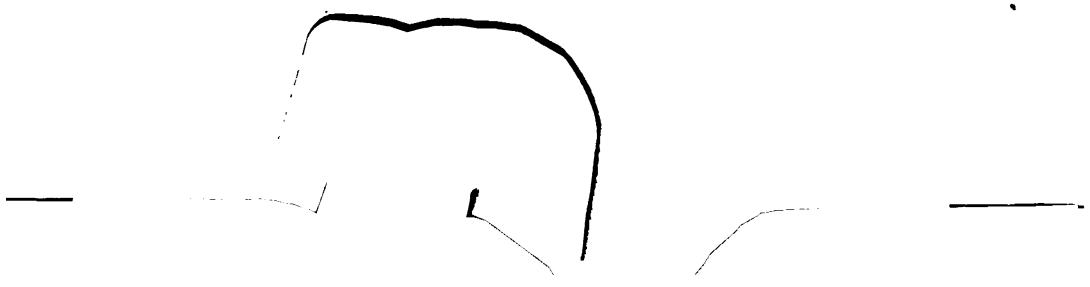

HAND-BOOK

OF THE

LAW OF TORTS

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IN TWO VOLUMES

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HAND-BOOK

OF THE

LAW OF TORTS.

VOLUME 2.

CHAPTER X.

WRONGS TO POSSESSION AND PROPERTY:

DUTY TO RESPECT PROPERTY AND POSSESSION—REMEDIES.

208. The common law recognized an absolute duty to respect the property of others, but based its remedies for the violation of such duties upon possession rather than on ownership.

The duty of abstaining from interference with property and possession is absolute, and the courts have gone to great length in recognizing corresponding absolute rights. That a disturbance of property or possession was involuntary and by mistake is no defense, if the physical act was voluntary. Therefore, where one person, in mowing his own grass, mowed by mistake a little of his neighbor's, which was growing alongside, he was held liable.[1] If, however, the act

1 Baseley v. Clarkson, 3 Lev. 37; Blaen, etc., Co. v. McCulloh, 59 Md. 403. Permission to trim plaintiff's trees, given defendant by a person having no authority, does not excuse defendant's trespass in acting on such permission, though he thought such person had authority. Huling v. Henderson (Pa. Sup.) 29 Atl. 276. But see Webber v. Quaw, 46 Wis. 118, 49 N. W. 830,

is involuntary, it is otherwise. "If a man who is assaulted and in danger of his life run through the close of another without keeping in a footpath, an action for trespass does not lie." [2] It is immaterial whether the person trespassing is acting for his own benefit,[3] or in good faith to benefit the true owner,[4] even if benefit result to the owner.[5] Indeed, intention does not necessarily enter into trespass or conversion. It is sufficient if the act is done without justifiable cause or purpose. Ordinarily, the only effect of intent is upon damages.[6] Mistake or ignorance affords no excuse; for example, where one buys an ox of another, and by mistake takes away the wrong ox, he is liable.[7] On the same principle, a purchase of property in good faith from a person having no title is no defense.[8] Indeed, it has been said that probably one-half the cases in which trespass de bonis asportatis is maintained arise from mere

[2] 9 Bac. Abr. "Trespass," F. So, where cattle join a herd driven along the highway, the driver, if innocent, is not liable for conversion. Young v. Vaughn, 1 Houst. 331; Brooks v. Olmstead, 17 Pa. St. 24. A horse which becomes frightened, and escapes from the owner, is not "running at large," within the meaning of an ordinance prohibiting animals from running at large. Presnall v. Raley (Tex. Civ. App.) 27 S. W. 200. Rightmire v. Shepard, 59 Hun, 620, 12 N. Y. Supp. 800.

[3] Hollins v. Fowler, 44 Law J. Q. B. 169.

[4] Trespass, Kirk v. Gregory, 1 Exch. Div. 55; trover, Hiort v. Bott, 9 L. R. Exch. 56.

[5] Where defendant filled in plaintiffs' lot without their consent, and thereby destroyed their fence and certain vegetables, plaintiffs are entitled to recover any actual damages they suffered by reason of defendant's trespass, and any advantage to the lot arising by reason of such filling in is not to be considered in estimating plaintiffs' damages. Hurley v. Jones (Pa. Sup.) 30 Atl. 499.

[6] Weaver v. Ward, Hob. 134; Tobin v. Deal, 60 Wis. 87, 18 N. W. 634; Wakeman v. Robinson, 1 Bing. 213; Jennings v. Fundeburg, 4 McCord, 161; Stephenson v. Brown, 147 Pa. St. 300, 23 Atl. 443; Wallard v. Worthman, 84 Ill. 446; Flanders v. Colby, 28 N. H. 34; Cate v. Cate, 44 N. H. 211; Amick v. O'Hara, 6 Blackf. 258; Mairs v. Manhattan, etc., Co., 89 N. Y. 498; Bruch v. Carter, 34 N. J. Law, 554; Maye v. Yappen, 23 Cal. 306; Hobart v. Hagget, 12 Me. 67; Luttrell v. Hazen, 3 Sneed (Tenn.) 20; ante, p. 391, "Exemplary Damages."

[7] Hobart v. Hagget, 12 Me. 67. Et vide Wallard v. Worthman, 84 Ill. 446.

[8] As to timber, see Loewenberg v. Rosenthal, 18 Or. 178, 22 Pac. 601; Higginson v. York, 5 Mass. 341; Allison v. Little, 85 Ala. 512, 5 South. 221. Et vide Cundy v. Lindsay, L. R. 3 App. Cas. 459; Smith v. Webster, 23 Mich.

misapprehension of legal rights.[9] In trover and conversion, however, it has been held that under certain circumstances intention may become an essential of the legal wrong.[10] So, in nuisance, it is not universally true that motive is immaterial.[11]

Remedies.

The common law provided remedies for injuries to possession and property, and based them upon possession rather than on the right of the property. The action of detinue at common law lay where a party claimed the specific recovery of goods and chattels, or deeds and writings detained from him.[12] For the same purpose, however, trover, one of the actions on the case not requiring the exactness of description necessary for detinue, came into more general use. It claims damages, and is based on the innocent fiction that the defendant, having found the goods, converted them to his own use.[13] Replevin could only be brought where there had been a taking by trespass, whether under color of legal process or otherwise.[14] Trespass, in its largest and most extensive sense, signifies any transgression or offense against the laws of nature, of society, or of the country in which we live, whether it relates

298; Pilcher v. Rawlins, L. R. 7 Ch. App. Cas. 259; Hazelton v. Week, 49 Wis. 661, 6 N. W. 309.

[9] Stanley v. Gaylord, 1 Cush. 536–551, per Metcalf, J.

[10] Post, p. 706, "Conversion."

[11] Post, p. 744, "Nuisance."

[12] Steph. Pl. 16. Et vide Robinson v. Richards, 45 Ala. 354; Caldwell v. Fenwick, 2 Dana, 332; Jennings v. Gibson, 1 Miss. 234. Where a foreign corporation, which has failed to comply with the requirements made a condition precedent to its right to do business in the state of Alabama, makes a conditional sale of a chattel therein, the contract is void, and, as the legal title consequently never passes out of the seller, it may maintain detinue for the chattel. Boulden v. Estey Organ Co., 92 Ala. 181, 9 South. 283.

[13] Steph. Pl. 19. Et vide Burroughes v. Bayne, 5 Hen. & M. 296; Pillot v. Wilkinson, 2 Hurl. & C. 72; Grand Island Banking Co. v. First Nat. Bank, 34 Neb. 93, 51 N. W. 596; Lucas v. Pittman, 94 Ala. 616, 10 South. 603; Reynolds v. Horton, 2 Wash. St. 185, 26 Pac. 221; Michigan Mut. Life Ins. Co. v. Cronk, 93 Mich. 49, 52 N. W. 1035; Tognini v. Kyle, 17 Neb. 209, 30 Pac. 829; Cain v. Cain (Sup.) 20 N. Y. Supp. 45. Moreover, trover being allied to trespass, could not be defeated by wager of law.

[14] Clerk & L. Torts, 186, collecting cases. And see Mennie v. Blake, 6 El. & Bl. 842; Mellor v. Leather, 1 El. & Bl. 619.

to a man's person or his property.[15] Trespass was used at common law as the name of an action where the injury to the person or property was direct, as trespass vi et armis, for assault and battery or for false imprisonment. Ejectment was a species of personal action of trespass for the recovery of both land and of damages for detention of possession. Trespass on the case was an action arising from the statute of Westminster II., and lay for consequential injuries.[16] Waste was a wrong[17] as well as a remedy.[18] Trespass for damages afforded a simple means for trying title to land. Its use for this purpose has not entirely disappeared.[19]

"The forms of [common law] action," says Mr. Pollock,[20] "brought not ownership, but possession, to the front, in accordance with a habit of thought which, strange as it may now seem to us, found the utmost difficulty in conceiving rights of property as having full existence, or being capable of transfer and succession, unless in close connection with the physical control of something which could be passed from hand to hand, or at least a part of it delivered in the name of the whole. * * * An owner who had neither possession nor the immediate right to possession could redress himself by a special action on the case, which did not acquire any technical name."

The protection which the law gives to possession seems to be an

[15] 3 Bl. Comm. 208.

[16] Ante, c. 1; Leame v. Bray, 3 East, 593; Cole v. Fisher, 11 Mass. 137; Berry v. Hamill, 12 Serg. & R. 210; Case v. Mark, 2 Ohio, 169. As to abolition of distinction between trespass and case, vide Duffield v. Rosenzweig, 144 Pa. St. 520, 23 Atl. 4; Welch v. Whittemore, 25 Me. 86; Coe v. English, 6 Houst. (Del.) 456; Wright v. Wilcox, 19 Wend. 343; Luttrell v. Hazen, 3 Sneed (Tenn.) 20; Schultz v. Frank, 1 Wis. 352; Guilford v. Kendall, 42 Ala. 651.

[17] The common-law action for waste might have been assumpsit (1 Chit. 102, 141), or covenant (Id. 141), or case (Id. 140).

[18] St. Glouc. 6 Edw. I., c. 5.

[19] Kircher v. Murray, 8 C. C. A. 448, 60 Fed. 48–52; Cox v. Hart, 145 U. S. 376, 12 Sup. Ct. 962; Downing v. Diaz, 80 Tex. 436, 16 S. W. 49; Stephenson v. Wilson, 37 Wis. 482. In Kentucky, however, in an action of trespass, the jury has no power to establish by its verdict a disputed line between the lands of the parties. Seale v. Shepherd (Ky.) 29 S. W. 31.

[20] Pol. Torts, 416. Et vide Lambert v. Stroother, Willes, 218; Dixon v. White Sewing Mach. Co., 128 Pa. St. 397–405, 18 Atl. 502.

extension of the protection it affords to the person.[21] The inviolability of the person extends to those sorts of disturbances by which the person might at the same time be interfered with.[22] In other words, the explanation of protection is to be found in the paramount necessity of preventing a breach of the peace.[23]

NATURE OF POSSESSION.

209. Possession, in its legal sense, is the present enjoyment or right of enjoyment of definite property by a person with a purpose to exercise such property for the benefit of the holder, or facts from which such purpose could be assumed if the mind were directed to the object of possession.[24]

Simple as it would seem to be, the idea of possession as the basis of an action for trespass is by no means clear.[25]

The enjoyment may consist in the contact, the detention, or control of the property; or it may arise from the right to reduce the property to physical control at the time, and the absence of any opposition to the exercise of that right. Mere temporary physical control does not necessarily constitute possession in its legal sense. There must be "something like acquiescence" in the physical fact of occupation on the part of the rightful owner.[26] Possession of lands which is merely incidental and subsidiary to the commission of a trespass thereon, as by cutting and removing the timber which

[21] Lord Denman, in Rogers v. Spence, 13 Mees. & W. 571.

[22] 1 Sav. Pos. § 6. The taking of a chattel out of a man's possession is an assault on his person. Powell, J., in Green v. Goddard, 2 Salk. 641.

[23] Clerk & L. Torts, 243.

[24] Clerk & L. Torts, 240; Bigelow, Torts, 183; London & County Banking Co. v. London & River Plate Bank, 21 Q. B. Div. 535–542; Regina v. Ashwell, 16 Q. B. Div. 190.

[25] Essay on "Possession in Common Law," by Sir Frederick Pollock and Mr. Justice Wright. And see Holmes, Com. Law (9th Ed.) p. 244, lect. 6.

[26] Pol. Torts, 468. "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession." Browne v. Dawson, 12 Adol. & E. 624–629; Ex parte Fletcher, 5 Ch. Div. 809–

is abandoned when that object is accomplished, is not legal possession.[27] Again, mere occupation or control by a servant or tenant at will does not seem to be legal possession.[28] Possession may be based on title or on bare physical occupancy or prehension without title. It may, accordingly, be actual or constructive.[29] It may also be subordinate or permissive, as that of a tenant under his landlord. The question of possession is one of fact for the jury.[30]

OBJECTS OF POSSESSION.

210. Possession entitling one to the common-law actions ex delicto may concern—

(a) Personal or real property;

(b) The appropriated or unappropriated benefits of nature.

Real and Personal Property.

As to personal property, the right to assume physical possession, it will hereafter be shown, is always sufficient. But, as to real prop-

812; Holmes v. Wilson, 10 Adol. & E. 503; Bowyer v. Cook, 4 C. B. 236; Hughes v. Stevens, 36 Pa. St. 320; Ozark Land Co. v. Leonard, 20 Fed. 881; Ware v. Johnson, 55 Mo. 500; Illinois & St. L. Railroad & Coal Co. v. Cobb, 82 Ill. 183; Pettit v. Cowherd, 83 Va. 20, 1 S. E. 393; Storrs v. Feick, 24 W. Va. 606; Gulledge v. White, 73 Tex. 498, 11 S. W. 527.

[27] Austin v. Holt, 32 Wis. 478. "Going upon land from time to time, and cutting logs thereon, does not give possession. Such acts are merely trespasses upon the land against the true owner, whoever he may be. * * * But it was never supposed that the hunter had possession of the forest through which he roamed in pursuit of game." Thompson v. Burhans, 79 N. Y. 93. Generally occasional intrusions do not constitute possession, whether done under claim of title or not.

[28] Hughes v. Stevens, 36 Pa. St. 320; Ozark Land Co. v. Leonard, 20 Fed. 881; Ware v. Johnson, 55 Mo. 500; Illinois & St. L. Railroad & Coal Co. v. Cobb, 82 Ill. 183; Pettit v. Cowherd, 83 Va. 20, 1 S. E. 392; Storrs v. Feick, 24 W. Va. 606; Gulledge v. White, 73 Tex. 498, 11 S. W. 527.

[29] The term "constructive possession," while, as used, often confused with "actual possession," serves a useful purpose, as meaning the right to take possession. The distinction is too firmly imbedded in the body of decisions to be disregarded.

[30] Hulse v. Brantley, 110 N. C. 134, 14 S. E. 510; Firth v. Veeder, 58 Hun, 605, 12 N. Y. Supp. 579; Kinney v. Ferguson, 101 Mich. 178, 59 N. W. 401.

erty, the right to possession is not sufficient to maintain trespass when some other person is in actual possession. Injuries to real property may be either to land or to easements (or rights in the nature of easements), such as rights of way, water rights, rights to support of land and buildings, ancient lights, and the like. Injuries to such incorporeal hereditaments give rise to causes of action, both in trespass and nuisance. It will be convenient to postpone their chief discussion until trespass is explained and nuisance comes under consideration.

Things Feræ Naturæ.

As to things feræ naturæ,[31] the act of reducing them to possession is essential to create title sufficient to maintain the common-law possessory remedies. "Property ratione soli is the common right which every owner of land has to take and kill all such animals feræ naturæ as may from time to time be found on his land; and, as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil."[32] Thus no one, before actual reduction into possession, can have a right in creatures, as fish in the sea, which are open to the pursuit of all.[33] But the act of reducing animals feræ naturæ to possession must not be wrongful, and, if it is effected by one who is at the moment a trespasser, no title to property is created. This principle has been

[31] As to what are feræ naturæ, see 1 Broom & H. Comm. (Wait's Ed.) 799. Doves: Com. v. Chace, 9 Pick. 15. A fox: Pierson v. Post, 3 Caines, 175. A hare: Sutton v. Moody, 1 Ld. Raym. 250. A buffalo: Ulery v. Jones, 81 Ill. 403. Wild geese: Amory v. Flyn, 10 Johns. 102. Property in monkeys and parrots: Grymes v. Shack, Cro. Jac. 262.

[32] Blades v. Higgs, 11 H. L. Cas. 621. Cf. Rigg v. Earl of Lonsdale, 1 Hurl. & N. 923. No property is acquired where an animal feræ naturæ is wounded and followed by dogs if the owner abandons the chase. Buster v. Newkirk, 20 Johns. 73. Finding and marking bee trees do not confer title sufficient to sustain trespass: Goff v. Kitts, 15 Wend. 550; Ferguson v. Miller, 1 Cow. 243; Gillet v. Mason, 7 Johns. 16; Fisher v. Steward, Smith (N. H.) 60, and note. Et vide Olmstead v. Rich, 53 Hun, 638, 6 N. Y. Supp. 826.

[33] Young v. Hichens, 6 Q. B. 606; Stevens v. Jeacocke, 11 Q. B. 731. Cf. Marsh v. Colby, 39 Mich. 626; McCarthy v. Holman, 22 Hun, 53; Paul v. Hazelton, 37 N. J. Law, 106. Oysters planted in navigable river are not such property as will sustain trespass against owner of adjacent land for taking them away. Brinckerhoff v. Starkins, 11 Barb. 248. Cf. Arnold v. Mundy, 6 N. J. Law, 1; 1 Am. Law. Reg. (N. S.) 579, 580.

applied where the plaintiff, without the permission of the owner, put an empty box for bees to hide in on the latter's land, and a third person took out the swarm of bees, and replaced the box. The court denied the plaintiff's right to recover in trover for the value of the bees, the honey, and the honeycomb.[34]

TRESPASS—DEFINITION.

211. Trespass is the wrongful disturbance of another's possession of lands or goods. The disturbance may consist of physical entry on lands, or seizure of goods, or of any other exercise of ownership or control over them inconsistent with the owner's possession.

An unauthorized entry of another's lands was a trespass for which at common law an action quare clausum fregit lay. Forcible disturbance of peaceable possession is a trespass.[35] If a man's land is not surrounded by any actual fence, the law encircles it with an imaginary inclosure, to pass which is to break and enter his close.[36] Actual and malicious exercise of force is sufficient.[37] But force as an essential element of disturbance may not be violence; nor need it be actual force, in the popular sense of the term; it may be implied.[38] The mere walking over a place whereon is neither grass nor herbage is sufficient,[39] and so, in general, is any unauthorized

[34] Rexroth v. Coon, 15 R. I. 35, 23 Atl. 37.

[35] Dolahanty v. Lucey, 101 Mich. 113, 59 N. W. 415.

[36] Add. Torts, 360. Wrongful entry is the gist of the action. Hill v. Bartholomew, 71 Hun, 453, 24 N. Y. Supp. 944. As to crossing boundaries: Oswalt v. Smith, 97 Ala. 627, 12 South. 604; Pace v. Potter (Tex. Civ. App.) 20 S. W. 928, reversed 85 Tex. 473, 22 S. W. 300.

[37] American Union Tel. Co. v. Middleton, 80 N. Y. 408. Forcible disturbance of peaceable possession is a trespass, and an action therefor involves no question of title. Dolahanty v. Lucey, 101 Mich. 113, 59 N. W. 415.

[38] Green v. Goddard, 2 Salk. 641; Meriwether v. Asbeck (Tex. Civ. App.) 25 S. W. 1100; Weaver v. Bush, 8 Term R. 78; Co. Litt. 256, B; Id. 162, A; Hatch v. Donnell, 74 Me. 163, Chase, Lead. Cas. 150; Van Leuven v. Lyke, 1 N. Y. 515, Chase, Lead. Cas. 152.

[39] Entick v. Carrington, 19 State Tr. 1030–1066; Dougherty v. Stepp, 1 Dev.

intrusion.[40] So to drive nails into a wall or to place stones and rubbish against it may amount to trespass.[41] The disturbance, however, is not necessarily confined to the surface of the land. Interference with minerals[42] beneath the surface, and perhaps interference with the column of air above the surface, may constitute trespass.[43] A mere nonfeasance is not sufficient, as neglect to repair banks whereby another's land is overflowed.[44] Similarly, to entitle the owner or possessor of personal property to bring trespass de bonis asportatis, he can show a forcible taking of goods; but this is not necessary. "No actual force need to be proved. He who interferes with my goods, and without my consent undertakes to dispose of them as having the property, general or special, does it at his peril to answer me the value in trespass or trover."[45] Manual

& B. 371; McCall's Adm'r v. Capehart, 20 Ala. 521; Newson v. Anderson, 2 Ired. 42.

[40] Dougherty v. Stepp, 1 Dev. & B. 371. Nailing a board on one's own premises, as to overhang neighbor's premises, is a trespass. Cf. Pickering v. Rudd, 4 Camp. 219, 220, with Pinchin v. London & B. Ry. Co., 1 Kay & J. 34; Leland v. Hathorn, 42 N. Y. 547; Smith v. Smith, 110 Mass. 302. Projecting of window sills; Richardson v. Pond, 15 Gray, 387–390; U. S. v. Appleton, 1 Sumn. (U. S.) 492–500, Fed. Cas. No. 14,463; Story v. Odin, 12 Mass. 157, 7 Am. Dec. 49, note.

[41] Lawrence v. Obee, 1 Starkie, 22; Gregory v. Piper, 9 Barn. & C. 591. Or a sign: Devlin v. Snellenburg, 132 Pa. St. 186, 18 Atl. 1119. Use of gas after arrearage in payment is not. Alexandria Mining & Exploring Co. v. Painter, 1 Ind. App. 587, 28 N. E. 113.

[42] Parker, B., in Smith v. Lloyd, 9 Exch. 562; Ashton v. Stock, 6 Ch. Div. 719.

[43] Firing bullets into another man's land has been held sufficient. Pickering v. Rudd, 1 Starkie, 56. But see Kenyon v. Hart, 6 Best & S. 249; Wadsworth Board of Works v. United Tel. Co., 13 Q. B. Div. 904–907. So, perhaps, man firing over another's field. Clifton v. Bury, 4 Times, Law R. 8. As to balloon: Guille v. Swan, 19 Johns. 381; Pol. Torts, 34. As to blasting: Hunter v. Farren, 127 Mass. 481.

[44] Brooke, Abr. Sur le C. Pl. 36; Hinks v. Hinks, 46 Me. 423; Turner v. Hawkins, 1 Bos. & P. 472; Shapcott v. Mugford, 1 Ld. Raym. 187.

[45] Sewall, J., in Gibbs v. Chase, 10 Mass. 125; Miller v. Baker, 1 Metc. (Mass.) 27; Morgan v. Varick, 8 Wend. 587; Dexter v. Cole, 6 Wis. 319; Reynolds v. Shuler, 5 Cow. 323. The removal of a chattel from one town to another entitles to nominal damages, when done without authority. Pollock, C. B., in Reg. v. Riley, Dears. Crown Cas. 157; Kirk v. Gregory, 1 Exch. Div. 55.

taking or removal is not necessary, although sufficient.[46] The two causes of action, trespass quare clausum fregit and de bonis asportatis, may be united in one proceeding; as where defendant was sued in one action for breaking into a dwelling house and carrying away goods.[47]

To show a disturbance of possession, it is not necessary to prove actual damages;[48] every invasion of property, be it ever so minute, constitutes a trespass.[49] The gist of the action is disturbance of possession. Other averments as to the manner in which the trespass was committed relate to damages only.[50] This is for the same reason which renders it unnecessary to prove actual damages in assault and battery. This is a breach of absolute duty, for which damages are awarded to prevent a breach of the peace.[51]

The disturbance may be committed by the defendant himself,[52] or by animals (even though the owner had no knowledge of their

[46] Holmes v. Doane, 3 Gray, 328. "Scratching the panel of a carriage would be a trespass." Fouldes v. Willoughby, 8 Mees. & W. 540. Et vide Gaylard v. Morris, 3 Exch. 695. So, striking or killing an animal. Dand v. Sexton, 3 Term R. 37; Wright v. Ramscot, 1 Saund. 83. A sheriff's levy disturbs possession, so as to entitle to trespass, although there be no taking. Welsh v. Bell, 32 Pa. St. 12; Wintringham v. Lafoy, 7 Cow. 735; Phillips v. Hall, 8 Wend. 610. Et vide Dixon v. Sewing-Mach. Co., 128 Pa. St. 397, 18 Atl. 502; Kitchen v. McCloskey, 150 Pa. St. 376, 24 Atl. 688; Burgess v. Graffam, 10 Fed. 216, 18 Fed. 251. But see Mennie v. Blake, 6 El. & Bl. 842. As to what disturbance is sufficient to justify trespass by reversioner against third person, or by one tenant against another, see post, pp. 666–668.

[47] Eames v. Prentice, 8 Cush. 337; Bishop v. Baker, 19 Pick. 517. So, trespass quare clausum fregit and trespass vi et armis as for trespassing on freehold and injuring plaintiff's wife. Robbins v. Sawyer, 3 Gray, 375.

[48] Williams v. Esling, 4 Pa. St. 486, Bigelow, Lead. Cas. 371; Dougherty v. Stepp, 1 Dev. & B. 371; Murphy v. Fond du Lac, 23 Wis. 365; Parker v. Griswold, 17 Conn. 288.

[49] Entick v. Carrington, 19 State Tr. 1029–1066. Et vide Tunbridge Wells Dipper Case, 2 Wils. 414.

[50] Taylor v. Cole, 3 Term R. 292; Whatling v. Nash, 41 Hun, 579; Curtis v. Groat, 6 Johns. 168; Smith v. Ingram, 7 Ired. 175; Wendell v. Johnson, 8 N. H. 222; Ferrin v. Symonds, 11 N. H. 363.

[51] Clerk & L. Torts. 267.

[52] Hatch v. Donnell, 74 Me. 163, Chase, Lead. Cas. 50.

vicious propensities),[53] or by inanimate things.[54] Every one aiding or encouraging a trespass, as in destroying a liquor shop, is liable in trespass; and mere presence, in connection with other circumstances, may be sufficient to attach liability as a principal.[55]

SAME—POSSESSION TO MAINTAIN.

212. Only persons in actual or constructive possession of lands or chattels at the time the wrong is committed can maintain trespass in reference thereto, and such constructive possession is that of the owner when no person is in actual possession.

To maintain trespass, it is absolutely necessary that the plaintiff be in actual possession, or have the right to take possession at the

[53] Van Leuven v. Lyke, 1 N. Y. 515, Chase, Lead. Cas. 152; Marsh v. Hand, 120 N. Y. 315, 24 N. E. 463. Compare Moynahan v. Wheeler, 117 N. Y. 285, 22 N. E. 702. Recent English cases on trespassing animals will be found discussed in 28 Ir. Law T. 406.

[54] Thus, if one throws stones and rubbish on another's land with intention to cause stinking water in his yard to penetrate the walls of his neighbor's house, and flow into his cellar, these are acts for which trespass will lie without proof of actual damages. Preston v. Mercer, Hardr. 60. See Reynolds v. Clarke, 2 Ld. Raym. 1399. But, if defendant unintentionally, as the result of the exercise of his own rights, as where his privy, allowed to be out of repair, flows into his neighbor's cellar, he is liable in nuisance on proof of damages,—not in trespass. Tenant v. Goldwin, Id. 1089. In these cases, accordingly, the inattention of defendant determines whether or not trespass will lie. Clerk & L. Torts, 268. And see Gregory v. Piper, 9 Barn. & C. 591. As to trespass by an engine, see Ambergate, etc., Ry. Co. v. Midland Ry. Co., 2 El. & Bl. 793.

[55] Brown v. Perkins, 1 Allen, 89. Et vide Com. v. Hurley, 99 Mass. 433; Cate v. Cate, 44 N. H. 211. As to liability of city, see Cavanagh v. City of Boston, 139 Mass. 426, 1 N. E. 834. Further, as to joint trespass, see Fields v. Williams, 91 Ala. 502, 8 South. 808; Murray v. Mace, 41 Neb. 60, 59 N. W. 387; Thompson v. Albright (Tex. App.) 14 S. W. 1020; McFadden v. Schill, 84 Tex. 77, 19 S. W. 368. An attorney who issues an execution, upon which goods of a stranger are seized and sold, but took no part in seizure, is not liable to owner in trespass. Hammon v. Fisher, 2 Grant, Cas. 330. Cf. McDaniels v. Cutler, 3 Brewst. (Pa.) 57.

time of trespass.[56] A person out of possession of land actually occupied by another cannot succeed in trespass until he has first ousted the possessor and put himself into possession.[57] Nor can the owner maintain trespass for taking personal property unless, at the time of taking, he had possession or the right of taking actual possession.[58] If the house and land, however, be occupied, not by a tenant who is not a tenant at will or lessee, but by a servant of the owner

[56] Ward v. Taylor, 1 Pa. St. 238; Hersey v. Chapin, 162 Mass. 176, 38 N. E. 442; Fitch v. New York, P. & B. R. Co., 59 Conn. 414, 20 Atl. 345. A stranger to title of land cannot maintain trespass against a railroad company for injuries by fires, land on which plaintiff intended to graze his cattle, without owner's consent. There was neither actual nor constructive possession. Texas & Pac. Ry. Co. v. Torrey (Tex. App.) 16 S. W. 547; Danihee v. Hyatt, 59 Hun, 616, 12 N. Y. Supp. 465; Odd Fellows' Sav. Bank v. Turman (Cal.) 30 Pac. 966; Fruitport Tp. v. Muskegon Circuit Judge, 90 Mich. 29, 51 N. W. 109; Smith, Dam. 363, note 3, collecting cases; Zeitinger v. Hackworth, 117 Mo. 505, 23 S. W. 763. Plaintiff, having bought a strip of land from defendant, an adjoining landowner, defendant ran it off, and erected a building on the line. Afterwards, plaintiff claimed that the line so run was incorrect, and that the true line was several inches within the line of the building. It was held that plaintiff never had either actual or constructive possession, so as to support an action of trespass quare clausum fregit. Wilkinson v. Connell, 158 Pa. St. 126, 27 Atl. 870. An action of trespass on land can only be maintained where the plaintiff had title or possession at the time of the acts complained of. Chicago, R. I. & P. Ry. Co. v. Shepherd, 39 Neb. 523, 58 N. W. 189, followed in Hanlon v. Union Pac. Ry. Co., 40 Neb. 52, 58 N. W. 590.

[57] Chicago & W. I. R. Co. v. Slee, 33 Ill. App. 420; Potter v. Lambie, 142 Pa. St. 535, 21 Atl. 888; Wood v. Michigan Air-Line R. Co., 90 Mich. 334, 51 N. W. 265. Where a widow and her son agree on a division of the land of the deceased husband and father, and the son takes possession of land allotted to him in such division, she, not having given him notice to quit, cannot maintain trespass against him, though a judgment was afterwards rendered, including it in her dower land. Norton v. Norton (Ky.) 27 S. W. 85.

[58] Wilson v. Haley Live-Stock Co., 153 U. S. 39, 14 Sup. Ct. 768 (trespass d. b. a.); Ward v. Macauley, 4 Term R. 489; Staples v. Smith, 48 Me. 470; Putman v. Wyley, 8 Johns. 387; Freeman v. Rankins, 21 Me. 446; Clark v. Carlton, 1 N. H. 110; Codman v. Freeman, 3 Cush. 306. A mortgagee, having the right to take possession, may maintain trespass against a stranger who unlawfully interferes, before the debt falls due. Woodruff v. Halsey, 8 Pick. 333; Foster v. Perkins, 42 Me. 168; Joseph v. Henderson, 95 Ala. 213, 10 South. 843.

or a tenant at will,[59] the occupation of the servant or the tenant at will is the occupation of the master or owner, and the latter may therefore sue for any act of trespass. The same principle applies especially with respect to personal property. Under such circumstances, it is not necessary for the owner to reduce the property to possession. Indeed, the tendency of the cases may be said to be to recognize such possession as concurrent, and as entitling both persons to maintain an action based on rights of possession.[60]

As between Persons in Special Relations.

While a landlord ordinarily cannot sue in trespass his tenant who is in possession,[61] the tenant may become a trespasser by willful

[59] Curtis v. Galvin, 1 Allen, 215; Moore v. Mason, Id. 406; Meader v. Stone, 7 Metc. (Mass.) 147; 2 Bl. Comm. 150; Jackson v. Parkhurst, 5 Johns. 128; Livingston v. Tanner, 14 N. Y. 64; Esty v. Baker, 50 Me. 325; Daniels v. Pond, 21 Pick. 367.

[60] Knight v. Legh, 4 Bing. 589; Starr v. Jackson, 11 Mass. 519; Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62; Holman v. Herscher (Tex. Sup.) 16 S. W. 984; Bertie v. Beaumont, 16 East, 33; Mayhew v. Suttle, 4 El. & Bl. 347; White v. Bayley, 10 C. B. (N. S.) 227; Lessee of Moore v. Doherty, 5 Ir. Law R. 449. Where a chattel is tortiously taken from the actual or constructive possession of the owner, he may bring trespass de bonis asportatis. The owner is in constructive possession, though a bailee, at time of actual taking, may have actual possession. Ely v. Ehle, 3 N. Y. 506, collecting cases, pages 507, 508. The owner still has constructive possession where the person who has possession is his agent or servant. Becker v. Smith, 59 Pa. St. 469. Also, replevin: Stadtfeld v. Henlsman, 92 Pa. St. 53; Staples v. Smith, 48 Me. 470; Harris v. Smith, 3 Serg. & R. 20; Hampton v. Brown, 13 Ired. 18. But see Holmes, Lead. Cas. 226–228; Moore v. Robinson, 2 Barn. & Adol. 817. Mr. Bigelow has suggested that the reason why it was not necessary for the owner of a chattel to reduce it to possession when actually in the hands of another was that land, being permanent, could be reduced to possession at any time, while this might be often impossible as to personalty, and that, damages being the object, substantial injustice might result from any other rule as to personalty.

[61] Chadbourne v. Straw, 22 Me. 450; Briggs v. Thompson, 9 Pa. St. 338; Ripley v. Yale, 16 Vt. 257; Mueller v. Kuhn, 46 Ill. App. 496; Schaefer v. Silverstein, Id. 608; post, p. 668. Trespass cannot be maintained against the owner of premises having the right of possession for making an entry thereon against the will of the tenant in possession after the lease had terminated. Mueller v. Kuhn, 46 Ill. App. 496. A landlord may put out with force a tenant holding under a lease containing a clause of re-entry for

wrong, and render himself liable to his landlord in trespass.[62] Trespass cannot be maintained, against the owner of premises having the right of possession, for making an entry thereon against the will of the tenant in possession after the lease has terminated.[63] The owner may sue in trespass a tenant at will who is in actual possession of the premises.[64] A landlord can maintain an action of trespass for injury to the freehold committed by a stranger while his tenant is in possession of the land.[65] As between landlord and tenant, or occupier and reversioner, a tenant in actual possession or occupier, and not the landlord or reversioner, can maintain an action, in the nature of trespass, for an act which is not an injury to the reversioner.[66] Thus, the occupier, and not the reversioner, can maintain an action against a stranger for merely entering upon the land.[67] But where a window was obstructed by the erection of a wall on the adjoining premises, it was held that the reversioner was entitled to recover damages because the obstruction was of permanent character, and would remain unless something was done to remedy the mischief.[68] The right of the mortgagor and mortgagee

covenant broken on the breach of such covenant. Schaefer v. Silverstein, 46 Ill. App. 608.

[62] Rogers v. Brooks, 99 Ala. 31, 11 South. 753; Emry v. Roanoke Navigation & Water-Power Co., 111 N. C. 94, 16 S. E. 18.

[63] Mueller v. Kuhn, 46 Ill. App. 496. Cf. Schaefer v. Silverstein, Id. 608.

[64] Ripley v. Yale, 16 Vt. 257. The jurisdiction of law and equity being amalgamated, the owner of an equity of redemption can sue for trespass to the property, and injury to the freehold, though before action he has conveyed his equity. Gwynne, J., dissenting, in Brookfield v. Brown, 22 Can. Sup. Ct. 398.

[65] Bailey v. Siegel Gas Fixture Co., 54 Mo. App. 50; Miller v. Mutzabaugh, 3 Pa. Dist. Ct. R. 449.

[66] Halligan v. Chicago & C. Ry. Co., 15 Ill. 558; Clark v. Smith, 25 Pa. St. 137; Rogers v. Brooks, 99 Ala. 31, 11 South. 753; Bascom v. Dempsey, 143 Mass. 409, 9 N. E. 744; Mayo v. Springfield, 138 Mass. 70; Stoltz v. Kretschmar, 24 Wis. 283; Cooper v. Crabtree, 20 Ch. Div. 589; Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62; Holmes v. Seely, 19 Wend. 506. As to right of possession of a lessee of a market stall, see Strickland v. Pennsylvania R. R., 154 Pa. St. 348, 26 Atl. 431; Vidalat v. City of New Orleans, 43 La. Ann. 1121, 10 South. 175.

[67] Baxter v. Taylor, 4 Barn. & Adol. 72. Et vide Simpson v. Savage, 1 C. B. (N. S.) 347.

[68] Jesser v. Gifford, 4 Burrows, 2141; Tucker v. Newman, 11 Adol. & E.

to recover for damages is governed by the same principles. If the mortgagor is entitled to possession, he and only he can sue for mere entry on the premises; but if the trespass affect the value of the security, the mortgagee will have his right of action.[69] Similarly, a tenant for life can recover only for injury to his particular estate. This includes only injury to the possession and enjoyment of the estate during his life. The reversioner can recover for an injury to the reversion.[70]

As between tenants in common, possession is concurrent, and all have equal rights of possession and property. No action of trespass will lie unless there be an actual ouster of one tenant in common by another.[71] As to what constitutes ouster, regard must be had to

40; Alston v. Scales, 9 Bing. 3. Where fire destroys grass in a leased pasture, and injures the sod, the owner can recover for the injury to the sod, and for the value of the grass in the condition it would have been but for the fire at the time the owner would have been entitled to resume possession. Missouri, K. & T. Ry. Co. v. Fulmore (Tex. Civ. App.) 26 S. W. 238.

[69] Page v. Robinson, 10 Cush. 99; Cole v. Stewart, 11 Cush, 181; James v. Worcester, 141 Mass. 361, 5 N. E. 826. See cases there cited; Sanders v. Reed, 12 N. H. 558; Fox v. Harding, 21 Me. 104.

[70] Bascom v. Dempsey, 143 Mass. 409, 9 N. E. 744; Rockwood v. Robinson, 159 Mass. 406, 34 N. E. 521; Ohio & M. Ry. Co. v. Trapp, 4 Ind. App. 69, 30 N. E. 812; Willey v. Laraway, 64 Vt. 559, 25 Atl. 436. One who is made trustee of land for his children, with the right to hold for life, or to dispose of it for the benefit of his children during life, as he should see fit, may waive his own interest, and sue as trustee for a trespass. Meehan v. Edwards, 92 Ky. 574, 18 S. W. 519. As between heirs and personal representatives: Marcy v. Howard, 91 Ala. 133, 8 South. 566. On the same principle, a person entitled to a possession of the subsoil may maintain an action of trespass against the party who digs holes in it, although other persons may for the time being have exclusive right to the possession of the surface. Cox v. Glue, 5 C. B. 533.

