Leigh v. Webb, 3 Esp. 165; Carratt v. Morley, 1 Q. B. 18; Brown v. Chadsey, 39 Barb. 253; Nowak v. Waller, 56 Hun, 647, 10 N. Y. Supp. 199; Booth v. Kurrus, 55 N. J. Law, 370, 26 Atl. 1013; Murphy v. Walters, 34 Mich. 180; Coffin v. Varila (Tex. Civ. App.) 27 S. W. 956. Where one requests an officer to arrest another, it is immaterial whether or not he acts maliciously, or whether or not there is want of probable cause, unless the officer makes the arrest because it is requested, and not of his own volition. Rich v. McInery (Ala.) 15 South. 663. Further, as to distinction between action, interference, and mere submission to judgment of tribunal, see Green v. Elgie, 5 Q. B. 99; Austin v. Dowling, L. R. 5 C. P. 534.

[32] Though plaintiff was not arrested by defendant's order, the arrest is ratified and constitutes a technical false imprisonment, where defendant afterwards ordered the officer to detain plaintiff, though it was only for a few minutes. Callahan v. Searles, 78 Hun, 238, 28 N. Y. Supp. 904. Adopted, Clark v. Starin, 47 Hun, 345; Wachsmuth v. Merchants' Nat. Bank, 96 Mich. 426, 56 N. W. 9; Travis v. Standard, etc., Ins. Co., 86 Mich. 288; Ante, p. 43, "Ratification."

[33] Gillingham v. Ohio R. R. Co., 35 W. Va. 588, 14 S. E. 243; Cunningham v. Seattle Electric Railway & Power Co., 3 Wash. St. 471, 28 Pac. 745; Pinkerton v. Gilbert, 22 Ill. App. 568; Pearce v. Needham, 37 Ill. App. 90; Travis v. Standard Life Acc. Ins. Co., 86 Mich. 288, 49 N. W. 141; Neimitz v. Conrad, 22 Or. 164, 29 Pac. 548; Duggan v. Baltimore & O. Ry., 159 Pa. St. 248, 28 Atl. 182, 186. A railroad company is not liable for the action of its local check clerk of freight in prosecuting one without probable cause, for the theft of articles from its cars. Flora v. Russell (Ind. Sup.) 37 N. E. 593. A railroad company is liable for the false arrest and imprisonment by its depot agent of a man who used a water closet at its depot set apart for ladies only. Illinois Cent. R. Co. v. King, 69 Miss. 852, 13 South. 824. In an action for false imprisonment, the testimony of one who arrested plaintiff that he did so by order of defendant, without showing the relationship between defendant and witness, does not justify a judgment against defendant. Hawkins v. Manston (Minn.) 59 N. W. 309.

[34] Judge acting without jurisdiction, Rudd v. Darling, 64 Vt. 456, 25 Atl.

SAME—DEFENSES.

143. Defenses peculiar to actions for false imprisonment may operate by way of—

(a) Justification, or

(b) Mitigation.

144. In an action for false imprisonment a complete justification is made out where it is shown that—

(a) The arrest was under a sufficient warrant, or

(b) The arrest was lawful without a warrant.

145. An arrest under a warrant, of the person described therein, for the offense charged, is justified when the warrant is regular on its face and is issued by a court of competent jurisdiction under regular proceedings in accordance with valid legislation, even though the warrant is, in fact, irregular and voidable, but not when it is void.

146. Both by common law and, commonly, by statute, an arrest without a warrant may be justified, dependent on the person making the arrest (whether an officer of the law or a private person), the dignity of the offense, and the time and place of its commission.

Justification by Judicial Warrant.

A sufficient judicial warrant takes away from an imprisonment the essential element of illegality, and completely justifies an ar-

479. Justice and irregular process, Austin v. Vrooman, 128 N. Y. 229, 28 N. E. 477; Booth v. Kurrus, 55 N. J. Law, 370, 26 Atl. 1013; Butler v. Potter, 17 Johns. 145. City recorder, Brunner v. Downs, 63 Hun, 626, 17 N. Y. Supp. 633; Boutte v. Emmer, 43 La. Ann. 980, 9 South. 921. Compare Thompson v. Whipple, 54 Ark. 203, 15 S. W. 604. Whether acting in public or private capacity, i. e. as police officer or watchman, or as a servant, see Pratt v. Brown, 80 Tex. 608, 16 S. W. 443; Norfolk & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935; Tolchester Beach Imp. Co. v. Steinmeier, 72 Md. 313, 20 Atl. 188; Southern Pac. Co. v. Hamilton, 4 C. C. A. 441, 54 Fed. 468. Et vide Oppenheimer v. Manhattan Ry. Co., 63 Hun, 633, 18 N. Y. Supp. 411; Wells v. Washington Market Co., 19 D. C. 385.

rest.[35] If the warrant be wrongfully obtained, although upon sufficient legal proceedings, the civil action should be malicious prosecution, and not false imprisonment.[36]

It is by no means clear when a warrant is not sufficient to justify the arrest. If it be void on its face, it is, of course, not sufficient.[37] To be regular on its face, the warrant must at least charge the commission of a criminal wrong,[38] and conform in other respects with statutory provisions and recognized practice.[39] If the arrest is made under process which is voidable only, because of irregularities in the proceedings under which the writ was issued, it would seem that the warrant may not be collaterally attacked,[40]

[35] Marks v. Townsend, 97 N. Y. 590; Jeffries v. McNamara, 49 Ind. 142–145, collecting cases: Joiner v. Ocean S. S. Co., 86 Ga. 238, 12 S. E. 361; Knight v. Railway Co., 9 C. C. A. 376, 61 Fed. 87; Finley v. Gutter Co., 99 Mo. 559, 13 S. W. 87; Lieb v. Shelby Iron Co., 97 Ala. 626, 12 South. 67; Pratt v. Brown, 80 Tex. 608, 16 S. W. 443; Kent v. Miles, 65 Vt. 582, 27 Atl. 194.

[36] Hobbs v. Ray (R. I.) 25 Atl. 694; Murphy v. Martin, 58 Wis. 278, 16 N. W. 603. Post, p. 630, "Malicious Prosecution."

[37] Gelzenleuchter v. Niemeyer, 64 Wis. 316, 25 N. W. 442; Id., Chase, Lead. Cas. 88, collecting cases on page 322, 64 Wis., and page 442, 25 N. W.; McLendon v. State, 92 Tenn. 520, 22 S. W. 200; Emery v. Hapgood, 7 Gray, 55; Gold v. Bissel, 1 Wend. 210; Blythe v. Thompson, 2 Abb. Prac. 468. And see Wachsmuth v. Bank, 96 Mich. 426, 56 N. W. 9; Buzzell v. Emerton, 161 Mass. 176, 36 N. E. 796.

[38] Hall v. Rogers, 2 Blackf. (Ind.) 429; Frazier v. Turner, 76 Wis. 562, 45 N. W. 411; Collins v. Brackett, 34 Minn. 339, 25 N. W. 708. The officer must take notice if the warrant is void on its face. Grumond v. Raymond, 1 Conn. 39; Lewis v. Avery, 8 Vt. 287; Clayton v. Scott, 45 Vt. 386; Fisher v. McGirr, 1 Gray, 1; Ely v. Thompson, 3 A. K. Marsh. 76; Grace v. Mitchell, 31 Wis. 533.

[39] In Minnesota, the warrant need not show all facts essential to constitute an indictment. It must charge that at least an offense was committed, and that there was reason to believe that the accused committed it. Collins v. Brackett, 34 Minn. 339, 25 N. W. 708. As to essentials for arrest at night, in New York, see Murphy v. Kron, 20 Abb. N. C. 259. The warrant for arrest for larceny, in Wisconsin, must show value of property stolen, or it is no defense. Frazier v. Turner, 76 Wis. 562, 45 N. W. 411.

[40] Jennings v. Thompson, 54 N. J. Law, 55, 22 Atl. 1008; Swart v. Rickard, 74 Hun, 339, 26 N. Y. Supp. 408; Aldrich v. Weeks, 62 Vt. 89, 19 Atl. 115; Fischer v. Langbein, 103 N. Y. 84, 8 N. E. 251; Id., 62 How. Prac. 238; Everett v. Henderson, 146 Mass. 89, 14 N. E. 932; Johnson v. Morton, 94 Mich. 1, 53 N. W. 816. Such a writ has been held to be a justification,

and that it justifies an officer in making an arrest under it. Irregularities in the process may be waived, as by giving bail.[41]

Where, however, the warrant is void, either from material defect in its language, for want of jurisdiction of the court, or because of the court having no power to issue it, the sheriff who executes it, the attorney who prepares it,[42] the client who authorizes it, and the witness who causes the arrest, all are liable at common law for the false imprisonment.[43] It would seem that if the legislation under which the warrant is issued is invalid, the warrant may still be a good defense.[44] If, however, the officer arrests a man not described in the warrant, such authority may mitigate punitive damages, but will not justify the arrest.[45] And, au contraire, arrest of the right person by the wrong name, through misnomer in the process, without allegation that the true name is unknown, has been held to be false imprisonment.[46]

An illegal arrest for larceny under an insufficient warrant cannot be justified, in an action for damages on that account, as an ar-

even where the officer knew of facts invalidating it. Marks v. Sullivan, 9 Utah, 12, 33 Pac. 224. And such process, when set aside, leaves acts done under it without justification, and illegal. Everett v. Henderson, 146 Mass. 89, 14 N. E. 932, cases collected at page 92, 146 Mass., and page 932, 14 N. E.

[41] Nelmitz v. Conrad, 22 Or. 164, 29 Pac. 548. But submitting to examination on oath does not. Carleton v. Akron Sewer Pipe Co., 129 Mass. 40. And see Buzzell v. Emerton, 161 Mass. 176, 36 N. E. 796. And see Reynolds v. Church, 3 Caines (N. Y.) 274; Dale v. Radcliffe, 25 Barb. (N. Y.) 333.

[42] Barker v. Braham, 2 W. Bl. 866, Bigelow, Lead. Cas. 235; Pig. Torts, 300. The courts must not only have jurisdiction of the subject, but also of the process. Grumon v. Raymond, 1 Conn. 39; Vaughn v. Congdon, 56 Vt. 111. But see, ante, p. 117, "Exemption of Judicial Officers as to Process."

[43] Hewitt v. Newburger, 141 N. Y. 538, 36 N. E. 593, overruling Id., 66 Hun, 230, 20 N. Y. Supp. 913.

[44] Brooks v. Mangan, 86 Mich. 576, 49 N. W. 633; Trammel v. Russellville, 34 Ark. 105; Wheeler v. Gavin, 5 Ohio Cir. Ct. R. 240. Compare Judson v. Reardon, 16 Minn. 431 (Gil. 387); Gifford v. Wiggins, 50 Minn. 401, 52 N. W 904. But see State v. Hunter, 106 N. C. 796, 11 S. E. 366.

[45] Holmes v. Blyler, 80 Iowa, 365, 45 N. W. 756; Formwalt v. Hylton, 66 Tex. 288, 1 S. W. 376; Mitchell v. Malone, 77 Ga. 301; Ryburn v. Moore, 72 Tex. 85, 10 S. W. 393; Dunston v. Paterson, 2 C. B. (N. S.) 495. Compare Knight v. International & G. N. Ry. Co., 9 C. C. A. 376, 61 Fed. 87.

[46] Hoye v. Brush, 1 Man. & G. 775; Scheer v. Keown, 29 Wis. 586.

rest for a different offense, such as reckless discharge of firearms, or resisting an officer.[47]

Justification without Warrant.

An arrest without a warrant may be justified by public authority. At common law, a public police officer is justified in arresting a person whom he has reasonable cause to suspect has committed, or is about to commit, a felony,[48] provided the person arrested be above the age of seven years,[49] and in detaining him until he can be brought before a magistrate for examination.[50] Where, however, the offense is only a misdemeanor, such an officer is not justified in making an arrest without a warrant unless a breach of the peace is threatened.[51] He is justified in arresting, without a warrant, a person committing a breach of the peace in his presence,[52] and in imprisoning him so long as,[53] but not longer than, there is danger of a renewal of the offense.

A private individual is justified in arresting a person for felony only where the felony has been actually committed, and there are reasonable grounds for suspicion that the person arrested has committed it.[54] A private individual may also arrest a person actually committing a breach of the peace, but not after the affray has ended.[55]

[47] Murphy v. Kron, 20 Abb. N. C. 259.

[48] 4 Bl. Comm. 292; Codd v. Cabe, 1 Exch. Div. 352, 45 Law J. Exch. 101; Galliard v. Laxton, 2 Best & S. 363; Beckwith v. Philby, 6 Barn. & C. 635, 9 Dowl. & R. 487; Buckley v. Gross, 3 Best & S. 566, 32 Law J. Q. B. 129.

[49] Marsh v. Loader, 14 C. B. (N. S.) 535.

[50] Allen v. Wright, 8 C. B. 522; Hall v. Booth, 3 Nev. & M. 316.

[51] Quinn v. Heisel, 40 Mich. 576; Griffin v. Coleman, 4 Hurl. & N. 265, 28 Law J. Exch. 134; Fox v. Gaunt, 3 Barn. & Adol. 798; Bowditch v. Balchin, 5 Exch. 377.

[52] Timothy v. Simpson, 1 Cromp., M. & R. 757; Moore v. Thompson, 92 Mich. 498, 52 N. W. 1000; Derecourt v. Corbishley, 24 Law J. Q. B. 313, 5 El. & Bl. 188; Josselyn v. McAllister, 25 Mich. 45.

[53] Queen v. Lesley, 29 Law J. M. Cas. 97.

[54] Allen v. Wright, 8 Car. & P. 522; Hall v. Booth, 3 Nev. & M. 316. Whereas the public officer may arrest on reasonable grounds of suspicion, even although no felony has been actually committed. Beckwith v. Philby, 6 Barn. & C. 635. Et vide Stev. Dig. Cr. Proc. c. 12, 1; Hogg v. Ward, 3 Hurl. & N. 417; 27 Law J. Exch. 443.

[55] Price v. Seeley, 10 Clark & F. 28; Hawley v. Butler, 54 Barb. 490; Timothy

In America the common law must be construed in connection with the statutes of each state. Generally, however, the substance of the rule stated has been preserved.[56] "What is reasonable cause for suspicion to justify an arrest may be said, paradoxical as the statement looks, to be neither a question of law nor fact, at any rate in the strict sense of the terms,—not of fact, because it is for the judge and not for the jury; and not of the law, because no definite rule can be laid down for the exercise of the judge's discretion." [57]

v. Simpson, 1 Cromp., M. & R. 757. A breach of the peace may not, however, be an actual affray. It is sufficient to justify an arrest if the conduct on the part of the person arrested directly tends to produce a breach of the peace,—as continually ringing a door bell without an excuse, Grant v. Moser, 5 Man. & G. 123; or trying to force one's self into a house in the presence of a mob. Compare Green v. Bartrom, 4 Car. & P. 308, with Rose v. Wilson, 1 Bing. 353, and Ingle v. Bell, 1 Mees. & W. 516. And see Cohen v. Huskisson, 2 Mees. & W. 477; Howell v. Jackson, 6 Car. & P. 723; Webster v. Watts, 11 Q. B. 311, 17 Law J. Q. B. 73; Wheeler v. Whiting, 9 Car. & P. 262; Wooding v. Oxley, Id. 1; Lucas v. Mason, L. R. 10 Exch. 251. Where plaintiff and others were gathered together in the street, and the officer ordered them to move on, and the others obeyed but plaintiff did not, and he was arrested by the officer, he can recover damages, because one person could not obstruct the street, and this was no violation of the ordinance without request to disperse. State v. Hunter, 106 N. C. 796, 11 S. E. 366. As to arrest not authorized by statute, see Winn v. Hobson, 54 N. Y. Super. Ct. 330. If, however, the officer arrested without a warrant, he is liable for committing, without examination, the plaintiff, who is entitled to an immediate hearing. Newby v. Gunn, 74 Tex. 455, 12 S. W. 67.

[56] As to arrest by police officer without warrant on suspicion for felony, not in fact committed: Rohan v. Sawin, 5 Cush. 281; Eanes v. State, 6 Humph. (Tenn.) 53; Bryan v. Bates, 15 Ill. 87; Taylor v. Strong, 3 Wend. 384; Quinn v. Heisel, 40 Mich. 576; In re Powers, 25 Vt. 261; McCarthy v. De Armit, 99 Pa. St. 63; Scircle v. Neeves, 47 Ind. 289; Doering v. State, 49 Ind. 56; Neal v. Joyner, 89 N. C. 287; Malcolmson v. Scott, 56 Mich. 459, 23 N. W. 166. But see Shanley v. Wells, 71 Ill. 78; Newton v. Locklin, 77 Ill. 103; Pow v. Beckner, 3 Ind. 475; Schmelder v. McLane, 36 Barb. 495; Phillips v. Fadden, 125 Mass. 198; Moore v. Durgin, 68 Me. 148; Kennedy v. Favor, 14 Gray, 200; McLennon v. Richardson, 15 Gray, 74. Arrest by private person, without warrant, of persons suspected of felony: Wakely v. Hart, 6 Bin. 316; Com. v. Deacon, 6 Serg. & R. 49; Renck v. McGregor, 32 N. J. Law, 70; Allen v. Leonard, 28 Iowa, 529; Morley v. Chase, 143 Mass. 396, 9 N. E. 767; Holley v. Mix, 3 Wend. 350; Gurnsey v. Lovell, 9 Wend. 320.

[57] Pol. Torts, citing Hailes v. Marks, 7 Hurl. & N. 56; 30 Law J. Exch. 289; Lister v. Perryman, L. R. 4 H. L. 521, 535, 540.

Reasonable cause, however, is for the judge, and not for the jury.[58] The burden of proof is on the defendant to show facts which would create reasonable suspicion in the mind of a reasonable man.[59] The judge may ask the jury whether the defendant acted on an honest belief, and whether he used reasonable care to inform himself of the facts.[60]

Private authority may justify interference with freedom of personal locomotion. Thus, a schoolteacher, in the exercise of the right to make and enforce reasonable rules for the regulation of a school, may without liability detain pupils after school hours.[61] So, by common law, any one might arrest a dangerous lunatic.[62] The justification, however, is not the benefit of the supposed insane person, but self-protection.[63] Similarly, imprisonment to prevent bodily harm may be justifiable in self-defense.[64]

[58] Cochran v. Toher, 14 Minn. 385 (Gil. 293); Lock v. Ashton, 12 Q. B. 871. Compare Perry v. Sutley, 63 Hun, 636, 18 N. Y. Supp. 633; Murray v. Friensberg (Sup.) 15 N. Y. Supp. 450; Newman v. New York, L. E. & W. R. Co., 54 Hun, 335, 7 N. Y. Supp. 560; Filer v. Smith, 96 Mich. 347, 55 N. W. 999; White v. McQueen, 96 Mich. 249, 55 N. W. 843.

[59] Broughton v. Jackson, 18 Q. B. 378, 21 Law J. Q. B. 266, per Lord Campbell, C. J.; Rosenkranz v. Haas (City Ct. N. Y.) 20 N. Y. Supp. 880. What is reasonable cause depends on the circumstances of each case (Hogg v. Ward, 3 Hurl. & N. 417, 27 Law J. Exch. 443; Joyce v. Parkurst, 150 Mass. 243, 22 N. E. 899), and is generally a question of law for the courts (Filer v. Smith, 96 Mich. 347, 55 N. W. 999). Cf. White v. McQueen, 96 Mich. 249, 55 N. W. 843; Wolf v. Perryman, 82 Tex. 112, 17 S. W. 772. But mere impression that innocent defendant resembled the accused does not justify. Maliniemi v. Gronlund, 92 Mich. 22, 52 N. W. 627. Street walking: Pinkerton v. Verberg, 78 Mich. 573, 44 N. W. 579.

[60] Stev. Mal. Pros. c. 7.

[61] Fertich v. Michener, 111 Ind. 472, 11 N. E. 605.

[62] Fletcher v. Fletcher, 28 Law J. Q. B. 134; and see cases cited in a note to Elliott v. Allen, 14 Law J. C. P. 136. But physicians fraudulently and falsely certifying to insanity may be held liable for false imprisonment by their victim. Hurlehy v. Martine, 56 Hun, 648, 10 N. Y. Supp. 92.

[63] Look v. Dean, 108 Mass. 116.

[64] But when an unarmed plaintiff, intrenched in a corncrib, is imprisoned for an hour and a half there, and shot at by defendant, armed with a revolver, there is not reasonable apprehension of fear, nor imprisonment reasonable and necessary under the circumstances. McNay v. Stratton, 9 Ill. App. 215–220.

147. Evidence showing the absence of malice is admissible, not by way of justification, but by way of mitigation of punitive damages.

One who has been wrongfully restrained of liberty of locomotion may recover, not only compensatory damages, but wanton disregard of legal right will entitle him to punitive damage; as in an action by a young girl for humiliation, insult, and wounded sensibility consequent upon her arrest.[65] While malice or want of proper cause is no part of the plaintiff's case in an action for false imprisonment, proof that the defendant believed himself to be legally right in making an improper arrest will mitigate exemplary damages, but will not diminish actual damages.[66] But compensatory damages are not necessarily limited to actual money losses. For an unlawful incarceration in an insane asylum one may recover, not only money expended in procuring his release, but also for consequent humiliation, shame, disgrace, and injury to reputation.[67]

[65] Ball v. Horrigan, 65 Hun, 621, 19 N. Y. Supp. 913; Ross v. Leggett, 61 Mich. 445, 28 N. W. 695; Pearce v. Needham, 37 Ill. App. 90; Taylor v. Coolidge, 64 Vt. 506, 24 Atl. 656; Hewlett v. George, 68 Miss. 703, 9 South. 885. A verdict for $2,917 damages has been set aside as excessive for three hours' detention in a lockup. Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127. And a verdict of 6 cents for detention long enough to walk across the street has been sustained as adequate. Henderson v. McReynolds, 60 Hun, 579, 14 N. Y. Supp. 351. Et vide Cabell v. Arnold (Tex. Civ. App.) 22 S. W. 62; Wiley v. Keokuk, 6 Kan. 94.

[66] Holmes v. Blyler, 80 Iowa, 365, 45 N. W. 756; Livingston v. Burroughs, 33 Mich. 511; Tenney v. Harvey, 63 Vt. 520, 22 Atl. 659; Comer v. Knowles, 17 Kan. 436; Sleight v. Ogle, 4 E. D. Smith, 445; Miller v. Grice, 2 Rich. Law, 27; McDaniel v. Needham, 61 Tex. 269; Rogers v. Wilson, Min. (Ala.) 407; Hill v. Taylor, 50 Mich. 549, 15 N. W. 899; Roth v. Smith, 41 Ill. 314. Good faith as a justification, Aldrich v. Weeks, 62 Vt. 89, 19 Atl. 115; Provocation no justification, Gracę v. Dempsey, 75 Wis. 313, 43 N. W. 1127; nor bad character of defendant, Hurlehy v. Martine, 56 Hun, 648, 10 N. Y. Supp. 92.

[67] Such damages, not being punitive, may be recovered after death of defendant. Hewlett v. George, 68 Miss. 703, 9 South. 885.

ASSAULT—DEFINITION.

148. An assault is an attempt with force or violence to inflict corporal injury on another, accompanied by apparent physical means to effect such injury if not prevented.[68]

Generally speaking, to constitute an assault there must be an attempt, which may be either real or apparent. A real attempt occurs when the party assaulting proceeds with intent to accomplish the injury threatened. Thus, in a leading case on this subject, one who, at a parish meeting, advanced with his fist clenched towards the chairman with intent to strike him, but was stopped by the church warden, who sat next but one to the chairman, was held liable for assault.[69] And where one pursued another with an uplifted whip, intending to strike him, and the latter made his escape, it was held an assault.[70] Accordingly, whenever a real attempt is present, and the assaulted person is aware of such attempt, there can be no question that an assault is committed. Apparent attempt occurs when there is no actual purpose or intent to do the

[68] Cooley, Torts, 160; De S. v. De S. Lib. Ass. p. 99, pl. 60; Read v. Coker, 13 C. B. 850; Barbee v. Reese, 60 Miss. 906; Pol. Torts, 182; Richmond v. Fisk, 160 Mass. 34, 35 N. E. 103; Pig. Torts, 290; Hays v. People, 1 Hill, 351; Bishop v. Ranney, 59 Vt. 316, 7 Atl. 820. The inaccuracy of generally accepted legal definitions is well illustrated in the case of assault. While the one given in the text is generally recognized as correct, still, popularly, the word assault is used to include battery, and no less an authority than Mr. Pollock says that "no reason appears for maintaining the distinction in our modern practice." Assault, in the penal codes of many states, also includes battery.

[69] Stephens v. Myers, 4 Car. & P. 349. Tindal, C. J., saying that, "though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault in law." Et vide Cobbett v. Grey, 4 Exch. 729; Handy v. Johnson, 5 Md. 450; Alexander v. Blodgett, 44 Vt. 476; Tombs v. Painter, 13 East, 1; State v. Neeley, 74 N. C. 425.

[70] Mortin v. Shoppee, 3 Car. & P. 373. So, to shake one's fist in another's face, and to threaten to strike, is an assault. Mitchell v. Mitchell, 45 Minn. 50, 47 N. W. 308. And see 1 Bac. Abr. "Assault and Battery," 370.

injury threatened, but a display of force under such circumstances as to cause one reasonably to expect and fear the injury.[71]

But in every case there must be an attempt. Threats alone are not sufficient. Mere words, unaccompanied by some act indicating an intention to carry the threat into execution, do not constitute an assault, for the obvious reason that words alone are insufficient to induce, in the mind of a reasonable man, fear of present corporal injury.[72] Words, however, may qualify an action or gesture which would ordinarily be considered an assault, and by showing that the assaulted party has no intention to do the violence, removes from the act the element of assault. Laying one's hand on one's sword and saying, "If it were not assize time, I would not take such language from you," is not an assault.[73] So the irate farmer, who would have knocked a man down "if it were not for his gray hairs," was not guilty of an assault.[74] In these cases, the accompanying words negative the idea of immediate injury to the party to whom the words are directed, and hence any alarm or fear which he may entertain on account of such acts and words is groundless and unreasonable. But mere intent to execute the threat is not essential.[75]

[71] Smith v. Newsam, 1 Vent. 256; Osborn v. Veitch, 1 Fost. & F. 317. In Read v. Coker, 13 C. B. 850, defendant gathered his workmen around plaintiff. They tucked up their aprons and sleeves, and threatened to break plaintiff's neck if he did not get out of the premises. Plaintiff feared violence. Defendant was guilty of an assault. There was threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution.

[72] State v. Merritt, Phil. (N. C.) 134; Fatnall v. Courtney, 6 Houst. (Del.) 437; Smith v. State, 39 Miss. 521; Johnson v. State, 35 Ala. 363; Reed v. State, 71 Ga. 865; 1 Hawk. P. C. 263; People v. Yslas, 27 Cal. 631.

[73] Tuberville v. Savage, 1 Mod. 3. And see Warren v. State, 33 Tex. 517; Mitchell v. State, 41 Ga. 527; Lawson v. State, 30 Ala. 14.

[74] State v. Crow, 1 Ired. 375; Com. v. Eyre, 1 Serg. & R. 347; State v. Hampton, 63 N. C. 13. So to waken a debtor in order to dun him entitles to damages, not necessarily nominal. Richmond v. Fisk, 160 Mass. 34, 35 N. E. 103; Green Bag, Feb. 1894, p. 97.

[75] Beach v. Hancock, 27 N. H. 223; Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132.

Apparent Means of Effecting Attempt.

The civil wrong of assault rests upon the infringement of right of every person "to live in society without being in fear of personal harm." [76] Hence, in determining the tort of assault, the question always is, was the attempted violence or force sufficient and fitting to put a man of ordinary courage and reason into fear and alarm.[77] If so, the wrong is effected, independent of the fact that the assaulting party did not harbor the intention to perpetrate the injury menaced. And it would therefore seem that, if one makes a real attempt to inflict corporal injury on another, but such other was not aware of the attempt, there is no civil wrong, because of no apprehension of harm. But, in the crime of assault, the rule is essentially different. Here the intent, as in all criminal acts, becomes a necessary element, and the question is, did the party assaulting make the outward display of force with the intention of effecting the threatened injury? If so, the crime has been committed.[78] Hence, one might be criminally assaulted though entirely ignorant of the attempt, and hence absolutely free from fear.[79] If the force threatened and the accompanying circumstances are of such a character as to raise, in the mind of a reasonable person, an apprehension of immediate bodily harm, the assault is complete. Thus, if one point an unloaded gun at another, within shooting range, knowing it to be unloaded, it is an assault if such other person has no reason to believe it unloaded. In such cases, he is put in fear and alarm, and it is that which the law purposes to prevent.[80] However, in an assault, the intent must be wrongful,—that is, hostile or unlawful.

[76] Beach v. Hancock, 27 N. H. 223; 1 Add. Torts (6th Ed.) 138; Cooley, Torts, 161; Chapman v. State, 78 Ala. 463; Pig. Torts, 292.

[77] Pig. Torts, 293; Pol. Torts, 182.

[78] State v. Crow, 1 Ired. 375; State v. Davis, 35 Am. Dec. 735; Robinson v. State, 31 Tex. 170; McKay v. State, 44 Tex. 43; Rosc. Cr. Ev. (8th Ed.) 423; State v. Godfrey, 17 Or. 300, 20 Pac. 625; People v. Lilley, 43 Mich. 521, 5 N. W. 982. Many authorities hold the contrary.

[79] People v. Lilley, 43 Mich. 525, 5 N. W. 982; Chapman v. State, 78 Ala. 463.

[80] Parke, B., in Reg. v. St. George, 9 Car. & P. 483; De S. v. De S. Lib. Ass. p. 99, pl. 60; Beach v. Hancock, 27 N. H. 223; Smith v. Newsam, 1 Vent. 256; State v. Smith, 2 Humph. 457; Lewis v. Hoover, 3 Blackf. 407; Tombs v. Painter, 13 East, 1; State v. Cherry, 11 Ired. 475; Handy v. Johnson, 5 Md.

BATTERY—DEFINITION.

149. Battery is the unpermitted application of force to the person of another.

Every assault, where carried to the extent of physical contact, becomes a battery, and every battery includes an assault. Battery is an accomplished assault. It consists in a violent, angry, rude, insolent, or unauthorized touching or striking of a person, either by the party guilty of the battery, or by any substance put in motion by him.[81] The distinction between assault and battery is well illustrated by Smith v. Newsam,[82] where defendant drew a sword and waved it in a menacing manner, but did not touch the plaintiff, and the jury was ordered to find the defendant guilty of assault but not of battery.

450; Osborn v. Veitch, 1 Fost. & F. 317; State v. Church, 53 N. C. 15; Richardson v. Van Voorhis (Sup.) 3 N. Y. Supp. 599. Further, as to self-defense, see Shorter v. People, 2 N. Y. 193; Panton v. People, 114 Ill. 505, 2 N. E. 411; Marts v. State, 26 Ohio, 162; Scribner v. Beach, 4 Denio, 448; Penn v. Ward, 2 Cromp., M. & R. 338; Oakes v. Wood, 3 Mees. & W. 150.

[81] Com. v. McKie, 1 Gray, 61; 1 Hawk. P. C. c. 62, § 2; Pig. Torts, 293; Cooley, Torts, 162; Add. Torts, 139; Rawlings v. Till, 3 Mees. & W. 28; Pursell v. Horne, 3 Nev. & P. 564; Clark & L. Torts, 130; Cole v. Turner, 6 Mod. 149, where Holt, C. J., says—First, the least touching of another in anger is a battery; second, if two or more meet in a narrow passage, and, without any violence or design of harm, the one touches the other gently, it will be no battery; third, if any of them use violence against the other, to force his way, in a rude, inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt will be a battery. McCabe v. State, 44 Tex. 48; Cooper v. McKenna, 124 Mass. 284; Boyle v. Case, 18 Fed. 880; Ricker v. Freeman, 50 N. H. 420; Fredericksen v. Singer Manuf'g Co., 38 Minn. 356, 37 N. W. 453; Fitzgerald v. Fitzgerald, 51 Vt. 420.

[82] (1674) 1 Vent. 256.

ASSAULT AND BATTERY—FORCE AND INTENT.

150. In both assault and battery, liability in tort depends upon—

(a) Force (attempted in assault, and exerted in battery), in its ordinary sense, or as amounting to not more than contact, or even deception; and

(b) Fault or intention on the part of the wrongdoer.

Force.

Whenever violence, in its ordinary sense, is threatened [83] or used,[84] an assault or battery is clearly committed. Thus, forcible defilement of a woman is actionable assault and battery.[85] It is not necessary, in assault, that any actual violence be done to the person,[86] and where violence is used it is not indispensably necessary that it should be to the person. Upsetting a chair or carriage [87] in which a person is sitting, or striking a horse [88] on which one is riding, compelling a person to run into his garden [89] to avoid being beaten, are all assaults.[90]

Every person has the right to live in society with the sense of perfect security; hence, it is not necessary, to constitute an assault or a battery, that the force, threatened in the one or exerted in the other, be of a violent nature, or of such a character that one would fear or suffer serious bodily injury.[91] It is the policy of the law

[83] Bloomer v. State, 3 Sneed (Tenn.) 66; State v. Rawles, 65 N. C. 334; State v. Martin, 85 N. C. 508; State v. Shipman, 81 N. C. 513; State v. Neeley, 74 N. C. 425; Hairston v. State, 54 Miss. 392; U. S. v. Myers, 1 Cranch, C. C. 310, Fed. Cas. No. 15,845; State v. Church, 63 N. C. 15; State v. Horne, 92 N. C. 805; State v. Morgan, 3 Ired. (N. C.) 186.

[84] Clark, Cr. Law, p. 202; 1 Russ. Crimes, 1020; 3 Bl. Comm. 120.

[85] Dean v. Raplee, 75 Hun, 389, 27 N. Y. Supp. 438.

[86] Liebstadter v. Federgreen (Sup.) 29 N. Y. Supp. 1039.

[87] Hopper v. Reeve, 7 Taunt. 698.

[88] 1 Steph. N. P. 210. And see Marentille v. Oliver, 2 N. J. Law, 358; Kirland v. State, 43 Ind. 146.

[89] Mortin v. Shoppee, 3 Car. & P. 373.

[90] Clark v. Downing, 55 Vt. 259.

[91] Com. v. McKie, 1 Gray (Mass.) 61. Where a milkman, against the express commands of one of his customers, entered the latter's sleeping room in the early morning, took hold of his arms and shoulders, and used sufficient

to protect one's person, not only from threat of violent attack, but also from threat of the slightest physical contact against his will. Hence, the attempt to interfere in any measure with another's personal security is an assault.[92] Force, often, is no more than contact. To put one's arms, though tenderly, around a woman's neck against her will, without some innocent reason or excuse, is an assault and battery.[93] And a man who sat upon a bed occupied by a woman and leaned over her, making repeated and persistent improper proposals, was liable in assault.[94]

Personal offense is what the law aims to relieve against by the action of assault and battery. Ordinarily, indignities do not constitute an assault;[95] but it has been held that one who enticed a woman out of her house while in bare feet and thin clothing, and barred the door against her re-entrance, was liable for assault and battery.[96]

force to awaken him, for the purpose of presenting his bill, he was held guilty. Richmond v. Fiske (Mass.) 35 N. E. 103.

[92] Mortin v. Shoppee, 3 Car. & P. 373.

[93] Goodrum v. State, 60 Ga. 509.

[94] Newell v. Whitcher, 53 Vt. 589. In the latter case, the court held that where the acts of the party complained of are of themselves innocent and harmless, and may become wrongful by the manner in which they are done, then a man is to be judged by the common and ordinary effect of such acts. But where the act itself is wrongful, and, if perpetrated, criminal, then the party must answer for all actual injuries sustained. Compare Alexander v. Blodgett, 44 Vt. 476.

[95] In Stearns v. Sampson, 59 Me. 568, the defendant removed plaintiff's furniture from her house and sleeping room, caused the windows to be removed, prevented food from being carried to the house, brought a bloodhound into the building, and left him with the tenant. The plaintiff finally left, by compulsion, with an officer, and was sick several weeks. It was held not to be an assault, the court using this language: "Acts which embarrass and distress do not necessarily amount to an assault. Indignities may not constitute an assault. Acts aggravating an assault differ materially from the conduct aggravated." And see Meader v. Stone, 7 Metc. (Mass.) 147. Assaulting a person in a courthouse, and denouncing him, in the presence of bystanders and officers of the court, as a thief, and threatening to cowhide him, are indignities and insults actionable in themselves, without reference to character or reputation. Caspar v. Prosdame, 46 La. Ann. 36, 14 South. 317.

[96] Jacobs v. Hoover, 9 Minn. 204 (Gil. 189).

Deception has been sometimes held to be equivalent to force as an ingredient in assault;[97] for one is guilty of assault and battery who knowing that a thing to be eaten contains a foreign substance, and concealing the fact, delivers it to another who innocently eats it and is injured in health.[98]

Fault or Intention.

The early conception of trespass was, as has been seen, that it lay for a breach of absolute rights corresponding to absolute duties. According to this conception the defendant acted at his peril, and it was immaterial whether he was at fault or not, so long as he actually invaded the sanctity of the plaintiff's person. The later cases, however, incline strongly to recognize that there can be no recovery in assault and battery unless there was fault or intention on the part of the defendant. In other words, the law recognizes unhappy accidents, which would not have occurred except for the intervention of human agency, but are results "rather to be deplored than punished."[99] But however slight or however harmless the touch, if rudely, or angrily, or unlawfully done, or in a hostile manner, the wrong is complete. Thus, spitting upon a man may be an assault,[100] and one who endeavored to strike another with a stick, and when it was wrenched from his hand by the other drew a pistol, which in the ensuing struggle was discharged, is guilty of assault and battery.[101]

Every one has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege. But the essence

[97] Cooley, Torts, 163; McCue v. Klein, 60 Tex. 168.

[98] Com. v. Stratton, 114 Mass. 303. The fact that deceased killed himself by the making of a wager as to the quantity of liquor he could swallow cannot relieve those who induced him to act from liability. The unlawful infliction of an injury by administering poison constitutes an assault. Carr v. State, 135 Ind. 1, 34 N. E. 533.

[99] Harvey v. Dunlop, Lalor Supp. (N. Y.) 193, approved in Nitroglycerine Case, 15 Wall. 524; Stanley v. Powell, 1 Q. B. 86, 60 Law J. Q. B. 52; Holmes v. Mather, L. R. 10 Exch. 261. 44 Law J. Exch. 176.

[100] Reg. v. Cotesworth, 6 Mod. 172. So, jostling a man out of the way, throwing water on him, Pursell v. Horn, 8 Adol. & E. 602; or forcibly cutting his hair, Forde v. Skinner, 4 Car. & P. 239.

[101] Engelhardt v. State, 88 Ala. 100, 7 South. 154.

of battery lies more in the animus and manner in which it is done than in the contact itself. Thus, to touch another lightly in a spirit of pleasantry, or to strike him on the hand or shoulder in conversation in a gentle manner does not involve a battery.[102] For a touch or stroke in jest an action will not lie.[103] But recovery may be had for actual damage resulting from such unpermitted contact, although there was no intention to injure. Thus, where one injured another by kicking him on the leg during school hours, damages were allowed though no injury was intended.[104]

An action will lie for assault and battery though the conduct complained of was reckless only, and not willful. If B., in endeavoring to hit C., hits A., an action will lie by A. against B.[105] It is not essential that there should be a direct or specific intention to commit an assault and battery at the time the violence is done. There is little distinction, except in degree, between a positive will to do wrong and an indifference whether wrong is done or not.[106] Therefore the rider of a bicycle, who ran over a man in plain sight, and only a few feet away, was held liable for an assault and battery, and not for mere negligence.[107]

SAME—DEFENSES.

151. Defenses to an action for assault and battery may operate by way of—

(a) Justification, or

(b) Mitigation.

[102] Williams v. Jones, Hardr. 298. Compare Coward v. Baddeley, 4 Hurl. & N. 478, 28 Law J. Exch. 260, and Wiffin v. Kincard, 2 Bos. & P. (N. R.) 472, with Rawlings v. Till, 3 Mees. & W. 28.

[103] Williams v. Jones, Hardr. 301.

[104] Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403.

[105] Weaver v. Ward, Hob. 289; Hopper v. Reeve, 7 Taunt. 698; Talmage v. Smith, 101 Mich. 370, 59 N. W. 656; Carmichael v. Dolen, 25 Neb. 335, 41 N. W. 178; Peterson v. Haffner, 59 Ind. 130; State v. Myers, 19 Iowa, 517; Bullock v. Babcock, 3 Wend. 391; Com. v. Hawkins, 157 Mass. 551–553, 32 N. E. 862, collecting cases. Compare Com. v. Pierce, 138 Mass. 165–180.

[106] 1 Bish. Cr. Law, c. 20.

[107] Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132; Kendall v. Drake (N. H.) 30 Atl. 524.

152. The charge of assault and battery may be justified by the person alleged to have committed it by bringing it within the limits of—

(a) Private defense, or

(b) Legal authority, whether public or private.

Private Defense of Person.

Assault is justifiable if it is committed in self-defense.[108] In the language of the early law, this was the defense of son assault demesne. In order that self-defense may be justified, assault must have been threatened. Thus, a person is justified in defending himself by shooting his assailant, if he has reason to believe that the assailant intends to do him great bodily harm, and that he is in danger of such harm, and no other means can effectually prevent it.[109] But, on the other hand, where a creditor followed a debtor, disputing about a bill, saying: "This thing must be settled now," and the latter struck him while he was walking with his hands in his pockets, it was held that no assault had been threatened by the debtor and self-defense was not made out.[110] To avoid becoming an assailant, however, the person originally attacked need not necessarily retreat.[111]

[108] The rule is essentially the same in civil and criminal cases as to the extent of the right. As to facts, however, in criminal cases only is there given the defendant the benefit of a reasonable doubt. March v. Walker, 48 Tex. 372.

[109] Com. v. O'Malley, 131 Mass. 423; Clyma v. Kennedy, 64 Conn. 310, 29 Atl. 539; Landrum v. Wells (Tex. Civ. App.) 26 S. W. 1001; French v. Ware, 65 Vt. 338, 26 Atl. 1096.

[110] Rhodes v. Rodgers, 151 Pa. St. 634, 24 Atl. 1044. So, in an action for assault and battery, where the evidence shows that defendant, while quarreling with plaintiff, stopped his wagon and got out, and walked several feet to where plaintiff was standing with his hands in his pockets, and struck plaintiff in such position, the question of justification under an answer of son assault demesne should not be submitted to the jury. Morganstein v. Nejedlo, 79 Wis. 338, 48 N. W. 652. Et vide Sargent v. Carnes, 84 Tex. 156, 19 S. W. 378; Hulse v. Tollman, 49 Ill. App. 490.

[111] Haynes v. State, 17 Ga. 465; State v. Tweedy, 5 Iowa, 433; Norris v. Casel, 90 Ind. 143; Steinmetz v. Kelly, 72 Ind. 442; State v. Dixson, 75 N. C. 275; Townsend v. Briggs, 99 Cal. 481, 34 Pac. 116. But see Howland v. Day, 56 Vt. 318.

Abusive words, written or spoken, maligant leers, and taunting grimaces, though made for the purpose of inducing an assault, do not justify it. There is said, however, to be an exception to this with respect to words "grossly insulting to females. * * * At least, one would be excused where grossly insulting language was employed in the presence of his family, if he were promptly to put a stop to it by force." This was applied in a case involving an assault made on a charivari party which, having been warned to desist on the first night, when they came to the defendant's house, returned on two subsequent nights and terrified his wife and children. The matter of self-defense was sent to the jury, with instructions that there was a difference in law between an assault by a body of rioters and one by a single person, and that, in the former case, the assaulted person may act with more promptness and resort to more forcible means to protect himself and family than in the latter case.[112]

Same—Defense of Family, Servants, and Friends.

A man has a right to use necessary force to protect his family, neighbors,[113] or servants from violence.[114] What a father and the head of a house can legally do in defense of his house the son can do.[115] Where the defendant was rightfully on the premises of the plaintiff's husband, and was interfered with in his work by plaintiff's mother, he had the right to rid himself of such annoyance, and plaintiff had no right to assault him in defense of her mother, if defendant was in the use of reasonable care.[116] The right of the master to come to the defense of his servant does not extend to

[112] Higgins v. Minaghan, 76 Wis. 298, 45 N. W. 127; Minaghan v. State, 77 Wis. 643, 46 N. W. 894; Higgins v. Minaghan, 78 Wis. 602, 47 N. W. 941.

[113] Compare 1 Bl. Comm. 429, and 1 Hawk. P. C. bk. 1, c. 60, with Leward v. Basely, 1 Ld. Raym. 62. As to right of overseer of poor to "intercept" a husband who had threatened to kill his wife to ascertain cause of disturbance he was creating, see French v. Ware, 65 Vt. 338, 26 Atl. 1096.

[114] Leward v. Basely, 1 Ld. Raym. 62; Fields v. Grenils, 89 Va. 606, 16 S. E. 880.

[115] Hammond v. Hightower, 82 Ga. 290, 292, 9 S. E. 1101. A son may resent a malicious trespass on his father's land. People v. Foss, 80 Mich. 559, 45 N. W. 480.

[116] Drinkhorn v. Bubel, 85 Mich. 532, 48 N. W. 710.

cases where the servant is the aggressor, nor to cases of mutual assault.[117]

Same—Defense of Property.

A man may justify an assault and battery in defense of his lands,[118] his house,[119] or his chattels,[120] and, generally, of possession or property.[121] One whose property is taken wrongfully by another may retake it from him using reasonable force. What is such reasonable force is a question for the jury.[122] The owner of chattels which are on the premises of another has even the right to go on such premises, if he can do so without breach of peace; and if assaulted while so doing, he can recover damages.[123] "Possession is nine points of the law." When a man is in possession, he may, after request to a trespasser to depart or desist, use force to remove him.[124] But if a trespasser has gained possession, or if one comes lawfully into possession but unlawfully retains possession,

[117] Jones v. Fortune, 128 Ill. 518, 21 N. E. 523.

[118] Com. v. Clark, 2 Metc. (Mass.) 23; Kiff v. Youmans, 86 N. Y. 324; Souter v. Codman, 14 R. I. 119. As to right of tenants in common to retain possession of common property, see Richardson v. Van Voorhies, 51 Hun, 636, 3 N. Y. Supp. 599.

[119] State v. Middleham, 62 Iowa, 150, 17 N. W. 446; State v. Burwell, 63 N. C. 661; Pitford v. Armstrong, Wright, N. P. (Ohio) 94; State v. Peacock, 40 Ohio St. 333; Wall v. State, 51 Ind. 453; McPherson v. State, 22 Ga. 478.

[120] People v. Dann, 53 Mich. 490, 19 N. W. 159.

[121] Harrington v. People, 6 Barb. 607–612; Filkins v. People, 69 N. Y. 101, 106; Liebstadter v. Federgreen, 80 Hun, 245, 29 N. Y. Supp. 1039; Dykman, J., dissenting, Conway v. Carpenter, 73 Hun, 540, 26 N. Y. Supp. 255.

[122] Com. v. Donahue, 148 Mass. 539, 20 N. E. 171. An officer of the old company regained its files from one of its ex-members, who was taking them for the benefit of the new company, of which he was a member. The officer was justified. Heminway v. Heminway, 58 Conn. 443, 19 Atl. 766. But, when a master lost a sum of money, and deducted the amount from the wages of his servant, upon the ground that the servant was responsible for the loss, the servant subsequently took the amount withheld from his wages from money placed in his hands by the master for the payment of his fellow servants. Held, that the master was not justified in assaulting the servant in an attempt to recover the money taken by him.

[123] Stuyvesant v. Wilcox, 92 Mich. 233, 52 N. W. 465.

[124] Thus the master of a house may execute his right to exclude another from his house as capriciously as he pleases. Timothy v. Simpson, 6 Car. & P. 499; Wheeler v. Whiting, 9 Car. & P. 262.

the rightful owner cannot justify an assault to dispossess him.[125] Wherever a lessee, after the surrender and termination of a lease, denies the lessor's right to peaceable entry and possession, and attempts to expel him by force, this is an unlawful assault, and the lessor is justified in resisting it with sufficient force to repel the same.[126]

Same—Commensurate Defense.

Force used in private defense must not exceed the necessity of the case. Defense is not attack. Excessive defense may become an assault and battery.[127] "In an action for assault and battery, to which the defendant pleads that the plaintiff first assaulted the defendant, who thereupon committed the alleged assault in his own defense, the plaintiff may show that, although he struck the first blow, the defendant was guilty of excess. * * * The old form of defendant's plea, 'molliter manus imposuit,' * * * shows also the full extent to which the law allows a man to defend himself from an unprovoked assault."[128] Therefore, in an action for assault, where it appears that the plaintiff first attacked the defendant, she cannot recover unless the defendant used more force than was necessary in repelling the attack.[129] When resistance exceeds the bounds of mere defense, so as to become vindictive, the defender becomes the aggressor, and may himself commit an assault.[130] "The law," however, "has enough regard for the weakness of human nature to regard a violent attack as sufficient excuse

125 Read v. Coker, 13 C. B. 850; Dean v. Hogg, 10 Bing. 349; Osborn v. Veitch, 1 Fost. & F. 317. Et vide Roberts v. Tayler, 1 C. B. 147; Beddall v. Maitland, 17 Ch. Div. 174; Jackson v. Courtenay, 8 El. & Bl. 8; Tullay v. Reed, 1 Car. & P. 6. Mere possession of premises will not justify violence to prevent the lawful occupant from entering. Liebstadter v. Federgreen, 80 Hun, 245, 29 N. Y. Supp. 1039.

126 Gillespie v. Beecher, 85 Mich. 347, 48 N. W. 561.

127 Dean v. Taylor (1855) 11 Exch. 68; Beddall v. Maitland, 17 Ch. Div. 174; Cook v. Beal, 1 Ld. Raym. 177; Cockroft v. Smith, 2 Salk. 642; Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155; Dole v. Erskine, 35 N. H. 503.

128 Dean v. Taylor, 11 Exch. 68.

129 Drinkhorn v. Bubel, 85 Mich. 532, 48 N. W. 710. Et vide Kent v. Cole, 84 Mich. 570, 48 N. W. 168.

130 Elliot v. Brown, 3 Wend. 497; Gates v. Lounsbury, 20 Johns. 427; Curtis v. Carson, 2 N. H. 539; Gregory v. Hill, 8 Term R. 299, 1 Hawk. P. C. 130.

for going beyond the mere necessities of self-defense, and chastising the aggressor within such bounds as did not exceed the natural limits of the provocation." [131] Force used in defense of land or goods is justified only when proportioned to the occasion.[132]

Authority.

Where an officer of justice is charged with an assault and battery, it is a good defense to show that he was at the time engaged in the execution of his official duties, and that the wrong was done in their discharge. If, however, he uses greater force than is necessary to effect the immediate object, he may become civilly liable.[133] Therefore, an officer who, in arresting an unresisting prisoner, threw him down, and pounded him so as to cause him to spit blood, was held personally liable.[134] But the person asserting the defense of official duty must prove his legal title to the office. It is not sufficient that he was an officer de facto.[135] The exemption from liability, in an assault and battery, on the ground of legal authority, exists only when there is an occasion for the exercise of force, and the officers exercising it are authorized [136] to employ it. Therefore, school trustees, who forcibly eject a schoolteacher because of her refusal to consent to a vacation ordered by them, are liable in an assault and battery.[137]

Parents may chastise their children under age reasonably, but excessive cruelty, arising from malicious motive and resulting in

[131] People v. Pearl, 76 Mich. 207, 42 N. W. 1109.

[132] Harvey v. Mayne, 6 Ir. C. L. 417.

[133] Baker v. Barton, 1 Colo. App. 183, 28 Pac. 88; 2 Greenl. Ev. 98; Boles v. Pinkerton, 7 Dana (Ky.) 453; Kreger v. Osborn, 7 Blackf. 74; Baldwin v. Hayden, 6 Conn. 453. Civil liability will extend at least as far as criminal. Hilliard v. Goold, 34 N. H. 230; Spensley v. Lancashire Ins. Co., 54 Wis. 433, 11 N. W. 894.

[134] Schwenke v. Union Depot & R. Co., 12 Colo. 341, 21 Pac. 43. Compare Hager v. Danforth, 20 Barb. 16, with Hull v. Bartlett, 49 Conn. 64. As to liability of constable, Brownell v. Durkee, 79 Wis. 658, 48 N. W. 241. Highway commissioners, Howe v. Oldham, 69 Hun, 615, 23 N. Y. Supp. 700.

[135] Pooler v. Reed, 73 Me. 488; Andrews v. Portland, 79 Me. 484, 10 Atl. 458; Grace v. Teague, 81 Me. 559, 18 Atl. 289.

[136] As to what is sufficient evidence that defendant acted as police officer, Short v. Symmes, 150 Mass. 298, 23 N. E. 42.

[137] White v. Kellogg, 119 Ind. 320, 21 N. E. 901.

permanent injury, is not justifiable because of parental authority.[138] The duty may be delegated. A teacher may punish a child.[139] He may take a pistol from a pupil, and in so doing use necessary force.[140] He may chastise for violation of only reasonable rules of order.[141] Consequently, chastisement for violation of rule requiring pupils to pay for the destruction of schoolroom property is an assault.[142] On the same principle, beating a cook about the head with a belaying pin for willful disobedience on board a vessel in port is an assault, and the assertion by the master of the lawfulness of such punishment will be regarded as an aggravation rather than as a defense. Violence is justifiable only in case of an emergency at sea.[143]

153. Leave and license, and provocation so recent that the mind of the wrongdoer has not had time to cool, while they may not justify battery, it would seem may serve to mitigate punitive damages, though not actual or compensatory damages.

Since the commission of an assault and battery constitutes a misdemeanor, a license from the person assaulted is no justification.[144] Thus a condition in a lease for a sewing machine authorizing an

[138] Fletcher v. People, 52 Ill. 395; State v. Jones, 95 N. C. 588; Johnson v. State, 2 Humph. 283; Winterburn v. Brooks, 2 Car. & K. 16; Fitzgerald v. Northcote, 4 Fost. & F. 656. The same rule applies to one standing in loco parentis. Dean v. State, 89 Ala. 46, 8 South. 38. As to right of master to chastise apprentice under 21, but not a servant, see Penn v. Ward, 2 Cromp., M. & R. 338. As to right of master of vessel to flog, Lamb v. Burnett, 1 Cromp. 295. But see post, p. 462, § 160.

[139] Sheehan v. Sturges, 53 Conn. 481, 2 Atl. 841; Patterson v. Nutter, 78 Me. 509, 7 Atl. 273.

[140] Metcalf v. State, 21 Tex. App. 174, 17 S. W. 142.

[141] Marlsbary v. State (Ind. App.) 37 N. E. 558.

[142] State v. Vanderbilt, 116 Ind. 11, 18 N. E. 266.

[143] Padmore v. Piltz, 44 Fed. 104.

[144] Ante, p. 199, "Leave and License." The law abhors the use of force, either for attack or defense, and never permits its use unnecessarily. Howland v. Day, 56 Vt. 318; Willey v. Carpenter, 64 Vt. 212, 23 Atl. 630. The absence of anger and the presence of good will in a fight will not alter the character of the assault (Com. v. Collberg, 119 Mass. 350), but will mitigate

entry on the premises and the taking away of the machine by the use of necessary force did not justify an assault, but operated in mitigation of damages.[145]

Provocation does not justify an assault and battery.[146] It would be an unwise law which did not make allowance for human infirmities; and if a person commits violence at a time when he is smarting under immediate provocation, that is a matter of mitigation.[147] In order, however, that provocation may mitigate damages, it must have been so recent as to form a part of the same transaction. It must occur at or shortly before the time of the assault. If there has been time for the mind to cool, the defense is lost.[148] An insult to one's wife is not legal provocation;[149] nor was the act of a syphilitic Italian in biting off the nose of another person justified, or the damages mitigated, by the fact that such person had assaulted him two or three days previously.[150] Publication of a gross insult the night before the assault may, however, serve to mitigate dam-

damages (Barholt v. Wright, 45 Ohio St. 177, 12 N. E. 183). The same rule applies to granger battle over a fence. "Although they were old men, it is but just to say that they fought with great spirit and brutality." Shay v. Thompson, 59 Wis. 540, 18 N. W. 473. Between husband and wife, see Pillow v. Bushnell, 5 Barb. 156.

[145] Fredericksen v. Singer Manuf'g Co., 38 Minn. 356, 37 N. W. 453. Compare Colvill v. Langdon, 22 Minn. 565. The right to sue for an assault and battery committed by throwing plaintiff down and ravishing her is not affected by the fact that she did not resist sexual intercourse to the utmost, though she might not in that event be entitled to damages by reason of the defilement. Dean v. Raplee, 75 Hun, 389, 27 N. Y. Supp. 438.

[146] Ante, p. 398.

[147] Lord Abinger in Frazer v. Berkeley, 7 Car. & P. 621; Perkins v. Vaughan, 5 Scotts, N. R. 881; Linford v. Lake, 3 Hurl. & N. 275; Avery v. Ray, 1 Mass. 12; Lee v. Woolsey, 19 Johns. 319; Maynard v. Beardsley, 7 Wend. 560; Ireland v. Elliott, 5 Iowa, 478; Kiff v. Youmans, 86 N. Y. 324; Burke v. Melvin, 45 Conn. 243.

[148] Thrall v. Knapp, 17 Iowa, 468; Goldsmith's Adm'r v. Joy, 61 Vt. 488, 17 Atl. 1010.

[149] Dupee v. Lentine, 147 Mass. 580, 18 N. E. 465.

[150] Bonino v. Caledonio, 144 Mass. 299, 11 N. E. 98. A fortiori, acts of provocation committed more than a year before are irrelevant. Prindle v. Haight, 83 Wis. 50, 52 N. W. 1134. Et vide Tatnall v. Courtney, 6 Houst. (Del.) 434. That plaintiff entered complaint against defendant for intoxication is

ages.[151] On the other hand, where an assault induced by insulting language was followed by kicking the plaintiff after he was lying on the floor, an award of punitive damages was justified.[152]

The current language of the cases is that leave and license and provocation are in mitigation of damages. It would seem, however, more accurate to say that no facts and circumstances can be given in mitigation of actual damages, unless they furnish a legal justification, and are therefore a defense to the cause of action.[153] It is insisted that provocative words cannot be given in mitigation of actual or compensatory damages, but only upon the question of punitive damages.[154]

not sufficient legal provocation. Roach v. Caldbeck, 64 Vt. 593, 24 Atl. 989. Nor is commitment for contempt. Millard v. Truax, 84 Mich. 517, 47 N. W. 1100.

[151] Ward v. White, 86 Va. 212, 9 S. E. 1021.

[152] Crosby v. Humphreys (Minn.) 60 N. W. 843. Abusive epithets addressed to a person 14 hours after an assault was made upon him are admissible in evidence to show that the assault was made with express malice. Spear v. Sweeney, 88 Wis. 545, 60 N. W. 1060.

[153] Birchard v. Booth, 4 Wis. 67–76, commenting on Cushman v. Ryan, 1 Story, 100, Fed. Cas. No. 3,515, which held that provocation might reduce damages to merely nominal damages. Et vide Corcoran v. Harran, 55 Wis. 120, 12 N. W. 468; Robison v. Rupert, 23 Pa. St. 523; Jacobs v. Hoover, 9 Minn. 204 (Gil. 189); Watson v. Christie, 2 Bos. & P. 224; Dresser v. Blair, 28 Mich. 501; Brown v. Swinford, 44 Wis. 282; Prentiss v. Shaw, 56 Me. 427; Voltz v. Blackmar, 64 N. Y. 440.

[154] Goldsmith's Adm'r v. Joy, 61 Vt. 488, 17 Atl. 1010, commenting on many cases. And see Caspar v. Prosdame, 46 La. Ann. 36, 14 South. 317. One assaulted and beaten is entitled to at least nominal damages, though the assault was induced by insulting language. Crosby v. Humphreys (Minn.) 60 N. W. 843.

CHAPTER VII.

INJURIES IN FAMILY RELATIONS.

THE FAMILY AT COMMON LAW.

154. The common law did not recognize the family as a legal entity and as having rights as an association of persons.[1]

"Next to the sanctity of the person comes that of the personal relations constituting the family." [2] However, it seems that prior to the statute of laborers (23 Edw. III. 1349) no action at law lay for any injury involved in such relations.[3] The preamble of this statute recites the mortality consequent on the pestilence of that time, and referred to "the grievous incommodities which of lack, especially of plowmen and laborers, may hereafter come." Among other provisions, it imposed heavy penalties on every person who procured, harbored, or retained the servant of another during the

[1] Cooley, Torts, p. 222. The courts have no jurisdiction to interfere as to when and how a maternal grandmother may visit her grandchildren, merely because there is ill feeling between the grandmother and the father. Succession of Reiss, 46 La. Ann. 347, 15 South. 151. A brother may sue a brother-in-law. Burns v. Kirkpatrick, 91 Mich. 364, 51 N. W. 893. However, the right of a child to sue a parent, and suits between husband and wife, for torts, is denied. Post, pp. 462, 463.

[2] Pol. Torts, p. 194. Coleridge, J., in Lumley v. Gye, 2 El. & Bl. 216–253. And see Bowen v. Hall, 6 Q. B. Div. 333.

[3] Pol. Torts, p. 197.

time he had contracted to serve. From this statute arose the actions commonly called "per quod actions," because of the peculiar wording of the pleadings. The action lay under the statute by the employer against a third person who interfered with the relationship of his servant, "per quod servitium amisit." This was easily adapted so as to be used by a father for the seduction of his child, and by a husband for abuse by a stranger of his wife (in the form of pleading, "per quod consortium amisit").

The principle is an important one, and "extends impartially to every grade of service, from the most brilliant and best paid to the most homely, and it shelters our nearest and tenderest domestic relations from the interference of malicious intermeddlers."[4] Many injuries to the family relations might fairly be classed as acts done at peril, because such wrongs (conspicuously, seduction) are constantly and properly viewed as trespass. In many instances, however, the basis of recovery is negligence, especially when the defendant's inadvertence diminishes capacity of servant, wife, or child to labor. And finally the action of the master for interference with his contract with his servant has become the basis for a class of cases commonly known as "malicious interference with contract," in which the defendant's evil motive is of the essence of the wrong.

MASTER AND SERVANT.

155. Certainly, since the statute of laborers,[5] the common law has recognized the right of a master to recover for the actual damage he may have suffered by the wrongful interference by a third person with his relationship to his servant, by personal injury to the servant, or otherwise depriving the master, in whole or in part, of his service.

Nature of Injury.

The action of the master for loss of service is thus of great antiquity, and had its origin in a state of society where service as a

[4] Haskins v. Royster, 70 N. C. 601–605. Et vide Daniel v. Swearengen, 6 S. C. 303; Morgan v. Smith, 77 N. C. 37.

[5] 23 Edw. III. (A. D. 1349).

rule was a matter not of contract, but of status.[6] And the interest of the master was so far regarded as property that the rights which he acquired by agreement, and being rights in personam, became rights in rem, and laid on persons not parties to the contract the duty to forbear from interfering.[7] The courts have paid more attention to the interruption of the relation, perhaps, than to the subject of the contract.[8]

For What Wrong the Action Lies.

The action lies for seduction of servant,[9] for assault and battery committed against a servant,[10] for negligence of a person impairing the servant's ability to render service.[11]

Actions for enticing servants from their employer, and for knowingly harboring servants who had previously left their employer, arose after the first statute of laborers.[12] They survived its repeal, and occur in modern practice.[13] Knowingly[14] enticing from the service of another one who is employed under a contract not fully executed is an actionable wrong.[15] Indeed, from this basis

[6] Clerk & L. Torts, 155.

[7] Grinell v. Wells, 7 Man. & G. 1033; Pig. Torts, 355 et seq.

[8] Butterfield v. Ashley, 6 Cush. (Mass.) 249; Fawcet v. Beavres, 2 Lev. 63; Sherwood v. Hall, 3 Sumn. (U. S.) 127, Fed. Cas. No. 12,777.

[9] Edmondson v. Machell, 2 Term R. 4.

[10] Fluker v. Railroad Co., 81 Ga. 461, 8 S. E. 529.

[11] McCarthy v. Guild, 12 Metc. (Mass.) 291; Sullivan v. Union Pac. R. Co., 3 Dill. 334, Fed. Cas. No. 13,599; Pol. Torts, 54. And see Osborne v. Gillett, 8 Exch. 88.

[12] Coleridge, J., in Lumley v. Gye, 2 El. & Bl. 216–253; Bowen v. Hall, 6 Q. B. Div. 333.

[13] State v. Hoover, 107 N. C. 795, 12 S. E. 451; Boulier v. Macauley, 91 Ky. 135, 15 S. W. 60; Ward v. State, 70 Miss. 245, 12 South. 249. On a trial for willfully interfering with and enticing away a servant while under contract for a specific time, under Code 1892, § 1068, the mere employment of the servant after he had left his former master is not sufficient to sustain a conviction. Jackson v. State (Miss.) 16 South. 299.

[14] Huntoon v. Hazelton, 20 N. H. 388; Gale v. Parrott, 1 N. H. 28; Coughey v. Smith, 47 N. Y. 244.

[15] Philp v. Squire, Peake, 83; Haight v. Badgeley, 15 Barb. 499; Duckett v. Pool, 33 S. C. 238, 11 S. E. 689; Milburne v. Byrne, 1 Cranch, C. C. 239, Fed. Cas. No. 9,542; Butterfield v. Ashley, 2 Gray (Mass.) 254; Scidmore v. Smith, 13 Johns. (N. Y.) 322; Bixby v. Dunlap, 56 N. H 456; Huff v. Watkins, 15 S. C. 82; Sherwood v. Hall, 3 Sumn. (U. S.) 127, Fed. Cas. No. 12,777;

there has grown up a branch of law in which malice is an essential ingredient. Its consideration is therefore postponed until malicious wrongs are under consideration.[16] Where the wrongful act causes the death of a servant, however, it was held at common law that no action will lie.[17] No such action lies where the servant breaks no contract.[18]

Form of Action.

The wrong consisted in actual damage by reason of loss of service or capacity to serve.[19] It was not actionable per se. It was therefore necessary to allege a per quod, i. e. per quod servitium amisit The action was not for the direct injury, but for consequent damage. For some time it was doubtful [20] whether the trespass or case lay,[21] but it was finally decided that both could be used,—trespass where there was violence, and case where there was deceit or negligence, the latter being the commonest instance.[22]

Plummer v. Webb, 4 Mason (U. S.) 380, Fed. Cas. No. 11,233; Jones v. Blocker, 43 Ga. 331; Carew v. Rutherford, 106 Mass. 1; Noice v. Brown, 39 N. J. Law, 569; Hudson v. State, 46 Ga. 624; Lee v. West, 47 Ga. 311; Walker v. Cronin, 107 Mass. 555; Ames v. Union R. Co., 117 Mass. 541; Roseberry v. State, 50 Ala. 160; Salter v. Howard, 43 Ga. 601; Caughey v. Smith, 47 N. Y. 244; Sargent v. Mathewson, 38 N. H. 54; Jackson v. State (Miss.) 13 South. 935 (under statute); Armistead v. Chatters (Miss.) 5 South. 9 (under statute).

[16] Post, p. 634.

[17] Osborn v. Gillet, L. R. 8 Exch. 88.

[18] Compare Nichol v. Martyn, 2 Esp. 734, and Hart v. Aldridge, 1 Cowp. 54, with Kedne v. Boycott, 2 H. Bl. 511, and Sykes v. Dixson, 9 Adol. & E. 693; Cox v. Munsey, 6 C. B. (N. S.) 375. When service is determined no action lies for harboring servant. Blake v. Lanyon, 6 Term R. 221. Et vide Campbell v. Cooper, 34 N. H. 49.

[19] Fluker v. Railroad Co., 81 Ga. 461, 8 S. E. 529; Knight v. Wilcox, 14 N. Y. 413. The measure of damages is said to be the same as in a suit by the servant against the master for a wrongful discharge. Lally v. Cantwell, 40 Mo. App. 44; Robert Marys' Case, 9 Coke, 113a. And see cases cited supra, note 19.

[20] McFadzen v. Olivant, 6 East, 387, per Bovell, C. J., in Evans v. Walton, L. R. 2 C. P. 615; 3 Bl. Comm. 139. Debauching a female servant was a trespass. Edmondson v. Machell, 2 Term R. 4.

[21] Moran v. Dawes, 4 Cow. (N. Y.) 412; Ditcham v. Bond, 2 Maule & S. 436.

[22] Chamberlain v. Haglewood, 5 Mees. & W. 515; Martinez v. Gerber, 3 Man. & G. 88.

PARENT AND CHILD.

156. The common law recognized the right of a parent to recover for wrongs committed against a child, whenever such parent suffered damage thereby through the loss of the service of his child. In order that a parent should be able to recover at common law for harm done to his child, he must show—

(a) Injury to the child.

(b) Consequent loss by the parent of the service of the child.

The common law regarded the right of the parent to recover for the seduction, enticement, or other injuries to the child as interruption of the relationship of master and servant, and not of parent and child, and did not undertake to compensate the father for wounded sensibilities.[23] Accordingly, the recovery of the parent was based upon, and varied with, the damage done because of the loss of service, and on the relationship of master and servant, not parent and child. The form of action was "per quod servitium amisit."[24] To entitle the parent to recover, he must show the existence of the relationship of master and servant. Therefore, the parent's right of action terminates whenever the child leaves the parent's house with intention not to return.[25] It has been held, however, that if the child in fact returns to the father, the defendant is liable.[26] So, when the child has been emancipated by the parent, the right to recover is gone.[27]

It is not necessary to show that the child rendered valuable services. Pouring tea, or milking cows, has been held to be an act of

[23] Evans v. Walton, L. R. 2 C. P. 615.

[24] Martin v. Payne, 9 Johns. (N. Y.) 387; Cooley, Torts, 268, et seq.

[25] Dean v. Peel, 5 East, 45. Et vide Griffiths v. Teetgen, 15 C. B. 344. A grown-up daughter, keeping a separate establishment, is not a parent's servant. Manley v. Field, 7 C. B. (N. S.) 96. Et vide Hedges v. Tagg, L. R. 7 Exch. 283.

[26] Martin v. Payne, 9 Johns. 387; Bigelow, Lead. Cas. 286.

[27] McCarthy v. Boston & L. R. Corp., 148 Mass. 550, 20 N. E. 182.

[illegible] may [illegible] notwithstanding a temporary absence.[illegible] Even a married daughter living apart from her husband [illegible] her father.[illegible] Proof of actual [illegible] The legal right of the parent at the time [illegible] she resides and is [illegible] is sufficient.[illegible] It rests on his legal

[illegible] Mann v. Barrett, 6 Esp. 32; [illegible] 2 Term R. [illegible].

[illegible] 2 Term R. 4; [illegible] 11 C. B. 344. [illegible] 3 H. & N. [illegible] L. R. 7 Exch. [illegible].

[illegible] 7 Barn. & C. [illegible]. Or an unmarried daughter. Martin v. Payne, 9 Johns. 387. So where the daughter is an adult: [illegible] N. J. Law [illegible]. Et vide Lipe v. Eisenlerd, 32 N. Y. 229; Brown v. [illegible] N. J. Law, 117.

[illegible] L. R. 3 Q. B. [illegible]; Bartley v. Richtmeyer, 4 N. Y. 38, 47. [illegible] was of age: Kendrick v. McCrary, 11 Ga. 603.

[illegible] however, the daughter is over age, there must exist some kind of service, however slight. Martin v. Payne, 9 Johns. 387; Keller v. Donnelly, 5 Md. 211; [illegible] v. Cole, 10 Mo. 634; Mulvehall v. Millward, 11 N. Y. 342; [illegible] v. Evans, 5 Ired. (N. C.) 16; Whitney v. Elmer, 60 Barb. 250; Wert v. [illegible] N. J. Law, 184; Lamb v. Taylor, 67 Md. 85, 8 Atl. 760; Lee v. Hodges, 13 Grat. 726; Patterson v. Thompson, 24 Ark. 55. But see Joseph v. Cavalier, cited 3 Steph. N. P. 2254, and Roscoe, N. P. Ev. 911.

[illegible] Boyd v. Byrd, 8 Blackf. (Ind.) 113. Even though the seducer was her employer: Simpson v. Grayson, 54 Ark. 404, 16 S. W. 4. Compare Speight v. Oliviera, 2 Starkie, 493. Et vide Rist v. Faux, 32 L. J. Q. B. 386; Bartley v. Richtmeyer, 4 N. Y. 38; White v. Murtland, 71 Ill. 250; Ellington v. Ellington, 47 Miss. 329; Emery v. Gowen, 4 Me. 33; Clinton v. York, 26 Me. 167; Kennedy v. Shea, 110 Mass. 147; Nickleson v. Stryker, 10 Johns. (N. Y.) 115; Furman v. Van Sise, 56 N. Y. 435; Clark v. Fitch, 2 Wend. (N. Y.) 459, 20 Am. Dec. 639; Mulvehall v. Millward, 11 N. Y. 342; Mercer v. Walmsley, 5 Har. & J. (Md.) 27; Mohry v. Hoffman, 86 Pa. St. 358; Hornketh v. Barr, 8 Serg. & R. 36. Et vide Wilson v. Sproul, 3 Pen. & W. (Pa.) 49; Fernsler v. Moyer, 3 Watts & S. 416; Riddle v. McGinnis, 22 W. Va. 253; Benson v. Remington, 2 Mass. 113; Roberts v. Connelly, 14 Ala. 235; Greenwood v. Greenwood, 28 Md. 369; Bolton v. Miller, 6 Ind. 262; Franklin v. McCorkle, 16 Lea (Tenn.) 609, 1 S. W. 250; Hewitt v. Prime, 21 Wend. (N. Y.) 79; Doyle v. Jessup, 29 Ill. 460; Davidson v. Abbott, 52 Vt. 570; Abrahams v. Kidney, 104 Mass. 222; Knight v. Wilcox, 14 N. Y. 413; Blagge v. Ilsley, 127 Mass. 191; Russell v. Chambers, 31 Minn. 54, 16 N. W. 458. These cases go beyond

obligation to provide for her support and education, and his consequent right to the profits of her labor.[34]

This fiction of service as the basis of the right of parent to sue for wrongs done the child is generally recognized in America, although much criticised.[35]

SAME—ACTIONS FOR INJURIES TO CHILD.