[71] Keay v. Goodwin, 16 Mass. 1; Wilkins v. Burton, 5 Vt. 76; Owen v. Foster, 13 Vt. 263; Miller v. Holland, 13 Pa. Co. Ct. R. 622; McPherson v. Seguine, 3 Dev. (N. C.) 153; Booth v. Sherwood, 12 Minn. 426 (Gil. 310); Gulf, C. & S. F. Ry. Co. v. Cusenberry, 86 Tex. 525, 26 S. W. 43. As adverse possession between cotenants, compare In re Grider, 81 Cal. 571, 22 Pac. 908, with Milner v. Milner, 101 Ala. 599, 14 South. 373; Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364. As to coparceners as plaintiffs on trespass, vide Thorn v. Maurer, 85 Mich. 569, 48 N. W. 640. As to action by cotenants to try title, see Boone v. Knox, 80 Tex. 642, 16 S. W. 448. Further,

the nature of the property. The effectual carrying away of a chattel is an ouster.[72] If one tenant in common expels his cotenant from the premises, he will be liable in trespass.[73] He would also be liable if a tenant should dig and carry away the turf from premises in which there is a cotenancy.[74] But a tenant in common of a coal mine is entitled to dig and carry away coal, subject to the restriction of not appropriating more than his share. If the rule was otherwise, he could not enjoy his proportion of the common property.[75] Denial of the cotenant's right with manifestation of force, is sufficient to constitute ouster.[76]

213. Actual physical occupation or control is sufficient title to sustain trespass, but not against the true owner or person having right of possession. If it be without title it must be—

(a) Substantially exclusive,

(b) With a purpose to exercise possession for the benefit of the holder, and

(c) At the time of the alleged wrong.

as to what is ouster by adverse possession between tenants in common, see an able note by William L. Murfree, 33 Cent. Law J. 296. And see Jordan v. Surghnor, 107 Mo. 520, 17 S. W. 1009; Ingalls v. Newhall, 139 Mass. 268, 30 N. E. 96; Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658; Sorenson v. Davis, 83 Iowa, 405, 49 N. W. 1004.

[72] Jacobs v. Seward, L. R. 5 H. L. 464. On the same principle, trover lies against one cotenant who sent the ship owned in common out to sea, whereby it was lost. Barnardiston v. Chapman, Bull. N. P. 34, 4 East, 121, note.

[73] Murray v. Hall, 7 C. B. 441, overruling the doctrine of Littledale, J., in Cubitt v. Porter, 8 Barn. & C. 257; Stedman v. Smith, 8 El. & Bl. 1; Erwin v. Olmstead, 7 Cow. 229; Dubois v. Beaver, 25 N. Y. 123; Odiorne v. Lyford, 9 N. H. 502; Great Falls Co. v. Worster, 15 N. H. 412; Thomas v. Pickering, 13 Me. 337; Owen v. Foster, 13 Vt. 263; Munroe v. Luke, 1 Metc. (Mass.) 459, 467–472; Bennett v. Clemence, 6 Allen, 10–19; Midford v. Hardison, 3 Murph. 164.

[74] Wilkinson v. Haygarth, 12 Q. B. 837.

[75] Job v. Potton, L. R. 20 Eq. 84.

[76] Jefcoat v. Knotts, 13 Rich (S. C.) 50; Carpentier v. Gardiner, 29 Cal. 160; Lessee of Clymer v. Dawkins, 3 How. (U. S.) 674; Thomas v. Hatch, 3 Sumn. (U. S.) 170, Fed. Cas. No. 13,809.

Possession may be with or without Title.

When both ownership and possession coincide, trespass, of course, lies,[82] but mere possession without title, but under claim of right, is sufficient to sustain the action.[83] And even if, in conversion, the defendant might sometimes be allowed to show title in a third person, in trespass he certainly cannot.[84] Jus tertii is no defense unless the defendant can show that the act complained of was done by the true owner or by his authority.[85] Thus a "squatter" has such possession as will entitle him to sue a railroad company for crossing his land or disturbing his house, even though situated on its right of way.[86] Indeed, as to a person not the owner, it is immaterial

[82] As where adverse possession may have ripened into title. Chesapeake & O. Ry. Co. v. Hickey (Ky.) 22 S. W. 441. Et vide Dhein v. Beuscher, 83 Wis. 316, 53 N. W. 551; Mitchell v. Bridger, 113 N. C. 63, 18 S. E. 91.

[83] Cary v. Holt, 2 Strange, 1238, 11 East, 70; Catteris v. Cowper, 4 Taunt. 547; Jeffries v. Railway Co., 5 El. & Bl. 802; Harker v. Birkbeck, 3 Burrows, 1556; Anthony v. Railroad Co., 162 Mass. 60, 37 N. E. 780; Marks v. Sullivan, 8 Utah, 406, 32 Pac. 668; McFeters v. Pierson, 15 Colo. 201; 24 Pac. 1076; Martin v. Pittman, 3 Colo. App. 220, 32 Pac. 840; Stahl v. Grover, 80 Wis. 650, 50 N. W. 589; Rogers v. Duhart, 97 Cal. 500, 32 Pac. 570; Barbarick v. Anderson, 45 Mo. App. 270.

[84] Sweetland v. Stetson, 115 Mass. 49; Anthony v. Railroad Co., 162 Mass. 60, 37 N. E. 780; Hoyt v. Gelston, 13 Johns. 141; Cook v. Howard, Id. 276–284; Aikin v. Buck, 1 Wend. 466; Demick v. Chapman, 11 Johns. 132; Squire v. Hollenbeck, 9 Pick. 551; Hanmer v. Wilsey, 17 Wend. 91; Parker v. Hotchkiss, 25 Conn. 321; Todd v. Jackson, 26 N. J. Law, 525; Ashmore v. Hardy, 7 Car. & P. 501; Whittington v. Boxall, 5 Q. B. 139; Cary v. Holt, 2 Strange, 1238; Wustland v. Potterfield, 9 W. Va. 438; Craig v. Gilbreth, 47 Me. 416; Gilson v. Wood, 20 Ill. 38; Gardiner v. Thibodeau, 14 La. Ann. 732; Boston v. Neat, 12 Mo. 125; Crawford v. Bynum, 7 Yerg. 381; Fuller v. Bean, 30 N. H. 181; Golden Gate Mill & Min. Co. v. Joshua Hendy Mach. Works, 82 Cal. 184, 23 Pac. 45; Criner v. Pike, 2 Head (Tenn.) 398; Tarry v. Brown, 34 Ala. 159; Kemp v. Seely, 47 Wis. 687, 3 N. W. 830.

[85] Trevilian v. Pyne, 1 Salk. 107; Graham v. Peat, 1 East, 244; Chambers v. Donaldson, 11 East, 65; Catteris v. Cowper, 4 Taunt. 547. The plea liberum tenementum is a complete answer to an action of trespass quare clausum fregit. See post, pp. 686, 687, "Defenses."

[86] Witt v. St. Paul & N. P. Ry. Co., 38 Minn. 123, 35 N. W. 862; Ft. Worth & N. O. Ry. Co. v. Smith (Tex. Civ. App.) 25 S. W. 1032; Galveston, H. & S. A. Ry. Co. v. Rheiner, Id. 971; Pacific Exp. Co. v. Dunn, 81 Tex. 85, 16 S. W. 792.

whether or not the defendant's claim of title is valid, if he has actual possession.[87] Persons in possession of lands may recover for crops taken away.[88] So a trespasser may sue a wrongdoer for burning wood he had gathered.[89] Actual possession of chattels pure and simple will sustain an action of trespass. Thus, a drayman, who, as bailee, had a wagon containing a load of furniture in the street, may recover against one who injured the horse, wagon, and load.[90] In case of purchase, possession is sufficient, although the title by agreement remains in the vendor.[91]

[87] Graham v. Peat, 1 East, 244; Cutts v. Spring, 15 Mass. 135; Bigelow, Lead. Cas. 341. Where there is a tortious possession of land not amounting to disseisin, the constructive possession as between the tort feasor and the party having the legal title continues in him who has the right; but the tort feasor may maintain trespass against a stranger who disturbs his possession, and the stranger cannot plead that the tort feasor's possession was the possession of the true owner. Langdon v. Templeton, 66 Vt. 173, 28 Atl. 866. Compare Hulse v. Brantley, 110 N. C. 134, 14 S. E. 510; United Copper Mining & Smelting Co. v. Franks, 85 Me. 321, 27 Atl. 185.

[88] Potter v. Lambie, 142 Pa. St. 535, 21 Atl. 888. Where plaintiff was in possession of lands under claim of title, he can recover for hay raised thereon, and destroyed by fire set by defendant's locomotive, without showing title to the land. McClellan v. St. Paul, M. & M. Ry. Co. (Minn.) 59 N. W. 978.

[89] Northern Pac. R. Co. v. Lewis, 2 C. C. A. 446, 51 Fed. 658; Gulf, etc., Co. v. Johnson, 4 C. C. A. 447, 54 Fed. 474. As to right of owner to sue for removal of timber cut, see Buker v. Bowden, 83 Me. 67, 21 Atl. 748; McCloskey v. Powell, 138 Pa. St. 383, 21 Atl. 148, 150; Gunn v. Harris, 88 Ga. 439, 14 S. E. 593.

[90] Laing v. Nelson, 41 Minn. 521, 43 N. W. 476; Brewster v. Warner, 136 Mass. 57; Wilson v. Haley Live-Stock Co., 153 U. S. 39, 14 Sup. Ct. 768; Matthews v. Smith's Exp. Co. (Co. Ct.) 23 N. Y. Supp. 132; St. Louis, I. M. & S. Ry. Co. v. Biggs, 50 Ark. 169, 6 S. W. 724, followed by St. Louis, I. M. & S. Ry. Co. v. Taylor, 57 Ark. 136, 20 S. W. 1083. Possession of wife's cow entitles to trespass against one who shot it. Taylor v. Hayes, 63 Vt. 475, 21 Atl. 610. Even if the wife owns the fee on which the husband built a house in which he lived, she can sue in trespass for forcibly entering it. Alexander v. Hard, 64 N. Y. 228. Et vide Martin v. Rector, 101 N. Y. 77, 4 N. E. 183. The sheriff, only, can sue in trespass for property taken under execution by him. Special property: Dufour v. Anderson, 95 Ind. 302. And see Simpson v. Dufour, 126 Ind. 322, 26 N. E. 69, collecting cases at page 305, 126 Ind., and page 69, 26 N. E.; Hanchett v. Ives, 33 Ill. App. 471.

[91] Fields v. Williams, 91 Ala. 502, 8 South. 808.

Possession must be Exclusive.

The possession must, however, be substantially exclusive. Where the basis of the action for trespass is possession de facto, the physical control must extend over the whole subject-matter [92] for which possession is claimed, and must be substantially exclusive.[93] Thus, one who works a part of a seam of coal does not thereby acquire a de facto possession of the whole seam. If two persons are in one field at the same time, and both assert ownership, and neither has title, neither can sue in trespass, because the possession is not exclusive.[94]

Possession must be Had Animo Possidendi.

"The corporeal act by which possession is acquired must be accompanied by a definite act of the mind, in order to enable possession actually to arise." [95] Therefore, where one used land which he knew was to have been ultimately dedicated to the public for the use of a street, not under an assertion of ownership, but merely as a dumping ground for refuge from his foundry, there was no possession.[96]

Possession at Time of Wrong, not of Action.

The possession which the law requires is possession at the time of the alleged trespass, not at the time of the commencement of the action.* If, therefore, such possession be negatived by the pleadings, the plaintiff cannot recover.† He must prove such possession,

[92] Aiken v. Buck, 1 Wend. 466; Bramwell, J., in Coverdale v. Charlton, 3 Q. B. Div. 376.

[93] Earl of Dartmouth v. Spittle, 19 Wkly. Rep. 444; Ashton v. Stock, 6 Ch. Div. 719.

[94] Barnstable v. Thacher, 3 Metc. (Mass.) 239; Reilly v. Thompson, 11 Ir. R. Com. Law, 238; Tottenham v. Byrne, 12 Ir. Com. Law, 376.

[95] 2 Sav. Poss. § 21.

[96] Leigh v. Jack, 5 Exch. Div. 264; Coverdale v. Charlton, 4 Q. B. Div. 104–122.

* Williams v. McGrade, 18 Minn. 82 (Gil. 65); Hanlon v. Union Pac. Ry. Co., 40 Neb. 52, 58 N. W. 590; Dhein v. Beuscher, 83 Wis. 316, 53 N. W. 551. Scheffel v. Weller, 41 Ill. App. 85. Where, in an action for injury to land, plaintiff shows that the patent was issued to a person with whom he does not connect himself, proof of title by adverse possession, which did not mature until after the injury, will not support a recovery. Gulf, C. & S. F. Ry. Co. v. Cusenberry, 86 Tex. 525, 26 S. W. 43.

† Moon v. Avery, 42 Minn. 405, 44 N. W. 257.

although the defendant pleaded only the general issue.‡ It does not assist the case of the plaintiff, who did not have actual possession at the time of the wrong charged, that subsequently, and before his suit was brought, he corrected an imperfect title or acquired title.‖ But one who acquires property after levy and before sale may recover in trespass against a sheriff for selling such property as that of another.††

214. Constructive possession is either the possession of an agent or servant, or an immediate right to possession, or possession conferred by law in certain cases, independently of any physical apprehension or transfer.[97]

Where there is no actual physical control, or occupancy, possession is determined by title. The occupation of premises by a servant, where there is no intention to possess them in any other way, is that of the owner. Where there is no actual possession, in proof of the right to possess, upon such proof, the law confers possession, independent of physical control.[98] Thus, a party in possession of an inclosed piece of land may have an action for trespass committed on an adjoining unfenced woodland to which he had title.[99] If two persons are in possession of one field, and each assert ownership, whoever has title can sue in trespass.[100] But, to war-

‡ Meeks v. Willard (N. J. Sup.) 29 Atl. 318.

‖ Davis v. Elmore, 40 S. C. 533, 19 S. E. 204; Colorado Consolidated Land & Water Co. v. Morris, 1 Colo. App. 401, 29 Pac. 302; Missouri L. & M. Co. v. Zeitinger, 45 Mo. App. 114; but see Ballard v. Carmichael, 83 Tex. 355, 18 S. W. 734; Gruner v. Westin, 66 Tex. 209, 18 S. W. 512.

†† Kitchen v. McCloskey, 150 Pa. St. 376, 24 Atl. 688; Schwartz v. McCloskey, 156 Pa. St. 258, 27 Atl. 300; Whitman v. Merrill, 125 Mass. 127. As between lessor and lessee, see Gulf, C. & S. F. Ry. Co. v. Cusenberry, 86 Tex. 525, 26 S. W. 43.

[97] Fraser, Torts, 38; Smith v. Milles, 1 Term R. 480; Pol. Torts (3d Ed.) 300, note k.

[98] Booth v. Sherwood, 12 Minn. 426 (Gil. 310); Meehan v. Edwards, 92 Ky. 574, 18 S. W. 519; Thacker v. Howell (Ky.) 26 S. W. 719; Maysville & B. S. R. Co. v. Pelham (Ky.) 20 S. W. 384.

[99] Penn v. Preston, 2 Rawle, 14. Compare Aiken v. Buck, 1 Wend. 466.

[100] Jones v. Chapman, 2 Exch. 803; Reading v. Royston, 2 Salk. 423; Butcher v. Butcher, 7 Barn. & C. 399.

rant recovery, the title must be proved.[101] An equitable title may be sufficient.[102] But a person holding lands under contract of sale not giving possessory rights, cannot sue for trespass to such lands if vacant;[103] but a contract is sufficient, if it entitles to possession.[104]

SAME—DEFENSES.

215-216. Justification of a trespass may be—

(a) Authority of law in the form of—

(1) Legal process, civil or criminal; or

(2) Otherwise, as abatement of nuisance, distress, necessity, or private defense.

(b) Consent of owner or possessor, which may be—

(1) Express or implied;

(2) Revocable or irrevocable.

(c) Property in defendant, which may be—

(1) An estate in fee, or less estate; or

(2) Special property, like easements.

Authority of Law—Legal Process.

As has been previously seen, authority of law without excess or abuse is a good defense to an action on tort.[105]

[101] Odd Fellows' Sav. Bank v. Turman (Cal.) 30 Pac. 966; Mayo v. Spartanburg, U. & C. R. Co., 40 S. C. 517, 19 S. E. 73. Proof of title to an undivided interest in a survey will support a recovery of the entire survey against a stranger to the title. Hill v. Smith (Tex. Civ. App.) 25 S. W. 1079. Plaintiff, having shown title to only half the survey, cannot recover for an injury where the evidence leaves it indeterminable on which half it was inflicted. Gulf, C. & S. F. Ry. Co. v. Cusenberry, 86 Tex. 525, 26 S. W. 43.

[102] Walton v. Pollock, 12 Pa. Co. Ct. R. 216; New York & T. Land Co. v. Gardner (Tex. Civ. App.) 25 S. W. 737. Compare Kircher v. Murray, 8 C. C. A. 448, 60 Fed. 48, with Dawson v. McLeary (Tex. Civ. App.) 25 S. W. 705. Tenant in dower may sue trespasser. Willey v. Laraway, 64 Vt. 559, 25 Atl. 436.

[103] Des Jardins v. Thunder Bay River Boom Co., 95 Mich. 140, 54 N. W. 718; Fletcher v. Livingston, 153 Mass. 388, 26 N. E. 1001.

[104] Inderlied v. Whaley, 65 Hun, 407, 20 N. Y. Supp. 183; Salimonie Mining & Gas Co. v. Wagner, 2 Ind. App. 81, 28 N. E. 158.

[105] Ante, p. 143. As to trespass by contractors making public improvement, see Kinser v. Dewitt, 7 Ind. App. 597, 34 N. E. 1014. By officer exe-

An entry upon the land of another is not a trespass unless it be unjustifiable. It may be justified, among other things, by legal process.[106] Civil process of law justifies an officer in breaking in the door of an inner room,[107] but it does not justify him in breaking the outer door.[108] "Every man's house is his castle." This is an old expression, and comes down to us from those feudal times when the grand people lived in large and fortified houses, which were called "castles." In these castles they resisted any entrance except by permission. From this source has come the expression. In accordance therewith, every man's abode, however humble, is his castle; and it is said, "Even though the winds of heaven may blow through it, the king of England cannot enter it." [109]

Where the officer executing civil process is guilty of a trespass in forcing an entrance into a dwelling house, its owner is justified in resisting further progress in service of the writ by force.[110] Where, however, the writ required the officer to take possession of a particular thing, as in a writ of replevin, the officer has been justified in breaking down the outer door, after first demanding admission.[111] Moreover, it would seem that specific orders of the court

cuting process: Sternwald v. Siegel, 7 Misc. Rep. 70, 27 N. Y. Supp. 375; Richardson v. Jankofsky (Tex. Civ. App.) 23 S. W. 815; Palmer v. Shenkel, 50 Mo. App. 571; Howell v. Caryl, Id. 440; Piepgras v. Edmunds, 5 Misc. Rep. 314, 25 N. Y. Supp. 961; Id. (Super. N. Y.) 26 N. Y. Supp. 1134; Breckwoldt v. Morris, 149 Pa. St. 291, 24 Atl. 300.

[106] Breckwoldt v. Morris, 149 Pa. St. 291, 24 Atl. 300.

[107] Williams v. Spencer, 5 Johns. 352; Butterfield v. Oppenheimer, 64 Hun, 633, 18 N. Y. Supp. 826; Breckwoldt v. Morris, 149 Pa. St. 291, 24 Atl. 300; Grim v. Robinson, 31 Neb. 540, 48 N. W. 388; Hubbard v. Mace, 17 Johns. 127; State v. Beckner, 132 Ind. 371, 31 N. E. 950; Com. v. Tobin, 108 Mass. 426. Compare Jones v. Herron, 31 Wkly. Notes Cas. 263, with Dexter v. Alfred, 64 Hun, 636, 19 N. Y. Supp. 770.

[108] Curlewis v. Laurie, 12 Q. B. 640; Burdett v. Abbott, 14 East, 1–154; Semayne's Case, 1 Smith, Lead. Cas. (9th Am. Ed.) 228, 5 Coke, 91a; Lloyd v. Sandilands, 8 Taunt. 250; Ratcliffe v. Burton, 3 Bos. & P. 223; Welsh v. Wilson, 34 Minn. 92, 24 N. W. 327.

[109] Hammond v. Hightower, 82 Ga. 290–292, 9 S. E. 1101. Et vide State v. Armfield, 2 Hawks, 246.

[110] Curtis v. Hubbard, 4 Hill, 437; State v. Beckner, 132 Ind. 371, 31 N. E. 950.

[111] Keith v. Johnson, 1 Dana, 604; Howe v. Oyer, 50 Hun, 559, 3 N. Y. Supp. 726.

may justify the officer in breaking such door.[112] At common law, the sheriff may justify the breaking open of the doors of a third person to execute legal process on a person, or property removed there to avoid levy of an execution. He does the same, however, at his peril, and, if he does not find the person or his property, he is a trespasser.[113] An officer having once gone lawfully to another man's house, and been by force ejected therefrom, may break open the door in order to re-enter.[114] The reservation, however, extends only to a man's house. It will not be extended to a mill, shop, barn, or outhouse connected with it.[115] An officer may break into such a building to serve civil process, if his demand for admission is refused.

It was one of the resolutions in Semayne's Case that, "within all cases where the king is party, the sheriff (if the doors be not opened) may break into the party's house, either to arrest him, or to do some other execution of the king's, if otherwise he cannot enter. But before he breaks in, he ought to signify the cause of his coming, and to make request to open the doors." In accordance with this, it is generally recognized that a party's own house is no sanctuary for him against criminal process.[116] Thus, an officer armed with a search

[112] Harvey v. Harvey, 26 Ch. Div. 644. The second resolution of Semayne's Case was that "when any house is recovered by any real action for by ejectione firmæ, the sheriff may break the house, and deliver the seisin or possession to the demandant or plaintiff." 5 Coke, 91a.

[113] Semayne's Case, 5 Coke, 91a, 1 Smith, Lead. Cas. (9th Am. Ed.) 228; Johnson v. Leigh, 6 Taunt. 246; Hutchison v. Birch, 4 Taunt. 627, explaining Ratcliffe v. Burton, 3 Bos. & P. 223.

[114] Eagleton v. Gutteridge, 11 Mees. & W. 465; Pugh v. Griffiths, 7 Adol. & E. 838; Aga Kurboolie Mahomed v. Queen, 4 Moore, P. C. 239; Bannister v. Hyde, 2 El. & El. 627.

[115] Clark v. Wilson, 14 R. I. 11, citing Penton v. Brown, Sid. 186; Haggerty v. Wilber, 16 Johns. 287; Brown v. Glenn, 16 Q. B. 254; Solinsky v. Lincoln Sav. Bank, 85 Tenn. 368, 4 S. W. 836; Douglass v. State, 6 Yerg. 525; Fullam v. Stearns, 30 Vt. 443; Crocker v. Carson, 33 Me. 436. As to what constitutes breaking into a house by an officer who holds civil process, see Curtis v. Hubbard, 4 Hill, 437, 1 Hill, 336; Ryan v. Schilcock, 7 Exch. 72, 21 Law J. Exch. 55; Nash v. Lucas, L. R. 2 Q. B. 590.

[116] Harvey v. Harvey, 26 Ch. Div. 644; Hancock v. Baker, 2 Bos. & P. 260; Barnard v. Bartlett, 10 Cush. 501; Burdett v. Abbott, 14 East, 157; Launock v. Brown, 2 Barn. & Ald. 592; Fost. Hom. 320. But the breaking

warrant may search for stolen goods, and, if the door of the house be shut, he may break it open, after his demand to open it has been refused, whether the stolen goods are there or not.[117]

Same—Without Legal Process.

The law authorizes entry irrespective of the actual consent of another, although no legal process be issued. "The law gives authority to enter into a common inn or tavern. So to the lord to distrain * * * to him in reversion, to see if waste be done, or to demand money payable."[118] One of the most important licenses to enter given by law is to go upon adjoining land to abate, without unreasonable damage, a nuisance, if such abatement can be effected without a breach of the peace.[119]

Analogous to the right of abatement is the right of distress.[120] Distress damage feasant is the taking by the occupier of lands of chattels (commonly, but not necessarily, animals) found incumbering or doing damage on the land. The right given by the law is the right of self-protection against the continuance of a trespass already committed.[121] At common law, the remedy was employed most commonly where cattle strayed by reason of defect of fences which the occupier was bound to repair. To entitle a party to distress damage feasant, "the thing distrained must be taken in the very

into a house cannot be justified by mere suspicion of a crime. 1 Hale, P. C. 459; State v. Smith, 1 N. H. 346.

[117] 2 Hale, P. C. 151; Chipman v. Bates, 15 Vt. 51; Beaty v. Perkins, 6 Wend. 382; Allen v. Colby, 47 N. H. 544.

[118] The Six Carpenters' Case, 8 Coke, 146a; 3 Bl. Comm. 212; 1 Cow. Treat. § 506; Newkirk v. Sabler, 9 Barb. 652.

[119] Bac. Abr. "Nuisance," C; 3 Bl. Comm. 5; Rex v. Rosewell, 2 Salk. 459; Mayor of Colchester v. Brooke, 7 Q. B. 339–376. As to notice of nuisance and request to abate, see Davies v. Williams, 16 Q. B. 546. It would appear that after such notice and request a building wrongfully erected may be pulled down (Jones v. Jones, 1 Hurl. & C. 1), even if a person be in it at the time (Burling v. Read, 11 Q. B. 904). The subject is discussed somewhat at length under "Abatement of Nuisance."

[120] Ante, p. 350, "Remedies"; Sansing v. Risinger (Tex. App.) 16 S. W. 249; Brown v. Stackhouse, 155 Pa. St. 582, 26 Atl. 669. As to right to enter premises to distrain for rent, see Keane v. Reynolds, 2 El. & Bl. 748.

[121] Pol. Torts, 473; Tyrringham's Case, 4 Coke, 360; Hannan v. Mockett, 2 Barn. & C. 934; Hamlin v. Mack, 33 Mich. 103; Hale v. Clark, 19 Wend. 498; Pierce v. Hosmer, 66 Barb. 345.

act." [122] Entry to make a distress is only justified when it does not result in a breach of the peace.[123] The common-law rules as to distress, and especially as to distress damage feasant,[124] have been declared inapplicable by decisions, and abolished or extremely restricted by statute, in almost all parts of the United States.

Entering on one's lands for the purpose of recapturing goods wrongfully placed there by the trespass of the landowner himself may be justified;[125] but this is not true if it cannot be shown how the goods got there, or if it be proved that they were put there by the trespass of a third party.[126] But there is no implied right of this kind which justifies a breach of the peace, although there is no statute analogous to the statute of forcible entry and unlawful detainer.[127] Nor may defendant take goods which came lawfully into plaintiff's hands. [128] Where cattle stray into another's field be-

[122] Vaspor v. Edwards, 12 Mod. 658. Further, as to common law, see Cape v. Scott, L. R. 9 Q. B. 269; Goodwyn v. Cheveley, 4 Hurl. & N. 631; Williams v. Spencer, 5 Johns. 352.

[123] Nash v. Lucas, L. R. 2 Q. B. 590; Crabtree v. Robinson, 15 Q. B. Div. 312.

[124] Sprague v. Railroad Co., 6 Dak. 86, 50 N. W. 617; Frazier v. Nortinus, 34 Iowa, 82; Oil v. Rowley, 69 Ill. 469; Ruter v. Foy, 46 Iowa, 132; Northcote v. Smith, 4 Ohio Cir. Ct. R. 565; Little Rock & F. S. Ry. Co. v. Finley, 37 Ark. 562; Eastman v. Rice, 14 Me. 419; Crocker v. Mann, 3 Mo. 472; Mooney v. Maynard, 1 Vt. 470. Contra, Stewart v. Benninger, 138 Pa. St. 437, 21 Atl. 159; Bulpit v. Matthews, 42 Ill. App. 561.

[125] Patrick v. Colerick, 3 Mees. & W. 483; Chambers v. Bedell, 2 Watts & S. 225; Hartwell v. Kelly, 117 Mass. 235; Spencer v. M'Gowen, 13 Wend. 256.

[126] 3 Bl. Comm. 4; Anthony v. Haney, 8 Bing. 186; Heermance v. Vernoy, 6 Johns. 5; Salisbury v. Green, 17 R. I. 758, 24 Atl. 787; Blake v. Jerome, 14 Johns. 406; Bolling v. Whittle, 37 Ala. 35; Dixon v. Clow, 24 Wend. 188. Compare McLeod v. Jones, 105 Mass. 403, with Hartwell v. Kelly, 117 Mass. 235.

[127] Harding v. Sandy, 43 Ill. App. 442; Salisbury v. Green, 17 R. I. 758, 24 Atl. 787; Richardson v. Anthony, 12 Vt. 273. However, where property is taken away from those in possession, and in good faith claiming possession, forcibly, without authority, and in their presence, they may recapture it without resorting to legal process. State v. Dooley, 121 Mo. 591, 26 S. W. 558.

[128] "If I bail my goods to a man, I cannot justify entering his house to take my goods, for it was by no wrong that they came there, but by the act of us

cause of defective fences, the owner is bound to remove them within a reasonable time.[129] Fresh re-entry is not so much justified as authority of law to re-enter as it is recognized by a denial of any right acquired from temporary possession by the trespasser.[130]

In the same class of justification by law are those cases which necessity constitutes as justification. Thus, where a highway or way of necessity has become impassable it is for the public's good that people should be allowed to pass over the adjoining land.[131] Where it is necessary to enter upon the land of another for the preservation of life[132] or property, as by entry for the purpose of preventing the spread of fire,[133] necessity is a sufficient excuse. By way of contrast, the right to commit a trespass in pursuit of animals feræ naturæ is not now recognized by English or American

both." 9 Edw. IV. p. 35, pl. 10; Williams v. Morris, 8 Mees. & W. 488; Wilde v. Waters, 24 Law J. C. P. 193; Webb v. Beavan, 6 Man. & G. 1055. But one may enter the close of another to rescue a boat of another cast there by a storm. Proctor v. Adams, 113 Mass. 376.

[129] "If I drive my beasts along the highway, and you have opened uninclosed land adjoining the highway, and my beasts enter your land and eat the herbage thereof, and I come freshly and chase them out of your land, you shall not have an action against me, for the chasing of them was lawful." 6 Edw. IV. p. 7, pl. 18; Goodwyn v. Cheveley, 4 Hurl. & N. 631; Tillett v. Ward, 10 Q. B. Div. 17; Hartford v. Brady, 114 Mass. 466. Et vide Browne v. Providence, H. & F. R. Co., 12 Gray, 55; Towne v. Nashua & L. R. R., 124 Mass. 101; Amstein v. Gardner, 132 Mass. 28; Taft v. New York, P. & B. R. Co., 157 Mass. 297–302, 32 N. E. 168; Cool v. Crommet, 13 Me. 250; Bush v. Brainard, 1 Cow. 78, and note.

[130] Ante, pp. 656, 657.

[131] Absor v. French, 2 Show. 28; Asser v. French, 2 Lev. 234; Ante, note 122, to necessity under variations to the normal right to sue; Campbell v. Race, 7 Cush. 408; Morey v. Fitzgerald, 56 Vt. 487; Carey v. Rae, 58 Cal. 159. There is, however, no such privilege with respect to a private right of way, which must be confined strictly to the terms of grant. Pomfret v. Ricroft, 1 Saund. 321; Taylor v. Whitehead, 2 Doug. 745; Bullard v. Harrison, 4 Maule & S. 387. It is otherwise where the grantor of a private right of way has obstructed it so it cannot be used except by deviation on his adjacent land. Selby v. Nettlefold, L. R. 9 Ch. 111.

[132] Y. B. 37 Hen. VI. p. 37, pl. 26.

[133] Per Littleton, J., 9 Edw. IV. p. 35, pl. 10; American Print Works v. Lawrence, 23 N. J. Law, 590, collecting cases; Proctor v. Adams, 113 Mass. 376. Compare Jones v. Richmond, 18 Grat. (Va.) 517.

law.[134] Nor is entry upon another's premises to cut down timber justified simply because it stood close to the line.[135] A trespass may be excused on the ground that it is committed in self-defense, in order to escape some special danger or apparent peril, or in defense of the possession of, or to rescue, a man's goods or chattels.[136] Generally, any public authority or direction carries with it an exemption from liability for what is necessary and proper to carry it into effect.[137] A trespasser cannot escape liability by handing the fruits of the trespass or wrong over to another. Thus, where the sheriff takes the goods of one man under an attachment of another, a recovery may be had against him for the trespass after he has gone out of office, though his successor sold the goods, and received the proceeds arising therefrom.[138]

Abuse of License—Trespass ab initio.

Abuse, not consisting in mere nonfeasance, of license given by law but not of license given by parties, to enter upon lands, makes trespass ab initio.

[134] Paul v. Summerhayes, 4 Q. B. Div. 9; Glenn v. Kays, 1 Ill. App. 479; Sterling v. Jackson, 69 Mich. 488, 37 N. W. 845.

[135] "No doubt," said Howard, J., in Toledo, St. L. & K. C. R. Co. v. Loop (Ind. Sup.) 39 N. E. 306, "if a boulder, a log, or a decrepit tree threaten to roll or fall from an adjoining land upon a railroad track or other highway, and there was no time to lose in seeking permission from the owner, any one might enter on the land to avert the danger." Mayhew v. Burns, 103 Ind. 328, 2 N. E. 793; Cooley, Torts, p. 46; Wood, Nuis. § 107. "However, * * * all peril may not be averted. It is the immediate and probable, and not the remote and barely possible, that we are called upon to guard against. * * * As for trees that grow so close to the line that their branches extend over the adjoining premises, there is no doubt that, if injury is shown, the adjoining owner may have his action in damages, or he may cut off the overhanging branches so far as they extend above the soil. He may not, though, cross his neighbor's line and cut down the tree. Wood, Nuis. § 108; Lemon v. Webb [1894] 3 Ch. 1."

[136] Ball, Torts & Cont. 21.

[137] Southern Bell Telephone & Telegraph Co. v. Constantine, 9 C. C. A. 359, 61 Fed. 61.

[138] Duke v. Vincent, 29 Iowa, 308; Wise v. Jefferis, 2 C. C. A. 432, 51 Fed. 643. The rule is the same in trover. Livermore v. Northrup, 44 N. Y. 107. Nor can liability for a nuisance be escaped by demise of premises on which it is created. Post, p. 795, "Nuisance."

Where the law authorizes one to enter upon the premises of another, and such person, having entered, abuses that license, he becomes a trespasser ab initio. His misconduct relates back so as to make his original entry tortious. In the celebrated Six Carpenters' Case, [139] six carpenters entered an inn and were served with wine, for which they paid. They afterwards asked for more wine, and were supplied with it. This they refused to pay for. They were sued as trespassers ab initio. The court laid down the three following rules: (1) Where a man abuses an authority or license given him by law, he becomes a trespasser ab initio; (2) where a man abuses an authority or license given him by another party, he may be punished for such an abuse, but he is not a trespasser ab initio; and (3) a mere nonfeasance cannot make a person who had authority or license given him by law a trespasser ab initio. The doctrine of the case has been repeatedly confirmed.[140] However, its last rule has been criticised as being merely artificial, and in many cases has been practically disregarded.[141] The present tendency of the cases, moreover, is to disregard the merely verbal difference involved in the distinction between misfeasance and nonfeasance.[142] But if a landlord, lawfully entering upon premises for the purpose of making a distress, abuse this right, given him by law, by converting the goods to his own use, this would be such a positive wrong, and not the mere omission to do something, and would make him a trespasser ab initio.[143] In order that a man may be made a trespasser ab initio, where the law has given him the entry, the acts

[139] 8 Coke, 146a; 1 Smith, Lead. Cas. 144.

[140] Oxley v. Watts, 1 Term R. 12; Bagshaw v. Goward, Bull. N. P. 81; Gargrave v. Smith, 1 Salk. 221; Dye v. Leatherdale, 3 Wils. 20; Barnett v. Earl of Guildford, 11 Exch. 19. And see Ordway v. Ferrin, 3 N. H. 69; Adams v. Rivers, 11 Barb. 390; Hale v. Clark, 19 Wend. 498; Whitney v. Backus, 149 Pa. St. 29, 24 Atl. 51; Wilbur v. Turner, 39 Ill. App. 526; Baker v. Lewis, 150 Pa. St. 251, 24 Atl. 616; Spades v. Murray, 2 Ind. App. 401, 28 N. E. 709.

[141] Note to Barrett v. White (3 N. H. 210) in 14 Am. Dec. 365.

[142] Ante, c. 1.

[143] Gargrave v. Smith, 1 Salk. 221. But see 11 Geo. II. c. 19, § 19. Attack v. Bramwell, 3 Best & S. 520. Further, as to nonfeasance, see West v. Nibbs, 4 C. B. 172; Vertue v. Beasley, 1 Moody & R. 21; Evans v. Elliott, 5 Adol. & E. 142; Jacobsohn v. Blake, 6 Man. & G. 925.

of abuse must be of such a character that there will be continued trespass in the absence of license.[144]

Consent of Owner or Occupant.

The justification of a trespass by the consent of owner or occupant is the logical application to trespass of the familiar principles already considered that no one can object to what he has consented to. The consent of the party may be expressed, or it may be implied. "In the common intercourse of life between friends and neighbors, tacit licenses are constantly given and acted on." [155] Thus, the license to enter on land may be inferred from entries made in course of friendly visiting extending over a great period of time.[156] A mere agreement to sell does not necessarily import a license to enter on the premises;[157] but if a man made a lease reserving the trees, the law will imply a right to enter and to show them to the purchaser.[158] It is to be determined by the jury, upon consideration of all the circumstances of the case.[159] The consent, however, must be that of the owner and occupant, and not of a third person.[160] One person cannot protect himself by an alleged or actual

[144] Taylor v. Jones, 42 N. H. 25-34, and cases cited; Stone v. Knapp, 29 Vt. 501; Mitchell v. Mitchell, 54 Minn. 301, 55 N. W. 1134 (special administrator); Adams v. Rivers, 11 Barb. 390. And, generally, see discussion of this subject in English and American note to the Six Carpenters' Case in Smith, Lead. Cas. (8th Am. Ed.) p. 257.

[155] Pol. Torts, § 308.

[156] Martin v. Houghton, 45 Barb. 258, and cases cited at page 260.

[157] Eggleston v. Railway Co., 35 Barb. 162; Fagan v. Scott, 14 Hun, 162.

[158] Harmon v. Harmon, 61 Me. 222-224. As to right to open family tomb and dispose of corpse, see Lakin v. Ames, 10 Cush. 198. Et vide Fletcher v. Evans, 140 Mass. 241, 2 N. E. 837. As to what license is sufficient to justify entering a house, see Cutler v. Smith, 57 Ill. 252.

[159] Lampet v. Starkey, 10 Coke, 46b. So, under a verbal contract of sale of standing trees to be cut and removed by the purchaser, the law implies a license for the purpose of cutting and removing the same. Duryea v. Smith, 62 Hun, 619, 16 N. Y. Supp. 688. Et vide Winterbourne v. Morgan, 11 East, 396; Bac. Abr. "Trespass," F; Keane v. Old Colony R. Co., 161 Mass. 203, 36 N. E. 788.

[160] Neither a trespasser nor tenant can grant a valid easement over the land of another. Gentleman v. Soule, 32 Ill. 271. Permission to trim plaintiff's trees, given defendant by a person having no authority, does not excuse defendant's trespass in acting on such permission, though he thought

agreement with another trespasser.[161] Nor does the instruction of plaintiff's wife to remove household goods justify.[162] Cases of this kind often arise, where the third person acts on the mistaken supposition that he can confer the authority. As to lands, possession of color of title only by the licensor is no defense to the licensee.[163] The cases as to personal property would not seem to be agreed whether or not, under such circumstances, taking possession by the supposed owner is trespass, where there has been no demand on the real owner and refusal to deliver to him.[164] Where a party justifies under authority from the individual or authority of law, he must alike show that he acted strictly within the provisions of such authority.[165] An excess of license is a trespass.[166]

A license which is not so coupled with an interest as to become a grant is personal as between the parties, and cannot be assigned to a stranger.[167] It is said that there is no such right as a license, fall-

such person had authority. Huling v. Henderson, 161 Pa. St. 553, 29 Atl. 276; Beaumont Lumber Co. v. Ballard (Tex. Civ. App.) 23 S. W. 920.

[161] Hazelton v. Week, 49 Wis. 661, 6 N. W. 309. Et vide Olsen v. Upsahl, 69 Ill. 273; Williamson v. Fischer, 50 Mo. 198; Smith v. Felt, 50 Barb. 612; McIntyre v. Green, 36 Ga. 48; Williams v. Sheldon, 10 Wend. 654; Woodruff v. Halsey, 8 Pick. 333; Vosburgh v. Moak, 1 Cush. 453.

[162] Burns v. Kirkpatrick, 91 Mich. 364, 51 N. W. 893. Compare Grim v. Robinson, 31 Neb. 540, 48 N. W. 388.

[163] Sandborn v. Sturtevant, 17 Me. 200. Et vide Huling v. Henderson, 161 Pa. St. 553, 29 Atl. 276.

[164] Compare Stanley v. Gaylord, 1 Cush. 536, Hyde v. Noble, 13 N. H. 494, and Galvin v. Bacon, 11 Me. 28, with Pierce v. Vandyke, 6 Hill, 613.

[165] Cate v. Cate, 44 N. H. 211.

[166] Capel v. Lyons (City Ct. N. Y.) 20 N. Y. Supp. 49; Inderlied v. Whaley, 65 Hun, 407, 20 N. Y. Supp. 183; Kissecker v. Monn, 36 Pa. St. 313; Abbott v. Wood, 13 Me. 115; Riddle v. Brown, 20 Ala. 412; Juchter v. Boehm, 67 Ga. 539. No permanent interest in land, even by easement, can be created by parol license, but such license is a protection as to anything properly done under it before revocation, although not where the act is negligently done, to plaintiff's damage. Selden v. Delaware & H. Canal Co., 29 N. Y. 634.

[167] Ackroyd v. Smith, 10 C. B. 164; Gronendyke v. Cramer, 2 Ind. 382; Carleton v. Redington, 21 N. H. 291; Ruggles v. Lesure, 24 Pick. 187; Harris v. Gillingham, 6 N. H. 9; Paine v. Northern Pac. R. Co., 14 Fed. 407; Reinmiller v. Skidmore, 7 Lans. 161; Jackson v. Babcock, 4 Johns. 418; Mendenhall v. Klinck, 51 N. Y. 246; De Haro v. U. S., 5 Wall. 599; Blaisdell v. Railroad, 51 N. H. 483.

ing short of an easement, which is not subject to revocation at will.[168] The holder of a general admission ticket to a theater seems to have only a license revocable at will, and that on ejection the holder must sue on contract.[169] The revocation of a license, like that of a grant, may either be by express words or by any act "sufficiently signifying the licensor's will. If a man has leave and license to pass through a certain gate, the license is as effectually revoked by locking the gate as by further notice." [170] In general, a mere use of land by a licensor in a manner incompatible with the license, terminates it without notice.[171] It is terminated by a transfer of the property [172] on or by the death of the licensor.[173]

[168] Shirley v. Crabb (Ind. Sup.) 37 N. E. 130. Thus, the facts that the owner once orally consented to the construction of the sewer which polluted a stream running through his farm, and that the village went to considerable expense towards constructing it before suit was begun, do not estop him from asking an injunction, since such consent constitutes a mere license, revocable at will. Village of Dwight v. Hayes, 150 Ill. 273, 37 N. E. 218 (49 Ill. App. 530, affirmed). Et vide Bohn v. Hatch (Super. Buff.) 15 N. Y. Supp. 550; Giles v. Simonds, 15 Gray, 441; Houston v. Laffee, 46 N. H. 505; Carleton v. Redington, 21 N. H. 291; Hetfield v. Central R. Co., 29 N. J. Law, 571; Kimball v. Yates, 14 Ill. 464; Jamieson v. Millemann, 3 Duer, 255; Duinneen v. Rich, 22 Wis. 550; White v. Manhattan Ry. Co., 63 Hun, 634, 18 N. Y. Supp. 396; Giles v. Simonds, 15 Gray, 441; Burton v. Scherpf, 1 Allen, 133; Allen v. Fiske, 42 Vt. 462; Eckerson v. Crippen, 110 N. Y. 585, 18 N. E. 443; Owen v. Field, 12 Allen, 457; Kremer v. Railway Co., 51 Minn. 15, 52 N. W. 977; Cronkhite v. Cronkhite, 94 N. Y. 323; Fargis v. Walton, 107 N. Y. 398, 14 N. E. 303; Totel v. Bonnefoy, 123 Ill. 653, 14 N. E. 687; Howe v. Searing, 6 Bosw. 354; Lake Erie & W. Ry. Co. v. Kennedy, 132 Ind. 274, 31 N. E. 943; Rayner v. Nugent, 60 Md. 515; Parish v. Kaspare, 109 Ind. 586, 10 N. E. 109.

[169] Wood v. Leadbitter, 13 Mees. & W. 838; Hyde v. Graham, 32 Law J. Exch. 27. Wood v. Leadbitter involved a general admission ticket. By analogy to the rule as to lodgers, a license to occupy exclusively a particular seat would seem to amount to a demise for the time of the particular seat, and therefore not be revocable. Clerk & L. Torts, 278, note C.

[170] Pol. Torts, § 308.

[171] Simpson v. Wright, 21 Ill. App. 67; Wilson v. Railway Co., 41 Minn. 56, 42 N. W. 600; Johnson v. Skillman, 29 Minn. 95, 12 N. W. 149.

[172] As by a conveyance of the land. Harris v. Gillingham, 6 N. H. 9; Drake v. Wells, 11 Allen, 141; Cook v. Stearns, 11 Mass. 533; Foot v. New

[173] Putney v. Day, 6 N. H. 430; Eggleston v. New York & H. R. Co., 35 Barb. 162; Carter v. Harlan, 6 Md. 20; Jenkins v. Lykes, 19 Fla. 148.

There is an important distinction between a license and a license coupled with an interest which becomes a grant. "License under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol coupled with a grant is as irrevocable as a deed, provided only that the grant is of a nature capable of being made by parol." [174] A license is coupled with an interest where the person obtaining a license to do a thing also acquires a right to the possession and control of the property with which the license is connected. In such cases the authority conferred by the license is not merely a permission, but amounts to a grant, and may be assigned to a third person.[175]

If the interest to which the license is annexed is an interest in the lands itself, as to go upon the lands to take the profit or enjoy an easement, and the license is in due form, it is irrevocable. Doubt

Haven & N. Co., 23 Conn. 214; Seidensparger v. Spear, 17 Me. 123; Carter v. Harlan, 6 Md. 20; Prince v. Case, 10 Conn. 375; Jenkins v. Lykes, 19 Fla. 148; Maxwell v. Bay City Bridge Co., 41 Mich. 453, 2 N. W. 639; Bridges v. Purcell, 1 Dev. & B. 492; Giles v. Simonds, 15 Gray, 441; Dark v. Johnston, 55 Pa. St. 164; Whitaker v. Cawthorne, 3 Dev. (N. C.) 389; Houx v. Seat, 26 Mo. 178.

[174] "A license creates no estate in lands. It is a mere power or authority founded on personal confidence, not assignable, and revocable at pleasure unless subsidiary to a valid grant, to the beneficial enjoyment of which its exercise is necessary, or unless executed under such circumstances as to warrant the interposition of equity. This is the result of the best considered cases. The doctrine of the early cases which converted and executed license into an easement is now generally discarded as being 'in the teeth of the statutes of frauds.' * * * In cases where the license is connected with a valid grant, as of chattels or fixtures upon the land of the licensor susceptible of being removed, it is subsidiary to the right of property, and irrevocable to the extent necessary to protect the licensee, and saves to him the right of entry,—the right of possession following the right of property." Vanderburg, J., in Johnson v. Skillman, 29 Minn. 95-97, 12 N. W. 149, and cases there cited; Miller v. Railroad Co., 6 Hill, 61, 2 Am. Lead. Cas. (5th Ed.) 576; Kremer v. Railway Co., 51 Minn. 15, 52 N. W. 977; Wood v. Leadbitter, 13 Mees. & W. 838; Thomas v. Sorrell, Vaughan, 330. Et vide Lee v. Stevenson, El., Bl. & El. 512; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Heath v. Randall, 4 Cush. 195.

[175] Sterling v. Warden, 51 N. H. 217. A person having an irrevocable license to enter on the land of another, and there do an act, may use such force as is required for the purpose, without being liable to an action. Lambert v. Robinson, 162 Mass. 34, 37 N. E. 753.

has been expressed, however, as to whether a license can be so annexed to an interest in mere personal property as to become irrevocable. In Vin. Abr.[176] it is said that "when a man bails goods to another to keep, it is not lawful for him, though the doors are open, to enter into the house of the bailee and to take the goods; but he ought to demand them; and if they are denied, to bring writ of detinue and to obtain them by law." But it has been held that where one who has cut hay belonging to another, and put it into the latter's barn, obtains and carries away the hay, the owner cannot revoke the license so as to prevent it.[177] However, even if the license be not actually coupled with the grant, but be so far executed as to induce the belief that there has been a grant, and the defendant has expended considerable money in making permanent improvements, induced by the silence of the plaintiff to believe the license to be permanent, it has been held to be irrevocable. Thus, in a celebrated English case, defendant gave verbal permission to run a water course through his land. This was constructed at a great cost, and was used for nine years. The defendant cut the water off but was restrained from obstructing its flow by an injunction.[178] Where the owner of land gives parol permission to a railroad company to enter thereon and construct its roadbed, such license is revocable only so long as it is executory; and after the company has spent large sums of money in pursuance thereof in the construction of its roadbed, such license cannot be revoked.[179] On the other hand, the principle is enforced that a license is revocable even

[176] "Trespass," 20 Hen. VI., p. 4, pl. 12. Et vide 9 Edw. IV., p. 35, pl. 10; Wood v. Mannley, 11 Adol. & E. 34.

[177] White v. Elwell, 48 Me. 360. And generally whenever a license amounts to a legal grant it is irrevocable. Bracken v. Rushville & V. G. R. Co., 27 Ind. 346; Collins Co. v. Marcy, 25 Conn. 239; Rogers v. Cox, 96 Ind. 157; Bingham v. Salene, 15 Or. 208, 14 Pac. 523; Nettleton v. Sikes, 8 Metc. (Mass.) 34; Claflin v. Carpenter, 4 Metc. (Mass.) 580; Hetfield v. Central R. Co., 29 N. J. Law, 571; Lewis v. McNatt, 65 N. C. 63; Goff v. Oberteuffer, 3 Phila. 71; Douglas v. Shumway, 13 Gray, 498.

[178] Feltham v. Cartwright, 5 Bing. N. C. 569. A license executed is not countermandable. See Patrick v. Colerick, 3 Mees. & W. 483; Wood v. Manley, 11 Adol. & E. 34.

[179] Messick v. Midland Ry. Co., 128 Ind. 81, 27 N. E. 419; Heath v. Randall, 4 Cush. 195; Saucer v. Keller (Ind. Sup.) 28 N. E. 1117; Cook v. Stearns,

though the licensor permits improvements to be made. This has been applied, for example, to the occupation of "a milling district" by railroad tracks.[180]

Liberum Tenementum.

The plea "liberum tenementum" (that it is the defendant's land) raises the question of title. A person who has the freehold and a right to possession of the land may, by a peaceable entry upon the land, acquire sufficient possession of it to enable him to maintain an action for trespass against any person who, being in possession at the time of his entry, wrongfully continues upon the land.* The permission of the owner to a third person is a sufficient license for a peaceable entry.† A person in possession, even if not legally entitled

11 Mass. 533; Cheever v. Pearson, 16 Pick. 266; Ruggles v. Lesure, 24 Pick. 187; Claflin v. Carpenter, 4 Metc. (Mass.) 580; Smith v. Benson, 1 Hill, 176; Sterling v. Warden, 51 N. H. 217; Yale v. Seeley, 15 Vt. 221; Arrington v. Larrabee, 10 Cush. 512; Snowden v. Wilas, 19 Ind. 10; Ameriscoggin Bridge Co. v. Bragg, 11 N. H. 102; Stephens v. Benson, 19 Ind. 367; Long v. Buchanan, 27 Md. 502; Cook v. Pridgen, 45 Ga. 331; Lee v. McLeod, 17 Nev. 103; Wickersham v. Orr, 9 Iowa, 253; Gibson v. St. Louis A. & M. Ass'n, 33 Mo. App. 165; Rhodes v. Otis, 33 Ala. 578; Grimshaw v. Belcher, 88 Cal. 217, 26 Pac. 84; Flickinger v. Shaw, 87 Cal. 126, 25 Pac. 268; Wilson v. Chalfant, 15 Ohio, 248; Rerick v. Kern, 14 Serg. & R. 267; Veghte v. Raritan, etc., Co., 19 N. J. Eq. 142; Risien v. Brown, 73 Tex. 135, 10 S. W. 661; Clark v. Glidden, 60 Vt. 702, 15 Atl. 358; Lane v. Miller, 27 Ind. 534. A parol license to divert part of the water of a stream cannot be revoked after the licensee has expended money and labor in pursuance of the license. McBroom v. Thompson (Or.) 37 Pac. 57. After a city has given a license to place awnings over the sidewalk, it cannot needlessly revoke it until the licensees have enjoyed it sufficiently long to give them a fair return for their outlay. City Council of Augusta v. Burum, 93 Ga. 68, 19 S. E. 820.

[180] Jackson & Sharp Co. v. Philadelphia, etc., R. Co., 4 Del. Ch. 180; Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., 51 Minn. 304, 53 N. W. 639; Lake Erie & W. R. Co. v. Michener, 117 Ind. 495, 20 N. E. 254; Williams v. Morrison, 32 Fed. 177; Kivett v. McKeithan, 90 N. C. 106; Woodward v. Seeley, 11 Ill. 157; St. Louis Stock Yards v. Wiggins Ferry Co., 112 Ill. 384; Ketchum v. Newman, 116 N. Y. 422, 22 N. E. 1052.

* Ball, Torts & Cont. 19; Butcher v. Butcher, 7 Barn. & C. 399.

† Hey v. Moorhouse, 6 Bing, N. C. 52; Chambers v. Donaldson, 11 East, 65; Sharon v. Wooldrick, 18 Minn. 354 (Gil. 325).

to it, may have trespass against a wrongdoer, but not against the rightful owner.‡ Indeed, by statute, the owner may in the same action recover possession and damages.†† It is required that plaintiff must have re-entered before he can maintain his action.|| Yet it would seem that it is not a valid objection that proceedings in error upon ejectment are pending.‡‡

Originally, if a man had a right to the possession of lands, he might enter and take possession by force of arms. In 1381, by the statute of 5 Rich. II. c. 7, it was provided "that none from henceforth shall make an entry into any lands or tenements but in case where entry is given by the law, and in such case not with a strong hand nor with a multitude of people, but only in a lisible, aisie, and peisable manner." This statute has in substance been re-enacted in all parts of the United States. Therefore, if a claimant of real estate out of possession resorts to force or violence amounting to a trespass of the person, to obtain possession from another claimant who is in peaceable possession, the party using such force and violence is liable in damages, without regard to legal title or right of possession.|| || If he commit a breach of the peace, the state only could prosecute him therefor.††† The statute, however, is not inconsistent with the right of the owner of the premises to make peaceable entry without the use of force or intimidation, as by means of a key.‡‡‡ When the rightful owner has also the right of possession, he has the right to enter upon his own land peaceably; and if his entry is resisted by force, he may, it seems, repel force by force, and, although

‡ Beddall v. Maitland, 17 Ch. Div. 174; Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62.

†† Raymond v. Andrews, 6 Cush, 265; Leland v. Tousey, 6 Hill, 328.

|| King v. Baker, 25 Pa. St. 186; Tongue v. Nutwell, 31 Md. 302; Caldwell v. Walters, 22 Pa. St. 378; Fry v. Branch Bank at Mobile, 16 Ala. 282; Carson v. Smith, 1 Jones (N. C.) 106; Stancill v. Calvert, 63 N. C. 616.

‡‡ Donford v. Ellys, 12 Mod. 138; Wilkinson v. Kirby, 15 C. B. 430; Barnett v. Earl of Guildford, 11 Exch. 19.

|| || Denver & R. G. Ry. Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286.

††† Low v. Elwell, 121 Mass. 309.

‡‡‡ Livingston v. Webster, 26 Fla. 325, 8 South 442; Fort Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272; Lee v. Town of Mound Station, 118 Ill. 304, 8 N. E. 759; Gage v. Hampton, 127 Ill. 87, 20 N. E. 12.

he may be liable civilly and criminally for assault, he is not responsible for damages in trespass.|| || ||

Easement or Special Property.

A person may justify his trespass to land by showing that he has a right of way over such land. Although the premises to which the right of way is an appurtenant may be in the occupation of the defendant, the right of way is nevertheless constructively in the occupation of the defendant; so he may use it for any purpose connected with his rights as a landlord.[181] This is true of a private right of way, so far as where access and use is allowed by the terms of the grant,[182] or by use.[183] In England, a right of way may exist

|| || || 1 Washb. Real Prop. § 396; Jones v. Jones, 31 Law J. Exch. 506; Turner v. Meymott, 1 Bing. 158; Butcher v. Butcher, 7 Barn. & C. 399; Browne v. Dawson, 12 Adol. & E. 624; Lows v. Telford, 1 App. Cas. 414; Blades v. Higgs, 10 C. B. (N. S.) 713; Yeates v. Allin, 2 Dana, 134; Davis v. Burrell, 10 C. B. 821–825; Burling v. Read, 11 Q. B. 904; Davison v. Wilson, Id. 890; Harvey v. Brydges, 14 Mees. & W. 437; Lyon v. Fairbanks, 79 Wis. 455, 48 N. W. 492; Manning v. Brown, 47 Md. 506; Hoffman v. Harrington, 22 Mich. 52; Sterling v. Warden, 51 N. H. 217; Krevit v. Meyer, 24 Mo. 107; Todd v. Jackson, 26 N. J. Law, 525; Hoots v. Graham, 23 Ill. 81. But see Harding v. Sandy, 43 Ill. App. 442; Ostatag v. Taylor, 44 Ill. App. 469; Twombly v. Monroe, 136 Mass. 464; Dustin v. Cowdry, 23 Vt. 631. Et vide 3 Bl. Comm. 214; 1 Chit. Gen. Prac. 646; Parsons v. Brown, 15 Barb. 590; Newton v. Harland, 1 Man. & G. 644; Reeder v. Purdy, 41 Ill. 279; cases collected in Frazier v. Caruthers, 44 Ill. App., at page 62. One in possession of immovable property may maintain trespass against the lawful owner for unlawfully and forcibly disturbing his possession. Nicol v. Illinois Cent. R. Co., 44 La. Ann. 816, 11 South. 34. And see Green v. Hammock (Ky.) 16 S. W. 357. Generally, as to when action of forcible entry and detainer lies, see Cain v. Flood (Com. Pl.) 14 N. Y. Supp. 776; Giddens v. Bolling, 92 Ala. 586, 9 South. 274; James v. Miles, 54 Ark. 460, 16 S. W. 195; Peddicord v. Kile, 83 Iowa, 542, 49 N. W. 997.

[181] Edwards v. Halinder, Poph. 46.

[182] Watts v. Kelson, L. R. 6 Ch. App. Cas. 169; United Land Co. v. Great Eastern Ry., L. R. 10 Ch. App. Cas. 582. Compare Newcomen v. Coulson, L. R. 5 Ch. Div. 133. Where, by deed in 1630, a sufficient way leave was granted to a colliery, the owners were allowed, 200 years afterwards, to adapt the way to the improvements of the age. Dand v. Kingscote, 6 Mees. & W. 174, as expressed by Malins, V. C., in 5 Ch. 139. Compare Finch v. Great Western Ry. Co., 5 Exch. Div. 254, with Skull v. Glenister, 16 C. B. (N. S.) 81.

[183] Cowling v. Higginson, 4 Mees. & W. 257; Williams v. James, L. R. 2 C. P. Cas. 577; Wimbledon v. Dixon, 1 Ch. Div. 371; Dare v. Heathcote, 25 L. J. Exch. 245. But proof of a driveway, by prescription, of one kind of

by custom in favor of a limited proportion of the public, as a right of way to church in favor of the inhabitants of a particular parish.[184] No action lies for passing or repassing[185] on a public way. An individual cannot ordinarily maintain an action caused by obstructing a highway unless he suffers some private, direct, and material damages beyond the public at large, as well as damages otherwise irreparable.[186] An injunction will, however, lie at the instance of an abutting property owner to restrain the construction of an elevated road, where no law authorizes its construction.[187] It is not a trespass to open a swinging window over a street.[188] If, however, a highway be used for purposes foreign to its dedication, the owner

animals, is evidence of a right to drive other kind of animals. Ballard v. Dyson, 1 Taunt. 279. But see Lawton v. Ward, Ld. Raym. 75; Howell v. King, 1 Mod. 190. An action will lie to a private individual for obstruction to a private way, as to any other easement. Williams v. Esling, 4 Pa. St. 486. Where a person has a right of way for logging purposes, and defendant hauls logs over it for him, the fact that other persons have an interest in the logs does not make defendant a trespasser. Robinson v. Crescent City Mill & Transp. Co., 93 Cal. 316, 28 Pac. 950.

[184] Poole v. Huskinson, 11 Mees. & W. 827; Gateward's Case, 6 Reporter, 59b.

[185] Dovaston v. Payne, 2 H. Bl. 527.

[186] Halsey v. Rapid Transit St. Ry. Co., 47 N. J. Eq. 380, 20 Atl. 859; Burlington Gaslight Co. v. Burlington, C. R. & N. Ry. Co. (Iowa) 59 N. W. 292; Morris & E. R. Co. v. Newark Pass. Ry. Co., 51 N. J. Eq. 379, 29 Atl. 184. A civil action to abate a public nuisance constituting an obstruction to a highway, and to enjoin its maintenance, may be maintained by a town in its own name. Township of Hutchinson v. Filk, 44 Minn. 255, 47 N. W. 255. A city in which is vested the fee of its streets, in trust for the public, has a right of action against one who mines coal underlying such street, without its consent, for the full value of the coal so mined, though the removal of the coal does not affect the use of the land for streets. Union Coal Co. v. City of La Salle, 136 Ill. 119, 26 N. E. 506; Upham v. Marsh, 128 Mass. 546; Weld v. Brooks, 152 Mass. 297, 25 N. E. 719; Conklin v. Old Colony R. Co., 154 Mass. 155, 28 N. E. 143; Nisley v. Harrisburg, P. Mt. J. & L. R. Co., 1 Pears. 23; Bills v. Belknap, 36 Iowa, 583; Matter of New York Catholic Protectory, 77 N. Y. 342; Bissell v. Collins, 28 Mich. 277; Griswold v. Bay City, 35 Mich. 452; City of Delphi v. Evans, 36 Ind. 90; Hovey v. Mayo, 43 Me. 322.

[187] Potts v. Quaker City El. R. Co., 161 Pa. St. 396, 29 Atl. 108; Earll v. City of Chicago, 136 Ill. 277, 26 N. E. 370.

[188] O'Linda v. Lothrop, 21 Pick. 292.

of the fee has constructive possession, so far that he may maintain trespass for such abuse. Thus, trespass will lie on the part of abutting owners for erecting telephone poles on a highway.[189] So trespass lies for stopping in front of a man's house and using towards him abusing and insulting language.[190] What would otherwise be a trespass may be justified by various easements of other descriptions.[191] The right conferred by an easement includes incidentally the privilege to enter upon lands to repair the subject-matter of the easement.[192]

SAME—REMEDIES.

217. Remedies for trespass may be—

(a) Self-help;

(b) Injunction;

(c) Damages.[193]

The remedy for a trespass, as we have seen, may be self-help; as where possession of lands or chattels is regained by force, or a fresh

[189] Board of Trade Tel. Co. v. Barnett, 107 Ill. 507.

[190] Adams v. Rivers, 11 Barb. 390. So for shooting at game on the highway. Reg. v. Pratt, 4 El. & Bl. 860. The public have no right of holding public meetings in a public thoroughfare. Ex parte Lewis, L. R. 21 Q. B. Div. 191. And, generally, see Lade v. Shephard, 2 Strange, 1004; Eastman v. Richmond Highway Board, L. R. 7 Q. B. Cas. 75; Blundell v. Catterall, 5 Barn. & Ald. 268; Every v. Smith, 26 Law J. Exch. 344; Beardslee v. French, 7 Conn. 125; New Haven v. Sargent, 38 Conn. 50; Fisher v. Rochester, 6 Lans. 225; Lyman v. Hale, 11 Conn. 185.

[191] To hang drying lines: Drewell v. Towler, 3 Barn. & Adol. 735. To erect a signboard: Hoare v. Metropolitan Board of Works, L. R. 9 Q. B. 297; Moody v. Steggles, L. R. 12 Ch. Div. 261; Francis v. Haywood, L. R. 22 Ch. Div. 177. To dig a ditch: Dorris v. Sullivan, 90 Cal. 279, 27 Pac. 216; Dexter v. Riverside & O. Mills, 61 Hun, 619, 15 N. Y. Supp. 374. A water right: Spargur v. Heard, 90 Cal. 221, 27 Pac. 198; Riverdale Park Co. v. Westcott, 74 Md. 311, 22 Atl. 270.

[192] Pomfret v. Ricroft, 1 Saund. 321.

[193] An action may be maintained for a trespass on land though no actual damage has been suffered, since repeated trespasses might be used as evidence of title; and hence the maxim "de minimis" does not apply. Bragg v. Laraway, 65 Vt. 673, 27 Atl. 492. In an action for trespass on land, it appeared that from 60 to 100 of defendant's sheep went on plaintiff's land a number of times; that they were on the land about four weeks; that they

entry is made on a trespasser, or where the right of distress [194] and distress damage feasant is exercised.

An injunction will be issued by the court, on a proper showing for equitable interference. Good title in the plaintiff and insolvency of the trespasser have been held sufficient.[195] An injunction will lie to restrain a continued trespass when threatened,[196] or against a permanent trespass.[197] And, generally, wherever there is a probability of irreparable injury, for which there can be no adequate pecuniary compensation, or where otherwise a multiplicity of suits cannot be prevented.[198] On the other hand, where the injury can

broke into plaintiff's wheat field and meadow; that plaintiff only cut 10 loads of hay from the part of the meadow on which the sheep were, while 14 loads were had from the part of the person who cut the hay on shares. Held, that plaintiff was entitled to recover substantial damages, and the rule that a verdict for defendant in a justice court will not be reversed merely to enable plaintiff to recover nominal damages does not apply. Phillips v. Covell, 79 Hun, 210, 29 N. Y. S. 613. As between trespass and breach of covenant, see Hill v. Bartholomew, 71 Hun, 453, 24 N. Y. Supp. 944.

[194] Talbot v. New York & H. R. Co., 78 Hun, 473, 29 N. Y. Supp. 187; ante, p. 353, "Injunction under Remedies."

[195] Hanly v. Watterson, 39 W. Va. 214, 19 S. E. 536. And, generally, see Baltimore Belt R. Co. v. Lee, 75 Md. 596, 23 Atl. 901; Whitlock v. Consumers' Gas Trust Co., 127 Ind. 62, 26 N. E. 570; Ashurst v. McKensie, 92 Ala. 484, 9 South. 262; Gilchrist v. Van Dyke, 63 Vt. 75, 21 Atl. 1099.

[196] Murphy v. Lincoln, 63 Vt. 278, 22 Atl. 418.

[197] Miller v. Lynch, 149 Pa. St. 460, 24 Atl. 80. As to protection of water and riparian rights, see Carpenter v. Gold, 88 Va. 551, 14 S. E. 329; Lathrop v. Haley, 81 Iowa, 649, 47 N. W. 878; Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co., 79 Wis. 297, 48 N. W. 371. As to title to support water rights, see Wattupa Reservoir Co. v. City of Fall River, 154 Mass. 305, 28 N. E. 257. As to protection of easements by injunction, see Hoosier Stone Co. v. Malott, 130 Ind. 21, 29 N. E. 412; Cunningham v. Fitzgerald, 63 Hun, 624, 17 N. Y. Supp. 341, and 18 N. Y. Supp. 946; Power v. Klein, 11 Mont. 159, 27 Pac. 513; Bank of State of Georgia v. Porter, 87 Ga. 511, 13 S. E. 650; Walker v. Emerson, 89 Cal. 456, 26 Pac. 968; Town of Marion v. Skillman, 127 Ind. 130, 26 N. E. 676.

[198] Jerome v. Ross, 7 Johns. Ch. 315, per Kent, C.; Anderson v. Harvey's Heirs, 10 Grat. 386; Wood v. Braxton, 54 Fed. 1005; Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686 (riparian rights); McMillan v. Ferrell, 7 W. Va. 223; Moore v. Ferrell, 1 Ga. 7; Erhardt v. Board, 113 U. S. 537, 5 Sup. Ct 565; Ellis v. Wren, 84 Ky. 254, 1 S. W. 440; Natoma Water & Mining Co. v.

be fully compensated by the award of damages, an injunction will not be issued.[199]

There can be no fixed rule whereby damages for trespass will be assessed. The extent of the recovery will vary with the right of the plaintiff. The merest intrusion upon bare possession will entitle at least to nominal damages, without proof of actual harm.[200] The reversioner alone may recover for future injury, unless the right of the person in possession entitle him thereto. Separate actions may be brought for the same wrong.[201] Where a stranger cuts down trees, a tenant can recover only in respect of shade, shelter, and fruit, for he is entitled to no more.[202] On the other hand, an heir at law cannot maintain trespass for an injury done to land descended to him without entry; but after entry, his right of possession relates back, so as to support an action against a wrongdoer for trespass committed at an antecedent period.[203]

The measure of the damages will also depend upon the nature of

Clarkin, 14 Cal. 544; Tainter v. Mayor, 19 N. J. Eq. 46; Sullivan v. Rabb, 86 Ala. 433, 5 South. 746; Clendening v. Ohl, 118 Ind. 46, 20 N. E. 639; Clark v. Jeffersonville, M. & I. R. Co., 44 Ind. 248; Murphy v. Lincoln, 63 Vt. 278, 22 Atl. 418; Ward v. Ohio River R. Co., 35 W. Va. 481, 14 S. E. 142; Richards v. Dower, 64 Cal. 62, 28 Pac. 113; Miller v. Lynch, 149 Pa. St. 460, 24 Atl. 80; Gilchrist v. Van Dyke, 63 Vt. 75, 21 Atl. 1099; Yates v. Town of West Grafton, 33 W. Va. 507, 11 S. E. 8; Thompson v. Engle, 4 N. J. Eq. 271; Saratoga Co. v. Deyoe, 77 N. Y. 219.

199 Curtis v. Paggett, 47 Kan. 86, 27 Pac. 109; Bierer v. Hurst, 162 Pa. St. 1, 29 Atl. 98; Thomas v. James, 32 Ala. 723; Crown v. Leonard, 32 Ga. 241; New York P. & D. Establishment v. Fitch, 1 Paige, 97; Hatcher v. Hampton, 7 Ga. 49; James v. Dixon, 20 Mo. 79; Smith v. Pettingill, 15 Vt. 82; Robelling v. First Nat. Bank, 30 Fed. 744; Ewing v. Rourke, 14 Or. 514, 13 Pac. 413; Miller v. Burket, 132 Ind. 469, 32 N. E. 309; Heaney v. Butte & M. Commercial Co., 10 Mont. 590, 27 Pac. 379; Latham v. Northern Pac. Ry. Co., 45 Fed. 721; McCullough v. City of Denver, 39 Fed. 307; German v. Clark, 71 N. C. 417; West Point Iron Co. v. Reymert, 45 N. Y. 703; Burnley v. Cook, 13 Tex. 586; Thornton v. Roll, 118 Ill. 350, 8 N. E. 145.

200 Ante, p. 81.

201 George v. Fisk, 32 N. H. 32-45; Lane v. Thompson, 43 N. H. 320; Reeder v. Purdy, 41 Ill. 279; Towne v. Rice, 24 Conn. 350; Starr v. Jackson, 11 Mass. 519; Jackson v. Todd, 25 N. J. Law, 121; Bennett v. Thompson, 13 Ired. 146.

202 Bedingfield v. Onslow, 3 Lev. 209.

203 Barnett v. Earl of Guildford, 11 Exch. 19.

the injury.[204] The ordinary rule is compensation.[205] General damages will also be inferred by the law, and special damages,[206] when properly pleaded and proved, may be recovered.[207] Thus, general damages will lie for breaking another's close, and special damages for the use of the property interfered with.[208] Where a railroad company lays its track on lands without the consent of the owner, it is liable for the difference in the market value of the land immediately before the commission of the injuries, and the market value of the land immediately afterwards.[209] Such a trespass is a continuing one, and entitles to successive actions. Accordingly, prospective damages cannot be recovered.[210] Where trees, timber, stone, and the like are carried away, the owner may adopt the property so removed as the measure of his damages, or he may recover the difference between the value of the land with such property on

[204] Gilbert v. Kennedy, 22 Mich. 5, per Christiancy, J. And see The Redemptorist v. Wenig (Md.) 29 Atl. 667, 668, per Robinson, C. J.

[205] Murray v. Mace, 41 Neb. 60, 59 N. W. 387.

[206] Such damages as are not the usual consequence of the trespass are special, and should be specially pleaded and proved, by way of aggravation. Dickinson v. Boyle, 17 Pick. 78; McTavish v. Carroll, 13 Md. 429; Sherman v. Dutch, 16 Ill. 283.

[207] Hawthorne v. Siegel, 88 Cal. 159, 25 Pac. 1114; Fields v. Williams, 91 Ala. 502, 8 South. 808; Jackel v. Reiman, 78 Tex. 588, 14 S. W. 1001; Chicago, K. & W. R. Co. v. Willits, 45 Kan. 110, 25 Pac. 576; Clark v. Bates, 1 Dak. 42, 46 N. W. 510; Wall v. Pittsburg Harbor Co., 152 Pa. St. 427–432, 25 Atl. 647; Saginaw Union St. Ry. v. Michigan Cent. R. Co., 91 Mich. 657, 52 N. W. 49; Cavanagh v. Durgin, 156 Mass. 466, 31 N. E. 643. A reasonable sum, without proof of special damages, may be recovered. Moore v. Smith (Tex. Sup.) 19 S. W. 781; Harrison v. Adamson, 86 Iowa, 693, 53 N. W. 334. Et vide Cavanagh v. Durgin, 156 Mass. 466, 31 N. E. 643; McArthur v. Cornwall (1892) L. R. App. Cas. 75. As to statutory regulations, see St. Croix Land & Lumber Co. v. Ritchie, 78 Wis. 492, 47 N. W. 658; Oskaloosa College v. Western Union Fuel Co. (Iowa) 54 N. W. 152; Befay v. Wheeler, 84 Wis. 135, 53 N. W. 1121.

[208] Ward v. Warner, 8 Mich. 508–525; McWilliams v. Morgan, 75 Ill. 473.

[209] Chicago, K. & W. R. Co. v. Willits, 45 Kan. 110, 25 Pac. 576.

[210] Blesch v. Chicago & N. W. R. Co., 43 Wis. 183; Adams v. Hastings & D. R. Co., 18 Minn. 260 (Gil. 236). Compare Town of Troy v. Cheshire R. R., 23 N. H. 83, to effect that entire damages, rather than damages anterior to the commencement of an action, should be recovered. And see Wood v. Michigan Air-Line R. Co., 90 Mich. 334, 51 N. W. 265.

or in it, and with such property removed.[211] Where the trees are ornamental, the latter measure of damages may be more advantageous to the owner.[212] Under such circumstances, there are virtually two causes of action,—one for the disturbance of the real estate, and one to recover the value of property unlawfully converted.[213]

Exemplary damages will be awarded where there are circumstances of outrage, insult, or willful, wanton, and malicious destruction of property.[214] Spite or ill-will is not necessary to entitle to punitive damages in trespass. The intentional doing of a wrongful act without just cause or excuse is sufficient.[215] Ratification of a trespass is not a ground for vindictive damages.[216] It would seem that recovery may be had for mental suffering.[217] By the statutes of many states, double or treble damages are awarded for willful trespass.[218] If treble damages are improperly claimed, the plaintiff,

[211] Sturges v. Warren, 11 Vt. 433; Kolb v. Bankhead, 18 Tex. 229; Foote v. Merrill, 54 N. H. 490; Wallace v. Goodall, 18 N. H. 439; Ensley v. Nashville, 2 Baxt. (Tenn.) 144; Harder v. Harder, 26 Barb. 409; Templemore v. Moore, 15 Ir. Com. Law, 14. In an action for unlawfully cutting timber from plaintiff's land, the measure of damages is not necessarily the value of the timber, but may be the depreciation of the market value of the land. Knisely v. Hire, 2 Ind. App. 86, 28 N. E. 195.

[212] Van Deusen v. Young, 29 Barb. 9.

[213] Smith v. Smith, 50 N. H. 212; Wooley v. Carter, 7 N. J. Law, 85; Thayer v. Sherlock, 4 Mich. 173. Et vide Seely v. Alden, 61 Pa. St. 302. Post, p. 706, "Conversion."

[214] Nagle v. Nicholson, 34 Pa. St. 48; Cutler v. Smith, 57 Ill. 252; Carli v. Union Depot, etc., Co., 32 Minn. 101, 20 N. W. 89. For maliciously injuring a dog, see Heiligmann v. Rose, 81 Tex. 222, 16 S. W. 931; Jacquay v. Hartzell, 1 Ind. App. 500, 27 N. E. 1105. Therefore, where such circumstances are proved, a verdict of $1,350 will not be set aside as excessive, although the actual damage proved was only $950. Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854; Jackel v. Reiman, 78 Tex. 588, 14 S. W. 1001. Compare Negley v. Cowell (Iowa) 59 N. W. 48. Et vide 3 Suth. Dam. § 1031, note 1, collecting cases. Further, as to damages, see Henderson v. Chicago, R. I. & P. Ry. Co., 83 Iowa, 221, 48 N. W. 1029.

[215] Trauerman v. Lippencott, 39 Mo. App. 478. Et vide Koester v. Cowan, 37 Ill. App. 252.

[216] Grund v. Van Vleck, 69 Ill. 478; Rosenkrans v. Barker, 115 Ill. 331, 3 N. E. 93.

[217] Bonnelli v. Bowen, 70 Miss. 142, 11 South. 791.

[218] Werner v. Flies (Iowa) 59 N. W. 18; McDonald v. Montana Wood Co.,

upon proper proof, may recover single damages.[219] The presumption of law is that the jury, where such treble or double damages are demanded, gave all the damages authorized by the statutes. This presumption can be rebutted by showing that the jury gave only single damages, and this fact must be shown by the verdict. Without this there is no power in the court to double or treble the damages.[220] "The fact that property taken by a trespasser has been appropriated to the owner's use by his consent, express or implied, goes in mitigation."[221] The action under the statute is sometimes held to be for a statutory penalty,—a cause of action which, though arising from the same subject-matter, is different from that accruing at common law.[222]

WASTE—DEFINITION.

218. Waste is an injury done or suffered by the owner of the present estate which tends to destroy or lessen the value of the inheritance.[223]

14 Mont. 88, 35 Pac. 668; McCruden v. Rochester Ry. Co., 77 Hun, 609, 28 N. Y. Supp. 1135, affirming 5 Misc. Rep. 59, 25 N. Y. Supp. 114; Humes v. Proctor, 73 Hun, 265, 26 N. Y. Supp. 315.