157. At common law the right to command the service of the child, even though temporarily employed elsewhere, determined the proper party plaintiff in an action to recover for wrongs to the child.

At common law the proper party plaintiff was determined by the person who was entitled to the service of the child. Any one entitled to such service could bring suit for wrong to the child.[36] The father was the normal plaintiff.[37] The mother's right to recover is based upon her right to the service of the child, and therefore could not exist until she became entitled to the child's service by the death—or, by statute, the desertion—of the father.[38] The mother

the English rule. Dean v. Peel, 5 East, 45; Blaymire v. Haley, 6 Mees. & W. 55; Harris v. Butler, 2 Mees. & W. 539; Grinnell v. Wells, 7 Man. & G. 1033. Compare Hedges v. Tagg, L. R. 7 Exch. 283–285. This is true even where the child is an imbecile. Hahn v. Cooper, 84 Wis. 629, 54 N. W. 1022. Et vide Lipe v. Eisenlerd, 32 N. Y. 229.

[34] Kennedy v. Shea, 110 Mass. 147 (citing cases). Et vide Furman v. Van Sise, 56 N. Y. 435, 444; Emery v. Gowen, 4 Greenl. (Me.) 33; Clinton v. York, 26 Me. 167; Griffiths v. Teetgen, 15 C. B. 344. Father's inability to support child does not, by itself, deprive him of right. Benson v. Remington, 2 Mass. 113; Martin v. Payne, 9 Johns. 387, Bigelow, Lead. Cas. 286.

[35] Ellington v. Ellington, 47 Miss. 329 (reviewing authorities at length); Mulvehall v. Millward, 11 N. Y. 342, Chase, Lead. Cas. 218; Hornketh v. Barr, 8 Serg. & R. (Pa.) 36; Osborn v. Francis, 44 N. J. Law, 441; Clark v. Fitch, 2 Wend. (N. Y.) 459; Ingersoll v. Jones, 5 Barb. (N. Y.) 661; Kennedy v. Shea, 110 Mass. 147. So in England: Sergeant Manning's note to Grinnell v. Wells, 7 Man. & G. 1033–1044; Starke's note to Speight v. Oliviera, 2 Starkie, 493–496.

[36] Hamilton v. Lomax, 26 Barb. (N. Y.) 615; Pence v. Dozier, 7 Bush (Ky.) 133; Ellington v. Ellington, 47 Miss. 329; White v. Nellis, 31 N. Y. 405.

[37] Vossel v. Cole, 10 Mo. 634.

[38] Furnam v. Van Sise, 56 N. Y. 435; Sargent v. Dennison, 5 Cow. (N. Y.) 106. Et vide Ryan v. Fralick, 50 Mich. 483, 15 N. W. 561; Heinrichs v. Krechner,

could not recover when the daughter became pregnant after she came into the mother's service.[39] Generally, any person who stands in loco parentis, and who was entitled to the service of the child, may recover. Thus, a guardian,[40] or a stranger in blood who has adopted the person seduced, may be a proper party plaintiff.[41]

At Common Law the Seduced Child could not Recover against Her Seducer.

The seduced child could not recover at common law, not only because in many cases she was a party to the wrong, but because the only recognized action was based upon the loss of service.[42] The injustice of the common-law rule is well illustrated by Ellington v. Ellington.[43] There a daughter made her permanent home with her seducer, her uncle. Her parent could not sue, for the child was out of his service and beyond control; the child could not sue, for she was particeps criminis; the uncle could not sue, for he was the author of the outrage. "Thus, the ruin of the girl must go unrevenged, and the author of it go unwhipt of justice."

35 Mo. 578; Felkner v. Scarlet, 29 Ind. 154; Gray v. Durland, 50 Barb. (N. Y.) 100; Texas & P. Ry. Co. v. Brick, 83 Tex. 526, 18 S. W. 947; Davidson v. Abbott, 52 Vt. 570; Parker v. Meek, 3 Sneed (Tenn.) 29.

[39] Logan v. Murray, 6 Serg. & R. (Pa.) 175; Dunlap v. Linton, 144 Pa. St. 335, 22 Atl. 819. Et vide South v. Denlston, 2 Watts (Pa.) 474.

[40] Fernsler v. Moyer, 3 Watts & S. (Pa.) 416; Blanchard v. Ilsley, 120 Mass. 487.

[41] Ingersoll v. Jones, 5 Barb. (N. Y.) 661; Irwin v. Dearman, 11 East, 23. So a stepparent: Bartley v. Ritchmyer, 4 N. Y. 38. Putative grandfather: Moritz v. Garnhart, 7 Watts (Pa.) 302. An aunt: Edmondson v. Machell, 2 Term R. 4. An uncle: Manvell v. Thomson, 2 Car. & P. 303; Davidson v. Goodall, 18 N. H. 423; Ingersoll v. Jones, 5 Barb. (N. Y.) 661; Bracy v. Kibbe, 31 Barb. (N. Y.) 273; Clark v. Fitch, 2 Wend. (N. Y.) 459; Maguinay v. Saudek, 5 Sneed (Tenn.) 146; Certwell v. Hoyt, 6 Hun (N. Y.) 575; Martin v. Payne, 9 Johns. (N. Y.) 387; Kinney v. Laughenour, 89 N. C. 365; Millar v. Thompson, 1 Wend. (N. Y.) 447; Morgan v. Dawes, 4 Cow. (N. Y.) 412; Bartley v. Ritchmeyer, 4 N. Y. 38; Mulvehall v. Millward, 11 N. Y. 322; Ball v. Bruce, 21 Ill. 161; Dain v. Wyckoff, 18 N. Y. 45; Keller v. Donnelly, 5 Md. 211; Moritz v. Garhart, 7 Watts (Pa.) 302; Blanchard v. Ilsley, 120 Mass. 487; Commissioners' Court of Butler Co. v. McCann, 23 Ala. 599. But see Fernsler v. Moyer, 3 Watts & S. (Pa.) 416.

[42] Hutchinson v. Horn, 1 Ind. 363; Smith v. Richard, 29 Conn. 432; Hamilton v. Lomax, 26 Barb. (N. Y.) 615; Pence v. Dozier, 7 Bush (Ky.) 133.

[43] 47 Miss. 329-340.

158. Exemplary damages were allowed to the parent for seduction, abduction, and the like, so that recovery for the injury to the relation of parent and child, rather than of master and servant, was secured.

No action apart from statute can be maintained by the father for injury in his parental capacity; but in the struggle between substantial justice to the parent and the precedents, the courts, in actions for seduction, have clung to the latter and striven to attain the former, until the anomaly has been produced of requiring the action to be prosecuted by the father for an injury inflicted upon him in his relation as master, and permitting a recovery in his relation as a parent.[44] The allowance by the court of punitive damages enabled them to make the fiction of service innocent, and to do substantial justice, notwithstanding it. Accordingly, while the loss of service is the ostensible basis of recovery, it is largely a matter of form, and the real grievance—the parent's humiliation and disgrace—is given a substantial remedy.[45] He may recover "all he can feel from the nature of the injury." [46]

[44] 21 Am. & Eng. Enc. Law, 1009. The action is in substance for a wrong to the person of the child. The loss of service is in most cases purely imaginary, and is characterized by a sensible writer as "one of the quaintest fictions in the world." Taylor, C. J., in McClure v. Miller, 11 N. C. 133.

[45] "However difficult to reconcile to principle of giving greater damages," said Lord Ellenborough, in Irwin v. Dearman, 11 East, 24, "the practice is become inveterate and cannot now be shaken." Et vide Tullidge v. Wade, 3 Wils. 18; Hudkins v. Haskins, 22 W. Va. 645; Tillotson v. Cheetham, 3 Johns. (N. Y.) 56; Barbour v. Stephenson, 32 Fed. 66; Simpson v. Grayson, 54 Ark. 404, 16 S. W. 4; Damon v. Moore, 5 Lans. (N. Y.) 454; Dain v. Wyckoff, 7 N. Y. 191, 18 N. Y. 45; Lipe v. Eisenlerd, 32 N. Y. 229; Lawyer v. Fritcher, 54 Hun (N. Y.) 586, 7 N. Y. Supp. 909; Id., 130 N. Y. 239, 29 N. E. 267; Chellis v. Chapman, 125 N. Y. 214–218, 26 N. E. 308.

[46] Garretson v. Becker, 52 Ill. App. 255; Phelin v. Kenderdine, 20 Pa. St. 354.

159. Statutory changes and judicial decisions tend to abolish the fiction of service, and to recognize the right of the parent to sue for the injury to the family relation, and of the child to recover for its own peculiar wrong. The consent of the child to intercourse will bar its right to recover, but not the right of the parent. Consent of the parent will bar his right to recover, and his indifference may mitigate damages.

By statutes of various kinds, and in varying degrees, the fiction of proof of loss of service as a condition precedent to the right of the parent to recover for injuries done to the child has been, to a large extent, abolished.[47] The tendency of legislation and decision is to recognize the reasonable view that when a child is injured the parent suffers one injury, which, according to circumstances, may or may not be based upon lawful service; and the child, another and distinct injury; and the master, under some circumstances, a further damage in loss or diminution of service.

What is Seduction.

Seduction is the act of a man in enticing a woman to commit unlawful sexual intercourse with him by means of persuasion, solicitation, promises, bribes, or other means without the employment of force.[48]

It has been insisted that mere persuasion of a previously chaste woman, if followed by illicit intercourse, as the result thereof, may constitute seduction.[49] An unchaste woman, who has reformed, may be seduced.[50] A criminal assault, or rape, however, is not

[47] Hood v. Sudderth, 111 N. C. 215, 16 S. E. 397; Stoudt v. Shepherd, 73 Mich. 588, 41 N. W. 696 (see How. Ann. St. §§ 7779–7781); Riddle v. McGinnis, 22 W. Va. 253; Gardner v. Kellogg, 23 Minn. 463; Ellington v. Ellington, 47 Miss. 329-340; Fry v. Leslie, 87 Va. 269, 12 S. E. 671; Scarlett v. Norwood, 115 N. C. 284, 20 S. E. 459; Schmit v. Mitchell (Minn.) 61 N. W. 140.

[48] Black, Law Dict. 1074.

[49] Graham v. McReynolds, 90 Tenn. 673, 18 S. W. 272. Et vide Robinson v. Powers, 120 Ind. 480, 28 N. E. 1112; Badder v. Keefer, 91 Mich. 611, 52 N. W. 60; Hallock v. Kinney, 91 Mich. 57, 51 N. W. 706.

[50] Patterson v. Hayden, 17 Or. 238, 21 Pac. 129; People v. Clark, 33 Mich. 112.

properly the basis of an action in the form of seduction, although it may entitle to as great damages.[51] There is no substantial difference between seduction and debauchery, as a cause of action.[52]

Recovery by the Person Seduced.

The right of an unmarried female to sue for her own seduction, and of the father (or, in case of his death or desertion, the mother) to sue for damages for seduction, although the daughter be not living with, or in the service of, the parents, or although there be no loss of service, is now enforced by many courts.[53] Where, however, the intercourse is merely the result of mutual desire,[54] or of a mere appeal to passion,[55] seduction is not made out so as to entitle the woman seduced to recover. There must be some pretense or artifice used.[56] A promise to marry is not essential to constitute the wrong, but will aggravate damages.[57]

[51] Hodges v. Bales, 102 Ind. 494, 1 N. E. 692; Breon v. Henkle, 14 Or. 494, 13 Pac. 289. But see Watson v. Watson, 53 Mich. 168, 18 N. W. 605; Kennedy v. Shea, 110 Mass. 147.

[52] Stoudt v. Shepherd, 73 Mich. 588, 41 N. W. 696; 1 Chit. Pl. 138; 2 Chit. Pl. 265–268, 375, 376.

[53] In North Carolina, feigned issues have been abolished by the constitution. Accordingly, a woman, when of age, and not her father, as the real party in interest, may recover for her seduction. Hood v. Sudderth, 111 N. C. 215, 16 N. E. 397; Ellington v. Ellington, supra. So, for example, in Indiana and Iowa, even by a woman not of age. McCoy v. Trucks, 121 Ind. 292, 23 N. E. 93; Stevenson v. Belknap, 6 Iowa, 97. Et vide Franklin v. McCorkle, 16 Lea (Tenn.) 609–612; White v. Gregory, 126 Ind. 95, 25 N. E. 806; Hodges v. Bales, 102 Ind. 494, 1 N. E. 692; De Haven v. Helvie, 126 Ind. 82, 25 N. E. 874; Becker v. Mason, 93 Mich. 336, 53 N. W. 361; Hawn v. Banghart, 76 Iowa, 683, 39 N. W. 251; Badder v. Keefer, 91 Mich. 611, 52 N. W. 60. As to statutory changes, see 3 Lawson, Rights, Rem. & Pr. § 1112.

[54] Becker v. Mason, 93 Mich. 336, 53 N. W. 361. As to consent after resistance, see Egan v. Murray, 80 Iowa, 180, 45 N. W. 563.

[55] Hawn v. Banghart, 76 Iowa, 683, 39 N. W. 251.

[56] Bailey v. O'Bannon, 28 Mo. App. 39.

[57] Franklin v. McCorkle, 16 Lea (Tenn.) 609. In an action for seduction, plaintiff testified that she resisted defendant's solicitations for three months, and then yielded on his promise to marry her, and that but two acts occurred. Defendant admitted the intercourse, but denied that it was induced by a previous promise of marriage. *Held*, that it cannot be said, as a matter of

Recovery by Parent.

The consent of an infant daughter is not a bar to the father's recovery.[58] The parent may, however, be disentitled by his consent to the seduction, and, by negligence or indifference, reduce the damages to which he may be entitled.[59] Pregnancy is not essential to constitute seduction. Communication of venereal disease is sufficient;[60] or incapacity to labor, without pregnancy or disease.[61] It is not material to the father's recovery whether the wrong done was accomplished by force, artifice, or persuasion.[62]

Damages.

Damages in seduction exhibit the logical application of the general principles as to damages.[63] General damages may be recovered,[64] but not remote damages; as for the illness of the daughter three months after seduction, produced by threats of a suit for seduction.[65] Recovery may be had for the natural consequences which resulted from the wrong.[66] Thus, pregnancy, childbirth,

law, that the intercourse was of a mutual desire, but that the truth of the charge was a question for the jury. Becker v. Mason, 93 Mich. 336, 53 N. W. 361. Complaint need not show reliance on such promise. Shewalter v. Bergman, 123 Ind. 155, 23 N. E. 686; McCoy v. Trucks, 121 Ind. 292, 23 N. E. 93. Et vide Elliott v. Nicklin, 5 Price, 641; Tullidge v. Wade, 3 Wils. 18; 2 Starkie, Ev. 732, note 7.

[58] White v. Murtland, 71 Ill. 250; Leucker v. Steileu, 89 Ill. 544.

[59] Travis v. Barger, 24 Barb. (N. Y.) 614; Parker v. Elliott, 6 Munf. (Va.) 587; Smith v. Masten, 15 Wend. (N. Y.) 270. As where father allowed young people while courting to sleep together. Seager v. Sligerland, 2 Caines (N. Y.) 219; Zerfing v. Mourer, 2 G. Greene (Iowa) 520; Graham v. Smith, 1 Edm. Sel. Cas. (N. Y.) 267.

[60] White v. Nellis, 31 N. Y. 405.

[61] Abrahams v. Kidney, 104 Mass. 222.

[62] Lawrence v. Spence, 99 N. Y. 669, 2 N. E. 145; Lavery v. Crooke, 52 Wis. 612, 9 N. W. 599.

[63] Ante, c. 5, as to damages.

[64] Simonds v. Busby, 119 Ind. 13, 21 N. E. 451.

[65] Knight v. Wilcox, 14 N. Y. 413, overruling 18 Barb. 212. Compare this case with Blagge v. Ilsley, 127 Mass. 191. Compare Boyle v. Brandon, 13 Mees. & W. 738, with Manvell v. Thomson, 2 Car. & P. 303.

[66] White v. Murtland, 71 Ill. 250; Klopfer v. Bromme, 26 Wis. 372; Brown v. Kingsley, 38 Iowa, 220; Hewitt v. Prime, 21 Wend. (N. Y.) 79.

sickness, and the loss of social standing,[67] may be considered in the assessments of damages, where the female is the plaintiff.[68] Loss of service during the child's minority,[69] expense incurred, mental suffering, family dishonor, and the demoralizing influence on other children, are proper elements of damages to be considered by the jury, where the action is by the parent.[70] The gist of the action is, of course, punitive damages.[71] Peculiar circumstances, showing deception, promise to marry, youth and innocence of the woman, publicity[72] given to the wrong, a proposition to procure abortion,[73] all will serve to aggravate damages. On the other hand, the previous unchastity, the willingness of the child, the indifference of the parent in exposing his child before the seduction, and the insensi-

[67] Hawn v. Banghart, 76 Iowa, 683, 39 N. W. 251.

[68] Wilson v. Shepler, 86 Ind. 275.

[69] Cuming v. Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65. Some proof of loss of service necessary, Grinnell v. Wells, 7 Man. & G. 1033; Eager v. Grimwood, 1 Exch. 61.

[70] Philips v. Hoyle, 4 Gray (Mass.) 568; Rollins v. Chalmers, 51 Vt. 592; Taylor v. Shelkett, 66 Ind. 297; Wandell v. Edwards, 25 Hun, 498; Barbour v. Stephenson, 32 Fed. 66; Akerley v. Haines, 2 Caines, 292; Hogan v. Cregan, 6 Rob. (N. Y.) 138; Stiles v. Tilford, 10 Wend. 338; Wilds v. Bogan, 57 Ind. 453; Hatch v. Fuller, 131 Mass. 574; Hornketh v. Barr, 8 Serg. & R. 36; Kendrick v. McCrary, 11 Ga. 603; Clem v. Holmes, 33 Grat. (Va.) 722; Leucker v. Steileu, 89 Ill. 545; Grable v. Margrave, 4 Ill. 372; Phelin v. Kenderdine, 20 Pa. St. 354.

[71] Terry v. Hutchinson, L. R. 3 Q. B. 599; Verry v. Watkins, 7 Car. & P. 308. $6,750 have been allowed. Lavery v. Crooke, 52 Wis. 612, 9 N. W. 599; Badgley v. Decker, 44 Barb. (N. Y.) 577; Torre v. Summers, 2 Nott. & McC. (S. C.) 267; Fox v. Stevens, 13 Minn. 272 (Gil. 252); Morgan v. Ross, 74 Mo. 318; Davidson v. Abbott, 52 Vt. 570; Johnston v. Disbrow, 47 Mich. 59, 10 N. W. 79; Giese v. Schultz, 69 Wis. 521, 34 N. W. 913; Franklin v. McCorkle, 16 Lea (Tenn.) 609; Fry v. Leslie, 87 Va. 269, 12 S. E. 671; Ingersoll v. Jones, 5 Barb. (N. Y.) 661; Baird v. Boehner, 77 Iowa, 622, 42 N. W. 454; Kerns v. Hagenbuchle (Super. N. Y.) 17 N. Y. Supp. 309; Cowden v. Wright, 24 Wend. (N. Y.) 429. But see Cuming v. Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65.

[72] Simons v. Busby, 119 Ind. 13, 21 N. E. 451; Flemington v. Smithers, 2 Car. & P. 292; Whitney v. Hitchcock, 4 Denio, 461.

[73] Franklin v. McConkle, 16 Lea, 609; Lawyer v. Fritcher, 130 N. Y. 239, 29 N. E. 267; Fox v. Stevens, 13 Minn. 272 (Gil. 252).

bility, will all serve to mitigate damages.[74] The pecuniary condition of the seducer may be considered.[75]

Other Injuries to Children.

An action lies by the parent for the abduction, the enticement, or wrongfully harboring a child, as well as for its seduction.[76] Thus, a father may sue a mother who enticed his daughter for the

[74] Bolton v. Miller, 6 Ind. 263. Ante, p. 398. But previous presents and payments to woman seduced will not. Russell v. Chambers, 31 Minn. 54, 16 N. W. 458; Stoudt v. Shepherd, 73 Mich. 588, 41 N. W. 696; Cochran v. Ammon, 16 Ill. 316; Peters v. Lake, 66 Ill. 209; Simpson v. Grayson, 54 Ark. 404, 16 S. W. 4; Shattuck v. Hammond, 46 Vt. 466; Hoffman v. Kemerer, 44 Pa. St. 452; Love v. Masoner, 6 Baxt. (Tenn.) 24; Carder v. Forehand, 1 Mo. 704; White v. Murtland, 71 Ill. 250; Patterson v. Hayden, 17 Or. 238, 21 Pac. 129; Wallace v. Clark, 2 Overt (Tenn.) 93; Drieh v. Davenport, 2 Stew. (Ala.) 266; Hawn v. Banghart, 76 Iowa, 683, 39 N. W. 251; Fry v. Leslie, 87 Va. 269, 12 S. E. 671; Leckey v. Bloser, 24 Pa. St. 401; McAulay v. Birkhead, 13 Ired. (N. C.) 28; Tillotson v. Cheetham, 3 Johns. 56; Shewalter v. Bergman, 123 Ind. 155, 23 N. E. 686; Grable v. Margrave, 3 Ill. 372; Rea v. Tucker, 51 Ill. 110; Thompson v. Clendening, 1 Head. (Tenn.) 287; Haynes v. Sinclair, 23 Vt. 108.

[75] Peters v. Lake, 66 Ill. 206; Mullin v. Spangenberg, 112 Ill. 140; White v. Gregory, 126 Ind. 95, 25 N. E. 806; De Haven v. Helvie, 126 Ind. 82, 25 N. E. 874; Grable v. Margrave, 4 Scam. (Ill.) 372; Hosley v. Brooks, 20 Ill. 116; Lavery v. Crooke, 52 Wis. 612, 9 N. W. 599. Evidence: The plaintiff is not confined as to evidence to a particular day or week, or to a particular act, but may give evidence covering many acts and extending over considerable time, McCoy v. Trucks, 121 Ind. 292, 23 N. E. 93; Badder v. Keefer, 100 Mich. 272, 58 N. W. 1007; may introduce evidence of the time when she became pregnant, Baird v. Boehner, 77 Iowa, 622, 42 N. W. 454; evidence of certain acts and statements of plaintiff, not limited to a time before the alleged seduction, was inadmissible, Cliffton v. Granger, 86 Iowa, 573, 53 N. W. 316; bad reputation of the woman after seduction is inadmissible, Shewalter v. Bergman, 123 Ind. 155, 23 N. E. 686; correspondence referring to the alleged seduction is proper evidence, Lee v. Cooley, 13 Or. 433, 11 Pac. 70; where pregnancy was alleged to have resulted from the intercourse with defendant, evidence that the girl had intercourse with another man after the seduction, but before pregnancy, is incompetent, Ayer v. Colgrove, 81 Hun, 322, 30 N. Y. Supp. 788.

[76] A father may maintain an action for harboring and secreting his minor daughter, and persuading her to remain absent from her family and service, without his consent. Stowe v. Heywood, 7 Allen, 118. As to an action for harboring plaintiff's son, and refusing to allow plaintiff to get possession and control of him, see Loomis v. Deets, 30 Atl. 612.

benefit of her son.[77] The consent of the father, when obtained by fraud, is no defense to such an action.[78] Nor is the general looseness of morals of the enticed child and of her family a defense.[79] But the parent may not recover damages for the improper expulsion of his child from school,[80] or procure an injunction to prevent publication of its portrait,[81] because there is no loss of service, and the law does not compensate for such sentimental suffering.

The law, regarding the right of service as property,[82] recognizes two classes of injuries, when an infant suffers personal injury, as distinguished from seduction, viz. the injury of the parent because of his loss of service consequent upon the damages done, and the injury of the child because of the damage inflicted upon him. The right of the father to recover indemnity for expense of care, medical attendance, and the like, to which he was put by injury to his child, although it were incapable of rendering service, was duly recognized.[83] This doctrine has been declared until it is now asserted without reservation that an action of this sort rests, not upon the relation of master and servant, but upon that of parent and child, and that the damages may include a reasonable allowance for prospective loss of service, based upon the evidence in the case.[84] The infant may sue, by the proper statutory parties, for the damage he suffers; and the father, on his peculiar separate cause of action.

[77] Bradley v. Shaffer (Sup.) 19 N. Y. Supp. 640. Et vide Pollock v. Pollock (Com. Pl. N. Y.) 29 N. Y. Supp. 37.

[78] As where fraud obtained consent to marriage to a bigamist, Lawyer v. Fritcher, 130 N. Y. 239, 29 N. E. 267. Et vide Kreag v. Anthus, 2 Ind. App. 482, 28 N. E. 773.

[79] Dobson v. Cothran, 34 S. C. 518, 13 S. E. 679.

[80] Donahoe v. Richards, 38 Me. 376; Spear v. Cummings, 23 Pick. 224; Stephenson v. Hall, 14 Barb. 222; Sherman v. Charlestown, 8 Cush. 161.

[81] Murray v. Gast Lithographic & Engraving Co. (Com. Pl. N. Y.) 28 N. Y. Supp. 271.

[82] Hall v. Hollander, 4 Barn. & C. 660. While it is said the child must be old enough to be capable of rendering service, this does not show that, if a jury chose to find that a very strong child was capable of service, their verdict would be disturbed. Webb's Pol. Torts, 282.

[83] Dennis v. Clarke, 2 Cush. (Mass.) 347.

[84] The Witness, 18; Netherland-American Steam Nav. Co. v. Hollander, 8 C. C. A. 169, 59 Fed. 417; Cuming v. Brooklyn City R. Co., 109 N. Y. 95, 16 N. E. 65.

Each cause of action has its peculiar rule of damages. Thus, where the child has not been emancipated by the parent, not he, but the father, is entitled to compensation for his diminished capacity to earn money during the time intervening between the injury and his arrival at majority.[85] The father may also recover actual loss of service as distinguished from prospective and expenses necessarily consequent on the care and cure of the child.[86] The negligence of the parent in allowing the child to undertake employment exposing him to dangers disapportioned to his years and discretion may prevent recovery.[87] The father may prosecute for an assault on his child.[88]

160. So long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid, comfort, and obey, it would seem that no action for tort will lie on behalf of such child against a parent.

The reason assigned for this rule is that "the peace of society and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child the right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws,

[85] Texas & P. Ry. Co. v. Morin, 66 Tex. 225, 18 S. W. 345 (commenting on Houston & G. N. Ry. Co. v. Miller, 51 Tex. 270; Sawyer v. Sauer, 10 Kan. 519, and Abeles v. Bransfield, 19 Kan. 16); Texas & P. Ry. Co. v. O'Donnell, 58 Tex. 27.

[86] Dollard v. Roberts, 130 N. Y. 269, 29 N. E. 104. And, generally, see Barnes v. Keene, 132 N. Y. 13, 29 N. E. 1090; Texas & P. Ry. Co. v. Brick, 83 Tex. 526, 18 S. W. 947; Id., 83 Tex. 598, 20 S. W. 511; Martin v. Wood, 52 Hun, 613, 5 N. Y. Supp. 274; Walker v. Second Ave. Ry. Co. (Super. N. Y.) 6 N. Y. Supp. 536; Buck v. People's St. Ry. E. L. & P. Co., 46 Mo. App. 555; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Schmitz v. St. Louis, I. M. & S. Ry. Co., 46 Mo. App. 380; Mauerman v. St. Louis, I. M. & S. Ry. Co., 41 Mo. App. 348; Louisville & N. R. Co. v. Willis, 83 Ky. 57.

[87] Weaver v. Iselin, 161 Pa. St. 386, 29 Atl. 49; Gulf, C. & S. F. R. Co. v. Redeker, 75 Tex. 310, 12 S. W. 855; Gulf, C. & S. F. R. Co. v. Vieno (Tex. Civ. App.) 26 S. W. 230.

[88] Hinckle v. State, 127 Ind. 490, 26 N. E. 777.

will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand." Therefore a minor daughter, who had been married, but who, at the time of the alleged injury, was separated and living apart from her husband, cannot sue her parents for unlawful incarceration in an insane asylum.[89]

HUSBAND AND WIFE.

161. No action in tort ordinarily lies between the husband and wife for injury to person or reputation, although it may, under statute, lie for injuries to separate property.

While it may be true that the law does not recognize the family, as an abstract entity, it recognizes and protects the various relationships involved. The right of the husband to moderately correct his wife, if at one time recognized,[90] has probably passed entirely away.[91] Nor has the husband any right, when his wife refuses to live with him, to take her person by force, and restrain her of her liberty until she is willing to render to him conjugal rights.[92] The wife can sustain no action for a tort by the husband to her person or reputation, even after divorce, where the tort was committed upon her while the relationship existed.[93] With the development

[89] Hewlett v. George, 68 Miss. 703, 9 South. 885. And see 7 Am. & Eng. Enc. Law, 665. Cf. Cooley, Torts, 170.

[90] State v. Rhodes, 1 Phil. (N. C.) 453.

[91] Cooley, Torts (2d Ed.) 262, citing Pearman v. Pearman, 1 Swab. & T. 600; People v. Winter, 2 Parker, Cr. R. 10; Com. v. McAfee, 108 Mass. 458; Poor v. Poor, 8 N. H. 307–313.

[92] Cochrane's Case, 8 Dowl. 630, overruled by Reg. v. Jackson [1891] 1 Q. B. 671.

[93] Slander: Freethy v. Freethy, 42 Barb. 641. Assault and battery: Longendyke v. Longendyke, 44 Barb. 366; when committed during coverture, and action is brought after divorce, Phillips v. Barnett, 1 Q. B. Div. 436; Peters v. Peters, 42 Iowa, 182; Main v. Main, 46 Ill. App. 106; Abbott v. Abbott, 67 Me. 304; Libby v. Berry, 74 Me. 286; Nickerson v. Nickerson, 65 Tex. 281; Phillips v. Barnett, 1 Q. B. Div. 436, 17 Moak. 100; Schultz v. Schultz, 89 N. Y. 644. The dissenting opinion and interesting discussion in this case referred to in Bertles v. Nunan, 92 N. Y. 152, will be found in the report of same case, 27 Hun, 26–34. A husband cannot sue his wife to recover dam-

of the modern law as to separate property of a wife, however, the right of the husband to sue his wife, and of the wife to sue her husband, for torts arising out of injury to property, has been recognized.[94]

SAME—ACTION FOR INTERFERENCE WITH DOMESTIC RIGHTS.

162. At common law, on the fiction of services lost, and, generally, under existing law, largely on the theory of pure tort, a husband not disentitled by his own conduct, may maintain an action against a third person for wrongful violation of, or interference with, the personal domestic duties owed him by his wife, notwithstanding her acquiescence in the wrong.

163. The corresponding right of the wife to sue has been frequently, but not universally, recognized.

Action by the Husband for Defilement of the Wife.

As against an adulterer, a husband had at common law an action of criminal conversation. This has been abolished.[95] The real remedy for many years was the action, adopted from that for enticing away a servant per quod servitium amisit, in the form per quod consortium amisit. The same latitude being allowed in

ages for deceit by which he was induced to marry her. Kujek v. Goldman (Com. Pl.) 29 N. Y. Supp. 294.

[94] The husband may sue the wife for her conversion of his property, Mason v. Mason, 66 Hun, 386, 21 N. Y. Supp. 306; Ryerson v. Ryerson (Sup.) 8 N. Y. Supp. 738; or her brother for removing household furniture at her direction, Burns v. Kirkpatrick, 91 Mich. 364, 51 N. W. 893; Bruce v. Bruce, 95 Ala. 563, 11 South. 197; Good v. Good, 39 W. Va. 357, 19 S. E. 382. In general, the husband may not sue for damages to his wife's estate. Central Railroad & Banking Co. v. Bryant, 89 Ga. 457, 15 S. E. 537. But compare Whalen v. Baker, 44 Mo. App. 290, with Kavanagh v. Barber, 131 N. Y. 211, 30 N. E. 235. However, Champlin, J., in Smith v. Smith, 73 Mich. 445, 41 N. W. 499, 500, said, "We are not prepared to decide that a married woman in the state [Michigan] may not maintain an action of libel against her husband."

[95] 20 & 21 Vict. c. 85, §§ 33–39.

the estimate of the husband's damages as were granted the parent in suing for seduction made the proceeding almost a penal one.[96] The tendency of current legislation and decision, however, is to base the action on the pure theory of tort, and to ignore the limitation introduced by the fiction of service. The willingness or unwillingness of the wife, the loss or the absence of service, does not affect the right of the husband to sue. The essential right injured is the right of a man to exclusively beget his own children. Loss of society, affection, and service will be presumed.[97] The mere separation of the wife from the husband will not prevent his recovery.[98] But negligence of the husband, though not amounting to consent, may mitigate damages.[99] Neither the death [100] of the wife before suit brought, nor cohabitation by the husband with the wife after knowledge of adultery, is a bar.[101] Punitive damages will be allowed.[102] Consent of the husband, whether to the specific act, or general immorality of the wife, is a bar to his right

[96] 3 Bl. Comm. 139, 140; Pol. Torts, 198; Cornelius v. Hambay, 150 Pa. St. 359, 24 Atl. 515.

[97] Bigaoulette v. Paulet, 134 Mass. 123; Weedon v. Timbrell, 5 Term R. 360; Adams v. Main, 3 Ind. App. 232, 29 N. E. 792; Yundt v. Hartrunft, 41 Ill. 9; Peters v. Lake, 66 Ill. 206; Coleman v. White, 59 Ind. 548; Wales v. Miner, 89 Ind. 118; Hadley v. Heywood, 121 Mass. 236; Johnston v. Disbrow, 47 Mich. 59, 10 N. W. 79; Jacobson v. Siddal, 12 Or. 280, 7 Pac. 108; Van Vacter v. McKillip, 7 Blackf. (Ind.) 578; Barnes v. Allen, 30 Barb. (N. Y.) 663.

[98] But see Michel v. Dunkle, 84 Ind. 544; Wood v. Mathews, 47 Iowa, 409; Sherwood v. Titman, 55 Pa. St. 77.

[99] Bunnell v. Greathead, 49 Barb. 106. Compare Sturam v. Hummell, 39 Iowa, 478.

[100] Bromley v. Wallace, 4 Esp. 237; Garison v. Burden, 40 Ala. 515; Sandborn v. Neilson, 4 N. H. 501. And see Clouser v. Clapper, 59 Ind. 548.

[101] Verholf v. Vanhouwenlengen, 21 Iowa, 429. The forgiveness is to the wife, not to her seducer. Clouser v. Clapper, 59 Ind. 548.

[102] Cornelius v. Hambay, 150 Pa. St. 359, 24 Atl. 515 (dissenting opinion of Williams, J.); French v. Deane, 19 Colo. 504, 36 Pac. 609; Johnston v. Disbrow, 47 Mich. 59, 10 N. W. 79. As to special damages in an action for alienating the affections of plaintiff's wife, it is error to direct the jury that, if they find that plaintiff contracted a venereal disease from his wife on account of her association with defendant, they should consider such fact in estimating the damages, in the absence of allegations in the petition of special damages sustained by reason of such fact. Dowdell v. King, 97 Ala. 635, 12 South. 405.

to recovery.[103] And his own previous infidelity during marriage may mitigate damages.[104] But to entitle him to recover for the defilement of his wife, the intercourse need not have been the result of seduction.[105]

Action by the Husband for Alienation of the Wife's Affections.

To entitle the husband to recover for injuries to the wife, it is not necessary that she should have been seduced or debauched. An action lies for the alienation,[106] or even for the partial alienation,[107] of her affections.

Under the action per quod consortium amisit, the husband could recover for the "comfort and assistance" of his wife. In Winsmore v. Greenbank,[108] the loss to the husband for which an action lay was that he had had a fortune left to her separate use. The action lies where the wife is retained against the inclination of her husband. If, however, he has ill-treated her, and another person acts in mere

[103] Schorn v. Berry, 63 Hun, 110, 17 N. Y. Supp. 572; Frye v. Derstler, 2 Yeates, 278; Cook v. Wood, 30 Ga. 891; Bonas v. Steffens, 62 Hun, 619, 16 N. Y. Supp. 819; Winter v. Henn, 4 Car. & P. 494; Bunnell v. Greathead, 49 Barb. (N. Y.) 106; Norris v. Norris, 30 Law J. Prob., Div. & Adm. 111; Duberley v. Gunning, 4 Term R. 651; Sanborn v. Neilson, 4 N. H. 501; Bonas v. Steffens, 16 N. Y. Supp. 819, 62 Hun, 619.

[104] Smith v. Masten, 15 Wend. (N. Y.) 270; Shattuck v. Hammond, 46 Vt. 466; Rea v. Tucker, 51 Ill. 110.

[105] Weedon v. Timbrell, 5 Term R. 360. And see Wales v. Miner, 89 Ind. 118; Wood v. Mathews, 47 Iowa, 409; Hadley v. Heywood, 121 Mass. 236.

[106] Rudd v. Rounds, 64 Vt. 432, 25 Atl. 438; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417; Highman v. Vanosdol, 101 Ind. 160; Hutcheson v. Peck, 5 Johns. (N. Y.) 196; Heermance v. James, 47 Barb. (N. Y.) 120. The complaint in an action by a man for the enticing away of his wife need not particularly state the arts used to accomplish the purpose. French v. Deane, 19 Colo. 504, 36 Pac. 609. The action may be against several persons. Huot v. Wise, 27 Minn. 68, 6 N. W. 425.

[107] Fratini v. Caslani, 66 Vt. 273, 29 Atl. 252.

[108] Willes, 577; Bigelow, Lead. Cas. 328; Wood v. Mathews, 47 Iowa, 410; Turner v. Estes, 3 Mass. 316; Barbee v. Armistead, 10 Ired. (N. C.) 530; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417; White v. Ross, 47 Mich. 172, 10 N. W. 188; Weedon v. Timbrall, 5 Term R. 357; Modisett v. McPike, 74 Mo. 636; Hutchinson v. Peck, 5 Johns. (N. Y.) 196; Campbell v. Carter, 3 Daly (N. Y.) 165; Barbee v. Armistead, 10 Ired. (N. C.) 530; Perry v. Lovejoy, 40 Mich. 520, 14 N. W. 485; Bennett v. Smith, 21 Barb. (N. Y.) 439; Rabe v. Hanna, 5 Ohio, 530; Smith v. Lyke, 13 Hun, 204.

hospitality, there is no responsibility.[109] A parent, while he may not restrain his daughter, who has left an indifferent husband, from returning to him, may counsel her for her own good to remain away, and offer her a home and a living.[110] The parent's motive will be presumed to be good, unless it be shown to be evil. The parent will not be liable for sheltering the wife or advising her to leave her husband.[111] But a stranger does such things at his peril. He may justify himself by showing good faith and good cause, but the burden is on him to prove it.[112] The soundness of this distinction has been seriously questioned.[113] And there is exceedingly good authority against it.[114]

Action by the Husband for Miscellaneous Wrongs.

The common law went to great length to protect the husband against the wrongful interference with his domestic rights by third persons. Anyone who knowingly assists the wife in the violation of her duty as such is guilty of a wrong for which an action will lie, when injury is thereby inflicted on the husband.[115] Therefore, an action may be maintained against a druggist for selling a wife a dangerous quantity of laudanum.[116]

Action by Wife for Corresponding Wrong.

The common-law right of a married woman to sue a third person for the seduction or enticing away of her husband has been denied,

[109] Berthon v. Cartwright, 2 Esp. 480; Philp v. Squire, 1 Peake, 114; Tasker v. Stanley, 153 Mass. 148, 26 N. E. 417.

[110] White v. Ross, 47 Mich. 172, 10 N. W. 188; Glass v. Bennett, 89 Tenn. 478, 14 S. W. 1085.

[111] Huling v. Huling, 32 Ill. App. 519–522 (collecting cases).

[112] Higham v. Vanosdol, 101 Ind. 160–166; Modisett v. McPike, 74 Mo. 636.

[113] It is difficult, however, said Mr. Bigelow (Lead. Cas. Torts, 336), to see any distinction in favor of a parent over any other person, in this particular. Bennett v. Smith, 21 Barb. (N. Y.) 439.

[114] Tasker v. Stanley (1891) 153 Mass. 148, 26 N. E. 417; Winsmore v. Greenbank, Willes, 577; Philp v. Squire, 1 Peake, 82; Turner v. Esles, 3 Mass. 316; Stowe v. Heywood, 7 Allen (Mass.) 118; Holtz v. Dick, 42 Ohio St. 23; Hutchinson v. Peck, 5 Johns. (N. Y.) 196; Schuneman v. Palmer, 4 Barb. (N. Y.) 225.

[115] Barnes v. Allen, 30 Barb. (N. Y.) 663, per Latt, J.

[116] Hoard v. Peck, 56 Barb. (N. Y.) 202.

because at common law the property of the husband was the property of the wife, and such damages, if recovered, would become his property. Therefore, it has been urged, to allow her to recover would involve the absurdity that the husband might also sue for such a cause.[117] On the other hand, it has been insisted that, in natural justice, no reason exists why the right of the wife to maintain an action against the seducer of her husband should not be coextensive with his right of action against her seducer. The weight of authorities and the tendency of the legislation strongly inclines to the latter opinion.[118] An action by the wife against her mother-in-law for the enticement of a husband has been entertained on principles similar to those giving the corresponding right of action to the son.[119] The measure of her damages in such cases is the actual injury caused by the loss of her husband's affection and support, and exemplary damages when the injury is willful and wanton, according to the defendant's pecuniary circumstances.[120] The wife, however, cannot maintain such an action when she is separated from her husband by agreement, although

[117] Duffies v. Duffies (1890) 76 Wis. 374, 45 N. W. 522; Rice v. Rice (Mich.) 62 N. W. 833; Clow v. Chapman (Mo. Sup.) 28 S. W. 328; Doe v. Roe, 82 Me. 503, 20 Atl. 83. Et vide Lynch v. Knight, 9 H. L. Cas. 577, Mulford v. Clewell, 21 Ohio St. 191; Logan v. Logan, 77 Ind. 558; Van Arnam v. Ayers, 67 Barb. (N. Y.) 544; Reeder v. Purdy, 41 Ill. 279–282; Michigan Cent. R. Co. v. Coleman, 28 Mich. 440; Kroessin v. Keller (Minn.; 1895) 62 N. W. 438.

[118] Westlake v. Westlake, 34 Ohio St. 621; Warren v. Warren, 89 Mich. 123, 50 N. W. 842; Foot v. Card, 58 Conn. 1, 18 Atl. 1027; Seaver v. Adams (N. H.) 19 Atl. 776; Bassett v. Bassett, 20 Ill. App. 543; Reed v. Reed, 6 Ind. App. 317, 33 N. E. 638; Holmes v. Holmes, 133 Ind. 386, 32 N. E. 932; Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389; Wolf v. Wolf, 130 Ind. 599, 30 N. E. 308; Mehroff v. Mehroff, 26 Fed. 13; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17 (overruling Van Arnam v. Ayers, 67 Barb. 544); Simmons v. Simmons (Sup.) 4 N. Y. Supp. 221; Warner v. Miller, 17 Abb. N. C. 221; Churchill v. Lewis, Id. 226; Jaynes v. Jaynes, 39 Hun (N. Y.) 40; Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389; Van Olinda v. Hall (Sup.) 34 N. Y. Supp. 777; Railsback v. Railsback (Ind. App.) 40 N. E. 276; Rice v. Rice (Mich.) 62 N. W. 833 (by wife against father-in-law). And see Lynch v. Knight, 9 H. L. Cas. 577.

[119] Huling v. Huling, 32 Ill. App. 519.

[120] Waldron v. Waldron, 45 Fed. 315.

the enticement of her husband occurred while she was living with him.[121]

SAME—INJURIES TO WIFE—DOUBLE CAUSE OF ACTION.

164. Where the injuries to the wife complained of do not arise from a state of facts in which the wife's own wrong is an essential part, there are two distinct causes of action:

(a) The injury to the wife;

(b) The injury to the husband.

164a. At common law the husband was a necessary party to proceedings on both causes of action. This has been generally, but not universally, changed by statute, so as to allow the husband and the wife to sue separately and in their own names for their respective damages.

The husband may complain of the seduction of his wife. The corresponding right is not naturally extended to a married woman. In most of the cases already considered, the wrong involved is exclusively the husband's. The wife's own conduct in itself is a wrong to him. But, whenever she is innocent, the legal aspect of the facts change entirely. The woman who consents to adultery is in a very different position in law from that occupied by the unfortunate victim of a rape. And the right of a husband to sue for the injuries of his wife, caused by either violence or negligence, is not inconsistent with her right to recover on the same state of facts. His damage is consequential, and consists of loss of service, society, medical expenses, and other incidental losses.[122] Her damage is direct, and

[121] Buckel v. Suss (Super. N. Y.) 18 N. Y. Supp. 719; Id., 2 Misc. Rep. 571, 21 N. Y. Supp. 907. But see Postlewaite v. Postlewaite, 1 Ind. App. 473, 28 N. E. 99. Article on "The Husband Seducer," 26 Am. Law Rev. 36. As to action by wife against her father and mother-in-law, see Young v. Young, 8 Wash. 81, 35 Pac. 592.

[122] Skoglund v. Railway Co., 45 Minn. 330, 47 N. W. 1071; Mann v. City of Rich Hill, 28 Mo. App. 497; Blair v. Railroad Co., 89 Mo. 334, 1 S. W. 367; Reading v. Pennsylvania R. Co., 52 N. J. Law, 264, 19 Atl. 321; Brooks v. Schevern, 54 N. Y. 343; Mewhirter v. Hatten, 42 Iowa, 288; Tuttle v. Rail-

arises from the injury to her person, her individual suffering, and similar harm.

Parties Plaintiff.

This was distinctly recognized by the common law.[123] But, under its peculiar doctrine as to this relationship, the husband and wife were required to be joined as parties plaintiff in an action for personal injuries to her.[124] This requirement has generally been changed by statute so that ordinarily, but not always,[125] the wife may recover for her peculiar injury, and the husband for his.[126] In

way Co., 42 Iowa, 518; St. Louis S. W. Ry. Co. v. Henson, 7 C. C. A. 349, 58 Fed. 531.

[123] Hyatt v. Adams, 16 Mich. 180; Michigan Central R. Co. v. Coleman, 28 Mich. 439 (reviewing cases, page 444); Burt v. McBain, 29 Mich. 262; Leonard v. Pope, 27 Mich. 145.

[124] Mathews v. Central Pac. R. Co., 63 Cal. 450; Mosier v. Beale, 43 Fed. 358. Husband and wife as plaintiffs in malpractice, see Lynch v. Davis, 12 How. Prac. (N. Y.) 323; Long v. Morrison, 14 Ind. 595; Twombly v. Leach, 11 Cush. (Mass.) 397. 3 How. Ann. St. § 1446c, provides that on "any person or persons sustaining bodily injury" by a defective street, the corporation shall be liable "to the person or persons so injured." Held not to authorize a husband to sue a city for loss of services of his wife from injuries caused by a defective sidewalk. Neither does 3 How. Ann. St. § 1446d, which provides that if any horse or other animal, or any cart, carriage, or vehicle, "or other property" is injured by reason of such neglect, the corporation shall be liable to and pay the owner thereof just damages, which may be recovered in an action, etc., authorize such suit. Roberts v. City of Detroit (Mich.) 60 N. W. 450.

[125] A suit for personal injuries and wrongs done to a wife must be brought by her husband in his own name. Fournet v. Steamship Co., 43 La. Ann. 1202, 11 South. 541. Et vide San Antonio & A. P. Ry. Co. v. Corley (Tex. Civ. App.) 26 S. W. 903; Snashall v. Metropolitan Ry. Co., 19 D. C. 99; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49; Barker v. Railway Co., 92 Ala. 314, 8 South. 466; Gallagher v. Bowie, 66 Tex. 265, 17 S. W. 407; Mewhirter v. Hatten, 42 Iowa, 288; Tuttle v. Chicago, R. I. & P. R. Co., Id. 518; Stone v. Evans, 32 Minn. 243, 20 N. W. 149. The husband and wife have separate injuries on which to base action for criminal assault on the wife. Johnston v. Disbrow, 47 Mich. 59, 10 N. W. 79. As to violation of right of husband and wife to sleep together, vide Pullman Palace-Car Co. v. Bales (Tex. Sup.) 14 S. W. 855; Id., 80 Tex. 211, 15 S. W. 785.

[126] Kelley v. Mayberry Tp., 154 Pa. St. 440, 26 Atl. 595; Henry v. Klopfer, 147 Pa. St. 178, 23 Atl. 337, 338 (this case also discusses at length the measure of the husband's damage).

such cases, the joinder of the husband with the wife as a coplaintiff would seem to be a mere irregularity, which may be corrected by striking out his name.[127] She may certainly recover for injuries to a business carried on by her as a feme sole,[128] when such injuries are specially pleaded.[129] Thus, he may sue alone for libel,[130] slander,[131] or other damage done her person, including pain and suffering,[132] caused by the negligence of another.[133] Inasmuch as the services of a married woman belong to her husband, any injury to her, injuriously affecting them, would naturally be a part of the damages which he can recover.[134] But a physical injury impairing her capacity to labor has been classified with pain and suffering,

[127] Colvill v. Langdon, 22 Minn. 565.

[128] Wolf v. Bauereis, 72 Md. 481, 19 Atl. 1045.

[129] Uransky v. Dry-Dock, E. B. & B. R. Co., 118 N. Y. 304, 23 N. E. 451; Woolsey v. Trustees, 61 Hun, 136, 15 N. Y. Supp. 647. In an action for trespass on the land of a wife, the husband may be joined as plaintiff, though under Rev. St. Ind. 1881, § 254, he is not a necessary party. Atkinson v. Mott, 102 Ind. 431, 26 N. E. 217. The cause of action for personal injuries to the wife accrues to the community estate represented by the husband, and in the absence of a showing of exceptional facts entitling the wife to relief he alone can sue. The refusal of a husband to bring an action for injuries to the wife does not entitle the wife to sue alone. Rice v. Mexican Nat. R. Co. (Tex. Civ. App.) 27 S. W. 921. A review of the married women's property act of 1893, 97 Law T. 407.

[130] Pancost v. Burnell, 32 Iowa, 394; Pavlovski v. Thornton, 89 Ga. 829, 15 S. E. 822.

[131] Logan v. Logan, 77 Ind. 588.

[132] Haden v. Clarke, 56 Hun, 645, 10 N. Y. Supp. 291; Atlanta St. R. Co. v. Jacobs, 88 Ga. 647, 15 S. E. 825.

[133] Chicago, B. & Q. R. Co. v. Dunn, 52 Ill. 260; Hennies v. Vogel, 66 Ill. 401; Chicago, B. & Q. R. Co. v. Dickson, 67 Ill. 122; City of Rock Island v. Dels, 38 Ill. App. 409; Berger v. Jacobs, 21 Mich. 215; Du Bois Borough v. Baker, 120 Pa. St. 266, 13 Atl. 783. Compare Heirn v. McCaughan, 32 Miss. 17; Cross v. Guthery, 2 Root (Conn.) 90; Hyatt v. Adams, 16 Mich. 180. And see Atlanta St. Ry. Co. v. Jacobs, 88 Ga. 647. In New York, the wife could maintain such suit between 1880 and 1890. Weld v. New York, L. E. & W. R. Co., 68 Hun, 249, 22 N. Y. Supp. 974; Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17; Campbell v. Perry (Sup.) 9 N. Y. Supp. 330; Haden v. Clarke (Sup.) 10 N. Y. Supp. 291; City of Portland v. Taylor, 125 Ind. 522, 25 N. E. 459; Mosier v. Beale, 43 Fed. 358.

[134] Becker v. Janinski (Com. Pl.) 15 N. Y. Supp. 675; 27 Abb. N. C. 45, note on page 46; Carr v. Easton, 7 Pa. Co. Ct. R. 403; Bloom v. Manhattan El.

and she has been held to have such an interest in her working capacity that she can recover for its impairment the amount depending on the nature of the injury and the length of time during which the pain and deprivation will continue.[135] While, ordinarily, the husband, being liable for them, should recover for medical and similar expenses involved in the injury to the wife,[136] she has still been allowed to include them in the measure of her damages.[137] Where the wife cannot recover for personal injuries, because guilty of contributory negligence, her husband cannot recover for the loss of her services consequent on such injuries.[138] A husband and wife cannot recover for a personal injury to the wife, if the husband was guilty of contributory negligence.[139]

Ry. Co. (Sup.) 17 N. Y. Supp. 812; National Bank v. Sprague, 20 N. J. Eq. 13; Hall v. Incorporated Town of Manson (Iowa) 58 N. W. 881; Yopst v. Yopst, 51 Ind. 61; Reynolds v. Robinson, 64 N. Y. 589; Shaeffer v. Sheppard, 54 Ala. 244; Bolman v. Overall, 80 Ala. 451, 2 South. 624; Uransky v. Dry-Dock, E. B. & B. R. Co., 118 N. Y. 304, 23 N. E. 451; Porter v. Dunn, 131 N. Y. 314, 30 N. E. 122; Kavanaugh v. Janesville, 24 Wis. 618; Barnes v. Allen, 1 Abb. Dec. 111; Phillippi v. Wolff, 14 Abb. Prac. (N. S.) 196; Sloan v. New York Cent. Ry. Co., 1 Hun, 540; Mewhirter v. Hatten, 42 Iowa, 288; Meese v. City of Fond du Lac, 48 Wis. 323, 4 N. W. 406; City of Wyandotte v. Agan, 37 Kan. 528, 15 Pac. 529; Mann v. City of Rich Hill, 28 Mo. App. 497; Blair v. Chicago & A. R. Co., 89 Mo. 334, 1 S. W. 367; Skoglund v. Minneapolis St. Ry. Co., 45 Minn. 330, 47 N. W. 1071. In Pennsylvania, a husband may file a stipulation releasing to his wife his right for damages. Kelley v. Mayberry Tp., 154 Pa. St. 440, 26 Atl. 595. As to the right of wife to recover when she is engaged in the service of another, and not in household duties, see Brooks v. Schwerin, 54 N. Y. 343; Tuttle v. Chicago, R. I. & P. Ry. Co., 42 Iowa, 518; Neumeister v. Dubuque, 47 Iowa, 465; Carr v. Easton, 7 Pa. Co. Ct. R. 403.

[135] Atlanta St. R. Co. v. Jacobs, 88 Ga. 647, 15 S. E. 825; Metropolitan St. Ry. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49. A husband cannot, under 3 How. St. §§ 1446c, 1446h, recover for loss of services of his wife injured by a defective sidewalk. Roberts v. City of Detroit (Mich.) 60 N. W. 450.

[136] Belyea v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.) 63 N. W. 627.

[137] City of Columbus v. Strassner (Ind. Sup.) 34 N. E. 5. See Henry v. Klopfer, 147 Pa. St. 178, 23 Atl. 337, 338; Burnham v. Webster, 54 N. Y. Super. Ct. 30; Lewis v. Atlanta, 77 Ga. 756; Wolf v. Bauereis, 72 Md. 481, 19 Atl. 1045.

[138] Winner v. Oakland Tp., 158 Pa. St. 405, 27 Atl. 1110, 1111. But see Honey v. Chicago, B. & Q. R. Co., 59 Fed. 423.

[139] Pennsylvania R. Co. v. Goodenough (N. J. Err. & App.) 28 Atl. 3 (Dixon, J., dissenting).

CHAPTER VIII.

WRONGS AFFECTING REPUTATION.

DEFAMATION DEFINED.

165. Defamation is a false publication calculated to bring into disrepute. As to its objects, it may refer to—

(a) Persons, when it is commonly called libel and slander; or

(b) Things, when it is commonly called slander of property or title.

Defamation is the generic name for injuries to reputation. While it is commonly called slander of title when it concerns property, still, where the words of a publication apply to property, in such a way as to injure the reputation of the owner by exposing him to hatred, contempt, or ridicule, it is a libel on such person.[1]

[1] State v. Mason (Or.) 38 Pac. 130; or to write that a bookmaker sells immoral books. Tabart v. Tipper, 1 Camp. 350; or that a merchant's wine is poisoned or tea coppered. Colteman, J., in Ingram v. Lawson, 6 Bing. N. C. 212–216. But see Willard v. Mellor, 19 Colo. 534, 36 Pac. 148 ("rubbish" not libelous).

The right of reputation is a confused one.[2] It is sometimes regarded as an absolute or simple right, from the violation of which damage will be presumed. In many, perhaps in most, cases, the right is a right not to be harmed, from the violation of which there is no presumption of damage, and no cause of action arises unless damages conforming to the legal standard can be proved.

It does not seem to be definitely settled whether the right of reputation must be respected at peril,—as is true, for example, of the right of personal security, or of freedom of locomotion.[3] More-

[2] "Now I think no one can examine the authorities upon the law of slander without seeing that there are a number of distinctions to be found which cannot be supported on any satisfactory principle." Lord Herschell in Alexander v. Jenkins [1892] 1 Q. B. 797–800.

[3] The uncertainty of the law on this point is well illustrated in Massachusetts cases. It was accepted without dissent that "a person publishes libelous matter at his peril." Holmes J., in Burt v. Advertiser Newspaper Co., 154 Mass. 238–245, 28 N. E. 1,—citing Watson v. Moore, 2 Cush. 133–140; Parkhurst v. Ketchum, 6 Allen, 406; Clark v. Brown, 116 Mass. 504. But in Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N. E. 462, it was held that if defendant use plaintiff's name by mistake for that of another person in a defamatory way, there was no liability. "The reason of this is obvious. Defamatory language is harmful only as it purports to be the expression of the thought of him who is using it. In determining the effect of a slander, the questions involved are, what is the thought intended to be expressed? and how much credit should be given to him who expresses it?" Per Knowlton, J., pages 295, 296, 159 Mass., and page 462, 34 N. E. And see Lawrence v. Newberry, 64 Law T. (N. S.) 797. On the other hand, Holmes, J., in dissenting opinion, sets forth what would seem to be the better reasoning: "On general principles of tort, the private intent of the defendant would not exonerate it. It knew it was publishing statements purporting to be serious, which would be hurtful to a man if applied to him. It knew it was using as the subject of those statements words which purported to designate a particular man, and would be understood by its readers to designate one. If the defendant had supposed that there was no such person, and had intended simply to write an amusing fiction, that would not be a defense, at least unless its belief was justifiable. Without special reason, it would have no right to assume that there was no one within the sphere of its influence to whom the description answered. The case would be very like firing a gun into a street, and, when a man falls, setting up that no one was known to be there" (Holmes, J., in Hanson v. Globe Newspaper Co., 159 Mass. 293–301, 34 N. E. 462). Hull's Case, J. Kel. 60; Rex v. Burton, 1 Strange, 481; Rigmaidon's Case, 1 Lewin, Crown Cas. 180; Reg. v. Desmond, 11 Cox, 146, Steph. Dig. Cr. Law, 163. So, where

over, malice is an essential ingredient of the wrong. Accordingly, while the right to reputation is a natural, as distinguished from an

the description which points out the plaintiff is supposed by the defendant to point out another man, whom in fact it does not describe, the defendant is equally liable as when the description is supposed to point out nobody. On the general principle of tort the publication is so manifestly detrimental that the defendant publishes it at the peril of being able to justify it in the sense in which the public will understand it. This would seem to be in accordance with the general trend of authorities. Mistake is ordinarily no excuse. Shepheard v. Whitaker, L. R. 10 C. P. 502; Fox v. Broderick, 14 Ir. C. L. 453; Mayne v. Fletcher, 4 Man. & R. Mag. 56, note; Rex v. Paine, 5 Mod. 163; Alliger v. Brooklyn Daily Eagle, 6 N. Y. Supp. 110; Griebel v. Rochester Print. Co., 60 Hun, 319, 14 N. Y. Supp. 848; McLean v. New York Press Co. (Sup.) 19 N. Y. Supp. 262. And see Davis v. Marxhausen (Mich.) 61 N. W. 504; Loibl v. Breidenbach, 78 Wis. 49, 47 N. W. 15; Brett v. Watson, 20 Wkly. Rep. 723. It is not necessary that plaintiff should intend to injure defendant if that was the manifest tendency of his words. Curtis v. Mussey, 6 Gray, 261–273; Haire v. Wilson, 9 Barn. & C. 643; King v. Clerk, 1 Barnard, 304; Odger, Sland. & L. (2d Ed.) 638. Indeed, one publishing a libel without knowing it may be civilly and criminally responsible. Dun v. Hall, 1 Ind. 344 (where, contrary to orders, servant published a libel, and the master was held responsible). And see Rex v. Gutch, Moody & M. 433; Rex v. Walter, 2 Esp. 21; Com. v. Morgan, 107 Mass. 199. An inadvertent publication is a legal wrong. Rex v. Abingdon, 1 Esp. 228. So, also, punitive damages may be given for reprehensible negligence in publishing an article without verification of its truth. Morning Journal Ass'n v. Rutherford, 2 C. C. A. 354, 51 Fed. 513; Smith v. Sun Printing & Pub. Ass'n, 5 C. C. A. 91, 55 Fed. 240. So for malice or gross negligence. Cooper v. Sun Printing & Pub. Ass'n, 57 Fed. 566; Davis v. Marxhausen (Mich.) 61 N. W. 504 (in which a libel was published of plaintiff because of a mistake in names. Montgomery, J., said: "While the case is manifestly one in which large damages should not be awarded, yet it is clear that the record fails to show conclusively that the publication occurred through mistake, and while in the exercise of reasonable care"). A note on the liability of a newspaper proprietor for libel published without his knowledge or consent, State v. Mason (Or.) 26 Lawy. Rep. Ann. 779, 38 Pac. 130. Query: Does the opinion of a majority of the court in Hanson v. Globe Newspaper Co., supra, correspond to the modification of the ordinary conception of trespass in the law of trespass to the person, apparent in Stanley v. Powell [1891] 1 Q. B. 86, and Holmes v. Mather, L. R. 10 Exch. 261, or the modification of the formula as to the duty of insuring safety which arose out of Rylands v. Fletcher, L. R. 1 Exch. 277, L. R. 3 H. L. 330, apparent in Cork v. Blossom, 162 Mass. 330, 38 N. E. 495; 8 Harv. Law Rev. 225 (cf. Gorham v. Gross, 125 Mass. 232); and Berger v. Gaslight Co. (Minn.) 62 N. W. 336 (cf. Cahill v. Eastman, 18 Minn. 324 [Gil. 292]). It would cer-

acquired, one, it can scarcely be accurately called an absolute right.[4]

The right to recover for personal defamation depends upon sufficient and consistent allegation and proof that, first, words or other signs (a) capable of a disparaging meaning (b) were used in that sense (c) with reference to plaintiff; second, that such words or signs were (a) published by defendant so that (b) one third person, at least, understood the ill meaning; and, third, that damage resulted to plaintiff either (a) from presumption of law (which is more liberal to the plaintiff in libel than in slander) or (b) from proof of special injury, which has been specially averred. Historical differences, however, make it inconvenient to consider these subjects in this order.

PUBLICATION—LIBEL, SLANDER, AND MALICIOUS PROSECUTION DISTINGUISHED.

166. Publication of defamatory matter consists in communicating it to a third person or persons.[5] According to the manner of publication, it is either—

(a) Slander, which is defamation of a person by mere talk;

tainly seem that in all these cases the effect of the law inclines, not towards the theory of tort, that a man may act at his peril, but that responsibility is based upon some mental element involving the doctrine of culpability. The absence of a conception of the tendencies in the general law of torts is as apparent in the opinion of Knowlton, J., as perhaps the wedded fondness for his theory is apparent in the opinion of Justice Holmes.

[4] "The right of every man to have his good name maintained unimpaired is a jus in rem, a right absolute and good against the world." Odger, Sland. & L. p. 1. Sterrett, J., in Collins v. Dispatch Pub. Co., 152 Pa. St. 187, 25 Atl. 546, 547. And see Holt, Libel, 15; 1 Bl. Comm. bk. 1, c. 1; 2 Kent, Comm. (13th Ed.) 16–26; 1 Chit. Pl. 399–407; Delamater v. Russell, 4 How. Prac. 233. But see Townsh. Sland. & L. §§ 47, 48, 57, to the effect that, "If the supposed right to reputation be an absolute right, then any invasion of it must be a wrong; but reputation is often invaded without such invasion amounting to a wrong. Hence, the inutility for any practical purpose of the definition of a wrong as an invasion of a right. * * * There was no reason for describing that as an absolute right which is something else."

[5] Pol. Torts, 215; or giving the defamatory charge to the world, Cooley, Torts, p. 193.

(b) Libel, which is personal defamation by any other means, except through courts of justice; or,

(c) Malicious prosecution, which is defamation through courts of justice.

Publication—Libel and Slander.

There are many attempted definitions of libel and slander. A favorite distinction is that in slander intelligence is communicated to the sense of hearing; in libel, to the sense of sight.[6] This is essentially true. Slander is, generally speaking, published by word of mouth; libel, by writing, printing, pictures, emblems, or effigies.[7] However, gestures and signs—for example, movements of lips of dumb people—are equivalent to spoken words, and publish slander, not libel. They are, however, addressed to the sense of sight, and not to the sense of hearing.[8] Perhaps a more vital distinction is that in slander the defamatory matter has a fugitive form; in libel it is embodied in a permanent form. In slander, production and publication are identical; in libel, its production is one thing and its publication another.[9]

A telegrapher talks over a wire, or by use of a knife between the prongs of a fork, so that third persons understand him to publish

[6] Cooley, Torts, p. 193; Townsh. Sland. & L. c. 1.

[7] A gallows at the door of an obnoxious person is a libel on him. 5 Coke, 125b. And see Eyre v. Garlick, 42 J. P. 68. Query: Is not Jefferies v. Duncombe, 11 East, 226 (pimp and bawdy house), a case of libel, not of nuisance. See Clerk & L. Torts, 424, note b. A display of a placard, concerning the mother of a boy sent to an industrial school, "We know the tree by its fruit," is libel. Kay v. Jansen, 87 Wis. 118, 58 N. W. 245. A statue, 1 Hawk. P. C. (8th Ed.) 542. A caricature, Austin v. Culpepper, 2 Show. 313. Chalk marks on wall, Tarpley v. Blaby, 7 Car. & P. 395. Scandalizing plaintiff by carrying fellow about with horns blowing at plaintiff's door, etc., Sir William Bolton v. Deane, Skin. 123 (cited in Austin v. Culpepper, 2 Show. 313). And see Spall v. Massey, 2 Starkie, 559; Cropp v. Tilney, 3 Salk. 225. Malicious protest of a draft, May v. Jones, 88 Ga. 308, 14 S. E. 552.

[8] Pol. Torts, 204, 205. Lord Abinger, in Gutsole v. Mathers, 1 Mees. & W. 494–501.

[9] Clerk & L. Torts, § 423; Fraser, Torts, 75. "In every slander there are two acts: (1) The composing; (2) the publishing. In every libel there are three acts: (1) The composing; (2) the writing; (3) the publishing." Townsh. Sland. & L. p. 58, § 70.

defamatory words. This is "talk," as much as spoken words. The mere media by which ideas are communicated, unless because of peculiar attribute (as permanency), should not alter the legal aspect of the conduct involved. And if a person talk to a phonograph so that a third person would overhear him in the act, this would be slander; but if the publication consisted in the subsequent reproduction of the language to a third person from the permanent coil, it would be hard to understand why this would not be libel. But intelligence would be communicated to the sense of hearing, not that of sight.

Again, slander is a wrong which cannot be committed by joint tort feasors. Libel can. "An action for slander will not lie jointly against two. Such an action cannot be maintained, because the words of one are not the words of another. A separate action for words spoken must be prosecuted against each. Even if a husband and wife utter similar words simultaneously, they were regarded as two separate publications, and an action had to be brought against the husband alone for what he said, and against both husband and wife for her words." [10] There is another distinction between libel and slander, which follows rather as a consequence, after it has been determined whether the wrong in a given case is to be regarded as libel or slander, than as means for determining the nature of the wrong in issue. Thus, libel is a criminal wrong, while slander at common law was not, and in most places is not now, punishable as a public wrong.[11]

Mr. Townshend insists that there is a third means of publishing defamation, viz. by courts of justice.[12] To this proposition it would be hard to take exception. But it can scarcely be said to be true that injury to the reputation is the only one produced by malicious prosecution. Damages, in this form of wrong, may be "to plaintiff's

[10] Van Syckel, J., in Van Horn v. Van Horn, 56 N. J. Law, 318, 28 Atl. 669–671, citing Townsh. Sland. & L. §§ 113–118; Thomas v. Rumsey, 6 Johns. 26; Odger, Sland. & L. 371, and cases cited.

[11] As to "scandalum magnatum," see Townsh. Sland. & L. § 138. As to distinction between civil and criminal, see Warnock v. Mitchell, 43 Fed. 428.

[12] Townsh. Sland. & L. VI. "An action for libel is upon all fours with an action for malicious prosecution. The latter is but an aggravated form of an action for libel, as in it the libel is sworn to before a magistrate." Briggs v. Garrett, 111 Pa. St. 404, 2 Atl. 513.

property or his reputation, or may arise from his being put in danger of life, limb, or liberty." Moreover, while in both libel and slander damages are, perhaps, in a great majority of cases, presumed,[13] this cannot be said in case of malicious prosecution.[14] And many authorities insist that before an action of malicious prosecution can be brought there must be interference with the plaintiff's person or a seizure of his property.[15]

SAME—WHAT CONSTITUTES.

167. Publication consists in—

(a) The giving out of defamatory matter by the defendant;

(b) The taking in by a third person or third persons.

The Giving Out.

No amount of malice in thought can make silence or inactivity actionable as libel and slander. Unless the defamatory matter has been given out to some third person, there can be neither actual damages nor a basis on which the law can, with any show of reason, presume damage. There is no injury to the reputation.[16] There is, however, no magic in the number of persons to whom the intelligence is communicated. A single person,[17] though invisible,[18] is sufficient. But the communication must be to a third person.[19] Where persons mutually engage in exchange of opprobrious epithets, neither can maintain an action for slander.[20] A husband and wife

[13] Shearw. Torts, 34.

[14] Post, p. 627, "Malicious Prosecution."

[15] Post, pp. 627, 628, "Malicious Prosecution"; 1 Starkie, Sland. & L. 360; Cooke, Defam. 87.

[16] Generally, see Pittard v. Oliver [1891] 1 Q. B. Div. 474; Bacon v. Michigan Cent. R. Co., 55 Mich. 224, 21 N. W. 324; Young v. Clegg, 93 Ind. 371; Spaits v. Poundstone, 87 Ind. 522; Marble v. Chapin, 132 Mass. 225; Mielenz v. Quasdorf, 68 Iowa, 726, 28 N. W. 41.

[17] Adams v. Lawson, 17 Grat. 250.

[18] Desmond v. Brown, 33 Iowa, 13; Sheffill v. Van Deusen, 13 Gray, 304; Giles v. State, 6 Ga. 276.

[19] Sheffill v. Van Deusen, 13 Gray, 304; Pavlovski v. Thornton, 89 Ga. 829, 15 S. E. 822; Shepheard v. Whitaker, L. R. 10 C. P. 502.

[20] Goldberg v. Dobberton, 46 La. Ann. 1303, 16 South. 192. "The uttering of a libel to the party libeled is clearly no publication, for the purposes of a

may be so far one person that the statement by the one to the other is not publication, unless, for example, they are living apart,[21] or a third person overhears the remarks.[22] But communication to a wife by a third person of words defamatory to her husband is a legal publication.[23] The testimony of ministers, who in their ministerial office have drawn from one statements of an ancient transaction which is the ground of suit, is admissible to show publication of the slander.[24]

While an allegation that defamatory matter was "published" is a sufficient allegation that it was given out,[25] a charge that it was "printed" has been held insufficient,[26] although printing implies passing through a compositor's room and should, therefore, perhaps be held to be prima facie publication.[27] If the libel charged be contained in a sealed letter, read only by the plaintiff, there is no giving out to a third person.[28] But it is otherwise if the letter refer in libelous words to the plaintiff, and a third person to whom it is sent reads it,[29] even if such person be the plaintiff's wife [30] or clerk,[31]

civil action." Phillips v. Jansen, 2 Esp. 624; Mielenz v. Quasdorf, 68 Iowa, 726, 28 N. W. 41; 28 Am. Law Reg. 276, 413; Wennhak v. Morgan, 20 Q. B. Div. 635.

[21] Wennhak v. Morgan, 38 Alb. Law J. 24; Sesler v. Montgomery (Cal.) 19 Pac. 686 (but see revisal in 78 Cal. 486, 21 Pac. 185); Trumbull v. Gibbons, 3 City H. Rec. 97. Such cases may also be regarded as involving privilege.

[22] State v. Shoemaker, 101 N. C. 690, 8 S. E. 332.

[23] Wenman v. Ash, 13 C. B. 836.

[24] Vickers v. Stoneman, 73 Mich. 419, 41 N. W. 495.

[25] Wilcox v. Moon, 64 Vt. 450, 24 Atl. 244; Id., 61 Vt. 484, 17 Atl. 742.

[26] Sproul v. Pillsbury, 72 Me. 20; Prescott v. Tousey, 50 N. Y. Super. Ct. 428.

[27] Baldwin v. Elphinston, 2 W. Bl. 1037.

[28] Warnock v. Mitchell, 43 Fed. 428, and cases collected at page 430; Spaits v. Poundstone, 87 Ind. 522; Lyle v. Clason, 1 Caines, 581; Willard v. Mellor, 19 Colo. 534, 36 Pac. 148. And see Delaware Ins. Co. v. Croasdale, 6 Houst. 181; Rolland v. Batchelder, 84 Va. 664, 5 S. E. 695; Barrow v. Lewellin [1615] Hob. 62.

[29] Young v. Clegg, 93 Ind. 371; Gough v. Goldsmith, 44 Wis. 262; Fowles v. Bowen, 30 N. Y. 20.

[30] Wenman v. Ash, 13 C. B. 836, 22 Law J. C. P. 190–192, per Maule, J.; Schenck v. Schenck, 20 N. J. Law, 208.