219 Von Hoffman v. Kendall, 63 Hun, 628, 17 N. Y. Supp. 713.

220 Clark v. Sargeant, 112 Pa. St. 16, 5 Atl. 44. It is proper to include interest on treble damages on entering judgment against defendant. McCloskey v. Ryder (Pa. Sup.) 21 Atl. 150; Fairchild v. Dunbar Furnace Co., 128 Pa. St. 485, 18 Atl. 443, 444.

221 2 Sedg. Dam. 526. See, also, 1 Suth. Dam. § 157; Huning v. Chavez (N. M.) 34 Pac. 44.

222 Mr. Pollock (Torts, p. 322), in course of consideration of costs, where damages are nominal, refers to the "common practice of putting up notice boards with these or the like words, 'Trespassers will be prosecuted according to law' (words which are, 'if strictly construed, a wooden falsehood'). * * * originally intended to secure the benefits * * * in the matter of costs. * * * Several better and safer forms of notice are available. A common American one, 'No trespassing,' is as good as any." An equally futile proceeding is the common practice of publishing notices specifying the amount of fine arbitrarily fixed by the owner of the premises for trespassing "on these grounds." The criminal fine is determined by statute. The amount of damages which may be recovered by civil action is in the discretion of the jury.

223 Cooley, Torts, § 332. This would appear to be more in concord with the modern conception of waste than the English definitions. "Waste is the com-

Besides the payment of rent reserved, if any, and the observance of the covenants of demise, there are other duties imposed on a tenant towards the landlord or reversioner and on the tenant for life or for years with regard to their remainder-men. The breach of these duties is waste at common law.[224] It was usual to declare in case at common law unless there was also a money demand which might be included in a declaration in assumpsit.[225] Covenant might also have lain at common law.[226] The famous statute of Gloucester extended the ancient law of waste by the writ of waste.[227] Waste is a wrong depending peculiarly upon the local conditions. To meet these conditions, many statutory changes have been introduced. Modern cases must be construed in connection with such statutes.[228] Waste, however intimately allied with, is a wrong distinct from trespass and from conversion. It pertains to land only, but trespass may apply to land and personalty; conversion, only to movable property. In both trespass and conversion, the remedy is based on the possession, or right of possession; in waste, the wrong is inflicted by the person in possession.[229]

mitting of any spoil or destruction in houses, lands, etc., by tenants, to the damage of the heir, or of him in reversion or remainder." 10 Bac. Abr. "Waste is any unauthorized act of a tenant of a freehold estate not of inheritance, or for any lesser interest, which tends to the destruction of the tenement, or otherwise to the injury of the inheritance." Pol. Torts, p. 285.

[224] Ball, Torts, c. 6, p. 56.

[225] Govett v. Radnidge, 3 East, 62; 1 Chit. Pl. 140, 141.

[226] 1 Chit. Pl. 141.

[227] 6 Edw. I. c. 5. See 1 Saund. 323b, note 7.

[228] For illustrations of statutory changes, see Sullivan v. O'Hara, 1 Ind. App. 259, 27 N. E. 590; McIlvain v. Porter (Ky.) 7 S. W. 309; Davis v. Clark, 40 Mo. App. 515; Curtiss v. Livingston, 36 Minn. 380, 31 N. W. 357; University v. Tucker, 31 W. Va. 621, 8 S. E. 410. Compare Laws Pa. 1891, No. 179, p. 208.

[229] Dodge v. Davis, 85 Iowa, 77, 52 N. W. 2; Cooley, Torts, § 332.

SAME—KINDS OF WASTE.

219. The substance of waste is the unauthorized wrong to the inheritance, either in the sense of the value or in the sense of destroying the identity.[230] What conduct amounts to waste is a question of fact. In kind it may be—

(a) Permissive or commissive; and

(b) Legal or equitable.

220. Permissive waste is merely passive conduct.

221. Commissive waste is the doing of a willful injury to the premises concerned.

Allowing a house to go to ruin by reason of nonrepair is permissive waste. An action does not lie for such waste against a tenant at will who has not covenanted to repair,[231] nor against a tenant from year to year.[232] While there is some doubt on the question, it seems that a tenant for years who has not covenanted to repair is liable for permissive waste.[233] A tenant for life is liable for such waste.[234] But an equitable tenant for life is not.[235] A dowress is not liable for permissive waste, unless the property involved is such that a prudent owner of the fee would keep in repair to prevent permanent injury to the fee. Therefore, it is not waste to allow buildings used for housing slaves before the emancipation to remain unrepaired thereafter, unless their utility in some other direction be apparent.[236] To suffer a gin mill to be dismantled [237] there-

[230] Jessel, M. R., in Jones v. Chappell, L. R. 20 Eq. 539–542; Meux v. Cobley [1892] 2 Ch. 253. "Whatever does a lasting damage to the freehold or inheritance is waste." 2 Bl. Comm. c. 18, p. 281.

[231] Harnett v. Maitland, 16 Mees. & W. 257.

[232] Torriano v. Young, 6 Car. & P. 8; Martin v. Gilham, 7 Adol. & E. 540. Indeed, in Kentucky an action at law for permissive waste will not lie. Smith v. Mattingly (Ky.) 28 S. W. 503.

[233] Torriano v. Young, 6 Car. & P. 8; Herne v. Bembow, 4 Taunt. 764; Greene v. Cole, 2 Saund. 252; Woodhouse v. Walker, 5 Q. B. Div. 404.

[234] Yellowly v. Gower, 11 Exch. 274–294.

[235] Powys v. Blagrave, 4 De Gex, M. & G. 448; Freke v. Calmady, 32 Ch. Div. 408.

[236] Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588.

[237] Cannon v. Barry, 59 Miss. 289.

after is permissive waste. It is also permissive waste to allow a pasture to be overrun with weeds.[238]

The wrong may be committed by tenants at will for life, for a term of one year, and from year to year. Tenants at will guilty of permissive waste may be treated as mere trespassers.[239] The tendency of American cases is to hold a tenant liable for either conversion or waste, regardless of the duration or origin of his term.[240] Thus, a devisee having a life interest, with possibility of shares in fee, may commit waste.[241] Cutting down trees on public land is waste, within the meaning of a statute which provides that where there are opposing claimants to public land, and one is threatening to commit on such land waste which tends materially to lessen the value of the inheritance, and which cannot be compensated by damages, an injunction will lie to restrain him therefrom.[242]

So, the receiver of a railroad company who fails to exercise an option of purchase[243] is liable for waste. Many cases arise in the

[238] Clemence v. Steere, 1 R. I. 272.

[239] Ball, Torts, 56–58. A tenant at will is under an implied agreement to use the premises in a tenant-like manner, and not, by his voluntary act, unnecessarily to injure them; and if he places, in a barn hired by him, a weight apparently and in fact excessive, which causes the barn to fall, he is guilty of voluntary waste, and is liable therefor upon his implied agreement. Acceptance of rent by a landlord for the full term for which the premises are let is not necessarily a waiver of his right to damages for breach of the tenant's implied agreement not to commit voluntary waste. Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95.

[240] Boefer v. Sheridan, 42 Mo. App. 226.

[241] Farabow v. Green, 108 N. C. 339, 12 S. E. 1003. As to life tenant, see Smith v. Mattingly (Ky.) 28 S. W. 503; Smith v. Meiser (Ind. App.) 38 N. E. 1092.

[242] Arment v. Hensel, 5 Wash. 152, 31 Pac. 464. A person who has not the immediate estate of inheritance, expectant on the termination of the life estate, cannot maintain an action of waste against the life tenant. Hatch v. Hatch, 31 Cin. Law Bul. 57.

[243] Powell v. Dayton, S. & G. R. Co., 16 Or. 33, 16 Pac. 863. As between vendor and vendee, see Holmberg v. Johnson, 45 Kan. 197, 25 Pac. 575; Moses v. Johnson, 88 Ala. 517, 7 South. 146. Waste by a purchaser at foreclosure sale pendente lite, Mitchell v. Mining Co., 75 Cal. 264, 17 Pac. 296; by remainder-men, Solomon v. Tarver, 79 Ga. 601, 4 S. E. 317; Simms v. Greer, 83 Ala. 263, 3 South. 423; mortgagee, Moriarty v. Ashworth, 43 Minn. 1, 44 N. W. 531; Miller v. Waddingham, 91 Cal. 377, 27 Pac. 750. The levy of a distress

United States from tenancies in dower.[244] A tenant in dower is undoubtedly liable for commissive waste.[245] The authorities do not agree as to whether a lessee for life or years is liable for waste committed by a stranger. The English authorities seem to think that the lessee is presumed to be capable of preventing it. Therefore the lessor has his action against the lessee for waste, and the lessee has his action of trespass against the wrongdoer.[246] A dowress has been held not liable for waste committed by third persons without her consent.[247] The tendency of the law to extend the scope of the action is apparent in the recognition of the right of the state to prevent commissive waste.[248] As to the nature of commissive waste, the American authorities are neither in harmony with themselves nor with the English cases. "While our ancestors brought over to this country the principles of the common law, these were nevertheless accommodated to these new conditions."[249] Accordingly, it is a question of fact as to what acts constitute waste, having reference to actually existing conditions, and the finding on such question will not be disturbed on conflicting evidence.[250] Commissive waste, as to land, may consist, for example, in the removing of virgin soil,

warrant has not the effect prima facie of satisfying the debt, so as to put on plaintiff the burden of showing that the property levied on has not been wasted; and, if defendant claims waste, the burden is on him to prove it. Taylor v. Felder, 5 Tex. Civ. App. 417, 23 S. W. 480. As to liability of guardian and ward, see State v. Tittman, 54 Mo. App. 490.

[244] Ante, p. 697; Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588; Willey v. Laraway, 64 Vt. 559, 25 Atl. 436; Calvert v. Rice, 91 Ky. 533, 16 S. W. 351.

[245] Cooley, Torts, § 333; 1 Scrib. Dower, 212–214; 2 Scrib. Dower, 795.

[246] Ball, Torts, 59; Regan v. Luthy (Com. Pl.) 11 N. Y. Supp. 709.

[247] Willey v. Laraway, 64 Vt. 559, 25 Atl. 436. A married woman is not liable for waste committed by her husband in his representative capacity as executor. Lilly v. Menke (Mo. Sup.) 28 S. W. 643.

[248] State v. Gramelspacher, 126 Ind. 398, 26 N. E. 81; McBride v. Board of Com'rs of Pierce Co., 44 Fed. 17; Caldwell v. Ward, 83 Mich. 13, 46 N. W. 1024, explained in 88 Mich. 378, 50 N. W. 303.

[249] Gaston, J., in Shine v. Wilcox, 1 Dev. & B. Eq. 631.

[250] Jackson v. Brownson, 7 Johns. 227, followed in Eysaman v. Small, 61 Hun, 618, 15 N. Y. Supp. 288; Shephard v. Shephard, 2 Hayw. (N. C.) 580; Balleutine v. Poyner, Id. 268; Lambeth v. Warner, 2 Jones, Eq. 165; Crawley v. Timberlake, 2 Ired. Eq. 460; Davis v. Gilliam, 5 Ired. Eq. 308; Dor-

diversion of the course of a stream, destruction of game, fish ponds, and the like.[251] It is not waste to use the premises in accordance with good usage and for purposes for which they were manifestly designed. Thus, the unauthorized digging of clay by a tenant is waste, where there is nothing in the situation of the premises or other special circumstances to take the case out of the general rule.[252] But, where the work for carrying on the business of making brick has been constructed and established, and the business lawfully undertaken by the owners of the land, it is not waste for a tenant to continue the business in the customary way.[253] On the same principle, while a tenant may not open new or discontinued mines or quarries,[254] yet he may exhaust mines and quarries opened at the commencement of the estate without committing waste.[255] As to the use of soil in husbandry, it was originally held that any conversion of land from one species to another, as plowing up woodland, or turning arable into pasture land, was waste; but modern authorities do not bear this out.[256] Whether such conversion interferes with the value as a whole, and the sanction of similar usage by good farmers, are proper considerations for the jury.[257] Putting all the land into wheat may be waste; so may negligence to observe the proper rotation of crops.[258] The exhaustion of the soil may be

sey v. Moore, 100 N. C. 41, 6 S. E. 270; Hasting v. Cruncleton, 3 Yeates (Pa.) 261; Clemence v. Steere, 1 R. I. 272; Wilson v. Edmonds, 24 N. H. 517; Harvey v. Harvey, 41 Vt. 373; Kidd v. Dennison, 6 Barb. 9; Keeler v. Eastman, 11 Vt. 293; Findlay v. Smith, 6 Munf. (Va.) 134.

251 Ball, Torts, 57.

252 Livingston v. Reynolds, 2 Hill, 157.

253 Russell v. Merchants' Bank of Lake City, 47 Minn. 286, 50 N. W. 228. Compare University v. Tucker, 31 W. Va. 621, 8 S. E. 410; Dodge v. Davis, 85 Iowa, 77, 52 N. W. 2. As to when the liability is only ex contractu, see Patureau v. McArdle, 44 La. Ann. 355, 10 South. 782.

254 Gaines v. Green Pond Iron Min. Co., 32 N. J. Eq. 86. If coal has been mined for domestic use, the life tenant may not mine for sale. Franklin Coal Co. v. McMillan, 49 Md. 549.

255 Sayers v. Hoskinson, 110 Pa. St. 473, 1 Atl. 308. Compare Grubbs' Appeal, 90 Pa. St. 228; McCord v. Oakland Quicksilver Min. Co., 64 Cal. 134, 27 Pac. 863.

256 Pol. Torts, 285.

257 Chapel v. Hull, 60 Mich. 167, 26 N. W. 874

258 Wilds v. Layton, 1 Del. Ch. 226.

waste,[259] although mere bad farming is not.[260] Commissive waste may affect timber and other products grown on land. With regard to such products the law will depend largely on the local custom and on the peculiar condition of the country in which the question may arise. Thus, in England, where local usage allowed it, taking "annual cuttings" was held not to be waste between the tenant for life and the remainder-man.[261] While, in England, outside of such local usage, the tenant could take wood for ordinary use, as for fuel or for repair, he would be liable for waste if he exceeded what was reasonable.[262] In this country, cutting valuable forest trees where there is little woodland on a farm may be waste;[263] but it is not waste to cut timber for necessary repair,—for example, to fence.[264] "Any such strictness as existed in England would be manifestly unsuited to the condition of things in other parts of this country, because it would be of some service to the inheritance. In newer states, where timber is abundant, it might indeed be beneficial to the inheritance, rather than wasteful, to permit the timber to be removed; and therefore what is wasteful elsewhere might in these sections of the country be permissible."[265] Ordinarily, a tenant for

[259] Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601.

[260] Richards v. Torbett, 3 Houst. (Del.) 172.

[261] Dashwood v. Magniac [1891] 3 Ch. 306; Honeywood v. Honeywood, L. R. 18 Eq. 306–309. To eradicate whitethorn is waste, but not to eradicate blackthorn. Gage v. Smith, Godb. 209.

[262] 2 Bl. Comm. 35; 1 Washb. Real Prop. 129. See McCord v. Oakland Quicksilver Min. Co., 64 Cal. 134, 27 Pac. 863.

[263] Powell v. Chesire, 70 Ga. 357; Huddleston v. Johnson, 71 Wis. 336, 37 N. W. 407. Defendant may be liable to remainder-men for such waste, although timber was cut under contract of sale with life tenant, and paid for in full. Dorsey v. Moore, 100 N. C. 41, 6 S. E. 270. Et vide Webster v. Webster, 33 N. H. 18; Lester v. Young, 14 R. I. 579; Silva v. Garcia, 65 Cal. 591, 4 Pac. 628; Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004; Moses v. Johnson, 88 Ala. 517, 7 South. 146; Carrington v. Lentz, 40 Fed. 18.

[264] Calvert v. Rice, 91 Ky. 533, 16 S. W. 351. Compare Den v. Kenney, 5 N. J. Law, 634.

[265] Cooley, Torts, 333, approved. Pol. Torts, § 286; King v. Miller, 99 N. C. 583, 6 S. E. 660; Alexander v. Fisher, 7 Ala. 514; Drown v. Smith, 52 Me. 141; Gardner v. Dering, 1 Paige, 593; Keeler v. Eastman, 11 Vt. 293; McGregor v. Brown, 10 N. Y. 114; Clemence v. Steere, 1 R. I. 222.

life may not cut timber simply for the money it will bring;[266] but it is not waste for the life tenant to cut wood or timber so as to fit the land for cultivation or pasture conformable to the rules of good husbandry; and this is so even where the wood or timber so cut is sold, used, or consumed on the premises.[267] But the mere fact that the value of the land is not diminished, or that it may be increased, is no defense in an action for actual waste.[268]

It is waste to pull down houses, outbuildings, or walls, to remove wainscots or floors, to build up old windows or doors, or to open new ones, or to change one species of building into another,—as a water mill into a wind mill, or a corn mill into a malt mill.[269] The tearing down of a house is waste, even if it be done for the purpose of erecting a better one.[270] The measure of damages would be the diminution of the value of the premises, and not the value of the building destroyed or removed.[271] Considerable latitude has been allowed with respect to the right of the tenement to remove fixtures. "The rule as to fixtures has always been relaxed more as between landlord and tenant than as between persons standing in other relations. It has been held that stoves are movable during the term; grates, ornamental chimney-pieces, wainscots fastened with screws, coppers, and various other articles."[272]

[266] Dorsey v. Moore (S. C.) 6 S. E. 270; 1 Washb. Real Prop. 116–128; White v. Cutler, 17 Pick. 248; Padelford v. Padelford, 7 Pick. 152; Sarles v. Sarles, 3 Sandf. Ch. 601; Jackson v. Brownson, 7 Johns. 227; Livingston v. Reynolds, 26 Wend. 115, 2 Hill, 157; McGregor v. Brown, 10 N. Y. 114; Robinson v. Kime, 70 N. Y. 147; Van Deusen v. Young, 29 N. Y. 9; Kidd v. Dennison, 6 Barb. 9; Davis v. Gilliam, 5 Ired. Eq. 308.

[267] Keeler v. Eastman, 11 Vt. 293; Alexander v. Fisher, 7 Ala. 514; Hastings v. Cruncleton, 3 Yeates (Pa.) 261; Williard v. Williard, 56 Pa. St. 119; Drown v. Smith, 52 Me. 141; Davis v. Gilliam, 5 Ired. Eq. 308; Owen v. Hyde, 6 Yerg. 334; Findlay v. Smith, 6 Munf. (Va.) 134; Appeal of Campbell, 2 Doug. (Mich.) 141; Jackson v. Brownson, 7 Johns. 227; Van Deusen v. Young, 29 N. Y. 9; Schnebly v. Schnebly, 26 Ill. 116; Wilkinson v. Wilkinson, 59 Wis. 557, 18 N. W. 527.

[268] Rossman v. Adams, 91 Mich. 69, 51 N. W. 685; Moses v. Johnson, 88 Ala. 517, 7 South. 146.

[269] Smyth v. Carter, 18 Beav. 78; Ball, Cas. Torts, 57.

[270] Dooly v. Stringham, 4 Utah, 107, 7 Pac. 405.

[271] Stoudenmire v. De Bardelaben, 85 Ala. 85, 4 South. 723.

[272] Tindal, C. J., in Grymes v. Boweren, 6 Bing. 437; Elwes v. Maw, 3 East, 38.

222. Legal waste is a term used to describe waste for which there lay a remedy at law. Equitable waste is a term used to describe waste which was only recognized as such and relieved against in equity.[273]

When a life estate is given "without impeachment of waste," the tenant for life will still be restrained from committing wanton or malicious waste, such as damaging and destroying buildings or boundary walls, cutting down wood unfit for timber, or trees grown for shelter or ornament, or destroying a field by carrying away brick earth.[274] The words "to have and to hold, and to use and control as the lessee thinks proper, for his benefit during his natural life," import a lease without impeachment for waste. But such words are not to be treated as importing a license to destroy or injure the estate, but to do all reasonable acts consistent with the preservation of the estate which in law might be waste. Such a lease does not permit the tenant to entirely strip the land of timber, convert it into lumber, and sell it away from the inheritance.[275]

SAME—REMEDIES.

223. The ordinary remedies for waste are

(a) An award of damages; or

(b) The issuance of an injunction against the recurrence of mischief.

Damages.

The actual damages, where recovery is allowed, are meted out on the same principles which would govern recovery in trespass, and in proportion to the injury sustained.[276] One can recover only such

[273] Fraser, Torts, 54.

[274] Vane v. Barnard, 2 Vern. 738; Bishop of London v. Web, 1 P. Wms. 528; 2 Bl. Comm. 282, 283; Downshire v. Sandys, 6 Ves. 107. But see Baker v. Sebright, 13 Ch. Div. 179.

[275] Duncombe v. Felt, 81 Mich. 332, 45 N. W. 1004. As to use of writ of estrepement, see Hensal v. Wright, 10 Pa. Co. Ct. R. 416. As to forfeiture, see Sullivan v. O'Hara, 1 Ind. App. 259, 27 N. E. 590. As to appointment of receiver, see Dunlap v. Hedges, 35 W. Va. 287, 13 S. E. 656.

[276] 3 Suth. Dam. § 1033, citing Van Deusen v. Young, 29 N. Y. 9; Randall v. Cleveland, 6 Conn. 328; Shadwell v. Hutchinson, 2 Barn. & Adol. 97; Dutro v. Wilson, 4 Ohio St. 101. As to refusal subsequent to commencement of ac-

damages as affect his expectant estate, and, in general, these damages are the amount the estate is diminished thereby in value.[277] The damage may be recovered by a mortgagor or his vendee for acts of waste committed with a knowledge that the value of the security will be injured thereby,[278] even though in its damaged condition it is of sufficient value to satisfy the mortgage debt.[279] Treble damages are often awarded by statute.[280]

Injunction.

The issuance of an injunction to prevent the commission or continuance of waste is governed by ordinary equitable principles. A court of equity will not interfere to prevent by injunction permissive waste, but will leave the aggrieved party to his remedy at law.[281] Nor will it grant an injunction against ameliorating or improving waste, as building a valuable house on the land.[282] In general, it will not issue unless the injury is so irreparable that damages would afford no adequate compensation,[283] and where there is no adequate

tion, see Davis v. Clark, 40 Mo. App. 515; Evelyn v. Raddish, Holt, N. P. 543; Dawson v. Tremaine, 93 Mich. 320, 53 N. W. 1044.

[277] 3 Suth. Dam. § 1034, note 4; Webb v. Portland Manuf'g Co., 3 Sumn. 189, Fed. Cas. No. 17,322.

[278] Van Pelt v. McGraw, 4 N. Y. 110; Manning v. Monaghan, 23 N. Y. 539; Wilson v. Maltby, 59 N. Y. 126–129.

[279] Bryom v. Chapin, 113 Mass. 308. So, as to replevin, Allen v. Butman, 138 Mass. 586; as to trover, Searle v. Sawyer, 127 Mass. 491. Et vide Waterman v. Matteson, 4 R. I. 539. Compare Coggill v. Millburn Land Co., 25 N. J. Eq. 27. Generally, as to right of mortgagee to recover, see Adams v. Corriston, 7 Minn. 456; Malone v. Marriott, 64 Ala. 486; Cooper v. Davis, 15 Conn. 556; Phœnix v. Clark, 6 N. J. Eq. 447; Ward v. Carp River Iron Co., 47 Mich. 65, 10 N. W. 109. Timber cut on land, not for consumption, belongs to a purchaser of tax title at the period of redemption. Nicklase v. Morrison, 56 Ark. 553, 20 S. W. 414.

[280] Sherrill v. Connor, 107 N. C. 543, 630, 12 S. E. 588; Smith v. Mattingly (Ky.) 28 S. W. 503. As to limitation against an action of waste, see Powell v. Dayton, S. & G. R. Co., 16 Or. 33, 16 Pac. 863; Danziger v. Silverthau (Super. Ct. N. Y.) 18 N. Y. Supp. 350.

[281] Powys v. Blagrave, 4 De Gex, M. & G. 448.

[282] Doherty v. Allman, L. R. 3 App. Cas. 709. Compare Miller v. Waddingham, 91 Cal. 377, 27 Pac. 750. But see Smyth v. Carter, 18 Beav. 78, per Sir John Romilly, M. R.

[283] Holmberg v. Johnson, 45 Kan. 197, 25 Pac. 575; Atkins v. Chilson, 7

remedy at law.[284] An injunction will issue upon threats to commit waste.[285] As between mortgagee and mortgagor, if the waste complained of will diminish the value of the property so as to render it insufficient or of doubtful sufficiency, it will be restrained by an injunction,[286] though the mortgage debt is not yet due.[287] It may issue to restrain injury to the freehold in the nature of waste, between tenants in common,[288] and between a vendor in possession and the vendee.[289] It will lie on the part of the state,—as, for example, to preserve security for taxes.[290] The decisions are in conflict as to whether an injunction will issue where the title is in dispute.[291] An injunction will not lie for use authorized by law.[292]

Metc. (Mass.) 398; Poindexter v. Henderson, 1 Miss. 176; Terry v. Allen, 60 Conn. 530, 23 Atl. 150.

[284] A landlord is not entitled to an injunction to restrain a solvent tenant from cutting and removing fodder from the demised premises, as he has an adequate remedy at law for any injury resulting therefrom. Perry v. Hamilton (Ind.) 35 N. E. 836. Mills' Ann. St. § 2272, part of an act giving the right to construct reservoirs for certain purposes, by providing that the owners thereof shall be liable for all damages arising from leakage therefrom, merely affirms a common-law principle, and does not take away the right to injunctive relief against the filling of a reservoir, where the injuries suffered therefrom are irreparable. Sylvester v. Jerome, 19 Colo. 128, 34 Pac. 760.

[285] Whitewater Valley Canal Co. v. Comegys, 2 Ind. 469; Loudon v. Warfield, 5 J. J. Marsh. 196.

[286] Moriarty v. Ashworth, 43 Minn. 1, 44 N. W. 531; Miller v. Waddingham, 91 Cal. 377, 27 Pac. 750.

[287] Cahn v. Hewsey, 8 Misc. Rep. 384, 29 N. Y. Supp. 1107.

[288] Hawley v. Clowes, 2 Johns. Ch. 122; Coffin v. Loper, 25 N. J. Eq. 443; Atkinson v. Hewitt, 51 Wis. 275, 8 N. W. 211.

[289] An injunction has been granted to restrain quarrying and removing rock, or removing trees, except nursery stock, by purchaser under contract against a vendor in possession. Holmberg v. Johnson, 45 Kan. 197, 25 Pac. 575.

[290] Rossman v. Adams, 91 Mich. 69, 51 N. W. 685; Caldwell v. Ward, 88 Mich. 378, 50 N. W. 303.

[291] Compare Preston v. Smith, 26 Fed. 884, McBride v. Board of Com'rs, 44 Fed. 17, and Nevitt v. Gillespie, 2 How. (Miss.) 108, with Arment v. Hensel, 5 Wash. 152, 31 Pac. 464; Wadsworth v. Goree, 96 Ala. 227, 10 South. 848; Kinsler v. Clarke, 2 Hill, Eq. (S. C.) 617; Snyder v. Hopkins, 31 Kan. 557, 3 Pac. 367; Duvall v. Waters, 1 Bland (Md.) 569; Lanier v. Alison, 31 Fed. 100.

[292] The tenant in dower will not be enjoined from cutting timber to make rails to put the fences in repair, even though the timber on the farm is very

The right of an injunction against waste may be lost by long delay and practical acquiescence.[293]

CONVERSION—DEFINITION.

224. Conversion is an unauthorized act which deprives another of his property, permanently or for an indefinite time.[294]

The law of conversion, as we have seen, was to a great extent developed through the common-law action on the case, "trover." The question which was originally asked was, not whether there was the substantive wrong, conversion, in a given instance, but whether trover would lie. Indeed, the remedy and the wrong are now alike commonly referred to as "trover and conversion."

The action of trover, according to the original form of declaration, was applicable only to cases where the plaintiff had lost his goods and they were subsequently found and appropriated by the defendant. Even under common-law practice and pleading, the averments of loss and finding have long been considered immaterial, and are not traversable by the defendant.[295] Even in jurisdictions where the code system of pleading is in force, the name is still applied to the action brought to recover the legal measure of damages for personal chattels wrongfully converted.[296]

scarce, for it is the duty and right of the life tenant to reasonably use the timber for purposes of repair, and such use is no injury to the remainderman. Calvert v. Rice, 91 Ky. 533, 16 S. W. 351; Neel v. Neel, 19 Pa. St. 323. So, between cotenants, McCord v. Mining Co., 64 Cal. 134, 27 Pac. 863.

293 Ball, Torts, 60.

294 Pol. Torts, p. 288.

295 Clerk & L. Torts, 167. "We should not allow this nonsensical form of losing and finding to be extended any further." Best, C. J. ("certainly no great friend to the action of trover"), in Mallalieu v. Laugher, 3 Car. & P. 551. The origin of trover, its distinction from other forms of common-law actions, and its justification, will be found set forth in Burroughes v. Bayne, 5 Hurl. & N. 296; especially by Martin, B. And, generally, see Glyn v. East & W. India Dock Co., 6 Q. B. Div. 475; England v. Cowley, L. R. 8 Exch. 126; Hiort v. Bott, L. R. 9 Exch. 86. For a statutory action allied to trover, see Smith v. Briggs, 64 Wis. 497, 25 N. W. 558; National Transit Co. v. Weston, 121 Pa. St. 485, 15 Atl. 569.

296 This is justified, not only because of the historical confusion of the law

Trespass and trover, while distinct forms of action, may in many instances lie for the same wrong, at the plaintiff's option. They

adjective and of the law substantive on this point, but also by its avoidance of confusion of the tort conversion with the equitable doctrine of conversion. This chain of reasoning would seem to add cogency to the insistence that "deprivation" should be used instead of "conversion," as the name descriptive of this species of civil wrong. Complaint in trover should contain: (1) Allegation of ownership or possession at the time of the alleged wrong. It need not show nature or evidence of plaintiff's title; it is enough to allege ownership generally. Reed v. McRill, 41 Neb. 206, 59 N. W. 775; Warren v. Dwyer, 91 Mich. 414, 51 N. W. 106; Oberfelder v. Kavanaugh, 21 Neb. 483, 32 N. W. 295; Stall v. Wilbur, 77 N. Y. 158; Swift v. James, 50 Wis. 540, 7 N. W. 656; Sturman v. Stone, 31 Iowa, 115; Kerner v. Boardman (Com. Pl.) 14 N. Y. Supp. 787. A complaint alleging possession of plaintiff is sufficient, although the judgment shows title. Rosenthal v. McMann, 93 Cal. 505, 29 Pac. 121. Property or possession must be shown at the time of the wrong, and not at the commencement of the action. Sawyer v. Robertson, 11 Mont. 416, 28 Pac. 456; Smith v. Force, 31 Minn. 119, 16 N. W. 704; Bond v. Mitchell, 3 Barb. 304. (2) A reasonably certain description of property. "All the saloon fixtures on the premises No. 424 M. street," giving city and county, is sufficient. Greenebaum v. Taylor, 102 Cal. 624, 36 Pac. 957. And see Crocker v. Hopps, 78 Md. 260, 28 Atl. 99; Leitner v. Strickland, 89 Ga. 363, 15 S. E. 469. (3) A sufficient allegation of the act of conversion. That defendant "converted" the property is an allegation of fact, not of law, and is sufficient, Duggan v. Wright, 157 Mass. 228, 32 N. E. 159; Johnson v. Ashland Lumber Co., 45 Wis. 119; or "sold," Edwards v. Sonoma Valley Bank, 59 Cal. 136; Cone v. Ivinson (Wyo.) 33 Pac. 31, 35 Pac. 933. Plaintiff need not allege particulars. Green v. Palmer, 15 Cal. 412. An allegation as to place is immaterial. First Nat. Bank v. Brown, 85 Tex. 80, 23 S. W. 862. An allegation of essential elements of conduct constituting conversion is sufficient. Cf. Hutchings v. Castle, 48 Cal. 152, with Triscony v. Orr, 49 Cal. 612. As to demand and refusal, see Holdridge v. Lee, 3 S. D. 134, 52 N. W. 265; Schmidt v. Garfield Nat. Bank, 64 Hun, 298, 19 N. Y. Supp. 252; Proctor v. Cole, 66 Ind. 576; Pugh v. Calloway, 10 Ohio St. 488; Kronschnable v. Knoblauch, 21 Minn. 56. And (4) an allegation of damage. Morish v. Mountain, 22 Minn. 564; Washburn v. Mendenhall, 21 Minn. 332. It is usual, but not necessary, to allege the value of the property. Jones v. Rahilly, 16 Minn. 320 (Gil. 283); Connoss v. Meir, 2 E. D. Smith, 314; Jefferson v. Hale, 31 Ark. 286; Woodruff v. Cook, 25 Barb. 505. Generally, as to complaint, see Howard v. Seattle Nat. Bank (Wash.) 38 Pac. 1040. Kyle v. Caravello (Ala.) 15 South. 527. As to general denial, see Warnick v. Baker, 42 Mo. App. 439; Sparks v. Heritage, 45 Ind. 66; Richardson v. Smith, 29 Cal. 529. As to answers, generally, see Dubois v. Sistare, 59 Hun, 353, 13 N. Y. Supp. 99; Benedict v.

have become largely, if not wholly, interchangeable[297] as to injuries to personal property.[298] The fundamental distinction between them is founded on this: Trespass is essentially a wrong to the actual possessor; conversion is a wrong to the person entitled to immediate possession.[299] The actual possessor is fre-

Farlow, 1 Ind. App. 160, 27 N. E. 307; Louisville & N. R. Co. v. Lawson, 88 Ky. 496, 11 S. W. 511. As to reply, McFadden v. Schroeder, 4 Ind. App. 305, 29 N. E. 491, and 30 N. E. 711. As between trover and remedy for breach of contract, see Shea v. Inhabitants of Milford, 145 Mass. 525, 14 N. E. 769.

[297] Innes, Torts, 9; 3 Bl. Comm. 152. Thus, the destruction of property may be the basis of an action either of trespass or conversion. Pig. Torts, 345. Abuse of license of law, e. g. to drive sheep away from defendant's close, may make trespass ab initio and enable owner to sue in trover. Gilson v. Fisk, 8 N. H. 404. Cf. Brown v. Boyce, 68 Ill. 294. The distinction between trespass and conversion may be very material on the question of damages. Clerk & L. Torts, 168, note c. It is well illustrated in Shea v. Inhabitants of Milford, 145 Mass. 525, 14 N. E. 769. Here property of the plaintiff was on defendants' land. Defendants requested plaintiff to remove it, and upon his refusal so to do, defendants removed it. It was held that, if plaintiff had the right to occupy the land, which he claimed, the acts of defendants were wrongful, and they would be liable to him for damages for breach of contract or for trespass, but not for value of property converted to their own use. So, in Downs v. Finnegan (Minn.) 59 N. W. 981, a further difference is well illustrated. While the plaintiff in conversion may waive the tort and sue in assumpsit, a trespass is not so convertible. It was accordingly held that, though a naked trespass, creating a liability for damages, cannot be the basis of an action as on implied assumpsit, where one has wrongfully quarried stone on the land of another, and converted the same to his own use so that replevin or trover would lie, the tort may be waived, and the value of the stone recovered in assumpsit. And see article by Judge Cooley in 3 Alb. Law J. 141. Further, as to difference between trespass and conversion, see Stanley v. Gaylord, 1 Cush. 536–553. Thorogood v. Robinson, 6 Q. B. 769; Town v. Hazen, 51 N. H. 596; Bushel v. Miller, 1 Strange, 128; Farnsworth v. Lowery, 134 Mass. 512.

[298] Trover will not lie for an injury to real estate. But a building may be converted. Osborn v. Potter, 101 Mich. 300, 59 N. W. 606; Jonsson v. Lindstrom, 114 Ind. 152, 16 N. E. 400. And if it be wrongfully taken away from a homestead, such severance does not destroy its exemption from legal process. Wylie v. Grundysen, 51 Minn. 360, 53 N. W. 805.

[299] That plaintiff's ties are on defendant's right of way does not defeat an action for conversion. Baker v. Railway Co., 52 Mo. App. 602. Trover will lie although the property be in the custody of a court of chancery. Garabaldi v. Wright, 52 Ark. 416, 12 S. W. 875. Indorsee in blank of note held

quently, but not always, the person entitled to immediate possession. So that trover sometimes may, but does not necessarily, include trespass.[300]

Conversion differs from negligence in being a breach of an absolute duty, and the result of what is done or omitted at peril; so that the question of culpability, or want of care, is not an element of conversion. Such personal fault is of the essence of negligence.[301] Unlike negligence, it cannot be brought for a personal injury. The line of distinction between the two is, in actual practice, by no means always distinct.[302]

Conversion is a transitory, as distinguished from a local, wrong. It has, therefore, been held that trover will not lie, at the suit of the owner of lands, against a person who removes timber from it under claim of title, since that would put the title to lands in issue.[303] Where, however, one has recovered possession of the land in ejectment, he may recover in trover for the removal of standing timber by a person in possession under claim of title.[304] Trover does not lie to recover money paid by mistake.[305] The owner is not bound to follow the property converted, although by law he may be entitled so to do, but may sue at once for damages. Therefore, a mortgagee whose mortgaged property has been unlawfully sold is

as collateral security may sue indorser, who has note for collection in trover. Carter v. Lehman, 90 Ala. 126, 7 South. 735. Where plaintiff in trover claims under a chattel mortgage, such special property must be alleged; a general allegation of a right to possession not being sufficient. Kennett v. Peters, 54 Kan. 119, 37 Pac. 999. See Axford v. Mathews, 43 Mich. 327, 5 N. W. 377; Foster v. Mining Co., 68 Mich. 188, 36 N. W. 171; Stevenson v. Fitzgerald, 47 Mich. 166, 10 N. W. 185.

[300] Fraser, Torts, 62; Lexington & O. Ry. Co. v. Kidd, 7 Dana, 245.

[301] Post, 821, "Negligence."

[302] Post, p. 814, "Negligence." And see Graves v. Smith, 14 Wis. 5; Platt v. Tuttle, 23 Conn. 233; Williams v. Geese, 3 Bing. N. C. 849.

[303] Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co., 55 N. J. Law, 350, 26 Atl. 920; Washburn v. Cutter, 17 Minn. 361 (Gil. 335); Nash v. Sullivan, 32 Minn. 189, 20 N. W. 144.

[304] Wilson v. Hoffman, 93 Mich. 72, 52 N. W. 1037. But timber has been regarded as personalty under such circumstances. Brooks v. Rogers, 101 Ala. 111, 13 South. 386.

[305] Muskegon Booming Co. v. Hendricks, 89 Mich. 172, 50 N. W. 799.

not compelled to pursue the lien to which he may be entitled, but may recover in trover.[306]

SAME—TITLE TO MAINTAIN.

225. To entitle him to recover in trover and conversion, the plaintiff or his assignor[307] must have had at the time of the alleged wrong—

(a) Property, general or special, entitling him to immediate possession; or

(b) Actual possession.[308]

To recover in trover, plaintiff must show possession in fact, or the right to recover possession. The wrong is not done to the thing itself, but to the abstract right to the thing.[309] The plaintiff, accordingly, must allege and prove possession or right of possession at the time of the alleged wrong; not indefinitely or, for example, at the time of the commencement of the action.[310] Absolute own-

[306] Cone v. Ivinson (Wyo.) 33 Pac. 31, 35 Pac. 933; House v. Phelan, 83 Tex. 595, 19 S. W. 140; Moore v. Baker, 4 Ind. App. 115, 30 N. E. 629. And see Searle v. Sawyer, 127 Mass. 491. That a railroad company converting goods by delivery could also be sued is no bar to an action against a person to whom such goods were delivered. Dickinson v. Merchants' Elevator Co., 44 Mo. App. 498. Generally, as to when a given action is trover, Hoowe v. Kreling, 93 Cal. 136, 28 Pac. 1042; Knipper v. Blumenthal, 107 Mo. 665, 18 S. W. 23; Below v. Robbins, 76 Wis. 600, 45 N. W. 416.

[307] Tome v. Dubois, 6 Wall. 548–554; Gulf, C. & S. F. Ry. Co. v. Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556; Brady v. Whitney, 24 Mich. 154.

[308] Hunter v. Cronkhite, 9 Ind. App. 470, 36 N. E. 924; Tribble v. Laird, 92 Ga. 686, 19 S. E. 26.

[309] Clerk & L. Torts, 168. Conversion cannot be maintained for a stock of liquor by one who does not own it, or have an interest therein, though the business is carried on in his name, for the purpose of saving the real owner the expense of a wholesale license. Epstein v. Meyer Bros. Drug Co., 82 Tex. 572, 18 S. W. 592.

[310] Gordon v. Harper, 7 Term R. 9, Chase, Lead. Cas. 201; Pyne v. Dor, 1 Term R. 55; Bradley v. Copley, 1 C. B. 685; Sawyer v. Robertson, 11 Mont. 416, 28 Pac. 456; Hunter v. Cronkhite, 9 Ind. App. 470, 36 N. E. 924; Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. 313; McLaughlin v. Waite, 9 Cow. 670; Smith v. Force, 31 Minn. 119, 16 N. W. 704; Vanderburgh v. Bassett, 4 Minn. 242 (Gil. 171); Balme v. Hutton, 9 Bing. 471–477.

ership of chattels—the right of general property—is said to draw to it the right of possession.[311] This would seem to mean no more than that ownership confers the right to take possession. Therefore one in whom is vested absolute property in a chattel may maintain trover and conversion against one who interferes with it, although the owner has never had possession in fact.[312] Constructive possession is sufficient.[313]

There are, however, many kinds of special property, not amounting to absolute ownership, which are sufficient to entitle one to recover for conversion. Special property denotes the possession of one who has a qualified interest; and it is sometimes added to one who has only bare possession.[314] Where a person relies on special property, there must, ordinarily, be adduced evidence of possession. Possession is not annexed to it by a construction of law.[315] Bare possession, as of a finder, gives sufficient right to maintain trover.[316]

[311] Lexington & O. Ry. Co. v. Kidd, 7 Dana, 245; Abercrombie v. Bradford, 16 Ala. 560–567.

[312] Ball, Torts, 70; Gordon v. Harper, 7 Term R. 9; 2 Saund. 47a, note 1; Ayer v. Bartlett, 9 Pick. 156; Foster v. Gorton, 5 Pick. 185; Stewart v. Bright, 6 Houst. 344.

[313] Bristol v. Burt, 7 Johns. 254; McCombie v. Davies, 6 East, 540; post, p. 722. And see cases collected, 1 Ames & S. Lead. Cas. 357. Cf. McNair v. Wilcox, 121 Pa. St. 437, 15 Atl. 575.

[314] 1 Chit. Pl. 151–169; Webb v. Fox, 7 Term R. 391. "What is meant by a special property in a thing? Does it mean a qualified right or interest in the thing, a jus in re, or a right annexed to the thing? Or does it mean merely a lawful right of custody, or possession, of the thing, which constitutes a sufficient title to maintain that possession against wrongdoers by action or otherwise? If the latter be its true signification, it is little more than a dispute about terms, as all persons will now admit that every bailee, even under a naked bailment from the owner, and every rightful possessor by act or operation of law, has in this sense a special property in the thing; but this certainly is not the sense in which the phrase is ordinarily understood." See Story, Bailm. § 93, notes g, h, i. It is consistent with the treatment of possession and property by Mr. Pollock, as heretofore followed in this book, to continue to separate possession from property. It would seem that the preservation of this distinction conduces to clearness.

[315] 2 Greenl. Ev. § 637, note 2 et seq.; Clark v. Draper, 19 N. H. 419.

[316] Armory v. Delamirie, 1 Strange, 505; 1 Smith, Lead. Cas. (8th Ed.) pt.

A fortiori, where there is possession under claim of title.[317] The possession of chattels is, in general, prima facie evidence of property, and of a right to their possession, if not against all who cannot show a better title, at least against all who rely on an inferior one.[318] As between the finder and one who claims the chattel as owner, the former may retain the property a reasonable length of time to satisfy himself whether the claimant is the owner.[319] Indeed, a party in or entitled to rightful possession may sometimes maintain trover against the owner.[320] On the other hand, however, mere lawful possession of property may not deprive the owner of his right to recover, although he had intended to part with both possession and property. By the doctrine of constructive repossession, he may be entitled to maintain trover.[321] Thus, where goods are

1, p. 679; Chase, Lead. Cas. 201; Nicholls v. Bastard, 2 Cromp., M. & R. 659; Wilbraham v. Snow, 2 Wm. Saund. 47a; Northam v. Bowden, 11 Exch. 70; Buckley v. Gross, 3 Best & S. 566; Sutton v. Buck, 2 Taunt. 302; Linscott v. Trask, 35 Me. 150; Krewson v. Purdom, 15 Or. 589, 16 Pac. 480. And see article on "Rights and Liabilities of the Finder of Chattels" in 16 Chi. Leg. News, 343.

[317] Possession of land under claim of title is sufficient evidence of ownership to entitle the person in possession to maintain trover for crops grown on the land. Russell v. Willette (Sup.) 30 N. Y. Supp. 490. Seymour v. Peters, 67 Mich. 415, 35 N. W. 62; Wessels v. Beeman, 87 Mich. 481, 49 N. W. 483.

[318] Brown v. Ware, 25 Me. 411; Adams v. McGlinchy, 66 Me. 474; Cook v. Patterson, 35 Ala. 102; Gilson v. Wood, 20 Ill. 38. One who, without permission, has cut cord wood from public lands and piled it along a railroad, is in actual possession thereof, and is engaged in selling it for his own benefit, may recover its full value, if negligently destroyed by fire from a locomotive; for the railroad company cannot justify its negligence by showing that plaintiff was a trespasser, or question his title without connecting itself with the true title. Northern Pac. R. Co. v. Lewis, 2 C. C. A. 446, 51 Fed. 658. And see Gulf, C. & S. F. Ry. Co. v. Johnson, 4 C. C. A. 447, 54 Fed. 474–480. A recent statement of the rule is that, in an action for conversion, title in a third person is no defense, unless defendant can in some manner connect himself with such person, and claim under him. Brown v. Shaw, 51 Minn. 266, 53 N. W. 633.

[319] Isack v. Clarke, 1 Rolle, 130; Clark v. Chamberlin, 2 Mees. & W. 78.

[320] Roberts v. Wyatt, 2 Taunt. 268; Engel v. Scott & H. Lumber Co. (Minn.) 61 N. W. 825.

[321] Ball, Torts, 379.

delivered for an illegal purpose (as to defraud creditors), the owner may repudiate the illegal purpose at any time before it is carried out, and bring trover to recover his goods from the person to whom they were intrusted.[322]

Few things in law, it is said, are more difficult to determine than what is a sufficient right of property to support trover or replevin.[323] The defendant cannot succeed by setting up the title of a third person, unless he can so connect himself with such third person as to claim title under him.[324] Accordingly, he is driven to defending his right to the property, and to attacking that of the plaintiff. The respective rights of possession of defendant and plaintiff vary from those of an absolute owner to those of a thief. To illustrate, it seems clear that the owner of personal property leased to another cannot maintain trover for a conversion pending the demise.[325] On the same principle, one who, in accordance with his authority, disposes of property coming into his possession, is not liable in trover, though he misapplies the proceeds, takes inadequate security, or sells for a less price than authorized. | He would, however, be liable

[322] Taylor v. Bowers, 1 Q. B. Div. 291.

[323] 1 Smith, Lead. Cas. (8th Am. Ed.) pt. 1, p. 690.

[324] "I am of the opinion," said Lord Campbell, C. J., in Jeffries v. Great Western Ry. Co., 5 El. & Bl. 802–805, "that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title himself, is a wrongdoer, and cannot defend himself by showing that there was title in some third person, for against a wrongdoer possession is a title." Thorne v. Tilbury, 3 Hurl. & N. 534; Biddle v. Bond, 34 Law J. Q. B. 137; Harrington v. Tremblay, 61 N. H. 413; Cheesman v. Exall, 6 Exch. 341; Bridges v. Hawkesworth, 21 Law J. Q. B. 75; Brown v. Shaw, 51 Minn. 266, 53 N. W. 633; Harker v. Dement, 9 Gill (Md.) 7; Jones v. Kellogg, 51 Kan. 263, 33 Pac. 997; Duncan v. Spear, 11 Wend. 54; Wheeler v. Lawson, 103 N. Y. 40, 8 N. E. 360; Lowremore v. Berry, 19 Ala. 130; Weymouth v. Chicago & N. W. Ry. Co., 17 Wis. 567; Steele v. Schricker, 55 Wis. 134, 12 N. W. 396; Jeffries v. Great Western Ry. Co., 34 Eng. Law & Eq. 122; Brown v. Shaw, 51 Minn. 266, 53 N. W. 633. But see Krewson v. Purdom, 13 Or. 563, 11 Pac. 281.

[325] Gordon v. Harper, 7 Term R. 9; 1 Chit. Pl. 152; 2 Greenl. Ev. § 640. Possession under a pledge is defense to an action for conversion. Clark v. Costello, 79 Hun, 588, 29 N. Y. Supp. 937. And see Borland v. Stokes, 120 Pa. St. 278, 14 Atl. 61. Cf. Kern v. Wilson, 73 Iowa, 490, 35 N. W. 594.

if he should dispose of it in a way or for a purpose not authorized.[326] A vendor may deliver personal property under a conditional sale, reserving title in himself, and under such an agreement regain possession, without becoming liable in conversion. And he has been allowed to recover in trover against such vendee for disposing of it without his consent,[327] and against third persons purchasing it with knowledge of the terms under which the vendee held it.[328] But such third persons are not liable to the vendee under such circumstances.[329] A bailee, pledgee, mortgagee, or holder of other special interest has sufficient property to enable him to recover the full value of the personal property as against a stranger to the title; but he must account to the general owner for the surplus recovered beyond the value of his own interest.[330] As against the general

[326] Lewis v. Metcalf, 53 Kan. 217, 36 Pac. 345; Willis v. Adams, 66 Vt. 223, 28 Atl. 1033; Chase v. Blaisdell, 4 Minn. 90; Laverty v. Snethen, 68 N. Y. 522; Chase, Lead. Cas. 197; Coleman v. Pearce, 26 Minn. 123, 1 N. W. 846. A maker of a note pledged certain collateral security, and agreed to maintain on demand 10 per cent. margin, "and on the nonperformance of this promise, or any part of it, I authorize S., agent, to sell the collateral," etc. It was held that the authority to sell related to the failure to pay the note as well as the failure to maintain such margin, and that a sale for nonpayment was not a conversion of the collaterals. Manning v. Shriver (Md.) 28 Atl. 899. In an action for money intrusted to defendant for application in a certain way, proof that he failed to so apply it is sufficient to sustain a recovery, without proof of how he appropriated it. Crosby v. Clark, 80 Hun, 426, 30 N. Y. Supp. 329; Syeds v. Hay, 4 Term R. 260.

[327] Watson v. Goodno, 66 Vt. 229, 28 Atl. 987. And see Rhodes v. Dickinson, 79 Ga. 724, 4 S. E. 164.

[328] Cf. Smith v. Wood, 63 Vt. 534, 22 Atl. 575. And see cases collected by counsel for defendant, page 535, 63 Vt., and page 575, 22 Atl. Although the agreement be not recorded, as required by the statute, to enable it to avail against third persons. Rodney Hunt Mach. Co. v. Stewart, 57 Hun, 545, 11 N. Y. Supp. 448. But see as to executory agreement, Snell v. Thorp (Sup.) 15 N. Y. Supp. 411. And, generally, see McNail v. Ziegler, 68 Ill. 224; Newhall v. Kingsbury, 131 Mass. 445; Hardy v. Munroe, 127 Mass. 64; Hance v. Tittabawassee Boom Co., 70 Mich. 227, 38 N. W. 228; Scott v. Hodges, 62 Ala. 337; Northington v. Faber, 52 Ala. 45.

[329] A person who pays for putting designs on a lithographic stone, title to which is agreed to be in the printer, cannot sue third person for its conversion. Knight v. Sackett & Wilhelms Lith. Co., 141 N. Y. 404, 36 N. E. 392.

[330] Fallon v. Manning, 35 Mo. 271; Atkins v. Moore, 82 Ill. 240; Leoncini

owner, or one in privity with the general owner, he can recover only the value of his special property. On the other hand, abuse by the bailee of his special property renders him liable in conversion to its owner. The hirer of a piano, who sends it to an auctioneer to be sold, is guilty of conversion; and so is the auctioneer who refuses to deliver it up unless expenses incurred be first paid.[331] Trover will not lie against a mortgagee for repossessing himself of the goods on condition broken by mortgagor.[332] A vendor may maintain conver-

v. Post, 13 N. Y. Supp. 825; Mechanics' & Traders' Bank of Buffalo v. Farmers' & Mechanics' Nat. Bank of Buffalo, 60 N. Y. 40; Russell v. Butterfield, 21 Wend. 300; Jellett v. St. Paul, M. & M. Ry. Co., 30 Minn. 265, 15 N. W. 237. Warehousemen have an entire cause of action in trover against persons who have bought goods stolen from their warehouses, though such goods may have belonged to divers bailors. Bode v. Lee, 102 Cal. 583, 36 Pac. 936. The officer holding property under attachment, not plaintiff in attachment, is proper party plaintiff for conversion of goods attached. Baker v. Beers, 64 N. H. 102, 6 Atl. 35. 1 Sedg. Dam. note a; 1 Smith, Lead. Cas. 210; Northam v. Bowden, 11 Exch. 70; Buckley v. Gross, 3 Best & S. 566. The bailee may maintain such action, not only for conversion, but for failure of duty, whereby property has been lost, as against a common carrier or innkeeper. Moran v. Portland Steam Packet Co., 35 Me. 55; Finn v. Western Ry. Corp., 112 Mass. 524; Duggan v. Wright, 157 Mass. 228, 32 N. E. 159 (mortgagee); Merchants' & Planters' Bank v. Meyer, 56 Ark. 499, 20 S. W. 406 (landlord's lien on cotton). And see Graw v. Patterson, 47 Ill. App. 87. Cf. Darden v. Callaghan (Cal.) 31 Pac. 263 (contract of purchase).

[331] Loeschman v. Machin, 2 Starkie, 311; Bigelow, Lead. Cas. Torts, 393. So a sale of samples by a drummer. Kruse v. Seeger & Guernsey Co. (Com. Pl. N. Y.) 16 N. Y. Supp. 529, affirming (City Ct. N. Y.) 15 N. Y. Supp. 825. The owner of the reversionary interest in such case must show actual damage to recover more than nominal damage. Johnson v. Stear, 15 C. B. (N. S.) 330; Blackburn, J., L. R. 1 Q. B. 617; Bramwell, J., 3 Q. B. Div. 490. The bailee cannot deny his bailor's title. Hence in case of adverse claim he can return to bailor before he has been under pressure, equivalent to eviction by paramount title. Biddle v. Bond, 34 Law J. Q. B. 137. As to conversion of stock, see Ryman v. Gerlach, 153 Pa. St. 197, 25 Atl. 1031, and 26 Atl. 302.

[332] First Nat. Bank of Colorado Springs v. Wilbur, 18 Colo. 316, 26 Pac. 777; Hanson v. Tarbox, 47 Minn. 433, 50 N. W. 474; Hawver v. Bell, 64 Hun, 636, 19 N. Y. Supp. 612. Compare Dozier v. Pillot, 79 Tex. 224, 14 S. W. 1027, with Lewis v. Ocean Nav. & Pier Co., 125 N. Y. 341, 26 N. E. 301. As to attacking for usury the mortgage involved in conversion, see Omaha Auction & Storage Co. v. Rogers, 35 Neb. 61, 52 N. W. 826. As to tender after repossession by mortgagee, see Blain v. Foster, 33 Ill. App. 297. But con-

sion against his vendee for repudiating conditions of sale.[333] And an action will lie by a mortgagee against the mortgagor or his privies for removing the chattels mortgaged, whether the mortgage is due or not.[334] Generally, any form of contract or consent by the owner will justify an alleged wrongful disposition.[335] An equitable lien is not sufficient.[336] Authority to dispose and collect proceeds does not entitle one to sue third persons for conversion.[337] Labor of an agister under mistake of title does not sustain trover.[338]

SAME—THE UNAUTHORIZED ACT.

226. The act of conversion is the distinct, unauthorized, and positive assumption of the powers of a true owner.[339]

227. Neither the benefit to defendant resulting from the act, nor ordinarily the motive inducing it, but the loss to plaintiff, is the basis of the wrong.

version will not lie against a carrier on demand by mortgagee after condition broken. Kohn v. Richmond & D. R. Co., 37 S. C. 1, 16 S. E. 376.

333 Vendee refusing to apply proceeds of timber to payment of notes, as required by deed, is liable in trover to vendor. Willis v. Adams, 66 Vt. 223, 28 Atl. 1033 (Ross, C. J., dissenting).

334 Gill v. Weston, 110 Pa. St. 312, 1 Atl. 921.

335 Tousley v. Board of Education, 39 Minn. 419, 40 N. W. 509; Henry Bill Pub. Co. v. Durgin, 101 Mich. 458, 59 N. W. 812; Benedict v. Farlow, 27 N. E. 307. Cf. Story, etc., Co. v. Story, 100 Cal. 30; Marks v. Wright, 81 Wis. 572, 51 N. W. 882. As to transfer as collateral security, see Ricards v. Wedemeyer, 75 Md. 10, 22 Atl. 1101; Mallory v. Cowart, 90 Ga. 600, 16 S. E. 658; Johnson v. Osborn, 85 Ga. 664, 11 S. E. 841. A license may be a full protection to the defendant. Ante, p. 679, "Trespass." But only so far as fair construction will justify. Huddleston v. Johnson, 71 Wis. 336, 37 N. W. 407. But authority from one who is not the owner is no defense, and there is no presumption that the licensor had any license from the owner. Applied to conversion of timber under license from one having no authority, in Millard v. McDonald Lumber Co., 64 Wis. 626, 25 N. W. 656.

336 Deeley v. Dwight, 132 N. Y. 59, 30 N. E. 258.

337 Swenson v. Kleinschmidt, 10 Mont. 473, 26 Pac. 198.

338 Therefore, an innocent trespasser who gets out logs on defendant's land cannot recover for latter's disposal of them. Gates v. Rifle Boom Co., 70 Mich. 309, 38 N. W. 245.

339 Pol. Torts, § 290. More elaborate statement in, 15 Am. Law Rev. 363.

228. The fact of wrongful assumption of the dominion, when established, entitles the owner or possessor to recover in trover, despite his subsequent dealings with the property not amounting to a legal discharge.

Every distinct act of dominion exerted over property in denial of the owner's right or inconsistent therewith amounts to conversion.[340] By an act of dominion is meant an act tantamount to an exercise of ownership.[341] Mere assertion of ownership would not seem to be sufficient.[342] The act must be unauthorized. If it is done in accordance with authority of law, whether process of law

[340] This would seem to be the test of conversion, rather than either (1) intention, actual or constructive, to assert title in defendant or against plaintiff; or (2) act of asportation or detention without authority. See Foulides v. Willoughby, 8 Mees. & W. 540; Bristol v. Burt, 7 Johns. 254; Frome v. Dennis, 45 N. J. Law, 515, Chase, Lead. Cas. 199; McPheters v. Page, 83 Me. 234, 22 Atl. 101; Webber v. Davis, 44 Me. 147–152; Nichols v. Newsom, 2 Murph. (N. C.) 302; Miller v. Baker, 1 Metc. (Mass.) 27; Baker v. Beers, 64 N. H. 102, 6 Atl. 35; Gibbs v. Chase, 10 Mass. 125–128; Forbes v. Railroad Co., 133 Mass. 154; Guthrie v. Jones, 108 Mass. 191; Hinckley v. Baxter, 13 Allen, 139; Woodes v. Jordan, 62 Me. 490; Spooner v. Manchester, 133 Mass. 270; Pease v. Smith, 61 N. Y. 477; Salt Springs Nat. Bank v. Wheeler, 48 N. Y. 492; Alexander v. Swackhamer, 105 Ind. 81, 4 N. E. 433, and 5 N. E. 908; Hollins v. Fowler, L. R. 7 H. L. 757; First Nat. Bank v. Northern R. Co., 58 N. H. 203; Baker v. Beers, 64 N. H. 102, 6 Atl. 35; Gordon v. Stockdale, 89 Ind. 240. See Robertson v. Hunt, 77 Tex. 321, 14 S. W. 68; Rhodes v. Dickinson, 79 Ga. 724, 4 S. E. 164; Rodney Hunt Mach. Co. v. Stewart, 57 Hun, 545, 11 N. Y. Supp. 448; Lewis v. Ocean Nav. & Pier Co., 125 N. Y. 341, 26 N. E. 301; Olds v. Chicago Open Board of Trade, 33 Ill. App. 445; Thomson v. Gortner, 73 Md. 474, 21 Atl. 371; Bolling v. Kirby, 90 Ala. 215, 7 South. 914; Omaha Auction & Storage Co. v. Rogers, 35 Neb. 61, 52 N. W. 826; Smith v. Wood, 63 Vt. 534, 22 Atl. 575; Johnson v. Farr, 60 N. H. 426; Miller v. Thompson, 60 Me. 322; Reeve v. Fox, 40 Ill. App. 127; Loeffel v. Pohlman, 47 Mo. App. 574; Petrie v. Williams, 68 Hun, 589, 23 N. Y. Supp. 237; Williams v. Smith, 153 Pa. St. 462, 25 Atl. 1122; Sanborn v. Hamilton, 18 Vt. 590.

[341] Bigelow, Torts, 184.

[342] Burnside v. Twitchell, 43 N. H. 390. But see Rembaugh v. Phipps, 75 Mo. 422. Slander of title might lie. Bigelow, Torts, 198, 190. Writ of replevin may justify a sheriff. Swantz v. Pillow, 50 Ark. 300, 7 S. W. 167.

or otherwise,[343] or with the consent of the party,[344] it is no wrong. The conversion must be without "lawful occasion." The act must be a positive tortious act.[345] A merely passive defendant cannot be guilty of conversion.[346] Nonfeasance or neglect of legal duty, as a mere failure to perform an act made obligatory by contract or by which property is lost to the owner, does not constitute conversion.[347] Thus, a bailee is not liable in trover for loss of property through larceny from him, or because of negligence resulting in its destruction.[348] Indeed, it is doubtful whether a person already in

[343] Distress is no conversion (Agars v. Lysle, Hut. 10), unless it be illegal (Shipwick v. Blanchard, 6 Term R. 298). And see Holsworth's Case, Clayt. 57, and Mires v. Solebay, 2 Mod. 242. But an officer is liable for conversion for carrying away nonseizable property under judicial writ (Tinker v. Pool, 5 Burrows, 2657), or property not described in the writ (Carpenter v. Scott, 86 Iowa, 563, 53 N. W. 328). Generally, see Stuart v. Phelps, 39 Iowa, 14; Prescott v. Wright, 6 Mass. 20; Case v. Hart, 11 Ohio, 364. Ante, p. 126, "Liability of Executive Officers"; ante, p. 130, "Sheriffs"; post, p. 722, note 364. So it is no conversion to drive trespassing cattle out of defendant's close. Stevens v. Curtis, 18 Pick. 227. And see Wilson v. McLaughlin, 107 Mass. 587; Bonney v. Smith, 121 Mass. 155; Tobin v. Deal, 60 Wis. 87, 18 N. W. 634. Necessity may be justification, as throwing goods over in a storm. Bird v. Astcock, 2 Bulst. 280; Drake v. Shorter, 4 Esp. 165; Macon & W. R. Co. v. Holt, 8 Ga. 157; McCarroll v. Stafford, 24 Ark. 224; Nelson v. Merriam, 4 Pick. 249; Perkins v. Ladd, 114 Mass. 420.

[344] Hills v. Snell, 104 Mass. 173. Although it need not have been against the will of defendant. Humpfner v. D. M. Osborne & Co., 2 S. D. 310, 50 N. W. 88.

[345] One who surrenders bonds to another cannot maintain trover on refusal of such other to redeliver the bonds, where there is no evidence that his possession, retention, or disposal of the bonds was tortious. Biel v. Horner (Com. Pl.) 30 N. Y. Supp. 227.

[346] Ragsdale v. Williams, 8 Ired. 498. Thus, refusal to return a borrowed sled is not conversion. Farrar v. Rollins, 37 Vt. 295.

[347] Sturges v. Keith, 57 Ill. 451; Dame v. Dame, 38 N. H. 429; Bailey v. Moulthorp, 55 Vt. 17; Munger v. Hess, 28 Barb. 75; Rogers v. Huie, 56 Am. Dec. 363; Bowlin v. Nye, 10 Cush. 416; Ragsdale v. Williams, 49 Am. Dec. 406; Devereux v. Barclay, 2 Barn. & Ald. 702.

[348] Ross v. Johnson, 5 Burrows, 2825, and cases cited in Ames, Lead. Cas. 405; Hawkins v. Hoffman, 6 Hill, 586; Packard v. Getman, 4 Wend. 613; Farrar v. Rollins, 37 Vt. 295. Cf. Jones v. Hodgkins, 61 Me. 480. If the finder allows butter to spoil, a horse to starve, a garment to be eaten by moths, he is not liable in trover; but it is otherwise if he uses or misuses

possession can commit the wrong of conversion by any act of interference limited to a special purpose, and falling short of the total assumption of the powers of a true owner, and depriving such owner of all beneficial use of the property.[349]

Violation of Absolute Duty.

It is not necessary to show advantage on the part of the defendant. The property need not have been converted to his own use; deprivation on the part of the plaintiff is sufficient.[350] In such cases, however, there must be an intention to deprive the owner, for some period, of the use of his property, except, indeed, in the case of common carrier. He, being in the eyes of the law an insurer, is liable for an innocent misdelivery of goods intrusted to him.[351] As has been seen, the duty to respect the property and possession

what he has found. Mulgrave v. Ogden, Cro. Eliz. 219, Ames, Lead. Cas. 391, and cases cited in note. But see, contra, Story, Bailm. § 87; 2 Kent, Comm. 568.

[349] "The truth is that, in order to maintain trover, a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way, but altogether; that he has been entirely deprived of the use of it. It is not enough that a man should say that something shall not be done by the plaintiff; he must say that nothing shall." Bramwell, B., in England v. Cowley, L. R. 8 Exch. 126. It is not conversion to prevent the removal of chattels not in defendant's possession. Post, p. 725; Pol. Torts, *p. 290.

[350] Perkins v. Smith, 1 Wils. 328; Parker v. Goden, 2 Strange, 813; Hiort v. Bott, L. R. 9 Exch. 86, and cases post, p. 723, note 367; McPheters v. Page, 83 Me. 234, 22 Atl. 101; Liptrot v. Holmes, 1 Kelly, 381–391; Nutter v. Ricketts, 6 Iowa, 92; Stephens v. Elwall, 4 Maule & S. 259; Fine Art Soc. v. Union Bank, 17 Q. B. Div. 705. As to mitigation of damages where proceeds were applied to plaintiff's benefit, see Mississippi Mills v. Meyer, 83 Tex. 433, 18 S. W. 748.

[351] Devereux v. Barclay, 2 Barn. & Ald. 702; Mills v. Ball, 2 Bos. & P. 457; Dewell v. Moxon, 1 Taunt. 391; Oppenheim v. Russell, 3 Bos. & P. 42; Stephenson v. Hart, 4 Bing. 476; Youl v. Harbottle, Peake, 68; Ball, Torts, 388; Alabama & T. R. R. Co. v. Kidd, 35 Ala. 209; Louisville & N. R. Co. v. Barkhouse, 100 Ala. 543, 13 South. 534; Adams v. Blankenstein, 2 Cal. 413; Hanna v. Flint, 14 Cal. 74; Indianapolis & St. L. R. Co. v. Herndon, 81 Ill. 143; Claflin v. Railroad Co., 7 Allen, 341; Guillaume v. Hamburg & A. Packet Co., 42 N. Y. 212. A common carrier is therefore not liable for refusal to deliver until satisfied as to the propriety of so doing. McEntee v. Steamboat Co., 45 N. Y. 34.

of another is absolute. One is not excused by showing, for example, that he was not personally guilty of intentional fraud,[352] or that he acted under an honest but mistaken idea of title.[353] The duty to respect property, however, is not so absolute as entirely to disregard the intention of the defendant. It has been held by the highest authorities that, when the act done is equivocal in its nature, there must be an intention of the defendant to take to himself the property in the goods, or to deprive plaintiff of it, to make him liable for conversion.[354] The absence of an improper motive, however, while not ordinarily a matter of justification, may materially affect the measure of plaintiff's damage.[355]

Subsequent Dealings with Property.

The subsequent offer to return, or the subsequent recovery or return, of the property wrongfully converted by another, or its proceeds, in part or whole, does not extinguish the owner's right of ac-

[352] Bonaparte v. Clagett, 78 Md. 87, 27 Atl. 619.

[353] Waverley Timber & Iron Co. v. St. Louis Cooperage Co., 112 Mo. 383, 20 S. W. 566; Benton v. Beattie, 63 Vt. 186, 22 Atl. 422; Morrill v. Moulton, 40 Vt. 242; Baker v. Kansas City, C. & S. R. Co., 52 Mo. App. 602; Williams v. Deen, 24 S. W. 536; Spraights v. Hawley, 39 N. Y. 441; Wilson v. Hoffman, 93 Mich. 72, 52 N. W. 1037; Camody v. Portlock (Ala.) 12 South. 871; Kimball v. Billings, 55 Me. 147; Scofield v. Kreiser (City Ct. N. Y.) 3 N. Y. Supp. 803. One who sells property as under a mortgage which was not included therein is liable for the conversion, whether he knew it or not. Kenney v. Ranney, 96 Mich. 617, 55 N. W. 982.

[354] Simmons v. Lillystone, 8 Exch. 431; Fouldes v. Willoughby, 8 Mees. & W. 540. Post, pp. 734–736, "Ministerial Duties"; ante, p. 129, note 92. In the driving cases a defendant may drive further or otherwise differently than the contract provides. If he do this with intention to break a contract, he may be liable in conversion; or, if he do it carelessly, in case (negligence); but, if he does it because he has innocently lost his way, he is not liable at all. Post, p. 730, note 410. Thus, if a person who hires a horse to drive to a particular place, by mistake, takes the wrong road, and on such discovery returns by a circuit through another town, he is not liable in trover for conversion of the horse. Spooner v. Manchester, 133 Mass. 270, reviewing cases; Farnsworth v. Lowery, 134 Mass. 512–519; Shea v. Milford, 145 Mass. 525, 14 N. E. 769. So intent to preserve wine may justify handling it otherwise tortiously. Post, p. 730, note 407.

[355] Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476; Woodlen-Ware Co. v. U. S., 106 U. S. 432, 1 Sup. Ct. 398.

tion against the wrongdoer,[356] but operates only by way of mitigating damages.[357] A judgment in trover does not vest the title of the property in the defendant, unless such judgment be for the value of the property,—not for merely nominal damages,—and is followed by satisfaction.[358] The owner may, however, treat the transaction as a sale, and, by waiving the tort, maintain an action ex contractu. The effect of this would be to pass title.[359] A land-

[356] Robinson v. Lewis, 6 Misc. Rep. 37, 25 N. Y. Supp. 1004. An offer to reinstate plaintiff, whose stock was illegally sold for nonpayment of dues, is no defense to the conversion. Carpenter v. American Bldg. & Loan Ass'n, 54 Minn. 403, 56 N. W. 95, 577. And see Allen v. American Bldg. & Loan Ass'n, 49 Minn. 544, 52 N. W. 144.

[357] Williams v. Archer, 5 C. B. 318; Watson v. Coburn, 35 Neb. 492, 53 N. W. 477; Carpenter v. American Building & Loan Ass'n, 54 Minn. 403; Gilbert v. Peck, 43 Mo. App. 577; Gibbs v. Chase, 10 Mass. 125; Brewster v. Silliman, 38 N. Y. 423; Reynolds v. Shuler, 5 Cow. 323; Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476; ante, p. 398, "Damages." Where the property has been returned, plaintiff is entitled, not merely to nominal damages, but to the difference of the value of the property when converted and when returned. Stillwell v. Farrell, 64 Vt. 286, 24 Atl. 243. On tender, owner is not bound to receive property converted. Higgins v. Whitney, 24 Wend. 379. Voluntary payments by defendant on plaintiff's obligations cannot be set up. Frank v. Tatum (Tex. Civ. App.) 26 S. W. 900; ante, p. 400, note 233. A short note on the effect of the return of the property on the question of damages, 41 Am. St. Rep. 43. Watson v. Coburn, 53 Mo. 477.

[358] Singer Manuf'g Co. v. Stillman, 52 N. J. Law, 263, 19 Atl. 260. Plaintiff brought trover, aided by attachment of the converted property, against defendant B. and defendant C., to whom B. had sold the property, and obtained judgment against B. alone. The property was seized under execution under such judgment. Before it was sold C. replevied the property, and the judgment remained unsatisfied. This did not divest plaintiff of title to the property, nor estop her from bringing replevin to recover such property from one to whom C. had intrusted it. (Field, C. J., and Knowlton and Holmes, JJ., dissenting.) Miller v. Hyde, 161 Mass. 472, 37 N. E. 760. And see Hepburn v. Sewell, 5 Har. & J. 211; Acheson v. Miller, 2 Ohio St. 203; Atwater v. Tupper, 45 Conn. 144; Hopkins v. Hersey, 20 Me. 449; Thurst v. West, 31 N. Y. 210; Lovejoy v. Murray, 3 Wall. 1–16; Elliott v. Hayden, 104 Mass. 180. Cf. Galvin v. Parker, 154 Mass. 346, 28 N. E. 244. But compare, as to bar of judgment, White v. Philbrick, 5 Me. 146. See Id., 17 Am. Dec. 214, note at page 218; Kenyon v. Woodruff, 33 Mich. 310–315; Parmelee v. Loomis, 24 Mich. 242; ante, c. 4, "Judgment against Joint Tort Feasors."

[359] Terry v. Munger, 121 N. Y. 161, 24 N. E. 272; Kalckoff v. Zoehrlaut, 40

lord does not waive conversion of timber cut by a tenant on the demised premises by the acceptance of rent for a period subsequent to such conversion.[360] Conversion may, however, be waived by subsequent ratification, express or implied.[361]

229. An act of conversion is committed when one of the following circumstances exist, or more than one concur:

(a) When the property is wrongfully taken;

(b) When it is wrongfully parted with;

(c) When it is wrongfully retained;

(d) When it is wrongfully destroyed.[362]

Taking Property.

The fiction of finding, as an essential of trover, has been abolished. "It is not material whether the tenant got possession lawfully, or unlawfully. In the latter case he waives the trespass and admits the possession to have been lawfully gotten, when he sues in trover."[363] Taking may constitute the act of conversion.[364] "Any

Wis. 427; ante, p. 295, "Waiver." Election to sue ex contractu or ex delicto. Moore v. Hill, 62 Vt. 424, 19 Atl. 997.

[360] Brooks v. Rogers, 101 Ala. 111, 13 South. 386. See Singer Manuf'g Co. v. Greenleaf, 100 Ala. 272, 14 South. 109.

[361] Firemen's Ins. Co. of Mobile v. Cochran, 27 Ala. 228. See Hotchkiss v. Hunt, 49 Me. 213.

[362] Clerk & L. Torts, 167.

[363] Lord Mansfield, in Cooper v. Chitty, 1 Burrows, 20–31.

[364] The very act of taking goods from one who has no right to dispose of them is in itself a conversion. Both the person who takes and the person who disposes are liable. Hurst v. Gwennap, 2 Starkie, 306; Yates v. Carnsew, 3 Car. & P. 99; Hilbery v. Hatton, 2 Hurl. & C. 822; Thatcher v. Morris, 134 Mass. 156–167; post, p. 734, note 432. And see Bearce v. Bowker, 115 Mass. 129; Barrett v. Warren, 3 Hill, 348. In McCombie v. Davies, 6 East, 538, there was wrongful detention, without redelivery to the bailor, by the pawnee of property wrongfully pawned by an agent. This case is said to be the extreme verge of the law. Mallalieu v. Laugher, 3 Car. & P. 551. Et vide Spackman v. Foster, 11 Q. B. Div. 99. It has, however, been approved. Fine Art Soc. v. Union Bank, 17 Q. B. Div. 712. Et vide Wilkinson v. King, 2 Camp. 335. Trespass may also lie for such taking. Stanley v. Gaylord, 1 Cush. 536. But taking is not conversion, where plaintiff's own wrong was the occasion, as where plaintiff allowed cattle taken by defend-

asportation of a chattel," says Mr. Baron Alderson,[365] "for the use of the defendant or a third person, amounts to a conversion, for this simple reason: that it is an act inconsistent with the general rights of dominion, which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is conversion." In order, however, that a mere actual taking should constitute a conversion, there must be an intention to exercise dominion.[366] An actual taking away is not always necessary. Thus, if an officer levy on a wood pile as the property of another, taking it under his control and into his custody so far as possible, this is such an exclusion of the lawful owner as will constitute conversion.[367] However, the mere assertion of a pretended right by one not in possession, nor entitled to an immediate possession, of property, or the threatening by such a person to prevent the true owner from dealing with his property, though it may be a cause of action if it results in special damages, is not conversion.[368] Cases in which taking is the sole element of conversion are not common. Ordinarily other elements of conversion concur.[369]

ant to run at large. Wellington v. Wentworth, 8 Metc. (Mass.) 548; North Penn. Ry. Co. v. Rehman, 49 Pa. St. 101; Van Valkenburg v. Thayer, 57 Barb. 196. But see Platt v. Tuttle, 23 Conn. 233.

[365] Fouldes v. Willoughby, 8 Mees. & W. 540. Et vide Beckwith v. Elsey, Clayt. 112; Houghton v. Butler, 4 Term R. 364.

[366] Clerk & L. Torts, 168.

[367] Molm v. Barton, 27 Minn. 530, 8 N. W. 765; Hossfeldt v. Dill, 28 Minn. 469, 10 N. W. 781. Compare Appleton Mill Co. v. Warder, 42 Minn. 117, 43 N. W. 791. But see Mallalieu v. Laugher, 3 Car. & P. 551; Herron v. Hughes, 25 Cal. 556; Fernald v. Chase, 37 Me. 289; Bailey v. Adams, 14 Wend. 201; Johnson v. Farr, 60 N. H. 426.

[368] A transfer on books or indorsement on document of title constitutes constructive taking. McCombie v. Davies, 6 East, 538. England v. Cowley, L. R. 8 Exch. 126; Hartley v. Moxham, 3 Q. B. 701. Compare Wansbrough v. Maton, 4 Adol. & E. 884. Et vide Guthrie v. Jones, 108 Mass. 191. Cf. Chapin v. Freeland, 142 Mass. 383, 8 N. E. 128 (replevin), and Leonard v. Stickney, 131 Mass. 541. And see Traylor v. Horrall, 4 Blackf. 317; Northrup v. Trask, 39 Wis. 515; Boobier v. Boobier, 39 Me. 406; Davis v. Buffum, 51 Me. 160. Contra, Crocket v. Beaty, 8 Humph. 20. Cf. Huddlestons' Adm'r v. Currin, 4 Humph. 237.

[369] In an action against a bank cashier for embezzlement, plaintiff must show receipt as well as misappropriation. Panama R. Co. v. Johnson, 63

Parting with Property.