[31] Delacroix v. Thevenot [1817] 2 Starkie, 63.

or it is read aloud to a stranger by the writer.[32] Indeed, a dictated typewritten letter,[33] or a telegram sent,[34] or a postal card mailed,[35] or the signing and delivery of a petition,[36] may necessarily involve the publication of libelous contents to third persons. The technical sense of publication is essentially different from the colloquial. Distribution of pamphlets,[37] posting in a conspicuous place a notice calling attention to specimens of defective work and materials of an architect or contractor, is publication.[38] And, generally, sale and delivery of a libelous publication [39] constitute legal publication. Every sale of a newspaper is a fresh publication,[40] but a news vendor is not necessarily liable as a publisher of defamatory matter contained in what he sells.[41] It is no publication to show a copy of a caricature to a person who asks to see it.[42]

If the plaintiff do the act which constitutes publication, he cannot recover for the defamatory matter he has communicated. Therefore, if one sends another a sealed letter containing defamatory matter, and which the latter reads aloud, he cannot recover, because the publication is his own act.[43] Again, the act of publishing is not the defend-

[32] Snyder v. Andrews, 6 Barb. 43. Cf. McCoombs v. Tuttle, 5 Blackf. 428–432. And see Miller v. Butler, 6 Cush. 71.

[33] Pullman v. Hill [1891] 1 Q. B. Div. 524. Giving a letter containing matter defamatory of another to a clerk to copy, which he does, is a publication. State v. McIntire, 115 N. C. 769, 20 S. E. 721.

[34] Williamson v. Freer, L. R. 9 C. P. 393.

[35] Robinson v. Jones [1879] L. R. 4 Ir. 391. So it is libel to send through the mail an envelope having indorsed thereon, in large letters, "Bad-Debt Collecting Agency." State v. Armstrong, 106 Mo. 395, 16 S. W. 604.

[36] Cotulla v. Kerr, 74 Tex. 89, 11 S. W. 1058.

[37] Woods v. Wiman, 122 N. Y. 445, 25 N. E. 919. And see Warnock v. Mitchell, 43 Fed. 428.

[38] Dennis v. Johnson, 42 Minn. 301, 44 N. W. 68. And see Kay v. Jansen, 87 Wis. 118, 58 N. W. 245.

[39] Duke of Brunswick v. Harmer, 14 Q. B. 185, 19 Law J. Q. B. 20; Thorne v. Moser, 1 Denio, 488; Staub v. Benthuysen, 36 La. Ann. 467; Belo & Co. v. Wren, 63 Tex. 686–723; Com. v. Blanding, 3 Pick. 304.

[40] See post, notes 44, 45.

[41] See post, notes 44, 45.

[42] Smith v. Wood, 3 Camp. 323. And see Delacroix v. Thevenot, 2 Starkie, 63 (putting a libel in desk).

[43] Wilcox v. Moon, 64 Vt. 450, 24 Atl. 244.

ant's, if he does not know of it. "A newspaper is not like a fire. A man may carry it about without being bound to suppose that it is likely to do any injury." [44] But it would seem that a man so far acts at his peril, with respect to defamatory matter which he has originated, that if, without intention, as by inadvertence on his part, it reaches and is known to third persons, he should be held to have published it.[45]

The Taking in by Third Persons.

The essence of publication is not the employment of means to give out the defamatory matter, but the actual communication of intelligence to third persons. This is not accomplished until such matter is understood.[46] Therefore, when the language is foreign, it must be shown to have been comprehended.[47] If not understood,

[44] Emmens v. Pottle, 16 Q. B. Div. 354, per Bowen, L. J., at page 358; Id., 55 Law J. Q. B. 51.

[45] 8 Harv. Law Rev. 206; Fraser, Torts, 85. But see Tompson v. Dashwood, 11 Q. B. Div. 43, 52 Law J. Q. B. 425. Cf. Pullman v. Hill, supra (with which it is inconsistent).

[46] Sullivan v. Sullivan, 48 Ill. App. 435. See, also, French v. Detroit Free Press Co., 95 Mich. 168, 54 N. W. 711; McAllister v. Detroit Free Press, 95 Mich. 164, 54 N. W. 710. Where the alleged slanderous words are, "She is ornrier than two hells," it is competent to show by persons who heard the words what they understood them to mean. Wimer v. Allbaugh, 78 Iowa, 79, 42 N. W. 587. As to evidence of witnesses as to understanding of words, see Johnston v. Morrison (Ariz.) 21 Pac. 465; Republican Pub. Co. v. Miner, 12 Colo. 77, 20 Pac. 345.

[47] Kiene v. Ruff, 1 Iowa, 482, Burdick, Lead. Cas. Torts, 215; Warmouth v. Cramer, 3 Wend. 395; Townsh. Sland. & L. (4th Ed.) 94; 1 Starkie, Sland. & L. 361. But, in an action for slander, a witness who heard the words spoken cannot testify as to what his understanding of them was. Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020. Cf. Dickson v. State (Tex. Cr. App.) 28 S. W. 815; Dressel v. Shippman (Minn.) 58 N. W. 684; Walker v. Hoeffner, 54 Mo. App. 554; Carpenter v. Willey, 65 Vt. 168, 26 Atl. 488; Howland v. George F. Blake Manuf'g Co., 156 Mass. 543, 31 N. E. 656; Halley v. Gregg, 82 Iowa, 622, 48 N. W. 974; Edwards v. Wooton, 12 Coke, 35; Hicks' Case, Hob. 375 (see these cases considered in Wernock v. Mitchell, 43 Fed. 428–433). Defamatory words spoken by a lunatic, whose insanity was obvious, or known to all the hearers, are not actionable. Dickinson v. Barber, 9 Mass. 224–227; Bryant v. Jackson, 6 Humph. 199; ante, c. 2; Yeates v. Reed, 4 Blackf. 463. So, also, of words spoken or understood as a jest. Donoghue v. Hayes, 265. Drunkenness is no defense. Kendrick v. Hopkins, Cary, 133; Gates v. Meredith, 7 Ind. 440.

the publication is not actionable.[48] When the language published may be understood in two senses, one very damaging to a certain person and the other harmless, the publisher cannot object that his readers gave it the sinister meaning.[49] Accordingly, witnesses are generally allowed to state their own understanding of the words spoken.[50] In other words, the rule is that the plaintiff must prove a publication by the defendant in fact. That the third person had an opportunity of reading the libel or hearing the slander is not sufficient, if the jury are satisfied that he did not read the libel or hear the slander, even though it is clear that the defendant desired and intended publication.[51]

SAME—REPUBLICATION.

168. Not every repetition, but every republication, gives rise to a new cause of action.

"Every repetition," it was said in Earl of Northampton's Case, "is a new publication, and gives rise to a new cause of action." [52] So far as mere repetition is concerned, this rule has been abandoned.[53] But there is an important, valid, and subsisting distinction between repetition and republication. "Republication is a second or subsequent publication in the same language. Repetition is a publication of language of the same import or meaning, as the language of a previous publication. Repetition is a subsequent publication, independent and distinct from the first publication. There may be a republication of a writing, i. e. a publication of the material written upon, with the writing thereon, and there may be a

[48] Broderick v. James, 3 Daly, 481–484.

[49] Jacksonville Journal Co. v. Beymer, 42 Ill. App. 443. See, also, Morey v. Morning Journal Ass'n, 49 Hun, 606, 1 N. Y. Supp. 475.

[50] Freeman v. Sanderson, 123 Ind. 264, 24 N. E. 239. Cf. Wirner v. Allbaugh, 78 Iowa, 79, 42 N. W. 587.

[51] As to libel, see Odger, Sland. & L. (2d Ed.) 154, citing Clutterbuck v. Chaffers, 1 Starkie, 471; Day v. Bream, 2 Moody & R. 55; Fonville v. McNease, Dud. (S. C.) 303. As to slander, see Sheffill v. Van Deusen, 13 Gray, 304.

[52] 12 Coke, 132–134.

[53] 1 Hil. Torts, 410–415; Gilman v. Lowell, 1 Am. Lead. Cas. 242, note, and cases cited. Post, p. 546, "Mitigation."

repetition of the subject-matter of a writing; also, there may be a repetition of oral language(speech), but there cannot be a republication of oral language." [54] Therefore, if after a recovery and satisfaction for one slanderous utterance or libelous publication, the same defamatory matter is uttered or published again by the wrongdoer, this is a new injury, and another cause of action, and there may be another recovery and satisfaction from him.[55] But a repetition of the same article, as an issue of the newspaper subsequent to the commencement of the action, operates to show malice and to aggravate damages.[56]

SAME—APPLICATION TO THE PLAINTIFF.

169. To recover for publication of defamatory words, the plaintiff must show—

(a) Their personal application to him;[57] and

(b) In a disparaging sense.

Personal Application.

A general charge is not sufficient. "If a man wrote that all lawyers were thieves, no particular lawyer could sue him, unless there is something to point to the particular individual." [58] However, a general charge may, by evidence that a certain person was specifically referred to, be made sufficient,[59] unless by its own nature it

[54] Townsh. Sland. & L. p. 92, § 112. And see Woods v. Pangburn, 75 N. Y. 495; Id., 14 Hun, 540; Tillotson v. Cheetham, 3 Johns. 56; Thomas v. Rumsey, 6 Johns. 26; Rockwell v. Brown, 36 N. Y. 207. With all due allowance for mitigating circumstances, damages will be awarded for injury to character by slander, aggravated by repetition. Rev. Civ. Code, par. 3, arts. 1934–2315.

[55] Wood v. Pangburn, 75 N. Y. 495.

[56] Welch v. Tribune Pub. Co., 83 Mich. 661, 47 N. W. 562; Ellington v. Taylor, 46 La. Ann. 371, 15 South. 499; post, p. 520, "Actual Malice"; note 220.

[57] McCallum v. Lamble, 145 Mass. 234, 13 N. E. 899, and cases collected; Le Fanu v. Malcomson, 1 H. L. Cas. 636.

[58] Willis, J., in Eastwood v. Holmes, 1 Fost. & F. 347–349. But cf. Lord Campbell, in Le Fanu v. Malcomson, 1 H. L. Cas. 636–668; Dexter v. Harrison, 146 Ill. 169, 34 N. E. 46.

[59] Thus "dagos" may be applied to plaintiff. Craig v. Pueblo Press Pub.

is too uncertain.[60] But, on the other hand, such person need not be described by his own name.[61] He makes out his case by showing that he is, and was understood to be, the person referred to.[62] He must so satisfy the jury.[63] A court may determine this matter, however, together with the defamatory nature of the words. Thus, it has been held libelous as a matter of law to nickname Senator Buckstaff "Senator Becksniff" (by reason of similarity to a Pecksniff), the "legislative God,"—and the like.[64]

The application must be to the plaintiff's person, not to his property.[65] To be libelous against a particular person, it must concern him, not a third person, even his wife.[66] So far as pleading is con-

Co. (Colo. App.) 37 Pac. 945. And see Boehmer v. Detroit Free Press Co., 94 Mich. 7, 53 N. W. 822.

[60] As to say, "One of you three is perjured." Sir John Bourn's Case, cited Cro. Eliz. 497.

[61] James v. Rutlech (1599) 4 Coke, 17b; Dressel v. Shippman (Minn.) 58 N. W. 684.

[62] Roach v. Garvan (1742) 2 Atk. 469; O'Brien v. Clement (1846) 15 Mees. & W. 434, 435; Dexter v. Harrison, 146 Ill. 169, 34 N. E. 46. Indeed, it may be described by the name of some one else, Levi v. Milne (1827) 4 Bing. 195; or by a fictitious name, King v. Clerk (1729) 1 Barnard. 304; or by asterisks, Bourke v. Warren (1826) 2 Car. & P. 307. But see Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N. E. 462.

[63] Lawrence v. Newberry (1891) 64 Law T. (N. S.) 797; Smart v. Blanchard, 42 N. H. 137; De Armond v. Armstrong, 37 Ind. 35; Goodrich v. Davis, 11 Metc. (Mass.) 473; Boehmer v. Press Co., 94 Mich. 7, 53 N. W. 822; Ayres v. Toulmin, 74 Mich. 44, 41 N. W. 855.

[64] Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111. The actionable quality of the words is one thing, the application to plaintiff another. Smith v. Coe, 22 Minn. 276; Petsch v. Dispatch Printing Co., 40 Minn. 291, 41 N. W. 1034; Carlson v. Minnesota Tribune Co., 47 Minn. 337, 50 N. W. 229, construing Gen. St. Minn. 1878, c. 66, § 115 (Rev. St. Minn. 1894, § 5257). In Stewart v. Wilson, 23 Minn. 449, the publication complained of was as follows: "As Mr. Wilson has sworn to this answer, here is a good chance for the 'deacon' to bring a complaint against him for perjury. We have not the slightest doubt but there is a great deal of perjury in these numerous cases, and it ought to be shown up. We have no idea, however, that Mr. Wilson is tainted with it in the slightest." Held that, in the absence of averment connecting plaintiff with the deacon, there was no cause of action.

[65] Ante, p. 473.

[66] The mere fact that a publication charges plaintiff's wife, since deceased, with having procured a miscarriage upon her person, is not libelous against

cerned, it is now commonly sufficient to allege generally that the defamatory matter was published concerning the plaintiff.[67]

Disparaging Sense.

A word naturally defamatory may be so used that it is neither intended nor understood to have its literal and damaging meaning, but to be harmless.[68] Thus, if one should say, "Thou art a murderer," the words would not be actionable, if he could make it appear that the person with whom he was conversing concerning unlawful hunting had admitted killing several hares, and that by the expression used he meant a "murderer" of the hares so killed.[69] So one may, without responsibility in damages, denounce another as a "thief," and mean and be understood to mean no more than that the latter had been guilty of mismanagement of corporation affairs.[70]

DAMAGE AS THE GIST OF LIBEL AND SLANDER.

170. Damage sometimes is of the gist of libel and slander, and sometimes is not.

Mr. Townshend has demonstrated that history is silent as to the introduction of the action for defamation. Accordingly, he applies hypothesis as a means of investigation as to the manner in which the law protects reputation, and concludes that pecuniary loss is the gist of the action. He regards the rule of law that certain language is, per se, and without other evidence, conclusive proof of pecuniary loss, as only a rule of evidence, while the rule of right re-

plaintiff. Wellman v. Sun Print. and Pub. Co., 66 Hun, 331, 21 N. Y. Supp. 577. A married woman, though living with her husband, may maintain action for slander in her own name, and without joining him with her. Pavlovski v. Thornton, 89 Ga. 829, 15 S. E. 822; Harper v. Pinkston, 112 N. C. 203, 17 S. E. 161.

[67] Ratcliffe v. Evans [1892] 2 Q. B. 524; Ellis v. Whitehead, 95 Mich. 105, 54 N. W. 752; Nelson v. Wallace, 48 Mo. App. 193.

[68] Starkie, Sland. & L. 98, 99, et seq.; Van Rensselaer v. Dole, 1 Johns. Cas. (N. Y.) 279. And see valuable note to second edition.

[69] Lord Cromwell's Case, 4 Coke, 13.

[70] Kidd v. Ward (Iowa) 59 N. W. 279; Delaney v. Kaetel, 81 Wis. 353, 51 N. W. 559; Wagner v. Saline Co. Progress Printing Co., 45 Mo. App. 6. And see Ellis v. Whitehead, 95 Mich. 105, 54 N. W. 752. But see Jacksonville Journal Co. v. Beymer, 42 Ill. App. 443.

mains intact, that a pecuniary loss must be shown to entitle to a remedy.[71]

To apply this distinction between a rule of evidence and a rule of right to the entire law of torts would, however, be revolutionary. There is no reason why the general law should be further filled with exceptions. The distinction also ignores the important proposition that where damages are presumed by the law from the invasion of a right (whether called natural, simple, absolute, or by other name), no inquiry is allowed into the character of the actual harm suffered. Then, there is no requirement that such actual harm be sufficient in quantity, temporal in character, or proximate in sequence, so far as mere right to recover (but not extent of recovery) is concerned. This distinction, accordingly, would seem to be untrue or misleading. The fact is that here the law is eminently artificial. It has held that certain classes of words in slander and a different class of words in libel are actionable per se; that is, invade a simple (or absolute) right of reputation. Upon proof of publication of such words, or absence of any defense, the plaintiff must recover at least nominal damages. The law has further held that where words are not within these classes (i. e. slanderous or libelous per se), then they are actionable only on proof of special injury to the complainant. Upon proof of publication of words not per se defamatory, even in the absence of any defense, the plaintiff cannot recover, unless he shows that he suffered harm which conforms to the standard fixed by the general rules.

Louisiana Rule.

Louisiana, freed from many of the fetters of the common law, and deriving its inspiration largely from the civil law, well illustrates the natural rule as to defamation of persons. It is provided by its Code[72] that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." "The courts of that state are not bound," said Fenner, J., in Spotorno v. Fourichon,[73] "by the technical distinctions of the common law as to words actionable per se and not actionable per se, and allowing for

[71] Townsh. Sland. & L. p. 44, § 56.

[72] Article 2315, Civ. Code, 1889.

[73] 40 La. Ann. 423, 4 South. 71.

the latter only actual pecuniary damages specially proved." [74] If the charges are false, injurious, and made maliciously or mala animo, they combine all the elements essential to support the action.[75] Both damage and injury and the malice may be inferred from the nature and falsity of the words, and from the circumstances under which they were uttered, without the necessity of special proof.[76] It was therefore held that, under the social habits and customs and prejudices prevailing in that state, charging a white man with being a negro was actionable slander.[77]

The consideration of this confused subject will follow this order: (1) The extent to which damage is of the gist of a cause of action in slander, and the character of such damage; (2) the extent to which damage is of the gist of a cause of action in libel; (3) cases in which damages will be presumed in libel and not in slander.

SAME—PRESUMPTION IN ACTION FOR SLANDER.

171. The rule in actions for slander is that damages—

(a) Will be presumed by law whenever the alleged slanderous matter—

(1) Imports a charge of punishable crime;

(2) Imputes a contagious or offensive disease;

(3) Is calculated to injure the plaintiff in his calling; or

(4) Tends to the disherison of the plaintiff.[78]

[74] Miller v. Holsteine, 16 La. 627; Feray v. Foote, 12 La. Ann. 894.

[75] Note confused use of "injurious."

[76] Miller v. Holsteine, supra; Daily v. Van Benthuysen, 3 La. Ann. 69; Tresca v. Maddox, 11 La. Ann. 206; Cass v. New Orleans Times, 27 La. Ann. 214.

[77] Toye v. McMahon, 21 La. Ann. 308; Warner v. Clark, 45 La. Ann. 863, 13 South. 203 (commenting, inter alia, on Dunsee v. Norden, 36 La. Ann. 79).

[78] Onslow v. Horne, 3 Wils. 177–185 (De Grey, C. J.) followed in Alexander v. Jenkins [1892] 1 Q. B. 797; Starkie, Sland. & L. 105; Pig. Torts, 305; Bigelow, Lead. Cas. 99; Fras. Torts, 86. There is another exception in England, by local custom, as imputing unchastity to a woman in London or Bristol. Shearw. Torts, 30.

(b) Must be proved in all other cases to have produced to the plaintiff some special injury, which must be, inter alia,

(1) Sufficient in quantity;

(2) Pecuniary or temporal; and

(3) Proximate.

Damages Presumed.

Matters which are slanderous per se are also libelous per se. Hence, when the cases of matter libelous per se, but not slanderous per se, have been duly regarded, consideration of matter defamatory per se is completed. Detailed discussion of the four classes of words in which the law presumes damage in slander is therefore postponed until the subject of the defamatory words comes up in logical order.

Special Injury—Nominal Damages.

The law will apply the maxim, "De minimis non curat lex," to the special injury or damage which a person must allege and prove to entitle him to recover for words not slanderous per se.[79]

Same—Pecuniary Loss.

Such damage must be pecuniary or temporal, not merely sentimental. They are allowed "whenever a person is prevented by slander from recovering that which would otherwise be conferred upon him gratuitously," as the loss of customers by a tradesman.[80] But generally loss of consortium vicinorum gives no ground of action.[81] So, if words prevent one from being invited to a friend's house to dinner, they are actionable;[82] but not if they prevent one's election to a club, and thus prevent dining friends. Chance of election, unlike actual membership, is not of temporal value.[83]

[79] Ante, c. 5, "Remedies."

[80] Pol. Torts, 300–303; Steele v. Southwick, 9 Johns. 214, 1 Am. Lead. Cas. 106; 6 Am. Law Rev. 593; 1 Starkie, Sland. & L. 194–202; Bassil v. Elmore, 65 Barb. 627, 48 N. Y. 561; Pettibone v. Simpson, 66 Barb. 492. And see Beach v. Ranney, 2 Hill, 309; Roberts v. Roberts, 5 Best & S. 384, 33 Law J. Q. B. 249; Anonymous, 60 N. Y. 262 (charge of self pollution); Woodbury v. Thompson, 3 N. H. 194.

[81] Roberts v. Roberts, 5 Best & S. 384, 33 Law J. Q. B. 249.

[82] Davies v. Salomon, L. R. 7 Q. B. 112; Lynch v. Knight, 9 H. L. Cas. 599.

[83] Chamberlain v. Boyd, 11 Q. B. Div. 407–416.

Mere words of common abuse are not actionable without proof of special pecuniary damages, and the law has been very generous to a slanderer in its definition of common abuse. Thus, to charge prostitution, or to say of a married woman that she was "a liar and infamous wretch, and that she had all but been seduced by a notorious libertine," is not actionable without averring and proving loss of temporal advantage.[84] So, to say of a woman that the defendant "looked over the transom light and saw Mrs. P. (the plaintiff) in bed with Capt. D." was not actionable, without proving special damages; and to allege that by reason of such false statement the plaintiff was damaged in her name and fame is not sufficient to show special damages.[85] If, however, reflection on chastity result in preventing a person's marriage, damages may be recovered, but even then only when there has been special pleading.[86] The English "Slander of Woman Act" has made words imputing unchastity or adultery slanderous per se.

It has been held that a charge of adultery by a clergyman is not scandalous per se. And a man may with impunity, unless such person thereby suffers special injury, call another a "black-leg," [87] a "gambler," [88] a "rogue," [89] a "welcher," [90] a "low fellow." [91]

Same—Proximate or Remote Damages.

As in all cases of tort, damages to be recoverable must be proximate not remote. But while the right to reputation was generally regarded as absolute, the courts did not extend the liberality of the rule as to consequences applied in trespass to slander. On the contrary, in the celebrated case of Vicars v. Wilcox,[92] where a person spoke disparaging words of another, by reason of which the

[84] Lynch v. Knight, 9 H. L. Cas. 431–448; Weaver v. Ritter, 14 Pa. Co. Ct. R. 486.

[85] Pollard v. Lyon, 91 U. S. 225.

[86] Davis v. Gardiner, 4 Coke, 16b, pl. 11; Reston v. Pomfreict, Cro. Eliz. 639; 3 Bl. Comm. 124.

[87] Parrat v. Carpenter, Cro. Eliz. 502 (charge of adultery by a clergyman not slanderous); Barnett v. Allen, 27 Law T. 491.

[88] Forbes v. King, 1 Dowl. P. C. 672.

[89] Hopwood v. Thorn, 8 C. B. 293–313.

[90] Blackman v. Bryant, 27 Law T. (N. S.) 491.

[91] Lumby v. Allday, 1 Cro. Jac. 301.

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

latter was dismissed from service, the damages were held to be remote. This holding is manifestly unsound.[93] True to their love for the "reasonably prudent man," the English courts incline to separate a natural and probable, from a remote, consequence, by what such a person would have foreseen as the result of a given conduct. Thus, in Lynch v. Knight,[94] in consequence of a charge of levity (but not incontinence), a husband turned his wife out of doors. It was held that no action lay, on the ground that the damage was not the natural result of the slander, but arose from the rashness or idiosyncrasy of her husband. "The act constituting the special damage must be such as might be expected from a reasonable man who believed the truth of the words according to the intention of the slanderer." [95]

A wrongdoer is not bound to anticipate the general probability of wrongdoing by a third person. Therefore he is not bound to foresee the repetition of a libel, any more than a particular act by this or that individual.[96] But one who gives defamatory matter to a reporter is responsible for its publication in a newspaper.[97]

"An action may sometimes be maintained for words written for which an action could not be maintained if they were merely spoken." [98] Libel is regarded in the law as an injury of a "greater and more aggravating nature than slander." The reason for this distinction may, perhaps, most truthfully be found in the histori-

[93] Lynch v. Knight, 9 H. L. Cas. 577. But see Wallace v. Rodgers, 156 Pa. St. 395, 27 Atl. 163.

[94] 9 H. L. Cas. 577.

[95] Pig. Torts, 309.

[96] Holmes, J., in Burt v. Advertiser Newspaper Co., 154 Mass. 238–247, 28 N. E. 1, and cases cited; McDuff v. Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671; Hardy v. Williamson, 86 Ga. 551, 12 S. E. 874; Halley v. Gregg, 82 Iowa, 622, 48 N. W. 974.

[97] State v. Osborn [1895] 54 Kan. 473, 38 Pac. 572; Clay v. People, 86 Ill. 147; Clifford v. Cochrane, 10 Ill. App. 570–577; Wilson v. Noonan, 27 Wis. 598; Miller v. Butler, 6 Cush. 71; Queen v. Cooper, 8 Q. B. 533; Adams v. Kelly, 1 Ryan & M. 157; Parkes v. Prescott, L. R. 4 Exch. 169; Field v. Colson (Ky.) 20 S. W. 264; ante, p. 383, c. 5, "Special Damages."

[98] White v. Nicholls, 3 How. 266; Thorley v. Lord Kerry, 4 Taunt. 355, citing Com. Dig. "Libel," A, 3, referring to cases in Fitzg. 121–253; Crop v. Tilney, 3 Salk. 226, per Holt, C. J.

cal development of the law rather than in the nature of the offense.[99] It is commonly urged that the difference is justified by the method of publication involved. In libel, the fact that production is one thing and publication another shows premeditation and design, and always, to some extent, affords opportunity for examination into the truth of the charge, so that the inference of malice is more certain. Again, the means of publishing libel tends to keep the charge "fresh in imagination, while with slander the words might not dwell in the memory." Written defamation is likely to have a more extended circulation than spoken words. And, finally, the tendency of libel, because of these considerations, to cause a breach of peace is more direct than that of slander.[100] The soundness of the reasoning has been often and vigorously questioned. Lord Mansfield, although he refused to repudiate the distinction because of authority, said: "It is curious that they [the judge and counsel who sustained the distinction] have * * * adverted to the question whether it tends to produce a breach of peace; but that is wholly irrelevant, and no ground for recovering damages. So it has been argued that writing shows deliberate malignity; but the same answer suffices, that the action is not upon the ground of malignity but for the damage sustained. So it is argued that a written scandal is more generally diffused than words spoken, but an assertion made in a public place * * * may be much more extensively diffused than a few printed papers dispensed, or a private letter. It is true that a newspaper may be generally read, but that is all casual."[101]

[99] Bigelow, Lead. Cas. 99. And see article in 10 Law Quart. Rev. 158, by Mr. Joseph R. Fisher.

[100] Pig. Torts, 313; Clement v. Chivis, 9 Barn. & C. 172; McClurg v. Ross, 5 Bin. (Pa.) 218, 219.

[101] Thorley v. Lord Kerry, 4 Taunt. 355, at page 364. And see Deford v. Miller, 3 Pa. St. 103; Colby v. Reynolds, 6 Vt. 489; Archbishop v. Robeson, 5 Bing. 17-21.

SAME—PRESUMPTION IN ACTION FOR LIBEL.

172. The rule as to damages in libel is that damages—

(a) Will be presumed only when the matter complained of as libelous is in its nature ordinarily calculated to—

(1) Injure the complainant in his calling;

(2) Injure complainant in his social relations; or,

(3) To subject him to public scandal, scorn, ridicule, or contempt.

(b) Must be proved in all other cases to have produced special loss or injury to the plaintiff conforming to legal standards.

This is the general rule of damages applied to violence of right of reputation. Certain words are defamatory per se. What such words are is determined, not by the use of artificial or historical tests,—the "four-class test," as in slander,—but by a reasonable and natural standard, viz. the inevitable tendency of certain classes of words to do what a man of sound common sense would call damage. Other words, which are not necessarily harmful, may become so under the circumstances of a particular case. Then the burden is on the complainant to show what loss to him was consequent on their publication.

Damages Presumed.

Whenever words are libelous per se, no proof of actual injury is necessary to entitle the plaintiff to recover something. The law presumes that he had suffered some injury by reason of the publication, and the amount of that injury or damage is a question for the jury.[102] Whenever words are slanderous per se, they are also libelous per se.[103]

[102] Henkle v. Schaub, 94 Mich. 542, 54 N. W. 293; Smith v. Sun Printing & Pub. Ass'n, 5 C. C. A. 91, 55 Fed. 240; Wynne v. Parsons, 57 Conn. 73, 17 Atl. 362; Newell, Defam. 181.

[103] Bergmann v. Jones, 94 N. Y. 51; 1 Suth. Dam. p. 12; Miles v. Harrington, 8 Kan. 425, 430; Yeates v. Reed, 4 Blackf. 463; Swift v. Dickerman, 31 Conn. 285; Mitchell v. Milholland, 106 Ill. 175; Stewart v. Minnesota Tribune

Words Defamatory per Se in Libel, but not in Slander.

"An action for libel may be sustained for words published which tend to bring one into public hatred, contempt, or ridicule,[104] even though the same words spoken would not have been actionable. And it would seem so apparent that an individual may be brought into hatred, contempt, and ridicule, within the meaning of the law, by professing vicious, degrading, absurd principles, that it can need no discussion." This was applied to a publication that a per-

Co., 40 Minn. 101, 41 N. W. 457; Haney Manuf'g Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073.

[104] Iron Age Pub. Co. v. Crudup, 85 Ala. 519, 5 South. 332 (under Code Ala. § 2720). "Generally, any false and malicious publication, when expressed in printing or writing, or by signs or pictures, is a libel, which charges an offense punishable by indictment, or which tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society. This general definition may be said to include whatever tends to injure the character of an individual, blackens his reputation, or imputes fraud, dishonesty, or other moral turpitude, or reflects shame, or tends to put him without the pale of social intercourse." Clopton, J., in citing Trimble v. Anderson, 79 Ala. 514; Henderson v. Hale, 19 Ala. 154; Dexter v. Spear, 4 Mason, 115, Fed. Cas. No. 3,867; Adams v. Lawson, 94 Am. Dec. 455–460; Solverson v. Peterson (Wis.) 25 N. W. 14; 1 Am. Lead. Cas. 127; 4 Wait, Act. & Def. 282. In an action brought under Code 1880, § 1094, making actionable words which from their usual construction and common acceptance are considered insults, no special damages need be alleged or proved. McLean v. Warring (Miss.) 13 South. 236. And, generally, in exposing to hatred and ridicule, see Augusta Evening News v. Radford, 91 Ga. 494, 17 S. E. 612; Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111; Winchell v. Argus Co., 69 Hun, 354, 23 N. Y. Supp. 650; Stafford v. Morning Journal Ass'n, 68 Hun, 467, 22 N. Y. Supp. 1008; Patchell v. Jaqua, 6 Ind. App. 70, 33 N. E. 132; Hatt v. Evening News Ass'n, 94 Mich. 114, 53 N. W. 952; Allen v. News Pub. Co., 81 Wis. 120, 50 N. W. 1093; Cerveny v. Chicago Daily News Co., 139 Ill. 345, 28 N. E. 692; Stokes v. Stokes, 76 Hun, 314, 28 N. Y. Supp. 165; O'Shaughnessy v. Morning Journal Ass'n, 71 Hun, 47, 24 N. Y. Supp. 609; O'Shaughnessy v. New York Recorder Co., 58 Fed. 653; Manget v. O'Niell, 51 Mo. App. 35. See, also, Augusta Evening News v. Radford, 91 Ga. 494, 17 S. E. 612; Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111; Patchell v. Jaqua, 6 Ind. App. 70, 33 N. E. 132. An article was published in defendant's paper, setting forth in sensational style that plaintiff was engaged to be married to a young lady; that he had ordered his wedding supper, and hired a minister to perform the ceremony; and that, a few hours before the marriage was to be solemnized, the young lady had eloped with his cousin. It also charged plaintiff with a

son had failed of election because he was an anarchist.[105] While it is not slanderous per se to call a woman a "bitch,"[106] or a prostitute,[107] a publication charging a female of previous good repute and chastity with having traveled with a married man, and with having been turned out of an hotel, and that the revelation has caused a sensation in the community where it transpired, is actionable libel.[108] It is libelous per se to write of a man that "he has turned into an enormous swine who lives on lame horses, and that he will probably remain a swine the rest of his days."[109] To write of one that he is a "swindler" is libelous,[110] but the words are

denial of the engagement, and of any relationship with the person alleged to be his cousin. Held that, if such publication was untrue, it was libelous, as tending to bring ridicule and contempt on plaintiff. Hatt v. Evening News, 94 Mich. 114, 53 N. W. 952. See, also, Cerveny v. Chicago Daily News Co., 139 Ill. 345, 28 N. E. 692.

[105] Cerveny v. Chicago Daily News Co., 139 Ill. 345, 28 N. E. 692. Cf. Stewart v. Pierce (Iowa) 61 N. W. 388.

[106] Nealon v. Frisbie, 11 Misc. Rep. 12, 31 N. Y. Supp. 850. Or herm p'rodite, Weatherhead v. Armitage, 2 Lev. 233. But see Malone v. Stewart, 15 Ohio, 319. It is not slanderous per se to say of a man, "He is a bloodsucker, and not worthy to live in the commonwealth, and his child unborn is bound to curse him." Thimmelthorp's Case, Noy, 64. The publication of a letter in which it is said: "You cannot get [plaintiff] down any lower than he is; he is low enough; you can't get him down any lower; you can't spoil a rotten egg,"—is libelous per se, without innuendoes, and no allegation of special damage is necessary. Pfitzinger v. Dubs, 12 C. C. A. 399, 64 Fed. 696. Ante, p. 490. Words of common abuse not slanderous.

[107] In Idaho, the charge that a woman is a "public prostitute" is not actionable per se; neither adultery, fornication, nor prostitution being punishable as such by statute. Douglas v. Douglas (Idaho) 38 Pac. 934.

[108] Indianapolis Journal Newspaper Co. v. Pugh, 6 Ind. App. 510, 33 N. E. 991; McMahon v. Hallock, 48 Hun, 617, 1 N. Y. Supp. 312; Mason v. Stratton, 49 Hun, 606, 1 N. Y. Supp. 511.

[109] Solverson v. Peterson, 64 Wis. 198, 25 N. W. 14. So to call a man a "skunk," Massuere v. Dickens, 70 Wis. 83, 35 N. W. 349. To publish, "I found an imp of the devil, in the shape of Jim Price, sitting in the mayor's seat; and now, sir, that imp of the devil and cowardly snail, that shrinks back into his shell at the sight of the slightest shadow, had the bravery to issue an execution against me," is libelous per se. Price v. Whiteley, 50 Mo. 439.

[110] Anson v. Stuart, 1 Term R. 748; Townsh. Sland. & L. p. 207, notes 3, 4; Smith v. Stewart, 41 Minn. 7, 42 N. W. 595 (inter alia, "Irresponsible, unadul-

not slanderous per se.[111] It is libelous per se to refer to one's "intimacy with a well-known young local elocutionist"; but such language would not be slanderous, in the absence of special injury.[112] It has been suggested[113] that a charge of having the itch, if written or printed and published, would be actionable, but not if spoken. While slander, injuring a man merely in his social relations, without inflicting pecuniary harm, is not actionable,[114] it is otherwise as to libel. To say that a man has been blackballed, and that he is ungrateful,[115] impecunious,[116] insane,[117] or even to charge him with unfeeling conduct,[118] is libelous. So to describe him as a hypocrite,[119] or to accuse him in print of lying, is libelous per se.[120]

Special Injury in Libel.

In libel, as in many other causes of action, one may be able to recover by showing special injury to himself when he would be entitled to nothing in the absence of such special injury. Thus, in an action for a malicious falsehood, intentionally published in a newspaper about a person's business,—a falsehood not actionable as a personal libel and not defamatory in itself,—evidence that a general

terated, first-class humbug and fraud"). But see Williams v. Chicago Herald Co., 46 Ill. App. 655 ("swindling scheme" not libelous).

111 Savile v. Jardine, 2 H. Bl. 532; Black v. Hunt, 2 L. R. Ir. 10; Broomfield v. Snoke, 12 Mod. 307 (cozening); Chase v. Whitlock, 3 Hill, 139; Odiorne v. Bacon, 6 Cush. 185; Weil v. Altenhofen, 26 Wis. 708; Lucas v. Flinn, 35 Iowa, 9. But see Stern v. Katz, 38 Wis. 136; Forrest v. Hanson, 1 Cranch, 63.

112 Collins v. Dispatch Pub. Co., 152 Pa. St. 187, 25 Atl. 546; Indianapolis Journal Newspaper Co. v. Pugh, 6 Ind. App. 510, 33 N. E. 991. Words spoken of a woman, "that she was in the habit of entertaining gentlemen callers at all hours of the night," do not necessarily impute unchastity. Hemmens v. Nelson, 138 N. Y. 517, 34 N. E. 342.

113 Villers v. Monsley, 2 Wils. 403, 404, by Bathurst and Gould, JJ.

114 Ante, p. 489.

115 Cox v. Lee, L. R. 4 Exch. 284.

116 Eaton v. Johns, 1 Dowl. Pr. (N. S.) 602.

117 Morgan v. Lingen, 8 Law T. (N. S.) 800.

118 Churchill v. Hunt, 2 Barn. & Ald. 685.

119 Jones v. Greeley, 25 Fla. 629, 6 South. 448.

120 Riley v. Lee, 88 Ky. 603, 11 S. W. 713; Prosser v. Callis, 117 Ind. 105, 19 N. E. 735.

loss of business has been the direct and natural consequence of such falsehood is admissible, and, if uncontradicted, is sufficient to maintain the action.[121]

Same—Mental Suffering.

On the one hand it was held, in Terwilliger v. Wands,[122] that illness and inability to labor, caused by the effect on the mind of defamatory words, are not such special damage as will sustain an action for slander, because only injuries affecting the reputation are the subject of the action. The words must, therefore, disparage the character, and this disparagement must be evidenced by some positive loss arising therefrom, directly and legitimately, as a fair and natural result. However, mental anxiety, grief, and loss of society resulting from libelous publication may be considered in estimating the damage.[123] Indeed, the mental suffering caused by a false publication is regarded as general damage in cases of libel.[124] And mental suffering is an element of actual damage, although malice be disproved. If this were not the rule, "one of the principal elements of damages would be excluded. If a virtuous young woman is entitled to no consideration for her injured feelings when she has been publicly charged with the grossest immorality, courts might as well deny her a cause of action." [125]

[121] Ratcliffe v. Evans [1892] 2 Q. B. 524; Daniel v. New York News Pub. Co., 67 Hun, 649, 21 N. Y. Supp. 862; Bradstreet Co. v. Gill, 72 Tex. 117, 9 S. W. 753; Brown v. Durham, 3 Tex. Civ. App. 244, 22 S. W. 868; Haney Manuf'g Co. v. Perkins, 78 Mich. 1, 43 N. W. 1073; Ante, c. 5, "Special Damages."

[122] Terwilliger v. Wands, 17 N. Y. 54; Allsop v. Allsop, 5 Hurl. & N. 534; Prime v. Eastwood, 45 Iowa, 640. But see Laing v. Nelson, 40 Neb. 252, 58 N. W. 846; Burt v. McBain, 29 Mich. 260; Swift v. Dickerman, 31 Conn. 285; Chesley v. Thompson, 137 Mass. 136; Rea v. Harrington, 58 Vt. 181, 2 Atl. 475; Welker v. Butler, 15 Ill. App. 209.

[123] Hamilton v. Eno, 81 N. Y. 116; Ward v. Dean, 57 Hun, 585, 10 N. Y. Supp. 421.

[124] Republican Pub. Co. v. Mosman, 15 Colo. 399, 24 Pac. 1051.

[125] Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628 (per Grant, J., at page 593, 85 Mich., and page 629, 48 N. W.).

CONSTRUCTION OF LANGUAGE USED.

173. In order to determine whether a statement is defamatory—

(a) It must be construed as to the ordinary and natural meaning without technical interpretation; if not defamatory in such meaning,—

(b) It must be construed with reference to the special meaning, if any, in which it was understood by the persons by and to whom it was published.[126]

Defamatory language is to be construed in its ordinary and popular sense.[127] The test is what the persons to whom it was published would reasonably suppose to have been intended, or did in fact understand, and not what the person publishing the defamation intended to charge.[128] The ordinary principles of construction apply. The language, for example, must be construed as a whole. Therefore, a statement that a person is a "forger" is not slander, actionable per se, where such words are coupled with a charge of some specific act, which of itself does not constitute forgery.[129] A publication charging the commission of a crime need not contain the technical statutory language in order to be libelous per se.[130]

[126] Capital & Counties Bank v. Henty, 7 App. Cas. 741, 52 Law J. Q. B. 232; Fraser, Torts, 80.

[127] When a publication is defamatory on its face, if plaintiff desires to enlarge its scope, and aggravate its meaning, by proof of facts tending in that direction, the facts should be alleged in his pleading, on the same principle which compels such averment when the article, in and of itself, is not libelous. Cassidy v. Brooklyn Daily Eagle, 138 N. Y. 230, 33 N. E. 1038; Id. (Sup.) 18 N. Y. Supp. 930. In an action for libel, charging plaintiff with being as "big a rascal" as one M., evidence is not admissible to show what kind of a rascal defendant charged M. to be, in the absence of any allegation to the effect in the same complaint. Cassidy v. Brooklyn Daily Eagle, supra.

[128] Post Pub. Co. v. Hallam, 8 C. C. A. 201, 59 Fed. 530, affirming 55 Fed. 456. But see Hanson v. Globe Newspaper Co., 159 Mass. 293, 34 N. E. 462. Ante, p. 474.

[129] Barnes v. Crawford, 115 N. C. 76, 20 S. E. 386; Turrill v. Dolloway, 17 Wend. 426; Thomas v. Blasdale, 147 Mass. 438, 18 N. E. 214; Hayes v. Ball, 72 N. Y. 418.

[130] World Pub. Co. v. Mullen, 43 Neb. 126, 61 N. W. 108. As to general rule

Words are to be construed in the light of their surroundings. Thus, the natural extravagance of terms used in the heat of passion may be intended and understood to mean much less than their normal import.[131] Although harmless upon their face, if found in bad company, words may, from that circumstance, be determined to have injurious meaning. It then becomes a question for the jury, if there is any such evidence of such extrinsic facts to be submitted to them.[132] Therefore, where an alleged libel consisted in the publication by a mercantile reporting agency, for the information of its subscribers, of a sheet containing, among the names of other business men, that of the plaintiff, followed by asterisks, with no proof of any meaning attached thereto, except the testimony of the defendant's superintendent to the effect that they referred only to a marginal note directing persons desirous of further information concerning the persons in connection with whose name they occurred to call at the defendant's office, a verdict was properly directed for the defendant, as the characters were not libelous per se, and were not shown to have any libelous significance as used.[133]

Function of Court and Jury.

Where the purport of the publication complained of is plain and unambiguous, the question whether it is a libel, in a civil action, is for the court.[134] Thus, in Morgan v. Halberstadt,[135] the alleged

of construction of words imputing a crime, see Smith v. Coe, 22 Minn. 276; West v. Hanrahan, 28 Minn. 385, 10 N. W. 415; Stewart v. Wilson, 23 Minn. 449; Schmidt v. Witherick, 29 Minn. 156, 12 N. W. 448; Mallory v. Pioneer Press Co., 34 Minn. 521, 26 N. W. 904.

131 Ritchie v. Stenius, 73 Mich. 563, 41 N. W. 687. Cf. Courtney v. Mannhein (City Ct. Brook.) 14 N. Y. Supp. 929; Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862.

132 Williams v. Smith, 22 Q. B. Div. 134; Shepheard v. Whitaker, L. R. 10 C. P. 502; Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862; Erber v. Dun, 12 Fed. 526–532; Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387.

133 Woodruff v. Bradstreet Co., 116 N. Y. 217, 22 N. E. 354; Benz v. Wiedenhoeft, 83 Wis. 397, 53 N. W. 686.

134 Morgan v. Halberstadt, 9 C. C. A. 147, 60 Fed. 592.

135 9 C. C. A. 147, 60 Fed. 592; Norton v. Livingston, 64 Vt. 473, 24 Atl. 247; Croasdale v. Bright, 6 Houst. (Del.) 52; Savoie v. Scanlan, 43 La. Ann. 967, 9 South. 916.

libel charged that an insurance agent was short in his accounts, and that he had "boasted of the manner in which he had helped himself to the company's money." It further charged that the agent "had been given unlimited opportunities to swindle the policyholders," and stated that its readers were familiar "with the methods and extent to which the agents named have availed themselves of their opportunities." It was held that there was no such ambiguity therein as to make a question for the jury. On the other hand, where there is an uncertainty or ambiguity in the defamatory character of the words, the question is ordinarily for the jury, under instructions from the court. Thus, in an action of libel for publishing an article charging a supervisor with receiving unlawful compensation for services, he admitted receipt of the money, but claimed that he received it for committee work, while the article charged him with receiving it for his services while the board was in session. The defendants claimed that the article charged him with unlawfully receiving it for committee work. The article was ambiguous as to the services for which the extra compensation was charged to have been received. It was held that the meaning of the article was for the jury.[136] But in certain jurisdictions, for example, in Missouri, the jury are the sole judges of the law as well as of facts.[137]

SIGNIFICATION OF WORDS.

174. Words may be divided, in this connection, into three classes:

(a) Those which cannot possibly bear a defamatory meaning, or innocent words;

(b) Those that are clearly defamatory on their face, or words per se defamatory;[138]

[136] Press Pub. Co. v. McDonald, 55 Fed. 264, affirmed 11 C. C. A. 155, 63 Fed. 238; Ewing v. Ainger, 96 Mich. 587, 55 N. W. 996; McAllister v. Detroit Free Press Co., 95 Mich. 164, 54 N. W. 710; Schild v. Legler, 82 Wis. 73, 51 N. W. 1090.

[137] Arnold v. Jewett (Mo. Sup.) 28 S. W. 614. But see Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358.

[138] Pratt v. Press Co., 30 Minn. 41–43, 14 N. W. 62.

(c) Those that are reasonably susceptible of a defamatory meaning as well as an innocent one, or ambiguous words.

Innocent Words.

There are some words which are not of a disparaging nature in the legal sense.[139] Thus, to charge a man with having sued his mother-in-law in a county court imputes lawful and proper conduct, and is not libelous.[140] So to describe one as a "man Friday" is not defamatory, "for the man Friday, as we all know, was a respectable man, although a black man." [141] It is not libelous to publish of a professional man "that he has moved his office to his house to save expense." [142] Very often, however, words apparently innocent have a double meaning,—one innocent, another defamatory. In such cases, the innuendo[143] may be made the basis of an action by proper pleading. However, some words are not only ordinarily, but necessarily, innocent. Thus, a publication to the effect that one was discharged from the superintendency of an office of the Farmers' Alliance "because of a heavy loss in the business," and that the books of such office, "when balanced, showed a net loss of $2,000," while another office showed a net profit of $5,000 on a much smaller business, and that "the showing simply proved" such person "to be a man of small business capacity," cannot be construed, by means of an innuendo, to charge dishonesty in conducting the office.[144]

[139] Fraser, Torts, 79.

[140] Cox v. Cooper, 12 Wkly. Rep. 75, and see Clay v. Roberts (1863) 9 Jur. (N. S.) 580. So to say that a man owes money does not imply that he cannot pay his debtors. Per Bramwell, B., in Reg. v. Coghlan (1865) 4 Fost. & F. 316.

[141] Forbes v. King (1833) 1 Dowl. 672, 2 Law J. (N. S.) Exch. 109. And see Lord Denman, C. J., in Hoare v. Silverlock (1848) 12 Q. B. 624–631; Hart v. Wall, 2 C. P. Div. 146.

[142] Stewart v. Minnesota Tribune Co., 40 Minn. 101, 41 N. W. 457; O'Connor v. Sill, 60 Mich. 175, 27 N. W. 13 (criticism of school teacher); Walker v. Hawley, 56 Conn. 559, 16 Atl. 674 (comment how a candidate procured his nomination).

[143] Post, p. 510.

[144] Gaither v. Advertiser Co. (Ala.) 14 South. 788. A complaint for libel in writing, to an insurance company for which plaintiff was adjuster, and

Words Defamatory per Se—Imputing a Crime.

According to the early English law, it was not slanderous to impute to another an offense, unless it was indictable, and scandalous or infamous.[145] Therefore, to say that one had "forsworn himself" is not slanderous, because "forsworn" could not, of necessity, be held to mean that he had committed perjury.[146] So, to charge that a person was one of those "who stole deer" imputed a trespass, so that the charge was not, as it must be to be actionable, "in itself scandalous."[147] In many of these cases, however, the point of decision was that the words were not used in such a sense as to impute a crime.[148] The modern English rule is that a charge of having committed a criminal, and not necessarily an indictable, offense is actionable per se.[149] Indeed, to say that a person is a "returned convict" is actionable per se; for although the words import that the punishment has been suffered, the obloquy remains.[150]

otherwise publishing a letter reciting: "The insulting remarks offered to our representative, * * * by your adjuster, * * * at his office, in the matter of * * *, warrants us to withhold any new business from your local agent here," states no cause of action, though it allege that defendant meant by the letter to impute to plaintiff a lack of business ability and skill, and a want of honesty and integrity in his business, etc., as such meaning cannot be given by innuendo to the words used. Cole v. Neustadter, 22 Or. 191, 29 Pac. 550. A letter by a man to a married woman stating: "I like you, and want to tell you so. If you like me, I want to know it. Let us be friends, and good friends. Answer this,"—conveys no imputation of want of chastity on the part of the lady, and is not libelous. Fields v. Curd (Ky.) 16 S. W. 453.

145 Starkie, Sland. & L. 133.

146 Holt v. Scholefield, 6 Term R. 691; Pig. Torts, 305.

147 Ogden v. Turner, 6 Mod. 104. So, to say, "You are a thief; you stole my tree," contemplates a trespass, and is not slanderous per se. Minors v. Leeford, Cro. Jac. 114; Bull. N. P. 5.

148 See Chase, Lead. Cas. 115.

149 Webb v. Beavan (1883) 11 Q. B. Div. 609, Chase, Lead. Cas. 112; Fraser, Torts, 86. But see Pig. Torts, 305; Simmons v. Mitchell, 6 App. Cas. 156.

150 Denman, C. J., in Fowler v. Dowdney (1838) 2 Moody & R. 119, 120. And see Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921.

Same—New York Rule

In New York the spirit of the earlier English cases was adopted as the test. In Brooker v. Caffin [151] Justice Spencer laid down the following rule: "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 they will be actionable in themselves." Hence, while, under the English rule, from a charge of perjury damages will be presumed,[152] in New York it has been held otherwise.[153] But the courts of this state have been able to find the charge of removing an ancient landmark both indictable and involving moral turpitude.[154] This rule has, however, been frequently followed.[155]

Same—General American Rule.

The New York rule has been generally criticised and not followed in many American states.[156] The test adopted is often a confused one.[157] Statutes in many jurisdictions have affected this portion of the law, both by definition of crime and of what words are per se defamatory. But, whatever phrase is adopted, the defamatory words must charge a crime.[158] It has been held not

[151] 5 Johns. 129. And see Brooks v. Harison, 91 N. Y. 83; Young v. Miller, 3 Hill, 21, Chase, Lead. Cas. 111. But see Widrig v. Dyer, 13 Johns. 108.

[152] Jones v. Herne, 2 Wils. 87.

[153] Alexander v. Alexander, 9 Wend. 141.

[154] Young v. Miller, 3 Hill, 21. It was naturally held that "a newspaper stigmatizing a certain house as a 'disorderly house' imputes that the occupants are guilty of a misdemeanor, and is actionable, at the suit of one or all of them." McLean v. New York Press Co., 64 Hun, 639, 19 N. Y. Supp. 262.

[155] Beck v. Stitzel, 21 Pa. St. 22; State v. Burroughs, 12 N. J. Law, 426, 1 Am. Lead. Cas. 113; Burton v. Burton, 3 G. Greene, 316. And see cases collected in Townsh. Sland. & L. 163. It is libelous per se to say of a person that he is a member of a "gang" which had entered into a scheme to obtain property by improper methods. Hatch v. Matthews, 83 Hun, 349, 31 N. Y. Supp. 926.

[156] Miller v. Parish, 8 Pick. 383.

[157] Cf. Henderickson v. Sullivan, 28 Neb. 329, 44 N. W. 448, with Pokrok Zapadu Pub. Co. v. Zizkovsky, 42 Neb. 64, 60 N. W. 358, approving it.

[158] Cases collected in Townsh. Sland. & L. 155, 156. Disturbing religious meeting, Thomas v. Smith, 22 N. Y. 55–89. Bribery, Booker v. State, 100 Ala. 30, 14 South. 561; Edwards v. San Jose Printing & Pub. Soc., 99 Cal. 431, 34 Pac. 128; Field v. Colson, 93 Ky. 347, 20 S. W. 264. Perjury, Upton v.

actionable per se to impute intention to commit a crime;[159] but to charge an attempt to commit murder is actionable per se. Thus, while it is actionable to charge another with being a "blackmailer,"[160] for this is equivalent to saying that he is guilty of the crime of extortion, it is not actionable to say of another that he "is guilty of concocting a blackmail or extortion scheme," as the words charge merely a plan or purpose to extort money, which is not punishable unless an attempt is made to carry it out.[161] It is not material that the words impute a crime in another state.[162] At-

Hume, 24 Or. 420, 33 Pac. 810. Poisoning, Republican Pub. Co. v. Miner, 3 Colo. App. 568, 34 Pac. 485. Forgery, Beneway v. Thorp, 77 Mich. 181, 43 N. W. 863. Indecent and criminal liberties, Thibault v. Sessions, 101 Mich. 279, 59 N. W. 624. Arson, Clugston v. Garretson, 103 Cal. 441, 37 Pac. 469; Taylor v. Ellington, 46 La. Ann. 371, 15 South. 499; Davis v. Carey, 141 Pa. St. 314, 21 Atl. 633; World Pub. Co. v. Mullen, 43 Neb. 126, 61 N. W. 108; Geisler v. Brown, 6 Neb. 254. Publication in a newspaper that N. and F. were arrested and lodged in jail to-day on charge of theft is libel per se. Belo v. Fuller, 84 Tex. 450, 19 S. W. 616. "The words 'God damned thief,' applied to a person without explanation or qualification, amount to a charge that the person has been guilty of larceny, and are actionable per se." Gaines v. Belding, 56 Ark. 100, 19 S. W. 236. Stealing fixtures, St. Martin v. Desnoyer 1 Minn. 41 (Gil. 25); Halsey v. Stillman, 48 Ill. App. 413; McCauley v. Elrod (Ky.) 27 S. W. 867. Theft, Collyer v. Collyer, 50 Hun, 422, 3 N. Y. Supp. 310. Embezzlement, Iron Age Pub. Co. v. Crudup, 85 Ala. 519, 5 South. 332; In re MacDonald (Wyo.) 33 Pac. 18 (receiving stolen goods); Hackett v. Providence Tel. Pub. Co. (R. I.) 20 Atl. 143. Blackmail, Hess v. Sparks, 44 Kan. 465, 24 Pac. 979. The fact that defendant published an article charging plaintiff with the commission of a felony conclusively establishes a cause of action for actual or compensatory damages. Childers v. San Jose Mercury Printing & Pub. Co., 105 Cal. 284, 38 Pac. 903. Adultery, Lowe v. Herald Co., 6 Utah, 175, 21 Pac. 991; Guth v. Lubach, 73 Wis. 131, 40 N. W. 681. Murder, Republican Pub. Co. v. Miner, 12 Colo. 77, 20 Pac. 345. See, also, Thomas v. Blasdale, 147 Mass. 438, 18 N. E. 214. And, generally, see Stumer v. Pitchman, 124 Ill. 250, 15 N. E. 757; Rosewater v. Hoffman, 24 Neb. 222, 38 N. W. 857; Gomez v. Joyce (Super. Ct. N. Y.) 1 N. Y. Supp. 337; Seery v. Viall, 16 R. I. 517, 17 Atl. 552; Beneway v. Thorp, 77 Mich. 181, 43 N. W. 863.

159 McKee v. Ingalls, 5 Ill. 30; Fanning v. Chace, 17 R. I. 388, 22 Atl. 275.

160 Republican Pub. Co. v. Miner, 12 Colo. 77, 20 Pac. 345.

161 Mitchell v. Sharon, 8 C. C. A. 420, 59 Fed. 980. A complaint charging defendants with a conspiracy to slander plaintiff, but failing to sufficiently plead the slander as against either, is demurrable, such conspiracy not being in itself a crime. Severinghaus v. Beckman, 9 Ind. App. 388, 36 N. E. 930.

162 Van Rensselaer v. Dole, 1 Johns. Cas. 279.

tributing want of chastity to a woman is more and more regarded as actionable per se.[163]

Same—Words Injurious to Calling.

"Whatever words have a tendency to hurt, or are calculated to prejudice, a man who seeks his livelihood by any trade or business are actionable."[164] "We think that the rule as to words spoken

[163] Imputation of fornication actionable, Ransom v. McCurley, 140 Ill. 634, 31 N. E. 119. Cf. Jacksonville Co. v. Beymer, 42 Ill. App. 443. "Whore" actionable, Michelson v. Lavin (Ga.) 20 S. E. 292; Reitan v. Goebel, 33 Minn. 151, 22 N. W. 291; Stroebel v. Whitney, 31 Minn. 384, 18 N. W. 98; Bidwell v. Rademacher (Ind. App.) 38 N. E. 879. An article in a newspaper headed, "Two * * * Teachers Guilty of Horrible Crimes," and importing that plaintiff aided another teacher in taking indecent and criminal liberties with the scholars, is actionable per se. Thibault v. Sessions (Mich.) 59 N. W. 624. Calling a woman a "whore" in the presence of others, who heard it, is actionable per se. Michelson v. Lavin (Ga.) 20 S. E. 292. Words charging a person with having been arrested for bastardy, and of having paid a sum of money to settle it, are both actionable per se; bastardy not being a crime under the law of New York. Erwin v. Dezell (Sup.) 19 N. Y. Supp. 784. In an action for slander, it appeared that the words charged were not spoken of plaintiff in regard to his calling, and the complaint did not show what was his calling, and alleged no special damage other than that plaintiff's neighbors and possible customers would have no dealing with him because of the slander, and that actions at law to enforce the payment of debts had been brought against him which would not have been brought but for the slander. Held insufficient to show special damages. Id. Defendants published in their newspaper a charge that plaintiff, when she was the wife of H., was detected by her husband in a room at a hotel with one G.; that they had registered under an assumed name as husband and wife; and that H. confronted them when they came out in the morning. Held, if false, sufficient to constitute a libel, and that the demurrer to the complaint was properly overruled. Gray v. Baker (Sup.) 19 N. Y. Supp. 940. And see Davis v. Sladden, 17 Or. 259, 21 Pac. 140. The English statute on the point is [1891] 54–55 Vict. c. 51.

[164] Bagley, J., in Whittaker v. Bradley, 7 Dowl. & R. 649. And, generally, see Cruikshank v. Gordon, 118 N. Y. 178; Morasse v. Brochu, 151 Mass. 567, 25 N. E. 74; Ganvreau v. Superior Pub. Co., 62 Wis. 403, 22 N. W. 726; De Pew v. Robinson, 95 Ind. 109; Fitzgerald v. Redfield, 51 Barb. 484; Lumby v. Allday, 1 Cromp. & J. 301; Arrow Steamship Co. v. Bennett, 73 Hun, 81, 25 N. Y. Supp. 1029; Nettles v. Somervell, 6 Tex. Civ. App. 627, 25 S. W. 658; Burton v. O'Niell, 6 Tex. Civ. App. 613, 25 S. W. 1013; McKenzie v. Denver Times Pub. Co., 3 Colo. App. 554, 34 Pac. 577. A postal card sent to a bank to a correspondent from whom it had received a draft on "B. Bors. & Co.," a mercantile firm, for collection, reading "B. in hands of notary," while in

of a man in his office or trade is not necessarily confined to offices and trades of the nature and duties of which the court can take judicial notice. The only limitation of which we are aware is that it does not apply to illegal callings."[165] The defendant may, if he can, escape by showing lawful excuse. If he shows no excuse, the law presumes damage.[166] Therefore, the rule is that, as to those callings in which credit is ordinarily essential to their successful prosecution, language which imputes to one in such calling a want of credit or responsibility is actionable per se.[167] Thus, a false statement that a merchant in the habit of purchas-

fact the draft had been paid to the bank, is libelous per se. Continental Nat. Bank v. Bowdre, 92 Tenn. 723, 23 S. W. 131. Defendant, a taxpayer of the village where the parties resided, published concerning plaintiff, an attorney, the following: "Make M. an attorney for the village so that every person that gets spanked on the ice will be able to obtain a judgment of from $1,000 to $10,000 against the village." Held, that the publication was libelous. Mattice v. Wilcox, 71 Hun, 485, 24 N. Y. Supp. 1060; Brown v. Vannaman, 85 Wis. 451, 55 N. W. 183; Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724; Lapham v. Noble, 54 Fed. 108.

[165] Per Channell, B., in Foulger v. Newcomb, L. R. 2 Exch. 327–330. But to call a stone mason a ringleader of the nine-hour system is not actionable, since this hardly relates to his calling. Miller v. David [1874] L. R. 9 C. P. 118.

[166] Steele v. Southwick, 9 Johns. 214, 1 Am. Lead. Cas. 135; Craft v. Boite, 1 Saund. 241–243, note.

[167] Read v. Hudson, 1 Ld. Raym. 610; Davis v. Lewis, 7 Term. R. 17; Dobson v. Thornistone, 3 Mod. 112; Chapman v. Lamphire, Id. 155; Sewall v. Catlin, 3 Wend. 291; Ostrom v. Calkins, 5 Wend. 263; Mott v. Comstock, 7 Cow. 654; Lewis v. Hawley, 2 Day, 495; Whittington v. Gladwin, 5 Barn. & C. 180; Southam v. Allen, T. Raym. 231; Phillips v. Hoefer, 1 Pa. St. 62; Blumhardt v. Rohr, 70 Md. 328, 17 Atl. 266 (diseased meat); Young v. Kuhn, 71 Tex. 645, 9 S. W. 860; Rider v. Rulison, 74 Hun, 239, 26 N. Y. Supp. 234; Simons v. Burnham (Mich.) 60 N. W. 476; Newell v. How, 31 Minn. 235, 17 N. W. 383. Malicious commercial report, Lowry v. Vedder, 40 Minn. 475, 42 N. W. 542. It has been held that it is not actionable to say of traders that they had executed a chattel mortgage. Newbold v. Bradstreet, 57 Md. 38. Publishing one's name in a list of "dead beats and delinquents," for circulation among business men, is libelous per se. Nettles v. Somervell, 6 Tex. Civ. App. 613, 25 S. W. 658. A publication that plaintiff's management of an office of the Farmers' Alliance proved him "to be a man of small business capacity" is libelous per se, as reflecting on plaintiff's business capacity. Gaither v. Advertiser Co. (Ala.) 14 South. 788. But in an action by a chair company for

ing goods on credit was heavily indebted, and had conveyed property to his wife at half its value, is actionable per se.[168] Words imputing insanity well illustrate the difference between responsibility in libel and slander. In slander, such words are actionable per se when spoken of one or his trade or occupation, but not otherwise, without proof of special damage;[169] but an imputation of insanity by any form of publication which constitutes libel is per se libelous.[170] One may, with impunity, say of a public officer, after the expiration of his term, what would be slanderous per se while he was in office.[171] Words derogatory of professional

injury to name and reputation, the complaint charged that the defendant had said of the plaintiffs with appropriate innuendoes, that they "used" to make the "Young surgical chair," until Young shut them up on account of an indebtedness; that Young never got anything for such indebtedness but a worthless judgment; and that he found them irresponsible, and any bank would say so. It charged the defendant with saying that they had copied another chair, and had been beaten on several points, and compelled to pay a royalty. It was held, that the language complained of was not actionable per se. Canton Surgical & Dental Chair Co. v. McLain, 82 Wis. 93, 51 N. W. 1098. And see Irish-American Bank v. Bader (Minn.) 61 N. W. 328.

[168] Simons v. Burnham (Mich.) 60 N. W. 476.

[169] Anderson, J., in Moore v. Francis, 121 N. Y. 199, 23 N. E. 1127, citing Morgan v. Lingen, 8 Law T. (N. S.) 800; Joannes v. Burt, 6 Allen, 236.

[170] Moore v. Francis, supra; Morgan v. Lingen, supra; King v. Harvey, 2 Barn. & C. 257; Southwick v. Stevens, 10 Johns. (N. Y.) 443; Perkins v. Mitchell, 31 Barb. 461–465. Insanity "not slanderous per se." Joannes v. Burt (1863) 6 Allen, 236. And see Townsh. Sland. & L. § 177; Odger, Sland. & L. 23, 30 Am. Law Reg. 389. But see Mayrant v. Richardson, 1 Nott & McC. (S. C.) 347; Walker v. Tribune Co., 29 Fed. 827 ("crank" not libelous per se).

[171] That he "bribed Indians" is innocent, after expiration of term. Foward v. Adams, 7 Wend. 204. While police officer holds office, imputation of brutality is libelous per se. O'Shaughnessy v. New York Recorder Co., 58 Fed. 653. And see Cotulla v. Kerr, 74 Tex. 89, 11 S. W. 1058 (court's commissioner); Gove v. Blethen, 21 Minn. 80 (justice); Larrabee v. Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 462 (county attorney). Fraud in election. Edwards v. San Jose, P. & P. Co., 99 Cal. 431, 34 Pac. 128; Murphy v. Nelson, 94 Mich. 554, 54 N. W. 282 (conduct of justice of peace). The holder of an office not being an office of profit cannot, in the absence of special damage, maintain an action of slander for words imputing to him misconduct and consequent unfitness for the office, unless the imputation relates to his conduct in the office, or unless, if true, it would lead to his removal therefrom. Alexander v. Jenkins [1892] 1 Q. B. 797. But to charge him with a lie in per-

character of clergymen,[172] lawyers,[173] doctors,[174] architects,[175] actors,[176] and educators[177] are actionable, without allegation or proof of special damage. But, to come within the category, the words complained of must refer to the plaintiff in his business or profession,[178] and not charge conduct on his part which is lawful and proper.[179]

formance of public duty is actionable. Prosser v. Callis, 117 Ind. 105, 19 N. E. 735. To charge that plaintiff is an habitual drunkard, and unfit for the office of town councillor, is not actionable, in the absence of special damage. Alexander v. Jenkins [1892] 1 Q. B. 797. And see Ratcliffe v. Evans [1892] 2 Q. B. 524. As to charge of drunkenness generally, see Broughton v. McGrew, 39 Fed. 672.

[172] Piper v. Woolman, 43 Neb. 280, 61 N. W. 588. As to charge him with drunkenness, Hayner v. Cowden, 27 Ohio St. 292.

[173] Greenwood v. Coffey, 26 Neb. 449, 42 N. W. 413; Mattice v. Wilcox, 50 Hun, 620, 13 N. Y. Supp. 330; Clark v. Anderson, 59 Hun, 620, 11 N. Y. Supp. 729. The mere publication of a notice of foreclosure sale under a mortgage made by plaintiff, an attorney engaged in the real-estate business, farming, and keeping a hotel, which mortgage has been paid, is not libelous per se, as tending to charge him with insolvency or dishonesty, or as affecting his credit. Campbell v. Missouri, K. & T. Ry. Co., 1 Mo. App. 3.

[174] Secor v. Harris, 18 Barb. 425; Pratt v. Press Co., supra. Where, in an action for libel and slander for words spoken and printed concerning plaintiff as a physician, the facts stated in the petition show that plaintiff had no authority to practice medicine in this state, he is not entitled to recover, and a general demurrer thereto is properly sustained. Hargan v. Purdy, 93 Ky. 424, 20 S. W. 432. And, generally, see note to 26 Lawy. Rep. Ann. 325.

[175] Dennis v. Johnson, 42 Minn. 301, 44 N. W. 68.

[176] Williams v. Davenport, 42 Minn. 393, 44 N. W. 311.

[177] St. James Military Academy v. Gaiser (Mo. Sup.) 28 S. W. 851.

[178] A publication that "an enticing article" had recently been sent out by plaintiff, asking subscriptions to a business corporation organized by him, is not prejudicial to plaintiff in his profession of lawyer, as it has no relation to his character or conduct as a lawyer. Keene v. Tribune Ass'n, 76 Hun, 488, 27 N. Y. Supp. 1045. But see Gribble v. Pioneer Press Co., 34 Minn. 342, 25 N. W. 710; Id., 37 Minn. 277, 34 N. W. 30. That given proceeding was "a dirty Jew trick," Hanaw v. Jackson Patriot Co., 98 Mich. 506, 57 N. W. 734.

[179] That a saloon keeper set up a prohibitory law as a defense to a just claim, Homer v. Engelhardt, 117 Mass. 539. And see Ireland v. McGarvish, 1 Sandf. 154.

Same—Contagious Disease.

Words which impute that one has a contagious disease, which would cause the person to be excluded from society,[180] may be actionable per se. But the imputation must be, not as having had, but as having, such disease (i. e. the continuance of the disorder); because it is only while the person is disordered that he is unfit for society.[181] Leprosy and the plague were such diseases;[182] but smallpox is not.[183] An imputation of having a venereal disease,[184] as gonorrhea,[185] is actionable per se.

Same—Words Tending to Disherison.

If the words used tend to produce disherison of a person, they are actionable per se, and it is not necessary to allege and prove that in consequence he was in fact disinherited. Thus, in Humphrys v. Stanfeild[186] defendant had said to plaintiff, "Thou art a bastard." Such words were held actionable, without more; for by reason of these words the plaintiff may be in disgrace with his father and uncle, and they, conceiving a jealousy of him touching the same, may disinherit him; and though they do not, yet the action lies for the damage which may ensue.

Ambiguous Words.

The court having determined that words are not clearly innocent or per se defamatory,[187] it is ordinarily a question of fact whether

[180] Golderman v. Stearns, 7 Gray, 181, Chase, Lead. Cas. 116; Williams v. Holdredge, 22 Barb. 396; Hewit v. Mason, 24 How. Prac. 366; Kaucher v. Blinn, 29 Ohio St. 62; Irons v. Field, 9 R. I. 216. And see, Colby v. Reynolds, 6 Vt. 489–494; Kinney v. Hosea, 3 Har. (Del.) 77–79.

[181] Carlslake v. Mapledoram (1788) 2 Term R. 473; Smith's Case, Noy, 151; Bloodworth v. Gray, 7 Mylne & G. 334; Pike v. Van Wormer, 5 How. Prac. 171. But see Miller's Case, Cro. Jac. 430. Cf. Monks v. Monks, 118 Ind. 238, 20 N. E. 744.

[182] Taylor v. Perkins (1607) Cro. Jac. 144; Crittal v. Horner, Hob. 385.

[183] Odger, Sland. & L. 64, 65.

[184] Golderman v. Stearns, 7 Gray, 181; Upton v. Upton, 51 Hun, 184, 4 N. Y. Supp. 936 (a married woman).

[185] Watson v. McCarthy, 2 Kelly, 57.

[186] Cro. Car. 469; Pig. Torts, 308.

[187] Capital & Counties Bank v. Henty, 7 App. Cas. 741; Mulligan v. Cole, L. R. 10 Q. B. 549; Gray v. Baker, 65 Hun, 620, 19 N. Y. Supp. 940; Jacksonville Journal Co. v. Beymer, 42 Ill. App. 443; Mitchell v. Sharon, 51 Fed. 424.

[illegible] in a defamatory sense.[188] [illegible] alleged and proved. That is to say, in [illegible] must be made.[189] The [illegible] When a

[188] [illegible] N. E. [illegible]. Defendant published an article [illegible] following: Millionaire [illegible] Located. * * * Plaintiff, formerly [illegible] manager of the Standard Oil Company until six months ago, when he suddenly disappeared, has been located [illegible] in Canada. Held that, since some of our countrymen who reside in Canada are fugitives from justice, of which courts may take judicial notice, whether the language was libelous was a question for the jury. McDonald v. Press Pub. Co., 55 Fed. 264, affirmed 11 C. C. A. 155, 63 Fed. 238. But see Thompson v. Pioneer Press Co., 37 Minn. 285, 33 N. W. 856. Whether a publication charging a school with permitting and teaching dancing was [illegible], on the ground that dancing is immoral, is a question for the jury. St. James Military Academy v. Gaiser (Mo. Sup.) 28 S. W. 851. Whether to say of a woman that "she had a bad disease" is equivalent to charging her with having a venereal disease, or imputing to her want of chastity, is for the jury. Upton v. Upton, 51 Hun, 184, 4 N. Y. Supp. 936. Whether a publication in a newspaper, which states that the "county dads came out with the statement," referred to the county auditors, or to another, is a question of fact. Prosser v. Callis, 119 Ind. 105, 19 N. E. 735; Arnott v. Standard Ass'n, 57 Conn. 86, 17 Atl. 361; Mosier v. Stoll, 119 Ind. 244, 20 N. E. 752.

[189] As to colloquium. Van Vechten v. Hopkins, 5 Johns. 211; Brettum v. Anthony, 103 Mass. 37; Patterson v. Wilkinson, 55 Me. 42; Sturtevant v. Root, 27 N. H. 69; Stitzell v. Reynolds, 59 Pa. St. 488. A complaint charging that defendant said, concerning plaintiff, "He took and drove off my ducks, and sold them," without a colloquium or innuendo, states no cause of action. Harrison v. Manship, 120 Ind. 43, 22 N. E. 87; Petsch v. Dispatch Printing Co., 40 Minn. 291, 41 N. W. 1034; Prendergast v. Same, 40 Minn. 295, 41 N. W. 1036; Vickers v. Stoneman, 73 Mich. 419, 41 N. W. 495; Ayres v. Toulmin, 74 Mich. 44, 41 N. W. 855; Wilcox v. Moon, 61 Vt. 484, 17 Atl. 742; Monks v. Monks, 118 Ind. 238, 20 N. E. 744.

[190] Pol. Torts, p. 217; Barham v. Nethersal, 4 Coke, 314; Van Vechten v. Hopkins, 5 Johns. 211; Hare & W. Lead. Cas. 138, and note. In an action for slander for saying to an unmarried woman in the presence of others, "You want to come home, and lose another young one, like you did," the complaint must allege by way of innuendo that it was intended thereby to charge

given term as defined by lexicographers is innocent, but as colloquially used meant adultery, to be basis of recovery in a legal action it must be alleged and proved that it was used in the actionable sense.[191] An innuendo cannot introduce new matter or enlarge the natural meaning of words, or put upon them a construction they will not bear. Its office is to define the defamatory meaning which the plaintiff sets upon the words,—to show how they came to have that meaning, and how they relate to the plain-

plaintiff with having had illicit sexual intercourse, and that the persons hearing the words so understood them. Cosand v. Lee (Ind. App.) 38 N. E. 1099. So a simple marriage notice is not libelous, but may be made so by proving that the alleged bride was a prostitute. Caldwell v. Raymond, 2 Abb. Prac. 193. A "tax-title shark" is not a phrase actionable per se, but may be made actionable by proper pleading and proof. Stewart v. Minnesota Tribune Co., 41 Minn. 71, 42 N. W. 787. So, a "blind tiger," applied to a building. Schulze v. Jalonick (Tex. Civ. App.) 29 S. W. 193. An issue can never be raised upon the truth of an innuendo. Fry v. Bennett, 5 Sandf. 54; Com. v. Snelling, 15 Pick. 321–335; Taylor v. Kneeland, 1 Doug. (Mich.) 67. And see Cooper v. Greely, 1 Denio, 347. In this case Horace Greely wrote of Fennimore Cooper: "He chooses to send none, but a suit for libel instead. So be it then. Walk in, Mr. Sheriff! There is one comfort to sustain us under this terrible dispensation. Mr. Cooper will have to bring his action to trial somewhere. He will not like to bring it to trial in New York, for we are known here; nor in Otsego, for he is known there." Plaintiff was allowed to show the true libelous meaning of the words by alleging and proving the innuendo. A remark that, if "A. [plaintiff] had not gone away, we should issue warrants for him," is susceptible of the meaning, given it by the innuendo, that plaintiff had absconded, and had been guilty of some offense for which he was liable for arrest, and with that meaning is actionable. Ayres v. Toulmin, 74 Mich. 44, 41 N. W. 855.

[191] Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 103. And see Edgar v. McCutchen, 9 Mo. 448; Matts v. Borba (Cal.) 37 Pac. 159 ("valhaca"); Dyer v. Morris, 4 Mo. 134 ("goose horn," i. e. whore house); Lipprant v. Lipprant, 52 Ind. 273 ("accommodation house"); Emmerson v. Marvel, 55 Ind. 265 ("slipped up on the blind side of her"); Miles v. Van Horn, 17 Ind. 245 (screwed). So the German phrase, "It comes not out of the air," may be shown to mean embezzlement. Glatz v. Thein, 47 Minn. 278, 50 N. W. 127. "Wanted E. B. Z., M. D., to pay a drug bill." Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862. Placard on furniture on sidewalk: "Taken back from W., who could not pay for it. Sold at a bargain. Beware of dead beats." Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387.

tiff.[192] When the words are in themselves actionable, it is not necessary to allege the innuendo.[193]

MALICE.

175. In an ordinary action for defamation, spoken wrongfully and intentionally, without just cause or excuse, malice in law is inferred; but when, on account of the cause of publishing, it is prima facie excusable, malice in fact must be proved.[194]

It is traditional that defamation must be false[195] and malicious.[196] But malice here is used not in the common, colloquial

[192] Price v. Conway, 134 Pa. St. 340, 19 Atl. 687. Words charging plaintiff with having a venereal disease do not sustain an innuendo that plaintiff kept a house of ill fame. The defamatory words set forth in a declaration for slander were: "She keeps a common open house. She is nothing but a whore anyway." It was held that, without any prefatory averments, these words, taken together, supported an innuendo, that a house of ill fame was meant. Posnett v. Marble, 62 Vt. 481, 20 Atl. 813; Wilcox v. Moon, 63 Vt. 481, 22 Atl. 80; Haines v. Campbell, 74 Md. 158, 21 Atl. 702; Jacobs v. Schmaltz, 62 Law T. 121; Higgins v. Walkem, 17 Can. Sup. Ct. 225. See, also, Randall v. Evening News Ass'n, 79 Mich. 266, 44 N. W. 783.

[193] Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119. An innuendo charging that defendant meant, by calling plaintiff a "downright thief," to charge that he was guilty of official corruption and oppression, may be disregarded as surplusage, the words themselves being actionable, and need not be proved by plaintiff. Callahan v. Ingram (Mo. Sup.) 26 S. W. 1020. And see Turton v. New York Recorder, 3 Misc. Rep. 314, 22 N. Y. Supp. 766; Cole v. Neustadter, 22 Or. 191, 29 Pac. 550.

[194] Bromage v. Prosser, 4 Barn. & C. 247.

[195] Falsity, however, is not an essential of the wrong of libel and slander, accurately speaking. "To say that showing the truth of the language published is a defense, and to say that the language must be false, are not identical propositions. * * * The plaintiff is not allowed, in the first instance, nor except to disprove a defense of truth, to give any evidence of the falsity of language published." Townsh. Sland. & L. pp. 59, 60, §§ 73, 388. And see Stewart v. Lovell, 2 Starkie, Cas. 93; Starkie, Sland. & L. p. 3.

[196] There is no magic in the word "malice," so far as pleading is concerned; any word of similar import is sufficient. White v. Nichols, 3 How. 266. Thus, "falsely and injuriously" is sufficient. King v. Hoot, 4 Wend. 113–136. And see Weaver v. Hendrick, 30 Mo. 502; Dillard v. Collins, 25 Grat. 343; Opdyke

sense, and means no more than in other branches of the law.[197] "Malice, in its common acceptation, means a wrongful act done intentionally, without just or reasonable cause."[198] Want of actual intention to vilify is no excuse for a libel.[199]

Malice Presumed.

Where the words are in themselves defamatory, and are uttered without justification, malice is an inference of law.[200] Thus, the law presumes that a publication charging a person with having committed a crime is malicious.[201] "It is urged that the motive

v. Weed, 8 Abb. Prac. 223. "Wilfully" and "maliciously" are essentially the same. Rounds v. Delaware, L. & W. R. Co., 3 Hun, 329, affirmed (February 8, 1876) 64 N. Y. 129; Dexter v. Spear, 4 Mason, 115, Fed. Cas. No. 3,867. But it would seem that "wrongfully" and "injuriously" are not equivalent to "maliciously." De Medina v. Grove, 10 Jur. 426. But see McPherson v. Daniels, 10 Bar. & C. 263–266; Taylor v. Kneeland, 1 Doug. (Mich.) 67.

[197] Com. v. York, 9 Metc. (Mass.) 93, 104, 105; Gassett v. Gilbert, 6 Gray, 94–97; Abrath v. Northeastern Ry. Co., L. R. 11 App. Cas. 247, 253, 254; White v. Duggan, 140 Mass. 18–20, 2 N. E. 110.

[198] Bayley, J., in Bromage v. Prosser, 4 Barn. & C. 247, at page 253; Bigelow, Lead. Cas. 117; Chase, Lead. Cas. 128. And see Lindley, J., in Stuart v. Bell [1891] 2 Q. B. 341–351; Capital & Counties Bank v. Henty, 7 App. Cas. 741–787; Marks v. Baker, 28 Minn. 162–166, 9 N. W. 678. It is proper to instruct that the word "malicious" is not to be considered in the same sense as spite or hatred, but as meaning that the person is actuated by improper and indirect motives, other than the mere purpose of protecting the public health or vindicating public justice. Blumhardt v. Rohr, 70 Md. 328, 17 Atl. 266.

[199] Curtis v. Mussey, 6 Gray, 265; Hallam v. Post Pub. Co., 55 Fed. 456; Smith v. Sun Printing & Pub. Ass'n, 5 C. C. A. 91, 55 Fed. 240; Simmons v. Holster, 13 Minn. 249 (Gil. 232); Zuckerman v. Sonnenschein, 62 Ill. 115; Byrket v. Monohon, 7 Blackf. 83; Pennington v. Meeks, 46 Mo. 217; Mitchell v. Milholland, 106 Ill. 175; Davis v. Marxhausen (Mich.) 61 N. W. 504; State v. Clyne, 53 Kan. 8, 35 Pac. 789.

[200] White v. Nicholls, 3 How. 266, followed Hetherington v. Sterry, 28 Kan. 429. And see Com. v. McClure, 11 Phila. 469; Smith v. Smith, 26 Hun, 573–577; Broughton v. McGrew, 39 Fed. 672; Byam v. Collins, 111 N. Y. 143, 19 N. E. 75.

[201] Pokrok Zakadu Pub. Co. v. Ziskovsky, 42 Neb. 64, 60 N. W. 358; Heyler v. New York News Co. (Sup.) 24 N. Y. Supp. 499; Colby v. McGee, 48 Ill. App. 294. In an action for slander, where the words complained of charge plaintiff with stealing defendant's goods, the question of whether the charge was made in good faith and without malice, while defendant was trying to find the thief, is for the jury. Hupfer v. Rosenfeld (Mass.) 38 N. E. 197.

of many publications which the law decrees libels may be innocent, and even laudable, and that without the proof of malice, or what is equivalent to malice, the mere act of composing or publishing a libel ought not to be the subject of punishment. This objection only becomes specious from misapprehension of the term 'malice.' Malice, to a legal understanding, implies no other than willfulness. The first inquiry of a civil judicature, if the fact do not speak for itself as a malum in se, is to find out whether it be willfully committed. It searches not into the intention or motive, any further or otherwise than as it is the mark of a voluntary act; and having found it so, it concerns itself no more with a man's design or principle of action, but punishes without scruple what manifestly to the offender himself was a breach of the command of the legislature. The law collects the intention from the act itself. The act being in itself unlawful (wrongful), an evil intent is inferred, and needs no proof by extrinsic evidence. That mischief which a man does he is supposed to mean, and he is not permitted to put in issue a meaning abstracted from the fact. The crime consists in publishing a libel. A criminal intention in the writing is no part of the definition of the crime of libel at common law. 'He who scatters fire brands, arrows, and death [which, if not an accurate, is a very intelligent description of a libel] is ea ratione criminal.' It is not incumbent on the prosecution to prove his intent, and on his part he shall not be heard to say, 'Am I not in sport?' To determine, therefore, the guilt of a civil act, and to inflict punishment on the offender, there is no need of knowing his motives. Human laws require no justification in imposing penalties for an act prohibited by the magistrate, in its consequences injurious, and which has indubitable marks of being voluntarily committed." [202]

In Conroy v. Pittsburg Times,[203] Mitchell, J., speaking of a charge libelous per se, and belonging to the class of qualified privilege, said: "It may be conceded that it belongs to the class of qualified privilege. In such cases it is common to say that the plaintiff must prove express malice. I apprehend, however, that the more accurate statement of the law is that in such cases there is no

[202] Holt, Lib. bk. 1, c. 3, p. 55, quoted in Townsh. Sland. & L. § 92; Dexter v. Spear, 4 Mason, 115, Fed. Cas. No. 3,867.

[203] 139 Pa. St. 334, 21 Atl. 154–156.

prima facie presumption of malice from publication. There must be some evidence beyond the mere fact of publication, but there is no requirement as to what the form of the evidence shall be. It may be intrinsic, from the style and tone of the article. 'If the communication contains expressions which exceed the limit of privilege, such expressions are evidence of malice, and the case shall be given to the jury.'[204] Or it may be extrinsic, as by proof of actual malice, or that the statement is knowingly false, or that it was made without probable cause, or in any way that clearly and reasonably tends to overcome the prima facie presumption of protection under the privilege. One of such ways is by the counter presumption of innocence. 'Probable cause that would justify such publication [charging larceny] would justify a prosecution of the alleged crime.'[205] And the reason for it is that the presumption of innocence cannot be overcome by mere rumor, or idle report, or careless or insufficient examination set up as probable cause. So, where the alleged libel charges an indictable offense, the presumption of innocence ought and must stand as prima facie evidence of falsity and want of probable cause, and therefore of malice, even in cases of a claim of privilege. A brief consideration of two fundamental principles will be sufficient to sustain this result: First, the immunity of a privileged communication is an exception. The general rule is that nothing but proof of its truth is a defense for a libel. That it was privileged because public, on a proper occasion, from a proper motive, and upon probable cause, is the excepted case, and he who relies on an exception must prove all the facts necessary to bring himself within it. Second, unless his action is founded on a negative averment, a plaintiff is not, in general, obliged to prove a negative; and the inconveniences of a departure from this rule are many. For example, in cases like the present, how is a plaintiff to proceed? Actual or special malice can rarely be proven. In fact it rarely exists. Libelous articles in newspapers seldom spring from any hostility to the individual, but usually from a ruthless disregard of personal feelings and private rights, in the mad hunt for news and sensation. The only chance of redress for the plaintiff, therefore, is, ordinarily, the

[204] Neeb v. Hope, 111 Pa. St. 145–154, 2 Atl. 568–572.
[205] Neeb v. Hope, 111 Pa. St. 145–153, 2 Atl. 568–571.

want of probable cause,—and how is he to prove this? It was held in Flitcraft v. Jenks [206] that he could not do it by evidence of good character and the consequent improbability of his doing the act charged, and how is he to prove specific facts in the dark, before the facts relied on as probable cause are shown by the defendant? The natural and logical order of proof is for the defendant to show the information on which he relied on probable cause, and for the plaintiff then to meet it in rebuttal. And this is the order that seems to be indicated by Brackenridge, J., in Gray v. Pentland.[207] 'The plaintiff may, if he chooses, either in the first instance, with a view to aggravate damages, go on to show express malice, or, after an attempt by the defendant to show probable cause, he may rebut this by proof of express malice.' It is true that actions like the present are closely assimilated to actions for malicious prosecution, in which the plaintiff must give evidence of want of probable cause. But the later actions are founded on the want of probable cause. It is an essential element of the plaintiff's case, while in an action for libel it is an element not of the plaintiff's case, but of the defendant's claim of privilege."

Malice Which must be Proved.

Where the occasion of publication is privileged, the onus is on the plaintiff to prove malice in fact.[208] Thus, where alleged slanderous words impute to one the crime of adultery, and the defendant avers that they were privileged because spoken by him in good faith to members of the family, and as a witness before a church committee, and that the words are true, and it appears from the evidence that the truth or falsity of the words was within his personal knowledge, and that they related to matters about which he could not be mistaken, he is not liable if the words were true; but, if they were false, they were not spoken in good faith, and he is liable, notwithstanding the circumstances under which the words were spoken.[209] But, "to enable the plaintiff to have the question of

[206] 3 Whart. 158.

[207] 2 Serg. & R. 23.

[208] Strode v. Clement, 19 S. E. 177.

[209] Etchison v. Pergerson, 88 Ga. 620, 15 S. E. 680; Pergerson v. Etchison, Id.; Brett, L. J., in Clark v. Molyneux, 3 Q. B. Div. 237; Jackson v. Hopperton, 12 Wkly. Rep. 913, 10 Law T. (N. S.) 529, 530, per Erle, J.; Taylor v.

malice submitted to the jury,[210] it is certainly not necessary that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the nonexistence of malice; but it is necessary that the evidence should raise the probability of malice and be more consistent with its existence than its nonexistence."[211] Therefore, in an action for slander, where the case is one of qualified privilege, evidence of the falsity of the charge is admissible on the part of the plaintiff, to prove malice, though such evidence is not in itself sufficient for that purpose.[212] Actual or implied malice, or malice in fact and malice in law, as Mr. Townshend has demonstrated, means, not different kinds of malice, but different kinds of proof.[213] The preservation of the distinction is of doubtful utility. For, "after all, this implied malice is a mere fiction. It is an antiquated absurdity. The law is put into a position of self-stultification whenever the judge tells the jury that they are obliged to imply malice, although the evidence shows that there is none in fact."[214]

Actual Malice.

Actual malice, while essential to the plaintiff's cause of action where question of privilege is involved, is ordinarily to be considered in connection with, not the right, but the extent of the recovery.[215] "So a libel may be published without any intention to harm a man, and yet it would be a libel, because a libel is judged by its natural consequences. That is what makes the thing libel.

Hawkins, 16 Q. B. 308, 321, per Lord Campbell; Wright v. Woodgate, 2 Cromp., M. & R. 573–577, per Parke, B.

[210] In an action for libel the existence of malice in fact is for the jury. Childers v. San Jose Mercury Printing & Publishing Co., 105 Cal. 284, 38 Pac. 903. Maule, J., in Somerville v. Hawkins, 10 C. B. 583–588, 15 Jur. 450.

[211] Atwill v. Mackintosh, 120 Mass. 177. Cf. Jenoure v. Delmege [1891] App. Cas. 73 (where the court did not allow the verdict to stand).

[212] Laing v. Nelson, 40 Neb. 252, 58 N. W. 846.

[213] Townsh. Sland. & L. 102, note. And see Selden, J., in Brush v. Prosser, 11 N. Y. 347–358.

[214] 27 Am. Law Rev. 777.

[215] Malice in fact is the same as actual malice, under Connecticut statute. Moore v. Stevenson, 27 Conn. 14; Hotchkiss v. Porter, 30 Conn. 414; Wynne v. Parsons, 57 Conn. 73, 17 Atl. 362. The statement is often made very broadly that plaintiff need never prove malice as a part of his case. Mans-

If it was done without any actual ill-will, any actual malevolence, the damages would not be as much as if it were done through a mean motive, an actual hatred, personal ill-will, deliberate intent to maliciously injure another man. So the question of malice may always be taken into consideration in determining the amount of damages which should be awarded. On the other hand, some things may be taken into consideration in mitigating damages. If a party who published a libel actually in good faith, doing what he thought was right under the circumstances, acting honestly,—and a libel might be published in that way,—the jury should take that good faith into consideration in mitigating, lessening, or diminishing the damages that would be awarded, and in some cases they might consider that such good faith should go far enough to reduce the damages to a mere nominal sum."[216] Hence, evidence as to the existence[217] or absence[218] of evil motive is admissible, under the

field, C. J., in Hargrave v. Le Breton, 4 Burrows, 2423–2425, repeated by Bayley, J., in Bromage v. Prosser, supra. Mr. Townshend, however (Sland. & L. 69, 404), calls attention to Wilson v. Stephenson, 2 Price 282, as inconsistent. And see Smith v. Ashley, 11 Metc. (Mass.) 367; Liddle v. Hodges, 2 Bosw. 537–544; Dolloway v. Turrill, 26 Wend. 383–396; Cooke, Def. c. 4; Lester v. Corley, 45 La. Ann. 1006, 3 South. 467.

[216] Simons v. Burnham (Mich.) 60 N. W. 476–481. Reckless indifference to the rights of others is equivalent to the intentional violation of them, and that for the one, as well as the other, a jury in a case of libel or other tort may give punitive or exemplary damages. Morning Journal Ass'n v Rutherford, 1 U. S. App. 296, 2 C. C. A. 354, 51 Fed. 513; Gott v. Pulsifer, 122 Mass. 235, 239; Warner v. Press Publishing Co., 132 N. Y. 181, 30 N. E. 393; Holmes v. Jones, 121 N. Y. 461, 24 N. E. 701. Thus, where defendant published an out of town dispatch, which was rendered libelous by an error in transmission, without having the same repeated to insure accuracy, punitory damages are justified on the ground of a wanton disregard of the rights of others, though repeating the dispatch would have involved extra expense and loss of time. Press Pub. Co. v. McDonald, 11 C. C. A. 155, 65 Fed. 238–245. See, also, Wabash Printing & Pub. Co. v. Crumrine (Ind. Sup.) 21 N. E. 904.

[217] Byrd v. Hudson, 113 N. C. 203, 18 S. E. 209; Hintz v. Graupner, 138 Ill. 158, 27 N. E. 935; Post Pub. Co. v. Hallam, 8 C. C. A. 201, 59 Fed. 530; Born

[218] Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020; Lally v. Emery, 79 Hun, 560, 29 N. Y. Supp. 888; Arnott v. Standard Ass'n, 57 Conn. 86, 17 Atl. 361.

general rules of evidence as to relevancy, competency, and the like.[219]

A repetition by a person in a slander suit of a charge laid in the complaint, though not made in the same, or substantially the same, words, is yet admissible in evidence for the purpose of showing

v. Rosenow, 84 Wis. 620, 54 N. W. 1089. By the weight of authority, prior and contemporaneous publications of the same libel, other than that declared on, are competent evidence to show malice, whether such other publications may themselves be made the basis of recovery in separate suits or not; and the danger of a double recovery for the same publications is to be avoided by a caution from the court that damages are to be allowed only for the article sued on. Van Derveer v. Sutphin, 5 Ohio St. 293; Pearce v. Lemaitre, 5 Man. & G. 700; Chamberlin v. Vance, 51 Cal. 75; Shock v. McChesney, 2 Yeates, 473; Gibson v. Cincinnati Enquirer, 2 Flip. 121, Fed. Cas. No. 5,392; Townsh. Sland. & L. § 392; Odger, Sland. & L. 272; Newell, Def. 331; Larrabee v. Minnesota Tribune Co., 30 N. W. 462, 36 Minn. 141; Casey v. Hulgan, 118 Ind. 590, 21 N. E. 322; Beneway v. Thorp, 77 Mich. 181, 43 N. W. 863; Wabash Printing & Pub. Co. v. Crumrine (Ind. Sup.) 21 N. E. 904; Halsey v. Stillman, 48 Ill. App. 413; Thibault v. Sessions, 101 Mich. 279, 59 N. W. 624 (including refusal to retract); Randall v. Evening News Ass'n, 97 Mich. 136, 56 N. W. 361; Ellis v. Whitehead, 95 Mich. 105, 54 N. W. 752; McCleneghan v. Reid, 34 Neb. 472, 51 N. W. 1037; Ranson v. McCurley, 140 Ill. 626, 31 N. E. 119. In New York, other publications of the same or different libels by the defendant are not admitted to prove malice, unless suit upon them is barred by limitation, or for some other reason. Frazier v. McCloskey, 60 N. Y. 337. But see Enos v. Enos, 135 N. Y. 609, 32 N. E. 123. Evidence as to publication subsequent to commencement of suit seems not to be admissible. Upton v. Hume, 24 Or. 420, 33 Pac. 810; Eccles v. Radam, 75 Hun, 535, 27 N. Y. Supp. 486. As to evidence of intention under statute, see Wynne v. Parsons, 57 Conn. 73, 17 Atl. 362; Arnott v. Standard Ass'n, 57 Conn. 86, 17 Atl. 361. Evidence that defendant, a priest, after action brought against him, mentioned it to his congregation, and said the suit was not against him but fell upon the congregation, "and we will see if the church shall destroy the vermin or if the vermin the church," is admissible to show malice. Morasse v. Brochu, 151 Mass. 567, 25 N. E. 74.

[219] In an action for slander, where the case is one of qualified privilege, evidence of the falsity of the charge is admissible on the part of plaintiff to prove malice, though such evidence is not in itself sufficient for that purpose. Laing v. Nelson, 40 Neb. 252, 58 N. W. 846. In an action against a rival merchant for libel in attacking plaintiff's credit, a letter written by defendant to plaintiff's creditor, threatening to withdraw his patronage if the claim was compromised, is admissible to show malice. Simons v. Burnham (Mich.) 60 N. W. 476. Thus, as to evidence admissible, it was held: In an action for slander, all the facts and conversation leading up to the slander-

malice in speaking the words charged.[220] In Gribble v. Pioneer-Press Company,[221] the defendant, inter alia, called the plaintiff (a member of the bar) a "half imbecile shyster," and subsequently apologized for its mistake in not calling him a "wholly imbecile shyster." It was held that publications before and after the one complained of, and even after suit was brought, were admissible to show actual malice, and thereby to aggravate damage. "The circumstance that other libels are more or less frequent, or more or less remote, * * * merely affects the weight and not the admissibility of the evidence." Attempted justification may be considered as evidence of actual malice.[222]

DEFENSES.

176. Defenses to an action for defamation may be—

(a) Statutory, or

(b) Common law.

Statutory Defenses.

Many statutes have been passed to alter the rule of the common law as to the ability of a person uttering a defamation to escape from liability in tort. The English statute provides that, on apology and payment into the court of a sum of money by way of amends for the injury sustained by the defamation in any public news-

ous words are admissible, to show the intention of the person uttering them, and how they were understood by the hearers. Kidd v. Ward (Iowa) 59 N. W. 270. On the other hand: In an action for slander in charging plaintiff with the larceny of property belonging to defendant, the fact that defendant was tried and acquitted of the offense is not evidence of malice or want of probable cause. Sibley v. Lay, 44 La. Ann. 936, 11 South. 581. Knowledge of circumstances on defendant's part may be a condition of malice. Norton v. Livingston, 64 Vt. 473, 24 Atl. 247; Moore v. Thompson, 92 Mich. 498, 52 N. W. 1000. Smith v. Matthews, 9 Misc. Rep. 427, 29 N. Y. Supp. 1058 (no inference of actual malice from neglect to investigate into the truth).

[220] Enos v. Enos, 135 N. Y. 607, 32 N. E. 123; Ellis v. Whitehead, 95 Mich. 105, 54 N. W. 752. See, also, McCleneghan v. Reid, 34 Neb. 472, 51 N. W. 1037; Ranson v. McCurley, 140 Ill. 626, 31 N. E. 119.

[221] Gribble v. Pioneer Press Co., 34 Minn. 342, 25 N. W. 710, citing cases at page 344, 34 Minn., and page 710, 25 N. W. Id., 37 Minn. 277, 34 N. W. 30 (on another point). Tindal, J., in Pearson v. Lemaitre, 5 Man. & G. 700–718.

[222] Marx v. Press Pub. Co., 134 N. Y. 561, 31 N. E. 918, and cases cited.

paper or other periodical publication, the defamer has a full defense,[223] which may be alternative.[224] The apology must be full and sufficient, printed in suitable type, and conform to the statutory requirements as to time and place of publication.[225] Express malice may, however, be shown by the defendant.[226] There is a corresponding act in Canada,[227] and in many of the states of the Union.[228]

SAME—COMMON-LAW DEFENSES.

177. The common-law defenses peculiar to defamation[229] may operate by way of—

(a) Justification, or

(b) Mitigation.[230]

178. Defamation may be justified by showing either that the charge claimed to be defamatory was—

(a) True, or that it was

(b) Privileged.

179. The truth of the charge is a full justification in a civil action for defamation.

[223] 6 & 7 Vict. c. 96, § 2; Chadwick v. Hereapath, 3 C. B. 885; O'Brien v. Clement, 16 Mees. & W. 159.

[224] Hawkesley v. Bradshaw, 5 Q. B. Div. 302, 49 Law J. Q. B. 333.

[225] Lafone v. Smith, 3 Hurl. & N. 735, 28 Law J. Exch. 33.

[226] Barrett v. Long, 3 H. L. Cas. 395.

[227] St. 50 Vict. cc. 22, 23; Ashdown v. Manitoba Free Press Co., 20 Can. Sup. Ct. 43; article on "Libel, Act of 1890," 15 Can. Law T. 89.

[228] Laws Mich. 1885, p. 354, § 3; Park v. Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731; Gen. Laws Minn. 1887, c. 191; Gen. Laws 1889, c. 131; Allen v. Pioneer Press Co., 40 Minn. 117, 41 N. W. 936; Clementson v. Minnesota Tribune Co., 45 Minn. 303, 47 N. W. 781; Holston v. Boyle, 46 Minn. 432, 49 N. W. 203.

[229] The conventional defenses have been discussed in chapter IV. Accord and satisfaction is a good defense to an action for defamation, as in other torts. Lane v. Applegate, 1 Starkie, 97. Thus, if by agreement mutual apologies are made, this may be a valid satisfaction of right of action. Boosey v. Wood, 34 Law J. Exch. 65. Statute of limitations: A slander once barred cannot be revived by an admission that it had formally been made, and malice cannot be attached to such admission. Vickers v. Stoneman, 73

[230] Etchison v. Pergerson, 88 Ga. 620, 15 S. E. 680.

Our law allows a man to speak the truth, though maliciously,[231] without showing good motive or justifiable end. This is the common-law rule generally, but not universally, recognized by constitutions and enforced by statutes. Hence, the truth of a charge claimed to be defamatory is a full justification to a civil action.[232] The justification must be as broad as the charge. Thus proof of embezzlement is not broad enough to sustain the charge of embezzlement and attempt to blow open a safe and destroy the books.[233]

Mich. 419, 41 N. W. 495. Leave and license: In Howland v. George F. Blake Manuf'g Co., 156 Mass. 543, 31 N. E. 656, Knowlton, J., said: "If the defendant is guilty of no wrong against the plaintiff except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of a wrongful act should be permitted to profit by it." And see 1 Ames, Lead. Cas. 422, citing King v. Waring, 5 Esp. 13; Rogers v. Clifton, 3 Bos. & P. 587–592; Weatherston v. Hawkins, 1 Term R. 110–112; Smith v. Wood, 3 Camp. 323; Duke v. Harmer, 14 Q. B. 185; Palmer v. Hummerston, 1 Cab. & E. 36; Gordon v. Spencer, 2 Blackf. 286; Smith v. Sutton, 13 Mo. 129. And see Coles v. Thompson (Tex. Civ. App.) 27 S. W. 46.

[231] Bigelow, Lead. Cas. 112, note h; Thorley v. Lord Kerrey, 4 Taunt. 355.

[232] Castle v. Houston, 19 Kan. 417, Chase, Lead. Cas. 132; Donaghue v. Gaffy, 53 Conn. 43, 2 Atl. 397; Press Co. v. Stewart, 119 Pa. St. 584, 14 Atl. 51; Royce v. Maloney, 57 Vt. 325; Wilson v. Marks, 18 Fla. 322; Perry v. Porter, 124 Mass. 338; Drake v. State, 53 N. J. Law, 23, 20 Atl. 747; Heilman v. Shanklin, 60 Ind. 424; Hathorn v. Congress Spring Co., 44 Hun, 608; Root v. King, 7 Cow. 613, 4 Wend. 113; Ellis v. Buzzell, 60 Me. 209; McClaugherty v. Cooper, 39 W. Va. 313, 19 S. E. 415 (under Code, c. 158, § 4). And see Chaffin v. Lynch, 83 Va. 106, 1 S. E. 803; Atlanta Journal v. Mayson, 92 Ga. 640, 18 S. E. 1010; Bank v. Bowdre, 92 Tenn. 723, 23 S. W. 131. In Mississippi, under Code 1880, § 1004, truth operates only in mitigation of damages. McLean v. Waring (Miss.) 13 South. 236. In Michigan, notice that justification will be a defense must be given. Wheaton v. Beecher, 79 Mich. 443, 44 N. W. 927. As to Massachusetts statute, see Brown v. Massachusetts Title Ins. Co., 151 Mass. 127, 23 N. E. 733. Mr. Townshend (Sland. & L. 310) has shown that, at common law, truth was regarded as a plea in mitigation only, until 1735; that the phrase, "The greater the truth, the greater the libel," has been attributed to both Lord Mansfield and Lord Ellenborough; and that the justice and expediency of the present general rule that truth may be an absolute defense is neither universally nor generally conceded. See note 2, p. 308, and Delaware Ins. Co. v. Croasdale, 6 Houst. 181. Miller v. Brooks, 65 Hun, 624, 20 N. Y. Supp. 359.

[233] Thompson v. Pioneer Press Co., 37 Minn. 285, 33 N. W. 856. A charge of incest and pregnancy is not justified by proof of incest only. Edwards v.

The fact that a teacher was of a grossly immoral character, and in the habit of having liquor in the school, is no defense to an action for publishing an article in the newspaper charging such teacher with taking indecent liberties with his scholars.[234] A general charge cannot be justified by the truth of the charge in a single instance.[235] But it is not necessary to prove the truth of all details of the charge. It is enough if defendant show the matter complained of to be substantially true,—that is, to prove the gist of the statement,—provided the details which are not justified produce no different effect on the mind of the person to whom publication is made than the actual truth would do.[236] Thus, to charge that certain

Kansas City Times, 32 Fed. 813. Cf. McNaughton v. Quay (Mich.) 60 N. W. 474 (where the charge was of perjury and larceny, and the perjury was justified, and a denial made as to the charge of larceny). And, generally, see Weaver v. Lloyd, 2 Barn. & C. 678; Bissell v. Cornell, 24 Wend. 354; Torrey v. Field, 10 Vt. 353; Burford v. Wible, 32 Pa. St. 95; Wilson v. Beighler, 4 Iowa, 427.

[234] Thibault v. Sessions (Mich.) 59 N. W. 624; McClaugherty v. Cooper, 39 W. Va. 313, 19 S. E. 415 (to justify charge of perjury); Becherer v. Stock, 49 Ill. App. 270. To justify a newspaper article charging a person with both "frequent" acts of adultery and a specific act of the same nature, not only sufficient acts must be proven to justify the general charge, but proof of the specific act must be given also. Miller v. McDonald (Ind. Sup.) 39 N. E. 159. Lamphere v. Clark (Sup.) 29 N. Y. Supp. 107 (charge of lewdness); Feely v. Jones, Id. 446 (abuse of funds by an attorney); Bishop v. Latimer (1861) 4 Law T. 775 (badly treated client). Cf. Fitch v. Lemmon, 27 U. C. Q. B. 273; Clement v. Lewis (1822) 3 Brod. & B. 297, 7 Moore, 200 (shameful conduct of an attorney).

[235] Clarkson v. Lawson (1829) 6 Bing. 266–587 (charge that a proctor had been suspended three times not supported by proof of a single suspension); Wakley v. Cooke (1849) 19 Law J. Exch. 91, 4 Exch. 510 (that plaintiff had been once recovered against for a libel does not justify defendant in calling him a "libelous journalist"). And see Swann v. Rary, 3 Blackf. 298; Sheehey v. Cokley, 43 Iowa, 183; Burford v. Wible, 32 Pa. St. 95; Ricket v. Stanley, 6 Blackf. 169; Stilwell v. Barter, 19 Wend. 485. But see Alcorn v. Hooker, 7 Blackf. 58.

[236] Willmett v. Harmer (1839) 8 Car. & P. 695; Alexander v. Northeastern Ry. Co., 34 Law J. Q. B. 152. Cf. England v. Bourke, 3 Esp. 80; Fraser, Torts, 90. And see Palmer v. Adams, 137 Ind. 72, 36 N. E. 695 (kidnapping a girl); Nettles v Somervell, 6 Tex. Civ. App. 627, 25 S. W. 658 (publishing plaintiff as a dead beat); Fidler v. Delavan, 20 Wend. 57 (charging plaintiff as a cheat and a swindle).

persons are "a gang who live by card-sharking" is justified by showing that on two different occasions they had cheated at cards.[237] On the other hand, a clergyman was charged with saying that "the blood of Christ has nothing more to do with our salvation than the blood of a hog." The proof was that he had denied the divinity of Christ and the doctrine of the atonement, and had asserted the perfection of Christ as a man, and the absence of greater virtue in his blood than in that of any other creature. It was held that the charge was not justified.[238] In the application of this reasonable principle there has not been entire consistency in the cases. Thus, it was properly held that to charge a woman with being a whore was not sustained by proof of her reputation as a thief.[239] But it was also held that the charge was not sustained by proof of bad reputation for chastity.[240] And courts have gone to great length in holding, for example, that the charge of a crime can be justified only by showing identity of the truth with the charge, both as to the object of the crime as well as to the wrong itself.[241] As a matter of fact it would seem that courts have pushed to an extreme the proposition that "there can be no such thing as a half-way justification." [242] Hence,

[237] Rex v. Labouchere (1880) 14 Cox, Cr. Cas. 419. A publication charging that a minister, of strong persuasion, and other means not so reputable, had induced a parishioner, who was believed to be of unsound mind, to turn over to him a large sum for the benefit of a certain college, and that there was general "indignation over this attempt to rob this woman of her property," it was held that the pleading of justification on the ground of truth need not state facts which would constitute an attempt to commit robbery. Walford v. Herald Printing & Pub. Co., 133 Ind. 372, 32 N. E. 929.

[238] Skinner v. Grant, 12 Vt. 456.

[239] Smith v. Buchecker, 4 Rawle, 295. And see Nelson v. Musgrave, 10 Mo. 648.

[240] Sunman v. Brewin, 52 Ind. 140.

[241] Charge of criminal intercourse with one person is not justified by proof of intercourse with another person. Buckner v. Spaulding, 127 Ind. 229, 26 N. E. 792; Watters v. Smoot, 11 Ired. 315. As to the place of intercourse, see Smithers v. Harrison, 1 Ld. Raym. 727; Sharpe v. Stephenson, 12 Ired. 348. The rule is the same as to stealing. Gardner v. Self, 15 Mo. 480. Charge of horse stealing is not justified by proof of hog stealing. Dillard v. Collins, 25 Grat. 343. So proof of a crime against nature with a cow is not justification of charge of such crime with a mare. Andrews v. Vanduzer, 11 Johns. 38; Downs v. Hawley, 112 Mass. 237; Shigley v. Snyder, 45 Ind. 541.

[242] Fero v. Ruscoe, 4 N. Y. 162.

it is a rule of pleading justification that "you should use the very words alleged to have been uttered." [243] "Truth should be specially pleaded." [244] General belief in truth of charge is no justification.[245] In an action for libel, where the defendant has pleaded the truth of the publication in justification, and does not request an instruction that the jury may consider whether the justification was pleaded in good faith, and not wantonly, it is not error for the court to charge that they may consider the plea of justification as evidence of malice to enhance the damages.[246]

180. Privilege of a communication may be either—

(a) Absolute, when attaching to the position a person holds, or to the document in which it is contained, and such privilege cannot be avoided, even by proof of actual malice; or

(b) Qualified (or conditional), when made with reference to public interest, or in discharge of a duty, and disattaches when malice is shown.[247]

[243] Restell v. Steward, 1 Charl. Cases at Chambers, 89; Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383; Sawyer v. Bennett, 66 Hun, 626, 20 N. Y. Supp. 835; As to proof, see Roberts v. Lamb, 93 Tenn. 343, 27 S. W. 668.

[244] J'Anson v. Stuart, 1 Term R. 748.

[245] Mason v. Mason, 4 N. H. 110. Underwood v. Parks, 2 Strange, 1200; Manning v. Clement, 7 Bing. 362–367; Van Ankin v. Westfall, 14 Johns. 233; Bisbey v. Shaw, 12 N. Y. 67; Sheahan v. Collins, 20 Ill. 326; Kay v. Fredrigal, 3 N. Y. 221; Updegrove v. Zummerman, 13 Pa. St. 619; Bodwell v. Swan, 3 Pick. 376. Where the publication charges plaintiff with a crime, the presumption of his innocence is conclusive if defendant does not plead the truth of the charge. Pokrok Zakadu Pub. Co. v. Ziskovsky, 42 Neb. 64, 60 N. W. 358. It is no defense in a suit for libel that the party sued had reasonable grounds to believe that the charge made was true. Such facts, if shown, would not relieve the publisher from liability. Shattuc v. McArthur, 25 Fed. 133.

[246] Marx v. Press Pub. Co. (Sup.) 12 N. Y. Supp. 162, affirmed 134 N. Y. 561, 31 N. E. 918; Lowe v. Herald Co., 6 Utah, 175, 21 Pac. 991.

[247] Shearw. Torts, 31. "There are two differences between qualified and absolute privilege." In the case of the latter, it is the occasion which is privileged. When once the nature of the occasion is shown, it follows as a necessary inference that every communication on that occasion is protected. But in the case of the former the defendant does not prove privilege until

Absolute Privilege—Judicial.

Upon principles of public policy [248] already considered,[249] "neither party,[250] witness,[251] counsel,[252] judge,[253] or jury [254] can be put to

lie has shown how the occasion was used. Secondly, even after a case of qualified privilege has been established, it may be met by the plaintiff proving in reply actual malice on part of defendant. Clerk & L. Torts, 450. And see Lynam v. Gowing, 6 Ir. C. L. 259.

[248] Royal Aquarium, etc., Soc. v. Parkinson [1892] 1 Q. B. 431, 442, per Lord Esher, M. R. And see Fry, L. S., in Munster v. Lamb, 11 Q. B. Div., at pages 588 and 607.

[249] Ante, p. 121, "Exemption of Judicial Officers from Liability in Tort."

[250] Party,—see Hibbard, Spencer, Bartlett & Co. v. Ryan, 46 Ill. App. 313; Randall v. Hamilton, 45 La. Ann. 1184, 14 South. 73; Youree v. Hamilton, 45 La. Ann. 1191, 14 South. 77; Lilley v. Roney, 61 L. J. Q. B. 727. But see Jones v. Foreland, 89 Ga. 520, 16 S. E. 262; Allen v. Crofoot, 2 Wend. 515; Bartlett v. Christhilf, 69 Md. 219; Lee v. White, 4 Sneed (Tenn.) 111; Badgley v. Hedges, 2 N. J. Law, 217. But an agent of a corporation, which is a party to the suit, is not within the privilege. Nissen v. Cramer, 104 N. C. 574, 10 S. E. 676.

[251] Seaman v. Netherclift, 2 C. P. Div. 53 (here an expert witness, when asked about a previous case in which he had given professional evidence, added, gratuitously, "though the jury decided the will was genuine, I believe it was a forgery"). Padmore v. Lawrence, 11 Adol. & E. 380; Kennedy v. Hilliard, 10 Ir. C. L. 195; Wright v. Lothrop, 149 Mass. 385, 21 N. E. 963, collecting cases at page 390, 149 Mass., and page 963, 21 N. E.; Zuckerman v. Sonnenschein, 62 Ill. 115 (translating defamatory words for an attorney). And see Terry v. Fellows, 21 La. Ann. 375; McLaughlin v. Charles, 60 Hun, 239, 14 N. Y. Supp. 608; Hunckel v. Voneiff, 69 Md. 179, 14 Atl. 500; Runge v. Franklin, 72 Tex. 585, 10 S. W. 721; Hutchinson v. Lewis, 75 Ind. 55; Liles v. Gaster, 42 Ohio St. 631; Cooper v. Phipps, 24 Or. 357, 33 Pac. 985; Baldwin v. Hutchinson, 8 Ind. App. 454, 35 N. E. 711.

[252] Counsel, Munster v. Lamb, 11 Q. B. Div. 588; Hodgson v. Scarlett, 1 Barn. & Ald. 244 (inter alia, "this is one of the most profligate things I ever knew done by a professional man. Mr. Hodgson is a fraudulent and wicked attorney"); Hollis v. Meux, 69 Cal. 625, 11 Pac. 248; McLaughlin v. Cowley, 127 Mass. 316; Id., 131 Mass. 70. And see Maulsby v. Reifsnider, 69 Md. 143, 14 Atl. 505; Oliver v. Pate, 43 Ind. 132 (mal. pros.); Vogel v. Gruaz, 110 U. S. 311, 4 Sup. Ct. 12. As to limitation as to relevancy, see Marsh v. Ellsworth, 50 N. Y. 309; Hoar v. Wood, 3 Metc. 193.

[253] Judge, Scott v. Stansfield, L. R. 3 Exch. 220. "Otherwise no man but

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[254] Juror, Rex v. Skinner [1772] Lofft, 55; Dunham v. Powers, 42 Vt. 1; grand juror, Little v. Pomeroy, 7 Ir. C. L. 50; Rector v. Smith, 11 Iowa, 302.

answer civilly or criminally for words spoken in office." [255] The privilege extends to courts of all kinds,[256] except where the matter is coram non judice.[257] It includes all pleadings,[258] affidavits,[259] and other legal papers [260] involved in judicial proceedings, as well as all communications between members of the bar and their clients. The

a beggar or a fool would be a judge." Lord Robertson, in Miller v. Hope, 2 Shaw, App. Cas. 134. And, generally, see Yates v. Lansing, 5 Johns. 282; Cooke v. Bangs, 31 Fed. 640; Lange v. Benedict, 73 N. Y. 12; Johnston v. Moorman, 80 Va. 131; Vaughn v. Congdon, 56 Vt. 111; Randall v. Brigham, 7 Wall. 535. As to distinction between classes of judges, ante, c. 122. Aylesworth v. St. John, 25 Hun, 156 (justice of peace); Evarts v. Kiehl, 102 N. Y. 296, 6 N. E. 592; Floyd v. Barker [1617] 12 Rep. 24 (judge of superior court); Houlden v. Smith, 19 L. J. Q. B. 70 (judge of inferior court); Royal Aquarium & S. & W. Garden Soc. v. Parkinson [1892] 1 Q. B. 431.

[255] Per Lord Mansfield, in Rex v. Skinner, Lofft, 56. And see Kidder v. Parkhurst, 3 Allen, 393; Munster v. Lamb, 23 Am. Law Reg. 12; Kelly, C. B., in Dawkins v. Lord Rokeby, L. R. 8 Q. B. 255, 263; Beardsley, J., in Gilbert v. People, 1 Denio, 41–43; Gray, C. J., in Hoar v. Wood, 3 Metc. 193; Henderson v. Broomhead, 4 Hurl. & N. 569; Kendillon v. Maltby, 2 Moody & R. 438; Moore v. Ames, 2 Caines, 170; 1 Hawk. P. C. c. 73, § 8; Lake v. King, 1 Saund. 131; 6 Bac. Abr. 348.

[256] Dawkins v. Prince, 1 Q. B. Div. 499 (military courts); Dawkins v. Rokeby, 23 W. R. 93 (military courts); Scott v. Stansfield, L. R. 3 Exch. 220 (county courts); Thomas v. Churton, 2 Best & S. 475 (coroners); Ryalls v. Leader, L. R. 1 Exch. 296 (bankruptcy registrar); Royal, etc., Soc. v. Parkinson [1892] 1 Q. B. 431 (London courts); Goffin v. Donnelly, 6 Q. B. Div. 307 (to effect that English houses of parliament are for certain purposes courts of judicature); Kane v. Mulvany, 2 Ir. C. L. [1868] 402. And see Rector v. Smith, 11 Iowa, 302 (grand juror).

[257] Ante, p. 123; Paris v. Levy, 9 C. B. (N. S.) 342; Lewis v. Levy, El., Bl. & El. 537, 555.

[258] Ruolis v. Backer, 6 Helsk. 395 (petition); Runge v. Franklin, 72 Tex. 585, 10 S. W. 721; Gardmal v. McWilliams, 43 La. Ann. 454, 9 South. 106 (petition); Weil v. Israel, 42 La. Ann. 955, 8 South. 826 (answer); and, generally, see Wilson v. Sullivan, 81 Ga. 238, 7 S. E. 274; Bartlett v. Christhilf, 69 Md. 219, 14 Atl. 518.

[259] Lilley v. Roney [1892] 61 L. J. Q. B. 727; Murphy v. Nelson, 94 Mich. 554, 54 N. W. 282.

[260] Revis v. Smith, 18 C. B. 126; Wyatt v. Buell, 47 Cal. 624; Hawk v. Evans, 76 Iowa, 593, 598, 41 N. W. 368; Henderson v. Broomhead, 4 Hurl. & N. 569. But cf. Hart v. Baxter, 47 Mich. 198, 10 N. W. 198; Bank v. Strong, 1 App. Cas. 307. Generally, accusations in the course of judicial proceedings are privileged, if made to the proper tribunal, though other-

privilege avails, although the words written or spoken were written or spoken without any justification or excuse, and from personal ill-will and anger against the person defamed.[261] "No one is permitted to allege that what was rightly done in a judicial proceeding was done with malice."[262] "This privilege, however, is not a license which protects every slanderous publication or statement made in course of judicial proceedings. It extends only to such matters as are relevant or material to the litigation; or, at least, it does not protect slanderous publication, clearly irrelevant and impertinent, voluntarily made, and which the party making it could not reasonably have supposed to be relevant."[263] So, while a witness may even volunteer a statement with impunity,[264] this is not true of what he may have said after leaving, or before entering, the box, nor, it would appear, of malicious and irrelevant interjections of defamatory matter while testifying.[265] On this principle, a judge

wise libelous. Pedley v. Morris, 61 L. J. Q. B. 21; Lilley v. Roney, 61 L. J. Q. B. 727.

[261] Per Lopes, J., in Royal Aquarium & S. & W. Garden Soc. v. Parkinson [1892] 1 Q. B. 431–451.

[262] Hollis v. Meux, 69 Cal. 625, 11 Pac. 248; Warner v. Paine, 2 Sandf. 195, 201; Suydam v. Moffat, 1 Sandf. 458–462; Garr v. Selden, 4 N. Y. 91–94. See, however, Parker, J., in Hill v. Miles, 9 N. H. 14.

[263] Andrews, J., in Moore v. Manufacturers' Nat. Bank, 123 N. Y. 420–423, 25 N. E. 1048, citing Ring v. Wheeler, 7 Cow. 725; Hastings v. Lusk, 22 Wend. 410; Gilbert v. People, 1 Denio, 41; Randall v. Hamilton, 45 La. Ann. 1184, 14 South. 73; Rice v. Coolidge, 121 Mass. 393; McLaughlin v. Cowley, 127 Mass. 316; Thorn v. Blanchard, 5 Johns. 508; Grover, J., in Marsh v. Ellsworth, 50 N. Y. 309–313. And see White v. Carroll, 42 N. Y. 161; Hollis v. Meux, 69 Cal. 625, 11 Pac. 248; Larkin v. Noonan, 19 Wis. 93; Calkins v. Summer, 13 Wis. 215; Shadden v. McElwee, 86 Tenn. 146, 5 S. W. 602; Jones v. Forehand, 89 Ga. 52, 16 S. E. 262; Barnes v. McCrate, 32 Me. 442; Hyde v. McCabe, 100 Mo. 412, 13 S. W. 875; Spaids v. Barrett, 57 Ill. 289; Smith v. Howard, 28 Iowa, 51; Stewart v. Hall, 83 Ky. 375; Hodgson v. Scarlett, 1 Barn. & Ald. 232; Moore v. Manufacturers' Nat. Bank, 51 Hun, 472, 4 N. Y. Supp. 378.

[264] Seaman v. Netherclift, 1 C. P. Div. 540.

[265] Trotman v. Dunn [1815] 4 Camp. 211. But see Coleridge, J., in Seaman v. Netherclift, 1 C. P. Div. 540, 541. Marsh v. Ellsworth, 50 N. Y. 309, and cases on page 310. This view Mr. Townshend combats with great force of reasoning and with a strong array of authorities. His contrary conclusion has been approved (Hunckel v. Voneiff, 69 Md. 179, 14 Atl. 500), and pro-

may be liable for words spoken out of office.[266] This rule accords with the analogy of the general exemptions recognized by law.[267]

Same—Legislative.

The exemption of the state for liability for torts [268] logically leads to the absolute privilege of legislators to speak freely in the performance and within the limits of their legislative functions.[269] Where, however, the privilege is exceeded, as where defamatory matter is published to the outside world, liability attaches.[270] And statements made by a person not under oath before a legislative committee may have only a conditional privilege.[271]

Same—Official Communications.

In order that laws may be best executed, there are many communications which must pass between the officials of the government and other persons. The same reasoning as to public policy which exempts from general liability for torts, and from special liability for defamation, grants absolute privilege to such matter.[272] Thus, it is a duty of every citizen to give to his government any in-

nounced plausible, but unsound (Shadden v. McElwee, 86 Tenn. 146, 5 S. W. 602).

[266] Paris v. Levy [1861] 9 C. B. (N. S.) 342.

[267] Ante, c. 2.

[268] Ante, p. 114.

[269] Ex parte Wason, L. R. 4 Q. B. 573; Bradlaugh v. Gorsett, 12 Q. B. Div. 271–283; Coffin v. Coffin, 4 Mass. 1. And see Townsh. Sland. & L. §§ 217–219.

[270] Stockdale v. Hansard, 7 Car. & P. 731; Wason v. Walter, L. R. 4 Q. B. 73. A statement made by a member of the city council, during a session thereof, in reference to the official conduct of the superintendent of streets, that he is a "downright thief," is not privileged, if at the time there was no proceeding before the council as to the latter's official conduct. Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020.

[271] Wright v. Lothrop, 149 Mass. 385, 21 N. E. 963.

[272] In Harrison v. Bush (1855) 5 El. & Bl. 344, defendant, an elector, wrote to Lord Palmerston that a local magistrate had been encouraging sedition. It was held that the communication, having been made with the best intention, was privileged, and that the privilege availed as a good defense. Dawkins v. Lord Paulet, L. R. 5 Q. B. 94; Cooke v. Wildes, 5 El. & Bl. 328–340; Sutton v. Johnstone, 1 Term R. 493. But see Beatson v. Skene, 5 Hurl. & N. 838; Hart v. Gumpach, L. R. 4 P. C. 439; Grant v. Secretary, 2 C. P. Div. 445. However, statements in an affidavit presented to a superintendent of schools to prevent granting teacher's license to plaintiff have only a qualified privilege. Wieman v. Mabee, 45 Mich. 484, 8 N. W. 71.

formation he may have as to the commission of an offense against its laws. Hence, if a citizen consults a state attorney as to whether facts stated constitute a crime, he may claim a double privilege, that subsisting between the bar and the advised and that between the general government and the community.[273] On the same principle, words concerning a city attorney that "he is unfit to hold the office of city attorney; his opinion is too easily warped for money considerations," spoken by the mayor to the city council, which has power to remove the attorney, are privileged.[274]

Qualified Privilege.

Any communication is privileged when made bona fide about something in which (1) the speaker has an interest or duty; (2) the hearer has a corresponding interest or duty; and (3) the statement is made in protection of that interest or in the performance of that duty.[275] They must be uttered in the honest belief that they are true.[276] Every one owes it as a duty to his fellow man to state

[273] Vogel v. Gruaz, 110 U. S. 311, 4 Sup. Ct. 12; Worthington v. Scribner, 109 Mass. 487; Dawkins v. Rokeby, 8 Q. B. 255; Harrison v. Bush (1855) 5 El. & Bl. 344 (where it was contended that the memorial complained of was addressed to wrong official). And see Blagg v. Sturt, 10 Q. B. 899; Pearce v. Brower, 72 Ga. 243; Gray v. Pentland, 2 Serg. & R. 23, 4 Serg. & R. 420; Rainbow v. Benson, 71 Iowa, 301, 32 N. W. 352; Wieman v. Mabee, 45 Mich. 484, 8 N. W. 71; Greenwood v. Cobbey, 26 Neb. 449, 42 N. W. 413; Van Wyck v. Aspinwall, 17 N. Y. 190; Kent v. Bongartz, 15 R. I. 72, 22 Atl. 1023.

[274] Greenwood v. Cobbey, 26 Neb. 449, 42 N. W. 413.

[275] Prof. Ames (1 Cases on Torts) has arranged the cases with reference to (a) communications in the common interest of maker and receiver, or in interest of maker alone, and (b) communications in interest of recipient. The arrangement by topics followed, while less logical and scientific, would seem to be practically more convenient. Shearw. Torts, 31, and, see, Toogood v. Spyring, 1 Cromp., M. & R. 181.

[276] White v. Nicholls, 3 How. 266–286; Alabama & V. Ry. Co. v. Brooks, 69 Miss. 168, 13 South. 847; Marks v. Baker, 28 Minn. 162–164, 9 N. W. 678; Quinn v. Scott, 22 Minn. 456; Klinck v. Colby, 46 N. Y. 427; Hamilton v. Eno, 81 N. Y. 116; Fowles v. Bowen, 30 N. Y. 20. Lopes, J., in Pullman v. Hill [1891] 1 Q. B. 524–530, and Stuart v. Bell [1891] 2 Q. B. 341, 353; Blackburn, J., in Davies v. Snead (1870) L. R. 5 Q. B. 608–611; Shearw. Torts, 31; Briggs v. Garrett, 111 Pa. St. 404, 2 Atl. 513; King v. Patterson, 49 N. J. Law, 417, 9 Atl. 705; Proctor v. Webster, 16 Q. B. Div. 112; Jenoure v. Delmege [1891] App. Cas. 73; Macdougall v. Knight, 17 Q. B. Div. 636; Harrison v. Bush, 5 El. & Bl. 344.

what he knows about a person, when inquiry is made, and everything pertinent to the subject of the inquiry which subsequently passes between the parties is also privileged.[277] The privilege may extend even to volunteered information.[278] But the standard of privilege is the standard of law, not of the individual. It depends not on what the individual may have supposed to be his interest or duty, but upon what a judge decides his interest or duty in fact to have been.[279]

The effect of the privileged communication of this qualified description is to cast on the plaintiff the burden of showing malice on the defendant's part.[280] This is ordinarily for the jury. If one exceeds the qualified privilege, its protection to him ceases, and the ordinary rules of liability apply. This, also, is usually a question of fact for the jury.[281] But the court determines what is and what is not privileged.[282] And judges who have had, from time to time, to deal with questions as to whether the occasion justified the speaking or writing defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest, will afford a justification.[283]

Same—Fair Report.

Fair reports, as distinguished from comment, are privileged, but the law is not always without doubt either as to whether the privi-

[277] Fraser, Torts, 103, citing Grove, J., in Robshaw v. Smith (1878) 38 Law T. (N. S.) 423, 424, and Beatson v. Skene (1860) 29 Law J. Exch. 430.

[278] Sunderlin v. Bradstreet, 46 N. Y. 188–191; Waller v. Loch (1880) 7 Q. B. Div. 619, at page 621 (per Jessel, M. R.). But see Coltman, J., in Coxhead v. Richards, 2 Man., G. & S. 568–598; Littledale, J., in Pattison v. Jones, 8 Barn. & C. 586.

[279] Clerk & L. Torts, 455, citing Byles, J., in Whiteley v. Adams, 15 C. B. (N. S.) 392–412. But see Jessel, M. R., in Waller v. Loch, 7 Q. B. Div. 619–621; Laughton v. Bishop of Sodor, L. R. 4 P. C. 495–504.

[280] Strode v. Clement, 90 Va. 553, 19 S. E. 177.

[281] Hill v. Durham House Drainage Co., 79 Hun, 335, 29 N. Y. Supp. 427; Neil v. Fords, 72 Hun, 12, 25 N. Y. Supp. 406; Strode v. Clement, 90 Va. 553, 19 S. E. 177. See, also, Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724.

[282] Ritchie v. Sexton, 64 Law T. (N. S.) 210. See, also, Strode v. Clement, 90 Va. 553, 19 S. E. 177.

[283] Erle, J., in Whiteley v. Adams, 15 C. B. (N. S.) 392–414.

lege be absolute or qualified, and as to what kind of report is within the privilege. The general opinion would seem to be that the privilege of fair report is qualified, not absolute.[284] However, by statute, parliamentary papers are absolutely protective.[285] And the absolute privilege allowed to parliamentary speeches[286] is also extended to faithful reports of them.[287]

Same—Reports of Judicial Proceedings.

"A fair account of what takes place in a court of justice is privileged. The reason is that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court, and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character, is infinitesimally small as compared with the convenience of publicity." [288] While this general principle is thus fully recognized, the courts are not in harmony as to what proceedings are within the rule. It is finally decided, it seems, that the privilege extends to ex parte statements made in open court,[289]—certainly where the matter is finally dealt with.[290] The tendency, indeed, has been not to extend the privilege to preliminary proceedings, because of the "tendency to pervert the public mind and to disturb the courts of justice." [291]

But a fair report of a judicial proceeding, at which no witnesses

[284] Townsh. Sland. & L. 356; Pol. Torts, 231; Saunders v. Baxter, 6 Heisk. 369.

[285] St. 3 Vict. c. 9, p. 99. Cf. Code Civ. Proc. N. Y. § 1907. And see Salisbury v. Union & Advertiser Co., 45 Hun, 120.

[286] Stockdale v. Hansard, 7 Car. & P. 731.

[287] Wason v. Walter, L. R. 4 Q. B. 73.

[288] Parmiter v. Coupland, 6 Mees. & W. 105–108; Johns v. Press Pub. Co. (Super. N. Y.) 19 N. Y. Supp. 3; Bissell v. Press Pub. Co., 62 Hun, 551, 17 N. Y. Supp. 393. And see Randall v. Hamilton, 45 La. Ann. 1184, 14 South. 73.

[289] McBee v. Fulton, 47 Md. 403; Salisbury v. Union & Advertiser Co., 45 Hun, 120; Usell v. Hales, 3 C. P. Div. 319; Curry v. Walter, 1 Bos. & P. 525; Lewis v. Levy, El., Bl. & El. 537, 27 Law J. Q. B. 282 (cf. Duncan v. Thwaites, 3 Barn. & C. 556); Stanley v. Webb, 4 Sandf. 21.

[290] Lopes, J., in Usell v. Hales, 3 C. P. Div. 319–329.

[291] Lord Ellenborough, in King v. Fisher, 2 Camp. 563–570. And see Charlton v. Watton, 6 Car. & P. 385. Lord Hardwicke, in Baker v. Hart, 2 Atk. 488, 489; Daw v. Eley, L. R. 7 Eq. 49. Therefore, the publication by newspapers of pleadings or other proceedings in civil cases before trial has been

are sworn, and which does not result in a final decision, but leads to a further inquiry, has been held to be privileged.[292] At the other extreme, the publication of a completed public record (as the publication of the entry of a judgment) is within the privilege.[293] The privilege does not attach where the publication is made the vehicle for the diffusion of immoral, blasphemous, or disgusting statements.[294] Again, if the account published is false or highly colored, or the reporter has added comments, allegations, and opinions of his own, reflecting upon the character or condition of others, then the privilege does not apply.[295]

Same—Reports of Public Meetings.

The report of public meetings has been held not to be within this privilege.[296] Other authorities, however, have taken the opposite view. Thus, in Davison v. Duncan,[297] it was held that the conduct of

held not privileged. Park v. Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731.

[292] Kimber v. Press Ass'n [1893] 1 Q. B. 65.

[293] Searles v. Scarlett [1892] 2 Q. B. 56, discussing Williams v. Smith, 22 Q. B. Div. 134; McNally v. Oldham, 16 Ir. C. L. 298; Macdougall v. Knight, 17 Q. B. Div. 636; Cosgrave v. The Trade Auxiliary Co., 8 Ir. C. L. 349; Jones v. McGovern, 1 Ir. C. L. 681.

[294] Steele v. Brannan, L. R. 7 C. P. 261 (obscene matter). And see Rex v. Carlile, 3 Barn. & Ald. 167 (publication of Paine's Age of Reason as a part of a report of a title in which that book had been read to the jury); Maule, J., in Hoare v. Silverlock, 9 C. B. 20–22; 1 Starkie, Sland. & L. 263.

[295] Godshalk v. Metzgar (Pa. Sup.) 17 Atl. 215. Thus, the publication of an account of the rendition of a judgment against an hotel keeper, under the heading "Hotel Proprietor Embarrassed," is not privileged. Hayes v. Press Co., 127 Pa. St. 642, 18 Atl. 331; Boogher v. Knapp, 97 Mo. 122, 11 S. W. 45; Salisbury v. Union & Advertiser Co., 45 Hun, 120; McAllister v. Detroit Free Press Co., 76 Mich. 338, 43 N. W. 431. Ball, Torts & Cont. 119; Thomas v. Croswell, 7 Johns. 264; McGregor v. Thwaites, 3 Barn. & C. 24; Stanley v. Webb, 4 Sandf. 21; Edsall v. Brooks, 17 Abb. Prac. 221; Hunt v. Algar, 6 Car. & P. 245.

[296] Davison v. Duncan, 7 El. & Bl. 229; Lewis v. Few, 5 Johns. 1; Hearne v. Stowell, 12 Adol. & E. 719; Popham v. Pickburn, 7 Hurl. & N. 891, 31 Law J. Exch. 133 (vestry meeting); Purcell v. Sowler, 2 C. P. Div. 215 (meeting of poor-law guardians). Cf. Boehmer v. Detroit Free Press Co., 94 Mich. 7, 53 N. W. 822.

[297] Davis v. Duncan, L. R. 9 C. P. 396. And cf. Charlton v. Watton, 6 Car. & P. 385. And see Viele v. Gray, 10 Abb. Prac. 1; Smith v. Higgins, 82 Mass.

persons at an election meeting might be made the subject of a fair and bona fide discussion by a writer in a public newspaper, and that unfavorable comments made upon such conduct in course of such discussion were privileged. However, a true and correct narrative of a quasi judicial meeting (as of a medical society, which expelled the plaintiff) is privileged.[298]

Same—Fair Comment and Criticism—Books.

No action lies if the defendant can prove that the words complained of are a fair and bona fide comment on a matter of public interest.[299] The courts recognize the right of men to criticise matters in public papers or books in which others may be generally interested. "One writer, in exposing the follies and errors of another, may make use of ridicule, however poignant. * * * If the reputation or pecuniary interests of the person ridiculed suffer, it is damnum absque injuria. Where is the liberty of the press, if an action can be maintained on such principles? * * * Who would have bought the works of Sir Robert Filmer, after he had been refuted by Mr. Locke? But shall it be said that he might have sustained an action for defamation against that great philosopher, who was laboring to enlighten and ameliorate mankind?" [300]

Same—Public Men.

That the character and capacity of public men is of general interest to the community of which the parties to a communication are members is sufficient to confer the privilege. "The modern

251; Bennett v. Barry, 8 Law T. (N. S.) 857; George v. Goddard, 2 Fost. & F. 689; Parsons v. Surgey, 4 Fost. & F. 247.

[298] Barrows v. Bell, 7 Gray, 301; Allbutt v. General Council of Medical Education & Registration, 23 Q. B. Div. 400. Cf. Haight v. Cornell, 15 Conn. 74; Pierce v. Ellis, 6 Ir. C. L. 55.

[299] Fraser, Torts, 90. Crompton, J., in Campbell v. Spottiswoode, 3 Best & S. 769.

[300] Lord Ellenborough, in Sir John Carr v. Hood (1808) 1 Camp. 355, note, with reference to a book by plaintiff entitled "A Stranger in Ireland," alleged to have been libeled by defendant by a book entitled "My Pocket Book, or Hints for a Ryghte Merrie and Conceited Tour." And see Willes, J., in Henwood v. Harrison, L. R. 7 C. P. 606-616; Crane v. Waters, 10 Fed. 619; Snyder v. Fulton, 34 Md. 128; O'Connor v. Sill, 60 Mich. 175, 27 N. W. 13; Press Co. v. Stewart, 119 Pa. St. 584, 14 Atl. 51.

doctrine, as shown by the cases, * * * appears to be that the public has a right to discuss, in good faith, the public conduct and qualifications of a public man (such as a judge, an ambassador, etc.) with more freedom than they can take with a private matter, or with the private conduct of any one. In such discussions they are not held to prove the exact truth of their statements and the soundness of their inferences, provided they are not actuated by express malice, and there is reasonable grounds for their statements or inferences, all of which is for the jury."[301] Therefore, it was held that the character of the manager of a railroad is open to public discussion and within the rule of privileged communications, when his plans affect many interests besides those of the stockholders of the road.[302] A fortiori, comment on the public conduct of a public man may be privileged. Thus, to charge a treasurer with embezzlement of public funds is privileged.[303] There is, however, a strong inclination on the part of the courts to modify and limit the application of this doctrine, and they have been liberal in recognizing and construing exceptions to it. The mere publication of news is not privileged.[304] And the cases have gone to great length in holding that in the publication of news, or in criticising men and things, a newspaper has no privilege or immunity not possessed by private individuals.[305] Therefore, to imitate a candi-

[301] Generally, as to criticism and fair comment, see Am. Law Reg. June, July, and August, 1891. 30 Am. Law Reg. 517. Lowell, C. J., in Crane v. Waters, 10 Fed. 619–621; Kelly v. Sherlock, L. R. 1 Q. B. 686; Kelly v. Tinling, Id. 699; Morrison v. Belcher, 3 Fost. & F. 614; Henwood v. Harrison, L. R. 7 C. P. 606; Davis v. Duncan, L. R. 9 C. P. 396; Gott v. Pulsifer, 122 Mass. 235. And see Jackson v. Pittsburgh Times, 152 Pa. St. 406, 25 Atl. 613.

[302] Crane v. Waters, 10 Fed. 619.

[303] Marks v. Baker, 28 Minn. 162, 9 N. W. 678; Id., Ames, Lead. Cas. 512. But see Aldrich v. Press Printing Co., 9 Minn. 133 (Gil. 123); Briggs v. Garrett, 111 Pa. St. 404, 2 Atl. 513. And see Express Co. v. Copeland, 64 Tex. 354.

[304] Mallory v. Pioneer Press Co., 34 Minn. 521, 26 N. W. 904; Barnes v. Campbell, 59 N. H. 128.

[305] "It is not denied that the right goes to the extent of free and full comment and criticism on the official conduct of a public officer, and there are some cases which maintain the doctrine as broadly as claimed. These cases declare that one who offers his services to the public as an officer thereby surrenders his private character to the public, and is deemed to consent to

date's amusingly gross handwriting, "I don't propose to go into debate on tariff difference on wool and quinine and other things: cause I hain't built that way," is not privileged.[306] Fair comment or criticism, however, is to be carefully distinguished from attacks on personal character,[307] or untrue statements of fact.[308]

any imputation, however false and defamatory, if made in good faith. We do not think the doctrine either sound or wholesome. In our opinion, a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property. Remedy by due course of law for injury to each is secured by the same constitutional guaranty, and the one is no less inviolate than the other. To hold otherwise would, in our judgment, drive reputable men from public position, and fill their places with others having no regard for their reputation, and thus defeat the purpose of the rule contended for, and overturn the reason upon which it is sought to sustain it." Williams, J., in Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921–926, collecting cases. Smart v. Blanchard, 42 N. H. 137; Sheckell v. Jackson, 10 Cush. 25. It is defamatory to write of a physician's "culpable negligence." Pratt v. Pioneer Press Co., 30 Minn. 41, 14 N. W. 62. Nor would it be otherwise if physician were city health officer. Foster v. Scripps, 39 Mich. 376. The secretary of a cemetery association organized under incorporation law is not a public officer, in such sense as to enable the publisher of a newspaper to claim that an article published concerning him, and charging him with embezzling the funds of such cemetery association, is a privileged communication, and thus compel such secretary, in an action for libel, to prove express malice. Wilson v. Fitch, 41 Cal. 363, followed in Pokrok Zakadu Pub. Co. v. Ziskovsky, 42 Neb. 64, 60 N. W. 358. See Taft, J., in Post Pub. Co. v. Hallam, 8 C. C. A. 201, 59 Fed. 530–540.

306 Belknap v. Ball, 83 Mich. 583, 47 N. W. 674.

307 Lord Tenterden, C. J., in McLeod v. Wakley, 3 Car. & P. 311–313; Sir John Carr v. Hood, 1 Camp. 355, note; Parmiter v. Coupland, 6 Mees. & W. 108; Campbell v. Spottiswoode, 3 Best & S. 769 (charging disseminator of religious truth among the heathen with imposture et sim.). And see Crane v. Waters, 10 Fed. 619; Hamilton v. Eno, 81 N. Y. 116; Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921; Barr v. Moore, 87 Pa. St. 385; Kinyon v. Palmer, 18 Iowa, 377; Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760; Smith v. Burrus, 106 Mo. 94, 16 S. W. 881; Hay v. Reid, 85 Mich. 296, 48 N. W. 507; Cooper v. Stone, 24 Wend. 434; Reade v. Sweetzer, 6 Abb. Prac. (N. S.) 9, note.

308 Davis v. Shepstone, 11 App. Cas. 187 (where a report containing false charges of injurious specific acts was published). And see Gott v. Pietsefer, 122 Mass. 235 (Cardiff giant); Walker v. Hawley, 56 Conn. 559, 16 Atl. 674.

Neither of these is privileged, and the jury determines what is and what is not "fair" criticism.[309]

In Davis v. Shepstone[310] the plaintiff, a resident commissioner in Zululand, was charged with having committed an unprovoked and reprehensible assault upon certain Zulu chiefs. It was contended by the defendant that this was a fair criticism on public men, that therefore there could be recovery only upon proof of express malice. The lord chancellor's statement of the law, generally approved,[311] was as follows:

"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by

[309] Bowen, L. J., in Merivale v. Carson (1887) 20 Q. B. Div. 275 ("the whip hand"). In this case the reasoning of Crompton, J., in Campbell v. Spottiswoode is preferred to that of Willis, J., in Henwood v. Harrison, L. R. 7 C. P. 606, as being practical rather than academical. Right of comment on public matter denied, Latimer v. Western Morning News Co., 25 Law T. (N. S.) 44; Hogan v. Sutton, 16 Wkly. Rep. 127; Wilson v. Fitch, 41 Cal. 363.

[310] 11 App. Cas. 187. And see Campbell v. Spottiswoode, 3 Fost. & F. 421, 432 (affirmed 3 Best & S. 769), and Popham v. Pickburn, 7 Hurl. & N. 891, 898.

[311] Burt v. Advertiser Newspaper Co., 154 Mass. 238–242, 28 N. E. 1; Hallam v. Post Pub. Co., 55 Fed. 456, affirmed 8 C. C. A. 201, 59 Fed. 530, 541, to the effect that false allegations of fact, charging a candidate for office with disgraceful conduct, are not privileged; and good faith and probable cause constitute no defense. Other American cases approving the same rule are Smith v. Burrus, 106 Mo. 94, 101, 16 S. W. 881; Wheaton v. Beecher, 66 Mich. 307, 33 N. W. 503; Bronson v. Bruce, 59 Mich. 467, 26 N. W. 671; Brewer v. Weakley, 2 Overt. 99; Sweeney v. Baker, 13 W. Va. 183; Hamilton v. Eno, 81 N. Y. 126; Rearick v. Wilcox, 81 Ill. 77; Negley v. Farrow, 60 Md. 158, 176; Jones v. Townsend, 21 Fla. 431, 451; Banner Pub. Co. v. State, 16 Lea, 176; Post Pub. Co. v. Moloney, 50 Ohio St. 71, 33 N. E. 921; Seely v. Blair, Wright (Ohio) 358; Wilson v. Fitch, 41 Cal. 363–383; Edwards v. Society, 90 Cal. 431, 34 Pac. 128; State v. Schmitt, 49 N. J. Law, 579, 586, 9 Atl. 774; Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760. It has, however, been held not libelous to say, "I am sorry that the representative from this district had a change of heart. Sometimes a change of heart comes from the pocket." Sillars v. Collier, 151 Mass. 50, 23 N. E. 723. But cf. Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1. Generally, as to criticism of public men, 13 Law Annual Rev. And see Negley v. Farrow, 60 Md. 158; Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760; Scripps v. Foster, 41 Mich. 742–746, 3 N. W. 216; Upton v. Hume, 24 Or. 420, 33 Pac. 810; Mattice v. Wilcox, 71 Hun, 485, 24 N. Y. Supp. 1060; Post Pub. Co. v.

the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or approved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct. In the present case, the appellants, in the passages which were complained of as libelous, charged the respondent (as now appears, without foundation) with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings, in language in the highest degree offensive and injurious. Not only so, but they themselves vouched for the statements by asserting that, though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege."