One of the most common exercises of dominion, unequivocally indicating an assumption of title, is a sale of a chattel without the authority of the owner.[370] There is liability for a sale under mistake of ownership. "The very assuming to one's self the property and right of disposing of another man's goods is a conversion."[371] There may be liability for an excessive sale.[372] An officer is liable for the wrongful sale of property,[373] and also the party at whose instance the officer makes the wrongful sale.[374] An attempt to sell is

Hun, 629, 17 N. Y. Supp. 777. Et vide Rushin v. Tharpe, 88 Ga. 779, 15 S. E. 830; Traylor v. Hughes, 88 Ala. 617, 7 South. 159. Compare Freeman v. Grant, 132 N. Y. 22, 30 N. E. 247. A vendor who has shipped goods to another on credit, and who notifies the railroad company not to deliver them, may maintain trover against a sheriff who takes them from the railroad company on attachment against the vendee. Wolf v. Shepherd (Ala.) 15 South. 519. Obtaining possession of property from an owner incapacitated by intoxication, and retaining possession, constitutes conversion. Baird v. Howard (Ohio) 36 N. E. 732. Obtaining a check without plaintiff's authority, as by forgery, is a conversion. Schmidt v. Garfield Nat. Bank, 64 Hun, 298, 19 N. Y. Supp. 252.

[370] Fette v. Lane (Cal.) 37 Pac. 914.

[371] Baldwin v. Cole, 6 Mod. 212, cited in McCombie v. Davies, 6 East 538. Thus, the conveyance of property by the receiptor under attachment is conversion. Et vide post, note 432; Miller Piano Co. v. Parker, 155 Pa. St. 208, 26 Atl. 303; Lyon v. Gormley, 93 Pa. St. 261. But a void attempt at foreclosure of a chattel mortgage is not a conversion. Powell v. Gagnon, 52 Minn. 232, 53 N. W. 1148. Compare Comfort v. Creelman, 52 Minn. 280, 53 N. W. 1157. And, further, see Fine Art Society v. Union Bank, 17 Q. B. Div. 705; Wilkinson v. King, 2 Camp. 335; Spackman v. Foster, 11 Q. B. Div. 99.

[372] A chattel mortgagee is liable, and liable only, when he sells more property than enough to satisfy the mortgage and the costs. Omaha Auction & Storage Co. v. Rogers, 35 Neb. 61, 52 N. W. 826. Generally, see Alderd v. Constable, 6 Q. B. 370; Lancashire Wagon Co. v. Fitzhugh, 6 Hurl. & N. 502. But an assignment of the right of assignor in a chose of action on which another has a lien, of which the assignee has notice, is not conversion against the holder of such a lien. Comfort v. Creelman, 52 Minn. 280, 53 N. W. 1157.

[373] Jones v. Kellogg, 51 Kan. 263, 33 Pac. 997; Whitney v. Preston, 29 Neb. 243, 45 N. W. 619. Compare Freeman v. Grant, 132 N. Y. 22, 30 N. E. 247; ante, p. 130, "Sheriff."

[374] Kane v. Hutchison, 93 Mich. 488, 53 N. W. 624; Phelps v. Delmore, 69 Hun, 18, 23 N. Y. Supp. 229.

sufficient.[375] Assignment of a qualified interest in property is a conversion only when the assignor has no assignable interest. A premature sale,[376] or a mere irregularity, as a subpledge by a pawnee, does not amount to conversion.[377] A disposal of a part of the chattel is such an act of dominion as may amount to a conversion.[378] Forms of parting with property other than by sales may amount to conversion; as delivery of goods by bailee to officers under an illegal attachment, or to another person after notice of the claim of the true owner, or under mistake.[379]

Retaining Property.

Mere retention of the property of another in violation of his right may constitute conversion.[380] Thus, claiming a lien on,[381] or mingling special with general, deposits,[382] or locking up a building con-

[375] Dickey v. Franklin Bank, 32 Me. 572. As to fraudulent sale, see White v. Garden, 10 C. B. 919.

[376] Donald v. Suckling, L. R. 1 Q. B. 585; Bigelow, Lead. Cas. 394.

[377] Halliday v. Holgate, L. R. 3 Exch. 299–302; Niles v. Edwards, 90 Cal. 10, 27 Pac. 159. A sale for credit by agent authorized to sell for cash only is not a conversion. Loveless v. Fowler, 79 Ga. 134, 4 S. E. 103.

[378] Clendon v. Dinneford, 5 Car. & P. 13; Philpot v. Kelley, 3 Adol. & E. 106; Brown v. Ela (N. H.) 30 Atl. 412. A "short sale" will not support conversion. Campbell v. Wright, 118 N. Y. 594, 23 N. E. 914.

[379] Alabama & T. R. R. Co. v. Kidd, 35 Ala. 209. Phillips v. Brigham, 26 Ga. 617. A collection of authorities as to the duty and liability of a carrier when adverse claim is set up to property received for transportation, 34 Am. St. Rep. 731. Insurance agent does not convert by returning policy to the company. Bull v. Knowlton, 21 Can. Sup. Ct. 371.

[380] Osborn v. Potter, 101 Mich. 300, 59 N. W. 606.

[381] Jacaoby v. Laussatt, 6 Serg. & R. 300.

[382] Moving and shipping wheat, Phillip Best Brewing Co. v. Pillsbury & Hurlbut Elevator Co., 5 Dak. 62, 37 N. W. 763. A creditor of an estate, who has possession of stocks payable to deceased, as executrix, commits no conversion in holding them for her executor, as against her successor in the administration of her husband's estate, pending the decision of said successor's suit against her estate for her conversion of said stocks. Mills v. Britton, 64 Conn. 4, 29 Atl. 231. When a trustee mingles his own funds with trust funds, and then takes a part for his own use, the part taken will be presumed to be his own, and not that which he held as trustee. Standish v. Babcock (N. J. Ch.) 29 Atl. 327.

taining chattels bought by another,[383] may be conversion. On the other hand, for example, mere delay in transportation is not a sufficient retention to constitute conversion,[384] nor the negligent keeping of what a man has found.[385] Demand and refusal, before commencement of an action,[386] while they do not in themselves constitute conversion, may be necessary to show conversion when other conduct fails to show it,[387] and are prima facie but not conclusive evidence of conversion.[388] Notwithstanding many loose sayings to the contrary they are not the only evidence of conversion.[389] Thus, such refusal does not prove conversion if the party has not the power of compliance,[390] although the act whereby the goods are put

[383] Hughes v. Coors, 3 Colo. App. 303, 33 Pac. 77. Et vide Jones v. Hunt, 74 Tex. 657, 12 S. W. 832.

[384] Briggs v. Railway Co., 28 Barb. 515. Et vide Stackpole v. Railway Co., 62 N. H. 493.

[385] Mulgrave v. Ogden, Cro. Eliz. 219; Burroughes v. Bayne, 5 Hurl. & N. 296. And see Gilmore v. Newton, 9 Allen, 117. A bona fide purchaser of personal property wrongfully taken from possession of the owner is not liable for conversion until after demand and refusal. Gellet v. Roberts, 57 N. Y. 28 (disapproving Dunning v. Austin, 34 Vt. 330; limiting Wooster v. Sherwood, 25 N. Y. 278).

[386] Cross v. Barber, 16 R. I. 266, 15 Atl. 69.

[387] Demand, Nixon v. Whitsett, 2 H. Bl. 135; Castle v. Corn Exch. Bank, 75 Hun, 89, 26 N. Y. Supp. 1035; refusal, Severn v. Keppel, 4 Esp. 156; Holbrook v. Wright, 24 Wend. 169. Plaintiff is sometimes said to be bound to prove either actual conversion or demand and refusal. Jones v. Fort, 9 Barn. & C. 764. This is not accurate. Post, p. 727, note 394.

[388] Anon. (Holt, C. J.) 12 Mod. 344, Ames, Lead. Cas. 399; Baldwin v. Cole, 6 Mod. 212; Esmay v. Fanning, 9 Barb. 176; Singer Co. v. King, 14 R. I. 5, Chase, Lead. Cas. 205; Osborn v. Potter, 101 Mich. 300, 59 N. W. 606 (conversion of a building); Jorgensen v. Tait, 26 Minn. 327, 4 N. W. 44; Catterall v. Kenyon, 3 Q. B. 310. Compare with Duggan v. Wright, 157 Mass. 228, 32 N. E. 159; Daggett v. Davis, 53 Mich. 35, 18 N. W. 548.

[389] Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476 (a leading case). "Any wrongful exercise of dominion over chattels to the exclusion of the right of the owner, or withholding them from his possession under a claim inconsistent with his rights, constitutes conversion." Dietus v. Fuss, 8 Md. 148.

[390] Thus, in "trover for a deed," the evidence of conversion was that when the deed was demanded from the defendant he said he would not deliver it up, but that it was then in the hands of his attorney. He had a lien upon

out of such power may be conversion, as where they are sold.[391] The demand must be unconditional.[392]

Demand is not, however, always necessary; as where the taking is tortious, where there has been an actual conversion of the property,[393] where there has been refusal before demand,[394] or where

it. This was held sufficient. Smith v. Young, 1 Camp. 439. Denial is not evidence of conversion if the property be lost by negligence. Anon., coram Tryor, C. J. (1705); Ames, Lead. Cas. 400. And see England v. Cowley, L. R. 8 Exch. 126; Featherstonhaugh v. Johnston, 8 Taunt. 237; Spackman v. Foster, L. R. 11 Q. B. 99; Tear v. Freebody, 4 C. B. (N. S.) 228. This doctrine is generally recognized by American cases. Thus, in Dearbourn v. Union Nat. Bank, 58 Me. 273, it was held that demand and refusal were not sufficient evidence of conversion, where it appeared that defendant was not in possession or control of the property, it having been previously lost, stolen, or misdelivered. Indeed, a common carrier does not seem to be liable for conversion if the goods have been either lost or stolen. Packard v. Getman, 4 Wend. 613. In general, see Carr v. Clough, 26 N. H. 280; Hill v. Covell, 1 N. Y. 522; Kelsey v. Griswold, 6 Barb. 436; Whitney v. Slauson, 30 Barb. 276; McCormick v. Railroad Co., 80 N. Y. 353; Davis v. Buffam, 51 Me. 160; Johnson v. Couillard, 4 Allen, 446; Pitlock v. Wells, Fargo & Co., 109 Mass. 452 (citing Smith v. Bank, 99 Mass. 605, to the effect that there is no liability for negligence unless something could not be accounted for upon search). Et vide Dietus v. Fuss, 8 Md. 148.

[391] Ante, p. 724, "Parting with." And see Crampton v. Valido Marble Co., 60 Vt. 291, 15 Atl. 153.

[392] Rushworth v. Taylor, 3 Q. B. 699.

[393] Forsdick v. Collins, 1 Starkie, 173; Lovell v. Martin, 4 Taunt. 799; Edgerly v. Whalan, 106 Mass. 307; Smith v. Jensen, 13 Colo. 213, 22 Pac. 434; Rice v. Yocum, 155 Pa. St. 538, 26 Atl. 698; Taylor v. Lyon (Pa. Sup.) 13 Atl. 739; Springer v. Groom (Pa. Sup.) 12 Atl. 446; Baker v. Lothrop, 155 Mass. 376, 29 N. E. 643; Velsian v. Lewis, 15 Or. 539, 16 Pac. 631; Follott v. Edwards, 30 Ill. App. 386; Missouri Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608; Gould v. Blodgett, 61 N. H. 115; Rosum v. Hodges, 1 S. D. 308, 47 N. W. 140; Lafayette Co. Bank v. Metcalf, 40 Mo. App. 494. So, where there has been a sale of part of the property, and the remainder is retained under denial of title, no tender or demand is necessary. Iler v. Baker, 82 Mich. 226, 46 N. W. 377. So where the custodian of a cask of wine bottles it for his own use, though he does not drink it. Philpott v. Kelley, 3 Adol. & E. 106. And see Rilly v. Boston Water Power Co., 11 Cush. 11; Ames, Lead. Cas. Torts, 561 (cases collected, page 563). And see Rosenau v. Syring, 25 Or. 386, 35 Pac. 844.

[394] First Nat. Bank v. Kickbusch, 78 Wis. 218, 47 N. W. 267; Bonaparte v. Clagett, 78 Md. 87, 27 Atl. 619; Claflin v. Gurney, 17 R. I. 185, 20 Atl. 932;

the purchase of goods has been effected through the fraud of the vendee.[395] The refusal, ordinarily, must also be unconditional.[396] If the defendant is in doubt as to the plaintiff's title, he may wait what a jury will consider a reasonable time to clear up the doubt.[397] But, while an unqualified refusal to abide by the conditions of special property is conclusive evidence of a conversion, if there be a qualification annexed to it, the question then is as to the reasonableness of such qualification. Thus, a keeper of a key to a warehouse may say to a bailor, "You must have my master's orders."[398] The substance of the refusal is the denial of title.[399] The jury, under

Fulton v. Lydecker (City Ct. N. Y.) 17 N. Y. Supp. 451. And, generally, see Ashfield v. Edgell, 21 Ont. 195. As to what constitutes sufficient demand, see Duggan v. Wright, 157 Mass. 228, 32 N. E. 159; Baumann v. Jefferson (Com. Pl.) 23 N. Y. Supp. 685. Where a tenant in common is present, and forbids the conversion of personal property as cotenant, demand for return is not necessary before suit. Waller v. Bowling, 108 N. C. 289, 12 S. E. 930

[395] Thurston v. Blanchard, 22 Pick. 18; Green v. Russell, 5 Hill, 183; Thompson v. Rose, 16 Conn. 71; Stevens v. Austin, 1 Metc. (Mass.) 557; Ladd v. Moore, 3 Sandf. 589; Bowen v. Fenner, 40 Barb. 383; Yeager v. Wallace, 57 Pa. St. 365; Noble v. Adams, 7 Taunt. 59. And see Earl of Bristol v. Wilsmore, 2 Dowl. & R. 755. But see Parke, B., in Powell v. Hyland, 6 Exch. 67–72; Gregory v. Fichtner (Com. Pl.) 14 N. Y. Supp. 891.

[396] See Felcher v. McMillan (Mich.) 61 N. W. 791.

[397] Vaughan v. Watt, 6 Mees. & W. 492; Pillott v. Wilkinson, 3 Hurl. & C. 345; Lee v. Bayes, 18 C. B. 599; Zachary v. Pace, 9 Ark. 212; Fletcher v. Fletcher, 7 N. H. 452; Ball v. Liney, 48 N. Y. 6. But see Thorogood v. Robinson, 6 Q. B. 769.

[398] Solomons v. Dawes, 1 Esp. 83; Green v. Dunn, 3 Camp. 215, note; Gunton v. Nurse, 2 Brod. & B. 447; Alexander v. Southey, 5 Barn. & Ald. 247; Burroughes v. Bayne, 5 Hurl. & N. 296; Connah v. Hale, 23 Wend. 462. So if, after dispute as to payments on machine, defendant promises to return next day if payment had not been made, this is not conversion. Bolling v. Kirby, 90 Ala. 215, 7 South. 914. And see, generally, as to refusal to deliver, Banking House v. Brooks, 52 Mo. App. 364; Clay v. Gage, 1 Tex. Civ. App. 661, 20 S. W. 948; Forehand v. Jones, 84 Ga. 508, 10 S. E. 1090; Dent v. Chiles, 5 Stew. & P. (Ala.) 383; Butler v. Jones, 80 Ala. 436, 2 South. 300. So refusal to deliver until owner paid bill due to third person. Hearn v. Bitterman (Tex. Civ. App.) 27 S. W. 158. Refusal to allow an owner to take his goods away until he paid a debt to a third person (Hearn v. Bitterman [Tex. Civ. App.] 27 S. W. 158), or until a replevin suit had been determined (Banking House v. Brooks, 52 Mo. App. 364) is conversion.

[399] If defendant retain a horse for board bill, this is no conversion; but,

proper instructions from the court, passes on the reasonableness of the qualification.[400] A refusal has been held not to constitute conversion, although defendant assigned as a reason his inability to deliver the property.[401] Noncompliance on demand may be sufficient refusal.[402] An offer to return the property demanded before the commencement of trover may cure the refusal, if the refusal be qualified.[403]

Destruction of Property.

When property is wrongfully dealt with, so that its identity is destroyed, it is converted. Thus, a railroad company which kills and uses the animal of another is liable in trover, whether the killing be negligent or not.[404] So, fraudulently obtaining possession of a note, putting it in judgment, and collecting it constitutes conversion, although the plaintiff knew the facts before bringing his action.[405] To apply any process of manufacture to raw material without the authority of the owner of such material may constitute

if he deny the owner's title, he waives his right to detain the horse, and is guilty of conversion. Williams v. Smith, 153 Pa. St. 462, 25 Atl. 1122.

[400] McCormick v. Pennsylvania Cent. R. Co., 49 N. Y. 303 (et vide 80 N. Y. 353); Alexandria v. Southey, 5 Barn. & Adol. 247. Et vide Ingalls v. Bulkley, 15 Ill. 224; Mount v. Derick, 5 Hill. 455; Blankenship v. Berry, 28 Tex. 448.

[401] As where a proprietor who received skates from his patrons, giving a check therefor, fails to give them up because of his inability to find them. Donlin v. McQuade, 61 Mich. 275, 28 N. W. 114. See argument for defendant, page 276, 61 Mich., and page 114, 28 N. W.; ante, pp. 726, 727; Towne v. Lewis, 7 C. B. 608.

[402] In Davis v. Nicholas, 7 Car. & P. 339, a person lent the goods to another, which passed on the latter's death into defendant's possession, who, on demand, said he should do nothing except what the law required. This was held to be conversion. In Watkins v. Woolley, Gow. 69, demand and nondelivery of a "landau" was held to be evidence of conversion. Davies v. Nicholas, 7 Car. & P. 339.

[403] Hayward v. Seaward, 1 Moore & S. 459; Wells v. Kelsey, 15 Abb. Prac. 53; Savage v. Perkins, 11 How. Prac. 17. Ante, p. 721, note 387.

[404] Atchison, T. & S. F. R. Co. v. Tanner, 19 Colo. 559, 36 Pac. 541. And see Burgess v. Isherwood, 101 Mich. 319, 59 N. W. 602.

[405] Rushin v. Tharpe, 88 Ga. 779, 15 S. E. 830. Compare Wittingham v. Owen, 19 D. C. 277. So, cancellation of certificate of membership in a board of trade amounts to the act of conversion. Olds v. Chicago Board of Trade, 33 Ill. App. 445.

conversion.[406] The adulteration of liquor destroys its identity, and may be the basis of an action of trover.[407] It is said, however, that if the chattel continues to exist as such, any injury done to it is a trespass, and nothing more. Thus, where the one had sawed a log of timber, the owner thereof could not recover in conversion.[408] However, the unauthorized use by an agister may amount to a conversion.[409] So improperly driving a horse [410] may be conversion. The wearing of a pearl has been held to be sufficient evidence of conversion.[411] On the other hand, mere destruction of property while in the bailee's hands does not constitute conversion; as where it is accidentally burned.[412]

[406] Com. Dig. "Action; Trover," E.

[407] Richardson v. Atchison, 1 Strange, 576; Philpott v. Kelley, 3 Adol. & E. 106. I. e. substitution of water for wine is conversion; but an act done to preserve goods is not. Dench v. Walker, 14 Mass. 499.

[408] Simmons v. Lillystone, 8 Exch. 431. Cf. Sanderson v. Haverstick, 8 Pa. St. 294; O'Reilly v. Shadle, 33 Pa. St. 489. Castrating a "scrub hog" is not conversion. Byrne v. Stout, 15 Ill. 180.

[409] Gove v. Watson, 61 N. H. 136.

[410] Stillwell v. Farwell, 64 Vt. 286, 24 Atl. 243; Wheelock v. Wheelwright, 5 Mass. 104. Impounding a horse in defense of property does not constitute conversion. Walker v. Wetherbee, 65 N. H. 656–662, 23 Atl. 621. So, driving a hired horse a greater or different distance than stipulated, although the journey was made on the Lord's day. Doolittle v. Shaw (Iowa) 60 N. W. 621; Hall v. Corcoran, 107 Mass. 251; Wheelock v. Wheelwright, 5 Mass. 104; Homer v. Thwing, 3 Pick. 492; Hart v. Skinner, 16 Vt. 138. But mere delay is not. Evans v. Mason, 64 N. H. 98, 5 Atl. 766. A short note on the liability of a hirer for driving a team to places where it was not hired to go. Doolittle v. Shaw (Iowa) 26 Lawy. Rep. Ann. 366, 60 N. W. 621. And see ante, p. 720, note 354.

[411] Lord Petre v. Heneage, 12 Mod. 519. And see cases collected in note to Ames, Lead. Cas. 398.

[412] Heald v. Carey, 21 Law J. C. P. 97 (and see Bromley v. Coxwell, 2 Bos. & P. 438; Cairns v. Bleeker, 12 Term R. 300); Jervis v. Jolleffe, 6 Term R. 9; Salt Springs Nat. Bank v. Wheeler, 48 N. Y. 492.

SAME—PARTIES.

230. The parties to the wrongful assumption of ownership involved in conversion are governed by ordinary principles, except, especially, as to cases of—

(a) Joint ownership.

(b) Performance of a ministerial duty.

The law as to disabilities is the same in trover as in other torts. A principal is liable for conversion by his servant.[413] One who instigates is as much a principal as he who performs the act of conversion.[414] An infant [415] or a lunatic [416] may be held liable in trover. A wife holding a mortgage on the property of her husband may maintain trover against an officer attaching such property.[417] The liability may arise from a joint wrong, as for wrongfully procuring a levy on which a sale was made.[418] A defense set up by one joint

[413] Lee v. McKay, 3 Ired. 29; Powell v. Sattler, Ames, Lead. Cas. 419, reported in Paley, Ag. 80; Mayer v. Kilpatrick, 7 Misc. Rep. 689, 28 N. Y. Supp. 145. As to conversion of property of principal by the agent, see Holbrook v. Wright, 24 Wend. 169; Witman v. Felton, 28 Mo. 601. Cf. Hardman v. Willcock, 9 Bing. 382; Story, Bailm. §§ 102, 103. As to liability of agent, see post, p. 734, "Ministerial Duties."

[414] Cone v. Ivinson (Wyo.) 33 Pac. 31, affirmed 35 Pac. 933; Bigelow Co. v. Heintze, 53 N. J. Law, 69, 21 Atl. 109.

[415] Freeman v. Boland, 14 R. I. 39, Chase, Lead. Cas. 200; ante, p. 158, "Infants."

[416] Morse v. Crawford, 17 Vt. 499.

[417] As to liability of husband and wife in trover at common law, see Draper v. Fulkes, Yel. 165; Ames, Lead. Cas. 392, and note; Keyworth v. Hill, 3 Barn. & Ald. 685; Tobey v. Smith, 15 Gray, 535. And see Handy v. Foley, 121 Mass. 259; ante, p. 216, "Husband and Wife." In an action against a husband for the conversion of bonds, the property of his deceased wife, reciprocal wills of the husband and wife, giving the property of each to the other, neither of which was in force at the time of the wife's death, nor made any mention of the bonds, are inadmissible (21 N. Y. Supp. 309, affirmed). Martin v. Hillen, 142 N. Y. 140, 36 N. E. 803. And see Lewis v. Beckler (Me.) 12 Atl. 627.

[418] Phelps v. Delmore, 69 Hun, 18, 23 N. Y. Supp. 229; Marks v. Wright, 81 Wis. 572, 51 N. W. 882; Gilbert v. Peck, 43 Mo. App. 577; Robertson v. Hunt, 77 Tex. 321, 14 S. W. 68. As to conspiracy in conversion, see Lockwood v. Bartlett, 130 N. Y. 340, 29 N. E. 257. And, generally, as to general

tort feasor avails to all.[419] So conversion by one partner, of property which came into possession of the firm on partnership account, is conversion by the firm.[420] The liability may arise from actual or implied consent subsequent to the wrong. Thus, the acceptance by a creditor of the proceeds of a wrongful sale of mortgaged property makes him liable in trover to the mortgagee.[421] Wrongdoing by plaintiff may disentitle him.[422]

Joint Owners.

There are, however, circumstances which raise questions as to parties somewhat peculiar to conversion and trespass. Thus, as between cotenants, an action for conversion will not lie by one against the other, so far as the land is concerned.[423] This is certainly true as to the legitimate use of the property; and the courts are averse to construing conduct of the tenant in common into an ouster.[424] "Short of destruction or something equivalent," one tenant in common may exercise full rights of property over a chattel, in defiance of the wishes of the other co-owners.[425] But any conduct on the part of a cotenant which amounts to an exclusion of the

joint liability, see Kavanaugh v. Taylor, 2 Ind. App. 502, 28 N. E. 553; Stevenson v. Valentine, 27 Neb. 338, 43 N. W. 107; Stevens v. Eanes, 22 N. H. 568.

[419] Story & I. Commercial Co. v. Story, 100 Cal. 30, 34 Pac. 671.

[420] Nisbet v. Patton, 4 Rawle, 119; Hawkins v. Appleby, 2 Sandf. 421, and cases cited; Stockton v. Frey, 4 Gill, 406; 1 Colly. Partn. § 449; Cutter v. Fanning, 2 Iowa, 580; ante, p. 291, "Partners," note 308. The fact that one member of a firm of attorneys employed to manage a will contest conspired with one of the heirs to cheat the others out of their share of a settlement, after the money had been paid over to the attorney in fact of the contesting heirs, does not render the firm liable for a diversion of the funds, where it acted in good faith until the settlement was made and money paid over. Richardson v. Richardson, 100 Mich. 364, 59 N. W. 178.

[421] Cone v. Ivinson (Wyo.) 33 Pac. 31, and 35 Pac. 933. But may not if ignorant of wrong. See Benton v. Beattie, 63 Vt. 186, 22 Atl. 422. As to conversion by warehouseman, see Burnham v. Cape Vincent Seed Co., 142 N. Y. 169, 36 N. E. 889.

[422] Miller v. Lamery, 62 Vt. 116, 20 Atl. 199. And see Rogers v. Miller, 62 N. H. 131. As to parties according to interest improperly converted, see post, p. 737, note 442.

[423] Stafford v. Azbell, 8 Misc. Rep. 316, 28 N. Y. Supp. 733.

[424] Jacobs v. Seward, L. R. 5 H. L. 464–472; Parker v. Proprietors of the Locks and Canals, 3 Metc. (Mass.) 91.

[425] He may refuse to deliver possession or deny title. Carpentier v. Menden-

others from ownership renders him liable in conversion. A sale of the whole estate to a stranger is conversion;[426] or the seizure of the whole common crop in denial of the rights of other cotenants.[427] The purchase of an outstanding title, however, inures to the benefit of the whole, and does not constitute ouster.[428] Intention to benefit the common property, as where one tenant in common unlawfully cuts and removes timber to save it from destruction by fire, is trover.[429] Joint owners may sue third persons for conversion, without showing the exact interest of each.[430]

hall, 28 Cal. 484; Compau v. Compau, 45 Mich. 367, 8 N. W. 85. Vide ante, p. 668, note 72. Although not in a suit of law. Greer v. Tripp, 56 Cal. 209. But adverse possession under claim of title with notice to the cotenant is a tort. Ante, p. 667, "Trespass," 13; Chandler v. Ricker, 49 Vt. 128; Ball v. Palmer, 81 Ill. 370; Culver v. Rhodes, 87 N. Y. 348; Mayes v. Manning, 73 Tex. 43, 11 S. W. 136; Cummings v. Wyman, 10 Mass. 464; English v. Powell, 119 Ind. 93, 21 N. E. 458. Process of manufacture: Fennings v. Lord Grenville, 1 Taunt. 241. A sale in market overt is equivalent to a destruction. Park, B., in Farrar v. Beswick, 1 Mees. & W. 688. But cultivation on shares does not make owner and cultivator tenants in common as to crops raised. Richards v. Wardwell, 82 Me. 343, 19 Atl. 863.

[426] Odom v. Weathersbee, 26 S. C. 244, 1 S. E. 890; Lobdell v. Stowell, 51 N. Y. 70; Weld v. Oliver, 21 Pick. 559, Chase, Lead. Cas. 202; Dyckman v. Valiente, 42 N. Y. 549; Person v. Wilson, 25 Minn. 189; Browning v. Cover, 108 Pa. St. 595; Wheeler v. Wheeler, 33 Me. 347; White v. Phelps, 12 N. H. 382; Davis v. Lottich, 46 N. Y. 393.

[427] Reed v. McRill, 41 Neb. 206, 59 N. W. 775; Marlowe v. Rogers (Ala.) 14 South. 790. And see Wood v. Noack, 84 Wis. 398, 54 N. W. 785.

[428] Jones v. Stanton, 11 Mo. 433; Weaver v. Wible, 25 Pa. St. 270; Bracken v. Cooper, 80 Ill. 221; Page v. Branch, 97 N. C. 97, 1 S. E. 625. But see Peck v. Lockridge, 97 Mo. 549, 11 S. W. 246; Clark v. Crego, 47 Barb. 599. Where land is conveyed by cotenants to a third person, to be sold by him for their use, the title to purchase money received by him immediately vests in the cotenants, entirely unaffected by the statute of uses; and the refusal of the grantee to pay it over on demand constitutes a conversion. Bork v. Martin (Super. Buff.) 11 N. Y. Supp. 569.

[429] Clow v. Plummer, 85 Mich. 550, 48 N. W. 795.

[430] As to liability of sheriff for seizing partnership property, see Mayhew v. Herrick, 7 C. B. 229. As to liability of pledgee to one of several owners on refusal to deliver on demand, see Harper v. Godsell, L. R. 5 Q. B. 422; Atwood v. Ernest, 13 C. B. 881; Wright v. Robotham, 33 Ch. Div. 106; Robertson v. Gourley, 84 Tex. 575, 19 S. W. 1006. As to action by less than all of cotenants to enforce rights based on injury to common property, see Ney

Ministerial Duties.

Where there has been merely ministerial dealing with goods, the liability of the agent or servant in conversion has been a matter of much dispute. Three propositions on the point have, however, been very clearly enunciated:[431] (1) A defendant is always liable if he has taken goods as his own and used them as his own. The rule is that persons who deal with property or chattels, or exercise dominion over them, do so at their peril.[432] Therefore, one who has innocently taken goods in pledge from a person wrongfully dealing with them is liable in trover at the suit of the real owner.[433] (2) When a person, though only an agent or a servant, takes part in a transaction which purports to effect a transfer of property in a chattel, and it turns out that his principal had no title, his ignorance of this fact does not protect him, for he has clearly intended and brought about that which is inconsistent with the rights of the true owner.[434] Even an auctioneer or broker who sells property and pays the proceeds to his principal, who has no title, is liable in trover to the real owner, although he may have no knowledge of the defective title or the principal's want of authority.[435] (3) If an

v. Mumme, 66 Tex. 268, 17 S. W. 407; Lee Chuck v. Quang Wo Chong, 91 Cal. 593, 28 Pac. 45; Bowser v. Cox, 3 Ind. App. 309, 29 N. E. 616.

[431] Clerk & L. Torts, 180, from which the English illustrations on this subject are taken. "A merely ministerial dealing with goods at the request of an apparent owner having the actual control of them appears not to be conversion." Pol. Torts, p. 203, commenting on Heald v. Carey, 11 C. B. 977, as being a case where defendant did something that did not amount to a conversion.

[432] In the celebrated case of Hollins v. Fowler, L. R. 7 H. L. 757, it was decided that any person who, however innocently, obtains the possession of goods of another person fraudulently deprived of them, and disposes of them for his own benefit, or that of any other person, is guilty of conversion. Accordingly, if a cotton broker, in expectation of finding a customer, buys from an apparent owner in good faith, and afterwards sells the cotton, he is liable to the real owner, though he only made a commission. Merchants' & P. Bank v. Meyer, 56 Ark. 499, 20 S. W. 406.

[433] McCombie v. Davies, 6 East, 538; Burroughes v. Bayne, 5 Hurl. & N. 296. And cf. Coleridge, J., in Mennie v. Blake, 6 El. & Bl. 851.

[434] Hoffman v. Carew, 22 Wend. 285; Coles v. Clark, 3 Cush. 399. But see Spooner v. Holmes, 102 Mass. 503.

[435] Everett v. Coffin, 6 Wend. 603. Et vide Milliken v. Hathaway, 148 Mass. 69, 19 N. E. 16; Kearney v. Clutton (Mich.) 59 N. W. 419; Hoffman v. Carow,

agent intermeddles with the custody of chattels, in ignorance of his principal's lack of title, and also in ignorance that any alteration of the property is intended, he is not guilty of a conversion. "The true proposition as to possession and detention and asportation seems to me to be that a possession or detention which is a mere custody or a mere asportation, made without reference to the question of the property in goods or chattel, is not a conversion." [436]

If a bailee, asserting no title in himself, restores the property to the bailor in accordance with the expressed or implied terms of the bailment, before notice or knowledge that the title is in a third person, he is not liable for conversion. To warrant recovery against him in trover, under such circumstances, it must be shown that it was his intention to deprive the plaintiff of property in the goods, or to take it to himself.[437] On this principle, one who allowed

22 Wend. 285; Courtis v. Cane, 32 Vt. 232; Robinson v. Bird, 158 Mass. 357, 33 N. E. 391; Coles v. Clark, 8 Cush. 399; Abernathy v. Wheeler, 92 Ky. 320, 17 S. W. 858; Taylor v. Pope, 5 Cold. (Tenn.) 413; Perkins v. Smith, 1 Wils. 328. So a sheriff. Garland v. Carlisle, 4 Clark & F. 693. So a clerk or servant innocently disposing of goods to which his master had no title, under his master's direction. Stevens v. Elwall, 4 Maule & S. 259. And see Edgerly v. Whalan, 106 Mass. 307; Hempfing v. Burr, 59 Mich. 294, 26 N. W. 496; Morrow Shoe Manuf'g Co. v. New England Shoe Co., 6 C. C. A. 508, 57 Fed. 685.

[436] Per Brett, J., in Fowler v. Hollins, L. R. 7 Q. B. 616-630. A succinct statement of facts and legal principles applied in this celebrated case will be found at page 348, Pig. Torts. And see Spackman v. Foster, 11 Q. B. Div. 99. Defendant may be a mere "conduit pipe in ordinary course of trade." Abbott, C. J., in Greenway v. Fisher, 1 C. & P. 190. Cf. Saxeby v. Wynne, 3 Starkie, Ev. (3d Ed.) 1159. So defendant, an attorney, may be a "strong box." Canot v. Hughes, 2 Bing. N. C. 448. Payment by a banker of a specially indorsed check to a fraudulent indorsee creates liability in conversion. Kleinwort, etc., Co. v. Cornplow, etc., de Paris [1894] 2 Q. B. 157; La Fayette Co. Bank v. Metcalf, 40 Mo. App. 494; Burditt v. Hunt, 25 Me. 419. And see Smith v. Colby, 67 Me. 169; Freeman v. Scurlock, 27 Ala. 407; Strickland v. Barrett, 20 Pick. 415; Deering v. Austin, 34 Vt. 330. An agent for a bailee of property is not liable for a conversion thereof by his principal in which he does not actually participate. McLennan v. Lemen (Minn.) 59 N. W. 628.

[437] Koch v. Branch, 44 Mo. 542, and cases considered; Eldridge v. Adams, 54 Barb. 417; Jordan v. Greer, 5 Sneed, 165; Foulds v. Willoughby, 8 Mees. & W. 540; Loring v. Mulcahy, 3 Allen, 575; Polley v. Lenox Iron Works, 2 Allen, 182; Hill v. Hayes, 38 Conn. 532. Defendant, however, it is said, is

wheat to be stored in his barn and shipped out by the storer, without knowledge of a replevin suit, which the plaintiff won, is not liable in trover.[438] A carrier who received goods and delivered them in accordance with directions of consignor, without notice of adverse title, is free from responsibility.[439] The exemption of the carrier is said to rest, not on the special ground of the exercise of public employment allowing no choice as to refusal or acceptance of goods, but upon this wider principle. If a common carrier assists in a wrongful transfer of property, liability will attach.[440]

liable in conversion, if he refuses to return plaintiff's goods, although he has not used them nor claimed them as his own. The law looks to his acts rather than to his words. Fothergill v. Lovegrove, 2 Fost. & F. 132. Et vide Pillot v. Wilkinson, 2 Hurl. & C. 72, 3 Hurl. & C. 345.

[438] Valentine v. Duff (Ind. App.) 33 N. E. 529; and see Parker v. Lombard, 100 Mass. 405; Spooner v. Holmes, 102 Mass. 503. A commission merchant, who receives tobacco, and sells the same in regular course of business, without notice of adverse claim, is not liable. Abernathy v. Wheeler, 92 Ky. 320, 17 S. W. 858. Where goods which left a warehouseman were wrongfully taken in replevin and sold, the warehouseman, having no knowledge thereof, was not liable for their conversion. Kearney v. Clutton (Mich.) 59 N. W. 419. If a bailee, having temporary possession of property, holding the same as the property of the bailor, and asserting no title in himself, and in good faith, in fulfillment of the terms of the bailment, either as expressed by the party or implied by law, restores the property to the bailee before he is notified that the true owner will look to him for it, no action will lie against him, for he has only done what was his duty. Steele v. Marsicano, 102 Cal. 666, 36 Pac. 920, collecting and commenting on cases at page 921. And see Leonard v. Tidd, 3 Metc. (Mass.) 6; Gurley v. Armstead, 148 Mass. 267, 19 N. E. 389; Hill v. Hayes, 38 Conn. 532; Nelson v. Iverson, 17 Ala. 216; Hudmon v. Du Bose, 85 Ala. 446, 5 South. 162.

[439] Per Willes, J., in Sheridan v. New Quay Co., 4 C. B. (N. S.) 650; Martin, B., in Fowler v. Hollins, L. R. 7 Q. B. 632.

[440] Clerk & L. Torts, 182, referring to Fowler v. Hollins, L. R. 7 Q. B. 616.

SAME—REMEDIES.

231. The wrong involved in conversion may give the plaintiff:

(a) An option to waive the tort and sue in assumpsit, or to resort to equity.

(b) A right to sue in detinue.

(c) A right to sue in replevin.[441]

(d) A right to sue in trover for damages.

Compensatory Damages.

The extent of plaintiff's recovery of damages is determined by the nature of his interest. The right of the absolute owner to recover has already been considered. If the plaintiff has but limited title, he can recover only according to his interest.[442] The ordi-

[441] The first three of these remedies have been already sufficiently discussed. Ante, p. 351. The institution of a chancery suit by a landlord, praying for an order restraining a tenant in arrears from removing certain articles from the premises, the tenant meanwhile remaining in actual possession, is not an act of conversion with reference to those fixtures. Felcher v. McMillan (Mich.) 61 N. W. 791. The jury may be called on to determine waiver of tort, and election to proceed on contract. Moore v. Hill, 62 Vt. 424, 19 Atl. 997. And see Burroughes v. Bayne, 5 Hurl. & N. 296. Trover and replevin as concurrent remedies. Below v. Robbins, 76 Wis. 600, 45 N. W. 416. A review of the remedy by damages for conversion, compared with that by trespass and by replevin, will be found in 2 Univ. Law Rev. 67. As to resort to equity, see Thayer v. Manley, 73 N. Y. 305. This was an action for the conversion of notes. Plaintiff, it was held, could have gone into equity, and have had defendant restrained from disposing of, and compelled to cancel, them, or he could sue for damages in conversion.