Same—Public Duty.

The right of school officers to give the character of a schoolteacher would seem to be a qualified, not an absolute, privilege; therefore, they are not liable for falsely charging a teacher with cruelty, incompetency, and neglect in the exercise of duty, if they act in good faith,[312] but criminal liability may attach on proof of actual malice.[313] Testimony given before an investigating committee of a board of aldermen has a qualified privilege, even although not in response to questions asked, provided it be pertinent to the investigation and apparently within the committee's power.[314] But a

Moloney, 50 Ohio St. 71, 33 N. E. 921; Jackson v. Pittsburg Times, 152 Pa. St. 406, 25 Atl. 613; Buckstaff v. Viall, 84 Wis. 129, 54 N. W. 111.

[312] The act of the trustees of a school in collecting evidence in respect to the conduct of the principal, and sending it to the board of education, which alone had power to remove her, is privileged, as being within the line of their public duty; and sending a copy of such charges to the principal, in order that she might answer the charges against her, is not a publication. Galligan v. Kelly (Sup.) 31 N. Y. Supp. 561; Branaman v. Hinkle, 137 Ind. 496, 37 N. E. 546. But see Galligan v. Kelly (Sup.) 31 N. Y. Supp. 561.

[313] Vallery v. State, 42 Neb. 123, 60 N. W. 347.

[314] Blakeslee v. Carroll, 64 Conn. 223, 29 Atl. 473. And see Howland v.

statement made by a member of the city council, during a session thereof, in reference to the official conduct of the superintendent of streets, that he is a "downright thief," is not privileged, if at the time there was no proceeding before the council as to the latter's official conduct.[315] So, while communication to a governor concerning proper legislation, to influence his action, is prima facie privileged, it is not in fact privileged if it contains defamatory matter which is necessarily published to others,[316]—as where a pamphlet is generally circulated.[317] Again, "for the sake of public justice, charges and communications which would otherwise be slanderous are protected if made bona fide in the prosecution of an inquiry into a suspected crime." [318]

Same—Religious and Fraternal Organizations.

The law encourages the various members of a religious organization, who are unable to dwell together in unity, peace, and concord, to try to settle their differences without public scandal. Hence communications in trials before church tribunals are privileged. Therefore, the congregation may prefer charges against the clergyman in accordance with the usage and discipline of the church, without civil responsibility.[319] And one church member may, before such tribunal, publicly charge that another had committed adultery with the plaintiff, who did not belong to that church.[320] The same privilege is extended to secret societies.[321] A vicar's counsel with his curate is privileged.[322] But a clergyman has no peculiar privi-

Flood, 160 Mass. 509, 36 N. E. 482, distinguishing, inter alia, Spill v. Maule, L. R. 4 Exch. 232-237; Chatfield v. Connerford, 4 Fost. & F. 1008.

[315] Callaham v. Ingram, 122 Mo. 355, 26 S. W. 1020.

[316] Coffin v. Coffin, 4 Mass. 1; Rex v. Creevey, 1 Maule & S. 273.

[317] Woods v. Wiman, 122 N. Y. 445, 25 N. E. 919.

[318] Coleridge, J., in Padmore v. Lawrence, 11 Adol. & E. 380. And see Johnson v. Evans, 3 Esp. 32; Fowler v. Homer, 3 Camp. 294; Jones v. Thomas, 34 Wkly. Rep. 104; Dale v. Harris, 109 Mass. 193. Cf. Eames v. Whittaker, 123 Mass. 342; Cristman v. Cristman, 36 Ill. App. 567; Harper v. Harper, 10 Bush, 447.

[319] Piper v. Woolman, 43 Neb. 280, 61 N. W. 588.

[320] Etchison v. Pergerson, 88 Ga. 620, 15 S. E. 680.

[321] Shurtleff v. Stevens, 51 Vt. 501; Kirkpatrick v. Eagle Lodge, 26 Kan. 384.

[322] Clark v. Molyneux, 3 Q. B. Div. 237; James v. Boston, 2 Car. & K. 4-8. And see Joannes v. Bennett, 5 Allen, 169; Kerbs v. Oliver, 12 Gray, 239.

lege for publishing a slander in a pastoral letter, however grave his sense of duty, or sincere his desire to improve the morals of the community.[323] In an action for slander in imputing unchastity to a woman, the fact that the slander was spoken to one who had formerly been pastor of a church to which both plaintiff and defendant belonged, and in response to inquiries by such former pastor, did not make the speaking a privileged communication.[324]

Same—Commercial Communications.

Fair reports of business standing, made up on special request,[325] even if a copy of a libelous article be sent, are not actionable.[326] But if defamatory matter be inserted in the reports of a commercial agency, not in good faith, nor with the honest purpose of truly informing the agency of the person's financial standing, but maliciously and to subserve the defendant's own private purposes, then the com-

[323] Gilpin v. Fowler, 9 Exch. 615. But see Laughton v. Bishop, L. R. 4 P. C. 495, holding that a bishop's charge, containing strictures on the conduct of a layman who had attacked his character, was privileged.

[324] Carpenter v. Willey, 65 Vt. 168, 26 Atl. 488.

[325] King v. Patterson (1887) 49 N. J. Law, 417, 9 Atl. 705 (see dissenting opinions); Locke v. Bradstreet Co., 22 Fed. 771; Pollasky v. Minchener, 81 Mich. 280, 46 N. W. 5; Trussell v. Scarlett, 18 Fed. 214. A creditor may lawfully inquire into the circumstances of his debtor, and the person inquired of may answer freely; and, if his communication be for the honest purpose of giving the desired information, no action will lie. Van Horn v. Van Horn, 56 N. J. Law, 318, 28 Atl. 669. And, generally, see Lowry v. Vedder, 40 Minn. 475, 42 N. W. 542; Montgomery v. Knox, 23 Fla. 595, 3 South. 211; Lynch v. Febiger, 39 La. Ann. 336, 1 South. 690. Lemay v. Chamberlain, 10 Ont. 638; Todd v. Dun, 12 Ont. 791; King v. Patterson, 49 N. J. Law, 417, 9 Atl. 705. As to answer to inquiries, see Story v. Challard, 8 Car. & P. 234; Kine v. Sewell, 3 Mees. & W. 297; Rude v. Nass, 79 Wis. 321, 48 N. W. 555; Posnett v. Marble, 62 Vt. 481, 20 Atl. 813; Howland v. George F. Blake Manuf'g Co., 156 Mass. 543, 31 N. E. 656; Zuckerman v. Sonnenschein, 62 Ill. 115; Van Horn v. Van Horn, 56 N. J. Law, 318, 28 Atl. 669; Brown v. Vannaman, 85 Wis. 451, 55 N. W. 183.

[326] Howland v. George F. Blake Manuf'g Co., 156 Mass. 543, 31 N. E. 656. And see cases collected in 30 Cent. Law J., at pages 13 and 14. Taylor v. Hawkins, 16 Q. B. 308; Amann v. Damm, 8 C. B. (N. S.) 597; Force v. Warren, 15 C. B. (N. S.) 806; Missouri Ry. Co. v. Behee, 2 Tex. Civ. App. 107, 21 S. W. 384; John W. Lovell Co. v. Houghton, 116 N. Y. 520, 22 N. E. 1066; Bacon v. Michigan Cent. R. Co., 66 Mich. 166, 33 N. W. 181; Beeler v. Jackson, 64 Md. 589, 2 Atl. 916.

munication is not privileged.[327] Indeed, if the report be false and injurious, it is not privileged even if the sheet be sent to subscribers in a cipher, and understood by them only,[328] but without reference to such special interest as the plaintiff as a creditor would have.[329] The privilege of business communications is, however, broader than as to mere commercial reports. It extends to cases where there is a personal interest in the subject-matter to which the communication relates.[330] It applies where there is imminent danger to the subject-matter to which it relates, for example, to a ship, its cargo, or company.[331] And, generally, business communications between strangers, although volunteered, are privileged if made in performance of a "duty which may be supposed to exist to give advice faithfully to those who are in want of it, * * * for the sake of the general convenience of business, though with some disregard of the equally important rule of morality that a man should not speak ill, falsely, of his neighbor." [332]

Same—Privilege of Advertisers.

So, with a defamatory advertisement, inserted in a newspaper, if necessary to protect the advertiser's interest, or if advertising was the only way to accomplish his lawful object, the circumstances ex-

[327] Lowry v. Vedder, 40 Minn. 475, 42 N. W. 542; Marks v. Baker, 28 Minn. 162–165, 9 N. W. 678; Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862.

[328] Sunderlin v. Bradstreet, 46 N. Y. 188.

[329] Mitchell v. Bradstreet Co., 116 Mo. 226, 22 S. W. 358; Goldstein v. Foss, 2 Car. & P. 252; Com. v. Stacey, 1 Leg. Gaz. Rep. (Pa.) 114; Pollasky v. Michener, 81 Mich. 280, 46 N. W. 5; Taylor v. Church, 8 N. Y. 452; Ormsby v. Douglass, 37 N. Y. 477; Sunderlin v. Bradstreet, 46 N. Y. 188; King v. Patterson, 49 N. J. Law, 417, 9 Atl. 705; Bradstreet v. Gill, 72 Tex. 115, 9 S. W. 753; Johnson v. Bradstreet, 77 Ga. 172; Erber v. Dun, 12 Fed. 526; Trussell v. Scarlett, 18 Fed. 214; Locke v. Bradstreet Co., 22 Fed. 771; Kingsbury v. Bradstreet Co., 116 N. Y. 217, 22 N. E. 365; State v. Lonsdale, 48 Wis. 348, 4 N. W. 390. But such an agency may publish, generally, the entry of a judgment against defendant without liability, unless it be a false statement and special damage result. Woodruff v. Bradstreet Co., 116 N. Y. 217, 22 N. E. 365.

[330] Blackham v. Pugh, 2 C. B. 611 (auction; charge of bankruptcy); Pig. Torts, 323.

[331] Pig. Torts, 324.

[332] Coltman, J., in Coxhead v. Richards, 2 C. B. 569–601; Beatson v. Skene, 5 Hurl. & N. 838; Bigelow, Lead. Cas. 174. A letter, written by one of two rival milk sellers, advising a shipper to sell no more milk to the other

cuse the extensive publication. But, if it was not necessary to advertise at all, or if the advertiser's object could have been accomplished equally well by an advertisement which did not contain the defamatory words, then the extent given to the announcement is evidence of malice, to go to the jury.[333] Therefore, in an advertisement notifying the public not to harbor or trust the advertiser's wife on his account, defamatory words in regard to the wife are not privileged.[334]

Same—Communications in Confidential Relations.

A qualified privilege is recognized where the relation between two persons is intimate, socially or professionally,[335] or arises from family connections. Thus, a letter from a son-in-law to his mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations on her future husband, is privileged.[336] Such communications are "fairly warranted by any reasonable occasion or exigency, and when honestly made they are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow compass." [337] Thus, a surety may speak unreservedly of

unless he had surety for his goods, was not a privileged communication. Brown v. Vannaman, 85 Wis. 451, 55 N. W. 183. And see Lawless v. Anglo-Egyptian Cotton Co., L. R. 4 Q. B. 262; Shurtleff v. Stevens, 51 Vt. 501; Tillinghast v. McLeod, 17 R. I. 208, 21 Atl. 345; Klinck v. Colby, 46 N. Y. 427; Shurtleff v. Parker, 130 Mass. 293. Cf. Cook v. Wildes, 5 El. & Bl. 328, 24 Law J. Q. B. 367.

[333] Odgers, Sland. & L. §§ 225, 226.

[334] Champlin, J., in Smith v. Smith, 73 Mich. 445, 41 N. W. 499, 500.

[335] As between attorney and client, see Wright v. Woodgate, 2 Cromp., M. & R. 573; Davis v. Reeves, 5 Ir. C. L. 79.

[336] Todd v. Hawkins, 8 Car. & P. 88, 2 Man. & R. 20. So, between brother and sister, Anon., cited in 2 J. P. Smith (Eng.) 4, and Adams v. Coleridge, 1 Times Law R. 84; charge by mother against son, Cristman v. Cristman, 36 Ill. App. 567; by one friend to another, as a doctor, Dixon v. Smith, 29 Law J. Exch. 125; or tradesman, Storey v. Challands, 8 Car. & P. 234.

[337] Cockayne v. Hodgkisson, 5 Car. & P. 543, 545, (gamekeeper selling game), by Parke, J. And see M'Dougall v. Claridge, 1 Camp. 266 (concerning solicitor's personal character). Statements made before a meeting of stockholders of a railroad company by a member, attributing drunkenness and incapacity to one of the officials, are privileged if made in good faith; and the fact that attorneys of the company, not stockholders, were present at

the man for whom he is responsible.[338] And, generally, communications in course of business between employer and employé are privileged.[339] However, defamatory words are not privileged because uttered in strictest confidence by one friend to another, nor because they are uttered after the most urgent solicitation, nor because the interview in which they are uttered is obtained at the instance of the person slandered. Therefore, a libelous letter to an unmarried woman concerning her suitor, written by mutual friends to prevent the marriage, is not privileged by previous friendship, nor by a general request made years before.[340]

Same—Master as to Servant.

The right of the master with reference to a servant who has been in his employ is generally recognized as privileged.[341] He may refuse to give a letter of recommendation to his servant when the latter leaves without committing slander,[342] and may give his servant a character to his neighbor, who afterwards employed him, which would be otherwise actionable.[343] He may warn other

the meeting, at the request of the president and some of the stockholders, does not take away the privilege. Broughton v. McGrew, 39 Fed. 672. And see Rude v. Nass, 79 Wis. 321, 48 N. W. 555.

[338] Dunman v. Bigg, 1 Camp. 269, note. So, to father of person alleged to have been slandered. Hix v. State (Tex. Cr. App.) 20 S. W. 550; Davis v. State (Tex. Cr. App.) 22 S. W. 979. To father of child, by Earle, C. J., in Whiteley v. Adams, 33 Law J. C. P. 89–95. Cf. Masters v. Burgess, 3 Times Law R. 96; Fowler v. Homer, 3 Camp. 294.

[339] Hill v. Durham House Drainage Co. (Sup.) 20 N. Y. Supp. 427. A circular letter, sent out by a firm, stating that a certain person is no longer in their employ, and advising their "friends and customers" to give him no recognition on their account, is not a privileged communication. Warner v. Clark, 45 La. Ann. 863, 13 South. 203; Daniel v. New York News Pub. Co., 67 Hun, 649, 21 N. Y. Supp. 862; Wright v. Woodgate, 2 Cromp., M. & R. 573; Scarll v. Dixon, 4 Fost. & F. 250; Stace v. Griffith, L. R. 2 P. C. 420; Hume v. Marshall, 42 J. P. 136; Washburn v. Cooke, 3 Denio, 110; Lewis v. Chapman, 16 N. Y. 369.

[340] Byam v. Collins, 111 N. Y. 143, 19 N. E. 75; Coles v. Thompson (Tex. Civ. App.) 27 S. W. 46. Cf. Whiteley v. Adams, 15 C. B. (N. S.) 310, 311, 392.

[341] White v. Nicholls, 3 How. 266; Pattison v. Jones, 8 Barn. & C. 578; Child v. Affleck, 9 Barn. & C. 403.

[342] Carroll v. Bird, 3 Esp. 201.

[343] Fresh v. Cutter, 73 Md. 87, 20 Atl. 774. Cf. Over v. Schiffling, 102 Ind. 191, 26 N. E. 91.

servants against one whom he has discharged, and may explain his reasons.[344] And he may publish with impunity a blacklist of discharged employés, in absence of contrary statute.[345] The privilege allows the master to tell the truth, and even to volunteer what he honestly believes to be the truth, without malice and in the honest belief that he is discharging a duty to his neighbor, provided his neighbor has employed or is about to employ such servant.[346] The right of the master, it is insisted, arises, not out of the relationship of master and servant, but out of the general right to communicate one's belief, in a bona fide desire to protect one's own or another's right.[347]

181. On the same principle that whatever tends to prove malice in defamation aggravates the wrong, and entitles the plaintiff to exemplary damages,[348] what-

[344] Somerville v. Hawkins, 10 C. B. 590, 20 Law J. C. P. 131, 15 Jur. 450. And see Manby v. Witt, 18 C. B. 544, 25 Law J. C. P. 294, 2 Jur. (N. S.) 1004; Fowles v. Bowen, 30 N. Y. 20; Dale v. Harris, 109 Mass. 193.

[345] Missouri Pac. R. Co. v. Behee (Tex. Civ. App.) 21 S. W. 384. And see Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 11 S. W. 555; Hunt v. Great Northern Ry. Co., 2 Q. B. 189; International & G. N. R. Co. v. Greenwood, 2 Tex. Civ. App. 76, 21 S. W. 559. Instructions given by an employer to his counsel to investigate entries made on his books by an employé, which the employer claims to be false, and to make protest to the employé against them, cannot serve as the foundation of a charge of slander and libel, or ground for an action in damages by the employé against the employer. Levy v. McCan, 44 La. Ann. 528, 10 South. 794. And see Bacon v. Michigan Cent. R. Co., 66 Mich. 166, 33 N. W. 181.

[346] Fresh v. Cutter, 73 Md. 87, 20 Atl. 744. And see Gardner v. Slade, 13 Adol. & E. (N. S.) 796; Id., 18 Law J. Q. B. 334, 13 Jur. 826; Child v. Affleck, 9 Barn. & C. 403; Dixon v. Parsons, 1 Fost. & F. 24; Fryer v. Kinnersley, 15 C. B. (N. S.) 422-429; King v. Waring, 5 Esp. 14.

[347] Townsh. Sland. & L. preface, vi.

[348] An instruction that the jury may add, as punitive damages, such amount as will adequately punish defendant, and will prevent others from doing the same, was insufficient, when plaintiff pleaded and put in evidence facts tending to rebut express malice, as this should have been called to the jury's attention. Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020. Perhaps as extreme an instruction as to exemplary damages as has not been made the basis of a reversal occurs in Hayes v. Todd, 34 Fla. 233, 15 South. 752. There

ever negatives malice operates to mitigate damages. The jury determines whether given matter is in mitigation or aggravation of damages.

Provocation.

Provocation may mitigate damage.[349] The law makes allowance for acts committed in the heat of sudden passion by way of mitigation of damages. But if there had been an opportunity for blood to cool, a mere provocation connected with wrong complained of cannot be shown.[350] The defense follows the analogy of provoca-

the court instructed the jury that "exemplary damages are such as not only compensate the wrong done but also tend to protect all good citizens of the state from like wrongs from the reckless and malicious tongue of such lawless persons as have no regard for the good name of their fellows or for the fair name and virtue of the women of the land, but turn themselves loose, like ravenous wolves, to destroy that which money cannot buy, and that which, when lost, the powers of earth cannot restore." And, further, see Cruikshank v. Gordon, 118 N. Y. 178, 23 N. E. 457; Southcombe v. Armstrong (City Ct. Brook.) 8 N. Y. Supp. 361; Grace v. McArthur, 76 Wis. 641, 45 N. W. 518; Kenyon v. Cameron, 17 R. I. 122, 20 Atl. 233. Punitive damages may be recovered in an action for slander, without proving express malice. Callahan v. Ingram, 122 Mo. 355, 26 S. W. 1020. Proof of express malice is necessary to entitle plaintiff to exemplary damages. Republican Pub. Co. v. Conroy (Colo. App.) 38 Pac. 423. In an action for slander, where the condition of the accounts between the parties is in dispute, and the record in a suit settling such accounts is admitted in evidence, it is for the jury to say whether the facts disclosed by such record are in mitigation or in aggravation of damages. McCauley v. Elrod (Ky.) 27 S. W. 867. As to excessive damages, see Maesk v. Smith (Sup.) 12 N. Y. Supp. 423; Crate v. Dacora (Sup.) 15 N. Y. Supp. 607; Tillinghast v. McLeod, 17 R. I. 208, 21 Atl. 345; Grace v. McArthur, 76 Wis. 641, 45 N. W. 518; Jones v. Greeley, 25 Fla. 629, 6 South. 448; Webber v. Vincent (Sup.) 9 N. Y. Supp. 101; Dennis v. Johnson, 42 Minn. 301, 44 N. W. 68; Henderson v. Fox, 83 Ga. 233, 9 S. E. 839.

[349] Libels by plaintiff, connected with same subject as libels by defendant, may be shown in mitigation. Tarpley v. Blabey, 2 Bing. N. C. 437. But plaintiff must be connected with such previous defamation. Dressel v. Shippman (Minn.) 58 N. W. 684. But see Townsh. Sland. & L. p. 678, § 410.

[350] Applied to a case where the Minneapolis Tribune contained statements concerning the setting of a broken arm by plaintiff so that it had to be reset. The Globe called this a brutal jest. The Tribune retorted by abusing the plaintiff. Non constat when knowledge of article of Globe came to defendant's knowledge. Doubtful knowledge was doubtful provocation, Quin-

tion as mitigating damages in assault and battery,[351] but there does not seem to be any doctrine akin to contributory negligence, whereby the wrong is barred if the person defamed in some manner induced the publication.[352]

Common-Law Retraction.

A mere offer to retract cannot be shown in mitigation of damages, but a retraction published in good faith, even after commencement of an action for defamation, may, under some circumstances, be proved in mitigation of damages,[353] but in mitigation only,[354] because it negatives malice.[355] Conversely, evidence that the defamer, subsequent to the publication of the article sued on, has published another containing a letter from the defamed requesting a retraction, is admissible to show malice.[356]

Honest Belief—Rumors.

The law recognizes that anything tending to show an honest belief in the substance of the publication when made is admissible for the purpose of disproving malice and mitigating damages, though

by v. Tribune Co., 38 Minn. 528, 529, 38 N. W. 623. The Tribune states; Globe criticises Tribune; Tribune attacks the doctor. A. hits B.; hence B. hits C. "Cooling time" is short in Quinby v. Tribune Co., 38 Minn. 529, 38 N. W. 623. The Globe article was day before the latter publication. But, if its retaliatory libelous article had been written on same evening of same day, provocation could have been shown. Stewart v. Tribune Co., 41 Minn. 71, 42 N. W. 787.

[351] Ante, p. 444, "Assault and Battery."

[352] Irvine, C., in Vallery v. State, 42 Neb. 123, 60 N. W. 347, 348, commenting on King v. Waring, 5 Esp. 15; Weatherston v. Hawkins, 1 Term R. 110; Smith v. Wood, 3 Camp. 323.

[353] Turton v. New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009; Davis v. Marxhausen (Mich.) 61 N. W. 504; Storey v. Wallace, 60 Ill. 51; Newell, Def. p. 907, § 84. But cf. Bolt v. Hauser (Co. Ct.) 10 N. Y. Supp. 397.

[354] Davis v. Marxhausen (Mich.) 61 N. W. 504.

[355] Allen v. Pioneer Press Co., 40 Minn. 117, 41 N. W. 936; Park v. Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731; Turton v. New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009; Id., 3 Misc. Rep. 314, 22 N. Y. Supp. 766.

[356] In an action against a newspaper for libel, an article, published after the article counted upon, which contained plaintiff's letter requesting a retraction, and a refusal to retract, is admissible to show malice. Thibault v. Sessions, 101 Mich. 279, 59 N. W. 624.

it tends to prove the truth of the charge.[357] Accordingly, in an action for slander, evidence that the slander was only a repetition of a current report of long standing, by which plaintiff's general reputation has become impaired, is admissible in mitigation of compensatory damages.[358] And where the article contained several distinct libelous charges, a justification as to part of the charge, and not the whole, goes only in mitigation of damages, and does not warrant a verdict for the defendant.[359] Therefore, partial truth may mitigate damages.[360] But good faith and reasonable belief will not prevent recovery of substantial damages.[361] Cases involving these general principles are constantly arising in connection with the defense urged by the defendant that his conduct was justified by rumors concerning the plaintiff.

So far as it may affect the culpability of the defendant, as mitigating malice, evidence that he knew, believed, and relied on[362] general rumors[363] to the effect of the defamatory matter would be entirely proper. Hence, such evidence is often held to be admissible.[364] However, from the plaintiff's point of view, the extent of

[357] Huson v. Dale, 19 Mich. 17–26 (per Christiancy, J.).

[358] Nelson v. Wallace, 48 Mo. App. 193.

[359] Hay v. Reid, 85 Mich. 296, 48 N. W. 507.

[360] Sawyer v. Bennett (Sup.) 20 N. Y. Supp. 45.

[361] Blocker v. Schoff, 83 Iowa, 265, 48 N. W. 1079; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1.

[362] Larrabee v. Minnesota Tribune Co., 36 Minn. 141–143, 30 N. W. 462; Lothrop v. Adams, 133 Mass. 471. Prior publication in other newspapers, properly repeated and shown, may mitigate, as showing how defendant might reasonably believe them to be true. Hewitt v. Pioneer Press Co., 23 Minn. 178; Upton v. Hume, 24 Or. 420, 33 Pac. 810. And see Frazier v. McCoskey, 60 N. Y. 337, disapproved in Hallam v. Post Pub. Co., 55 Fed. 456; Id., 8 C. C. A. 201, 59 Fed. 530–537. The truth of the charge, though not pleaded, is admissible to disprove malice, and in mitigation of damages, if it was known at the time of publication, but not otherwise. Simons v. Burnham (Mich.) 60 N. W. 476.

[363] But facts sufficient to justify belief, if unknown, and not relied on by defendant, are not in mitigation. Quinn v. Scott, 22 Minn. 456. Thus, that after charge of crime plaintiff had reputation of being guilty is not admissible. Simmons v. Holster, 13 Minn. 249 (Gil. 232); Marks v. Baker, 28 Minn. 162, 9 N. W. 678; Regnier v. Cabot, 2 Gilman, 34. And see 33 Cent. Law J. 379.

[364] Van Derveer v. Sutphin, 5 Ohio, 293; Republican Pub. Co. v. Mosman,

his suffering is not measured by defendant's moral shortcoming or personal righteousness. Hence, such evidence is perhaps as often disallowed.[365] If, however, a defendant offers to prove such rumors, he cannot object to similar evidence in rebuttal.[366] But publishing defamatory matter as a rumor,[367] or giving a specific source as authority, is no longer [368] a defense [369] by way of justification, although it may operate to mitigate damages.[370]

Plaintiff's Character and Position.

When one claims damages on the ground of the disparagement of his character, evidence, in mitigation of damages, may be given, under proper allegation,[371] that his character was blemished before the publication of the libel or slander.[372] Thus, in an action for libel the defendant may prove, in mitigation of damages, that before and at the time of the publication of the libel the plaintiff was generally suspected to be guilty of the crime thereby imputed to him, and that, on account of this suspicion, his relatives and friends had ceased to associate with him.[373] Evidence of general bad reputation

15 Colo. 399, 24 Pac. 1051; Hay v. Reid, 85 Mich. 296, 48 N. W. 507; Morrison v. Press Pub. Co. (Super. N. Y.) 14 N. Y. Supp. 131–133; Arnold v. Jewett (Mo. Sup.) 28 S. W. 614. And see cases collected, pro and con, in Townsh. Sland. & L. p. 678, § 411.

365 Scott v. Sampson, 8 Q. B. Div. 491; Edwards v. San José Print. & Pub. Soc., 99 Cal. 431, 34 Pac. 128; Gray v. Elzroth, 10 Ind. App. 587, 37 N. E. 551. A defendant who has started and circulated a slanderous report about a woman cannot prove by others that they had heard the same slander. Blackwell v. Landreth, 90 Va. 748, 19 S. E. 791.

366 Bogk v. Gassert, 149 U. S. 17, 25, 13 Sup. Ct. 738; Ward v. Blake Manuf'g Co., 5 C. C. A. 538, 56 Fed. 437, 441; Elliott, App. Proc. § 628.

367 Republican Pub. Co. v. Miner, 3 Colo. App. 508, 34 Pac. 485; Haskins v. Lumsden, 10 Wis. 309.

368 Northampton's Case, 12 Coke, 384; Davis v. Lewis, 7 Term R. 17; Maitland v. Goldney, 2 East, 426.

369 Lewis v. Walter, 4 Barn. & Ald. 605; De Crespigny v. Wellesley, 5 Bing. 392 (libel); Tidman v. Ainslie, 10 Exch. 63 (libel); McPherson v. Daniels, 10 Barn. & C. 263 (slander); Watkin v. Hall, L. R. 3 Q. B. 396 (slander).

370 Dole v. Lyon, 10 Johns. 447.

371 Halley v. Gregg, 82 Iowa, 622, 48 N. W. 974; Ward v. Deane (Sup.) 10 N. Y. Supp. 421.

372 Ball, Cas. Torts, p. 122.

373 Earl of Leicester v. Walter, 2 Camp. 251. Cf. Sandford v. Rowley, 93 Mich. 119, 52 N. W. 1119.

is admissible, in mitigation of damages; and evidence of bad reputation as to that phase of character involved in a case is competent, not to establish any facts in issue, but to explain conduct and to enable the jury better to weigh the evidence upon doubtful questions of fact bearing on the character of defendant.[374] Therefore, bad reputation for integrity is admissible in charges of political dishonesty. "We should be loth to differentiate a want of integrity in political matters from the same failing in business or society."[375] The plaintiff's general social and personal standing may be shown in evidence as bearing on the question of damages.[376] And if plaintiff

[374] Sage, District Judge, in Hallam v. Post Pub. Co., 55 Fed. 456, discussing Gilchrist v. McKee, 4 Watts, 380; Conroe v. Conroe, 47 Pa. St. 198; Drown v. Allen, 91 Pa. St. 393; Moyer v. Moyer, 49 Pa. St. 210; Duval v. Davy, 32 Ohio St. 604; Sanford v. Rowley, 93 Mich. 119, 52 N. W. 1119. And see Greenl. Ev. § 55. In an action for slander in imputing to plaintiff official misconduct, to show want of actual malice, defendant should have been allowed to prove what others had said to him in regard to plaintiff's official conduct. Callahan v. Ingram (Mo. Sup.) 26 S. W. 1020. Evidence of a general belief and suspicion that plaintiff was guilty of the acts charged in the slanderous words is admissible in mitigation of damages. Gray v. Ellzroth, 10 Ind. App. 587, 37 N. E. 551. It has, however, been held that in an action of libel only the "general" reputation of plaintiff can be shown in mitigation of damages. Thibault v. Sessions, 101 Mich. 279, 59 N. W. 624; Indianapolis Journal Newspaper Co. v. Pugh, 6 Ind. App. 510, 33 N. E. 991.

[375] Taft, J., in Post Pub. Co. v. Hallam, 8 C. C. A. 201, 59 Fed. 530–537.

[376] Larned v. Buffinton, 3 Mass. 546; Harding v. Brooks, 5 Pick. 244–247; Klumph v. Dunn, 66 Pa. St. 141–147; Press Pub. Co. v. McDonald, 11 C. C. A. 155, 63 Fed. 238. As to plaintiff's character, and, generally, increasing damage, see Morey v. Morning Journal Ass'n, 123 N. Y. 207, 25 N. E. 161; Enos v. Enos (Sup.) 11 N. Y. Supp. 415; Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628; Hintz v. Graupner, 138 Ill. 158, 27 N. E. 935; Dixon v. Allen, 69 Cal. 527, 11 Pac. 179. As to circulation of defendant's newspaper in aggravation of damage, see Farrand v. Aldrich, 48 N. W. 628; Patten v. Belo, 79 Tex. 41, 14 S. W. 1037. It is competent in a slander suit to admit proof, as bearing on the question of damages, that plaintiff has a family of young children, who would be disgraced by the charge. Enos v. Enos, 135 N. Y. 609, 32 N. E. 123. In a civil action for libel, plaintiff's general social standing may be shown in the evidence in chief, as bearing on the question of damages. Press Pub. Co. v. McDonald, 11 C. C. A. 155, 63 Fed. 238. "It is not competent to enter into the details of the finances of a defendant in a libel or slander suit. The inquiry should be directed to his financial standing in

alleges her good character and repute, and this is denied by the defendant, the plaintiff is not required to rest upon the legal presumption as to chastity and virtue,[377] but she can properly offer proof under such allegation as part of her case.[378]

SLANDER OF TITLE OR PROPERTY.

182. Plaintiff can recover for disparaging words published concerning title or property whenever he shows—

(a) That the statement is false;

(b) That the statement is malicious in fact;

(c) That the statement has caused him proximate and special pecuniary injury.[379]

The wrong called slander of title is, properly speaking, the basis of an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title.[380] No specific name has been applied to cases which rest on the same foundation, but are not the same as slander of title.[381] Disparagement of property is clearly analogous.[382] The old form of action concerns realty only; the new relates to property generally,—realty

the community. Though he may be possessed of considerable wealth, yet, if this be not generally known in the community, no greater injury can on that account be said to flow from the publication of the libel, or the utterance of the slander. It is his reputed, not his actual, standing, that bears upon the injury." Grant, J., in Farrand v. Aldrich, 85 Mich. 593, 48 N. W. 628–630.

377 Conroy v. Pittsburgh Times, 139 Pa. St. 334, 21 Atl. 154.

378 Stafford v. Morning Journal Ass'n, 142 N. Y. 598, 37 N. E. 625, distinguishing Houghtaling v. Kilderhouse, 1 N. Y. 530; Pratt v. Andrews, 4 N. Y. 493; Young v. Johnson, 123 N. Y. 226, 25 N. E. 363. And see Peters v. Bourneau, 22 Ill. App. 177.

379 Fraser, Torts, 116. And see Boynton v. Shaw Stocking Co., 146 Mass. 219, 15 N. E. 507; Wier v. Allen, 51 N. H. 177; Snow v. Judson, 38 Barb. 210; Kennedy v. Press Co., 41 Hun, 422.

380 Tindal, J., in Malachy v. Soper (1835) 3 Bing. N. C. 371–382.

381 Pig. Torts, 381, 382.

382 Western Counties Manure Co. v. Lawes Manure Co., L. R. 9 Exch. 218. But in Young v. Macrae, 3 Best & S. 264–270, Blackburn, J., says: "My own impression is that where there is a written depreciation of an article, unless it is a slander actionable in itself, no allegation of special damage will

and personalty, corporeal and incorporeal,—and is brought for a false statement injurious to the owner in his right to profits. It has been insisted that it is of little consequence whether the wrong is slander, or whether it is a statement of any other nature "calculated" to produce special damage.[383] However, on consideration of the elements of the wrong, it appears that, as to matters of practice at least, there is material difference, and that the wrongs under consideration lie halfway between libel and slander and malicious prosecution;[384] and, in many respects, approach wrongs of fraud.[385]

Falsity of Statement.

In wrongs of this description, as in libel and slander, the words which constitute the offense must be set out exactly in the complaint or declaration,[386] and special damages must be circumstantially alleged.[387] In cases where character is at stake, the presumption is in favor of the party defamed; but there is no similar presumption in favor of a man's title, or the quality of his merchandise.[388] Unless he shows falsehood, he shows no case to go to the jury.[389]

make it actionable except in the case of slander of title." Clerk & L. Torts, 493, note a, classes Sheperd v. Wakeman, 1 Sid. 79, as such a case. Disparagement may be actionable as to copyright, patents, and the like. Dicks v. Brooks (1880) 15 Ch. Div. 22, 49 Law J. Ch. 812; Thorley's Cattle-Food Co. v. Massam (1880) 14 Ch. Div. 763; Hendriks v. Montagu, 17 Ch. Div. 638, 50 Law J. Ch. 456; Singer Manuf'g Co. v. Loog, 8 App. Cas. 15; Meyrose v. Adams, 12 Mo. App. 329; Andrew v. Deshler, 45 N. J. Law, 167. To inchoate rights under agreement: Benton v. Pratt, 2 Wend. 385; Rice v. Manley, 66 N. Y. 82. To diversion of custom by misrepresentation of rights: Marsh v. Billings, 7 Cush. 322; Bigelow, Lead. Cas. Torts, 59. And see Riding v. Smith, 1 Exch. Div. 91; Clerk & L. Torts, 493.

[383] Abinger, C. B., in Gutsole v. Mathers, 1 Mees. & W. 495–500 (where defendant said that tulips of the plaintiff about to be sold at auction were stolen property).

[384] Burtch v. Nickerson, 1 Am. Lead. Cas. 121.

[385] Pig. Torts, 260, 375. "It is a special variety of deceit, which differs from the ordinary type, in that third persons, not plaintiff himself, are induced by defendant's falsehood to act in a manner which caused plaintiff's damage." Pol. Torts, 260.

[386] Gutsole v. Mathers, 1 Mees. & W. 495; Hill v. Ward, 13 Ala. 310.

[387] Bailey v. Dean, 5 Barb. 297–300.

[388] Burnett v. Tak, 45 Law T. 743.

[389] Clerk & L. Torts, 494, citing Maule, J., in Pater v. Baker, 3 C. B., at page 869; Steward v. Young, L. R. 5 C. P. 122–127. Cf. Rowe v. Roach, 1

In this action truth may be given in evidence under the general issue.[390].

Malice.

While the authorities are agreed that malice is essential to the plaintiff's case, they are at variance as to whether malice in law is sufficient, or whether there must be malice in fact.[391] The later opinions require the plaintiff to allege, and, as a necessary part of his case, to prove, that malice in fact existed,—that is, a desire on the defendant's part to injure the plaintiff, or to benefit himself or some third person at the plaintiff's expense.[392] Certainly, where there is an occasion of privilege, the plaintiff will be nonsuited unless he shows malice in fact.[393] As in malicious prosecution, so in the cases under consideration, malice and want of probable cause are intimately connected. Want of reasonable cause is only evidence from which the jury may, but is not bound to, infer malice.[394] If what a person did or said was in pursuance of a bona fide claim or color of title which he was honestly asserting, and especially if he

Maule & S. 304. In an action for slander of title, where defendant sets up title in himself, the action becomes one to try title, in which the burden of proof is on defendant as in a petitory action. McConnell v. Ory, 46 La. Ann. 564, 15 South. 424. As to requirement that in slander of patents plaintiff must commence proceedings to establish validity of patents, see Rollins v. Hicks, L. R. 13 Eq. 355; Axmann v. Lund, L. R. 15 Eq. 330.

[390] Kendall v. Stone, 2 Sandf. 269.

[391] In Young v. Macrae, 3 Best & S. 264, it was held not actionable. And see Johnson v. Hitchcock, 15 Johns. 185. In Western Counties Manure Co. v. Lawes Manure Co., L. R. 9 Exch. 218, false statements as to inferiority of plaintiff's fertilizer, resulting in loss of customers, were held actionable, without proof of malice. And see Paull v. Halferty, 63 Pa. St. 46; Dicks v. Brooks, 15 Ch. Div. 39. In Wren v. Weild, L. R. 4 Q. B. 213, letters to infringement of defendant's patents by plaintiff were held actionable only when made mala fide. Steward v. Young, L. R. 5 C. P. 122. And see Gerard v. Dickenson, 4 Coke, 18; Dodge v. Colby, 37 Hun, 515; Walkley v. Bostwick, 49 Mich. 374, 13 N. W. 780; Andrew v. Deshler, 45 N. J. Law, 167.

[392] Halsey v. Brotherhood, 19 Ch. Div. 391; Hatchard v. Mege, 18 Q. B. Div. 771.

[393] Pater v. Baker, 3 C. B. 831; Pitt v. Donovan, 1 Maule & S. 639. And see Steward v. Young, L. R. 5 C. P. 122.

[394] Pitt v. Donovan, 1 Maule & S. 639; Maule, J., in Pater v. Baker, 3 C. B. 868; Wren v. Weild, L. R. 4 Q. B. 213.

was acting under advice of counsel, though his title proves not to have been perfect, he will not be liable for slander of title.[395] "Whether a party acted maliciously depends upon his own motives, and on the view which the jury entertained of the mind of the party himself; and we cannot try what are the motives and feelings of particular men's minds by referring to the mind of some other person. Therefore, if we refer to a mind that is sensible and reasonable, and which does not judge under the same pressure as the mind of the person in question might do, and make that sensible and reasonable mind the standard by which to judge of the state of the mind of the person who is under that pressure, we shall be referring to an improper rule to judge by. The question is, not what judgment a sensible and reasonable man would have formed in this case, but whether the defendant did or did not entertain the opinion he communicated." [396]

Special Damages.

In order that the plaintiff may recover, he must both allege and show, not merely damage, but special pecuniary damage, as the natural, proximate result of the disparagement.[397] Therefore, the

[395] Hill v. Ward, 13 Ala. 310; Bailey v. Dean, 5 Barb. 297.

[396] Pitt v. Donovan, 1 Maule & S. 639; Ames, Lead. Cas. 630. And see note 1, at page 631, citing Harriss v. Sneeden, 101 N. C. 273, 7 S. E. 801; Gerard v. Dickenson, 4 Coke, 18; Lovett v. Weller, 1 Rolle, 409; Smith v. Spooner, 3 Taunt. 246; Green v. Button, 2 Cromp., M. & R. 707; Pater v. Baker, 3 C. B. 831; Watson v. Reynolds, 1 Moody & M. 3; Carr v. Duckett, 5 Hurl. & N. 783; Atkins v. Perrin, 3 Fost. & F. 179; Brook v. Rawl, 4 Exch. 521; Burnett v. Tak, 45 Law T. 743; Steward v. Young, L. R. 5 C. P. 122; Wren v. Weild, L. R. 4 Q. B. 213; Hart v. Wall, L. R. 2 C. P. 146; Dicks v. Brooks, 15 Ch. Div. 39; Halsey v. Brotherhood, 19 Ch. Div. 389; Boulton v. Shields, 3 U. C. Q. B. 21; Hill v. Ward, 13 Ala. 310; McDaniel v. Baca, 2 Cal. 326; Thompson v. White, 70 Cal. 135, 11 Pac. 564; Reid v. McLendon, 44 Ga. 156; Van Tuyl v. Riner, 3 Ill. App. 556; Stark v. Chetwood, 5 Kan. 141; Gent v. Lynch, 23 Md. 58; Swan v. Tappan, 5 Cush. 104; Meyrose v. Adams, 12 Mo. App. 329; Andrew v. Deshler, 45 N. J. Law, 167; Dodge v. Colby, 37 Hun, 515; Hovey v. Rubber Co., 57 N. Y. 119; Kendall v. Stone, 5 N. Y. 14; Cornwell v. Parke, 52 Hun, 596, 5 N. Y. Supp. 905; Id., 123 N. Y. 657, 25 N. E. 955; McElwee v. Blackwell, 94 N. C. 261.

[397] Burkett v. Griffith, 90 Cal. 532, 27 Pac. 527; Cheesebro v. Powers, 78 Mich. 472, 44 N. W. 290; Duncan v. Griswold, 92 Ky. 546, 18 S. W. 354; Swan v. Tappan, 5 Cush. 104–111; Tobias v. Harland, 4 Wend. 537; Collins

mere averment that, because of the alleged wrong, the plaintiff was compelled to go out of business is insufficient.[398] So, in Malachy v. Soper, a verbose allegation that mining shares had depreciated in value, and that the plaintiff had been prevented from selling them at a profit, was held insufficient. "The doctrine of the older cases is that the plaintiff ought to aver that by the speaking he could not sell or lease, and that it will not be sufficient to say only that he had an intent to sell without alleging a communication for sale."[399] But, if one falsely and maliciously claims a lien on wood which another had contracted to sell, whereby the latter is unable to deliver, this is good cause of action for slander of title.[400] However, the damage complained of must be the proximate result of the wrong. Therefore, it has been held, in New York,[401] that the breach of a contract with a third person for sale of a lot of land was insufficient to make out special damage.

v. Whitehead, 34 Fed. 121; Stark v. Chetwood, 5 Kan. 141; Dooling v. Budget Pub. Co., 144 Mass. 258, 10 N. E. 809; Walton v. Perkins, 28 Minn. 413, 10 N. W. 424.

[398] Dudley v. Briggs, 141 Mass. 582, 6 N. E. 717; Wilson v. Dubois, 35 Minn. 471, 29 N. W. 68.

[399] 3 Bing. N. C. 371 (per Tindal, C. J.), affirmed in Riding v. Smith, 1 Exch. Div. 91–94 (per Kelly, C. B.).

[400] Green v. Button, 2 Cromp., M. & R. 707.

[401] Kendall v. Stone, 5 N. Y. 14, Chase, Lead. Cas. 149. (However, this case was decided on reasoning of Vicars v. Wilcocks, 8 East, 1, generally regarded as unsound.) And see Brentman v. Note (City Ct. N. Y.) 3 N. Y. Supp. 420.

CHAPTER IX.

MALICIOUS WRONGS.

MALICIOUS WRONGS IN GENERAL.

183. To do intentionally what is calculated in the ordinary course of events to damage, and which in fact does damage, another, in that other person's property or trade, is actionable, if done without just cause or excuse.[1]

The truth of the saying of Dr. Holmes to the effect that the growth of the law is to be found in history and not in science, is nowhere more apparent than in the subject of malicious wrongs. Certain traditional forms of malicious wrongs are clearly recognized. Discussion of such wrongs are found in texts, scattered articles, deci-

[1] Bowen, L. J., in Mogul Steamship Co. v. McGregor, L. R. 23 Q. B. 598, [1892] App. Cas. 25, citing Bromage v. Prosser, 4 Barn. & C. 247; Capital, etc., Bank v. Henty, L. R. 7 App. Cas. 74. This statement avoids the common principles, for example, as in 1 Add. c. 1, § 9, p. 36 (40). But every malicious act wrongful in itself in the eyes of the law, if it causes hurt or damage to another, is a tort, and may be the foundation of an action. An act wrongful

sions, and digests. Among these may be mentioned libel and slander, slander of title, business, or property, fraud and deceit, malicious prosecution, and other malicious abuse in connection with courts of justice. Beyond these conventional forms of wrongs there has been a general tendency to deny the existence of a cause of action for which the law provides sanction. The loose sayings already considered, to the effect that a bad intention cannot make a lawful conduct actionable, and that an unlawful intention cannot make a lawful conduct actionable, have led to a vague impression that these familiar forms of malicious wrongs are the only ones recognized by law, and that unless a given case be brought within them there is no cause of action. This is a radical error. It is true that for libel and slander, deceit, and malicious prosecution [2] the common law provided a specific form of action and a definite remedy; but under the actions on the case, even at common law wherever there was a wrong conforming to the legal standard, the remedy was provided, in large measure at least.

Classification of Malicious Wrongs.

The ordinary classification of malicious wrongs is based on the historical development of the law adjective. The classification of Mr. Pollock [3] does not seem to be entirely logical, in that it fails to give to libel and slander a proper place among malicious wrongs, in its dissociation of malicious procedure and of slander of title. His classification, perhaps the current one, has regard to the object of the wrong; that is to say, he bases the classification upon the right which is violated. But the very fact that there is the most interminable confusion as to the nature of rights would necessarily make such a classification unsatisfactory.

Mr. Innes,[4] as has been seen, rearranged the entire law of torts,

in itself producing damage is naturally actionable. Generally, see ante, p. 86; Clerk & L. Torts, 16; Green v. Button, 2 Cromp., M. & R. 707; Cattle v. Stockton Waterworks Co., L. R. 10 Q. B. 43. An interesting article on the right to so maliciously exercise one's legal rights as to cause damage to others, and the remedy therefor, 58 J. P. 814.

[2] Bigelow, Lead. Cas. 207–210; historical portion of note to Hutchins v. Hutchins, 7 Hill, 104.

[3] Pol. Torts (Webb's Ed.) p. 7; and ante, p. 108.

[4] Innes, Torts, introduction.

with reference to the instrumentalities by which the harm complained of was caused. A specific application of this idea to malicious wrongs might materially clarify the subject. In libel and slander, the instrument of harm is the means of publication. In malicious prosecution, malicious abuse of process, et sim., a court of justice is the means by which the harm is inflicted. In deceit, the instrument of harm is the false and damaging suggestion or suppression of the truth. Beyond these conventional lines, the instrument of wrong may be concerted action between a number of persons, when the wrong is called a "boycott" or "conspiracy." [5] It may be one's influence on the conduct of third persons.[6] It may be the use of one's own property [7] or one's own official position. It may be a tort to a third person.[8] This category may be indefinitely extended, and, however arranged, will be added to by the courts from time to time as new wrongs arise from the increasing complexity of society and the ingenuity of human error and selfishness.

For present purposes, however, it is convenient, and will avoid stretching the cases into an order not contemplated, and introducing a nomenclature not used by the courts in deciding cases, to follow Mr. Pollock, and use the current names of the wrongs considered.

[5] Post, p. 641.

[6] Prof. Ames (1 Lead. Cas. Torts, 8) divides the malicious injury to the plaintiff by influencing the conduct of a third person thus: Section 1, by inducing or aiding a third person to commit a breach of legal duty to the plaintiff: (a) The duty of a servant to his master; (b) the duty of a wife to her husband; (c) the duty of a contractor; (d) the duty of an individual not to commit a tort. Section 2, by influencing a third person who owes no legal duty to the plaintiff: (a) By slander of title and disparagement of goods; (b) by fraud; (c) by force or threats; (d) by maintenance. This admirable order has met with warm approval.

[7] Chesley v. King, 74 Me. 164. And see Ames, Lead. Cas. Torts, 744–750, note 1, citing Stevens v. Kelley, 78 Me. 445–452, 6 Atl. 868; Roath v. Driscoll, 20 Conn. 533; Greenleaf v. Francis, 18 Pick. (Mass.) 117; Trustees v. Youmans, 45 N. Y. 362; Wheatley v. Baugh, 25 Pa. St. 528. And see Frazier v. Brown, 12 Ohio St. 294; Chasemore v. Richards, 7 H. L. Cas. 349–388; Smith v. Kenrick, 7 C. B. 515. As to bursting an oil well, see 30 Am. Law Reg. (N. S.) 237–251. And see Phelps v. Nowlen, 72 N. Y. 39.

[8] Midland Ins. Co. v. Smith, L. R. 6 Q. B. Div. 561; Ames, Lead. Cas. Torts, 719.

The radical changes thus avoided will also leave other portions of the law of torts in its conventional arrangement.

DECEIT.

184. Whether or not deceit is actionable depends upon the legal aspect of—

(a) The wrongful conduct of defendant.

(b) The conduct of plaintiff caused thereby.

(c) The damage resulting therefrom.

Writs of deceit were very ancient. A variety of forms are given in the register.[9] Deceit, being older than case, was for a time distinct from it.[10] Indeed, it was the model for the new writs evolved under the statute of Westminster II. But case encroached upon it. In consequence, it "lost its individuality. The name is still retained; but for a century or more that has been used to indicate the nature of the subject-matter rather than any peculiar form of action. Deceit has been fused with the younger and more vigorous action of trespass on the case, or, rather, has become one of its species." [11] Since the general repeal of the various peculiar forms of action, the name continues to describe a particular form of wrong, or, more accurately, the means by which a particular wrong is done.[12]

Deceit affords a good illustration of the overlapping of various branches of the system of jurisprudence as administered in English speaking countries. The law as to deceit is immediately related to contracts, and is especially involved in sales.[13] The tort may be

[9] Ante, p. 16, c. 1.

[10] 3 Reeve, Hist. England (Finl. Ed.) p. 606.

[11] Bigelow, Lead. Cas. 20 et seq., note to Pasley v. Freeman. And see 2 Esp. N. P. 623. By Isaac Espinasse, "deceit" is also spelled "disceit,"—e. g. at page 821.

[12] Innes, Torts, preface.

[13] Therefore, Cornfoot v. Fowke, 6 Mees. & W. 358, which involved an action on the contract, is generally referred to in discussions on deceit. Bigelow, Lead. Cas. 21. As to election to rescind contract, see New Brunswick, etc., Co. v. Conybeare, 9 H. L. Cas. 711. As to rescission and restitution in integrum, see Western Bank v. Addie, L. R. 1 Scotch App. 145. Legal Companion (India), review of the Tagore Law Lectures for 1894, by Sir Frederick Pollock, on the "Law of Fraud, Mesrepresentation, and Mistake in British India" (issue of December, 1894).

merged in the contract.[14] The person induced to enter into a contract by deceit may rescind and sue for damages.[15] It is by no means an easy matter to determine whether a given cause of action is on the contract or in tort.[16] The action of assumpsit was, as has been seen, originally an action on the case, and still retains traces of its ex delicto origin. Hence, wherever there is a contract of warranty, the buyer has always had the right to waive the contract and sue in tort.[17] And, generally, money obtained by deceit is recoverable in assumpsit.[18] The term "misrepresentation," as used in the law of contract, is sometimes given a totally different signification from that assigned to it in the law of torts. Thus, it is de-

[14] Burns v. Dockray, 156 Mass. 135, 30 N. E. 551; Union, etc., Co. v. Scheidler, 130 Ind. 214, 29 N. E. 1071.

[15] Thus, persons induced by fraud of agent may rescind and sue agent for damages in the amount paid for insurance, although the policy had run for six months. Hedden v. Griffin, 136 Mass. 229. So, when action was brought in November on insurance note, and in August prior knowledge of fraud came to insured, the latter cannot rescind in November, after suit was brought. Plympton v. Dunn, 148 Mass. 523, 20 N. E. 180.

[16] A complaint alleged that plaintiff, relying on the fraudulent representations of defendants that one of them had a good tax title to land, and that the former owner died leaving no minor heirs, was induced to purchase the land, and take a quitclaim deed, and pay therefor $500; that he had also paid a judgment for costs and damages in a suit by which the minor heirs of the former owner recovered land,—and for the amount of such a judgment, together with the expenses of the suit, and the purchase money, he demanded judgment. Held an action for damages for fraud alleged, and not to rescind the contract of sale. McConnell v. Hughes, 83 Wis. 25, 53 N. W. 149. And see Clark, J., in Hexter v. Bast, 125 Pa. St. 52, 17 Atl. 252, 253; Mahurin v. Harding, 28 N. H. 128.

[17] Blanton v. Wall, 4 Jones, Law (N. C.) 532; McLeod v. Tutt, 1 How. (Miss.) 288; Osgood v. Lewis, 2 Har. & G. (Md.) 495; Hillman v. Wilcox, 30 Me. 170; House v. Fort, 4 Blackf. (Ind.) 293; Trice v. Cockran, 8 Grat. (Va.) 442; Lassiter v. Ward, 11 Ired. Law (N. C.) 443; Vanleer v. Earle, 26 Pa St. 277; Carter v. Glass, 44 Mich. 154, 6 N. W. 200; Hopkins v. O'Neil, 46 Mich. 403, 9 N. W. 448; Booth v. Northrop, 27 Conn. 325; Huston v. Plato, 3 Colo. 402; Lindsay v. Mulqueen, 26 Hun, 485. The best practice is to join account for deceit with account in tort, alleging a simple breach of warranty. Schuchardt v. Allens, 1 Wall. (U. S.) 359; Hummiston v. Smith, 22 Conn. 19. Cf. Bartholomew v. Bushnell, 20 Conn. 271; Beeman v. Buck, 3 Vt. 53; West v. Emery, 17 Vt. 583; Vail v. Strong, 10 Vt. 457.

[18] 1 Esp. 21. But assumpsit will not lie on a fraudulent transaction. Id. 93.

fined to be an innocent misrepresentation or nondisclosure of facts, as distinguished from fraud and warranties. Such misrepresentations have no effect on a contract, except in the case of contract said to be uberrimæ fidei, in which, from their nature or from particular circumstances, one party must rely on the other for his knowledge of facts and the other is bound to the utmost good faith, as in insurance contracts and the like.[19] The term will, however, be used in its more general and popular sense, in which it is essentially identified with fraud.

An action of deceit results in the award of damages, this is the distinctive remedy in tort.* On the other hand, in equity, a false statement may be sufficient ground for refusing specific performance,[20] or for setting a contract aside;[21] or equity may reform a fraudulent contract and then specifically enforce the contract as reformed.[22]

SAME—THE WRONGFUL CONDUCT OF DEFENDANT.

185. The wrongfulness of defendant's conduct depends upon—

(a) His mental attitude, and

(b) His consequent act or omission.

186. Defendant's mental attitude is the gist of the wrong.

The wrong, for which at common law trespass lay, did not depend, so far as the fact of liability is concerned, upon the mental attitude of the wrongdoer; although willfulness at the one extreme or mis-

[19] Clark, Cont. 308–310. "The practical test of fraud, as opposed to misrepresentations, is that fraud gives rise to an action ex delicto, while innocent misrepresentation does not. Fraud, besides being a vitiating element in contract, is a tort or wrong apart from the contract, and may be treated as such by beginning an action of deceit. Misrepresentation in exceptional cases may invalidate a contract, but will not support an action of deceit."

* But see ante, c. 1. note 50.

[20] Lamare v. Dixon, L. R. 6 H. L. 414.

[21] Groff v. Rohrer, 35 Md. 327; Traill v. Baring, 4 De Gex, J. & S. 318; Cowley v. Smyth, 46 N. J. Law, 380; Florida v. Morrison, 44 Mo. App. 529; Keating v. Price, 58 Md. 532. But see Tone v. Wilson, 81 Ill. 529.

[22] Bisp. Eq. § 468.

take at the other might affect the extent of the recovery. Deceit, on the other hand, rests primarily upon the mental attitude. It depends distinctly upon moral shortcoming. Ordinarily, there is not only voluntary conduct; there is also voluntary injury. There is not, however, harmony in the decisions as to how far mere negligence can be the basis of deceit. The law of deceit has to deal with the legal aspects of the moral question. The standard of legal fraud is practically the same as of moral fraud.[23] The presumption of innocence applies, and the burden is on defendant to show moral or legal wrong.[24]

187. False representations do not amount to a fraud at law unless they be made with a fraudulent intent. The intent to deceive may be shown in either of three ways:

(a) That the party knew his statements to be false;

(b) That, having no knowledge of their truth or falsity, he did not believe them to be true; or

(c) That, having no knowledge of their truth or falsity, he yet represented them to be true of his own knowledge.[25]

[23] Pig. Torts, 269; Clark, Cont. 340. The saying of Bramwell, L. J., in Weir v. Bell, 3 Exch. Div. 238–243, is famous: "I am of opinion that, to make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or of anything else, except where some duty is shown and correlative right, and some violation of that duty and right. And when these exist, it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical and unmeaning, with the consequent uncertainty."

[24] Childs v. Merrill, 66 Vt. 302, 29 Atl. 532.

[25] Mitchell, J., in Humphrey v. Merriam, 32 Minn. 197, 198, 20 N. W. 138: "In the first there would be a knowingly false assertion as to the fact; in the second, as to his belief; and in the third, as to his knowledge of the fact. And in each case the intent to deceive would be a necessary inference. But in each case the intent to deceive must exist and must be proved." And see Id., 46 Minn. 413, 49 N. W. 199.

The courts are generally agreed that no action can be maintained for a naked lie without intent to deceive.[26] "It is settled law that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, and makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position to his damage."[27] The intent required is to harm the plaintiff,—that is, to induce him to pursue the conduct complained of.[28] It is not essential that it should be for the defendant's benefit. Thus, a person making misrepresentations as to the title of lands may be liable to the purchaser, though he has no direct interest in the transaction, and receives none of the consideration.[29] The difficulty, however, arises in determining when the law will find intent. The intent may be actual, when the case is clear, or it may be implied, usually by the jury.[30] The courts are not in harmony on the subject.

[26] "The untruth of a representation made to a party on some future occasion and for a different purpose cannot be relied on as a ground for rescinding a contract or for maintaining an action for deceit." Barnett v. Barnett, 83 Va. 504, 2 S. E. 733. And see Buschman v. Codd, 52 Md. 202; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Beach v. Tuck, 57 Hun, 588, 10 N. Y. Supp. 884; Carter v. Harden, 78 Me. 528, 7 Atl. 392. A pleading counting on fraudulent representations, which avers no more than that they were untrue, without charging that they were knowingly or fraudulently made, is bad. Fenwick v. Bowling, 50 Mo. App. 516.

[27] Park, B., in Thom v. Bigland, 8 Exch. 731. And see Murray v. Man, 2 Exch. 538; Bohn v. Kemble, 7 C. B. (N. S.) 260. And see Bell, J., in Mahurin v. Harding, 28 N. H. 128. Cf. Angell v. Loomis, 97 Mich. 5, 55 N. W. 1008. Unless complaint alleges that representations are fraudulent, it does not state a cause of action in deceit. Holst v. Stewart, 154 Mass. 445, 28 N. E. 574, distinguishing Litchfield v. Hutchinson, 117 Mass. 195.

[28] Tapp v. Lee, 3 Bos. & P. 367; Thom v. Bigland, 8 Exch. 725–731; Watson v. Poulson, 15 Jur. 1111; Polhill v. Walter, 3 Barn. & Adol. 123.

[29] Carpenter v. Wright, 52 Kan. 221, 34 Pac. 798.

[30] In an action for deceit in the exchange of real estate, a declaration alleging that defendant knowingly made false representations of material facts, by which plaintiff was induced to make the exchange, is sufficient, since the jury may infer fraudulent intent. Brady v. Finn, 162 Mass. 260, 38 N. E. 506.

False Statement with Knowledge.

The clearest case of liability for deceit arises where a person, knowing a statement to be false, and intending to deceive, is guilty of a misrepresentation. Under such circumstances, his liability is without doubt.[31] For "'sciens' without 'fraudulenter' would be sufficient to support the action."[32] But an honest statement of what one believes to be the facts, without misrepresentation of the source or extent of his information, cannot be made the basis of recovery.[33]

False Statement without Knowledge or Belief in Truth.

Where a false statement is made without knowledge, and with an actual intent to wrong another, the liability is clear. "If a man having no knowledge whatever of the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is in law guilty of fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts."[34] The belief of a party, to be an excuse for a false

[31] Marsh v. Falker, 40 N. Y. 562; Stitt v. Little, 63 N. Y. 427; Avery v. Chapman, 62 Iowa, 144, 17 N. W. 454; Simms v. Eiland, 57 Miss. 83; Holdom v. Ayer, 110 Ill. 448; Graham v. Hollinger, 46 Pa. St. 55; Huber v. Wilson, 23 Pa. St. 178; Tucker v. White, 125 Mass. 344; Hartford Ins. Co. v. Matthews, 102 Mass. 221; Terrell v. Bennett, 18 Ga. 404; Crown v. Brown, 30 Vt. 707; Zabriskie v. Smith, 13 N. Y. 322; Sollund v. Johnson, 27 Minn. 455, 8 N. W. 271; Schwabacker v. Riddle, 99 Ill. 343; Farmers' Stock-Breeding Ass'n v. Scott, 53 Kan. 534, 36 Pac. 978; Wachsmuth v. Martini, 45 Ill. App. 244; Dickson v. Reuter's Tel. Co., 3 C. P. Div. 1; Johnston v. Bent, 93 Ala. 160, 9 South. 581; Williams v. McFadden, 23 Fla. 143, 1 South. 618; Buschman v. Codd, 52 Md. 202.

[32] Per Butler, J., in Pasley v. Freeman, 3 Term R. 51, at page 60. And see Foster v. Charles, 6 Bing. 396; Polhill v. Walter, 3 Barn. & Adol. 114. See, too, per Lord Carnes, Peek v. Gurney, L. R. 6 H. L. 377–409.

[33] Kerr, Fraud & M. 54, 55, et seq.; Chandelor v. Lopus, 1 Smith, Lead. Cas. 299; Haycraft v. Creasy, 2 East, 92; Stone v. Denny, 4 Metc. (Mass.) 151; Marsh v. Falker, 40 N. Y. 562; Chester v. Comstock, Id. 575; Myer v. Amidon, 45 N. Y. 169; Oberlander v. Spiess, Id. 175.

[34] Maule, J., Evans v. Edmonds, 13 C. B. 777–786; Pawson v. Watson, Cowp. 785–788. Per Lord Mansfield, Haycroft v. Creasy, 2 East, 92–103. Per Lord Kenyon, Behn v. Burness, 3 Best & S. 751, 32 Law J. Q. B. 204;

representation, must be "a belief in the representation as made. The scienter will therefore be sufficiently established by showing that the assertion was made as of the defendant's own knowledge, and not as mere matter of opinion, with regard to facts of which he was aware

Hamlin v. Abell, 120 Mo. 188, 25 S. W. 516. Where a wife, in the presence of her husband, makes representations concerning the condition and value of land which her husband owns, and is about to exchange or sell to another person, and at the same time informs such person that she has never seen the land, and that she makes the statement from what her husband had told her of it, and she had no interest in the land, and is not benefited by the change or sale, she is not liable for damages for such representations, though they are false, in the absence of proof that she knew of their falsity. Stevens v. Allen, 51 Kan. 144, 32 Pac. 922. But see Scroggin v. Wood, 87 Iowa, 497, 54 N. W. 437. "If persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they asserted that which they knew to be untrue." Per Lord Cairns, in Reese River Silver Min. Co. v. Smith, L. R. 4 H. L. 64–79; Fisher v. Mellen, 103 Mass. 503; Cole v. Cassidy, 138 Mass. 437; Bristol v. Braidwood, 28 Mich. 191; Walsh v. Morse, 89 Mo. 568; Cabot v. Christie, 42 Vt. 121; Bower v. Fenn, 90 Pa. St. 359; Leavitt v. Sizer, 35 Neb. 80, 52 N. W. 832. A representation by one who knew nothing about the stock, and relied on defendant's statements wholly, "who assumed to know its value, whether he did or not," may be actionable fraud. Lawton v. Kittridge, 30 N. H. 500. And see Ormsby v. Budd, 72 Iowa, 80, 33 N. W. 457. "Positive assertion of knowledge is not required. If a man makes an untrue representation as of his own knowledge, not knowing whether it be true or false, it is a fraud. The falsehood is intentional. And an unqualified affirmation amounts to an affirmation as of one's own knowledge. Stone v. Denny, 4 Metc. (Mass.) 151; Wilder v. De Cou, 18 Minn. 470 (Gil. 421). The fraud is as great as if the party knew his statement to be untrue. It is, in law, a willful falsehood for a man to assert, as of his own knowledge, a matter of which he has no knowledge. Kerr, Fraud & M. 54. It is immaterial whether such statements were made innocently or knowingly. It is as fraudulent to affirm the existence of a fact about which one is in entire ignorance as it is to affirm what is false, knowing it to be so." Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566; Martin v. Hill, 41 Minn. 337, 43 N. W. 337; Montreal River Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507; Leavitt v. Sizer, 35 Neb. 80, 52 N. W. 832; Totten v. Burhans, 91 Mich. 495, 51 N. W. 1119; Phelps v. Smith, 116 Ind. 387, 17 N. E. 602; Bartholomew v. Pierson, 112 Ind. 430, 14 N. E. 249; Stix v. Sadler, 109 Ind. 254, 9 N. E. 905; Indianapolis, P. & C. Ry. Co. v. Bush, 101 Ind. 582; Pittsburgh, C. & St. L. Ry. Co. v. Spencer, 98 Ind. 186; Dixon v. Duke, 85 Ind. 434; Slauter v. Fa-

that he had no such knowledge." [35] Although the party making the representation may have had no knowledge of its falsity, yet he will be equally responsible if he had no belief in its truth, and made it "not caring whether it was true or false." [36]

False Statement without Knowledge, but with Negligence.

Where, however, there is neither knowledge of falsity nor actual intention to deceive, but a misrepresentation in fact, on which another acts to his damage, the courts of England and of this country are not in entire harmony with each other, nor with themselves, as to the rule of liability. There may be both negligence in making the statement and negligence as to the information on which the statement is based.[37]

vorite, 107 Ind. 291, 4 N. E. 880; Furnas v. Friday, 102 Ind. 129, 1 N. E. 206; West v. Wright, 98 Ind. 335; Roller v. Blair, 96 Ind. 203; Bethell v. Bethell, 92 Ind. 318; Brooks v. Riding, 46 Ind. 15; Krewson v. Cloud, 45 Ind. 273; Booher v. Goldsborough, 44 Ind. 490; Frenzel v. Miller, 37 Ind. 1; Fisher v. Mellen, 103 Mass. 503; Brownlie v. Campbell, 5 App. Cas. 925; Slim v. Croucher, 1 De Gex, F. & J. 518; Bullis v. Noble, 36 Iowa, 618; Raley v. Williams, 73 Mo. 310; Oregon Ry. Co. v. Oregon Ry. & Nav. Co., 10 Sawy. 464, 22 Fed. 245; Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537; Cox v. Highley, 100 Pa. St. 249. In an action for falsely representing to plaintiff that the forged indorsement of a check paid by the latter was genuine, defendant is not liable if he acted in good faith, and it need not appear that he had adequate reason for his belief. Lamberton v. Dunham, 165 Pa. St. 129, 30 Atl. 716.

[35] Per Steele, J., in Cabot v. Christie, 42 Vt. 121, 126–127, citing Taylor v. Ashton, 11 Mees. & W. 418; Hammatt v. Emerson, 27 Me. 308–326; Bennett v. Judson, 21 N. Y. 238; Stone v. Denny, 4 Metc. (Mass.) 151; Hazard v. Irwin, 18 Pick. (Mass.) 95.

[36] Per Smith, J., in Joliffe v. Baker, 11 Q. B. Div. 255–275; Haycraft v. Creasy, 2 East, 92. Per Lawrence, J., in Rex v. Mawbey, 6 Term R. 619–637.

[37] The question for liability for negligence may arise in connection with the subject of misrepresentation in two ways: The negligence may come in at two different stages: (1) In the formation of the belief which the representation expresses; as where the defendant knows that he is representing the existence of certain facts, and believes his representations to be true, but has been guilty of carelessness in not sufficiently examining the ground of his belief, a reasonable examination of which would have disclosed the real state of things. (2) In the expression of the belief, or, in other words, in the act of making the representation, as where the defendant, knowing that cer-

Same—English Rule.

The main current of English authorities is to the effect that an action for damages for deceit cannot be maintained, except upon proof that the statement made was false in fact and fraudulent in intent; in other words, actual knowledge of the falsity, or actual fraud, is essential, and mere negligence in not acquiring such knowledge or in expressing belief will not suffice,[38] and an action of deceit will not lie in respect of a negligent, as distinguished from a fraudulent, misrepresentation.[39] The leading case on the subject is Derry v. Peek,[40] where it was held that the directors of a company were not liable to persons who had bought shares on the faith of a pros-

tain facts do not exist, forgets that his language or conduct will be reasonably construed as a representation of the existence of such facts, the negligence consisting in the making of a deceptive statement which he has no intention of making at all.

[38] Smith, J., in Joliffe v. Baker, 11 Q. B. Div. 274; Dickson v. Reuter's Tel. Co., 3 C. P. Div. 5, per Bramwell, L. J.; Taylor v. Ashton, 11 Mees. & W. 418; Wilde v. Gibson, 1 H. L. Cas. 605–633, per Lord Campbell.

[39] Angus v. Clifford [1891] 2 Ch. 449. Defendants, directors of a mining company, in a prospectus stated that certain reports of experts as to the value of the company's property had been prepared "for the directors." Plaintiff took shares on the faith of this statement. The report in question had been made by the instruction and in the interest of the vendors of the mine, and not of the directors. It was held that, as it appeared that the directors had used the statement carelessly, and not with intent to deceive, an action of deceit would not lie (63 Law T. [N. S.] 684, and 39 Wkly. Rep. 252, reversed). Angus v. Clifford, supra. "The gist of the action is fraud in the defendants, and damage to the plaintiff. Fraud means an intention to deceive. If there was no such intention, if the party honestly stated his opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue." Lord v. Goddard, 13 How. 198. Guilty knowledge and intent to deceive were essential to plaintiff's recovery. Graham v. Hollinger, 46 Pa. St. 55. And see Collins v. Evans, 5 Q. B. 820–826; Behn v. Kemble, 7 C. B. (N. S.) 260; Thom v. Bigland, 8 Exch. 725; Childers v. Wooler, 2 El. & El. 287. But see Fuller v. Wilson, 3 Q. B. 58, 1009. With respect to dispute between courts of queen's bench and exchequer, see Fuller v. Wilson, 3 Q. B. 58; Evans v. Collins, 5 Q. B. 820; Ormrod v. Huth, 14 Mees. & W. 651. And cf. Taylor v. Ashton, 11 Mees. & W. 401; Shrewsbury v. Blount, 2 Man. & G. 475; Western Bank v. Addie, L. R. 1 H. L. Sc. 145–162.

[40] L. R. 14 App. Cas. 337–374, 61 Law T. (N. S.) 265, 58 Law J. Ch. (N. S.)

pectus. This prospectus represented that the company had power to operate tramways by steam. The representation proved to be false in fact. It was held that the mere negligence in making the statement was not the basis for an action for deceit, notwithstanding its falsity, although it may afford evidence of fraud. Lord Herschell said: "I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of that he states. To prevent a false statement from being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground; for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made." The conclusion reached was that, while there was a moral duty imposed on those who put before the public a prospectus to induce others to embark their money in a commercial enterprise, to be vigilant to see that it contained such representations only as are in strict accordance with facts, a special intervention of legislature would be required to convert this moral duty into a legal duty.[41] The rule adopted by the

864. Cf. Cotton, L. J., in same case, 37 Ch. Div. 541–568, 59 Law T. (N. S.) 78. "Where a man makes a false statement to induce another to act upon it, without reasonable ground to suppose it to be true, and without taking care to ascertain whether it is true, he is civilly liable as much as a person who commits what is usually called fraud, and tells an untruth knowing it to be an untruth. Sir J. Hannen, at page 578, 37 Ch. Div. Cf. Weir v. Bell, 3 Exch. Div. 243; Dickson v. Reuter's Tel. Co., 3 C. P. Div. 6.

[41] Lord Herschell, J., in Derry v. Peek, L. R. 14 App. Cas. 337; Clerk & L. Torts, 412–631. An article on liability for false representations where no intention to deceive was shown, but where negligence only on the part of the person making them was proven. Justice of the Peace. Republished in 28 Ir. Law T. 33.

house of lords, in Derry v. Peek, however, has been generally criticised both in England [42] and America.[43]

The American Rule.

In Illinois, Chief Justice Craig, in Schwabacker v. Riddle,[44] said: "We are aware of no authority which will sanction a recovery in an action for deceit, unless a false representation has been made knowingly with intent to deceive." In Massachusetts, the rule is that there can be no recovery unless the representations were known

[42] Clerk & L. Torts, Append., to the effect that it is doubtful whether this rule is consistent with Burrowes v. Lock, 10 Ves. 470, and Slim v. Croucher, 1 De Gex, F. & J. 518; and that the rule of this case will not be extended beyond the point to which authority compels its application, and that such cases of implied representations will be referred to as anomalous exceptions to the general rule. London Law J. July 6, 1890. "The extension attempted, from giving the effect of fraud to statements made in reckless ignorance of the truth or falsehood, to mistaken statements honestly made, ignores the element of intention in fraud. A mistaken statement honestly made may give a ground for the rescission of a contract, but not for affixing to the whole contract the ill savor of fraud. Upon the rescission of a contract, the rights of the parties can be adjusted, but fraud cuts down everything, and exposes those guilty of it to the stringent and, if successful, degrading remedy by an action of deceit. Commercial morality is better forwarded by following a level standard, than by setting up the unattainable in everyday life, and calling things by names which would be scouted by the social opinion of honorable business men."

[43] "The faith of investors in corporate securities has received many shocks from many directions, but it is not easy to imagine any quiet blow more likely to be more general and severe in its results than will be given by the distinct understanding on the part of the business world that specific statements signed by the directors, in a prospectus issued to induce investment, do not mean that the directors have even reasonable ground to believe what they sign to be true. Investors are to understand that, if they come to grief by relying on such prospectuses, they have no redress by showing that the statements were false, that the directors might have known their falsity by proper attention, nor even by showing that the directors had no reasonable ground to believe their statements to be true." Mr. Austin Abbott, in the Daily Register. And see 23 Am. Law Rev. 1007.

[44] 99 Ill. 343–348; Wachsmuth v. Martini, 45 Ill. App. 244; Knight v. Gaultney, 23 Ill. App. 376; Ward v. Luneen, 25 Ill. App. 164; Antle v. Sexton, 137 Ill. 410, 27 N. E. 691. But see Case v. Ayers, 65 Ill. 142; Angus v. Clifford [1891] 2 Ch. 449; Da Lee v. Blackburn, 11 Kan. 190.

by the defendant to be false, and were made with intent to deceive,[45] or were made as of the defendant's own knowledge, when he did not know them to be true.[46] The federal courts of the United States have recognized that a positive statement as of the defendant's own knowledge, recklessly made without knowledge of its truth, is actionable if false, and it need not be alleged that the representation was fraudulently made with intention to induce the plaintiff to act.[47] The general spirit of American decisions accords with this rule.[48]

[45] Nowlan v. Cain, 3 Allen (Mass.) 263; Brown v. Rice, 26 Grat. 467; Hull v. Fields, 76 Va. 607; Peek v. Derry (1887) 37 Ch. Div. 541, overruled in Derry v. Peek (1889) 14 App. Cas. 337.

[46] Knowlton, J., in Nash v. Trust Co., 159 Mass. 437–440, 34 N. E. 625. In this case Derry v. Peek, 14 App. Cas. 337, was cited with approval. And see Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168; Burns v. Dockray, 156 Mass. 135, 30 N. E. 551. However, in Goodwin v. Trust Co., 152 Mass. 189–202, 25 N. E. 100, it was said that the Massachusetts rule is not "precisely that declared by the house of lords in Derry v. Peek." Cf. rule in Litchfield v. Hutchinson, 117 Mass. 195. As to the latter part of the rule, see, also, Farmers' Stock-Breeding Ass'n v. Scott, 53 Kan. 534, 36 Pac. 978.

[47] Cooper v. Schlesinger, 111 U. S. 148–155, 4 Sup. Ct. 360. And see Barnes v. Union Pac. Ry. Co., 4 C. C. A. 199, 54 Fed. 87; Lynch v. Mercantile Trust Co., 18 Fed. 486. "To hold a person liable as for a fraud in making a representation, the jury must be satisfied that he did not actually believe the facts to be as represented, or that he had no reasonable ground for supposing them as represented." Thayer, J., in Glaspie v. Keator, 5 C. C. A. 474, 56 Fed. 203–210, citing Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Savage v. Stevens, 126 Mass. 207; Bennett v. Judson, 21 N. Y. 238; Buford v. Caldwell, 3 Mo. 477–480; Barnes v. Railway Co., 4 C. C. A. 199, 54 Fed. 87. "The party selling property must be presumed to know whether the representation which he makes of it is true or false. If he knows it to be false, that is fraud of the most positive kind; but if he does not know it, then it can only be from gross negligence. And in contemplation of a court of equity, representations founded on mistake, resulting from such negligence, is fraud. 6 Ves. 180, 189; Jeremy, 385, 386. The purchaser confides in it, upon the assumption that the owner knows his own property, and truly represents it; and, as well argued in the case in Cranch (McFarren v. Taylor, 3 Cranch, 281), it is immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud. The injury to him is the same, whatever may have been the motives of the seller." Smith v. Richards, 13 Pet. 38. And see Jewett v.

[48] See note 48 on following page.

188. The false representation may be—

(a) Expressed, or

(b) Implied.

Express Misrepresentation.

The simplest case of deceit is that of express statements by one person to another, false in themselves, made knowingly, with in-

Carter, 132 Mass. 335; Cole v. Cassidy, 138 Mass. 437; Masson v. Bovet, 1 Denio (N. Y.) 69–73; Lockbridge v. Foster, 4 Scam. (Ill.) 569; Joice v. Taylor, 6 Gill & J. (Md.) 54–58; McFerran v. Taylor, 3 Cranch (U. S.) 270; Doggett v. Emerson, 3 Story, 700–732, 733, Fed. Cas. No. 3,960; Burrowes v. Lock, 10 Ves. 470–475; Ayre's Case, 25 Beav. 513; Sears v. Hicklin, 13 Colo. 143, 21 Pac. 1022; Haight v. Hayt, 19 N. Y. 464; Stevens v. Allen, 51 Kan. 144, 32 Pac. 922; Antle v. Sexton, 137 Ill. 410, 27 N. E. 691.

[48] It has been held in Wisconsin that it is immaterial whether the misrepresentations were made willfully or not. Cotzhausen v. Simmons, 47 Wis. 103, 1 N. W. 473. And see Davis v. Nuzum, 72 Wis. 439, 40 N. W. 497; McKennon v. Vollmar, 75 Wis. 82, 43 N. W. 800. This general doctrine is approved in Montreal River Lumber Co. v. Mihills, 80 Wis. 540, 50 N. W. 507, in which the court say: "Undoubtedly, it is a question upon which courts are not all in harmony, not even with themselves." In Burke v. Railroad Co., 83 Wis. 410, 53 N. W. 692, the auditor of a railroad company represented to plaintiff that the shortage of a certain station agent was a certain amount, and that, on the payment of that sum, the agent would be retained by the company. On the strength of such representation plaintiff advanced the money to replace the shortage. The agent's shortage was afterwards found to be double the amount represented, and he was discharged by the company; and it was held that plaintiff was entitled to recover the money paid on the false representation, though the auditor believed it to be true at the time he made it. In Ross v. Hobson (Ind. Sup.) 26 N. E. 775, it was held that a person who has made representations charged to be false cannot show in defense that he was not informed in regard to the matters represented. And see Kirkpatrick v. Reeves, 121 Ind. 280, 22 N. E. 139. In Hexter v. Bast, 125 Pa. St. 52, 17 Atl. 252, Judge Clark held that, as a general rule, the statement must be both false and fraudulent, but that the fraud may consist in representing that one knows that of which he is in fact consciously ignorant. And in Griswold v. Gebbie, 126 Pa. St. 353, 17 Atl. 673, Judge Mitchell held that a reckless assertion of a material matter shown to be false, made in entire ignorance, throws on the defendant the burden of showing his belief in the truth of the representation. In Michigan, the rule seems to be settled that it is immaterial whether a false representation is made innocently or fraudulently, if by its means the plaintiff is injured. Holcomb v. Noble, 69 Mich. 396, 37 N. W. 497. Accordingly, in an action to recover the amount

tent to deceive, in reliance on which the latter acts to his damage.[49] Thus, in Barley v. Walford,[50] "the plaintiff sent to the defendant some samples of printed handkerchiefs with a view to obtaining orders from him. The defendant told him that the design he had printed was a registered one, and that the owner of it was going to proceed against him for an injunction. The plaintiff, in consequence, was put to considerable expense in proceeding to London to make inquiries. The statement was false. Another element of damage was that the defendant, having delayed the plaintiff's manufacture, made use of the design himself, and obtained the command of the market which the plaintiff would otherwise have had for his wares. There was an averment that the defendant knew the statement was false, and that he knowingly and willfully uttered it; and the court held that the plaintiff had stated a good cause of action. Here the statement was made ex-

paid for a contract appointing plaintiff general agent in certain counties, because of misrepresentations, evidence as to whether defendant intended any fraud is admissible, and the result to plaintiff is the same whether defendant acted in good or bad faith. Angell v. Loomis, 97 Mich. 5, 55 N. W. 1008. False representations by one selling out his business, whether innocently or fraudulently made, that certain accounts included in the sale of his interest were collectible, entitle the purchaser to damages. Totten v. Burhans, 91 Mich. 495, 51 N. W. 1119. The Minnesota rule as to deceit is stated in Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360: "An action for deceit lies against one who makes a false representation of a material fact susceptible of knowledge, knowing it to be false, or as of his own knowledge, when he does not know whether it is true or false, with intention to induce the person to whom it is made, in reliance upon it, to do or refrain from doing something to his pecuniary hurt, when such person, acting with reasonable prudence, is thereby deceived and induced to so do, or refrain, to his damage." Bullitt v. Farrar, 42 Minn. 8, 43 N. W. 566; Kiefer v. Rogers, 19 Minn. 32–36 (Gil. 14). And, generally, see Litchfield v. Hutchinson, 117 Mass. 195–198; Hazard v. Irwin, 18 Pick. (Mass.) 96; Savage v. Stevens, 126 Mass. 207; Frost v. Angier, 127 Mass. 212.

[49] McGibbons v. Wilder, 78 Iowa, 531, 43 N. W. 520.

[50] 9 Q. B. Div. 197. A seller's false statement that the stock he is offering has always paid a certain rate of dividends is a positive statement of a material fact, which may be actionable in deceit. Handy v. Waldron (R. I.) 29 Atl. 143. See, also, McClellan v. Scott, 24 Wis. 81; Griffin v. Farrier, 32 Minn. 474, 21 N. W. 553; Cruess v. Fessler, 39 Cal. 336; Chrysler v. Canaday, 90 N. Y. 272; Eaton v. Winnie, 20 Mich. 165, 166. Post, note 16.

pressly to the plaintiff." [51] Among the principal questions which arise in this connection is the construction of the words of the misrepresentation. The proper construction is not necessarily the literal one. "If a person makes a representation of that which is true, if he intend that the party to whom the representation is made should not believe it to be true, that is a false representation." [52] Moreover, an express statement may involve an actionable concealment. "Suppose you state a thing partially, you make as false a statement as if you misstated it altogether. Every word may be true, but if you leave out something which qualifies it, you may make a false statement. For instance, if, pretending to set out the report of a surveyor, you set out two passages in his report, and leave out a third passage which qualifies them, that is an actual misstatement." [53] But the alleged misrepresentation receives a fair construction under the usual rules, and will not be strained beyond the fair purport of the words. Therefore, the mere recommendation by a person interested in the construction of a railroad, that a proposition for construction be accepted, is not a representation on which an action for deceit can be maintained by a bank which cashes a draft for the contractors, drawn by them on the construction company, which made a contract with them.[54] And courts, if there is sufficient evidence of misrepresentation, incline to submit the import of the statement for determination by the jury.[55] The test of express misrepresentation is not what the defendant in his own mind intended, but what any one might reasonably suppose to be the meaning of the words used.[56] In order

[51] Pig. Torts, 255. And see Stewart v. Stearns, 63 N. H. 99.

[52] Per Alderson, B., in Moens v. Heyworth, 10 Mees. & W. 147–158.

[53] Per James, L. J., in Arkwright v. Newbold, 17 Ch. Div. 301, 318. On the other hand, where a retail merchant makes an untrue statement of his affairs to a mercantile agency, and the latter transmits to a wholesale firm a statement still more favorable to the retail dealer, and the wholesaler sells to the retailer, and is unable to collect from him, the latter is not liable for deceit, since the credit was given on a statement which was different from the one published by him. Wachsmuth v. Martini, 154 Ill. 515, 39 N. E. 129.

[54] Kelly v. Gould, 141 N. Y. 596, 36 N. E. 320 (64 Hun, 639, 19 N. Y. Supp. 349, affirmed).

[55] Powers v. Fowler, 157 Mass. 318, 32 N. E. 166.

[56] Cotton, L. J., in Arkwright v. Newbold, 17 Ch. Div. 301–322. And se-

to establish a case of false representation, it is not necessary that things which are false shall have been stated as if they were true, but where the representation of that which is true creates an obvious impression which is false, as to one who seeks to profit by the misrepresentation he has thus produced, it is a case of false representation.[57]

Implied Misrepresentation.

Representations may be implied from conduct. "If one conducts himself in a particular way, with the object of fraudulently inducing another to believe in the existence of a certain state of things, and to act upon the basis of its existence, and damage resulted therefrom to the party misled, he who misled him will be just as liable as if he had misrepresented the facts in express terms. * * * Thus, the representation of safety may be implied from the issue of chattels for use, from the loan or gift of a dangerous chattel, or it may be implied from the defendant's forgetting what construction will be put on his conduct." Thus, leaving gates open at a level crossing "amounts to a statement and a notice to the public that the line at that time is safe for crossing." [58] So, where an owner of premises invites others to come thereon, it being reasonable for the persons invited to infer from such invitation an intention on the part of the owner to represent that, so far as he knows, there is no hidden source of danger on the premises, the invitation will amount to a representation to that effect; and if the premises are in fact unsafe, by reason of a secret defect, existing to the owner's knowledge, and damage results from their unsafe condition, the owner will be liable, none the less because, not having the point present to his mind, he did not intend his invitation to be so construed.[59] No doubt, in practice, the claim in such

Lindley, J., in Smith v. Chadwick, 20 Ch. Div. 27–79, as to line of distinction between negligence and fraud on other points; Lord Blackburn in Smith v. Chadwick, 20 Ch. Div. 79. And, generally, see Thom v. Bigland, 8 Exch. 725.

[57] Lomerson v. Johnston, 47 N. J. Eq. 312, 20 Atl. 675.

[58] Lord Cairns, in North-Eastern R. Co. v. Wanless, L. R. 7 H. L. 12–15; Farrant v. Barnes, 11 C. B. (N. S.) 553. And see post, p. 881, "Negligence"; "Case with Reference to Custom."

[59] Fry, L. J., in Cunnington v. Great Northern Ry. Co., 49 Law T. (N. S.) 392–394.

cases is never framed in deceit, but is simply charged as negligence, but the omission in which the negligence consists, and which lies at the bottom of the liability, is nothing else than a misrepresentation of safety, whereby the plaintiff has been induced to act to his own damage. But, though the practice is otherwise, there seems to be no valid reason why actions of this nature should not be framed in deceit. It was probably a recognition of the close connection between the action of deceit and the action for negligently inducing another to act to his damage, which induced Willes, J., to say, with reference to the liability of the owner of dangerous premises towards a bare licensee, that "to create a cause of action, something like fraud must be shown";[60] and gave rise to the expression, which is frequently to be met, that the licensor is liable only where the condition of the premises was in the nature of a "trap."[61]

In effect, it often occurs that the suit by the servant against the master for failing to perform the duty of the master to the servant, —as with respect to exercising reasonable care to furnish safe instrumentality, place, and fellow servants,—is essentially upon deceit, rather than for negligence in its conventional sense; or, perhaps, it is more accurate to say that here negligence and deceit coincide. The master represents to the servant that he has performed his duty in these respects. The servant has a right to rely upon such representation, whether made in fact or implied by law. Especially is it true that, where the servant, his suspicions being aroused by appearances, complains to the master of the danger of place, instrumentality, or fellow servant, and the master allays the servant's fears by assurances of safety, as a matter of superior knowledge, or promises to remedy the defect, and fails to do so, if these representations are false in fact, and the servant's own conduct in failing to discover such defects or imperfections as he could be reasonably held to find out, then he is entitled to recover for consequent damages. And if the master has exercised good faith, even then, although he exposed his servant to danger, there can be

[60] Gautret v. Egerton, L. R. 2 C. P. 371–375.

[61] Clerk & L. Torts, 402, citing Bolch v. Smith, 7 Hurl. & N. 736, per Wilde, B.; Gautret v. Egerton, L. R. 2 C. P. 371–374, per Willes, J.; Corby v. Hill, 4 C. B. (N. S.) 556.

no recovery. Ordinarily, however, the law on this point is worked out through the phraseology of negligence. Hence, this portion of the law will be considered under that subject.

189. A false representation may consist in either or both—
(a) The assertion of a falsehood, or
(b) The suppression of the truth.

When a falsehood has been asserted, deceit is manifestly made out. But conduct may fall far short of the assertion of a falsehood, and still be actionable as fraudulent. Thus, fraud may be perpetrated by encouraging and taking advantage of a delusion known to exist in the minds of others.[63]

A misrepresentation does not consist in words alone, but may grow out of the act of concealment of a material fact.[64] Thus, it was held that deceit lay where the vendor of a house, knowing of a defect in a wall, plastered it up and papered it over.[65]

[63] Busch v. Wilcox, 82 Mich. 315, 46 N. W. 940.

[64] Chisholm v. Gadsden, 1 Strob. (S. C.) 220; Lobdell v. Baker, 1 Metc. (Mass.) 193. And see Tryon v. Whitmarsh, 1 Metc. (Mass.) 1; Boyd's Ex'rs v. Browne, 6 Pa. St. 310; Decker v. Hardin, 5 N. J. Law, 579; Bokee v. Walker, 14 Pa. St. 139; Rheem v. Naugatuck Wheel Co., 33 Pa. St. 358; Miller v. Curtiss (Super. N. Y.) 15 N. Y. Supp. 140. Where a subscription for corporate stock is obtained by the representation that a prominent business man has subscribed for a large amount, and the fact that he paid nothing for his stock is concealed, such concealment makes the representation fraudulent. Coles v. Kennedy, 81 Iowa, 360, 46 N. W. 1088. Where, during negotiations for the sale of land, defendant, the owner, assures plaintiff that the title is good, and conceals from her the report that his grantor was insane at the time he parted with the land, and plaintiff on his representations purchased the land, which is afterwards recovered from her by the guardian of the defendant's grantor, who has been adjudged insane, such representations and concealments are fraudulent. Burns v. Dockray, 156 Mass. 135, 30 N. E. 551; Firestone v. Werner, 1 Ind. App. 293, 27 N. E. 623.

[65] Cited in Pickering v. Dawson (1813) 4 Taunt. 779; Schneider v. Heath (1813) 3 Camp. 506: "If I sell a horse which has lost an eye, no action lies; but otherwise if I sell him with a counterfeit eye." Southerne v. Howe, 2 Rolle, 5. And see Hill v. Gray, 1 Starkie, 434.

Suppression of truth, where there is a duty to speak, is as much a legal wrong as a positive falsehood.[66] Therefore children who permit a third person to purchase land of their father in the belief that he is mentally competent, and without any knowledge or information to the contrary, are estopped from asserting his incompetency in a suit brought by them, as his heirs, to set aside

[66] Allen v. Addington, 7 Wend. 9; Anon. (1876) 67 N. Y. 598; Hotchkiss v. Third Nat. Bank, 127 N. Y. 329, 27 N. E. 1050; Stewart v. Wyoming Cattle Ranch Co., 128 U. S. 383, 9 Sup. Ct. 101. "As to whether there is a duty to speak, on pain of being guilty of fraud by reason of silence," Peckham, J., said, in Rothmiller v. Stein (N. Y. App.) 38 N. E. 718, "certain rules have been laid down by the court, which differ somewhat in their breadth and scope with the different and varying circumstances under which they are to be applied. The contract of marine or life insurance has been held to require the exhibition of the very highest good faith on the part of the person desiring insurance, and he has been held liable for the concealment of any material facts known to him to exist, although such concealment was not fraudulent. On the other hand, in the case of a contract of guaranty, it has been held that the concealment of a fact, in order to vitiate the contract, must be fraudulent,—that is, concealed with a fraudulent purpose, with the intent to deceive. North British Ins. Co. v. Lloyd, 10 Exch. 523; Kidney v. Stoddard, 7 Metc. (Mass.) 252. In regard to sales of goods, the common law has adopted a rule which is not so strict as in the above classes of contracts. The great maxim, 'caveat emptor,' is by this law applied in a variety of cases, and, unless there be some misrepresentation or artifice to disguise the thing sold, or some warranty as to its character or quality, the vendee is bound by the sale, notwithstanding the existence of intrinsic defects and vices, known to the vendor and unknown to the vendee, materially affecting its value. 1 Story, Eq. Jur. (10th Ed.) §§ 212, 212a. This is the rule in regard to those who deal at arm's length with each other, and between whom there is no condition of special confidence or fiducial relationship existing in regard to the necessity of giving information which has not been asked, the rule differs somewhat at law and in equity, and while the lower courts would permit no recovery of damages against a vendor because of mere concealments of facts under certain circumstances, yet, if the vendee refuses to complete the contract because of the concealment of a material fact on the part of the other, equity would refuse to compel him so to do, because equity only compels the specific performance of a contract which is fair and open, and in regard to which all material matters known to each have been communicated to the other. Id. § 206. And the rule of caveat emptor, even in regard to the sale of chattels, is applied with certain restrictions, and is not permitted to obtain in a case where it is plain it was the duty of the vendor to acquaint the vendee with a material fact known to the former and

the deed on that ground.[67] Suppression of truth may, moreover, become actionable. Therefore concealment, by the owner of a business enterprise, of a decline in its profits between the date of his agreement to sell and the signing of the contract of sale, is actionable when the purchaser has no opportunity to discover the decline, and has agreed to buy on the faith of representations as to the prior rate of profit, having told the seller that he would not buy if there had been a decline.[68] If, however, there be no duty to disclose, failure to tell the truth is not actionable fraud.[69] Thus deceit does not lie for leasing a house required for immediate occupation without disclosing that it is in a ruinous condition.[70]

190. An action for fraud or deceit does not lie where the representation complained of consists merely in—

(a) An expression of opinion;

(b) A representation of law;

(c) A promise or representation as to future events.

Expression of Opinion.

Statements which purport to be mere opinion, as distinguished from statements of facts, cannot be made the foundation of recov-

unknown to the latter. It has been held that it is the duty of one who is about to sell a flock of sheep to inform the intending purchaser of the fact, if it be known to the vendor, of the existence of a highly contagious disease among the sheep to be sold, and that it is fraudulent suppression of a material fact if it is knowingly concealed."

[67] Angell v. Loomis, 97 Mich. 5, 55 N. W. 1008. And see Kidney v. Stoddard, 7 Metc. (Mass.) 252. But see Cooley, Torts, 123.

[68] Loewer v. Harris, 6 C. C. A. 394, 57 Fed. 368. And see French v. Vining, 102 Mass. 132. Cf. Wellington v. Downer Kerosene Oil Co., 194 Mass. 64. And see Crowell v. Jackson, 53 N. J. Law, 656, 23 Atl. 426; Burns v. Dockray, 156 Mass. 135, 30 N. E. 551; Coles v. Kennedy, 81 Iowa, 360, 46 N. W. 1088. A purchase of stock from a stockholder at a low price, by an officer of the corporation, is not fraudulent because such officer has knowledge in his official capacity of favorable sales of other stock, which enhanced the value of the stock generally, and of which fact the seller was ignorant. Crowell v. Jackson, 53 N. J. Law, 656, 23 Atl. 426.

[69] See Lord Cairns, in Peek v. Gurney, L. R. 6 H. L. 377.

[70] Keates v. Lord Cadogan (1851) 10 C. B. 591. Cf. Smith v. Marrable (1843) 11 Mees. & W. 5; Wilson v. Finch-Hatton (1877) 2 Exch. Div. 336; Sheldon

ery.[71] "The misrepresentation must relate to alleged facts, or to the condition of things as then existent. * * * It must be as to matters of fact substantially affecting his (the aggrieved party's) interest, not as to matters of opinion, judgment, probability, or expectation. An assertion respecting them is not an assertion as to any existent fact. The opinion may be erroneous; the judgment may be unsound; the expected contingency may never happen; the expectation may fail."[72] Thus, the phrase "worth so much" is a mere expression of an opinion;[73] but to say that defendant "gave so much for" specified property has been held to represent a fact.[74] So, to represent what dividends certain stock would pay in the

v. Davidson, 85 Wis. 138, 55 N. W. 161. Cf. Franklin v. Brown, 118 N. Y. 110, 23 N. E. 126. So, if defendant sell diseased pigs, under agreement that they should be taken "with all faults," no action lies for failure to disclose condition. Ward v. Hobbs (1878) L. R. 4 App. Cas. 14.

[71] Derry v. Peek, L. R. 14 App. Cas. 337; La Lievre v. Gould [1893] 1 Q. B. 491; Buschman v. Codd, 52 Md. 202; Holbrook v. Connor, 60 Me. 578; Aetna Ins. Co. v. Reed, 33 Ohio St. 283; Jenne v. Gilbert, 26 Neb. 457, 42 N. W. 415; Fulton v. Hood, 34 Pa. St. 365; Haven v. Meal, 43 Minn. 315, 45 N. W. 612; Doran v. Eaton, 40 Minn. 35, 41 N. W. 244; Rawson v. Harger, 48 Iowa, 269; Tuck v. Downing, 76 Ill. 71; Sheldon v. Davidson, 85 Wis. 138, 55 N. W. 161; Crown v. Carriger, 66 Ala. 590; Belcher v. Costello, 122 Mass. 189; Nash v. Minnesota Title Ins. & Trust Co., 159 Mass. 437, 34 N. E. 625, and cases cited at page 440, 159 Mass., and page 625, 34 N. E.; Gordon v. Butler, 105 U. S. 553; Southern Development Co. v. Silva, 125 U. S. 249, 8 Sup. Ct. 881; Sawyer v. Prickett, 19 Wall. 146; Benton v. Ward, 47 Fed. 253; Id., 59 Fed. 411; Scrogin v. Wood, 87 Iowa, 497, 54 N. W. 437 (that a stallion would not produce sorrel colts). Cf. Peak v. Frost, 162 Mass. 298, 38 N. E. 518.

[72] Appleton, C. J., in Long v. Woodman, 58 Me. 49, citing Pedrick v. Porter, 5 Allen, 324, to the effect that an action of tort for deceit in the sale of property does not lie for malicious and fraudulent representation concerning profits that may be made in the future. Hazard v. Irwin, 18 Pick. (Mass.) 95.

[73] Harvey v. Young (1602) 1 Yel. 21.

[74] Lindsay Petroleum Co. v. Hurd (1874) L. R. 5 P. C. 243. And see Conlan v. Roemer, 52 N. J. Law, 53, 18 Atl. 858; Smith v. Carlson, 36 Minn. 220, 30 N. W. 761; Sandford v. Handy, 23 Wend. 260; Van Epps v. Harrison, 5 Hill, 63; Page v. Parker, 43 N. H. 363. But see Hemmer v. Cooper, 8 Allen, 334; Ekins v. Tresham, 1 Lev. 102; Dobell v. Stevens, 3 Barn. & C. 623; Cooper v. Lovering, 106 Mass. 79; Holbrook v. Connor, 60 Me. 578. But see dissenting opinion of Dickerson, J., Bishop v. Small, 63 Me. 12. And see cases collected in Cooley, Torts (2d Ed.) 56. Where a stock of merchandise in a retail store was marked in both letters and figures, and the price indicated by the

future is to express an opinion,[75] but to represent that stock had paid a specified rate of dividend at prior times is to state a fact.[76]

The reason, apparently, is that "if any one relies on mere opinion, instead of ascertaining facts, it is his own folly."[77] However, in some cases an opinion is regarded as substantially a fact, for the misrepresentation of which an action for deceit will lie. Thus, a misrepresentation that "the parties were good" creates liability in deceit on the part of persons making such statement, if they are not parties to the contract.[78] Indeed, perhaps the true view of the law is that an expression of an opinion not honestly entertained, and intended to be acted upon, cannot, in many cases, be regarded otherwise than as a fraud.[79] The fact that an opinion is a state of the mind is no insuperable objection. "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what is the state of a man's mind at a particular time; but, if it can be ascertained, it is as much

letters was known only to the seller, representations as to what the private marks indicated are not representations as to value, nor expressions of opinion. Elerick v. Reid, 54 Kan. 579, 38 Pac. 814.

[75] Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Totten v. Burhans, 91 Mich. 495, 51 N. W. 1119.

[76] Handy v. Waldron (R. I.) 29 Atl. 143. And, generally, see Crane v. Elder, 48 Kan. 259, 29 Pac. 151; Childs v. Merrill, 63 Vt. 463, 22 Atl. 626; Winston v. Young, 47 Minn. 88, 49 N. W. 521; ante, note 50.

[77] Sieveking v. Litzler, 31 Ind. 13.

[78] Pasley v. Freeman, 3 Term R. 51; Robbins v. Barton, 50 Kan. 120, 31 Pac. 686; Blecher v. Costello, 122 Mass. 189; Kinkler v. Jurica, 84 Tex. 116, 19 S. W. 359; Medbury v. Watson, 6 Metc. (Mass.) 246; Pilcher v. Levino (Sup.) 30 N. Y. Supp. 314; Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360. And see Marsh v. Falker, 40 N. Y. 562; Percival v. Harres, 142 Pa. St. 369, 21 Atl. 876; Dotly v. Campbell, 1 How. Prac. (N. S.) 101; Lyons v. Briggs, 14 R. I. 222; Redding v. Wright, 49 Minn. 322, 51 N. W. 1056; Jude v. Woodburn, 27 Vt. 415; Hubbell v. Meigs, 50 N. Y. 480–489; Hickey v. Morrell, 102 N. Y. 454–463, 7 N. E. 321. But see Nevada Bank v. Portland Nat. Bank, 59 Fed. 338, disapproving Hopkins v. Cooper, 28 Ga. 392, and Glover v. Townshend, 30 Ga. 92.

[79] Willes, J., in Anderson v. Pacific Ins. Co., L. R. 7 C. P. 65, 69. But see Lord Cairns, in Peek v. Guerney, L. R. 6 H. L. 377; Hickey v. Morrell, 102 N. Y. 454, 7 N. E. 321 (fireproof warehouse). Estimate of timber is a matter of fact, not of opinion. Chase v. Boughton, 93 Mich. 285, 54 N. W. 44, Grant, J., dissenting. And see Glaspie v. Keator, 5 C. C. A. 474, 56 Fed. 203. Rep-

a fact as anything else." [79] Therefore, it is an actionable misrepresentation for directors issuing a prospectus inviting subscriptions to represent that funds really to be used to pay pressing debts are intended to be used in extending the business operations.[81] The proper view of these cases is that there is an exception as between vendor and vendee.[82] Exaggerated praise is not actionable.[83] Hence, statements as to value,[84] and "those vague commendations of wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation, and as to which it has always been understood the world over that such statements are to be distrusted," are not actionable.[85] But where land is given by the owner in trade with a person located far away from such land, who accepts it as described by the owner, without examining it, such person may recover for intentional misrepresentations made by the owner as to the condition and value of the land.[86] An action for damages for false

resentations that a corporation is "prosperous," "well organized," "doing a large business," and the like have been held to be actionable, if fraudulently made as statements of fact and not of mere opinion. Nevada Bank v. Portland Nat. Bank, 59 Fed. 338. See, also, Hedin v. Institute (Minn.) 64 N. W. 158.

[80] Bowen, L. J., in Edgington v. Fitzmaurice, 29 Ch. Div. 459.

[81] Edgington v. Fitzmaurice, supra. And see Jorden v. Money, 5 H. L. Cas. 185.

[82] Clerk & L. Torts, 393.

[83] Columbia Electric Co. v. Dixon, 46 Minn. 463, 49 N. W. 244 (value of assets and patents of electric company are largely matters of opinion). In other words, a certain amount of "puffing" is allowed. Directors v. Kisch, L. R. 2 H. L. 99.

[84] Shanks v. Whitney, 66 Vt. 405, 29 Atl. 367. Cf. Baum v. Holton, 4 Colo. App. 406, 36 Pac. 154.

[85] Holmes, J., in Demming v. Darling, 148 Mass. 504, 505, 20 N. E. 107; Teague v. Irwin, 127 Mass. 217; Harvey v. Young, Yel. 21a; 1 Benj. Sales, c. 2. See Bicknall v. Waterman, 5 R. I. 43; Gordon v. Parmelee, 2 Allen (Mass.) 214; Mooney v. Miller, 102 Mass. 217; Cooper v. Lovering, 106 Mass. 77; Bishop v. Small, 63 Me. 12; Brown v. Leach, 107 Mass. 367; 8 Am. & Eng. Enc. Law, p. 809, and cases cited in notes 7 and 8. See, also, Story, Sales (2d Ed.) §§ 360, 361; Nash v. Trust Co., 159 Mass. 437, 34 N. E. 625; Chandelor v. Lopus, 1 Smith, Lead. Cas. 294, and note on pages 320, 321. The law as to a warranty of value is well stated by Campbell, J., in Picard v. McCormack, 11 Mich. 73.

[86] Stevens v. Allen, 51 Kan. 144, 32 Pac. 922; Henderson v. Henshall, 4 C.

representations as to title, made in the sale of lands, may be maintained, though the deed contained no covenants.[87] The doctrine of caveat emptor is not applicable in an action for damages for inducing the plaintiff, by false representations, to take an assignment of a lease executed by one who had no title to the land.[88]

Representations of Law.

A misrepresentation of law is not considered as amounting to fraud, because, as it is generally said, all persons are presumed to know the law; and it might perhaps be added that such a statement would rather be the expression of an opinion than the assertion of a fact.[89] Therefore the representations by the agent of a corporation that its stock is not assessable beyond a certain per

C. A. 357, 54 Fed. 320; Griffing v. Diller, 66 Hun, 633, 21 N. Y. Supp. 407. "Whenever a sale is made of a property not present, but at a remote distance, which the seller knew that the purchaser has never seen, but which he buys upon the representation of the seller, relying on its truth, then the representation in effect amounts to a warranty, at least that the seller will make good the representation." Smith v. Richards, 13 Pet. (U. S.) 26; Harris v. McMurray, 23 Ind. 9; McCullen v. Scott, 24 Wis. 84; Bolds v. Woods, 9 Ind. 657. 36 N. E. 933.

[87] Barnes v. Union Pac. Ry. Co., 4 C. C. A. 199, 54 Fed. 87; Saguin v. Siedentopf, 88 Iowa, 723, 54 N. W. 430.

[88] Cheney v. Powell, 88 Ga. 629, 15 S. E. 750; Williamson v. Woten, 132 Ind. 202, 31 N. E. 791; Speed v. Hollingsworth, 54 Kan. 436, 38 Pac. 496; Fargo Gas & Coke Co. v. Fargo Gas & Electric Co. (N. D.) 59 N. W. 1066; Brady v. Finn, 162 Mass. 260, 38 N. E. 506; Bloomer v. Gray, 10 Ind. App. 326, 37 N. E. 819; Davis v. Jenkins, 46 Kan. 19, 26 Pac. 459.

[89] 2 Pom. Eq. Jur. 877. And see Bank of U. S. v. Daniel, 12 Pet. 32. "A representation of what the law will and will not permit to be done is one on 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. And see Aetna Ins. Co. v. Reed, 33 Ohio St. 283; Townsend v. Cowles, 31 Ala. 428; Leham v. Shackleford, 50 Ala. 437; The Belfast v. Boon, 41 Ala. 50; Mayhew v. Phœnix Ins. Co., 23 Mich. 105; Clem v. Newcastle & D. R. Co., 9 Ind. 488; Burt v. Bowles, 69 Ind. 1; Thompson v. Phœnix Ins Co., 75 Me. 55; Gormely v. Gymnastic Ass'n of South Side, 55 Wis. 350, 13 N. W. 242; Jaggar v. Winslow, 30 Minn. 263, 15 N. W. 242; People v. San Francisco, 27 Cal. 655; Lexow v. Julian, 21 Hun, 577; Starr v. Bennett, 5 Hill, 303; Lewis v. Jones, 4 Barn. & C. 506; 2 Aust. Jur. 172; Kerr, Fraud & M. 397. As to

cent. of its value constitutes no defense to an action, against holders of the stock, to enforce payment of the entire amount subscribed, where he has failed to use due diligence to ascertain the truth or falsity of such representations.[90] The line of distinction, however, between a statement of a fact and a statement of law, is often indistinct. "There is not a single fact connected with personal status that does not more or less involve a question of law. * * * It is not less a fact because that fact involves some knowledge or relation of law."[91] Ignorance of the law signifies ignorance of the laws of one's own country.[92] Ignorance of the laws of a foreign government is ignorance of fact.[93] Therefore an immigrant just arrived, meeting an old citizen, who professes familiarity with the law of land titles of the country, may successfully complain of a misrepresentation as to the title of land.[94]

Promise.

A malicious representation or concealment must be of an existent fact.[95] A representation or assurance in relation to a future event

rescission of contract for misrepresentation of law, see Upton v. Tribilcock, 91 U. S. 45.

[90] Upton v. Tribilcock, 91 U. S. 45 (this leading case has been cited with approval more than 30 times in various federal reports).

[91] Jessel, M. R., in Eaglesfield v. Londonderry (1876) L. R. 4 Ch. Div. 693–703. And see West London Com. Bank v. Kitson, 13 Q. B. Div. 360. So, misrepresentation to a depositor that the directors and stockholders of a bank are personally liable may be actionable. Westervelt v. Demarest, 46 N. J. Law, 37; Sheldon v. Davidson, 85 Wis. 138, 55 N. W. 161.

[92] Storrs v. Barker, 6 Johns. Ch. 166–169.

[93] Haven v. Foster, 9 Pick. (Mass.) 112–130.

[94] Morland v. Atchinson, 19 Tex. 303. Cf. Abbott v. Treat, 78 Me. 121–126, 3 Atl. 44. And see Cheney v. Powell, 88 Ga. 629, 15 S. E. 750.

[95] Representations as to the harvest which a given land would raise cannot be regarded as fraudulent. Holton v. Noble, 83 Cal. 7, 23 Pac. 58. And see Morey v. Miller, 102 Mass. 217. Nor a vendor's assurance that a dam would always continue to furnish a full amount of power in the future, where the vendee had equal opportunity for estimate. Morrison v. Koch, 32 Wis. 254; Patterson v. Wright, 64 Wis. 289–291, 25 N. W. 10. Promises as to what a quartz mill will pay are not actionable. Pedrick v. Porter, 5 Allen (Mass.) 324. While representations as to past business are material and actionable, it is in general otherwise as to future profits. Markel v. Moudy, 11 Neb. 213, 7 N. W. 853. And see Com. v. Mechanics' Ins. Co., 120 Mass. 496. Cf. Pru-

is not, in the criminal law, a false pretense.[96] On the same principle, an actionable misrepresentation must relate to a present or past state of facts, and an action of deceit does not lie for failure on the part of a promisor to perform a promise made by him to do something in the future, which he does not intend to do, and subsequently refuses to do, although the promisee has so altered his position, in reliance on such promise, that he is thereby damaged.[97] Therefore, where a vendee of goods promises to give a good and sufficient bond to reconvey,[98] or to indorse the note of another if the vendor would

dential Assur. Co. v. Aetna Life Ins. Co., 23 Fed. 438; Hale v. Continental Life Ins. Co., 12 Fed. 359. But see Rohrschneider v. Knickerbocker Life Ins. Co., 76 N. Y. 216; Miller v. Barber, 66 N. Y. 558; United States Ins. Co. v. Wright, 33 Ohio St. 533. Proposed plans were relied on in the purchase of land on which houses were to be built, and it was held that the representations were as to the future, and therefore not binding. Squire v. Campbell, 1 Mylne & C. 459; Dawe v. Morris, 149 Mass. 188, 21 N. E. 313; Knowlton v. Keenan, 146 Mass. 86, 15 N. E. 127; Saunders v. McClintock, 46 Mo. App. 216; Gage v. Lewis, 68 Ill. 604; Lawrence v. Gayetty, 78 Cal. 126, 20 Pac. 382; Haenni v. Bleisch, 146 Ill. 262, 34 N. E. 153; Gray v. Manufacturing Co., 127 Ill. 187, 19 N. E. 874; Williams v. Kerr, 152 Pa. St. 500, 25 Atl. 618; Moore v. Cross (Tex. Civ. App.) 26 S. W. 122.

[96] State v. Magee, 11 Ind. 154. And see Ranney v. People, 22 N. Y. 413.

[97] Fenwick v. Grimes, 5 Cranch, C. C. 439, Fed. Cas. No. 4,733; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Patterson v. Wright, 64 Wis. 289, 25 N. W. 10; Bigelow, Frauds, 11, 12. This is a part of the general proposition that representations having reference merely to the future constitute no ground of action or defense. Saunders v. McClintock, 46 Mo. App. 216; Robertson v. Parks, 76 Md. 118, 24 Atl. 411.

[98] Long v. Woodman, 58 Me. 49. So if vendor promises to pay off incumbrances, and that his wife should join in a deed. Burt v. Bowles, 69 Ind. 1–6. "I have always understood it to have been decided in Jorden v. Money, 5 H. L. Cas. 185, that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises de futuro, which, if binding at all, must be binding as contracts." Madson v. Alderson, 8 App. Cas. 467–473. In Jorden v. Money, 5 H. L. Cas. 185 (and see 6 H. L. Cas. 380, 10 H. L. Cas. 677), a father who could have set aside a deed to L. for want of consideration did not do so because L. agreed that she would never sue the father's son, about to be married, on certain bonds. Accordingly, the father allowed the conveyance to stand, and died. The misrepresentation was held not to be of existing facts, but of intention, and therefore of no legal effect. And see Insurance Co. v. Mowry, 96 U. S. 544; Insurance Co. v. Eggleston, Id. 572–578; Allen v. Rundle,

sell him the goods,[99] or to deliver possession of premises at a future day,[100] the vendor cannot recover upon the vendee's failure to perform his promise, notwithstanding his damage, and the vendee's fraudulent intention.[101]

50 Conn. 9; Jackson v. Allen, 120 Mass. 64, 79; Langdon v. Doud, 10 Allen (Mass.) 433.

[99] Gallager v. Brunel, 6 Cow. 346. A representation by defendant that plaintiff could have possession of a certain building on property leased to plaintiff on a certain date, several months after the making of such representation, is not actionable, though such event did not occur, in that it relates to a future, or not to a past or present event. Sheldon v. Davidson (Wis.) 55 N. W. 161. And see Robertson v. Parks, 76 Md. 118, 24 Atl. 411. So where a retiring officer promises to pay an overdraft which he induced his successor to charge to himself. State v. Prather, 44 Ind. 287.

[100] Sheldon v. Davidson, 85 Wis. 138, 55 N. W. 161. And see Morrison v. Koch, 32 Wis. 254, where it was held not to be an actionable misrepresentation that a certain dam would always in the future continue to furnish the full amount of power conveyed.

[101] And see Gage v. Lewis, 68 Ill. 604; Hazlett v. Burge, 22 Iowa, 535; Lexow v. Julian, 21 Hun (N. Y.) 577; Starry v. Korab, 65 Iowa, 267, 21 N. W. 600; Farrar v. Bridges, 3 Humph. (Tenn.) 566; Welz v. Rhodius, 87 Ind. 1; Sieveking v. Litzler, 31 Ind. 13; Shropshire v. Kennedy, 84 Ind. 111; Fenwick v. Grimes, 5 Cranch, C. C. 439, Fed. Cas. No. 4,733; Dawe v. Morris, 149 Mass. 188, 21 N. E. 313. "The law gives a different effect to a representation of existing facts from that given to a representation of facts to come into existence. To make a false representation the subject of indictment or action, two things must coincide: A statement likely to impose on one of ordinary prudence and caution, and that it should be a statement of existing facts. The law also gives a different effect to those promissory statements based on general knowledge, information, and judgment, and those representations which, from knowledge peculiarly his own, a party may certainly know will prove true or false." Sawyer v. Prickett, 19 Wall. (U. S.) 146–160. "Promissory statements may be made in terms which imply that a certain condition of things exists at the time, and formed the basis of a promised future condition of things. When they are of this description, if they are intentionally false, they are fraudulent, and form the basis of the right of rescission; but otherwise fraud cannot be predicated of promises not performed for the purpose of avoiding a contract. Like untruthful expressions of expectation or opinion, even though meant to deceive, they are not fraudulent in legal definition, because they are not misrepresentations of existing facts." Applied to a prospectus, Banque v. Brown, 34 Fed. 192. And see New Brunswick Ry. v. Conybeare, 9 H. L. Cas. 711. But see Goodwin v. Horne, 60 N. H. 485; Turnipseed v. Hudson, 50 Miss. 429.

191. In an action for deceit, it is immaterial whether the false representation was made to the plaintiff, or to some other person,[102] provided there was an intention, express or implied, of inducing the plaintiff to act with respect—

(a) To himself, without reference to other specific persons;

(b) To other specific persons;

(c) To the person making the statement.[103]

In the commonest case of false representation, the expression or suppression of the truth is made directly to the plaintiff, in person. But "every man must be held liable for the consequences of a false representation made by him to another, upon which a third person acts and by so acting is injured or damnified, provided it appears that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss. But, to bring it within the principle, the injury, I apprehend, must be the immediate, and not the remote, consequence of the representation thus made." [104] This will appear fully in consideration of the cases (immediately following) as to the person whom the defendant's misrepresentation has induced to act.

Inducing Acts on the Plaintiff's Behalf.

The law has recognized a distinction between a representation made by a vendor of property, and one made by an apparently disinterested third party. In the former case, there may be liability; in the latter, not.[105] But the law recognizes that the natural effect of fraudulent representation is not necessarily confined within so narrow a scope. The statement need not be made to the injured party. Thus, if one sell a gun, representing that it was safe, and the vendee's son is injured by its explosion, he can recover damages

[102] When made to plaintiff's agent, they are made to plaintiff. Culliford v. Gadd (Super. N. Y.) 17 N. Y. Supp. 451, 18 N. Y. Supp. 208.

[103] Pig. Torts, 254.

[104] Barry v. Croskey, 2 Johns. & H. 1.

[105] Medbury v. Watson, 6 Metc. (Mass.) 246.

therefor.[106] And, even where there is nothing of danger involved, there may be liability to third persons because of fraudulent representations. Thus, if a letter containing false representations as to facts in connection with property (as mortgage bonds to be sold), and not merely with reference to matters of opinion, induce not merely the person to whom it is addressed, but also other persons to whom it was shown, to invest, such representations are actionable.[107] But such liability would not extend to those who afterwards bought of such purchasers, since the letter was not intended to aid the first purchasers in selling to others.[108]

The principle seems to be that a representation, whatever be its nature, cannot be supposed to continue forever, but that there is a reasonable time within which the plaintiff must act upon it, and a reasonable limitation to be placed upon the successive classes of persons who act upon it, so as to be able to rely upon the fraud.[109]

Advertisements made to the public generally, as a false statement in a time-table as to the running of trains,[110] or to certain classes

[106] Langridge v. Levy, 2 Mees. & W. 519, 4 Mees. & W. 337. And see Bodger v. Nicholls, 28 Law T. (N. S.) 441; Ward v. Hobbs, 4 App. Cas. 13. In George v. Skivington, L. R. 5 Exch. 1, the wife of a vendee was injured by using a bottle of hair wash. Baron Cleasby said: "Substitute the word 'negligence' for 'fraud,' and the analogy of Langridge v. Levy and this case is complete." This seems to practically overrule Longmeid v. Holliday, 6 Exch. 761. And see Mullett v. Mason, L. R. 1 C. P. 559, where damages were recovered which were caused by spreading of a contagious disease through an animal sold. Cf. Hill v. Balls, 2 Hurl. & N. 298; 27 Law J. Exch. 45, with State v. Fox (Md.) 29 Atl. 60, as to damages consequent on sale of a glandered horse. Merguire v. O'Donnell, 103 Cal. 50, 36 Pac. 1033. And see Randall v. Roper, 27 Law J. Q. B. 266, El., Bl. & El. 84; Dingle v. Hare, 7 C. B. (N. S.) 145, 29 Law J. C. P. 143; Collen v. Wright, 7 El. & Bl. 301, 26 Law J. Q. B. 147. A vendor of hay who knowingly sold hay on which lead had been spilled, whereby his vendee lost his cow, was held liable, because silence was equivalent to deceit. French v. Vining, 102 Mass. 132.

[107] Windram v. French, 151 Mass. 547, 24 N. E. 914; Honnewell v. Duxbury, 154 Mass. 286, 28 N. E. 267; Peek v. Gurney, L. R. 6 H. L. 377. But see Brambell, B., in Bedford v. Bagshaur, 4 Hurl. & N. 538.

[108] Nash v. Trust Co., 159 Mass. 437, 34 N. E. 625.

[109] Peek v. Gurney, L. R. 6 H. L. 377; Bigelow, Lead. Cas. 41; Pig. Torts, 265; Reeve v. Dennett, 145 Mass. 23, 11 N. E. 938.

[110] Dunton v. Great Northern Ry., 5 El. & Bl. 860. But see Clerk & L. Torts, 403.

of the public, as a false advertisement of a farm to let by one who had not power to let,[111] are actionable.

Inducing Acts with Respect to Other Specified Persons.

The usual form in which the wrong arises from inducing another person to act to his damage with respect to other specified persons is in obtaining credit for a third party. Thus, in Pasley v. Freeman,[112] the defendant affirmed to the plaintiff that a certain third person might be safely trusted and given credit. This statement was made falsely, deceitfully, and fraudulently, as the defendant knew nothing about such person. In reliance thereon, the goods were sold, and the plaintiff brought his action for damages. The defendant could not have been held liable on a guaranty, because his representations were not in writing, as required by the statute of fraud. It was held, however, that the action for deceit lay. Lord Tenterden's act[113] was passed to cover devices thus "dexterously intended to avoid the statute of frauds."[114] Actions, however, for misrepresentation as to the financial responsibility of another, are generally recognized.[115]

Inducing Acts with Respect to the Party Making the Statement.

When the false statement results in inducing one to do acts relative to the person making the statement, the result is nearly always a contract between the parties.[116] Thus, in the leading case of Chandelor v. Lopus,[117] the defendant sold to the plaintiff a stone

[111] Richardson v. Silvester, L. R. 9 Q. B. 34. Cf. Harris v. Nickerson, L. R. 8 Q. B. 286.

[112] 2 Smith, Lead. Cas. (9th Ed.) 74: "If it was not there (Pasley v. Freeman, 3 Term R. 54) for the first time that an action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the law was, at all events, not so well settled but that a distinguished judge (Gross, J), differing from his brother on the bench, held that such an action was not maintainable. Lord Bramwell, in Peek v. Derry, 14 App. Cas. 337.

[113] 9 Geo. IV. c. 14, § 6.

[114] Gibbs, C. J., in Ashlin v. White, Holt, N. P. 387.

[115] Nevada Bank of San Francisco v. Portland Nat. Bank, 59 Fed. 338; Haycraft v. Creasy, 2 East, 92. Post, note 122.

[116] Pig. Torts, 254.

[117] 1 Smith, Lead. Cas. (Hare & W. Ed.) 290. And see Ormrod v. Huth, 14 Mees. & W. 651. Cf. Cornfoot v. Fowke, 6 Mees. & W. 358.

which he affirmed to be Bezoar stone, but which proved not to be so. It was held that no action lay against him, unless he either knew that it was not a Bezoar stone, or had warranted it to be a Bezoar stone. While this case has often been misunderstood,[118] "it can easily be shown that the decision was correct. * * * Two things were decided, and only two: One, a rule of pleading, stated by Stephen, as 'things are to be pleaded according to their legal effect or operation.' The other, that a mere affirmation made on the occasion of a sale, unless made as a contract, or made fraudulently, is immaterial, and if either of these is relied upon it must be pleaded accordingly. Neither of these points was novel, or particularly important; so the case as it stands, though entirely correct, is more useful as a text for a dissertation than as a statement of substantive law." [119] The true principle would seem to be that whenever a representation amounts to a warranty of fact stated, and is untrue, it is fraudulent in law, whether there was knowledge, or want of knowledge, of its untruth on the part of the person making it.[120]

Representations concerning matters which are obvious to ordinary intelligence, and which lie as much within the knowledge of one party as the other, and where they are not made for the purpose of preventing inquiry or examination, do not amount to a warranty of the knowledge of their truth on the part of the person making them.[121]

Another illustration of cases in which the false statements have induced acts with respect to the person making the statement occurs in the cases in which merchants make false representations as to their financial responsibility to mercantile agencies. If, in reliance upon such representations, other merchants, subscribers to the agency, have been induced to make contracts, the fraud is actionable.[122]

[118] Cf. Parker, C. J., in Bradford v. Manley (1816) 13 Mass. 139.

[119] Smith, Lead. Cas. (9th Am. Ed.) 329, 330, note 1; 1 Harv. Law Rev. 191.

[120] Ball, Torts & Cont. 133; Margetson v. Wright, 5 Moore & P. 606; Holliday v. Morgan, 1 El. & El. 1; Lysney v. Selby, 2 Ld. Raym. 1118.

[121] Ball, Torts & Cont. 134; Baillie v. Merrill, 1 Rolle, 275.

[122] Eaton v. Avery, 83 N. Y. 31; Genesee Co. Sav. Bank v. Michigan Barge Co., 52 Mich. 164, 17 N. W. 790; Mooney v. Davis, 75 Mich. 188, 42 N. W. 802; Furry v. O'Connor, 1 Ind. App. 573, 28 N. E. 103; Hinchman v. Weeks, 85 Mich. 535, 48 N. W. 790; Gainsville Nat. Bank v. Bamberger, 77 Tex.

SAME—CONDUCT OF PLAINTIFF.

192. A false representation has no connection as cause of the damage claimed, unless—

(a) It actually operated to deceive; and

(b) It was relied on, although not exclusively.

193. Plaintiff's contributory negligence, or credulity, in relying on a false representation, is ordinarily no defense to the fraud.

Connection as Cause.

Fraud or deceit is an instrument by which one person injures another. If, therefore, the misrepresentation be not as to a material matter, and be not relied on, and not it, but something else, is the cause of the damage, it cannot be made the basis of recovery.

In connecting such instrumentalities as the cause of the damage, it is not necessary that it should be shown to be the sole or only cause.[123] It is sufficient if it be a proximate cause.[124] A person

48, 13 S. W. 959; Claflin v. Flack (Com. Pl.) 13 N. Y. Supp. 269. As to the duty of a merchant to notify a mercantile agency to whom he has made a statement that his circumstances have since changed, see Cortland Manuf'g Co. v. Crosky, 2 Johns. & H. 1. Where a merchant makes a report to a commercial agency of material facts as to his financial condition, knowing them to be false, for the purpose of obtaining a standing thereby, one to whom the agent communicates the report, and who by reason thereof, believing it to be true, sells goods to the merchant on credit, may recover in an action against him for the fraudulent representation. Hinchman v. Weeks, 85 Mich. 535, 48 N. W. 790; ante, note 115.

[123] Safford v. Grout, 120 Mass. 20; James v. Hodsden, 47 Vt. 127; Warder v. Bowen, 31 Minn. 335, 17 N. W. 943; Sioux Nat. Bank v. Norfolk State Bank, 5 C. C. A. 448, 56 Fed. 139. If the plaintiff's mind was partly influenced by defendant's misstatements, the defendant will not be any less liable because the plaintiff was also partly influenced by a mistake of his own. Per Bowen, L. J., in Edgington v. Fitzmaurice, 29 Ch. Div. 459–483; Peek v. Derry, 37 Ch. Div. 541. And see Saunders v. McClintock, 46 Mo. App. 216.

[124] Addington v. Allen, 11 Wend. (N. Y.) 374; Fishback v. Miller, 15 Nev. 428; Lebby v. Ahrens, 26 S. C. 275, 2 S. E. 387; Winter v. Bandel, 30 Ark. 362; Black v. Black, 110 N. C. 399, 14 S. E. 971; Lewis v. Jewell, 151 Mass. 345, 24 N. E. 52; Ming v. Woolfolk, 116 U. S. 599, 6 Sup. Ct. 489; Ledbetter v. Davis, 121 Ind. 119, 22 N. E. 744; Roseman v. Canovan, 43 Cal. 110; Web-

may have relied both upon the misrepresentation of another, and upon other considerations. It has been held, however, that reliance on such false representations must be a predominating motive. "The term 'predominate,' in its natural and ordinary signification, is understood to be something greater or superior in power and influence with which it is connected or compared. So understood, a predominating motive, when several motives may have operated, is one of greater force and effect than any other motive. But the court are of opinion that if the false and fraudulent representation was a motive at all, conducive to the act,—if it was one of several motives acting together, and by their combined force producing the result,—it should be left to the jury so to find it." [125]

The Plaintiff must have been Deceived.

Deceit which does not deceive is not fraud.[126] Therefore, if the vendor conceals a defect in a cannon sold to the vendee, and the latter does not inspect the cannon, he cannot recover in fraud for damages caused by its subsequent explosion.[127] "A mere naked lie, though told with intent to deceive, upon which nobody acts, and by which nobody is deceived, is not actionable." A declaration alleging, in substance, that the defendant falsely and fraudulently represented that he had a valid claim against plaintiffs for damages, that the latter relied upon the representation, and that they had investigated, at a large expense, and found the representation to be false, does not, therefore, state a cause of action. "One or the other of the last two allegations is as untruthful as the representations are claimed to be. Both cannot be true. If the plaintiffs rely upon the representations, they did

ster v. Bailey, 31 Mich. 36; Parmlee v. Adolph, 28 Ohio St. 10; Wakeman v. Dalley, 51 N. Y. 27; Risch v. Von Lilienthal, 34 Wis. 250; Endsley v. Johns, 120 Ill. 469, 12 N. E. 247; Fowler v. McCann, 86 Wis. 427, 56 N. W. 1085; Fulton v. Hood, 34 Pa. St. 365; Pratt v. Philbrook, 41 Me. 132.

125 Mathews v. Bliss, 22 Pick. 48. Cf. Tatton v. Wade, 18 C. B. 371, where part of the representation is in writing, and actionable under the statute of frauds, and part is spoken only.

126 Fraser, Torts, 130.

127 Horsfall v. Thomas, 1 Hurl. & C. 90. But see Cockburn, C. J., in Smith v. Hughes, L. R. 6 Q. B. 605. And see Smith v. Chadwick, L. R. 20 Ch. Div. 27; Sheldon v. Davidson, 85 Wis. 138, 55 N. W. 161.

not investigate them; if they investigated them, they did not rely upon them." [128]

A distinction between reliance and deception should be noted. There may be deception without reliance. One may be deceived by another's misrepresentation, and still not be entitled to recover, because he did not rely upon such representation; as where such representations were made a long time prior to his conduct,[129] and his conduct was influenced altogether by other considerations. But, on the other hand, there can be no sufficient reliance with deception. Thus, if a person knew statements to be false,[130] or did not believe them,[131] or if he did not know of them specifically,[132] he cannot say that he relied on them.

Reliance.

False representations do not constitute a cause of action, unless it appears that the person complaining believed them to be true, and acted thereon to his injury.[133] The plaintiff must allege and affirmatively prove that he believed the statement of the defendant, and relied on it.[134] He cannot recover if it appears that he

[128] Enfield v. Colburn, 63 N. H. 218.

[129] Representations made a year before plaintiff's conduct causing damage are not, as a matter of law, actionable. Reeve v. Dennett, 145 Mass. 23, 11 N. E. 938.

[130] "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." Graves, J., in Whiting v. Hill, 23 Mich. 399–405, and cases cited. And see Bowman v. Carithers, 40 Ind. 90; Stitt v. Little, 63 N. Y. 427; McCormick v. Kelly, 28 Minn. 135, 9 N. W. 675; Michaud v. Eisenmenger, 46 Minn. 405, 49 N. W. 202; Lincoln v. Ragsdale, 37 N. E. 25. "But if a person employs an agent to take orders, and a representation is made to him of the solvency of a person whom he advises his employers to trust for goods, if at the time the agent knew that such person was insolvent, though he did not communicate it to his employers, they cannot maintain an action against the person who made such false representation." Cowen v. Simpson, 2 Esp. 290.

[131] Griffing v. Diller, 66 Hun, 633, 21 N. Y. Supp. 407.

[132] Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376.

[133] Upton v. Levy, 39 Neb. 331, 58 N. W. 95; Pearl v. Walter, 80 Mich. 317, 45 N. W. 181; Windram v. French, 151 Mass. 547, 24 N. E. 914.

[134] Becraft v. Grist, 52 Mo. App. 586. See, also, Timmis v. Wade, 5 Ind. App. 139, 31 N. E. 827; Henderson v. Henshall, 4 C. C. A. 357, 54 Fed. 320;

would have acted as he did in the absence of any representation on the part of the defendant.[135] Hence, if he learns of the falsity of the representation before the transaction is completed, and carries it out notwithstanding, he cannot recover.[136] Representation after consummation of a sale are not actionable.[137] And generally knowledge of the falsity of the representation, or failure of the plaintiff to believe it, or reliance on his own investigation, shows that he did not rely thereon,[138] especially where means of correct information were equally accessible to both parties.[139]

Stevens v. Allen, 51 Kan. 144, 32 Pac. 922; Barnes v. Union Pac. Ry. Co., 12 U. S. 1, 4 C. C. A. 199, 54 Fed. 87. Nye v. Merriam, 35 Vt. 438; Hagee v. Grossman, 31 Ind. 223; Griffing v. Diller, 66 Hun, 633, 21 N. Y. Supp. 407; Humphrey v. Merriam, 32 Minn. 197; Cheney v. Powell, 88 Ga. 629, 15 S. E. 750; Fowler v. McCann, 86 Wis. 427, 56 N. W. 1085; Robbins v. Bartom, 50 Kan. 120, 31 Pac. 686; Runge v. Brown, 23 Neb. 817, 37 N. W. 660; Sheldon v. Davidson, 85 Wis. 138, 55 N. W. 161; Upton v. Levy, 39 Neb. 331, 58 N. W. 95; Stetson v. Riggs, 37 Neb. 797, 56 N. W. 628.

[135] Ming v. Wollfolk, 116 U. S. 599, 6 Sup. Ct. 489; Black v. Black, 110 N. C. 398, 14 S. E. 971; Holdom v. Ayer, 110 Ill. 448; Wimer v. Smith, 22 Or. 469, 30 Pac. 416; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Powers v. Fowler, 157 Mass. 318, 32 N. E. 166. In an action on a note given for the exclusive right to use a patented article within a certain territory, where defendant claimed damages on the ground that others were entitled to use the article therein, and testified that plaintiffs' agent told him that as soon as he was ready to use it the others would have to "get out" of the territory, and the purchase was made with that understanding, and otherwise would not have been made, an instruction that, if these representations were made, it is a material question whether defendant considered them as material, and they operated as a material inducement to enter into the contract, is proper (97 Mich. 419, 56 N. W. 774, reversed). Davis v. Davis, 100 Mich. 162, 58 N. W. 651.

[136] McEacheran v. Western Transp. Co., 97 Mich. 479, 56 N. W. 860; Whiting v. Hill, 23 Mich. 399; Vernol v. Vernol, 63 N. Y. 45. And see Pratt v. Philbrook, 41 Me. 132; Tuck v. Downing, 76 Ill. 71. But see Matlock v. Reppy, 47 Ark. 148, 14 S. W. 546.

[137] Farmers' Stock-Breeding Ass'n v. Scott (Kan.) 36 Pac. 978.

[138] Clopton v. Cozart, 13 Smedes & M. (Miss.) 363; Ellison v. Barker, 14 Mont. 96, 35 Pac. 722; Hagee v. Grossman, 31 Ind. 223; Proctor v. McCord, 60 Iowa, 153, 14 N. W. 208; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Lincoln v. Ragsdale, 9 Ind. App. 555, 37 N. E. 25; Nelson v. Luling, 62

[139] Nounnan v. Sutter County Land Co., 81 Cal. 1, 22 Pac. 515.

If the statement complained of is capable of being understood in more than one sense, the plaintiff must, of course, show that he acted upon it in the sense in which it is false.[140]

As between vendor and vendee, there are three phases in which a case of false representation may appear: First, the vendee may be induced to purchase, relying solely on the false representations of the vendor; second, he may be induced to make the investment by the combined false representation of the vendor, and certain information received from some other source;[141] or, third, although the vendor may have made such false statements, yet the vendee may not trust them, and may act alone from information received from other sources.[142] It is only in the first and second cases that the vendee is entitled to an action for damages.

But a mere perfunctory inquiry on the part of the plaintiff is not sufficient to enable a falsifying defendant to escape.[143] In general, to escape liability, the defendant may prove that the other party (1) knew the truth,[144] or (2) relied on his own investigation,[145] or (3) was not really influenced by the defendant's misrepresenta-

N. Y. 645; Nye v. Merriam, 35 Vt. 438; Bowman v. Carithers, 40 Ind. 90; Anderson v. Bernett, 6 Miss. 165; Doran v. Eaton, 40 Minn. 35, 41 N. W. 244; Freeman v. McDaniel, 23 Ga. 354; Byard v. Holmes, 34 N. J. Law, 296; Hanson v. Edgerly, 29 N. H. 343; Taylor v. Guest, 58 N. Y. 262; Fuller v. Hodgdon, 25 Me. 243.

[140] Lindley, L. J., in Smith v. Chadwick, 20 Ch. Div. 27. This is for the jury. Powers v. Fowler, 157 Mass. 318, 32 N. E. 166.

[141] A dealer and expert in violins, who gives a false and fraudulent opinion as to the make and value of such an instrument, to a purchaser ignorant of such matters, is liable to such purchaser, who buys in reliance on such representations, in an action for deceit, even though the latter attached no importance to the statements as to the maker, and did not rely solely thereon. Powell v. Flechter (Com. Pl. N. Y.) 18 N. Y. Supp. 451.

[142] Moris v. Moris (Ga.) 20 S. E. 506; Black v. Black, 110 N. C. 398, 14 S. E. 971 (exchange of a mule for a horse); Nye v. Merriam, 35 Vt. 438.

[143] Redgrave v. Hurd, 20 Ch. Div. 1; Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755.

[144] Michaud v. Eisenmenger, 46 Minn. 405, 49 N. W. 202.

[145] Black v. Black, 110 N. C. 398, 14 S. E. 971; Wimer v. Smith (Or.) 30 Pac. 416; Hall v. Thompson, 1 Smedes & M. (Miss.) 443. If defendant endeavored to mislead plaintiff in making these investigations, this may be new and actionable fraud. Roseman v. Canovan, 43 Cal. 110; Webster v. Balley, 31 Mich. 36.

tion.[146] The determination of these questions is ordinarily for the jury.[147]

Materiality of Representations.

It follows logically from the conception of fraud as the cause of the plaintiff's harm that it must be as to a material circumstance.[148] The courts recognize that what is a material representation depends upon the circumstances of each case, and this is ordinarily for the jury.[149] Thus, a representation that land is in a city, when in fact it was nine miles away,[150] or that it is free from overflow from a bordering river,[151] or generally as to its quality and character,[152] may be material. On the other hand, if the representation relates to matters extrinsic and collateral to the transaction involved, and concerns it in only a trivial and unimportant way, it affords no ground of action. Thus, where one deeded a farm to another, the grantee cannot recover, in an action on the case, damages for alleged

[146] Fraser, Torts, 130. Thus, if the buyer acts on his own examination and the advice of a third person, there can be no recovery. Poland v. Brownell, 131 Mass. 138. Or if plaintiff acts on defendant's guaranty, and not on his misrepresentation, he cannot recover. Holdom v. Ayer, 110 Ill. 448. It is an error to refuse to instruct that, if plaintiff did not rely on the alleged representation, but sought and obtained information elsewhere as to such facts, and entered into the contract relying on his own judgment, he could not recover. Craig v. Hamilton, 118 Ind. 565, 21 N. E. 315.

[147] Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755, affirming (Sup.) 14 N. Y. Supp. 411.

[148] Jordan v. Pickett, 78 Ala. 331; Young v. Young, 113 Ill. 430; Dawe v. Morris, 149 Mass. 188, 21 N. E. 313; Geddes v. Pennington, 5 Dow, 159; Davis v. Davis, 97 Mich. 419, 56 N. W. 774; Hall v. Johnson, 41 Mich. 286, 2 N. W. 55; Nounnan v. Land Co., 81 Cal. 1, 22 Pac. 515; Schwabacker v. Riddle, 99 Ill. 343; Winston v. Young, 52 Minn. 1, 53 N. W. 1015; Palmer v. Bell, 85 Me. 352, 27 Atl. 250; Curtiss v. Howell, 39 N. Y. 211.

[149] Davis v. Davis, 97 Mich. 419, 56 N. W. 774.

[150] Powers v. Fowler, 157 Mass. 318, 32 N. E. 166.

[151] Estell v. Myers, 54 Miss. 174.

[152] Martin v. Jordan, 60 Me. 31; Rhoda v. Annis, 75 Me. 17; Messer v. Smyth, 59 N. H. 41. And, generally, see Coolidge v. Goddard, 77 Me. 578, 1 Atl. 831; Allen v. Truesdell, 135 Mass. 75; Drake v. Grant, 36 Hun, 464; Powers v. Fowler, 157 Mass. 318, 32 N. E. 166; Davis v. Davis, 97 Mich. 419, 56 N. W. 774; Id., 100 Mich. 162, 58 N. W. 651; Walker v. Anglo-American Mortg. & Trust Co., 72 Hun, 334, 25 N. Y. Supp. 432; Holst v. Stewart, 161 Mass. 516, 37 N. E. 755 (frequency of arrival and departure of trains).

deceit in misrepresenting the manner in which a right of way over the premises had been used.[153] Perhaps as definite a test of the materiality of a misrepresentation as can be generally stated is this: A statement is always material when the person to whom it is made would not have acted as he did, had he not believed and relied on it.[154]

Conduct of Plaintiff as a Bar to Relief.

There are many circumstances under which no complaint can be heard from a person charging deceit. Between joint tort feasors in deceit, there is no cause of action for contribution after judgment rendered against one or more of them. Nor can one of such persons sue the other directly.[155] Moreover, the law is inclined to apply broadly the equitable principle in pais to fraudulent misrepresentations.[156] The commonest form of conduct which will prevent recovery in deceit may, with some latitude of meaning, be conveniently called contributory negligence.

Contributory Negligence.

No man can recover for harm he has inflicted on himself. If his own negligence has been the cause of his damage, he cannot recover for it. But, in order that negligence should exist, it is necessary that he should have been guilty of failure to exercise care, under such circumstances as placed on him the duty of exercising diligence. The law recognizes, in many circumstances, the right of one man to rely upon the statements of another. Hence, it is not often such negligence to be credulous, or to fail to use such means of ascertaining the truth as may easily be at hand, as will prevent recovery. There is, indeed, a strong inclination on the part of courts to hold, without any qualification, that a person guilty of a fraudu-

[153] Palmer v. Bell, 85 Me. 352, 27 Atl. 250; Winston v. Young, 52 Minn. 1, 53 N. W. 1015.

[154] McAleer v. Horsey, 35 Md. 439; Powers v. Fowler, 157 Mass. 318, 32 N. E. 166; Holst v. Stewart, 161 Mass. 516, 37 N. E. 755; Reid v. Cowduroy, 79 Iowa, 169, 44 N. W. 351.

[155] Ante, p. 209, "Joint Tort Feasors." A fraudulent transaction in which both parties have knowingly participated will not support a judgment for plaintiff, nor a judgment for affirmative relief for defendant. Buchtella v. Stepanek, 53 Kan. 373, 36 Pac. 749.

[156] Ellis v. Newbrough (N. M.) 27 Pac. 490.

lent misrepresentation cannot escape the effects of his fault on the ground of the injured party's negligence.[157] "The doctrine is well settled, as a rule, that a party guilty of fraudulent conduct shall not be allowed to cry 'Negligence,' as against his own deliberate fraud."[158]

A man may act upon the positive representation of a fact, although means of obtaining correct knowledge were immediately at hand, and open to him.[159] Thus, where the seller of a boat falsely represented that there were no claims against it, knowing the representations to be false, it was no defense to an action for the deceit that the buyer could have ascertained the fact by a search of the records, but failed to do so.[160] On the same principle, representa-

[157] Alfred Shrimpton & Sons v. Philbrick, 53 Minn. 366, 55 N. W. 551; Stewart v. Stearns, 63 N. H. 99; Dambmann v. Schulting, 75 N. Y. 55; Cottrill v. Krum, 100 Mo. 397, 13 S. W. 753; David v. Park, 103 Mass. 501; Mead v. Bunn, 32 N. Y. 275; Warder, Bushnell & Glessner Co. v. Whitish, 77 Wis. 430, 46 N. W. 540; Eaton v. Winnie, 20 Mich. 156; Kendall v. Wilson, 41 Vt. 567; Pierce v. Wilson, 34 Ala. 596; Hale v. Philbrick, 42 Iowa, 81; Sutton v. Morgan, 27 Atl. 894; Hicks v. Stevens, 121 Ill. 186, 11 N. E. 241; Endsley v. Johns, 120 Ill. 469, 12 N. E. 247; Linington v. Strong, 107 Ill. 295; Ladd v. Pigott, 114 Ill. 647, 2 N. E. 503; Oswald v. McGehee, 28 Miss. 340; McClellan v. Scott, 24 Wis. 81; Walsh v. Hall, 66 N. C. 233; Chamberlin v. Fuller, 59 Vt. 247, 9 Atl. 832; Redding v. Wright, 49 Minn. 322, 51 N. W. 1056; Porter v. Fletcher, 25 Minn. 493; Gammill v. Johnson, 47 Ark. 335, 1 S. W. 610; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638.