[442] Fowler v. Gilman, 13 Metc. (Mass.) 267; Tenney v. Bank, 20 Wis. 152; Peebles v. Railway, 112 Mass. 498. As between bailee, pledgee, and mortgagee, see note 26 in "Conversion." Further, as to measure of damages between mortgagor or mortgagee, see Kearney v. Clutton, 101 Mich. 106, 59 N. W. 419; Brierly v. Kendall, 17 Q. B. 937; Flanders v. Thomas, 12 Wis. 410; Gravel v. Clough, 81 Iowa, 272, 46 N. W. 1092. Between pledgee and pledgor, see Johnson v. Stear, 15 C. B. (N. S.) 330. Between vendee and vendor, see Chinery v. Viall, 5 Hurl. & N. 288. A mortgagee who wrongfully seizes the mortgaged property before condition broken is liable for the full value thereof where possession cannot be delivered, and not merely for the value of its use for the time intervening between the seizure and

nary measure of compensatory damages in an action for conversion by a plaintiff who has been deprived of his chattel is the value of the property at the time of conversion, together with interest, and any special damages which may be incurred in consequence of the wrong.[448] The value is ordinarily to be taken as of the time of the

the maturity of the mortgage debt. Finley v. Cudd (S. C.) 20 S. E. 32. As to right of lien holder to deduct the value of the special property, see Mulliner v. Florence, 3 Q. B. Div. 484; Work v. Bennett, 70 Pa. St. 484. And see Jarvis v. Rodgers, 15 Mass. 389; Stearns v. Marsh, 4 Denio, 227; Wheeler v. Pereles, 43 Wis. 332; McCalla v. Clark, 55 Ga. 53. As to conversion of books by canvassing agent, Henry Bill Pub. Co. v. Durgin, 101 Mich. 458, 59 N. W. 812. Action by assignee for benefit of creditors, Abbott v. Chaffee, 83 Mich. 256, 47 N. W. 216. And see Hamm v. Drew, 83 Tex. 77, 18 S. W. 434; Meyer v. Orynski (Tex. Civ. App.) 25 S. W. 655. Sale by railroad company on unclaimed baggage, see McClellan v. Wyatt (City Ct. N. Y.) 11 N. Y. Supp. 686. As to conversion by administrators, Kenyon v. Olney, 61 Hun, 618, 15 N. Y. Supp. 416; Reynolds v. St. Paul Trust Co., 51 Minn. 236, 53 N. W. 457. Sheriff, Bigelow Co. v. Heintze, 53 N. J. Law, 69, 21 Atl. 109. Execution creditor, Wessels v. Beeman, 87 Mich. 481, 49 N. W. 483. Surviving partner and representatives of deceased, Hawkins v. Capron, 17 R. I. 679, 24 Atl. 466; Russell v. McCall, 141 N. Y. 437, 36 N. E. 498. Vendee of partner, Kingsbury v. Tharp, 61 Mich. 216, 28 N. W. 74. Attorney, Petrie v. Williams, 68 Hun, 589, 23 N. Y. Supp. 237. Mortgagee, Brotherton v. Goldman, 90 Mich. 340, 51 N. W. 508. Second mortgagee, Brown v. Miller, 108 N. C. 395, 13 S. E. 167. Senior mortgagee, Peregoy v. Wheeler, 88 Iowa, 732, 55 N. W. 462; Simpson v. Hinson, 88 Ala. 527, 7 South. 264. And see Brown v. Miller, 108 N. C. 395, 13 S. E. 167. Between landlord and tenant, Lewis v. Ocean Nav. & Pier Co., 125 N. Y. 341, 26 N. E. 301; Marlowe v. Rogers (Ala.) 14 South. 790; Brooks v. Rogers, 101 Ala. 111, 13 South. 386; Taylor v. Felder, 5 Tex. Civ. App. 417, 23 S. W. 480. Landlord and vendee of tenant, Finney v. Harding, 136 Ill. 573, 27 N. E. 289, reversing 32 Ill. App. 98. By tenant against landlord for removing trade fixtures, Rosenau v. Syring, 25 Or. 386, 35 Pac. 844; Voss v. Bassett (Tex. App.) 15 S. W. 503. Under mining lease, Hartford Iron Min. Co. v. Cambria Min. Co., 93 Mich. 90, 53 N. W. 4. Between tenants in common, Wood v. Noack, 84 Wis. 398, 54 N. W. 785.

[448] Shepard v. Pratt, 16 Kan. 209; Smith v. Bates (Tex. Civ. App.) 27 S. W. 1044; Jefferson v. Hale, 31 Ark. 286; Coffey v. Bank, 46 Mo. 140; Skinner v. Pinney, 19 Fla. 42; State v. Hope, 25 S. W. 893; McCormick v. Railroad Co., 49 N. Y. 303. Cf. Railway Co. v. Hutchins, 32 Ohio St. 571; Hull v. Davidson, 6 Tex. Civ. App. 588, 25 S. W. 1047; Perkins v. Marrs, 15 Colo. 262, 25 Pac. 168; Clerk & L. Torts, 199. Where assignors for benefit of creditors, before the assignment, pledge for their own debts collaterals held by them as security for

wrongful act.[444] It has been held that a person cannot take any advantage of increased value given to the chattel by its improvement subsequent to the date of conversion.[445] Thus, the normal measure of damages for conversion of timber has been held its value

debts due them, and the pledgees sell the collaterals so pledged, the measure of damages of the owners of such collaterals is their market value at the date of their conversion. In re Jamison & Co.'s Estate, 163 Pa. St. 143, 29 Atl. 1001; Appeal of Boyer, Id.; 3 Suth. Dam. § 1109, note 2. As to conversion of note, plaintiff is entitled to actual, and not face, value. Griggs v. Day, 137 N. Y. 542, 32 N. E. 1001. Cf. Hersey v. Walsh, 38 Minn. 521, 38 N. W. 6130. Et vide Decker v. Mathews, 12 N. Y. 313. As to conversion of insurance policy: Hayes v. Massachusetts Mut. Life Ins. Co., 125 Ill. 626, 18 N. E. 322. In an action for the conversion of a picture left by plaintiff with defendants to be sold for not less than a certain price, he can recover only the actual value of the picture. Sinnette v. Hoddick, 10 Misc. Rep. 586, 31 N. Y. Supp. 453. As to loss of title deeds in America, see Towle v. Lovet, 6 Mass. 394; Mowry v. Wood, 12 Wis. 413–423; 1 Sedg. Dam. § 262. Defendant may recover loss of profits from suspension of business caused by wrongful sale of plaintiff's fixtures, Haverly v. Elliott, 39 Neb. 201, 57 N. W. 1010; and, generally, loss occasioned by detention of property, Moore v. King, 4 Tex. Civ. App. 397, 23 S. W. 484. Allowance of interest may be in discretion of the jury. State v. Hope, 121 Mo. 34, 25 S. W. 893. But see Arkansas Val. Land & Cattle Co. v. Mann, 130 U. S. 69, 9 Sup. Ct. 458.

[444] Heinekamp v. Beaty, 74 Md. 388, 21 Atl. 1098; Falk v. Fletcher, 18 C. B. (N. S.) 403; Johnson v. Lancashire & Y. Ry. Co., 3 C. P. Div. 499; Hendricks v. Evans, 46 Mo. App. 313. Cf. Ewbank v. Nutting, 7 C. B. 797, with Burmah Trading Corp. v. Mirza Mahomed Aally Sherazee, L. R. 5 Ind. App. 130; Douglass v. Kraft, 9 Cal. 562; Hamer v. Hathaway, 33 Cal. 117. As to fluctuations in value, see post, p. 741, note 451. Consignor may recover from a common carrier the value of the goods at the time they should have been delivered to him. Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476. In trover for property, possession of which defendant obtained by purchase of plaintiff while the latter was incapable, because of intoxication, to make a contract, the measure of damages is the difference between the value of the property delivered and the consideration received. Baird v. Howard (Ohio Sup.) 36 N. E. 732.

[445] Reid v. Fairbanks, 13 C. B. 692, where it was held that the measure of damages for conversion of a half-built ship was its value in its unfinished condition, and not as subsequently completed. As to discretion of the jury to find the value at a subsequent time, see Greening v. Wilkinson, 1 Car. & P. 625; West v. Wentworth, 3 Cow. 82; Ewing v. Blount, 20 Ala. 694; Jenkins v. McConico, 26 Ala. 213; Loeb v. Flash, 65 Ala. 526; 3 Suth. Dam. pp. 509–518.

when first separated from the freehold, and not the value of the article into which it may have been converted.[446] On the other hand, it has been urged that "the right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages." [447]

Much of the confusion and uncertainty as to the measure of damages in conversion, especially where intentional wrong is involved, has been removed by Mr. Justice Miller in the celebrated [448] case of Wooden-Ware Co. v. U. S.[449] The rule he there laid down for assessing damages against defendant is: (1) Where he is a willful trespasser, the full value of the property at the time and place of demand or of suit, but with no deduction for his labor and expenses; (2) where he is an unintentional or mistaken trespasser or an innocent vendee from such trespasser, the value at the time of conversion, less the amount which he and his vendor have added to its value; (3) where he is a purchaser without notice of wrong from a willful trespasser, the value at the time of such purchase.[450]

[446] Where timber of the value of $25 had been, in the exercise of what was supposed to be proper authority, converted into hoops of the value of $700, and in its converted form passed to the party by whose labor in good faith the change had been wrought. Wetherbee v. Green, 22 Mich. 311, discussing at length and reviewing cases as to what changes of identity will prevent a recovery in specie. And see Beede v. Lamprey, 64 N. H. 510, 15 Atl. 133; Moody v. Whitney, 38 Me. 174; Penfield v. Sage, 71 Hun, 573, 24 N. Y. Supp. 994; Brooks v. Rogers, 101 Ala. 111, 13 South. 386; Ellis v. Wire, 33 Ind. 127. As to reimbursing defendant for increased value of property by cutting trees, see Nicklase v. Morrison, 56 Ark. 553, 20 S. W. 414.

[447] Silsbury v. McCoon, 3 N. Y. 379. And see Nesbitt v. St. Paul Lumber Co., 21 Minn. 491.

[448] This case has been generally followed and approved. U. S. v. Baxter, 46 Fed. 350–353; U. S. v. Windgate, 44 Fed. 129 (collecting cases applying the rule on page 131); Kingory v. U. S., 44 Fed. 669, 670; U. S. v. Perkins, 44 Fed. 670–674; U. S. v. Mock, 149 U. S. 273–277, 13 Sup. Ct. 848.

[449] 106 U. S. 432.

[450] Wright v. Skinner (Fla.) 16 South. 335. On this principle, in Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U. S. 428, 12 Sup. Ct. 877, it was held that a person who wrongfully works a mine, takes out ores

Where property fluctuates in value, as stocks and bonds, plaintiff has been held entitled to the highest market price between the time of conversion and the time of trial.[451] The authorities on this point are, however, by no means in harmony.[452] Value, in general, means market value, not the value to the plaintiff.[453] Ordinarily, the value at the place of the conversion controls; not that in the wholesale market with an allowance for freight.[454] Where the con-

therefrom, removes them, and converts them to his own use is not entitled, in an action to recover their value, to be credited for the cost of mining the ores.

[451] Markham v. Jaudon, 41 N. Y. 235; Burt v. Dutcher, 34 N. Y. 493; Rosum v. Hodges, 1 S. D. 308, 47 N. W. 140; Romaine v. Van Allen, 26 N. Y. 309; Morgan v. Gregg, 46 Barb. 183; Jaques v. Stewart, 81 Ga. 81, 6 S. E. 815; Wilson v. Mathews, 24 Barb. 295; Pickert v. Rugg, 1 N. D. 230, 46 N. W. 446; Carter v. Du Pre, 18 S. C. 179; Dimock v. U. S. Nat. Bank, 55 N. J. Law, 296, 25 Atl. 926. Et vide Baker v. Drake, 53 N. Y. 211; Page v. Fowler, 39 Cal. 412; Waymouth v. Chicago & N. W. Ry. Co., 17 Wis. 550; Meixell v. Kirkpatrick, 33 Kan. 282, 6 Pac. 241; Seymore v. Ives, 46 Conn. 109; 3 Suth. Dam. § 1118.

[452] Compare Pennsylvania Co. v. Philadelphia, G. & N. R. Co., 153 Pa. St. 160, 25 Atl. 1043; Stewart v. Bright, 6 Houst. (Del.) 344; Gresham v. Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556; President and Directors of Franklin Bank v. Harris, 77 Md. 423, 26 Atl. 523; Andrews v. Clark, 72 Md. 396, 20 Atl. 429,—with cases in note 452. A very clear statement of what is perhaps the best view of this subject will be found in Huntingdon & B. T. R. Co. v. English, 86 Pa. St. 247. Et vide Neiler v. Kelly, 69 Pa. St. 403. Where there is no trust relationship between the parties, and no obligation to deliver specific stock at a particular time, the measure of damages for failure to deliver is the market value on the day when it should have been delivered, with interest to the day of trial; but if there be a duty to deliver at a particular time, and that duty has not been fulfilled, plaintiff may recover the highest market value between that time and the time of trial.

[453] Iler v. Baker, 82 Mich. 226, 46 N. W. 377; Beebe v. Wilkinson, 30 Minn. 548–552, 16 N. W. 450. Where the property has no market value, the damage consists of its value to the owner for a particular use, and cost of replacing. Leoncini v. Post (Com. Pl.) 13 N. Y. Supp. 825. In an action for the detachment and removal of saloon fixtures, it is proper to exclude evidence of the value of the fixtures when removed from their position, and considered without reference to their intended uses. Greenebaum v. Taylor, 102 Cal. 624, 36 Pac. 957; Suydam v. Jenkins, 3 Sandf. 614–620. Where evidence as to value is conflicting, the price at which defendant sold the goods converted may be accepted as true value. Kelley v. Mechanics' & Traders' Bank, 72 Hun, 168, 25 N. Y. Supp. 556.

[454] Gentry v. Kelley, 49 Kan. 82, 30 Pac. 186.

version occurs at some distance from market, the value at the nearest market, less the cost of transportation, is the value to be taken.[455]

Special Damages.

Where the circumstances are such that a defendant must be aware that the chattel converted by him is required for some particular purpose, he may be liable to pay special damages for causing the failure of that purpose.[456] Thus, in Bodley v. Reynolds [457] it was held that a carpenter who lost his employment because of the conversion of his tools might recover for loss of both the employment and the tools. There is, however, a distinction between special damages and special value. To entitle one to recover special damages not forming part of the actual present value of the goods, the defendant must have some notice of the inconvenience likely to be occasioned.[458] Mere capacity for profitable use is a part of the value of the chattel; and the loss of such use cannot be a separate item of damages, for, if so, the plaintiff would be entitled to a double recovery pro tanto.[459]

Nominal Damages.

The damages may be merely nominal. Thus, nominal damages only can be recovered where the property converted has been attached by a creditor of the owner.[460] So, where property came lawfully into the plaintiff's possession, and remains in the same condition as before the conversion, he may be compelled to accept

[455] Hodson v. Goodale, 22 Or. 68, 29 Pac. 70.

[456] Clerk & L. Torts, 282; Heald v. MacGowan (Com. Pl.) 14 N. Y. Supp. 280; Parsons v. Sutton, 66 N. Y. 92. And, generally, see Rank v. Rank, 5 Pa. St. 211; Bennett v. Lockwood, 20 Wend. 222; Mayne, Dam. 206; 2 Sedg. Dam. c. 14; 2 Greenl. Ev. § 276.

[457] 8 Q. B. 779.

[458] France v. Gaudet, L. R. 6 Q. B. 199. And see The Notting Hill, 9 Prob. Div. 105, a case of collision, considering loss of market as remote damage.

[459] Reid v. Fairbanks, 13 C. B. 692. As to special damages where property has been returned, see Barrelett v. Bellgard, 71 Ill. 280; Rank v. Rank, 5 Pa. St. 211. As to special damages for detention of a horse, for value of its hire, see Huckins v. Kapf (Tex. App.) 14 S. W. 1016. Expense of recovery in specie, by prosecution of detinue, of property converted, should be specially pleaded. Ross v. Malone, 97 Ala. 529, 12 South. 182.

[460] Jones v. Cobb, 84 Me. 153, 24 Atl. 798.

it in mitigation of damages which may thus be reduced to a merely nominal sum.[461]

Exemplary Damages.

As to exemplary damages in trover, where the injury has been inflicted wantonly and maliciously, the jury is at liberty to give, and it is proper for them to give, damages beyond the mere compensation for the loss or injury, and exemplary or vindictive in proportion to the degree of malice or wantonness evinced by the act of the defendant.[462] When, however, the act which produced the injury does not appear to have been wanton or malicious, as where there was a mistake in title,[463] and when the parties came before the court in the character of bona fide claimants of property honestly contending for their rights, vindictive or exemplary damages ought not to be allowed. Indeed, where persons in good faith make an insufficient or invalid levy, and on discovering their mistake tender the property back to the person from whom it was taken, leave it on his premises, and do not thereafter assert any claim to it, they are liable only for nominal damages, unless the conversion resulted in injury to the property.[464]

[461] Bigelow Co. v. Heintze, 58 N. J. Law, 69, 21 Atl. 109. Et vide Barrelett v. Bellgard, 71 Ill. 280; Hiort v. London & Northwestern Ry. Co., 4 Exch. Div. 188. Et vide Farr v. Hunt, 87 Wis. 223, 58 N. W. 377. The court may stay the action, in whole or in part, if plaintiff obtained redress by delivery of chattel and payment of costs. Fisher v. Prince, 3 Pa. St. 1363; Pickering v. Truste, 7 Term R. 53; Earle v. Holderness, 4 Bing. 462. And see Rutland & W. Ry. Co. v. Bank, 32 Vt. 639; 1 Sedg. Dam. (8th Ed.) § 54. As to transaction equivalent to a return, see Plevin v. Henshall, 10 Bing. 24. Cf. Edmondson v. Nuttal, 17 C. B. (N. S.) 280.

[462] Wilde v. Hexter, 50 Barb. 448; Neller v. Kelly, 69 Pa. St. 403 (collection of Pennsylvania cases at page 408); Mowry v. Wood, 12 Wis. 413; Allaback v. Utt, 51 N. Y. 651. Et vide Day v. Woodworth, 13 How. 363; Sedg. Dam. 531.

[463] So where defendant acted under contract as the plaintiff's agent. Slocum v. Putnam (Tex. Civ. App.) 25 S. W. 52.

[464] Farr v. Hunt, 87 Wis. 223, 58 N. W. 377. A judgment for punitive damages, in an action for the malicious conversion of certain wheat, peaceably taken by defendant under a bona fide claim of title, and by the advice of reputable counsel, will be set aside, where the only evidence of malice is a statement, made by defendant at the time, that it was too rich for plaintiff to litigate with. Abbott v. 76 Land & Water Co., 103 Cal. 607, 37 P. 527.

CHAPTER XI.

NUISANCE.

DEFINITION.

232. Nuisance is a distinct civil wrong, consisting of anything wrongfully done or permitted which interferes with or annoys another in the enjoyment of his legal rights.[1]

[1] This definition is substantially that of Mr. Cooley. Cooley, Torts, § 595. Perhaps the most that can be said for any definition of nuisance is that it is not so objectionable as many others. From the nature of the subject, every one must be unsatisfactory,—perhaps more unsatisfactory than the average legal definition. In an interesting article by L. M. Countryman on "Nuisance" in 16 Am. & Eng. Enc. Law, 924–926, a collection of definitions will be found. And see Bish. Noncont. Law, § 411, note 1; Wood, Nuis. § 50 et seq. Many statutes have undertaken apparently the impossible task of defining a nuisance. A common definition by such statutes is that a nuisance is anything injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with comfortable enjoyment of life or property. The statutes of the various states would in general seem to be essentially declaratory of the common law. Gen. St. Minn. 1878, p. 820, c. 75, § 44. Cf. Pen. Code Minn. tit. 2, § 319 (Gen. St. 1894, § 6613 et seq.); Rev. St. Ind. 1881, §§ 289–291 (Rev. St. Ind. 1894, §§ 290–292); Steinke v. Bentley, 6 Ind. App. 603, 34 N. E. 97; Indianapolis Water Co. v. American Strawboard Co., 53 Fed. 970; Code Wash. T. § 1247; Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 13 Sup. Ct. 822; Sanb. & B. Ann. St. § 3180; Wendlandt v. Cavanaugh, 85 Wis. 256, 55 N. W. 408; Code Iowa, § 3331; Downing v. City of Oskaloosa, 86 Iowa, 352, 53 N. W. 256; Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. 1000. But see Innis v. Cedar Rapids, I. F.

The subject of nuisance is one of the oldest heads of the English law.[2] The early actions of assize of nuisance and of quod permittat prosternere were real actions, and were based upon the freehold title in the plaintiff and the defendant, respectively.[3]

Distinguished from a Purpresture.

A purpresture is "an inclosure by a private party of a part of that which belongs to, and ought to be open and free to the enjoyment of, the public at large.[4] It is not necessarily a public nuisance. A public nuisance must be something that subjects the public to some degree of inconvenience or annoyance, but a purpresture may exist without putting the public to any inconvenience whatever."[5] The public character of a purpresture appears especially in the remedies provided by law.[6] Proceedings in equity to abate a purpresture are usually upon the relation of the attorney general, and not usually or necessarily upon information by private parties.[7]

Distinguished from Trespass.

Nuisance is distinguished from trespass. "The distinction between nuisance and trespass is that nuisance is only a consequence or result of what is not directly or immediately injurious, but its

& N. W. Ry. Co., 76 Iowa, 165, 40 N. W. 701; Rev. St. Idaho, § 3633; Redway v. Moore, 2 Idaho, 1036, 29 Pac. 104; Civ. Code Cal. § 3483; Castle v. Smith (Cal.) 36 Pac. 859; Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618; Gen. St. Nev. § 3273; Fogg v. Nevada C. O. Ry. Co., 20 Nev. 429, 23 Pac. 840; Civ. Code Or. § 330; Kothenberthal v. City of Salem Co., 13 Or. 604, 11 Pac. 287. And see Norcross v. Thoms, 51 Me. 503.

[2] Bigelow, Lead. Cas. 462, contains a learned review of the early history of nuisance.

[3] 3 Bl. Comm. §§ 221, 222; Waggoner v. Jermaine, 45 Am. Dec. 474.

[4] Black, Law Dict. tit. "Purpresture." And see Smith v. McDowell, 148 Ill. 51, 35 N. E. 141.

[5] Attorney General, etc., v. Evart Booming Co., 34 Mich. 462. And see Moore v. Jackson, 2 Abb. N. C. (N. Y.) 211.

[6] As indictment, Reg. v. United Kingdom Electric Tel. Co., 6 Law T. (N. S.) 378; or information of intrusion, Wood, Nuis. § 78.

[7] 2 Story, Eq. Jur. (13th Ed.) § 924. And see Soltau v. De Held, 9 Eng. Law & Eq. 104; Ewell v. Greenwood, 26 Iowa, 377. See, also, 2 Wat. Inj. 260; Wood, Nuis. §§ 78–80; 16 Am. & Eng. Enc. Law, 939–942; United States v. Debs, 64 Fed. 724.

without damaging interference. They have been called upon to adjust abstract right with demands of expediency in connection with the conditions of modern business. That the tendency is to be guided by considerations of convenience and utility, and that the line of demarcation between what is and what is not nuisance is often indistinct, are natural results. Accordingly, courts continually refer questions of nuisance to a jury for determination as a matter of fact.[18]

RIGHTS INVADED.

233. The legal rights with which a nuisance interferes may concern—

(a) Property,

(1) Corporeal, or

(2) Incorporeal; or

(b) Personal enjoyment of health and comfort.

Injury to Corporeal Property.

There is a distinction, it was held in the leading case of St. Helen's Smelting Co. v. Tipping,[19] between an action for a nuisance in respect to an action producing a material injury to the property, and one in respect to an action producing personal discomfort. As to the latter, a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place and trades carried on around him. As to the former, the same rule would not apply.[20] The nuisance may be to corporeal hereditaments. Thus, if one erects a smelting house so near the house of another that the vapor and smoke kill his corn and grass, and damage his cattle[21] or injure his trees,[22] this is a nuisance. "So, also,

[18] Lake v. Milliken, 16 Am. Rep. 456; King v. Thompson, 30 Am. Rep. 364; Ayer v. City of Norwich, 12 Am. Rep. 396; Foshay v. Town of Glen Haven, 3 Am. Rep. 73.

[19] 11 H. L. Cas. 642 (1865).

[20] Lord Westbury in St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642.

[21] By lead smelting works, Hale, Fitzh. Nat. Brev. 184, quoted in 3 Bl. Comm. p. 218; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 785.

[22] By copper smelting works, St. Helen's Smelting Works v. Tipping, su-

if my neighbor ought to scour a ditch, and does not, whereby my land is overflowed, this is an actionable nuisance." [23] Overhanging eaves, from which water flows on another's premises, constitute a nuisance.[24] Corrupting the air with offensive smells,[25] or disturbing the adjoining property with distressing noises on adjoining premises, may constitute a nuisance.[26] By way of contrast, an occupant of land is under no duty to his neighbor to cut thistles naturally growing on his own land, to prevent them from seeding; and if, because he neglects to cut them, seeds are blown on his neighbor's land, to the latter's damage, there is no liability.[27]

Incorporeal Property—Injury to Easement of Light and Air.

A nuisance may affect incorporeal hereditaments. There is no right, ex jure naturæ, to the free passage of light and air to a house or building. Light and air are not subjects of property, beyond the moment of actual occupancy.[28] At common law, when windows had subsisted at a particular place for a long time, they were said to be ancient; and, if the adjoining landowner constructed a building so as to interfere with such ancient lights, his wrong fell short of a

pra, note 20. Noxious gases from burning brick, Bamford v. Turnley, 3 Best & S. 62–66; Fogarty v. Junction City Pressed-Brick Co., 50 Kan. 478, 31 Pac. 1052; Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. 1000. And see Campbell v. Seaman, 63 N. Y. 568; Demarest v. Hardham, 34 N. J. Eq. 469; Pennoyer v. Allen, 56 Wis. 502, 14 N. W. 609; Bohan v. Port Jervis Gas-Light Co., 122 N. Y. 18, 25 N. E. 246.

[23] Hale, Fitzh. Nat. Brev. 183, note a. And see 3 Bl. Comm. § 218; post, p. 754, note 48.

[24] Fitzh. Nat. Brev. 184; Battishill v. Reed, 18 C. B. 696; Hazeltine v. Edgmand (Kan. Sup.) 10 Pac. 544; Gould v. McKenna, 27 Am. Rep. 705.

[25] 3 Bl. Comm. 217; Smiths v. McConathy, 11 Mo. 517.

[26] Fish v. Dodge, 4 Denio, 311; Sparhawk v. Union Passenger Ry. Co., 54 Pa. St. 401. As a dog howling by night, Street v. Gugell, Selw. N. P. (13th Ed.) 1090; Brill v. Flagler, 23 Wend. 354. A review of the English authorities as to nuisance to dwelling house, especially as to the measure of annoyance which may be inflicted without damage, will be found reviewed in 53 J. P. 817.

[27] Giles v. Walker, 24 Q. B. Div. 656.

[28] Guest v. Reynolds, 68 Ill. 478, Chase, Lead. Cas. 1. And see Yates v. Jack, 1 Ch. App. 295.

trespass, for there was no violation of another's possession or lands. The injury was recognized as a nuisance.[29] But the rule was otherwise as to air. In America, however, the doctrine of easement of light and air over the land of another has not been generally accepted as arising by prescription,[30] although the easement may be created by grant.[31] Accordingly, interference with another's light and air does not ordinarily constitute a nuisance. "Depriving one of a mere pleasure, as of a fine prospect, by building a wall or the

[29] Aldred's Case, 9 Coke, 58. Extent of right will be found accurately stated by James, L. J., in Kelk v. Pearson, 6 Ch. App. 809–811. Et vide Parker v. Smith, 5 Car. & P. 438; Wells v. Ody, 7 Car. & P. 410; Dent v. Auction Mart Co., L. R. 2 Eq. 238. Extent of obstruction is always a question of fact, which depends upon the evidence in each case. The fact that an obstruction leaves 45 degrees unobstructed may be evidence showing no occasion for interference by court. Compare Parker v. First Ave. Hotel Co., 24 Ch. Div. 282, with City of London Brewery Co. v. Tennant, 9 Ch. App. 212. Generally, as to acquisition and obstruction, see Tapling v. Jones, 11 H. L. Cas. 290; Arcedeckne v. Kelk, 2 Giff. 683; Staight v. Burn, 5 Ch. App. 163. An article on the obstruction of ancient lights, with a review of the recent cases in relation thereto, J. P., republished in 29 Ir. Law T. (N. S.) 755–757. See, however, as to wind for windmill, Webb v. Bird, 13 C. B. (N. S.) 841; air for chimneys, Bryant v. Lefever, 4 C. P. Div. 172. A short review of the variety of questions arising as to the obstruction of lights, especially when premises are rebuilt and in an altered form, will be found in 58 J. P. 649.

[30] Mullen v. Stricker, 19 Ohio St. 135; Mahan v. Brown, 13 Wend. 261; Parker v. Foote, 19 Wend. 309; Haverstick v. Sipe, 33 Pa. St. 368; Pierre v. Fernald, 26 Me. 436; Randall v. Sanderson, 111 Mass. 114; Jenks v. Williams, 115 Mass. 217; Ward v. Neal, 37 Ala. 500; Hubbard v. Town, 33 Vt. 295; Keiper v. Klein, 51 Ind. 316; Turner v. Thompson, 58 Ga. 268; Cherry v. Stein, 11 Md. 1; Powell v. Sims, 5 W. Va. 1. See note to Story v. Odin, 7 Am. Dec. 46–49; Knabe v. Levelle (Super. N. Y.) 23 N. Y. Supp. 818. Authorities on the easements of light and air will be found collected in Keating v. Springer, 37 Am. St. Rep. 175–184 (146 Ill. 481, 34 N. E. 805). See Lindsey v. First Nat. Bank, 20 S. E. 621; Knabe v. Levelle (Super. N. Y.) 23 N. Y. Supp. 818; Levy v. Samuel (Super. N. Y.) 23 N. Y. Supp. 825; Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111, 37 Pac. 192. Nor will such easement be applied as to land of lessor by the lease of a building to be used for a purpose requiring light, such as marble cutting. Keating v. Springer, 146 Ill. 481, 34 N. E. 805.

[31] Keats v. Hugo, 115 Mass. 204. The grant may be expressed or implied. Compton v. Richards, 1 Price, 27.

like, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is, therefore, not an actionable nuisance." [32]

Same—Support.

At common law, depriving a neighbor of the subadjacent or adjacent support necessary to sustain his land in its natural and unincumbered state, by use of one's own land to the neighbor's damage, was an actionable wrong.[33] The right of lateral support existed only in favor of land unweighted by buildings; and no action lay without proof of appreciable damages.[34] Liability under such circumstances depends on the negligence of the defendant in removing adjacent soil. If the weight of buildings prevented his making the excavation, carefully, without damage, there is no liability.[35] There is, it is insisted,[36] no such thing as an absolute right to support, but there is a qualified right entitling every man to have his soil

[32] Aldred's Case, 9 Coke, 58, referred to in 3 Bl. Comm. § 217. Nor is obstructing view of hotel from depot, diverting travel, actionable. Stufflebeam v. Montgomery, 2 Idaho, 763, 26 Pac. 125. Et vide Hay v. Weber, 79 Wis. 587, 48 N. W. 859.

[33] Humphries v. Brogden, 12 Q. B. 739; Bonomi v. Backhouse, 28 Law J. Q. B. 378; Farrand v. Marshall, 19 Barb. 380, 21 Barb. 409; Lasala v. Holbrook, 4 Paige, 169; McGuire v. Grant, 25 N. J. Law, 356; Richardson v. Vermont Cent. Ry. Co., 25 Vt. 465; Stimmel v. Brown, 7 Houst. (Del.) 219, 30 Atl. 996; Shrieve v. Stokes, 8 B. Mon. 453; Moody v. McClelland, 39 Ala. 45; Louisville & N. R. Co. v. Bonhayo, 94 Ky. 67, 21 S. W. 526; Curr v. Hundley, 3 Colo. App. 54, 31 Pac. 939; Parke v. City of Seattle, 5 Wash. 1, 31 Pac. 310, and 32 Pac. 82; Stearns' Ex'r v. City of Richmond, 88 Va. 992, 14 S. E. 847. As to measure of damages, see McGettigan v. Potts, 149 Pa. St. 155, 24 Atl. 198; Ulrick v. Dakota Loan & Trust Co. (S. D.) 51 N. W. 1023; Conboy v. Dickinson, 92 Cal. 600, 28 Pac. 809.

[34] Smith v. Thackerah, L. R. 1 C. P. 564; Wyatt v. Harrison, 3 Barn. & Adol. 871; Thurston v. Hancock, 12 Mass. 220; Chase, Lead. Cas. Torts, 23; Stone v. Hunt, 94 Mo. 475, 7 S. W. 431.

[35] As to negligence in excavating without notice, see Schultz v. Byers, 53 N. J. Law, 442, 32 Atl. 514; City of Covington v. Geylor (Ky.) 19 S. W. 741; Ulrick v. Dakota Loan & Trust Co. (S. D.) 49 N. W. 1054; First Nat. Bank of San Francisco v. Villegra, 92 Cal. 600, 28 Pac. 97; Conboy v. Dickinson, 92 Cal. 600, 28 Pac. 809. Generally, as to the duty of owner in making excavation, see editorial note, Schultz v. Byers, 13 Lawy. Rep. Ann. 569. Et vide Stone v. Hunt, 94 Mo. 475, 7 S. W. 431; Louisville & N. R. Co. v. Bonhayo, 94 Ky. 67, 21 S. W. 526; Moellering v. Evans, 121 Ind. 195, 22 N. E. 989.

[36] Ante, c. 1.

left intact, that no removal of the adjoining soil can be made so as to disturb the integrity of the soil of others.[37] It is, however, absolute in the sense that negligence in the removal of the support need not be shown.[38]

On the other hand, buildings are not deprived of this qualified right to support unless they sensibly increase the pressure on the lands. This is a logical application of the requirement of the connection as cause. Where the structures do not contribute to the injury, there is no reason why they should affect the plaintiff's right to recover.[39] But the right to support of land weighted by buildings may be acquired by grant and modeled by statute.[40] A grant may be implied, as well as express, as in Rigby v. Bennett,[41] where a man granted part of his land for a building. In England, such right to support of land may also be acquired by prescription.[42] The soundness of this doctrine has been strenuously denied,[43] and it would seem that the better opinion is that the erection of a building

[37] Wood, Nuis. § 172.

[38] Nichols v. City of Duluth, 40 Minn. 389, 42 N. W. 84; Schultz v. Bower (Minn.) 59 N. W. 631. Compare City of Covington v. Geylor (Ky.) 19 S. W. 741; Schultz v. Byers, 53 N. J. Law, 442, 22 Atl. 514. As to malice as an element, see Conboy v. Dickinson, 92 Cal. 600, 28 Pac. 809. But the right of an owner of a building to take down or change any foundation, wall or other part thereof, without being answerable for the consequent injury to his neighbor's building, attached thereto, is subject to the qualification that he will be liable in damages if the injury to his neighbor is occasioned by the negligent manner in which the work is performed. Leavenworth Lodge No. 2 v. Byers, 54 Kan. 323, 38 Pac. 261.

[39] Wood, Nuis. §§ 177, 178, collecting cases; Victor Min. Co. v. Morning Star Min. Co., 50 Mo. App. 525.

[40] Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209; Jencks v. Kenny (Super. N. Y.) 19 N. Y. Supp. 243.

[41] 21 Ch. Div. 559. When the owner of land sells a part thereof, he impliedly grants to the grantee all those apparent easements which are necessary for the reasonable use of the part granted, and which are, at the time of the grant, used by the owner of the entirety, for the benefit of the part granted. Lampman v. Milks, 21 N. Y. 505. As to party walls, see Heartt v. Kruger, 121 N. Y. 386, 24 N. E. 841; Rogers v. Sinsheimer, 50 N. Y. 646; Briggs v. Klosse, 5 Ind. App. 129, 31 N. E. 208.

[42] Dalton v. Angus, L. R. 6 App. Cas. 740; Lemaitre v. Davis, 19 Ch. Div. 281. But see Solomon v. Master, etc., of Vintners' Co., 4 Hurl. & N. 585.

[43] Wood, Nuis. § 200.

wholly on one's own land is not the basis of a prescriptive right to have it supported by the soil of the adjacent owner, since no injury is inflicted on the latter, on which he could base an action to secure the removal of the building.[44]

As to subjacent support, the rule is, where one possesses the surface and another the subsoil, the former has a right to such support from the lower strata as will suffice to maintain the surface in its natural state, i. e. unburdened by buildings; and the owner of the surface may not dig into the subsoil beyond what is necessary for the cultivation of the land or its proper enjoyments.[45] The natural rights of the parties may, however, be varied by contract or by custom.[46]

Same—Interference with Water Rights.

Every proprietor has a right to the continued flow of a natural stream running through his land, and to the use of its water to a reasonable extent. He may not accumulate it so as to overflow lands above him, nor seriously lessen the quantity of water which would naturally descend, or defile it so as to render it unfit for use.[47] What is reasonable use of running water is a question for the jury.

[44] Sullivan v. Zeiner, 98 Cal. 346, 33 Pac. 209; Handlam v. McManus, 42 Mo. App. 551.

[45] Ball, Torts, 43; Humphries v. Brogden, 12 Q. B. 739; Cox v. Glue, 5 C. B. 533; Harris v. Ryding, 5 Mees. & W. 60; Wilms v. Jess, 94 Ill. 464, 465 (per Scholfield, J., collecting cases); Marvin v. Brewster Iron Min. Co., 55 N. Y. 538; Coleman v. Chadwick, 80 Pa. St. 81; Yandes v. Wright, 66 Ind. 319; Wakefield v. Duke of Buccleuch, L. R. 4 Eq. Cas. 624, L. R. 4 H. L. 377; Hartwell v. Camman, 10 N. J. Eq. 128; Stewart v. Chadwick, 8 Iowa, 463; Caldwell v. Copeland, 37 Pa. St. 427.

[46] Hilton v. Granville, 5 Q. B. 701. But see Harris v. Ryding, 5 Mees. & W. 60.

[47] Ball, Torts, 43. A review of recent decisions as to the law of easements in running waters, J. P., reprinted in 28 Ir. Law T. 448. Wood, Nuis. c. 8 (nuisance relating to water, especially, §§ 345, 349, 356). The right of the proprietor of the land is not measured by the demands of his business. "The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both." Per Black, J., in Wheatley v. Chrisman, 24 Pa. St. 298, 302; Marshall v. Peters, 12 How. Prac. (N. Y.) 218; Black, Pom. Water Rights; Middleton v. Pritchard, 3 Scam. (Ill.) 510; City of Chicago v. Laflin, 49 Ill. 172; 3 Kent, Comm. 427; 2 Hil. Real Prop. 92; Ang. Water Courses, § 5.

Thus, the erection and maintenance of a dam, flooding the land above, is a nuisance, rendering the wrongdoer liable in nuisance for damages to all persons whose lands are flooded.[48] An obstruction of a stream may give a cause of action for damages; as where a railroad company, by blasting, created a fill or bar in a stream, injuring a mill.[49] As to what constitutes use to a reasonable extent, the authorities are not agreed. Ordinary use of water ad lavandum et potandum for domestic purposes and for cattle is a reasonable use, but the question is largely for the jury.[50] A riparian owner may,

[48] Butz v. Ihrie, 1 Rawle, 218; Strout v. Millbridge, 45 Me. 76; Wheatley v. Chrisman, 24 Pa. St. 298; Payne v. Kansas City, St. J. & C. B. R. Co., 112 Mo. 6, 20 S. W. 322; Knight v. Albemarle & R. R. Co., 111 N. C. 80, 15 S. E. 929; Wallace v. Columbia & G. R. Co., 37 S. C. 335, 16 S. E. 35. But the erection of the frame of a milldam, which, when completed, will pond the water back, and thereby create a nuisance, does not itself constitute a nuisance. State v. Suttle, 115 N. C. 784, 20 S. E. 725; Stout v. McAdams, 3 Ill. 67; Brown v. Bowen, 30 N. Y. 519. Et vide Ellis v. Clemens, 21 Ont. 227; Hartshorn v. Chaddock, 135 N. Y. 116, 31 N. E. 997; Krug v. St. Mary's Borough, 152 Pa. St. 30, 25 Atl. 161; Paine Lumber Co. v. U. S., 55 Fed. 854; Dunman v. Gulf, C. & S. F. R. Co. (Tex. Civ. App.) 26 S. W. 304. The wrong may also be regarded as a trespass. McKee v. Delaware & H. Canal Co., 125 N. Y. 353, 26 N. E. 305, affirming (Sup.) 4 N. Y. Supp. 753; Wharton v. Stevens, 84 Iowa, 107, 50 N. W. 562; Glass v. Fritz, 148 Pa. St. 324, 23 Atl. 1050; Barden v. City of Portage, 79 Wis. 126, 48 N. W. 210; McKee v. President, etc., of Delaware & H. Canal Co., 125 N. Y. 353, 26 N. E. 305; McGee v. Fox, 107 N. C. 768, 12 S. E. 369; ante, p. 749, note 23; Irwin v. Janesville Cotton Mills, 88 Wis. 429, 60 N. W. 786; Clement Manuf'g Co. v. Wood, 162 Mass. 173, 38 N. E. 444.