[158] Linington v. Strong, 107 Ill. 295; Lord Chelmsford, in Directors v. Kisch, L. R. 2 H. L. 99–120; Stewart v. Stearns, 63 N. H. 99. And see Dambmann v. Schulting, 75 N. Y. 55; Burroughs v. Pacific Guano Co., 81 Ala. 255, 1 South. 212; Brooks v. Matthews, 78 Ga. 739, 3 S. E. 627; Taylor v. Fleckenstein, 30 Fed. 99; Keller v. Orr, 106 Ind. 406, 7 N. E. 195; Wallace v. Chicago, St. P., M. & O. Ry. Co., 67 Iowa, 547, 25 N. W. 772; Bowers v. Thomas, 62 Wis. 480, 22 N. W. 710; First Nat. Bank v. Deal, 55 Mich. 592, 22 N. W. 53; McGinn v. Tobey, 62 Mich. 252, 28 N. W. 818; Smith v. Smith, 134 N. Y. 62, 31 N. E. 258; Rider v. Kelso, 53 Iowa, 367, 5 N. W. 509; Baker v. Lever, 67 N. Y. 304; Jackson v. Collins, 39 Mich. 557; Ledbetter v. Davis, 121 Ind. 119, 22 N. E. 744; Hanscom v. Drullard, 79 Cal. 234, 21 Pac. 736; Lewis v. Jewell, 151 Mass. 345, 24 N. E. 52; Clark v. Ralls (Iowa) 24 N. W. 567; Kenner v. Harding, 85 Ill. 264.

[159] Castenholz v. Heller, 82 Wis. 30, 51 N. W. 432.

[160] Redding v. Wright, 49 Minn. 322, 51 N. W. 1056; Wheeler v. Baars, 33 Fla. 696, 15 South. 584. And see Davis v. Jenkins, 46 Kan. 19, 26 Pac. 459; Carpenter v. Wright, 52 Kan. 221, 34 Pac. 798. See, on this, Kiefer v. Rog-

tions as to the value of stock or profits of a business may be actionable, although the plaintiff could have ascertained their falsity by examination of books open to him.[161] He need not have an expert verify the statements, although he is entitled to do so.[162] One who has induced an agent to purchase a railroad bond by representing that it was an "A No. 1" bond, and that the railroad was good security therefor, is not liable in an action for fraudulent representations, where he was known by the agent to stand in the position of a seller, and the market price of the bond was easily ascertainable.[163]

"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." [164] The law is not blind to the fact that communities are composed of individuals of varying degrees of intelligence and ca-

ers, 19 Minn. 32 (Gil. 14); Porter v. Fletcher, 25 Minn. 493; Griffin v. Farrier, 32 Minn. 474, 21 N. W. 553; Reynolds v. Franklin, 39 Minn. 34, 38 N. W. 636; Erickson v. Bennet, 39 Minn. 326, 40 N. W. 157. Deceit may lie although the deed to land contains no covenants. Barnes v. Union Pac. Ry. Co., 4 C. C. A. 199, 54 Fed. 87. Cf. Saguinn v. Siedentopf (Iowa) 54 N. W. 430.

[161] Blacknall v. Rowland, 108 N. C. 554, 13 S. E. 191; Redding v. Wright, 49 Minn. 322, 51 N. W. 1056. And see Taylor v. Saurman, 110 Pa. St. 3, 1 Atl. 40; Dobell v. Stevens (1825) 3 Barn. & C. 623; Baily v. Merrell, 3 Bulst. 95. So misrepresentation as to frequency of running of trains may be actionable, despite access to time tables on plaintiff's part. Holst v. Stewart, 161 Mass. 516, 37 N. E. 755. So, with reference to statements as to the character of land which plaintiff could, but in fact did not, inspect. Brady v. Finn, 162 Mass. 260, 38 N. E. 506; Henderson v. Henshall, 4 C. C. A. 357, 54 Fed. 320; Stevens v. Allen, 51 Kan. 144, 32 Pac. 922. But see Armstrong v. White (Ind. App.) 34 N. E. 847.

[162] Blacknall v. Rowland, 108 N. C. 554, 13 S. E. 191.

[163] Denning v. Darling, 148 Mass. 504, 20 N. E. 107.

[164] Porter, J., in Mead v. Bunn, 32 N. Y. 275–280. And see Cottrill v. Krum, 100 Mo. 397, 13 S. W. 753; Eaton v. Winnie, 20 Mich. 156; Duff v. Williams, 85 Pa. St. 490; Bird v. Kleiner, 41 Wis. 134; Pomeroy v. Benton, 57 Mo. 531; Wharf v. Roberts, 88 Ill. 426; Stewart v. Stearns, 63 N. H. 99; McGibbons v. Wilder, 78 Iowa, 531, 43 N. W. 520; Faribault v. Sater, 13 Minn. 223 (Gil. 210); Kiefer v. Rogers, 19 Minn. 32 (Gil. 14); Burr v. Willson, 22

pacity.[165] "It is as much actionable fraud willfully to deceive a credulous person with an improbable falsehood as it is to deceive a cautious, sagacious person with a plausible one. The law draws no line between the two falsehoods." [166]

However, the law recognizes that if one's own failure to exercise the precaution a reasonable man would take under the circumstances has caused the damage to himself, he cannot recover; but the law does not proceed on the theory of the merits of the plaintiff, or the demerits of the defendant.[167] Therefore, under extra-

Minn. 206; Porter v. Fletcher, 25 Minn. 493; Olson v. Orton, 28 Minn. 36, 8 N. W. 878; Maxfield v. Schwartz, 45 Minn. 150, 47 N. W. 448. But see Bigelow, Frauds (Ed. 1888) 522. Cf. page 523, etc., Kerr, Fraud & M. 80. "Men in business transactions of this kind are authorized to trust one another, and not act as though those with whom they deal are untruthful and dishonest. When, therefore, one having peculiar knowledge of a subject makes representations touching it to another having no knowledge thereof, which operate as an inducement to him to enter into a contract with the maker of the representations, involving such subject, he may rely upon such representations, and is not required to make inquiry or investigation as to their truth." Clark v. Ralls (Iowa) 24 N. W. 567.

[165] Mitchell, C. J., in Ingalls v. Miller, 121 Ind. 188–191, 22 N. E. 995, quoting McKee v. State, 111 Ind. 378, 12 N. E. 510: "The design of the law is to protect the weak and credulous from the wiles and stratagems of the artful and cunning, as well as those whose vigilance and sagacity enable them to protect themselves."

[166] Barndt v. Frederick, 78 Wis. 1, 47 N. W. 6; Pearl v. Walter, 80 Mich. 317, 45 N. W. 181; Leland v. Goodfellow, 84 Mich. 357, 47 N. W. 591; Redding v. Wright, 49 Minn. 322, 51 N. W. 1056. In an action for damages against the administratrix of one who fraudulently induced plaintiff to exchange land for certain other property, evidence that at the time of the exchange plaintiff was of a weak mind is competent in order to show a susceptibility to intestate's representations. Bloomer v. Gray, 10 Ind. App. 326, 37 N. E. 819.

[167] See Bigelow, Frauds (Ed. 1888) 523; Walsh v. Hall, 66 N. C. 233; Cottrill v. Krum, 100 Mo. 397, 13 S. W. 753. Especially in all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions, and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. Fuller, C. J., in Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. 418. Even in cases where the misrepresentations are in reference to material facts affecting the value of property, and not merely expressions

ordinary circumstances, false representations respecting title, inducing the making of a conveyance, may entitle the grantor to a remedy for deceit.[168] A grantor who executes a deed to real estate, trusting to the assurance of the grantee that it would convey nothing, cannot recover for the alleged fraudulent representations, especially if the means of information are equally open to both parties, and the grantor consults his attorney with reference to the deed.[169] Misrepresentations may be so extravagant that no reasonably prudent man would have believed in or relied on them. Such

of opinion or judgment, the law holds that the person to whom such representations are made has no right to rely upon them if the facts are within his observation, or if he has equal means of knowing the truth, or by the use of reasonable diligence might have ascertained it, and is not induced to forego further inquiry which he otherwise would have made. Foster, J., in Palmer v. Bell, 85 Me. 352, 27 Atl. 250, 251; Gordon v. Parmelee, 2 Allen (Mass.) 212–214; Savage v. Stevens, 126 Mass. 207–208; Rhoda v. Annis, 75 Me. 17–27; Brown v. Leach, 107 Mass. 364; Parker v. Moulton, 114 Mass. 99; Veasey v. Doton, 3 Allen (Mass.) 380; Bradbury v. Haines, 60 N. H. 123–124. "The common law affords to every one reasonable protection against fraud in dealing, but it does not go the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." 2 Kent, Comm. (13th Ed.) 485. In a proceeding to enforce specific performance of a written contract, a plea of fraud, even if it involved a want of prudence in relying on fraudulent representations on the part of the party resisting such performance, may be relied on as a defense, as showing that the contract was not valid. Aultman v. Olson, 34 Minn. 450, 26 N. W. 451; Frohreich v. Gammon, 28 Minn. 476, 11 N. W. 88; Miller v. Sawbridge, 20 Minn. 442, 13 N. W. 671; Albany City Sav. Inst. v. Burdick, 87 N. Y. 40; Linington v. Strong, 107 Ill. 295; Gardner v. Trenary, 65 Iowa, 646, 22 N. W. 912; Thoroughgood's Case, 2 Coke, 9; Stanley v. McGauran, L. R. 11 Ir. 314; Redgrave v. Hurd, 20 Ch. Div. 1, 13; Pol. Cont. 401 et seq., and cases cited; Bigelow, Frauds, 523–525. Maxfield v. Schwartz, 45 Minn. 429, 47 N. W. 448. It has, however, been held that laches which may prevent a purchaser from rescinding the contract of sale for fraud will not prevent her from maintaining an action for damages sustained by the fraudulent misrepresentation, where such action is not barred by any statute of limitation. Griffin v. Diller, 66 Hun, 633, 21 N. Y. Supp. 407.

[168] But see Robins v. Hope, 57 Cal. 493.

[169] Cobb v. Wright, 43 Minn. 83, 44 N. W. 662; Slaughter v. Gerson, 13 Wall. 379; Brown v. Leach, 107 Mass. 364; Parker v. Moulton, 114 Mass. 99; Aetna Ins. Co. v. Reed, 33 Ohio St. 283; Morrill v. Madden, 35 Minn. 493, 29 N. W. 193.

will not sustain an action for deceit. But this, as in other cases of due care,[170] the jury ordinarily should determine.[171]

The conduct of the party charged with fraud, in preventing investigation, and generally in throwing the complainant off his guard, may serve to justify what would otherwise be, on the complainant's part, the want of ordinary care.[172] Whereas, the efforts of one person to have another pursue his own investigation are calculated to raise a strong presumption of good faith.[173]

SAME—RESULTING DAMAGE.

194. Fraud without damage, or damage without fraud, will not form the basis of an action, but where both concur an action will lie.[174]

"Fraud does not consist in mere intention, but in intention carried out by hurtful acts. It consists of conduct that operates prejudicially to the rights of others, and is so intended." [175] In other words, the plaintiff must show, not only that he was deceived by the defendant's fraud, without such negligence or other fault on his part as will bar his right to recover, and that he relied on the defendant's wrongful act, but also that he acted, or refrained from acting, in consequence, whereby damages resulted to him.[176] There is no cause of action without actual damage. Damage is the gist of the action.[177] The

[170] Post, p. 816, "Negligence."

[171] Barndt v. Frederick, 78 Wis. 1, 47 N. W. 6.

[172] Schwabacker v. Riddle, 99 Ill. 343; Schumaker v. Mather (Sup.) 14 N. Y. Supp. 411; White v. Mowbray (Sup.) 3 N. Y. Supp. 225 (misrepresentations as to apparent unsoundness of a horse).

[173] Woolenslagle v. Runals, 76 Mich. 545, 43 N. W. 454. Cf. Hanscom v. Drullard, 79 Cal. 234, 21 Pac. 736.

[174] Cook, J., in Baily v. Merrell, 3 Bulst. 95.

[175] Williams, J., in Williams v. Davis, 69 Pa. St. 21–28.

[176] Upton v. Levy, 39 Neb. 331, 58 N. W. 95; Dawe v. Morris, 149 Mass. 191, 21 N. E. 313; Busterud v. Farrington, 36 Minn. 320, 31 N. W. 360; Stetson v. Riggs, 37 Neb. 797, 56 N. W. 628; First Nat. Bank v. North (S. D.) 51 N. W. 96.

[177] Lord Blackburn, in Smith v. Chadwick, 9 App. Cas. 197; Doran v. Eaton, 40 Minn. 35, 41 N. W. 244; Alden v. Wright, 47 Minn. 225, 49 N. W. 767; Newell v. Chapman, 74 Hun, 111, 26 N. Y. Supp. 361; Melville v. Gary (Md.) 24 Atl. 604.

cause of action accrues, not on the completion of the defendant's fraud, and the plaintiff's conduct in deceived reliance thereon, but upon the happening of the damage subsequent to and consequent thereon.[178] Therefore, in order to recover from the vendor of a note for fraudulent representations as to the solvency of the maker, it is necessary to show that the indorser thereon is insolvent, in order to prove damages.[179]

The damages which are made the basis of recovery must conform to the legal standard. Inasmuch as the law does not presume damage, the damages which are proved must be substantial. More nominal damages are not sufficient.[180] Damages which are too vague and speculative in their nature do not satisfy the requirements of the law. Thus, the profits which the purchaser of a business enterprise would have made out of the transfer thereof to a corporation to be organized for the purpose of taking it are too uncertain to be recoverable by the purchaser in an action for fraudulent representation, inducing the purchase, although a syndicate had promised to underwrite the capital of the corporation, thereby, in effect, promising to subscribe all the capital not contributed by others, but had not entered into any definite or obligatory contract with the purchaser.[181] So damage to business reputation because of loss of money and large creditors, consequent upon a bad bargain induced by the defendant's fraud, cannot be recovered.[182] Thus, if the de-

[178] An action to recover damages for alleged false representations as to the value of certain bonds, whereby plaintiff was induced to purchase them, cannot be maintained until the maturity of the bonds, as no damages can be shown until then. Currier v. Poor (Sup.) 32 N. Y. Supp. 74.

[179] Hamlin v. Abell, 120 Mo. 188, 25 S. W. 516; Bradford v. Neill, 46 Minn. 347, 49 N. W. 193. Cf. Childs v. Merrill, 63 Vt. 463, 22 Atl. 626. It was held in Tyson v. Ranney (Wis.) 61 N. W. 563, that where a husband contracts to exchange his own property for land, and afterwards informs his wife of the contract, and directs that the land be conveyed to her, she cannot maintain an action against the grantor for false representations as to the character of the land. It is doubtful if this decision can be harmonized with insurance cases where the policy is issued to one person, and the misrepresentation made to another, who paid the premium.

[180] Van Velsor v. Seeberger, 35 Ill. App. 598.

[181] Loewer v. Harris, 6 C. C. A. 394, 57 Fed. 368. And, generally, see Davis v. Davis, 84 Mich. 324, 47 N. W. 555.

[182] Totten v. Burhans, 91 Mich. 495, 51 N. W. 1119.

fendant, by false representations, induces a third person to revoke a will favorable to the plaintiff, and to execute another will depriving such plaintiff of substantial benefits, no action lies. "The possibility of injury is too shadowy and evanescent to be dealt with by courts of law."[183] Remote harm does not complete the cause of action.[184] Damages for fraud are governed by ordinary principles. The general rule is compensation.[185] Exemplary damages may be awarded under appropriate circumstances.[186] The rule as to general and special damages is applied.[187]

MALICIOUS PROSECUTION.

195. Malicious prosecution is a wrong to person, estate, or reputation, based upon a previous judicial proceeding.

[183] Hutchins v. Hutchins, 7 Hill, 104; Randall v. Hazelton, 12 Allen (Mass.) 412.

[184] Hemmwell v. Drixbury.

[185] The measure of damages for falsely representing the existence of a claim for damages in favor of a lot sold is the value of the claim. Shanks v. Whitney, 66 Vt. 405, 29 Atl. 367; Fixen v. Blake, 47 Minn. 540, 50 N. W. 612; Ellis v. Barlow (Tex. Civ. App.) 26 S. W. 908; Wallace v. Hallowell (Minn.) 58 N. W. 292; Newell v. Chapman, 74 Hun, 111, 26 N. Y. Supp. 361; Tate v. Watts, 42 Ill. App. 103; Thomas v. Dickinson, 67 Hun, 350, 22 N. Y. Supp. 260; Lare v. Westmoreland Specialty Co., 155 Pa. St. 33, 25 Atl. 812; McHose v. Earnshaw, 5 C. C. A. 210, 55 Fed. 584; Stickney v. Jourdan (Minn.) 49 N. W. 980; High v. Berret (Pa. Sup.) 23 Atl. 1004; Atwater v. Whiteman, 41 Fed. 427, followed in Glaspell v. Northern Pac. R. Co., 43 Fed. 900 (under Code Dak. § 1967); Redding v. Godwin, 44 Minn. 355, 46 N. W. 563.

[186] Whenever fraud, malice, gross negligence, or oppression mingle in the controversy, the law allows the jury to give exemplary damages. Cady v. Case, 45 Kan. 733, 26 Pac. 448.

[187] In an action for false representations made to a purchaser of a business enterprise, the charges of the accountants employed by him to examine the books, and the fees of solicitors employed to organize a corporation to take over the business, must be specially alleged. Loewer v. Harris, 6 C. C. A. 394, 57 Fed. 368. In an action for deceit in selling plaintiff glandered horses, special damages are recoverable for medical treatment of the horses, and for the value of the stable which plaintiff had to burn to prevent contagion. Merguire v. O'Donnell, 103 Cal. 50, 36 Pac. 1033.

196. To sustain an action for malicious prosecution, there must be a concurrence of the following elements:

(a) The commencement of a civil or criminal judicial proceeding.

(b) Its termination in favor of the plaintiff in malicious prosecution, except where his success was fraudulent.

(c) The plaintiff in malicious prosecution must have been the defendant in the original proceeding, and the defendant in malicious prosecution must have been the prosecutor or plaintiff, or cause of the original proceeding.

(d) The absence of any reasonable or probable cause for such proceeding.

(e) The proceeding must have been actuated by malice.

(f) It must have resulted in damage, conforming to the legal standards, to plaintiff in malicious prosecution.

Actions on the case were early brought for malicious prosecutions.[188] And, when this wrong was committed by several persons, there was an action on the case, "in the nature of an action of conspiracy," against them.[189] The averment of conspiracy, however, came to be rejected as surplusage.[190] The wrong now called "conspiracy" has, of course, no special relation to false imprisonment or

[188] Daw v. Swiane, 1 Sid. 424; Skinner v. Gunton, 1 Saund. 228; Atwood v. Monger, Style, 378.

[189] Phillips v. Jansen, 2 Esp. 624; Lord Chief Justice Holt, in Savile v. Roberts, 1 Ld. Raym. 374; Price v. Crofts, T. Raym. 180; St. 33 Edw. I., "Conspiratoribus," Fitzh. Nat. Brev, p. 1, subd. 14, D. Thus it was held in Mills v. Mills, Cro. Car. 239, Saur. Abr. p. 62, pl. 3: "And this being in fact an action for malicious prosecution, with this difference, that an action for a malicious prosecution may be brought against one only, but an action on the case in the nature of a conspiracy must be against more than one, or against one, charging that he, together with J. S. or others, had conspired to inflict the plaintiff, or charge him with a crime, the grounds of the action therefor are the same."

[190] Muriel v. Tracey, 6 Mod. 169. In Bigelow, Cas. Torts, p. 190, a learned and extended discussion will be found.

malicious prosecution.[191] Malicious prosecution was not a trespass,[192] but gave rise to an action on the case, in which damage was the gist of the action. It is convenient to postpone the distinction between it and false imprisonment and malicious abuse of process. It is, as has been seen, regarded as defamatory publication through courts of justice. The burden of proof is on the plaintiff to show that each of the essential elements of the wrong exist.[193] The defendant's case, therefore, is a negative one. Thus, justification and matter mitigating damage are denials of the plaintiff's case,[194] and do not operate by way of confession and avoidance. This will be made clear by a separate consideration of the constituent elements as enumerated.

SAME—THE JUDICIAL PROCEEDING.

197. To constitute malicious prosecution, there must have been an original judicial proceeding. The tendency of the American courts is to recognize as a basis for malicious prosecution either a civil or criminal original proceeding even though there may have been no interference with the person or property.

The original proceeding must have been judicial. If it is extrajudicial, the remedy is trespass.[195] Therefore, where a man is arrested on perfect legal process, though maliciously, without probable cause, and is acquitted, he cannot sue in trespass, for false im-

[191] Post, p. 637.

[192] "In no case has he who instituted a groundless proceeding been held liable as a trespasser." Lovier v. Gilpin, 6 Dana (Ky.) 321–328; Daniels v. Feilding, 16 Mees. & W. 200; Barber v. Rollinson, 1 Cromp. & M. 330; Cassier v. Fales, 139 Mass. 461, 1 N. E. 922. Et vide Legallee v. Blaisdell, 134 Mass. 473; Sheldon v. Carpenter, 4 N. Y. 579; De Medina v. Grove, 10 Q. B. 152–170.

[193] 2 Greenl. Ev. § 449; Barton v. Kavanaugh, 12 La. Ann. 332; Mitchell v. Jenkins, 5 Barn. & Adol. 588; Whalley v. Pepper, 7 Car. & P. 506; Walker v. Cruikshank, 2 Hill, 297; Melvin v. Chancy (Tex. Civ. App.) 28 S. W. 241; Barber v. Scott (Iowa) 60 N. W. 497; Welsh v. Cheek (N. C.) 20 S. E. 460. Want of probable cause and malice, Womack v. Fudikar, 47 La. Ann. 33, 16 South. 645.

[194] 2 Greenl. Ev. § 457.

[195] Furpin v. Remy, 3 Blackf. 210; Johnstone v. Sutton, 1 Term R. 510.

prisonment, but for malicious prosecution.[196] There is not a unanimity of opinion in applying this requirement.[197] Malicious prosecution, it seems, will not lie where the court has no jurisdiction of the subject-matter.[198] But it is sufficient if the plaintiff was actually brought before the court, although there may have been an insufficient complaint, defect of process, or want of jurisdiction in the magistrate.[199] It is both affirmed and denied that, where the complaint in the original proceeding does not set out an offense in the law, the plaintiff can recover in false imprisonment only, and not in malicious prosecution.[200] So dismissal by a magistrate on hearing, or his decision that a warrant is void on its face, has been held to entitle to trespass, not case.[201]

What Judicial Proceedings are Sufficient.

The authorities are not agreed as to what judicial proceedings are sufficient as a basis for an action of malicious prosecution. In England, "malicious prosecution" has been defined as "the malicious institution against another of criminal, bankruptcy, or liquidation proceedings, without reasonable and probable cause." [202] On the other hand, Mr. Stephens [203] distinguishes as wrongs more or

[196] Murphy v. Martin, 58 Wis. 276, 16 N. W. 603; King v. Johnston, 81 Wis. 579, 51 N. W. 1011; Gelzenleuchter v. Niemeyer, 64 Wis. 321, 25 N. W. 442; Boaz v. Tate, 43 Ind. 60; Colter v. Lower, 35 Ind. 285. Et vide ante, p. 418, note 7. As to false imprisonment under such circumstances, see Carratt v. Morley, 1 Q. B. 18; West v. Smallwood, 3 Mees. & W. 418; Atwood v. Monger, Style, 378.

[197] Post, p. 630, "Malicious Prosecution and False Imprisonment."

[198] Bixby v. Brundige, 2 Gray, 129; Whiting v. Johnson, 6 Gray, 246; Painter v. Ives, 4 Neb. 122. Et vide Marshall v. Betner, 17 Ala. 832. But see, contra, Wood v. Sutor, 70 Tex. 343, 8 S. W. 51; Id., 76 Tex. 403, 13 S. W. 321; Stone v. Stevens, 12 Conn. 219.

[199] Gibbs v. Ames, 119 Mass. 60–66. Compare Bell v. Keepers, 37 Kan. 64, 14 Pac. 542; Stocking v. Howard, 73 Mo. 25.

[200] Compare Finn v. Frink, 84 Me. 261, 24 Atl. 851, and Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101, with Krause v. Spiegel, 94 Cal. 370, 29 Pac. 707; Kramer v. Lott, 50 Pa. St. 495; Schattgen v. Holnback, 149 Ill. 646, 36 N. E. 969.

[201] Maher v. Ashmead, 30 Pa. St. 344; Baird v. Householder, 32 Pa. St. 168. Compare Stewart v. Thompson, 51 Pa. St. 158.

[202] Fraser, Torts, 121.

[203] Steph. Mal. Pros. *p. 19, c. 3.

less closely analogous to malicious prosecution, malicious arrest,[204] bringing or conspiring to bring a civil action vexatiously,[205] maliciously taking proceedings in bankruptcy,[206] maliciously presenting a petition for the winding up of a company,[207] maliciously obtaining a search warrant for goods,[208] maliciously obtaining a search warrant under Criminal Law Amendment Act 1885,[209] and maliciously exhibiting articles of the peace.[210]

However, it neither accords with modern ideas of pleading and practice, nor of primary rights, to direct much attention to the minute distinction between malicious prosecution and allied wrongs. Indeed, even the lines of demarkation between malicious prosecution, malicious abuse of process, and false imprisonment are none too distinct.[211]

Malicious prosecution applies, clearly, where the original proceeding was criminal in its nature. Very commonly, the action is brought where the original proceeding was a malicious arrest.[212]

[204] Steph. Mal. Pros. *p. 19, c. 3, citing Scheibel v. Fairbairn [1799] 1 Bos. & P. 388; Gibson v. Chaters [1800] 2 Bos. & P. 129; Page v. Wiple [1803] 3 East, 314; Jennings v. Florence [1857] 2 C. B. (N. S.) 467; Gilding v. Eyre [1862] 10 C. B. (N. S.) 592; Churchill v. Siggers [1854] 3 El. & Bl. 929. And see Bank of British North America v. Strong [1876] 1 App. Cas. 307.

[205] Cotterell v. Jones [1851] 11 C. B. 713; Attwood v. Monger [1653] Style, 378, per Roll, C. J.; Castrique v. Behrens [1861] 3 El. & El. 720; Redway v. McAndrew [1873] L. R. 9 Q. B. 74; Quartz Hill Consol. G. Min. Co. v. Eyre, 11 Q. B. Div. 674, and [1883] 52 Law J. Q. B. 488.

[206] Brown v. Chapman, 1 W. Bl. 427; Farly v. Danks [1855] 4 El. & Bl. 493; Cotton v. James, 1 Barn. & Adol. 128; Whitworth v. Hall, 2 Barn. & Adol. 695; Johnson v. Emerson [1871] L. R. 6 Exch. 329; Quartz Hill Consol. G. Min. Co. v. Eyre, 11 Q. B. Div. 674, and [1883] 52 Law J. Q. B. 488.

[207] Quartz Hill Consol. G. Min. Co. v. Eyre, 11 Q. B. Div. 674, and [1883] 52 Law J. Q. B. 488.

[208] Leigh v. Webb [1800] 3 Esp. 164; Elsee v. Smith [1822] 1 Dowl. & R. 28; Wyatt v. White, 5 Hurl. & N. 371, and [1860] 29 Law J. Exch. 193. And see Cooper v. Booth, 3 Esp. 144.

[209] Hope v. Evered, 17 Q. B. Div. 338, and [1886] 55 Law J. M. Cas. 146.

[210] Steward v. Gromett [1859] 7 C. B. (N. S.) 191; Rex v. Doherty [1810] 13 East, 171; Drummond v. Pigou [1835] 2 Bing. N. C. 114; Turner v. Turner [1818] Gow, 20.

[211] Post, p. 630.

[212] Everett v. Henderson, 146 Mass. 89, 14 N. E. 932; Lauzon v. Charroux (R. I.) 28 Atl. 975; Potter v. Gjertsen, 37 Minn. 386, 34 N. W. 746. In the

Preferring a bill before a grand jury is a sufficient prosecution to support an action, whether the grand jury find a true bill or not.[213] With respect to the malicious institutions of civil suits, the authorities are not entirely agreed as to what cases are within the rule.[214] The general tendency of the American courts would seem to be that, wherever the other elements of malicious prosecution are present, it is immaterial whether the original proceedings be civil or criminal. The broad ground is taken that the prosecution of a civil action, maliciously and without proper cause, terminating favorably to the defendant, produces an injury, for which recovery of damages lies, although there has been no interference with the person or property. An action has been held to lie for forcible entry and unlawful detainer,[215] for the malicious issuance of an injunction,[216] for malicious attachment,[217] or garnishment,[218] so, for

same action malicious prosecution may be united with assault and battery. Peterson v. Toner, 80 Mich. 350, 45 N. W. 346.

[213] Taylor's Case [1620] Palm. 44; Jones v. Gwynn, 10 Mod. 148; Chambers v. Robinson, 2 Strange, 691; Whiteford v. Henthorn, 10 Ind. App. 97, 37 N. E. 419 (where a teacher arrested a school trustee to test his right to appoint another person and test her rights under contract). It is sufficient if the indictment contains one count which is malicious and without reasonable and proper cause. Reed v. Taylor, 4 Taunt. 616; Delisser v. Towne, 1 Q. B. 333; Boaler v. Holder, 51 J. P. 277.

[214] Cooley, Torts, *p. 187; Pol. Torts, 265. And see Bowen, L. J., in Quartz Hill Consol. G. Min. Co. v. Eyre, 11 Q. B. Div. 674–690; Fivaz v. Nichols, 2 C. B. 501; Magnay v. Burt, 5 Q. B. 381. But see Cotterell v. Jones, 11 C. B. 713; Atwood v. Monger, Style, 378; Castrique v. Behrens, 3 El. & El. 720; Redway v. McAndrew, L. R. 9 Q. B. 74. See Potts v. Imlay, 4 N. J. Law, 377, commenting on early English cases.

[215] Pope v. Pollock, 46 Ohio St. 367, 21 N. E. 356; Thompson v. Gatlin, 7 C. C. A. 351, 58 Fed. 534. But see Mayer v. Walter, 64 Pa. St. 283, collecting cases. Cf. Slater v. Kimbro, 91 Ga. 217, 18 S. E. 296.

[216] Kohlsaat v. Crate, 144 Ill. 14, 32 N. E. 481; Newark Coal Co. v. Upson, 40 Ohio St. 17; Mark v. Hyatt, 61 Hun, 325, 15 N. Y. Supp. 885; Manlove v. Vick, 55 Miss. 567.

[217] Zinn v. Rice, 154 Mass. 1, 27 N. E. 772; Tomlinson v. Warner, 9 Ohio, 104; Beyersdorf v. Sump, 39 Minn. 495, 41 N. W. 101; Hayden v. Shed, 11 Mass. 500; Nelson v. Danielson, 82 Ill. 545; Maskell v. Barker, 99 Cal. 642, 34 Pac. 340.

[218] Schumann v. Torbett, 86 Ga. 25, 12 S. E. 185. Bankruptcy: Chapman v. Pickersgill, 2 Wils. 145; Farley v. Danks, 4 El. & Bl. 493. Et vide Quartz

malicious issuance of a search warrant for goods charged to have been stolen,[219] but not, it would seem, for ejectment,[220] or an unauthorized action in the name of another.[221] But as to this there is much dispute as to principle, and almost equal division of authorities. On the one hand, it is urged that the defendant is adequately compensated for the damages he sustains by the costs allowed him; that, if such suits are allowed, vexatious litigation will be encouraged (especially since a corresponding right of action should accrue against one who defends without probable cause and with malice), whereby parties would be unfairly subjected to subsequent suits for bringing or defending actions of law.[222] To this it seems a complete answer to say that the English costs

Hill Consol. G. Min. Co. v. Eyre, 11 Q. B. Div. 674, Newark Coal Co. v. Upson, 40 Ohio St. 17; Smith v. Burrus, 106 Mo. 94, 16 S. W. 881; Butchers' Union Slaughter-House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter-House Co., 37 La. Ann. 874. But compare McNamee v. Minke, 49 Md. 122, and Krause v. Spiegel, 94 Cal. 370, 29 Pac. 707. The lawful use of process, neither arresting the person nor seizing the goods, may not be basis of action. Eberly v. Rupp, 90 Pa. St. 259.

[219] Carey v. Sheets, 67 Ind. 375; Id., 60 Ind. 17; Boeger v. Langenberg, 97 Mo. 390, 11 S. W. 223; Whitson v. May, 71 Ind. 264; Miller v. Brown, 3 Mo. 127; Olson v. Tvete, 46 Minn. 225, 48 N. W. 914. Further, as to what is sufficient prosecution, see Dubois v. Keats, 11 Adol. & E. 329; Fitzjohn v. Mackinder, 9 C. B. (N. S.) 505; Eagar v. Dyott, 5 Car. & P. 5.

[220] Muldoon v. Rickey, 103 Pa. St. 110. Et vide Norcross v. Otis Bros. & Co., 152 Pa. St. 481, 25 Atl. 575; Gonzales v. Cobliner, 68 Cal. 151, 8 Pac. 697; Brown v. Cape Girardeau, 90 Mo. 377.

[221] Bond v. Chapin, 8 Metc. (Mass.) 31.

[222] Savill v. Roberts, 1 Ld. Raym. 374; Purton v. Honnor, 1 Bos. & P. 205; Cotterell v. Jones, 11 C. B. 713; Quartz Hill Consol. G. Min. Co. v. Eyre, 11 Q. B. Div. 674; Ray v. Law, Pet. C. C. 207, Fed. Cas. No. 11,592; Mitchell v. South Western R. Co., 75 Ga. 398; Smith v. Hintrager, 67 Iowa, 109, 24 N. W. 744; Cade v. Yocum, 8 La. Ann. 477; McNamee v. Minke, 49 Md. 122 (see Clements v. Odorless Excavating Apparatus Co., 67 Md. 461, 10 Atl. 442, and 13 Atl. 632); Woodmansie v. Logan, 1 N. J. Law, 93; Potts v. Imlay, 4 N. J. Law, 330; State v. Meyer, 40 N. J. Law, 252; Kramer v. Stock, 10 Watts (Pa.) 115; Mayer v. Walter, 64 Pa. St. 283; Muldoon v. Rickey, 103 Pa. St. 110; Emerson v. Cochran, 111 Pa. St. 619, 4 Atl. 498; Smith v. Adams, 27 Tex. 28; Johnson v. King, 64 Tex. 226; 1 Swift, Dig. 492; Wetmore v. Mellinger, 64 Iowa, 741, 18 N. W. 870; Eberly v. Rupp, 90 Pa. St. 259; Lucy v. Metropolitan Life Ins. Co., 31 Wkly. Law Bul. 22; Hibbard v. Ryan, 46 Ill. App. 313.

afford a much broader compensation than is afforded by the narrow limits within which costs are taxed in this country;[223] that the burden of proof on the litigant is a sufficient deterrent from unjustifiable suits for malicious prosecution, so far as the plaintiff in the original proceeding is concerned; and that the argument as to the corresponding right of action against a defendant improperly imposing a defense fails to distinguish between the position of the parties in the action of law, it being the plaintiff that sets the law in motion, while the defendant merely stands on his legal right.[224] If, however, the defendant should, in a counterclaim, demand an affirmative judgment against the plaintiff, the soundness of this latter reasoning might be questioned. The highly artificial character of the restriction as to requirement of interference of persons or seizure of property to make out a case of mali-

[223] Indeed, before the statute entitling defendant to costs in such action existed, they had a remedy at common law. Co. Litt. 161a; 3 Lev. 210; 2 Wils. 305, 379; 4 Mod. 13. See review of authorities by Church, J., in Whipple v. Fuller, 11 Conn. 582.

[224] McPherson v. Runyon, 41 Minn. 525, 43 N. W. 392, and cases cited; Smith v. Burrus, 106 Mo. 94, 16 S. W. 881; Brounstein v. Sahlein, 65 Hun, 365, 20 N. Y. Supp. 217; Green v. Cochran, 43 Iowa, 544; O'Neill v. Johnson, 53 Minn. 439, 55 N. W. 601; 21 Am. Law Reg. (N. S.) 281; Eastin v. Bank of Stockton, 66 Cal. 123, 4 Pac. 1106; Berson v. Ewing, 84 Cal. 89, 23 Pac. 1112; Hoyt v. Macon, 2 Colo. 113; Whipple v. Fuller, 11 Conn. 582; Wall v. Toomey, 52 Conn. 35; Payne v. Donegan, 9 Ill. App. 566; McCardle v. McGinley, 86 Ind. 538; Burnap v. Albert, Taney, 244, Fed. Cas. No. 2,170; Marbourg v. Smith, 11 Kan. 554; Cox v. Taylor, 10 B. Mon. (Ky.) 17; Woods v. Finnell, 13 Bush (Ky.) 628; Allen v. Codman, 139 Mass. 136, 29 N. E. 537; Brown v. City of Cape Girardeau, 90 Mo. 377, 2 S. W. 302; Pangburn v. Bull, 1 Wend. 345; Dempsey v. Lepp, 52 How. Prac. 11; Smith v. Smith, 56 How. Prac. 316; Willard v. Holmes, Booth & Haydens, 2 Misc. Rep. 303, 21 N. Y. Supp. 998; Pope v. Pollock, 46 Ohio St. 367, 21 N. E. 356; Closson v. Staples, 42 Vt. 209; Watson v. Freeman, Hob. 205; Chapman v. Pickersgill, 2 Wils. 145. In 1779 an action was brought in an ecclesiastical court for malicious prosecution of plaintiff for incest. No objection was raised to the nature of the prosecution, although a demurrer to the declaration was sustained on other grounds. Fisher v. Bristow, 1 Doug. 215. So Bailey, J., said (Elsee v. Smith, 2 Chit. 304): "If a party falsely, maliciously, and without probable cause, put the law in motion, that is properly a subject of an action on the case." See articles of Mr. Lawson (21 Am. Law Reg. [N. S.] 281).

cious prosecution is shown by the absence of any corresponding requirements in actions for malicious abuse of process.[225]

SAME—TERMINATION OF PROCEEDING.

198. To maintain an action for malicious prosecution, the plaintiff must show that the original proceeding terminated in his favor, if, from its nature, it was capable of such termination; and such termination must have been final, so that it cannot be reviewed.

Success of Plaintiff.

The original proceeding complained of as the basis for an action of malicious prosecution must have terminated in favor of the plaintiff.[226] The action of malicious prosecution must not be brought before the first proceeding is determined, because until then it cannot appear that the first cause was unjust.[227] "For maliciously prosecuting a good cause of action in the manner provided by law, * * * there is no remedy, because there is no wrong."[228] If the original proceeding has not terminated in the plaintiff's favor, all questions as to malice, want of proper cause, and the like, are im-

[225] 2 Saund. Pl. & Ev. 651; Ludington v. Peck, 2 Conn. 700; Swift v. Chamberlain, 3 Conn. 537; Watson v. Watson, 9 Conn. 141; 2 Selw. N. P. 1054.

[226] O'Brien v. Barry, 106 Mass. 300; Basebe v. Matthews, L. R. 2 C. P. 684; Continental Const. & Imp. Co. v. Vinal, 48 Hun, 620, 1 N. Y. Supp. 200. As to sufficiency of allegation as to termination of original proceeding, see Horn v. Sims, 92 Ga. 421, 17 S. E. 670. And compare Tisdale v. Kingman, 34 S. C. 326, 13 S. E. 547, with Sneeden v. Harris, 109 N. C. 349, 13 S. E. 920; Arundel v. Tregono, Yelv. 116; Fisher v. Bristow, 1 Doug. 215; Morgan v. Hughes, 2 Term R. 225; Whitworth v. Hall, 2 Barn. & Adol. 695; Castrique v. Behrens, 3 El. & El. 709. For a sufficient allegation of terminations of proceedings, see Horn v. Sims, 92 Ga. 421, 17 S. E. 670. Compare Tisdale v. Kingman, 34 S. C. 326, 13 S. E. 547, with Sneeden v. Harris, 109 N. C. 349, 13 S. E. 920.

[227] Bull. N. P. 12; Hamilburgh v. Shephard, 119 Mass. 30; O'Brien v. Barry, 106 Mass. 300; Woodworth v. Mills, 61 Wis. 44, 20 N. W. 728; Lowe v. Wartman, 47 N. J. Law, 413, 1 Atl. 489; West v. Hayes, 104 Ind. 251, 3 N. E. 932; 14 Am. & Eng. Enc. Law, 28, 42, collecting cases.

[228] Per Field, J., in Johnson v. Reed, 136 Mass. 421–423. And see Macey v. Childress, 2 Tenn. Ch. 442; Lauzon v. Charroux (R. I.) 28 Atl. 975.

material.[229] Where, however, the proceedings are ex parte, and the plaintiff had no opportunity of being heard, there is an exception to the rule [230] requiring success of the plaintiff in the original proceeding. Conviction is as unfavorable to the plaintiff's case as acquittal is favorable.[231] Discharge without judgment or verdict in a civil suit is sufficient.[232] But acquittal or conviction or discharge or favorable verdict are not the only alternatives. Abandonment may be a termination sufficiently favorable to the plaintiff.[233] It would seem—although there is doubt on the point [234]—that the entry of a nolle prosequi by the prosecuting officer is a sufficient discharge.[235] Discharge by a magistrate on preliminary examination, if found by the jury to be absolute, will entitle the plaintiff to re-

[229] Hergenrather v. Spielman (Md.) 22 Atl. 1106. But see Foetman v. Rottier, 8 Ohio St. 548.

[230] Steward v. Gromett, 7 C. B. (N. S.) 191. Et vide Basebe v. Matthews, L. R. 2 C. P. 684; Rex v. Doherty, 13 East, 171. Compare Hyde v. Greuch, 62 Md. 577; Zinn v. Rice, 154 Mass. 1, 27 N. E. 772, collecting cases; Parker v. Huntington, 2 Gray, 125.

[231] Post, p. 618.

[232] Zinn v. Rice, 154 Mass. 1, 27 N. E. 772; Rossiter v. Minnesota Bradner-Smith Paper Co., 37 Minn. 296, 33 N. W. 855; Newark Coal Co. v. Upson, 40 Ohio St. 17.

[233] Cardival v. Smith, 109 Mass. 158, Chase, Lead. Cas. 102; Leever v. Hamill, 57 Ind. 423; Swensgaard v. Davis, 33 Minn. 368, 23 N. W. 543; Pixley v. Reed, 26 Minn. 80, 1 N. W. 800; Rossiter v. Minnesota Bradner-Smith Paper Co., 37 Minn. 296, 33 N. W. 855. But see Williams v. Taylor, 6 Bing. 183.

[234] Brown v. Randall, 36 Conn. 56; Hays v. Blizzard, 30 Ind. 457; Chapman v. Woods, 6 Blackf. 504; Stanton v. Hart, 27 Mich. 539; Woodworth v. Mills, 61 Wis. 44, 20 N. W. 728; Kennedy v. Holladay, 25 Mo. App. 503; Bell v. Matthews, 37 Kan. 686, 16 Pac. 97; Hatch v. Cohen, 84 N. C. 602; Clegg v. Waterbury, 88 Ind. 21.

[235] Bell v. Matthews, 37 Kan. 686, 16 Pac. 97; Moulton v. Beecher, 1 Abb. N. C. 193, Chase, Lead. Cas. 103; Bacon v. Towne, 4 Cush. 217; Parker v. Farley, 10 Cush. 279; Brown v. Lakeman, 12 Cush. 482; Cardival v. Smith, 109 Mass. 158. Nol pros. not enough without order of discharge by court, Langford v. Boston & A. R. Co., 144 Mass. 431, 11 N. E. 697. But see Graves v. Dawson, 133 Mass. 419. But see same case, 130 Mass. 78, where discharge after binding over and before indictment on motion of district attorney, followed by nol pros., held sufficient. Et vide Thompson v. Price (Mich.) 59 N. W. 253.

cover.[236] But where a judge, on construing statement of facts, issues a warrant for the violation of a particular statute, but subsequently discharges the prisoner on a change of opinion as to the law, there is no ground for an action for malicious prosecution.[237] A compromise of the first cause of action is not, in general, sufficient,[238] nor is an indictment quashed for insufficiency in law.[239] But voluntary discontinuance of prosecution will not raise a presumption of malice against, nor put on, the defendant in a suit for malicious prosecution, the burden of showing probable cause.[240]

SAME—PARTIES TO PROCEEDING.

199. The plaintiff in malicious prosecution must have been the defendant or accused in the original proceeding. The defendant in malicious prosecution must have been actually instrumental in putting process of law into force, directly or indirectly.

The plaintiff in malicious prosecution must have been a defendant in the original proceeding. Therefore a third person, not a party to a proceeding by a judgment creditor to attach lands as the property of the judgment debtor, by which a cloud was cast on the title of such third person, cannot maintain an action against the creditor for malicious prosecution.[241]

[236] Robbins v. Robbins, 133 N. Y. 597, 30 N. E. 977; Mentel v. Hippely (Pa. Sup.) 30 A. 1021; Bigelow v. Sickles, 80 Wis. 98, 49 N. W. 106; Dreyfus v. Aul, 29 Neb. 191, 45 N. W. 282. Cf. Ross v. Hixon, 46 Kan. 550, 26 Pac. 955; Tucker v. Cannon, 28 Neb. 196, 44 N. W. 440. Dismissal of a warrant by a justice with the consent of the party prosecuting is a sufficient determination of the proceeding to authorize an action for malicious prosecution. Welch v. Cheek (N. C.) 20 S. E. 460.

[237] Armstrong v. Vicksburg, S. & P. R. Co. (La.) 16 South. 468.

[238] Gallagher v. Stoddard, 47 Hun, 101; Mayer v. Walter, 64 Pa. St. 283; Emery v. Ginnan, 24 Ill. App. 65; Rosenberg v. Hart, 33 Ill. App. 262; McCormick v. Sisson, 7 Cow. 715; Hammilburgh v. Shephard, 119 Mass. 30.

[239] McKensie v. Missouri Pac. Ry. Co., 24 Mo. App. 392.

[240] But discharge by court on failure of grand jury to indict is. Joiner v. Ocean S. S. Co. (Ga.) 12 S. E. 361; Darnell v. Sallee, 7 Ind. App. 581, 34 N. E. 1020.

[241] Duncan v. Griswold, 18 S. W. 354.

As to parties defendant, the general principles already considered apply. There may be direct liability.[242] To attach such liability it is not necessary that the defendant should subscribe to the complaint on which the arrest was made. But merely a complaining witness is not responsible for process issued by a court on his testimony.[243] The test is, was defendant actively instrumental in putting the law into force.[244] An attorney is not liable in an action for malicious prosecution, unless, in conducting the litigation complained of, he knew there was no cause of action, and knew also that his client was acting solely from illegal or malicious motives; and in forming his opinion upon these matters he has a right to act upon such information as his client imparts, and is not bound to inform himself elsewhere.[245] The liability may attach indirectly. Thus, the master, within limits already discussed, is held liable for

[242] Chapman v. Dodd, 10 Minn. 350 (Gil. 277). As against a corporation, Kent v. Courage, 55 J. P. 264. As to joint tort feasors, see Jones v. Jenkins, 3 Wash. St. 17, 27 Pac. 1022; Rosenberg v. Hart, 33 Ill. App. 262. Attorney and client, Peck v. Chouteau, 91 Mo. 138, 3 S. W. 577; Sneeden v. Harris, 109 N. C. 349, 13 S. E. 920; Stansbury v. Fogle, 37 Md. 369; Clements v. Ohrly, 2 Car. & K. 686; Beyersdorf v. Sump, 39 Minn. 495, 41 N. W. 101. As to partners, Cole v. Curtis, 16 Minn. 182 (Gil. 161).

[243] Willmerton v. Sample, 42 Ill. App. 254; Hahn v. Schmidt, 64 Cal. 284, 30 Pac. 818; White v. Shradski, 36 Mo. App. 635; Wasserman v. Louisville & N. R. Co., 28 Fed. 802. As to an officer serving a warrant, see Lueck v. Heisler, 87 Wis. 644, 58 N. W. 110.

[244] Danby v. Beardsley, 43 Law T. 603, per Justice Lobey. This is the only definition explicitly suggested. Stephens, Mal. Pros. 5. Et vide Vennum v. Huston, 38 Neb. 293, 56 N. W. 970; Harris v. Warre, L. R. 4 C. P. 125; Davis v. Noake, 6 Maule & S. 29; Cohen v. Morgan, 6 Dowl. & R. 8. Where defendant furnished an inspector with facts on which he filed an information against plaintiff charging a distinct offense, defendant cannot escape liability for malicious prosecution on the ground that the prosecution was instituted through mistaken judgment on the part of the inspector (Newman v. Davis, 58 Iowa, 449, 10 N. W. 852, distinguished). Holden v. Merritt (Iowa) 61 N. W. 390. Leigh v. Webb, 3 Esp. 164; Elsie v. Smith, 1 Dowl. & R. 97; Clarke v. Postan, 6 Car. & P. 423; Jones v. Nichols, 3 Moore & P. 12; Dawson v. Vansandau, 11 Wkly. Rep. 516; Fitzjohn v. Mackinder, 9 C. B. (N. S.) 505; Clements v. Ohrly, 2 Car. & K. 686; Brown v. Chadsey, 39 Barb. 253; Pierce v. Thompson, 6 Pick. (Mass.) 193; Bicknell v. Dorion, 16 Pick. (Mass.) 478.

[245] Peck v. Chouteau, 91 Mo. 138, 3 S. W. 577.

the acts of his servants.[246] An officer, in executing a warrant of arrest in a criminal proceeding, does not, however, act as the agent of the person upon whose complaint the proceeding was instituted, and such person is not liable for the acts of the officer unauthorized by the warrant or by such person, and the declarations of the officer are not admissible to bind such persons.[247] The ordinary rules as to exemption from liability apply. Therefore a grand juror[248] or a justice of the peace[249] is not liable in such an action.

The plaintiff's consent may bar his right of action. Thus, an action for malicious prosecution of a judgment will not lie where the debtor submitted to the attachment and paid the debt.[250]

SAME—MALICE AND WANT OF PROBABLE CAUSE.

200. Want of probable cause and malice must concur to sustain an action for malicious prosecution.

Malice.

"Malice," as here used, is not necessarily synonymous with "anger," "wrath," or "vindictiveness." Any such ill feeling may constitute

[246] Flora v. Russell (Ind. Sup.) 37 N. E. 593. Thus, an insurance company may be held liable for the acts of its superintendent in arresting plaintiff for larceny. Lyenberger v. Paul, 40 Ill. App. 516; Humphrey v. Prudential Ins. Co., 62 Hun, 618, 16 N. Y. Supp. 480. But the principal is not liable for the independent prosecution by his agent. Springfield Engine & Threshing Co. v. Green, 25 Ill. App. 106. And evidence that the defendant in an action for malicious prosecution employed a person to search for property he had lost, and to take all legal steps necessary for its recovery, and that such person charged plaintiff with larceny of the property, and caused his arrest, does not sustain a verdict for plaintiff. Murrey v. Kelso (Wash.) 38 Pac. 879. Agent of corporation making complaint on advise of company's attorney is not liable. Jordan v. Alabama G. S. R. Co., 81 Ala. 220, 8 South. 191. Company is not liable for its watchman's independently causing arrest. Govaski v. Downey, 100 Mich. 429, 59 N. W. 167.

[247] Reisan v. Mott, 42 Minn. 49, 43 N. W. 691; Bartlett v. Hawley, 38 Minn. 308–312, 37 N. W. 580; Zebley v. Storey, 12 Atl. 569.

[248] Sidener v. Russell, 34 Ill. App. 446; Thornton v. Marshall, 92 Ga. 548, 17 S. E. 926.

[249] Vennum v. Huston, 38 Neb. 293, 56 N. W. 970.

[250] Hibbard v. Ryan, 46 Ill. App. 313.

malice.[251] But it may be no more than the opposite of bona fides. Any prosecution carried on knowingly, wantonly, or obstinately, or merely for the vexation of the person prosecuted, is malicious.[252] Every improper or sinister motive constitutes malice, in this sense.[253] Thus, where reputable citizens are wantonly and illegally arrested and incarcerated in a jail on false charges of grave crimes, and thereafter the prosecutor confesses that his only purpose was to procure immunity from prosecution of his brother for the same offense, the prosecution is malicious and without probable cause.[254] The plaintiff is not required to prove "express malice," in the popular sense.[255] The test is, was the defendant actuated by any indirect motive, in preferring the charge or commencing the action against the plaintiff.[256] Malice may be express, or it may be implied from

[251] Evidence of a statement by defendant that if plaintiff did not act peaceably, and behave himself, he would "put him behind the bars," is admissible to show malice. Holden v. Merritt (Iowa) 61 N. W. 390; Stratton v. Lockhart, 1 Ind. App. 380, 27 N. E. 715; Thurston v. Wright, 77 Mich. 96, 43 N. W. 860; Farrar v. Brackett, 86 Ga. 463, 12 S. E. 686; Byford v. Girton (Iowa) 57 N. W. 588. Zeal in prosecution may be evidence of malice. Mark v. Hastings (Ala.) 13 South. 297. Appearance before a grand jury upon subpœna is prima facie not malicious. Smith v. McDaniel, 5 Ind. App. 581, 32 N. E. 798. Offer to arbitrate or compromise before attaching is evidence of negative malice. Lewis v. Taylor (Tex. Civ. App.) 24 S. W. 92. In an action for the malicious prosecution of a writ of attachment, evidence that defendant was informed by a clerk of plaintiff of his business and financial affairs, and of his efforts to borrow money and dispose of his property, is admissible, as tending to rebut malice and show probable cause. Le Clear v. Perkins (Mich.) 61 N. W. 357. A publication that an "enticing article" had recently been sent out by plaintiff, asking subscriptions to a business corporation organized by him, is not prejudicial to plaintiff in his profession of lawyer, as it has no relation to his character or conduct as a lawyer. Keene v. Tribune Ass'n of New York, 76 Hun, 488, 27 N. Y. Supp. 1045; Burton v. O'Niell, 6 Tex. Civ. App. 613, 25 S. W. 1013.

[252] Kerr v. Workman, Add. (Pa.) 270.

[253] Tindal, C. J., in Stockley v. Hornidge, 8 Car. & P. 16.

[254] Pace v. Aubrey, 43 La. Ann. 1052, 10 South. 381. Et vide Chicago, B. & Q. R. Co. v. Kriski, 30 Neb. 215, 46 N. W. 520; Smith v. Burrus, 106 Mo. 94, 16 S. W. 881.

[255] Pullen v. Glidden, 66 Me. 202; Lunsford v. Dietrich, 93 Ala. 565, 9 South. 308; Musgrove v. Newell, 1 Mees. & W. 582; Sutton v. Johnstone, 1 Brown, Parl. Cas. 76; Judson v. Reardon, 16 Minn. 431 (Gil. 387).

[256] Hicks v. Faulkner, 8 Q. B. Div. 167; Brown v. Hawkes [1891] 2 Q. B. 718. Et vide Mitchell v. Jenkins, 5 Barn. & Adol. 588; Garrett v. Mannelhmer, 24

want of probable cause,[257] but it does not follow as a necessary inference.[258]

Probable Cause.

"Probable cause, in criminal cases, is such conduct on the part of the accused as may induce the court to infer that the prosecution was undertaken for public motives."[259] In Hicks v. Faulkner,[260] reasonable cause is divided into four parts, viz.: (1) An honest belief of the accuser in the guilt of the accused. (2) Such belief must be based on an honest conviction of the circumstances which lead the accuser to that conclusion. (3) Such secondly mentioned belief must be based upon such reasonable grounds as would lead any fairly cautious man in the defendant's situation so to believe. (4) The circumstances so believed and relied on by the accuser must be such as to amount to reasonable ground for belief in the guilt of the accused.[261]

Probable cause, in civil actions, is such reasons, supported by facts and circumstances, as will warrant a cautious, reasonable, and prudent man in the honest belief that his action, and the means taken in prosecution of it, are legal, just, and proper.[262] Thus, for example, where the plaintiff and his companions, having been discharged by the defendant, tore paper from the walls in their room in the defendant's house, and set fire to it, leaving matches and smouldering papers on the floor, these are circumstances constituting reasonable and probable cause to justify prosecution for arson.[263]

Minn. 193. "Any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice is malicious." Stevens v. Midland Counties Ry. Co., 10 Exch. 352; Coleman v. Allen, 79 Ga. 637.

[257] Smith v. Burrus, 106 Mo. 94, 16 S. W. 881.

[258] Cartwright v. Elliott, 45 Ill. App. 458.

[259] If plaintiff was innocent of the crime, but defendant had reasonable ground for suspicion, supported by circumstances strong enough in themselves to warrant a cautious man in the belief that he was guilty the jury should find for the defendants. Hurlbut v. Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

[260] 8 Q. B. Div. 167, 171, 172.

[261] The importance of this decision was, however, greatly diminished by Abrath v. North-Eastern Ry. Co., L. R. 11 App. Cas. 247; Steph. Mal. Pros. 69, 70.

[262] Benton v. St. Paul, M. & M. Ry. Co., 33 Minn. 189, 22 N. W. 300.

[263] Nachtman v. Hammer, 155 Pa. St. 200, 26 Atl. 311. Unexplained re-

Where the defendant had the plaintiff arrested for maliciously injuring water pipes, though he knew that what plaintiff did was done under order of the park commissioner, this was held sufficient to submit to the jury the question, and to justify the finding of want of probable cause.[264] But where the plaintiff was employed to collect the accounts of a corporation which had agreed to pay certain of his debts, and, the company failing to pay such debts, the plaintiff notified it that he had collected certain money for it, which he would turn over as soon as it paid said debts, which amounted to as much as the sum collected, it was held that these facts showed no probable cause for charging the plaintiff with embezzlement.[265] The absence of a probable cause may also be inferred from the institution of a criminal suit for the sole purpose of collecting a debt.[266]

cent possession of stolen property may justify arrest for larceny. Thompson v. Richardson, 96 Ala. 488, 11 South. 728; Ferguson v. Arnow, 142 N. Y. 580, 37 N. E. 626; Mahaffey v. Byers, 151 Pa. St. 92, 25 Atl. 93. Jones v. Jones, 71 Cal. 89, 11 Pac. 817; Brown v. Master (Ala.) 16 South. 443. In embezzlement, see Rankin v. Crane (Mich.) 61 N. W. 1007; Tucker v. Cannon, 32 Neb. 444, 49 N. W. 435. In perjury, see Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31. And, generally, see Molloy v. Long Island Ry. Co., 59 Hun, 424, 13 N. Y. Supp. 382; Mell v. Barner, 135 Pa. 151, 19 Atl. 940; Allen v. Codman, 139 Mass. 136, 29 N. E. 537; Sheahan v. National S. S. Co. (Sup.) 20 N. Y. Supp. 740; Withan v. Thomas, 66 Hun, 632, 21 N. Y. Supp. 176; Wrench v. Samenfeld (Sup.) 19 N. Y. Supp. 948; Willard v. Holmes, Booth & Haydens (Com. Pl. N. Y.) 21 N. Y. Supp. 998, reversed in 142 N. Y. 492, 37 N. E. 480; Sprague v. Gibson, 63 Hun, 626, 17 N. Y. Supp. 685; Central Ry. Co. v. Brewer, 78 Md. 394, 28 Atl. 615; Richard v. Boland, 5 Misc. Rep. 552, 26 N. Y. Supp. 57; Thomas v. Smith, 51 Mo. App. 605.

[264] Wass v. Stephens (Sup.) 6 N. Y. Supp. 131; Id., 128 N. Y. 123, 28 N. E. 21. Et vide Hooper v. Vernon, 74 Md. 136, 21 Atl. 556.

[265] Brooks v. Bradford (Colo. App.) 36 Pac. 303. Et vide Mahaffey v. Byers, 151 Pa. St. 92, 25 Atl. 93; Hazzard v. Flury, 120 N. Y. 223, 24 N. E. 194; Willard v. Holmes, Booth & Haydens, 142 N. Y. 492, 37 N. E. 480, overruling (Com. Pl. N. Y.) 21 N. Y. Supp. 998; Bandell v. May (Sup.) 15 N. Y. Supp. 273; Horn v. Sims, 92 Ga. 421, 17 S. E. 670. The mere fact that plaintiff had in his possession a ring, which defendant believed to be one stolen from him, is not sufficient to constitute a probable cause for plaintiff's arrest. Jonasen v. Kennedy, 39 Neb. 313, 58 N. W. 122. Further, see Brooks v. Bradford, 4 Colo. App. 410, 36 Pac. 303; Darnell v. Sallee, 7 Ind. App. 581, 34 N. E. 1020; Flora v. Russell (Ind. Sup.) 37 N. E. 593.

[266] Kimball v. Bates, 50 Me. 308; Paddock v. Watts, 116 Ind. 146, 18 N. E. 518; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101. Et vide Toomey v. Delaware, L. & W. R. Co. (Super. N. Y.) 21 N. Y. Supp. 448; Neufeld v. Rode-

Inference from Conviction, Acquittal, or Dismissal.

Conviction of the crime charged is, in general, evidence of probable cause. But the authorities are not agreed as to whether such evidence is final. On the one hand, it is contended that, in the absence of fraud procuring conviction,[267] a conviction by a trial court is conclusive against the plaintiff,[268] although followed by acquittal on appeal.[269] On the other hand, it is insisted that proof of conviction is only such evidence as is sufficient to establish probable cause if not overcome.[270] Conviction does not, however, negative malice.[271]

minski, 144 Ill. 83, 32 N. E. 913. But the fact that the defendants in an action for malicious prosecution offered to refrain from prosecuting the plaintiff if he would repay the money he had misappropriated is not sufficient to show a want of probable cause for the prosecution. Rankin v. Crane (Mich.) 61 N. W. 1007.

[267] Payson v. Casewell, 22 Me. 212. Compare Lawrence v. Cleary, 88 Wis. 473, 60 N. W. 793; Morton v. Young, 55 Me. 24.

[268] Crescent City Live-Stock Landing & Slaughterhouse Co. v. Butchers' Union Slaughterhouse & Live-Stock Landing Co., 121 U. S. 140, 7 Sup. Ct. 472; Oppenheimer v. Manhattan Ry. Co., 63 Hun, 633, 18 N. Y. Supp. 411; Parker v. Huntington, 7 Gray, 36; Cloon v. Gerry, 13 Gray, 201; Boogher v. Hough, 99 Mo. 184, 12 S. W. 524; Parker v. Farley, 10 Cush. (Mass.) 279; Adams v. Bicknell, 126 Ind. 211, 25 N. E. 804, and cases therein cited; Whitney v. Peckham, 15 Mass. 243; Phillips v. Village of Kalamazoo, 53 Mich. 33, 18 N. W. 547; Smith v. Macdonald, 3 Esp. 7; 14 Am. & Eng. Enc. Law, 66; 2 Greenl. Ev. § 457.

[269] Adams v. Bicknell, 126 Ind. 210, 25 N. E. 804; Reynolds v. Kennedy, 1 Wils. 232. Compare Mellor v. Baddeley, 2 Cromp. & M. 675; Basebe v. Matthews, L. R. 2 C. P. 684. But see Boaler v. Holder, 51 J. P. 277; Marks v. Townsend, 97 N. Y. 590. As to the inference of probable cause from conviction, or even indictment, when a new trial may be subsequently granted, see Whitney v. Peckham, 15 Mass. 243. See Bacon v. Towne, 4 Cush. 217; Cloon v. Gerry, 13 Gray (Mass.) 201; Hil. Torts, 457; Cooley, Torts (2d Ed.) 214; ante, p. 611, note 239. As to inference from dismissal of complaint, Wheeler v. Hanson, 161 Mass. 370, 37 N. E. 382. The voluntary discontinuance of a civil suit is not prima facie evidence that it was maliciously instituted. Smith v. Burrus, 106 Mo. 94, 16 S. W. 881. Cf. Ross v. Hixon, 46 Kan. 550, 26 Pac. 955; Bigelow v. Sickles, 80 Wis. 98, 49 N. W. 106; Funk v. Amor, 7 Ohio Cir. Ct. R. 419.

[270] Moffatt v. Fisher, 47 Iowa, 473; Arnold v. Moses, 48 Iowa, 694. See, also, Olson v. Neal, 63 Iowa, 214, 18 N. W. 863; Bowman v. Brown, 52 Iowa, 437, 3 N. W. 609; Barber v. Scott (Iowa) 60 N. W. 497; Knight v. International

[271] Lewton v. Hower (Fla.) 16 South. 616.

Similarly, acquittal is prima facie evidence for the plaintiff; but this may have been shown to have been obtained by fraud, as by breach of verbal stipulation for continuance.[272] Acquittal may be proved without producing a copy of the records, but may be so proved, and in cases of felony the record must be produced.[273] The voluntary dismissal of an action is not an admission of want of probable cause.[274]

Effect of Honest Belief.

Probable cause naturally depends upon the good faith and honest and reasonable belief of the defendant.[275] "And although the facts known make out a prima facie case of guilt, yet if the circumstances are all consistent with the innocence of the party, and the prosecutor knows the accused is not guilty, or does not believe him to be guilty, he cannot have reasonable cause for the prosecution."[276] This is to be determined by a consideration of all the circumstances of the case which had happened at the time of commencing the original proceeding. Thus, proof that the plaintiff had waived the preliminary examination on the criminal charge, and had been indicted, and that the jury had disagreed, furnishes evidence of probable cause. But, if the defendant had full knowledge of all the material charge, he is liable, though he did not appear before the grand

& G. N. Ry. Co., 9 C. C. A. 376, 61 Fed. 87. A judgment of conviction in a criminal court is conclusive only between the parties,—i. e. the state and the defendant,—but is no estoppel as between the defendant and strangers to the record. Johnson v. Girdwood (Com. Pl. N. Y.) 28 N. Y. Supp. 151. A judgment of conviction on a plea of guilty may be avoided collaterally by proof that the plea was induced by the fraud, duress, and conspiracy of the person seeking to avail of it. Johnson v. Girdwood, supra.

[272] Leyenberger v. Paul, 40 Ill. App. 516. Compare Stevens v. Metropolitan Ins. Co., 21 N. Y. Supp. 1024; Sutton v. McConnell, 46 Wis. 269, 50 N. W. 414. The fact that a plaintiff in an action for malicious prosecution was discharged upon his examination is not conclusive evidence of a want of probable cause for the prosecution. Rankin v. Crane (Mich.) 61 N. W. 1007.

[273] Morrison v. Kelly, 1 W. Bl. 384; Reg. v. Brangan, 1 Leach, Club Cas. 27.

[274] Asevado v. Orr, 100 Cal. 293, 34 Pac. 77.

[275] Barton v. Kavanaugh, 12 La. Ann. 332.

[276] Woodworth v. Mills, 61 Wis. 44, 20 N. W. 728; Fagan v. Knox, 1 Abb. N. C. 246; Griffin v. Chubb, 58 Am. Dec. 85; Prough v. Entriken, 11 Pa. St. 81; Sharpe v. Johnston, 76 Mo. 660; Roy v. Goings, 112 Ill. 656; Brewer v. Jacobs, 22 Fed. 217; Ravenga v. Mackintosh, 2 Barn. & C. 693–698.

jury.[277] But the mere honest belief that there was a good chance for conviction of false pretense does not justify an arrest, although the person arrested may have made erroneous statements as to his solvency.[278] It would appear, however, that the defendant is limited to showing what facts he actually knew at the time of commencement of original proceeding. He cannot prove, by way of defense, and not in mitigation of damages, such knowledge as he could in fact have obtained by the exercise of ordinary intelligence and diligence.[279]

Merely honest belief on the part of the plaintiff as to the defendant's guilt or wrong, while it may disprove express malice, is not sufficient to constitute probable cause.[280] Circumstances sufficient to warrant a cautious man in the belief of another's guilt are not enough to justify a prosecution, but the belief must also be that of a reasonable and prudent man.[281] The defendant is bound to make inquiries which are reasonable under the circumstances. If he fails to do so, he is charged with notice of the information such inquiries would have produced. Failure to make inquiries may be equivalent to want of probable cause.[282] Statements of third persons that they believe the plaintiff to be guilty of the crime charged will not jus-

[277] Barber v. Scott (Iowa) 60 N. W. 497.

[278] Connery v. Manning (Mass.) 39 N. E. 558.

[279] Stewart v. Sonneborn, 98 U. S. 187. Compare with Smith v. King, 62 Conn. 515, 26 Atl. 1059; Tabert v. Cooley, 46 Minn. 367, 49 N. W. 124; Boyd v. Mendenhall, 53 Minn. 274, 55 N. W. 45. But see Nachtman v. Hammer, 155 Pa. St. 200, 26 Atl. 311, where, in an action for malicious prosecution, evidence of facts showing probable cause, which were not known by defendant until three years after the prosecution, is inadmissible. Threefoot v. Nuckols, 68 Miss. 116, 8 South. 335.

[280] Brown v. Hawks [1891] 2 Q. B. 718; Winnebiddie v. Porterfield, 9 Pa. St. 137; Garrett v. Manneihmer, 24 Minn. 193. Et vide Ball v. Rawles, 93 Cal. 222, 28 Pac. 937.

[281] McClafferty v. Philp, 151 Pa. St. 86, 24 Atl. 1042. Et vide McGuire v. Goodwin, 31 Ill. App. 420; Johnson v. Miller, 69 Iowa, 562, 47 N. W. 903; Reasonable or "impartial" man, Thompson v. Beacon Val. Rubber Co., 56 Conn. 493, 16 Atl. 554.

[282] Boyd v. Mendenhall, 53 Minn. 274, 55 N. W. 45. See note in 26 Am. St. Rep. 147. Et vide Thompson v. Price, 100 Mich. 558, 59 N. W. 253; Abrath v. North Eastern Ry., 11 Q. B. Div. 440.

tify,[283] even though made upon affidavit.[284] Nor are mere declarations of third persons, not communicated, evidence of probable cause.[285] That the defendant knew of the plaintiff's good reputation when the prosecution was commenced may be proved to show want of probable cause;[286] and it would seem that generally the plaintiff's bad character, but not particular instances of bad conduct, may be shown to meet the allegation of want of probable cause.[287]

Advice of Counsel.

If a party lays all the facts of his case fairly before a person learned in the law, and acts in good faith on the opinion given him, he can show probable cause, and is not liable to an action for malicious prosecution.[288] He must, however, show that he received and

[283] Stratton v. Lockhart, 1 Ind. App. 380, 27 N. E. 715; Norrell v. Vogel, 39 Minn. 107, 38 N. W. 705. Compare English v. Major, 59 Hun, 317, 12 N. Y. Supp. 935.

[284] Stocking v. Howard, 73 Mo. 25; Best v. Hoeffner, 39 Mo. App. 682. Compare Rives v. Wood (Ky.) 15 S. W. 131. But one has a right to rely upon statements made by third persons as to recent possession of stolen goods by plaintiff in malicious prosecution. Bernar v. Dunlap, 94 Pa. St. 329. Et vide McCarthy v. Deormit, 99 Pa. St. 63; Fisher v. Forrester, 33 Pa. St. 501.

[285] Compare Bacon v. Towne, 4 Cush. 217-241, with McIntire v. Levering, 148 Mass. 546, 20 N. E. 191.

[286] Scott v. Fletcher, 1 Overt. (Tenn.) 488; Israel v. Brooks, 23 Ill. 575; Miller v. Brown, 3 Mo. 127; Blizzard v. Hays, 46 Ind. 66; McIntire v. Levering, 148 Mass. 546, 20 N. E. 191; Woolworth v. Mills, 61 Wis. 44, 20 N. W. 728.

[287] And to mitigate damages: Bacon v. Towne, 4 Cush. 217-241; Pullen v. Glidden, 68 Me. 559; Barron v. Mason, 31 Vt. 189; Rodriguez v. Tadmire, 2 Esp. 721; Gregory v. Thomas, 2 Bibb (Ky.) 286; Bostick v. Rutherford, 4 Hawks (N. C.) 83; Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. 93.

[288] Ravenga v. Mackintosh, 2 Barn. & C. 693; Le Clear v. Perkins (Mich.) 61 N. W. 357; Leahey v. March, 155 Pa. St. 458, 26 Atl. 701; Walter v. Sample, 25 Pa. St. 275; Coggswell v. Bohn, 43 Fed. 411; Well v. Israel, 42 La. Ann. 955, 8 South. 826; Norrell v. Vogel, 39 Minn. 107, 38 N. W. 705; Johnson v. Miller, 82 Iowa, 693, 47 N. W. 903, and 48 N. W. 1081; Palmer v. Broder, 78 Wis. 483, 47 N. W. 744; Hewlett v. Cruchley, 5 Taunt. 277; Cuthbert v. Galloway, 35 Fed. 466; Hall v. Suydan, 6 Barb. 84, 88; McClafferty v. Philp, 151 Pa. St. 86, 24 Atl. 1042; Wilder v. Holden, 24 Pick. 8, 11; Stevens v. Fassett, 27 Me. 267, 283; Paddock v. Watts, 116 Ind. 146, 18 N. E. 518; Turner v. Walker, 3 Gill & J. (Md.) 378; Rives v. Wood (Ky.) 15 S. W. 131;

acted on legal advice in good faith, and what facts he stated to his counsel when he obtained the advice.[289] He is not entitled to have a verdict directed on the ground that he acted on the advice of counsel, where his claim that a fair statement of the facts was laid before his attorney, and that he honestly followed advice honestly asked, is disputed.[290] He must act in good faith. Mere disclosure, without belief in guilt, is not sufficient.[291] It must be affirmatively shown that the disclosure was full, fair, and in good faith;[292] and where a material circumstance, known, or which should have been known, by the defendant, was not included in the statement to the counsel,[293] or where facts are exaggerated,[294] probable cause is not made out. The counsel must be learned in the law, in order to

Leaird v. Davis, 17 Ala. 27; Collard v. Gay, 1 Tex. 494. Compare Sebastian v. Cheney, 86 Tex. 497, 25 S. W. 691; Folger v. Washburn, 137 Mass. 60; Roy v. Goings, 112 Ill. 656; Forbes v. Hagman, 75 Va. 168; White v. Carr, 71 Me. 555. And see authorities collected Barhight v. Tammany, 38 Am. St. Rep. 856 (Pa. Sup.) 28 Atl. 135. But advice of counsel may not be conclusive evidence of probable cause. Gulf, C. & S. F. Ry. Co. v. James, 73 Tex. 12, 10 S. W. 744; Shannon v. Jones, 76 Tex. 141, 13 S. W. 477; Rives v. Wood (Ky.) 15 S. W. 131; Glasgow v. Owen, 69 Tex. 167, 6 S. W. 527; Fugate v. Millar, 109 Mo. 281, 19 S. W. 71. Accordingly the rule is sometimes more cautiously stated,—that the fact that defendant acted on advice of counsel affords strong evidence that the prosecution was entered into in good faith, and without malice. Womack v. Fudicker (La.) 16 South. 645. Consultation with attorney no defense, if attorney gave no advice, but referred plaintiff to United States officers. Holden v. Merritt (Iowa) 61 N. W. 390. Garnier v. Bernard, 45 La. Ann. 1265, 14 South. 189; Beihofer v. Loeffert, 159 Pa. St. 365, 28 Atl. 217. Advice of counsel should be considered in determining not only the existence of probable cause, but also the absence of malice. Hurlbut v. Boaz, 4 Tex. Civ. App. 371, 23 S. W. 446.

[289] Brooks v. Bradford, 4 Colo. App. 410, 36 Pac. 303; Mentel v. Hippely, 165 Pa. St. 558, 30 Atl. 1021; Jackson v. Bell (S. D.) 58 N. W. 671.

[290] Connery v. Manning (Mass.) 39 N. E. 558.

[291] Vann v. McCreary, 77 Cal. 434, 19 Pac. 826; Johnson v. Miller, 82 Iowa, 693, 47 N. W. 903, and 48 N. W. 1081; Godfrey v. Soniat, 33 La. Ann. 915; Glasscock v. Bridges, 15 La. Ann. 672.

[292] Barhight v. Tammany, 158 Pa. St. 545, 28 Atl. 135; Brooks v. Bradford, 4 Colo. App. 410, 36 Pac. 303; Crane v. Buchmann (Ohio C. Pl.) 30 Wkly. Law Bul. 120; Jackson v. Bell (S. D.) 58 N. W. 671.

[293] Jessup v. Whitehead (Colo. App.) 29 Pac. 916; Webster v. Fowler, 89 Mich. 303, 50 N. W. 1074; Norrell v. Vogel, 39 Minn. 107, 38 N. W. 705.

[294] Flora v. Russell (Ind. Sup.) 37 N. E. 593.

make his advice a justification.[295] It is not sufficient if he be an unprofessional person.[296] It seems that counsel must also be unbiased.[297]

Concurrence of Malice and Want of Probable Cause.

In Farmer v. Sir Robert Darling,[298] all the judges agreed "that malice, either express or implied, and the want of probable cause, must both concur." In Sutton v. Johnstone,[299]—which case has met with universal approbation,[300]—however, it was said that the essential ground of malicious prosecution is that the legal proceeding "was carried on without probable cause. We said this is, emphatically, the essential ground, because every other allegation may be implied from this; but this must be substantially and expressly proved, and cannot be implied. From the want of probable cause,

[295] A police or trial justice is not such a person. Sutton v. McConnell, 46 Wis. 269, 50 N. W. 414; Brobst v. Ruff, 100 Pa. St. 94; Finn v. Frink, 84 Me. 261, 24 Atl. 851; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101; Mark v. Hastings, 101 Ala. 165, 13 South. 297; Ball v. Rawles, 93 Cal. 222, 28 Pac. 937. Nor a United States inspector. Holden v. Merritt (Iowa) 61 N. W. 390; Hahn v. Schmidt, 64 Cal. 284, 30 Pac. 818. Et vide Govaski v. Downey, 100 Mich. 429, 59 N. W. 167. But see Holmes v. Horger, 96 Mich. 408, 56 N. W. 3. Advice of district judge is, however, evidence showing good faith. Such advice has been held admissible on question of probable cause, but is not full justification. Monaghan v. Cox, 155 Mass. 487, 30 N E. 467; Cooper v. Hart, 147 Pa. St. 594, 23 Atl. 833. Compare Stimer v. Bryant, 84 Mich. 466, 47 N. W. 1099. County or district attorney is, however, competent legal counsel. Perry v. Sulier, 92 Mich. 72, 52 N. W. 801; Sebastian v. Cheney (Tex. Civ. App.) 24 S. W. 970; Id., 86 Tex. 497, 25 S. W. 691; Moore v. Northern Pac. Ry. Co., 37 Minn. 147, 33 N. W. 334. Assistant county attorney. Genevey v. Edwards, 55 Minn. 88, 56 N. W. 578. So is an attorney general. Gilbertson v. Fuller, 40 Minn. 413, 42 N. W. 203. When plaintiff disputes the truth of matters testified by defendant being those he had stated to counsel, the question of probable cause, so far as good faith in consultation of counsel is concerned, is for the jury. Lalor v. Byrne, 51 Mo. App. 578.

[296] Beal v. Robeson, 8 Ired. (N. C.) 276.

[297] Smith v. King, 62 Conn. 515, 26 Atl. 1059.

[298] 4 Burrows, 1971–1974. Et vide Anonymous Case, 6 Mod. 73.

[299] 1 Term R. 493–510; 1 Brown, P. C. 76. Compare Jones v. Gwynn, 10 Mod. 214.

[300] Musgrove v. Newell, 1 Mees. & W. 582–587; Willans v. Taylor, 6 Bing. 183–188; 2 Barn. & Adol. 845, 858, 859; Mitchell v. Jenkins, 5 Barn. & Adol. 588.

malice may be, and most commonly is, implied. The knowledge of the defendant is also implied. From the most express malice the want of probable cause cannot be implied."

Malice is, however, an essential element of malicious prosecution, and must be alleged in the declaration or complaint.[301] The want of probable cause, without malice, is not sufficient.[302] The inference of malice from want of probable cause is one of fact, to be determined in view of all the circumstances,[303] and may be drawn although there is no direct testimony as to prior trouble, ill will, or grudge.[304] The jury may, but are not bound to, infer malice from want of probable cause.[305] Indeed, such inference of malice from want of probable cause may be so removed by facts that there is nothing for a jury to pass on.[306] Malice may, of course, be proved by showing ill feeling on the defendant's part.[307] On the

[301] Saxon v. Castle, 6 Adol. & El. 652; Page v. Wiple, 3 East, 314; Vanduzor v. Linderman, 10 Johns. 106.

[302] Emerson v. Cochran, 111 Pa. St. 619, 4 Atl. 498. Malice is a distinct issue. Smith v. Maben, 42 Minn. 516, 44 N. W. 792. The offer to compromise a civil suit is, however, evidence of neither want of probable cause nor malice. Id. Et vide Cooper v. Hart, 147 Pa. St. 594, 23 Atl. 833.

[303] Fugate v. Millar, 109 Mo. 281, 19 S. W. 71.

[304] Blunk v. Atchison, T. & S. F. Ry. Co., 38 Fed. 311.

[305] Jordan v. Alabama G. S. R. Co., 81 Ala. 220, 8 South. 191. Even where the plaintiff was twice arrested on the same state of facts, and the case was twice dismissed, it is for the jury to determine whether or not he acted maliciously. Hinson v. Powell, 109 N. C. 534, 14 S. E. 301.

[306] Thus, in an action against a railway company for malicious prosecution, it appeared that a series of robberies of defendant's freight cars had been committed for over a year; that an investigation was begun by the police, and prosecuted by defendant under their direction; that a person was arrested, confessed he participated in the crime, and implicated plaintiff, an employé of defendant at place of robberies; that the arrest was not made until after consultation with defendant's attorney and the district attorney; and that, after the hearing, plaintiff was discharged. It was held that, although an arrest and discharge raised a presumption of want of probable cause, from which the jury might have inferred malice, yet the other facts clearly showed absence of malice, and a verdict for the defendant should have been directed. Madison v. Pennsylvania R. Co., 147 Pa. 509, 23 Atl. 764. Accordingly, all relevant circumstances should be proved and considered. Palmer v. Broder, 78 Wis. 483, 47 N. W. 744; Bigelow v. Sickles, 80 Wis. 98, 49 N. W. 106.

[307] Ante, p. 615, note 251.

other hand, no matter how much malice be shown, want of probable cause will not be inferred from it. The law does not inquire into private motive. If the defendants can show reasonable and probable cause, they make out a complete defense.[308] The plaintiff cannot recover if the defendant had reasonable and probable cause, even though he acted with malice, and though the charge on which the arrest was made was untrue.[309] He must both allege and prove want of probable cause, or he cannot recover,[310] subject to the consideration of the effect of acquittal, discharge, or dismissal.[311]

[308] Sanders v. Palmer, 5 C. C. A. 77, 55 Fed. 217; Johnson v. State, 32 Tex. Cr. R. 58, 22 S. W. 43. Compare Jordan v. Alabama G. S. R. Co., 81 Ala. 220, 8 South. 191. Et vide Brounstein v. Wile (Sup.) 20 N. Y. Supp. 204; Fugate v. Millar, 109 Mo. 281, 19 S. W. 71; Smith v. Hall, 37 Ill. App. 28; Mitchell v. Wall, 111 Mass. 492; Horn v. Sims, 92 Ga. 421, 17 S. E. 670. Compare Jackson v. Linnington, 47 Kan. 396, 28 Pac. 173. No inference as to motive can be drawn from the matter of termination of previous suit by the court (Hinson v. Powell, 109 N. C. 534, 14 S. E. 301; Swindell v. Houck, 2 Ind. App. 519, 28 N. E. 736), or by the party (Smith v. Burrus, 106 Mo. 94, 16 S. W. 881); nor, as a matter of law, from unworthy character of witness (Jordan v. Alabama G. S. R. Co., 81 Ala. 220, 8 South. 191). Et vide Farrar v. Brackett, 86 Ga. 463, 12 S. E. 686.

[309] Redman v. Stowers (Ky.) 12 S. W. 270. And see Lunsford v. Dietrich, 86 Ala. 250, 5 South. 461.

[310] Hicks v. Faulkner, 8 Q. B. Div. 167; Vennum v. Huston, 38 Neb. 293, 56 N. W. 970. Sufficient allegation of want of probable cause: Jones v. Jenkins, 3 Wash. St. 17, 27 Pac. 1022. Failure to allege: Ely v. Davis, 111 N. C. 24, 15 S. E. 878; Duncan v. Griswold, 92 Ky. 546, 18 S. W. 354. Burden of proof is on plaintiff. Le Clear v. Perkins (Mich.) 61 N. W. 357; Lucas v. Hunt, 91 Ky. 279, 15 S. W. 781, overruling Brown v. Morris, 3 Bush (Ky.) 81; 1 Archb. N. P. 446; Mitchell v. Jenkins, 5 Barn. & Adol. 588; Whalley v. Pepper, 7 Car. & P. 506; Walker v. Cruikshank, 2 Hill, 296. Even then it has been held that a creditor cannot escape liability for wrongfully suing out an attachment. Yarborough v. Weaver, 6 Tex. Civ. App. 215, 25 S. W. 468; Fry v. Estes, 52 Mo. App. 1. As to evidence admissible to prove and rebut inference of want of probable cause, see Barber v. Scott (Iowa) 60 N. W. 497; Tykeson v. Bowman (Minn.) 61 N. W. 909. As to evidence not admissible, see Grout v. Cottrell (Sup.) 22 N. Y. Supp. 336, reversed in 143 N. Y. 677, 38 N. E. 717.

[311] Ante, p. 610. Where one accused of a crime is discharged by the examining magistrate, and sues the prosecutor for malicious prosecution, the burden of proving probable cause is on defendant. Barhight v. Tammany, 158 Pa. St. 545, 28 Atl. 135.

Province of Court and Jury.

The comment made by Mr. Pollock on the doctrine of probable cause, as being neither a question of law nor of fact in false imprisonment,[312] applies with equal propriety to the doctrine of probable cause as involved in malicious prosecution.

In the earlier stages of the English law, there can be no doubt that the question of reasonable cause was one of law, for the court. Mr. Stephen,[313] after an exhaustive review of the English cases, concludes that this "acknowledged rule has been gradually affected by successive judicial decisions, until the practical burden of deciding whether or not the plaintiff has shown a want of reasonable cause has been, in effect, transferred to the jury." In England, malice has always been recognized as properly for the jury.[314] In America, however, probable cause in malicious prosecution, was early recognized as a mixed question of law and fact.[315] The authorities are agreed, with essential unanimity, that what circumstances are sufficient to prove probable cause must be decided by the court; that, where there is no conflict in the testimony as to what these circumstances are, the court must pass upon the whole case; but that, where the evidence is conflicting, it must be left to the jury to apply to the facts, as found by them, the law as to what constitutes reasonable and probable cause, as defined by the court. Malice is ordinarily exclusively for the jury; but if the court finds the presence of probable cause, as a matter of law, there is nothing for the jury to pass upon.[316]

[312] Ante, p. 428, "False Imprisonment"; Pol. Torts, 192.

[313] The law relating to actions for malicious prosecution: Steph. Mal. Pros. (London, 1888). Et vide review of recent English cases in 54 J. P. 145. The Canadian rule is that the existence of reasonable and probable cause is a question for the court, though the jury may be asked to find on the facts from which such cause may be inferred. Archibald v. McLaren, 21 Can. Sup. Ct. 588.

[314] Mitchell v. Jenkins, 5 Barn. & Adol. 588.

[315] Munns v. Dupont, 3 Wash. C. C. 31–41, Fed. Cas. No. 9,926, 1 Am. Lead. Cas. 249.

[316] Sanders v. Palmer, 5 C. C. A. 77, 55 Fed. 217; Schattgen v. Holnback, 149 Ill. 646, 36 N. E. 969; Stewart v. Sonneborn, 98 U. S. 187; Knight v. International & G. N. Ry. Co., 9 C. C. A. 376, 61 Fed. 87; Thompson v. Price (Mich.) 59 N. W. 253; Jackson v. Bell (S. D.) 58 N. W. 671; Leahey v. March,

SAME—DAMAGES.

201. Damages are the gist of an action for malicious prosecution.

The necessity of alleging and proving damages as a part of the case has been recognized, although damage is not usually included in the enumeration of the essential elements of malicious prosecution. Malicious prosecution is a conspicuous illustration of a class of malicious wrongs, of which the gist is damages, and trespass and false imprisonment may be malicious, and therefore the basis of the award of exemplary damages; but even in the absence of proof of malice or proof of damage, the sufferer can recover. In other words, they are based upon the absolute or simple rights from the violation of which damage is presumed. In malicious prosecution, however, there can be no recovery unless actual damage, conforming to the standard of the law, is alleged and proved; that is to say, the right violated is the right not to be harmed.

In the leading case of Byne v. Moore,[318] where, in an action for maliciously indicting for an assault, the plaintiff gave no evidence that the bill was returned "Not found," and was thereupon nonsuited, the court refused to set aside the nonsuit. The ground of deci-

155 Pa. St. 458, 26 Atl. 701; Robbins v. Robbins (Sup.) 15 N. Y. Supp. 215; Moore v. Northern Pac. R. Co., 37 Minn. 147, 33 N. W. 334; Gilbertson v. Fuller, 40 Minn. 413, 42 N. W. 203; Ball v. Rawles, 93 Cal. 222, 28 Pac. 937; Mahaffey v. Byers, 151 Pa. St. 92, 25 Atl. 93; Rankin v. Crane (Mich.) 61 N. W. 1007; Lewton v. Hower (Fla.) 16 South. 616; Bish. Noncont. Law, § 240; Anderson v. How, 116 N. Y. 336, 22 N. E. 695; Boyd v. Mendenhall, 53 Minn. 274, 55 N. W. 45. And see note, 26 Am. St. Rep. 141, 142, Cooley, Torts, 209, for illustration of what is for court and what is for jury. Nigh v. Keifer, 5 Ohio Cir. Ct. R. 1. In an action for malicious prosecution, it is error to instruct the jury that "if the facts are disputed, it is for you to determine whether or not there was probable cause." Belhofer v. Loeffert, 157 Pa. St. 365, 28 Atl. 217. In an action for malicious prosecution, submitting to the jury the question of probable cause is harmless error, so far as defendant is concerned, where the undisputed facts show want of probable cause. Brooks v. Bradford (Colo. App.) 36 Pac. 303.

[318] 5 Taunt. 187; Bigelow, Lead. Cas. 181.

sion was that if the plaintiff cannot prove injury sustained, either to his person, by imprisonment, to his reputation, by the scandal, or to his property, by the expense, he cannot maintain the action.[319]

The general principles of damages already considered apply. The plaintiff is entitled to recover if he has established a cause of action for nominal damages.[320] He may recover compensatory damages, reasonable hire withheld, loss of time of owner,[321] for injured credit, decrease of earnings, peace of mind, mental suffering, and all proximate consequences of the wrong.[322] Under general damages he can recover for injury suffered since the suit was commenced.[323] Punitive damages may be allowed where express malice is shown.[324] Excessive[325] and remote[326] damages

[319] Selw. N. P. 1026; 2 Greenl. Ev. § 449; Savil v. Roberts, 1 Salk. 13; Jones v. Gwynn, 10 Mod. 214; Kramer v. Stock, 10 Watts (Pa.) 115; Godfrey v. Soniat, 33 La. Ann. 916; Murphy v. Redler, 16 La. Ann. 1. 2 Esp. N. P. 629, classifies the injury done by maliciously suing out a commission of bankruptcy (Brown v. Chapman, 3 Burrows, 1418) as an injury in cases where there is no trust. 1 Am. Lead. Cas. (5th Ed.) 258, collecting cases.

[320] Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866. Et vide Tripp v. Thomas, 3 Barn. & C. 427. As to when he is entitled to only nominal damages, vide Schwartz v. Davis (Iowa) 57 N. W. 849; Girard v. Moore (Tex. Civ. App.) 24 S. W. 652.

[321] Jones v. Lamon, 92 Ga. 529, 18 S. E. 423. As to difference in value of property before and after property has been garnished, vide Girard v. Moore, 86 Tex. 675, 26 S. W. 945.

[322] Jones v. Jenkins, 3 Wash. St. 17, 27 Pac. 1022; Wheeler v. Hanson, 161 Mass. 370, 37 N. E. 382; Bull. N. P. 13, 14; Closson v. Staples, 42 Vt. 209; Gould v. Barratt, 2 Moody & R. 171; Whipple v. Fuller, 11 Conn. 581. Compare Sandback v. Thomas, 1 Starkie, 306, with Sinclair v. Eldred, 4 Taunt. 7. Vide comment in Webber v. Nicholls, 1 Russ. & M. 417, 4 Bing. 416; Tompson v. Mussey, 3 Greenl. (Me.) 305; Lawrence v. Hagerman, 56 Ill. 68.

[323] Schmidt v. Hughes, 33 Ill. App. 65; Wheeler v. Hanson, 161 Mass. 370, 37 N. E. 382.

[324] Cooper v. Utterbach, 37 Md. 282. In such cases plaintiff may show the financial condition of defendant. Winemiller v. Thrash, 125 Ind. 353, 25 N. E. 350. A verdict for $12,500 punitive damages has been sustained. Russell v. Bradley, 50 Fed. 515. But see Adams v. Gillam, 53 Kan. 131, 36 Pac. 51.

[325] Two thousand five hundred dollars for compelling a young woman to disrobe, and allow officers to run their fingers through her hair in search of

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[326] Tynberg v. Cohen (Tex. Civ. App.) 24 S. W. 314.

are governed by ordinary rules. Special damages, as costs and fees expended by the plaintiff in original proceeding, should be specially alleged and proved.[327] The plaintiff may recover, as special damages, the profit he was prevented from making, for example, by the attachment of his goods,[328] or from boarders who left on ascertaining that their landlady was about to be ousted.[329]

diamonds, is not excessive. Doane v. Anderson (Sup.) 15 N. Y. Supp. 459. Eight thousand dollars actual damages sustained: Gulf, C. & S. F. Ry. Co. v. James, 73 Tex. 12, 10 S. W. 744; Ball v. Horrigan (Sup.) 19 N. Y. Supp. 913; Evansville & T. H. R. Co. v. Talbot, 131 Ind. 221, 29 N. E. 1134. As to evidence in malicious prosecution, see Lockwood v. Beard, 4 Ind. App. 505, 30 N. E. 15; Bruce v. Tyler, 127 Ind. 468, 26 N. E. 1081; Reynolds v. Haywood (Sup.) 28 N. Y. Supp. 467. For an insufficient complaint, compare Hyfield v. Bass Furnace Co., 89 Ga. 827, 15 S. E. 752, with Obernatte v. Johnson, 36 Neb. 772, 55 N. W. 220. Et vide Dennehey v. Woodsum, 100 Mass. 195; Tisdale v. Kingman, 34 S. C. 326. For a sufficient complaint, see Lauzon v. Charroux (R. I.) 28 Atl. 975; Cottrell v. Cottrell, 126 Ind. 181, 25 N. E. 905; Swindell v. Houck, 2 Ind. App. 519, 28 N. E. 736. Defense of advise of attorney is not new matter demanding a reply. Olson v. Tvete, 46 Minn. 225, 48 N. W. 914.

[327] And expense for procuring sureties on bail bond, Wheeler v. Hanson, 161 Mass. 370, 37 N. E. 382. And such special damages as rent of mill of which plaintiff lost possession through defendant's action of trover, Farrar v. Brackett, 86 Ga. 463, 12 S. E. 686. Recovery of damages suffered from taking and detention of goods in replevin will not prevent plaintiff, who was defendant in replevin suit, from recovery in malicious prosecution. McPherson v. Runyon, 41 Minn. 524, 43 N. W. 392. The condition of plaintiff's family cannot be shown for the purpose of affecting general damages. Reisan v. Mott, 42 Minn. 49, 43 N. W. 691. But see Peck v. Small, 35 Minn. 465, 29 N. W. 69. But deprivation of society of wife is competent. Killebrew v. Carlisle, 97 Ala. 535, 12 South. 167; Strang v. Whitehead, 12 Wend. 64; Mitchell v. Davies, 51 Minn. 168, 53 N. W. 363; Dornell v. Jones, 15 Ala. 490; Stanfield v. Phillips, 78 Pa. St. 73; Miles v. Weston, 60 Ill. 361; Horne v. Sullivan, 83 Ill. 30; Thompson v. Lumley, 7 Daly (N. Y.) 74; Zeigler v. Powell, 54 Ind. 173.

[328] State v. Andrews, 39 W. Va. 35, 19 S. E. 385; Bradley v. Borin, 53 Kan. 628, 36 Pac. 977. But cf. Zinn v. Rice (Mass.) 37 N. E. 747.

[329] Slater v. Kimbo, 91 Ga. 217, 18 S. E. 296.

SAME—DISTINCTION FROM FALSE IMPRISONMENT.

202. Malicious prosecution and false imprisonment are two different causes of action, composed of different elements. They are not incompatible, however, but may arise out of the same state of facts, and be the basis of the same action.

False imprisonment is a radically different wrong from malicious prosecution.[330] Recovery of damages in an action for false imprisonment is no bar to an action for malicious prosecution.[331] False imprisonment is a direct injury to the freedom of the person, and, at common law, was an action of trespass. Malicious prosecution may be entirely independent of personal interference, and always gives rise to an action on the case.[332] The very statement of the facts in the case of false imprisonment shows the acts involved to be illegal.[333] The ground of malicious prosecution is the procuring to be done what upon its face is, or may be, a legal act, from malicious motives, and without probable cause.[334] That there should have been an original legal proceeding of some kind, and that the plaintiff should have succeeded in it, is an essential element peculiar to malicious prosecution.[335] The coincidence of malice and want of probable cause is also peculiar to malicious prosecution. Malice is never

[330] Brown v. Chadsey, 39 Barb. 253.

[331] Guest v. Warren, 23 Law J. Exch. 121; ante, p. 323, note 116, "Judgment as a Bar."

[332] Ante, p. 604, "Trespass under Malicious Prosecution"; Brown v. Chadsey, 39 Barb. 253.

[333] Imprisonment caused by a malicious prosecution is not false unless without legal process or extrajudicial. Nebenzahl v. Townsend, 61 How. Prac. 356; Murphy v. Martin, 58 Wis. 276, 16 N. W. 606; Colter v. Lower, 35 Ind. 285; 7 Am. & Eng. Enc. Law, 663, 664, and cases cited; Turpin v. Remy, 3 Blackf. 210; Mitchell v. State, 12 Ark. 50, and cases cited; 1 Chit. Pl. § 133.

[334] Johnstone v. Sutton, 1 Term. R. 510; Nebenzahl v. Townsend, 61 How. Prac. 356. Where an arrest is made for the purpose of enforcing the payment of a debt, malicious prosecution, and not false imprisonment, is the proper remedy. Mullen v. Brown, 138 Mass. 114; Herzog v. Graham, 9 Lea (Tenn.) 152; Woodward v. Washburn, 3 Denio, 369.

[335] Everett v. Henderson, 146 Mass. 89, 14 N. E. 932.

properly an essential element of false imprisonment;[336] and probable cause, only when there has been an arrest without warrant, and then as matter of the defendant's, and not of the plaintiff's, case. Accordingly, advice of an attorney is no defense to false imprisonment; warrant of arrest, in perfect form, is not to malicious prosecution.

On the other hand there is no incompatibility between the two causes of action.[337] The same state of facts may constitute both false imprisonment and malicious prosecution, as where, on an affidavit falsely charging perjury, the arrest and incarceration in jail of the accused is a malicious prosecution. If the affidavit is made without probable cause, his incarceration thereunder in jail is false imprisonment.[338] The two causes of action arising out of the same state of facts may be united in the same pleading, and the plaintiff may recover under either.[339] And it has been held that a complaint for either cause of action may be converted into the other by amendment.[340] Under a declaration for the one cause of action, however, no recovery can be had for the other.[341] In Johnson v. Girdwood,[342] Judge Pryor said: "If the plaintiff's characterization of his action as for false arrest and imprisonment be correct, the complaint cannot stand a moment. * * * Under our system of procedure, a plaintiff's right of recovery depends, not upon the name he gives his action, or the classification to which he subjects it, but upon wheth-

[336] Carey v. Sheets, 60 Ind. 17; Coller v. Lower, 35 Ind. 285; ante, p. 430; Johnson v. Bouton, 35 Neb. 898, 53 N. W. 995; Hobbs v. Ray (R. I.) 25 Atl. 694; Comer v. Knowles, 17 Kan. 436.

[337] 14 Am. & Eng. Enc. Law, 17, note 1, citing cases.

[338] Weil v. Israel, 42 La. Ann. 955, 8 South. 826. Compare with Sloan v. Schomaker, 136 Pa. St. 382, 20 Atl. 525; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101.

[339] Bradner v. Faulkner, 93 N. Y. 515; Marks v. Townsend, 97 N. Y. 590; Anderson v. How, 116 N. Y. 336, 22 N. E. 695; Barr v. Shaw, 10 Hun, 580; King v. Ward, 77 Ill. 603. The plaintiff has, however, been required to elect between them. Nebenzahl v. Townsend, 61 How. Prac. 353.

[340] Spice v. Steinruck, 14 Ohio, 213; Painter v. Ives, 4 Neb. 122; Truesdell v. Combs, 33 Ohio St. 186; Steel v. Williams, 18 Ind. 161.

[341] Hobbs v. Ray (R. I.) 25 Atl. 694; Herzog v. Graham, 9 Lea (Tenn.) 152; Brown v. Chadsey, 39 Barb. 253; King v. Johnston, 81 Wis. 578, 51 N. W. 1011. Compare Bauer v. Clay, 8 Kan. 580; Wagstaff v. Schippel, 27 Kan. 450.

[342] 28 N. Y. Supp. 151, 152.

er, on the facts exhibited, he is entitled to any legal redress. With us, all suits are special actions on the case, and if the facts show a right to relief the plaintiff will not be turned out of court because of a technical error in scientific nomenclature."

MALICIOUS ABUSE OF PROCESS.

203. An action for damages[343] lies for the malicious abuse of lawful process, civil or criminal, even if such process has been issued for a just cause, and is valid in form, and the proceeding thereon was justified and proper in its inception, but injury arises in consequence of abuse in subsequent proceedings.

The leading case on this subject is Grainger v. Hill,[344] where the defendant was held liable, not for putting process of arrest in force, but for abusing it for an object not within its scope. The officer arrested the owner of a vessel on civil process, and used such process to compel the defendant to give up his ship's register.[345] Damages were recovered, not for maliciously putting the process in force, but for maliciously abusing it; leading the person arrested to do some collateral thing, which he could not lawfully be compelled to do.[346] A common form of abuse of process is excessive attach-

[343] As to mandamus to prevent successful use of information obtained by abuse of process, see ante, p. 351, "Remedies." See, also, Rosenthal v. Circuit Judge, 98 Mich. 208, 57 N. W. 112.

[344] 4 Bing. N. C. 212; Twilley v. Perkins, 77 Md. 252, 26 Atl. 286. Further, as to abuse of criminal process: Page v. Cushing, 38 Me. 523; Jenings v. Florence, 2 C. B. (N. S.) 467; Smith v. Weeks, 60 Wis. 94, 18 N. W. 778; Baldwin v. Weed, 17 Wend. 224; Carleton v. Taylor, 50 Vt. 220; Mayer v. Walter, 64 Pa. St. 283. As to abuse of capias to collect fees: Small v. Banfield (N. H.) 20 Atl. 284.

[345] Barnett v. Reed, 51 Pa. St. 190. Excessive attachment: Moody v. Deutsch, 85 Mo. 237; Savage v. Brewer, 16 Pick. (Mass.) 453. So, an officer may become a trespasser ab initio by staying too long in a store where he has attached goods. Rowley v. Rice, 11 Metc. (Mass.) 337; Williams v. Powell, 101 Mass. 467; Davis v. Stone, 120 Mass. 228. Et vide Cutter v. Howe, 122 Mass. 541; Malcom v. Spoor, 12 Metc. (Mass.) 279; Esty v. Wilmot, 15 Gray (Mass.) 168.

[346] Page v. Cushing, 38 Me. 523; Johnson v. Reed, 136 Mass. 421; Holley

ment.[347] "But the mere giving of notice by a third person to a debtor not to pay the creditor the amount due him under a contract is neither the use nor abuse of legal process; and no action can be maintained by the creditor against the person giving the notice, for the delay in the payment, and the expense of the lawsuit which he was compelled to bring against the debtor, in consequence of such notice, though it may have been given maliciously and vexatiously."[348]

The authorities are not agreed as to what constitutes the essential elements of this action. Seizure of property is not an essential of the action.[349] Such a definition would fail to distinguish between malicious abuse of process and malicious prosecution, and seems to depend on the distinction that the action is case, and not trespass.[350] Another view, and perhaps one more in harmony with the modern spirit of the law of torts, is to distinguish malicious

v. Mix, 3 Wend. 350. Abuse of process is its perversion. Sharswood, C. J., in Mayer v. Walter, 64 Pa. St. 283. One who, after placing a valid writ of restitution in the hands of an officer, voluntarily assists in removing the property, is liable for such injury to the property as amounts to an abuse of process. Murray v. Mace (Neb.) 59 N. W. 387. So, a sheriff who, under a writ, exposes to inclement weather the daughter and household goods of an unsuccessful defendant in a suit to try title to land, to gratify malice of a successful plaintiff, is liable, and the plaintiff also, if he ratify or authorize such conduct. Casey v. Hanrick, 69 Tex. 405, 6 S. W. 405; Rogers v. Brewster, 5 Johns. 125.

[347] Zinn v. Rice, 37 N. E. 747. And, further, as to wrongful attachment, see Woessner v. Wells (Tex. Civ. App.) 28 S. W. 247; Imperial Roller Milling Co. v. First Nat. Bank of Cleburne (Tex. Civ. App.) 27 S. W. 49; Strauss v. Dundon, Id. 503.

[348] Norcross v. Otis, 152 Pa. St. 481, 25 Atl. 575; Potts v. Imlay, 4 N. J. Law, 377.

[349] Therefore, a mere notice by a stranger to a debtor not to pay a creditor, in consequence of which the creditor is compelled to sue to recover his money, is not sufficient to support an action for damages. In such a case, the only loss is the delay in payment, which is compensated by interest. Norcross v. Otis, 152 Pa. St. 481, 25 Atl. 575. However, though claimant was not deprived of the goods levied on, nor hindered in selling them in the regular course of business, he is entitled to damages for any injury to his credit. Birch v. Conrow, 161 Pa. St. 118, 28 Atl. 1000.

[350] Where the act is an immediate wrong against all forms of law, trespass is the remedy. Where the process is legal, but used in an oppressive man-

abuse of process from malicious prosecution in at least two respects: First, in that want of probable cause is not an essential element,[351] and, second, that it is not essential that the original proceeding shall have terminated.[352] It differs from false imprisonment in that, inter alia, a warrant valid on its face is no defense, and it is entirely inconsistent with extrajudicial proceedings.[353] The process abused, moreover, may be either civil or criminal.[354] It has, however, been held that an action for false imprisonment may lie for misuse or abuse of legal process after it has issued.[355]

MALICIOUS INTERFERENCE WITH CONTRACT.

204. Actions to recover damages for malicious interference with contract have been generally recognized in England, and sometimes in America. Four things are necessary to sustain the action:

(a) A contract.

(b) Knowledge of the contract on the part of defendant.

(c) Malice on the part of defendant.

(d) Damage suffered by plaintiff.

ner, the remedy is case. Kennedy v. Barnett, 64 Pa. St. 141, commenting on Sommer v. Wilt, 4 Serg. & R. (Pa.) 19; Barnett v. Reed, 51 Pa. St. 190; Kramer v. Lott, 50 Pa. St. 495.

[351] Hazard v. Harding, 63 How. Prac. 326. Compare Juchter v. Boehm, 67 Ga. 534; Crusselle v. Pugh, 71 Ga. 744.

[352] Bebinger v. Sweet, 1 Abb. N. C. 263; Driggs v. Burton, 44 Vt. 124; Mayer v. Walter, 64 Pa. St. 283; Zinn v. Rice, 154 Mass. 1, 27 N. E. 772; Antcliff v. June, 81 Mich. 477, 45 N. W. 1019; Emery v. Ginnan, 24 Ill. App. 65; 2 Greenl. Ev. § 452.

[353] King v. Johnston, 81 Wis. 578, 51 N. W. 1011. But see Holley v. Mix, 3 Wend. 350; Wood v. Graves, 144 Mass. 365, 11 N. E. 567; State v. Jungling, 116 Mo. 162, 22 S. W. 688.

[354] Thus, it may lie for a wrongful levy: Birch v. Conrow, 161 Pa. St. 118, 28 Atl. 1009; Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866; Sommer v. Wilt, 4 Serg. & R. 19; Churchill v. Siggers, 3 El. & Bl. 929. For excessive attachment: Savage v. Brewer, 16 Pick. 453; Moody v. Deutsch, 85 Mo. 237. Et vide Hollingsworth v. Atkins, 46 La. Ann. 515, 15 South. 77; State v. Andrews, 39 W. Va. 35, 19 S. E. 385; B. C. Evans Co. v. Reeves, 6 Tex. Civ. App. 254, 26 S. W. 219.

[355] Wood v. Graves, 144 Mass. 365; Crowell v. Gleason, 10 Me. 325; Fran-

In England.

In the celebrated case, Lumley v. Gye,[356] the plaintiff, the manager of a theater, had contracted with an opera singer to perform for him exclusively during the term of her engagement. The defendant, knowing this, and maliciously intending to injure the plaintiff as a manager, while the agreement was in force, and before the expiration of the term, enticed and procured the singer to wrongfully refuse to execute the contract. The majority of the court regarded the case as in strict analogy to the ordinary case of master and servant, as one of pure tort, and as resting on natural principles of tort, in that whoever maliciously procures the violation of another's right, whether involving a contract or not, ought to be made to indemnify. Coleridge, J., dissenting, however, urged that actions under the statute of laborers were confined to menial servants, that only the parties to the contract should be allowed to recover under it, and that the damages claimed in this case were objectionable as remote. The rule established in this case has been subsequently followed in England.[357] It is not material whether the contract maliciously interfered with is between a master and servant or not. If the interference is used for the purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, the conduct is malicious.[358]

In America.

In Walker v. Cronin,[359] the English rule was followed. "Every one," it was said, "has the right to enjoy the fruits and advantages

cisco v. State, 24 N. J. Law, 30; Sleight v. Leavenworth, 5 Duer, 122; Lange v. Benedict, 73 N. Y. 12.

[356] 2 El. & Bl. 216; Green v. Button, 2 Cromp., M. & R. 707; Cattle v. Stockton Waterworks Co., L. R. 10 Q. B. 453; 1 Intercollegiate Law J. 102; article by William L. Hodge, 28 Am. Law Rev. 47, 80; article by A. L. Tidd, 40 Cent. Law J. 86.

[357] Bowen v. Hall, 6 Q. B. Div. 335; 20 Am. Law Rev. 578; Templeton v. Russell, 1 Q. B. Div. 715. And see note 356; Com. Dig. "Action on Case," A; Cattle v. Stockton Water Works Co., L. R. 10 Q. B. 453, 458; Ames, Cas. Torts, 612, note 2; Add. Torts, 37.

[358] Temperton v. Russell [1893] 4 Reports, 376.

[359] 107 Mass. 555, approved in Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 816. And see Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307.

of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, and annoyance. If the disturbance or loss comes as a result of competition, or the exercise of like rights by others, it is damnum absque injuria; * * * but if it comes merely from wanton or malicious acts of others, without the justification of competition, or the service of any interest or lawful purpose, it stands on a different footing," and the wrongdoer is liable. Lumley v. Gye has been followed in a number of other cases,[360] and by the supreme court of the United States in Angle v. Chicago, St. P., M. & O. Ry. Co.[361] On the other hand, the numerical weight of authority would seem to be against recognition of such a moral wrong as the basis of a judicial action.[362] Thus, in a case similar to Lumley v. Gye, the defendant induced Mary Anderson to break her contract with her manager, the plaintiff. The court held that the action could not be maintained, because it was not the policy of the law to restrict competition, whether concerning property or personal services; that the only occasion for more stringent regulation of the latter is in purely domestic relations; and that ordinarily the employer should look only to the person employed, when there was a breach of the contract, just as the seller must look to the buyer, and the creditor to the debtor, in default of payment.[363]

[360] Jones v. Stanly, 76 N. C. 355; Bixby v. Dunlap, 56 N. H. 456; Jones v. Blocker, 43 Ga. 331; Salter v. Howard, 43 Ga. 601; Benton v. Pratt, 2 Wend. 385; Rice v. Manley, 66 N. Y. 82; Dickson v. Dickson, 33 La. Ann. 1261; Upton v. Vail, 6 Johns. 181; Barr v. Essex Trades Council (N. J. Ch.; Dec. 24, 1894) 30 Atl. 881, reviewing cases; Lally v. Cantwell, 30 Mo. App. 524.

[361] 14 S. Ct. 240; 7 Harv. Law Rev. 428 (Jan. 13, 1894). It was said in Chambers v. Baldwin, 91 Ky. 121, 15 S. W. 57: "An action cannot in general be maintained for inducing a third person to break his contract with plaintiff; for one party to the contract may have his remedy by suing on it,"—approving Cooley, Torts, 497.

[362] Chambers v. Baldwin, 91 Ky. 121, 15 S. W. 57; Boyson v. Thorn, 98 Cal. 578, 33 Pac. 492. Malicious interference with contract, 32 Cent. Law J. 273 And see 2 Harv. Law Rev. 19. And see dissenting opinion, Haskins v. Royster, 70 N. C. 601.

[363] Bourlier v. Macauley, 91 Ky. 135, 15 S. W. 60.

CONSPIRACY.

205. A conspiracy is an agreement or engagement of persons to co-operate in accomplishing some unlawful purpose, or some purpose which may not be unlawful, by unlawful means.[364] The conspirators are liable for conduct pursuant to such agreement to inflict injury. The injury done, and not the conspiracy, is the gist of the action.

206. The charge of conspiracy may be of use—

(a) To create a liability in cases of tort actionable only when committed by two or more;

(b) To enable the defendant to apply principles of liability of joint tort feasors to conspirators;

(c) To enlarge the scope of evidence admissible;

(d) To aggravate damages; and

(e) To entitle to an injunction.

"Conspiracy" naturally refers to some agreement for joint action. At common law, it was the name of a writ. That writ did not take its appellation from the wrong it was designed to remedy. On the contrary, the wrong to which it issued was malicious prosecution; but it issued only when persons, by agreement, united in concerted malicious prosecution.[365] The practice is supposed to have its origin in the phraseology of 21 Edw. I.[366] Because of confusion as to this old writ, and of civil with criminal conspiracy, there is much uncertainty in the meaning given to, and the use made of, the term. Indeed, the term is now commonly applied to unlawful combinations of workmen to raise their wages, or otherwise improve their condition.[367]

[364] State v. Mayberry, 48 Me. 218.

[365] Bigelow, Lead. Cas. 214.

[366] Bigelow, J., in Parker v. Huntington, 2 Gray (Mass.) 124. And see Van Syckel, J., in Van Horn v. Van Horn (N. J. Err. & App.) 28 Atl. 669.

[367] Toml. Law Dict. tit. "Conspiracy." And see post, p. 641.

Injury the Gist of the Action.

A civil conspiracy is an unlawful combination or agreement between two or more persons to do an act unlawful in itself, or a lawful act by unlawful means.[368] But, as has been shown, mere agreement to do wrong is not actionable. There must be some overt act consequent upon such agreement, to give the plaintiff a standing in a court of law, although it may be otherwise in equity. The liability is damages for doing, not for conspiring.[369] The charge of conspiracy does not change the nature of the act. The true test of liability, in cases of conspiracy, is whether or not there is conduct in pursuance of a conspiracy, and injury—not merely damage—resulting from such conduct. The general nature of the wrong is the malicious interference with certain general rights recognized and protected by the law.[370] There may be an agency, and also a con-

[368] King v. Jones, 4 Barn. & Adol. 345; O'Connell v. Reg., 11 Clark & F. 115; Breitenberger v. Schmidt, 38 Ill. App. 168; Reg. v. Parnell, 14 Cox, Cr. Cas. 508; Angle v. Chicago, St. P., M. & O. R. Co., 151 U. S. 1, 14 Sup. Ct. 240. The definition of a conspiracy given in the text is the current and conventional one. It has been observed with much force, however, that "what a conspiracy is no one knows. Its definition is always question begging, and the only intelligible meaning of it seems to be that there is an indefinite class of offenses which become conspiracies because several combine in the execution, and so render opposition by an individual more difficult." 8 Harv. Law Rev. 228; Mr. Justice Harlan, in Arthur v. Oakes, 63 Fed. 310. And see Lord Esher, in Temperton v. Russell [1893] 1 Q. B. 715.

[369] Boston v. Simmons, 150 Mass. 461, 23 N. E. 210; Sweeny v. Torrence, 11 Pa. Co. Ct. R. 497.

[370] Hutchins v. Hutchins, 7 Hill (N. Y.) 104; Bigelow, Lead. Cas. 207. Et ride Place v. Minster, 65 N. Y. 89; Burd. Lead. Cas. 259; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Austin v. Barrows, 41 Conn. 287; Verplanck v. Van Buren, 76 N. Y. 247; Findlay v. McAllister, 113 U. S. 104, 5 Sup. Ct. 401; Parker v. Huntington, 2 Gray (Mass.) 124; Payne v. Western Ry. Co., 13 Lea (Tenn.) 507; Kimball v. Harman, 34 Md. 407; Allen v. Fenton, 24 How. 407; Bush v. Sprague, 51 Mich. 41, 16 N. W. 222; Garing v. Fraser, 76 Me. 37; Herron v. Hughes, 25 Cal. 556; Cook v. Churchman, 104 Ind. 141–149, 3 N. E. 759; Wildee v. McKee, 111 Pa. St. 335, 2 Atl. 108; Engstrom v. Sherburne, 137 Mass. 153; Savile v. Roberts, 1 Ld. Raym. 374; Cotterell v. Jones, 11 C. B. 713; Castrique v. Behrens, 30 Law J. Q. B. 163; Walsham v. Stainton, 33 Law J. Eq. 68; Skinner v. Gunton, 1 W. Saund. 229; Turner v. Turner, Gow, 20. A complaint charging defendant with a conspiracy to slander plain-

spiracy to defraud, between the same persons, and relating to the same transaction.[371]

Use of Charge of Conspiracy.

It is often loosely said that the allegation of conspiracy in an action on tort is immaterial and surplusage, and that the fact of conspiracy became actionable only when the act would be a ground of suit if done by a single person.[372] This is far from being literally true. While in an action against two or more persons, in the nature of a conspiracy, if the tort be actionable whether committed by one or more, recovery may be had against but one, but, if the tort be actionable only when committed under an unlawful conspiracy of two or more, recovery may not be had unless the unlawful conspiracy be established. Thus, judgment confessed by a father in favor of a son cannot be held fraudulent, as to creditors of the father, without collusion and combination between the two to hinder, delay, and defraud such creditors.[373] The charge of conspiracy is further of use as enabling the plaintiff to recover against all conspirators as joint tort feasors, or, if he fail to prove a concerted design, he may still recover damages against such as are shown to be guilty of the tort without such an agreement.[374] Mere silent approval of an unlawful act does not, however, render

tiff, but failing to sufficiently plead slander as against either, is demurrable. Severinghaus v. Beckman, 9 Ind. App. 388, 36 N. E. 930.

[371] Wolfe v. Pugh, 101 Ind. 293.

[372] Boston v. Simmons, 150 Mass. 461, 23 N. E. 210; Kimball v. Harman, 34 Md. 407; Cooley, Torts, 125.

[373] Collins v. Cronin, 117 Pa. St. 35, 11 Atl. 869; Laverty v. Vanarsdale, 65 Pa. St. 507; Rundell v. Kalbfus, 125 Pa. St. 123, 17 Atl. 238; Id., 134 Pa. St. 102, 19 Atl. 492; Burton v. Fulton, 49 Pa. St. 151; Newall v. Jenkins, 26 Pa. St. 159; Wellington v. Small, 3 Cush. (Mass.) 145; Leavitt v. Gushee, 5 Cal. 152; Johnson v. Davis, 7 Tex. 173; Gregory v. Duke of Brunswick, 6 Man. & G. 205.

[374] Van Horn v. Van Horn, supra; Skinner v. Gunton, 1 Saund. 228 et seq.; Parker v. Huntington, 2 Gray (Mass.) 124; Boston v. Simmons, 150 Mass. 461, 23 N. E. 210; Eason v. Westbrook, 2 Murph. (N. C.) 329; Laverty v. Vanarsdale, 65 Pa. St. 507–509; Garing v. Fraser, 76 Me. 37–41; Breedlove v. Bundy, 96 Ind. 319; Buffalo Lubricating Oil Co. v. Standard Oil Co., 42 Hun, 153; Brinkley v. Platt, 40 Md. 529; Keit v. Wyman, 67 Hun, 337, 22 N. Y. Supp. 1331; Griffing v. Differ, 66 Hun, 633, 21 N. Y. Supp. 407.

one liable as a conspirator;[375] nor does presence as a spectator;[376] nor membership in an association to prosecute, unless the member sought to be charged intentionally aided in the prosecution.[377] But actual participation need not be proved.[378] While conspiracy thus may increase the person's liability for a given wrong, it may also serve to aggravate the wrong done, and thus tend to increase the measure of the recovery.[379]

The charge of conspiracy correspondingly increases the range of evidence admissible against the defendants. Thus, when a prima facie case is established, showing the existence of an actionable conspiracy, declarations, acts, or omissions of any of the conspirators touching the original or concerted plan (but not before or afterwards), and with reference to the common object, are evidence against each and every one of them. This is true, although such declarations, acts, or omissions be not made or performed in the presence of more than one of such conspirators.[380]

The charge of conspiracy may be further of use as entitling its object to an injunction even before there has been any overt act under the unlawful agreement. The issuance of the injunction will be governed by the common equitable principles. A combination to boycott a newspaper may be enjoined.[381]

[375] Brannock v. Bouldin, 4 Ired. (N. C.) 61; Johnson v. Davis, 7 Tex. 173.

[376] Blue v. Christ, 4 Ill. App. 351.

[377] Johnson v. Miller, 63 Iowa, 529, 17 N. W. 34; Id., 82 Iowa, 693, 47 N. W. 903, and 48 N. W. 1081.

[378] Page v. Parker, 43 N. H. 363-367; Tappan v. Powers, 2 Hall (N. Y.) 277; Livermore v. Herschell, 3 Pick. 33; Bredin v. Bredin, 3 Pa. St. 81.

[379] Cooley, Torts, 125; Robinson v. Parks, 76 Md. 118, 24 Atl. 411; Lee v. Kendall, 56 Hun, 610, 11 N. Y. Supp. 131; Kimball v. Harman, 34 Md. 407.

[380] Brinkley v. Platt, 40 Md. 529; Williams v. Dickenson, 28 Fla. 90, 9 South. 847; Allen v. Kirk, 81 Iowa, 659, 47 N. W. 906; Taylor Co. v. Standley, 79 Iowa, 669, 44 N. W. 911; Work v. McCoy, 87 Iowa, 217, 54 N. W. 140; Kilburn v. Rice, 151 Mass. 442, 24 N. E. 403; Percival v. Harres, 142 Pa. St. 369, 21 Atl. 876; Gaunce v. Backhouse, 37 Pa. St. 350; Brackett v. Griswald, 59 Hun, 617, 13 N. Y. Supp. 192; St. Paul Distilling Co. v. Pratt, 45 Minn. 215, 47 N. W. 789; Rollins v. Board of Com'rs, 15 Colo. 103, 25 Pac. 319; Strout v. Packard, 76 Me. 148. Letters written by one conspirator to another during alleged conspiracy are admissible. Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786. But see Blum v. Jones, 86 Tex. 492, 25 S. W. 694.

[381] Casey v. Cincinnati Typographical Union No. 3, 45 Fed. 135; Rogers

SAME—STRIKES AND BOYCOTTS.

207. The essential elements of strikes and boycotts actionable as torts are—

(a) A combination of persons to do harm to another;

(b) Malicious intent; and

(c) Damage to complainant.

The Combination.

It is constantly and loosely said that, what one person may lawfully do singly, two or more may lawfully agree to do, and actually do, jointly.[382] This can by no means be accepted at the present time as unqualifiedly true. Leaving technical reasoning and authority out of view for a moment, it is evident, from ordinary considerations, that the sum of a number of similar actions may result in a general effect, the elements of which are not apparent in isolated action. The separation of a single animal is not a stampede. A single desertion is not a panic. A single servant may leave his employment without suggesting the paralysis of a general "tie up." One member of a crew might, without wrong, leave a train, on the main traveled road, although it would be a criminal outrage for the entire train crew to abandon the train at the same point. There is, however, abundance of legal authority and reasoning against so artificial a conclusion.

In the criminal law, it is entirely clear that "an agreement to effect an injury or wrong to another by two or more persons constitutes an offense, because the wrong to be effected by a combination

v. Evarts (Sup.) 17 N. Y. Supp. 264; Mogul S. S. Co. v. M'Gregor, 15 Q. B. Div. 476; St. Paul Distilling Co. v. Pratt, 45 Minn. 215, 47 N. W. 789; Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906.

[382] "What one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful. The gist of a private action for the wrongful act of many is, not the combination or conspiracy, but the damage done or threatened to the plaintiff by the acts of the defendants. If the act be unlawful, the combination of many to commit it may aggravate the injury, but cannot change the character of the act." Per Mitchell, J., in Bohn Manuf'g Co. v. Hollis, 54 Minn. 223–234, 55 N. W. 1119.

assumes a formidable character. When done by one alone, it is but a civil injury, but it assumes a formidable or aggravated character when it is to be effected by the powers of combination." [383] In Com. v. Carlisle,[384] (1821) where employers combined to depress the wages of their employés by artificial means, Chief Justice Gibson, "that judge of 'great and enduring reputation,'" [385] said: "There is, between the different parts of the body politic, a reciprocity of action on each other, which, like the action of antagonizing muscles in the natural body, not only prescribes to each its appropriate state and condition, but regulates the motion of the whole. The effort of an individual to disturb this equilibrium can never be perceptible, nor carry the operation of his interest, or that of any other individual, beyond the limit of fair competition. But, the increase of power by combination of means being in geometrical proportion to the number concerned, an association may be able to give it impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so powerful and dangerous that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual." This distinction is recognized in civil cases as the basis of liability in tort, and as resting on sound reasoning, although caution should be exercised not to carry the doctrine beyond the limits necessary for protection of individuals.[386]

This view of the law has received indorsement in the recent strike cases. As a matter of fact, the questions of law which they involve

[383] Rex v. Seward, 1 Adol. & E. 706. Cf. Reg. v. Peck, 9 Adol. & E. 686; Reg. v. Parnell, 14 Cox, Cr. Cas. 508–514; Queen v. Kenrick, 5 Q. B. 49; Com. v. Hunt, 4 Metc. (Mass.) 111–121; State v. Stewart, 59 Vt. 273–286, 9 Atl. 559; State v. Glidden, 55 Conn. 46–78, 8 Atl. 890.

[384] Brightly, N. P. (Pa.) 36–41, Append.; Callan v. Wilson, 127 U. S. 540–556, 8 Sup. Ct. 1301; Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 60 Fed. 803; Cote v. Murphy, 159 Pa. St. 420, 28 Atl. 190.

[385] See Jenkins, J., in Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 60 Fed. 803-815.

[386] Bowen, L. J., in Mogul Steamship Co. v. McGregor, 23 Q. B. Div. 598, at page 616. In house of lords ([1892] App. Cas. 25, at page 38) Lord Halsbury said: "I do not deny that there are many things which might be perfectly lawfully done by an individual, which, when done by a number of persons, become unlawful."

had immediate reference to injunction, rather than to damages, but the underlying principles enunciated control liability in tort.[387]

It is insisted that "any man (unless under contract obligation, or employment charging him with a public duty) has a right to refuse to work for or deal with any man, or class of men, as he sees fit; and this right, which one man may exercise singly, any number may agree to exercise jointly." [388] Indeed, the common-law right of laborers to combine and use peaceful means to advance their interests, and, more specifically, the price of labor, has been generally broadened by statute.[389] Where such a statute extends the common-law rights as to combinations of labor, the courts recognize corresponding changes in the rights of employers to combine to resist employés. Therefore, where employés enter into a lawful combination to control, by artificial means, the supply of labor, preparatory to a demand for an advance in wages, a combination of employers to resist such artificial advance is lawful, since it is not made to lower the price of labor, as regulated by supply and demand.[390] However, the right of employés to leave their employment whenever they choose is far from being absolute.[391] In Farmers' Loan & Trust Co. v.

[387] "There would seem to be no good reason why, in some cases at least, the third person injured should not have a remedy also, theoretical but practically useless, against the striker, not for breach of contract, but for a tort committed in that breach by the misfeasance or nonfeasance of duty." Ardemus Stewart, Esq., on the legal side of the strike question, 1 Am. Law Reg. & Rev. 609–614. And see Temperton v. Russell [1893] 4 Reports, 376, at page 386, per Lord Justice A. L. Smith; Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 60 Fed. 815; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 746.

[388] Pardee, J., in Re Higgins, 27 Fed. 443; Beatty, J., in Cœur d'Alene Consolidated & Min. Co. v. Miners' Union, 51 Fed. 260; Carew v. Rutherford, 106 Mass. 1; Bowen v. Matheson, 14 Allen (Mass.) 499; Snow v. Wheeler, 113 Mass. 179; Walker v. Cronin, 107 Mass. 555; Payne v. Western & A. R. Co., 13 Lea (Tenn.) 507; Cooley, Torts, 278; Hilton v. Eckersley, 6 El. & Bl. 47. And see Sir William Earl's treatise on the Law Relating to Traders' Unions, at page 13.

[389] As in Mayer v. Journeymen Stone-Cutters' Ass'n, 47 N. J. Eq. 519, 20 Atl. 492. And see Perkins v. Rogg, 28 Wkly. Law Bul. 32.

[390] Cote v. Murphy, 159 Pa. St. 420, 28 Atl. 190. And see Buchanan v. Barnes (Pa. Sup.) 28 Atl. 195; Buchanan v. Kerr, 159 Pa. St. 433, 28 Atl. 195.

[391] "Rights are not absolute, but are relative. Rights grow out of duty, and are limited by duty. One has not the right arbitrarily to quit service

Northern Pac. Ry. Co.,[392] Judge Jenkins held that a strike was necessarily illegal. In Arthur v. Oakes,[393] however, Mr. Justice Harlan said: "We are not prepared, in the absence of evidence, to hold, as a matter of law, that a combination among employés, having for its object their orderly withdrawal, in large numbers or in a body, from the service of their employer, on account simply of a reduction in

without regard to the necessities of that service. His right of abandonment is limited by the assumption of that service, and the conditions and exigencies attaching thereto. It would be monstrous if a surgeon, upon demand and refusal of larger compensation, could lawfully abandon an operation partially performed, leaving his knife in the bleeding body of his patient. It would be monstrous if a body of surgeons, in aid of such demand, could lawfully combine and conspire to withhold their services. * * * It would be intolerable if counsel were permitted to demand larger compensation, and to enforce his demand by immediate abandonment of his duty in the midst of a trial. It would be monstrous if the bar of a court could combine and conspire in aid of such extortion by one of its members, and refuse their service. I take it that in such case, if the judge of the court had proper appreciation of the duties and functions of his office, that court, for a time, would be without a bar, and the jail would be filled with lawyers. It cannot be conceded that an individual has the legal right to abandon service whenever he may please. His right to leave is dependent upon duty, and his duty is dictated and measured by the exigency of the occasion." Jenkins, J., in Farmers' Loan & Trust Co. v. Northern Pac. R. Co., 60 Fed. 803, 812.

[392] He defined a strike to be (at page 821) "a combined effort among workmen to compel the master to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand. The concerted cessation of work is but one of, and the least effective of, the means to the end; the intimidation of others from engaging in the service, the interference with, and the disabling and destruction of, property, and resort to actual force and violence, when requisite to the accomplishment of the end, being the other, and more effective, means employed. It is idle to talk of a peaceable strike. None such ever occurred. The suggestion is impeachment of intelligence. From first to last, * * * force and turbulence, violence and outrage, arson and murder, have been associated with the strike as its natural and inevitable concomitants. No strike can be effective without compulsion and force. That compulsion can come only through intimidation. A strike without violence would equal the representation of the tragedy of Hamlet with the part of Hamlet omitted. The moment that violence becomes an essential part of a scheme, or a necessary means of effecting the purpose of a combination, that moment the combination, otherwise lawful, becomes illegal. All com-

[393] 63 Fed. 310–327, citing Farrer v. Close, L. R. 4 Q. B. 602–612.

their wages, is not a strike, within the meaning of the word as commonly used. Such a withdrawal, although amounting to a strike, is not either illegal or criminal." It was held in this case, however, that "an intent upon the part of a single person to injure the rights of others, or of the public, is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent; but a combination of two or more persons, with a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal."

Malicious Intent.

There are many loose sayings to the effect that the malicious motive makes a bad case worse, but they cannot make that wrong which, in its own essence, is lawful.[394] This unqualified statement is not true, as applied universally to the law of torts,[395] nor is it true as applied to the matter under consideration. Malicious injury to the business of another has long been held to give a right of action to the injured party.[396] Judge Taft, in his celebrated opinion

binations to interfere with perfect freedom in the proper management and control of one's lawful business, to dictate the terms upon which such business shall be conducted, by means of threats or by interference with property or traffic or with the lawful employment of others, are within the condemnation of the law. It has well been said that the wit of man could not devise a legal strike, because compulsion is the leading idea of it. A strike is essentially a conspiracy to extort by violence, the means employed to effect the end being not only the cessation of labor by the conspirators, but the necessary prevention of labor by those who are willing to assume their places, and, as a last resort, and in many instances an essential element of success, the disabling and destruction of the property of the master, and so, by intimidation, and by the compulsion of force, to accomplish the end designed."

[394] Jenkins v. Fowler, 24 Pa. St. 308; Heywood v. Tillson, 75 Me. 225; Morris v. Tuthill, 72 N. Y. 575; Mahan v. Brown, 13 Wend. 261; Phelps v. Nowlen, 72 N. Y. 39; Bohn Manuf'g Co. v. Hillis (supra).

[395] Ante, pp. 55, 56.

[396] Garret v. Taylor, Cro. Jac. 567; Keeble v. Hickeringill, 11 East, 574; Gunter v. Astor, 4 Moore, 12, 10 E. C. L. 357; Lumley v. Gye, 2 El. & Bl. 216; Gregory v. Duke of Brunswick, 6 Madd. & G. 205; Young v. Hichens, 6 Q. B. 606; Temperton v. Russell [1893] 1 Q. B. 715; Carew v. Rutherford, 106 Mass. 1; Walker v. Cronin, 107 Mass. 555; Van Horn v. Van Horn, 52 N. J. Law, 284, 20 Atl. 485, affirmed 28 Atl. 669; Lucke v. Assembly (Md.) 26 Atl.

in Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.,[397] said: "Ordinarily, when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others, of their own motion, to do that which the combiners seek to compel them to do. Such combinations are said to be unlawful conspiracies, though the acts in themselves, and considered singly, are innocent, when the acts are done with malice, i. e. with the intention to injure another without lawful excuse." Indeed, the gravamen of the wrong in cases of this kind is malice.[398] This renders necessary, in cases of this kind, an inquiry as to the intent of the defendants, to ascertain if the case falls within the class in which it is held that malicious motive may make an act, which would not be wrongful without malice, wrongful when done with malice.[399] "Malice," as here employed, of course, signifies, not colloquial, but technical, malice. "Malice" means the purpose of injuring the plaintiff, or benefiting the defendant at the expense of the plaintiff.[400]

Damage to Complainant.

While a combination to injure others may be the basis for preventive relief in a court of equity, the wrong is not a complete tort

505; Curran v. Galen (Sup.) 22 N. Y. Supp. 826; Bradley v. Pierson, 148 Pa. St. 502, 24 Atl. 65; Ryan v. Brewing Co. (Sup.) 13 N. Y. Supp. 660; Moores v. Union, 23 Wkly. Cin. Law Bull. 48, 7 Ry. & Corp. Law J. 108; Delz v. Winfree (Tex. Sup.) 16 S. W. 111; Olive v. Van Patten (Tex. Civ. App.) 25 S. W. 428; Jackson v. Stanfield (Ind. Sup.) 36 N. E. 345; Railroad Co. v. Greenwood (Tex. Civ. App.) 21 S. W. 559; Chipley v. Atkinson, 23 Fla. 206, 1 South. 943; Haskins v. Royster, 70 N. C. 601; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475, note; Mapstrick v. Ramge, 9 Neb. 390, 2 N. W. 739.

[397] 54 Fed. 730–738, and authorities cited. And see Mogul S. S. Co. v. McGregor, supra.

[398] Van Horn v. Van Horn, 52 N. J. Law, 284, 20 Atl. 485, Chase, Lead. Cas. 109.

[399] Barr v. Essex Trades Council (N. J. Ch.) 30 Atl. 881.

[400] Van Horn v. Van Horn, 52 N. J. Law, 284, 20 Atl. 485, per Scudder, J.; Temperton v. Russell, 4 Reports, 376.

until damage has been suffered. But mere damage alone is not necessarily sufficient. In Mogul Steamship Co. v. McGregor,[401] on appeal, Bowen, L. J.,[402] considered the proposition "that an action will lie if a man maliciously and wrongfully acts so as to injure another in that other's trade." "Obscurity," he said, "resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure' are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure,' in strictness, means more than an intent to harm. It connotes an intent to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term 'wrongful' imports, in its turn, the infringement of some right. The ambiguous proposition * * * therefore leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of trade. * * * The plaintiffs had a right to be protected against certain kind of conduct, and we have to consider what conduct would pass this legal line or boundary. Now, intentionally to do that which is calculated, in the ordinary course of events, to damage, and which does in fact damage, another, in that other person's property or trade, is actionable, if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a 'malicious wrong.'"

[401] This case, as reported in L. R. 15 Q. B. 476–482, was regarded by Lord Coleridge, C. J., as involving a boycott. A temporary injunction was, however, refused, because irreparable damage was not shown.

[402] 23 Q. B. Div. 598, at pages 612, 613. And see dissenting opinion of Lord Esher, at page 601. This great case was finally appealed and decided. [1892] App. Cas. 25, affirming the decision of the court of appeal. More specifically that since the acts of defendant were done with the lawful object of protection and extending their trade, and increasing their profits, and since they had not employed any unlawful means, the plaintiff had no cause of action. For further report see 61 Law J. Q. B. 295; 66 Law T. 1; 40 Wkly. Rep. 337. See, also, Walker v. Cronin, 107 Mass. 555; Heywood v. Tillson, 75 Me. 225.

Principles Applied.

At the one extreme, the exercise of equal rights affords a full justification to the charge of an actionable conspiracy of this kind. In Mogul Steamship Co. v. McGregor,[403] the defendants, shipowners, formed an association to maintain a monopoly of homeward tea trade, whereby they allowed purchasers of tea shipped exclusively in their vessels a rebate on freights. The plaintiffs, rival shipowners, suffered damage because they were excluded from the benefits of the association. The right to recover was denied because the defendants were pushing their lawful trade by lawful means. Competition afforded a full justification. The motive of the defendant was business gain, without actual malice to the plaintiff.[404] No unlawful means were employed.[405]

At the other extreme, a boycott must, consistently with these cases, be regarded as an actionable wrong. Lawful competition in business may damage another without creating a wrong, but trades unions are not ordinarily competitors of the persons against whom a boycott is directed. There is no rivalry in business. The purpose of the boycott is, by a combination of many, to cause loss to one person by coercing others, against their will, to suspend or discontinue dealing or patronage because of his refusal to comply with demands of the boycotters.[406] This is a totally different thing from that competition which is the life of trade. It was accordingly held in Barr v. Essex Trades Counsel [407] that the boycott of a newspaper, which included threatening circulars, designed to procure discontinu-

[403] 23 Q. B. Div. 598.

[404] Coleridge, C. J., in L. R. 21 Q. B. Div. 544, at page 552.

[405] So, wholesale butchers, to protect each other from dishonest and insolvent customers, and otherwise naturally to assist each other, may agree that each, on the request of the other, will refuse to sell merchandise to any butcher indebted to them both, and such butcher cannot recover for consequent injury to his business. Delz v. Winfree, 6 Tex. Civ. App. 11, 25 S. W. 50. Cf. Dueber Watch-Case Manuf'g Co. v. E. Howard Watch Co. (Sup.) 24 N. Y. Supp. 647.

[406] Definitions of boycott, 2 Am. & Eng. Enc. Law, 512, quoting Com. v. Shelton, 11 Va. Law J. 324. A history and definition of the word, with numerous authorities, as to the rights of employers and employés, and the civil liability of those establishing a boycott, by D. H. Pingrey, 38 Cent. Law J. 427.

[407] 30 Atl. 884.

ance of advertisements and decrease of circulation, is an actionable wrong. Boycotts, indeed, have been almost universally regarded as illegal conspiracies, and therefore as actionable wrongs.[408]

Between these extremes, the authorities are not in accord. In Bohn Manuf'g Co. v. Hillis[409] it was held that a voluntary association of retail dealers could agree not to deal with any manufacturer or wholesale dealer who would sell direct to consumers, and, in accordance with such agreement, notify all members whenever any wholesale dealer or manufacturer made any such sale, without committing an actionable wrong, or creating a basis for the issuance of an injunction. Here the conduct of the retailers' association may have been justified by the exercise of equal rights. It was an effectual check on dangerous competition. Moreover, in this case,

[408] Old Dominion S. S. Co. v. McKenna, 30 Fed. 48, 24 Blatchf. 244. See 21 Am. Law Rev. 509, 764; Barr v. Essex Trades Council (N. J. Ch.) 30 Atl. 881; Carew v. Rutherford, 106 Mass. 1; State v. Glidden, 55 Conn. 46, 8 Atl. 890; State v. Stewart, 59 Vt. 273, 9 Atl. 559; Casey v. Typographical Union, 45 Fed. 135; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 738; Thomas v. Cincinnati Ry. Co., 62 Fed. 803, commenting, inter alia, on U. S. v. Workingmen's Ass'n, 54 Fed. 994; U. S. v. Patterson, 55 Fed. 605.

[409] Bohn Manuf'g Co. v. Hollis, 54 Minn. 223, 55 N. W. 1119, citing, inter alia, Bowen v. Matheson, 14 Allen (Mass.) 499; Parker v. Huntington, 2 Gray (Mass.) 124; Wellington v. Small, 3 Cush. (Mass.) 145; Payne v. Western & A. R. Co., 13 Lea (Tenn.) 507; and Mogul S. S. Co. v. McGregor, supra. The conclusion reached may be in harmony with this last case, but certainly not the process by which it is arrived at. "It will therefore be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public, or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence." Gibson, J., in Com. v. Carlisle, Brightly, N. P. (Pa.) 36. And see State v. Buchanan, 5 Har. & J. 317; State v. De Witt, 2 Hill (S. C.) 282; State v. Norton, 23 N. J. Law, 33; State v. Donaldson, 32 N. J. Law, 151; State v. Burnham, 15 N. H. 396; State v. Glidden, 55 Conn. 46, 8 Atl. 890; Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307; Smith v. People, 25 Ill. 17; State v. Stewart, 59 Vt. 273, 9 Atl. 559; In re Higgins, 27 Fed. 443; Cœur d'Alene Consolidated & Min. Co. v. Miners' Union, 51 Fed. 260; U. S. v. Workingmen's Amalgamated Council, 54 Fed. 994.

as in the cases in which the right of men to quit the employment of their master is recognized, there was simply the exercise jointly of the right any man has to deal with those he chooses, and to quit working whenever he chooses, in the absence of such particular circumstances; as, for example, where there is an attempt to influence the conduct of persons outside of the association. In Delz v. Winfree [410] the court recognized as correct the proposition that a person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason, or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property, but added: "The privilege here asserted must be limited to the individual action of the party who asserts the right. It is not equally true that one person may from such motive influence another person to do the same thing." Accordingly, while it was held that no action for conspiracy would lie for refusal on the part of several dealers in cattle to sell to the complainant (a nonpaying customer), yet such action would lie if they induced another dealer, who likewise refused to sell to him. And in Temperton v. Russell [411] it was distinctly held that a combination by two or more persons to induce others not to deal with, or to enter into contract with, a particular individual, is actionable, if done for the purpose of injuring that

[410] 80 Tex. 400, 16 S. W. 111. In the same case it was subsequently distinctly held (6 Tex. Civ. App. 11, 25 S. W. 50) that wholesale butchers, to protect each other from dishonest and insolvent customers, and otherwise naturally to assist each other, may agree that each, on the request of the other, will refuse to sell merchandise to any butcher indebted to them both, and such butcher cannot recover for consequent injury to his business. This doctrine was followed in Olive v. Van Patten (Tex. Civ. App.) 25 S. W. 428. There it was held that a petition alleging that defendants (wholesale lumber dealers) formed an association agreeing not to sell to others than dealers; that, because of refusal by plaintiff (another dealer) to join such association, they had maliciously distributed circulars asking that patronage be withdrawn from plaintiff till he agreed not to sell to others than dealers, thereby influencing others not to deal with plaintiff, to his injury,—states a good cause of action. And see Buffalo Lubricating Oil Co. v. Standard Oil Co., 106 N. Y. 669, 12 N. E. 825; Bradley v. Pierson, 148 Pa. St. 502, 24 Atl. 65; Kelly v. Chicago, M. & St. P. Ry. Co. (Iowa) 61 N. W. 957. Cf. Murray v. McGarigle, 69 Wis. 483, 34 N. W. 522.

[411] [1893] 4 Reports, 376.

individual, provided he is thereby injured. The courts, however, regard as actionable wrong any attempt to secure a monopoly of business by coercion or intimidation by combinations. From this point of view, Bohn Manuf'g Co. v. Hollis has been criticised as in conflict with approved authority, and as being bad as a precedent.[412]

In Van Horn v. Van Horn the line is a much finer one, and all the reasoning of the court, though not necessarily their conclusion, can hardly be reconciled with authority, or be found consistent. Here the declaration charged that the defendants conspired to injure the plaintiff in her business of selling fancy goods, which she carried on in her own name, and that, by false and malicious statements concerning her personal and business character, they induced and persuaded one who had supplied her with goods to remove the stock so supplied, and to refuse to deliver what he had expected to let her have, leaving her without any stock to sell, or customers to sell to. It was held by the supreme court of New Jersey that an action lay for a combination or conspiracy by fraudulent and malicious acts to drive a trader out of business resulting in damages,[413] and that this was not an action of slander,[414] and on appeal to the court of last resort[415] these views were sustained. It was held that "the rule to be deduced from these cases, and the one which has the most ample support, is that while a trader may lawfully engage in the sharpest competition with those in a like business, by holding

[412] Jackson v. Stanfield, 137 Ind. 592, 36 N. E. 345, and 37 N. E. 14. Here "The Retail Lumber Dealers' Association of Indiana" by its by-laws gave an active member a claim against a wholesaler for selling to a person not a "regular dealer" in such member's community, provided for a hearing of the claim by a committee, and required members to refuse to patronize a wholesaler who ignored the committee's decision. Plaintiff, who was not a "regular dealer," underbid defendant on a contract, but wholesalers refused to sell to him, and he was obliged to abandon the contract, because defendant, an active member of the association, had previously enforced a claim against a wholesaler who had sold to plaintiff, and expressed an intention of continuing to enforce such claims. Held, that defendant was liable for the amount which plaintiff lost by abandoning his contract, and would be perpetually enjoined from making a claim under the by-laws of the association against any person who sold to plaintiff.

[413] 52 N. J. Law, 284, 20 Atl. 485.

[414] 55 N. J. Law, 514, 21 Atl. 1069.

[415] (N. J. Err. & App.) 28 Atl. 669.

out extraordinary inducements, by representing his own wares to be better and cheaper than those of others, yet when he oversteps that line, and commits an act with the malicious intent of inflicting injury upon his rival's business, his conduct is illegal, and if damage results from it the injured party is entitled to redress."

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