[49] Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 19 S. E. 521. As to obstruction of water course by railroad embankment, see Ohio, etc., Ry. Co. v. Thillman, 43 Ill. 127. As to obstruction by booms, see Stevens Point Boom Co. v. Reilly, 46 Wis. 237, 49 N. W. 978. By a city in constructing a small sewer, see Orchard Place Land Co. v. Brady, 53 Kan. 420, 36 Pac. 728. As to injunction to restrain obstruction of water course, see Spargur v. Heard, 90 Cal. 221, 27 Pac. 198; Kerr v. West Shore R. Co., 127 N. Y. 269, 27 N. E. 833. Further, as to obstruction, see Ferris v. Wellborn, 64 Miss. 29, 8 South. 165; Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621; Mississippi & T. R. Co. v. Archibald, 67 Miss. 38, 7 South. 213. As to action to restrain obstruction, see Atchison, T. & S. F. R. Co. v. Long, 46 Kan. 701, 27 Pac. 182; Hoyt v. Cline (Sup.) 15 N. Y. Supp. 337. Compare Jolliffe v. Chesapeake & O. R. Co. (Va.) 20 S. E. 781, with Fleming v. Wilmington & W. R. Co., 115 N. C. 676, 20 S. E. 714.

[50] Washb. Easem. 213, 220; Wadsworth v. Tillotson, 15 Conn. 369; Wood, Nuis. § 356.

without regard to the necessity of the lower owner, take water from a stream, even to the exhaustion of the whole supply;[51] but this proposition has been doubted.[52] "Indeed," said Mr. Wood, "he may use it for any ordinary purpose of life, but his use must be such as not to interfere measurably with the rights of those above or below him on the stream."[53] The use of water for any purpose not domestic, such as irrigation or manufacturing, sensibly diminishing the volume of the stream, is a nuisance.[54] Use of water from a running stream by a railroad company, although essential to the operation of its road, is not a domestic use, and damages may be recovered for such diversion, so far as they actually concern the employment of the land, but not for an unused water power.[55] The owner of the fee abutting on a running stream is entitled to take ice therefrom, if the taking does not interfere with navigation, or with the use of the water for hydraulic or other rightful purposes.[56] Diversion of water may be a wrong[57] which may be restrained,[58] and be

[51] Clerk & L. Torts, 294; Lord Kingsdown in Miner v. Gilmour, 12 Moore, P. C. 131–156.

[52] Lord Norbury v. Kitchin, 9 Jur. (N. S.) 132.

[53] Wood, Nuis. § 345.

[54] Directors, etc., of Swindon Waterworks Co. v. Proprietors of Wilts & B. Canal-Nav. Co., L. R. 7 H. L. 697. But the diversion of small quantites of water for irrigating, when water was more than sufficient for use of mill, which water was returned into the stream above the mill, except the inappreciable quantity absorbed, it was held not such an unreasonable use of water as was prohibited by law. Embrey v. Owen, 6 Exch. 353. And see Washb. Easem. c. 3, § 2.

[55] Clark v. Pennsylvania R. Co., 145 Pa. St. 438, 22 Atl. 989. Et vide Attorney General v. Great Eastern R. Co., 18 Wkly. Rep. 1187. A railroad company is liable for total diversion of a water course in the construction of its road. Atchison, T. & S. F. R. Co. v. Long, 46 Kan. 701, 27 Pac. 182.

[56] Edgerton v. Huff, 26 Ind. 35. As to rights of riparian proprietors to ice in streams, see 51 Law T. 23. Brown v. Cunningham, 82 Iowa, 512, 48 N. W. 1042; Marsh v. McNider, 88 Iowa, 390, 55 N. W. 469; Concord Manuf'g Co. v. Robertson (N. H.) 25 Atl. 718; Howe v. Andrews, 62 Conn. 398, 26 Atl. 394; Sowles v. Moore, 65 Vt. 322, 26 Atl. 629; Allen v. Weber, 80 Wis. 531, 50 N. W. 514.

[57] Webb v. Portland Manuf'g Co., 3 Sumn. 189, Fed. Cas. No. 17,322; Kimberly & Clark Co. v. Hewitt, 79 Wis. 334, 48 N. W. 373; Blanchard v. Baker, 8 Me. 253.

[58] Mott v. Ewing, 90 Cal. 231, 27 Pac. 194; Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. 390.

the basis of an action for damages.[59] Diversion of water for purposes of irrigation and mining in Western states depends largely upon statutory regulations, especially as to prior appropriation.[60] Substantial pollution of a stream by discharging foul matter into it may be a nuisance.[61] "Care must be taken to distinguish between the natural and necessary development of land itself, and injury resulting from the character of some business not incident and necessary to the development of the land or other substances lying within it. The owner of the land has the right to develop it by digging for coal, iron, gas, oil, or other minerals; and if, in progress of these developments, an injury occurs to the owner of adjoining lands, without fault or negligence on his part, an action for such injury cannot be maintained. If this were not so, a man might be utterly deprived of the use of his property." It is not so where the

[59] Van Bibber v. Hilton, 84 Cal. 585, 24 Pac. 308, 598; Fleming v Railroad Co., 115 N. C. 676, 20 S. E. 714; New York Rubber Co. v. Rothery, 57 Hun (N. Y.) 590, 10 N. Y. Supp. 872; Williams v. Fulmer, 151 Pa. St. 405, 25 Atl. 103, affirming 122 Pa. St. 191, 15 Atl. 726.

[60] McGee Irrigating Ditch Co. v. Hudson (Tex. Sup.) 22 S. W. 967; Barrows v. Fox (Cal.) 30 Pac. 768; Id., 98 Cal. 63, 32 Pac. 811; Southern Pac. R. Co. v. Dufour, 95 Cal. 615, 30 Pac. 783; Oppenlander v. Left-Hand Ditch Co., 18 Colo. 142, 31 Pac. 854; Healy v. Woodruff, 97 Cal. 464, 32 Pac. 528; Conant v. Jones (Idaho) 32 Pac. 250; Cole v. Logan, 24 Or. 304, 33 Pac. 568; Salina Creek Irr. Co. v. Salina Stock Co., 7 Utah, 456, 27 Pac. 578; Chiatovich v. Davis, 17 Nev. 133, 28 Pac. 239; Shotwell v. Dodge, 8 Wash. 337, 36 Pac. 254; Taylor v. Abbott, 103 Cal. 421, 37 Pac. 408. Generally, as to appropriation of water for mining or irrigation, see Isaacs v. Barber (Wash.) 38 Pac. 871; Wimer v. Simmons (Or.) 39 Pac. 6. As to diversion from canal for water power, see Green Bay & M. Canal Co. v. Kaukauna Water-Power Co. (Wis.) 61 N. W. 1121.

[61] Wood v. Aud, 3 Exch. 748; Hodgkin v. Ennor, 4 Best & S. 229. As to discharge of sewage into stream, see Bainard v. City of Newton, 154 Mass. 255, 27 N. E. 995. As to liquor distillery, see Price v. Lawson, 74 Md. 499, 22 Atl. 206. See an interesting article on ability of riparian owner to recover against one of several persons who has polluted stream above him. 96 Law T. 503; ante, p. 213, "Joint Tort Feasors." Befouling stream by cattle droppings, Barton v. Union Cattle Co., 28 Neb. 350, 44 N. W. 454; dumping refuse, Easton & A. R. Co. v. Central R. Co., 52 N. J. Law, 267, 19 Atl. 722; pollution by gas works, Pensacola Gas Co. v. Pebley, 25 Fla. 381, 5 South. 593; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Laing v. Whaley, 3 Hurl. & N. 675.

injury is caused by the prosecution of a business which has no necessary relation to the land itself, and is not necessary to its development. It was accordingly held that where a pipe-line company carried oil from a distance, and allowed it to escape and percolate through another's land, and destroy his springs, the company is liable in damages.[62] A prescriptive right to use a stream in a manner amounting to a public nuisance cannot be acquired so as to be a defense to an action by a private party, especially injured thereby, to enjoin the maintenance of such wrong.[63] On the other hand, where mine water, with the impurities it had absorbed from the earth and minerals in the mines, flowed or was pumped from them, and allowed to take its natural course, the owner of the mines was not liable for damages produced, because the flow of such water was the natural and necessary result of the development by the owner of his own property.[64]

Same—Interference with Percolating, Subterranean, and Artificial Waters.

It is not material, so far as to wrongs of befouling water is concerned, whether the damage is done to a defined water course, or water which has merely percolated.[65] Therefore, the pollution of a well

[62] Hauck v. Tidewater Pipe-Line Co., 153 Pa. St. 366–375, 26 Atl. 644, distinguishing Pennsylvania R. Co. v. Lippincott, 116 Pa. St. 472, 9 Atl. 871; Pennsylvania R. Co. v. Marchant, 119 Pa. St. 541, 559, 13 Atl. 690; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Robb v. Carnegie, 145 Pa. St. 324, 22 Atl. 649; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. 453. Et vide Kinnaird v. Standard Oil Co., 89 Ky. 468, 12 S. W. 937.

[63] Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149.

[64] Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. 453; Id., 102 Pa. St. 370, 86 Pa. St. 401, 94 Pa. St. 302. A discussion of this doctrine will be found in an able article by Mr. J. M. Gest, on the "Natural Use of Land," in the January and February numbers, 1894, of 1 Am. Law Reg. & Rev. pp. 1, 97. The doctrine of Pennsylvania Coal Co. v. Sanderson was repudiated by Young v. Bankier Distillery Co. [1893] App. Cas. 691. See March number, 1894, 1 Am. Law Reg. & Rev. 254. As to injury between owners of adjoining mines, see Smith v. Kenrick, 7 C. B. 515; Baird v. Williamson, 33 Law J. C. P. 101. A sanitarium may use water for bathing patients, and allow it, so polluted, to flow into a stream, and thus damage an adjoining owner, there being no negligence or malice. Barnard v. Shirley (June, 1893; Ind. Sup.) 34 N. E. 600.

[65] Womersley v. Church, 17 Law T. (N. S.) 190; Snow v. Whitehead, 27 Ch. Div. 588; Ballard v. Tomlinson, 54 Law J. Ch. 454. A fortiori, where a city's sewers pollute a stream going underground, through seams and fissures

is a nuisance.[66] But any person may appropriate the whole of water percolating through or under his land.[67] On the other hand, there is no liability on the part of the landowner[68] for merely intercepting the percolation of water into a well.[69] There is difference of opinion as to whether such appropriation is actionable if it be malicious.[70] No right to such percolating water can be acquired by prescription, because of the indefiniteness of the right and the inability of the servient owner to prevent the user by which the right is claimed to be acquired.[71] But where the water is subterra-

in the limestone bed of the stream, the owner of a farm whose waters are rendered unfit for use may recover damages. Good v. Altoona City, 162 Pa. St. 493, 29 Atl. 741.

[66] Beatrice Gas Co. v. Thomas, 41 Neb. 662, 59 N. W. 925. Compare Dillon v. Acme Oil Co., 49 Hun (N. Y.) 565, 2 N. Y. Supp. 289. The American authorities are not, however, in harmony on the point. As to waters polluted by a cemetery, compare City of Greencastle v. Hazelett, 23 Ind. 186; Ball v. Nye, 99 Mass. 582. The liability may arise from negligence. Collins v. Chartiers Val. Gas Co., 131 Pa. St. 143, 18 Atl. 1012; Id., 139 Pa. St. 111, 21 Atl. 147.

[67] New River Co. v. Johnson, 2 El. & El. 435; Wheatley v. Baugh, 25 Pa. St. 528 (a leading case); Dexter v. Riverside & O. Mills, 61 Hun, 619, 15 N. Y. Supp. 374; Ocean Grove v. Asbury Park, 40 N. J. Eq. 447, 3 Atl. 168; Alexander v. U. S., 25 Ct. Cl. 87; Roath v. Driscoll, 20 Conn. 533; Williams v. Ladew, 161 Pa. St. 283, 29 Atl. 54; Brain v. Marfell, 28 Wkly. Rep. 130; Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. 433; Buffum v. Harris, 5 R. I. 243; Chatfield v. Wilson, 18 Vt. 49; New Albany R. Co. v. Peterson, 14 Ind. 112; Frazier v. Brown, 12 Ohio St. 294; Swett v. Cutts, 50 N. H. 439; Chase v. Silverstone, 62 Me. 175; Taylor v. Fickas, 64 Ind. 167. But see, as to reasoning on other point, Bassett v. Salisbury Manuf'g Co., 43 N. H. 569.

[68] Trowbridge v. Brookline, 144 Mass. 139, 10 N. E. 796. Compare Hougan v. Milwaukee & St. P. Ry. Co., 35 Iowa, 558.

[69] Acton v. Blundell, 12 Mees. & W. 324.

[70] 30 Am. Law Reg. 237–251, comparing, as to this point, Greenleaf v. Francis, 18 Pick. (Mass.) 117; Wheatley v. Baugh, 25 Pa. St. 528; Haldeman v. Bruckhardt, 45 Pa. St. 514; Trustees v. Youmans, 50 Barb. 316; Chesley v. King, 74 Me. 164 (a leading case); Redman v. Forman, 83 Ky. 214; Chatfield v. Wilson, 28 Vt. 49; Phelps v. Nowlen, 72 N. Y. 39; and Chasemore v. Richards, 7 H. L. Cas. 349–357, 2 Hurl. & N. 168.

[71] Wrightman, J., in Chasemore v. Richards, supra; Dickinson v. Grand Junction Canal Co., 7 Exch. 282; Broadbent v. Ramsbotham, 11 Exch. 602; Lybe's Appeal, 106 Pa. St. 626; Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427; "The Law of Subterranean Waters," by Henry Budd, Esq., in 30 Am. Law Rev. 237 (and see references at page 264).

nean, but follows a defined course, it is subject to the law governing running streams or water courses, and not to the law of mere percolating waters.[72] It would seem that artificial water above ground has been generally regarded on the same basis with underground percolating water. A person from whose land such a water course flows, though he may have no right to have the flow continued, is entitled to sue, for a nuisance, any owner higher up the stream who pollutes it so as to deprive him of the beneficial enjoyment of the water while it continues to flow.[73] But an uninterrupted adverse use of water of an artificial aqueduct has been held to create a prescriptive right to its enjoyment.[74] Water rights may, however, be acquired and altered by agreement, express[75] or implied,[76] and by prescription.[77]

[72] Willis v. City of Perry (Iowa) 60 N. W. 727, and cases cited; Burroughs v. Saterlee, 67 Iowa, 396, 25 N. W. 808; Grand Junction Canal Co. v. Shugar, 6 Ch. App. 483. Et vide Mosier v. Caldwell, 7 Nev. 1002. Article in Current Comment in Legal Miscellany on "Subterranean Waters," March 1, 1801, May 18, 1890. The reason for the distinction is not clear. Clerk & L. Torts, 295. As to liability for befouling, see Woodward v. Aborn, 35 Me. 271; Stainton v. Woolrych, 23 Beav. 225; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Columbus Gas Light Co. v. Freeland, 12 Ohio St. 392; Ottawa Gas Light Co. v. Graham, 28 Ill. 73.

[73] Wood v. Wand, 3 Exch. 748, 779; Arkwright v. Gell, 5 Mees. & W. 203; Greatrex v. Hayward, 8 Exch. 291; Sampson v. Hoddinott, 1 C. B. (N. S.) 590; Trustee v. Dickinson, 9 Cush. (Mass.) 544; Curtiss v. Ayrault, 47 N. Y. 73; Nuttall v. Bracewell, L. R. 2 Exch. 1; Woodbury v. Short, 17 Vt. 387; Watkins v. Peck, 13 N. H. 360; Clerk & L. Torts, 296; Wood, Nuis. § 401; ante, p. 753, note 47. Et vide Powell v. Butler, 5 Ir. Com. Law, 309; Magor v. Chadwick, 11 Adol. & E. 584.

[74] Cole v. Bradbury, 86 Me. 380, 29 Atl. 1097.

[75] Horn v. Miller, 136 Pa. St. 640, 20 Atl. 706; Oneto v. Restano, 89 Cal. 63, 26 Pac. 788; Smith v. Chicago, M. & St. P. R. Co. (Wis.) 50 N. W. 497. Mill and water privilege, Smith v. Thayer (Mass.) 28 N. E. 1131; reservation of riparian rights, E. G. Blackslee Manuf'g Co. v. E. G. Blackslee's Sons Iron Works, 129 N. Y. 155, 29 N. E. 2.

[76] Where, however, an owner of two adjoining farms, on one of which a spring furnished water for stock conveyed to the other by pipes, defendant sold and conveyed the latter farm to plaintiff, such owner may not interfere with the supply of said spring. Paine v. Chandler, 134 N. Y. 385, 32 N. E. 18; Crooker v. Benton, 93 Cal. 365, 28 Pac. 953; Wood, Nuis. 473, note 1, collecting cases; ante, p. 753, note 47.

[77] Chauvet v. Hill, 93 Cal. 407, 28 Pac. 1066; Horn v. Miller, 142 Pa. St. 557, 21 Atl. 994; Ball v. Kehl, 95 Cal. 606, 30 Pac. 780; Attorney General v.

Same— Interference with Surface Water.

It is often, somewhat loosely, said that a landowner may deal with casual and intermittent surface waters on his own estate as he may choose, or that a landowner cannot collect surface water so as to cause it to flow on the land of an adjoining owner in a manner different from its natural flow.[78] It may be safely said that no right of action accrues for injury arising from the natural flow or drainage of water from the premises of one upon or through the premises of another.[80] But beyond this the limitations placed by law on the right to gather and divert the flow of surface water, or to exclude it, are not clear.

According to the civil law, the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one to discharge all waters falling or accumulating upon his land upon the land of the servient owner; and that such natural flow or passage of water cannot be interrupted or prevented by the servient owner to the detriment or injury of the estate of the dominant or any other proprietor.[81] This rule of the civil law has never been accepted by common-law countries. By the common law, there is no right jure naturæ in the flow of surface water. Neither its detention, diversion, nor repulsion is actionable, though damages ensue.[82] This common-law rule is of a very recent origin.[83]

Revere Copper Co., 152 Mass. 444, 25 N. E. 605; Riverside Water Co. v. Gage, 89 Cal. 410, 26 Pac. 889. Compare Last Chance Water Ditch Co. v. Heilbron, 86 Cal. 1, 26 Pac. 523; Hindman v. Rizor, 21 Or. 112, 27 Pac. 13. As to alteration of servitude, see Allen v. San Jose Land & Water Co., 92 Cal. 138, 28 Pac. 215.

[78] Ball, Torts, 43. The term "surface water" includes such water as is carried off by drainage independently of a water course. Bunderson v. Burlington & M. R. Co. (Neb.) 61 N. W. 721. Cf. Rigney v. Tacoma Light & Water Co., 9 Wash. 576, 38 Pac. 147.

[80] Livezey v. Schmidt (Ky.) 29 S. W. 25.

[81] 3 Wait, Act. & Def. 711, § 15, and cases cited; Domat, Civ. Law (Cush. Ed.) p. 616, § 1583; Minor v. Wright, 16 La. Ann. 151. Cases referring to the civil law will be found collected by counsel for appellant in Barkley v. Wilcox, 86 N. Y. 140, 141.

[82] Bowlsby v. Speer, 31 N. J. Law, 351; Gannon v. Hargadon, 10 Allen, 109; Chatfield v. Wilson, 28 Vt. 49; Dickinson v. Worcester, 7 Allen, 19; Greeley v. Maine Cent. R. Co., 53 Me. 200; Swett v. Cutts, 50 N. H. 439;

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[83] Bowlsby v. Speer, 31 N. J. Law, 351.

Rawston v. Taylor [84] appears to be the first English case on the subject.[85] In Barkley v. Wilcox (1881),[86] a leading case on the subject,[87] it is said that the question as to the right of the owner of lower tenement to obstruct the flow of surface water to the injury of the owner above had not at that time been authoritatively decided in New York. The rule is sometimes called the "Massachusetts rule." [88] There would seem, however, to be uncertainty as to what the common-law rule is. The ordinary rule is that the upper proprietor is not bound to permit water to flow onto the lower estate.[89] The courts are by no means agreed [90] as to how far the upper tenant may collect and concentrate surface waters, and pour them, as by means of an artificial ditch, upon the adjacent proprietor in an unusual quantity. Ordinarily, this right is denied,[91] unless a

Broadbent v. Ramsbotham, 11 Exch. 602; Rawston v. Taylor, Id. 369; Greatrex v. Hayward, 8 Exch. 291.

[84] 11 Exch. 369 (1885).

[85] 21 Lawy. Rep. Ann. 593, containing an exceptionally valuable note by Henry P. Farnham.

[86] 86 N. Y. 140.

[87] Drake v. Chicago, R. I. & P. Ry. Co., 63 Iowa, 305, 19 N. W. 215; Kansas City & E. R. Co. v. Riley, 33 Kan. 374–377, 6 Pac. 581; Jackman v. Arlington Mills, 137 Mass. 277–284; Boyd v. Conklin, 54 Mich. 583–589, 20 N. W. 595; Crawford v. Rambo, 44 Ohio St. 279–284, 7 N. E. 429.

[88] Boyd v. Conklin, 54 Mich. 583, 20 N. W. 595.

[89] Frazier v. Brown, 12 Ohio St. 294; Livingston v. McDonald, 21 Iowa, 160; Gibbs v. Williams, 25 Kan. 214.

[90] Disagreements generally, in the application of the common-law rule as to surface waters, arise from the natural inconsistency of the maxims, "Sic utere tuo ut alienum non lædas," and "Cujus est solum ejus est usque ad cœlum." Shane v. Kansas City, St. J. & C. B. Ry. Co., 71 Mo. 237.

[91] Hurdman v. Northeastern Ry., 3 C. P Div. 168; Broder v. Saillard, 2 Ch. Div. 692; Reynolds v. Clarke, 2 Ld. Raym. 1399; Jenkins v. Wilmington & W. R. Co., 110 N. C. 438, 15 S. E. 193; Smith v. Faxon, 156 Mass. 589, 31 N. E. 687. Defendant's land, a part of which was swamp, adjoined plaintiff's. Defendant dug a ditch, which drained the water from the swamp onto the land of plaintiff, rendering it unproductive. Held, in an action for damages, that the fact that the digging of the ditch was good husbandry and improved defendant's land was no defense. Yerex v. Elneder, 86 Mich. 24, 48 N. W. 875; Williamson v. Oleson (Iowa) 59 N. W. 267. Discussion by Clark, J., and Merriman, J., in Gregory v. Bush, 64 Mich. 37, 31 N. W. 90; Davis v. Sullivan, 36 Neb. 69, 53 N. W. 1025; Kansas City, Ft. S. & M. R. Co. v. Cook, 57 Ark. 387, 21 S. W. 1066; Illinois Cent. R. Co. v. Miller, 68 Miss. 760, 10

prescriptive right has been acquired.[92] It has, however, been recognized.[93] When the improvement of land for ordinary purposes without negligence accumulates surface waters, and causes them to flow upon the land of another, there is no liability.[94] On the other hand, the landowner may appropriate surface water flowing over his land in no definite channel, although it is thereby prevented from reaching a water course which it previously supplied.[95]

The old common-law rule, that surface water is a common enemy, is materially modified by a recognition of the vague principle, "Sic

South. 61; Larkins v. Lamping, 44 Ill. App. 649; Drew v. Cole (Cal.) 32 Pac. 229; Lambert v. Alcorn, 144 Ill. 313, 33 N. E. 53, 55; Schnitzius v. Bailey, 48 N. J. Eq. 409, 22 Atl. 732. But culverts or ditches must be connected as the cause of the wrong. Felt v. Vicksburg, S. & P. R. Co., 46 La. Ann. 549, 15 South. 177; Kelley v. Dunning, 39 N. J. Eq. 482; Rhoads v. Davidheiser, 133 Pa. St. 226, 19 Atl. 400. Cf. Meixell v. Morgan, 149 Pa. St. 415, 24 Atl 216; Lattimore v. Davis, 14 La. 161; Hughes v. Anderson, 68 Ala. 280; Beach v. Gaylord, 43 Minn. 476, 45 N. W. 1095; Conner v. Woodfill, 126 Ind. 85, 25 N. E. 876; Rathke v. Gardner, 134 Mass. 14.

[92] Chapel v. Smith, 80 Mich. 100, 45 N. W. 69; Osten v. Jerome, 93 Mich. 196, 53 N. W. 7; Eshleman v. Martic Tp., 152 Pa. St. 68, 25 Atl. 178; Bunderson v. Railroad Co., 43 Neb. 545, 61 N. W. 721.

[93] Lambert v. Alcorn, 144 Ill. 313, 33 N. E. 53. (This case is perhaps the most radical in support of right to rid one's lands of surface water which has yet been decided.) Note to Lambert v. Alcorn (Ill.) 21 Lawy. Rep. Ann. 611. Cf. with Gray v. McWilliams (Cal.) 21 Lawy. Rep. Ann. 593, 32 Pac. 976; Paddock v. Somes, 102 Mo. 226, 14 S. W. 746; Wharton v. Stevens (Iowa) 50 N. W. 562; Johnson v. Railway Co., 80 Wis. 641, 50 N. W. 771; Jones v. Wabash Ry., 18 Mo. App. 251.

[94] Brown v. Winona & S. W. Ry. Co., 53 Minn. 259, 55 N. W. 123. Thus, an erection of a building on one's premises, diverting surface water and causing it to flow on the land of an adjoining owner, is not an actionable wrong. Bowlsby v. Speer, 31 N. J. Law, 351. May change course, Johnson v. Chicago, St. P., M. & O. Ry. Co., 80 Wis. 641, 50 N. W. 771. Increase flow by underground drains, Meixell v. Morgan, 149 Pa. St. 415, 24 Atl 216.

[95] In Broadbent v. Ramsbotham, 11 Exch. 602, it was held that where the plaintiff's mill, for more than 50 years, has been worked by the stream of a brook which was supplied by the water of a pond filled by rain, a shallow well supplied by subterraneous water, a swamp, and a well formed by a stream springing out of the side of a hill, the waters of all which occasionally overflowed and ran down the defendant's land in no definite channel into the brook, the plaintiff had no right, as against the defendant, to the natural flow

utere tuo, ut alienum non lædas."[96] The law allows the "reasonable use"[97] of one's own land, and all this involves. More specifically, in this, as in other questions of nuisance, courts are governed by considerations of expediency. The comparative injury produced or relieved in many cases will determine.[98] Thus one draining his land may deposit the surface water in a natural drain, though it is thereby conveyed on a neighbor's land, if it does not unreasonably injure the latter; and such drainage which reclaims twenty acres of agricultural land, and causes only an acre or two of his neighbor's land to be submerged for a time in the spring of the year, is not unreasonable.[99] The law as to surface waters applies alike to private individuals, private corporations, like railroad companies,[100] and municipal corporations.[101] Ordinarily, corporate character confers no immunity not extended to a private individual.

of any of the waters. Gibbs v. Williams, 25 Kan. 214; Bangor v. Lansil, 51 Me. 521; Parks v. Newburyport, 10 Gray, 28; Waffle v. New York Cent. Ry., 58 Barb. 413; Goodale v. Tuttle, 29 N. Y. 459.

[96] Ante, c. 1. And see article on "Right of Action Arising Against a Neighbor from Nuisance Committed on One's Land," 58 J. P. 745.

[97] Ante, c. 1; John M. Gest, in 1 Am. Law Reg. & Rev. 1; Ray, Neg. 301. One who negligently allows filth and surface water to accumulate on his land, and percolate through the soil onto adjacent land, is liable for the injuries therefrom. Anheuser-Busch Brewing Ass'n v. Peterson, 41 Neb. 897, 60 N. W. 373. And see Pfeiffer v. Brown, 165 Pa. St. 267, 30 Atl. 844.

[98] Hughes v. Anderson, 68 Ala. 280.

[99] Canty, J., in Sheehan v. Flynn (Minn.) 61 N. W. 462.

[100] Booth v. Railroad Co., 140 N. Y. 267, 35 N. E. 592; Whalley v. Lancashire Ry., 13 Q. B. Div. 131; Staton v. Norfolk & C. R. Co., 109 N. C. 337, 13 S. E. 933; Wead v. St. Johnsbury & L. C. R. Co., 64 Vt. 52, 24 Atl. 361; Gulf C. & S. F. Ry. Co. v. Donahoo, 59 Tex. 128; Galveston, H. & S. A. Ry. Co. v. Tait, 63 Tex. 223; Gilbert v. Savannah, G. & N. A. Ry. Co., 69 Ga. 396; Indianapolis, B. & W. Ry. Co. v. Smith, 52 Ind. 428; Hogenson v. St. Paul, M. & M. Ry. Co., 31 Minn. 224, 17 N. W. 374; Curtis v. Eastern Ry., 98 Mass. 428.

[101] Municipal corporations, in raising grade of street and interfering with natural drainage, have been held liable for failure to provide a sufficient escape of the water dammed up. Ross v. Clinton, 46 Iowa, 606. Cf. Town of Martinsville v. Shirley, 84 Ind. 546. But a city is not bound to provide against extraordinary storms. Allen v. City of Chippewa Falls, 52 Wis. 430, 9 N. W. 284. Ordinarily, it is not responsible for effect on surface water by changing

Same—Nuisance on Highways.

There is no particular form or ceremony necessary to the dedication of land to public use. All that is required is the consent of the owner of the land, and the fact of its being used for public purposes intended by the appropriation.[102] This principle is applied to a public highway.[103] Highways may also be acquired by prescription.[104] Almost universally statutory methods are provided for the acquisition of highways.[105]

Interference with the right of free and safe passage over a public highway has been regarded from the point of view of trespass,[106] and of negligence.[107] The obstruction or use of a street, so as to unreasonably impede travel, and render its use inconvenient or dan-

grade of street, Wakefield v. Newell, 12 R. I. 75; Alden v. City of Minneapolis, 24 Minn. 254; Lynch v. Mayor, 76 N. Y. 60; Murphey v. Mayor, etc., of Wilmington, 5 Del. 530; Stewart v. City of Clinton, 79 Mo. 603; but, no more than an individual, cannot precipitate surface water on adjoining property, in unnatural quantity, by ditches or drains, Smith v. City Council of Alexandria, 33 Grat. 208; O'Brien v. City of St. Paul, 25 Minn. 333; Gillison v. City of Charleston, 16 W. Va. 282; Inhabitants of West Orange v. Field, 37 N. J. Eq. 600; Noonan v. City of Albany, 79 N. Y. 470; City of North Vernon v. Voegler, 89 Ind. 77. And, generally, see Inhabitants of Township of Hamilton v. Wainwright (N. J. Ch.) 29 Atl. 200; Rhodes v. City of Cleveland, 10 Ohio, 139; Pennoyer v. City of Saginaw, 8 Mich. 534; New York Cent. & H. R. R. Co. v. City of Rochester, 127 N. Y. 591, 28 N. E. 416; Aurora v. Love, 93 Ill. 521; Arn v. City of Kansas, 14 Fed. 236; Kobs v. City of Minneapolis, 22 Minn. 150; Young v. Commissioners, 134 Ill. 569, 25 N. E. 689. Commissioners of highway are personally liable. Tearney v. Smith, 86 Ill. 391.

[102] President, etc., of City of Cincinnati v. White, 6 Pet. 431. And see Morgan v. Railroad Co., 96 U. S. 716; Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243; Godfrey v. City of Alton, 12 Ill. 29; Columbus v. Dahn, 36 Ind. 330; Holdane v. Trustees of Cold Spring, 21 N. Y. 474.

[103] State v. Trask, 6 Vt. 355; Noyes v. Ward, 19 Conn. 250; 3 Kent, Comm. 432.

[104] Com. v. Cole, 26 Pa. St. 187. A way of necessity is an accessorial servitude, founded on the principle that a man shall not derogate from his own grant. "If A. has an acre of ground surrounded by the ground of B., A., for necessity, has a way over a convenient part of B.'s ground to his own soil, as a necessary incident to his ground." Staple v. Heydon, 6 Mod. 1-4.

[105] Wood, Nuis. § 233.

[106] Ante, p. 745.

[107] Excavations making a sidewalk or highway unsafe attach liability for negligence. Smith v. Ryan (City Ct. Brook.) 8 N. Y. Supp. 853; Galvin v.

gerous to travelers, may become a public nuisance.[108] The appropriation of a street by an individual, to be an actionable nuisance, need not be exclusive. It is sufficient if it renders the free passage less commodious.[109] Thus, in Barber v. Penley,[110] a person who, by carrying on a theater, caused a crowd to assemble and obstruct the highway, thereby creating a nuisance to private adjoining owners, is answerable for the obstruction, if it be the necessary result of his acts, even though it be not his actual object. There is no difference of principle in this respect between entertainments carried on out of doors or inside of a building. On the other hand, however, sliding in a street, accompanied by boisterous conduct, even if it be contrary to city ordinance, and cause a person's horse to run away, is not a nuisance.[111] A nuisance may be actionable if it detract from the safety of travelers,[112] whether from something suspended in the air,[113] on the surface,[114] or from an excavation.[115] The safety of the traveler has reference to the ordinary means of locomotion. Therefore, things calculated to frighten horses may

Mayor, 112 N. Y. 223, 19 N. E. 675; Brezee v. Powers, 80 Mich. 172, 45 N. W. 130; Kelly v. Bennett, 132 Pa. St. 218, 19 Atl. 69; ante, p. 176, "Municipal Corporations"; post, p. 771, note 154.

[108] Holmes v. Corthell, 80 Me. 31, 12 Atl. 730.

[109] Hart v. Mayor, 24 Am. Dec. 165; Norristown v. Moyer, 67 Pa. St. 355; State v. Mayor, 30 Am. Dec. 564.

[110] [1893] 3 Ch. 489.

[111] Jackson v. Castle, 80 Me. 119, 13 Atl. 49; Id., 82 Me. 579, 20 Atl. 237.

[112] Dygert v. Schenck, 35 Am. Dec. 575.

[113] As an awning, McConnell v. Bostelmann, 72 Hun, 238, 25 N. Y. Supp. 390; a roof, Garland v. Towne, 55 N. H. 55 (cf. Mellen v. Morrill, 126 Mass. 545); a cornice, Grove v. Ft. Wayne, 45 Ind. 429; a bow-window, Jenks v. Williams, 115 Mass. 217.

[114] A cellar door, Daniels v. Potter, 4 Car. & P. 262; Proctor v. Harris, Id. 337; a gate, James v. Hayward, Cro. Car. 184; a fence, Neff v. Paddock, 26 Wis. 546; a building, Houston & G. N. R. Co. v. Parker, 50 Tex. 330; Stetson v. Faxon, 19 Pick. 147. An unguarded opening, four feet and nine inches in width, in a pavement, and extending from the building line into the street five feet and six inches, if located in a frequented street, is a public nuisance, and neither lapse of time, nor the existence of like nuisances elsewhere with the consent of the municipality, will legalize it. King v. Thompson, 87 Pa. St. 365, distinguishing McNerney v. Reading City, 150 Pa. St. 611, 25 Atl. 57.

[115] Cellar opening unguarded, Coupland v. Hardingham, 3 Camp. 389; coal

be actionable nuisances.[116] It would seem that no liability exists for injuries caused by a nuisance outside the limits of a highway.[117] But, to enable a private person to sustain the action, he must show special injury. The public may institute proceedings for the abatement or prevention of such a nuisance, irrespective of the question of pecuniary damage, by the speediest and most effectual remedy.[118]

Interference with Health, Comfort, and Convenience.

It is not essential, however, to constitute a nuisance, that the injury should be to property.[119] The early conception of nuisance as appears in Blackstone's definition and by the early forms of remedy provided by law, was an injury to lands, tenements, and hereditaments. And, in some cases, only property owners can at the present time sue for nuisance.[120] The scope of nuisance has, however,

hole, Clifford v. Dam, 44 N. Y. Super. Ct. 391; Hadley v. Taylor, L. R. 1 C. P. 53; Hobbit v. London & N. W. Ry. Co., 4 Exch. 254. Et vide Barnes v. Ward, 9 C. B. 392; post, p. 919, "Negligence"; post, 799, "Personal Interference."

[116] A hollow, burnt, and blackened log within the limits of the highway, Foshay v. Town of Glen Haven, 25 Wis. 288; a derrick, Jones v. Housatonic R. Co., 107 Mass. 261; a tent, Ayer v. City of Norwich, 12 Am. Rep. 396; drumming near highway, Loubz v. Hafner, 1 Dev. (N. C.) 185; water wheel, House v. Metcalf, 27 Conn. 631; sled with tub, Judd v. Fargo, 107 Mass. 264; traction engine, McComber v. Nichols, 22 Am. Rep. 522; post, p. 919, "Negligence."

[117] Wood, Nuis. §§ 322–328; Irvine v. Wood, 51 N. Y. 224. Cf. Drake v. Lowell, 13 Metc. (Mass.) 292, with Congreve v. Smith, 18 N. Y. 79, Hixon v. Lowell, 13 Gray, 59, Congreve v. Morgan, 18 N. Y. 84, and Hewison v. New Haven, 34 Conn. 136. And see Morse v. Town of Richmond, 41 Vt. 435. Cases of this kind, however, often turn, not so much upon the nature of a nuisance, as the responsibility of an owner to abutting property, or of a city for damage. Post, p. 919, "Negligence"; post, p. 799, "Personal Interference."

[118] Smith v. McDowell, 148 Ill. 51, 35 N E. 141.

[119] This distinction has already been referred to in St. Helens Smelting Co. v. Tipping, ante, p. 748, note 20. Mr. Bigelow says it is impossible to say just what this distinction is to be. The meaning appears to be that the degree of harm in an action for personal discomfort must be greater than in an action for injury to property. Bigelow, Lead. Cas. 467; in same language, Ball, Lead. Cas. Torts, 409.

[120] This right to complain of pollution of a stream may be confined to riparian owners (Conrad v. Arrowhead Hot Springs Hotel Co., 103 Cal. 399, 37 Pac. 386; Chance v. Warsaw Water Works [Sup.] 29 N. Y. Supp. 729); and damage by nuisance to an alley can be recovered only by owner or oc-

been widened so far as to clearly include such use of property or conduct of person as renders the enjoyment of life uncomfortable, or is indecent and offensive to the senses. Thus, noise [121] may be so continuous and excessive, or vapors or noxious smells [122] render the enjoyment of life and property so uncomfortable, as to be a nuisance. A fortiori, the maintenance of anything injurious to health [123] may be a nuisance. It usually occurs that such interference with personal comfort or such personal offense is coincident with damage to property.[124] But the word "nuisance" is said to be applied by the English law indiscriminately to infringement of property and personal rights.[125] It seems, however, that mental discomfort and injury which are not of temporal, but of spiritual, character, are not nuisances; as that resulting from running street cars on Sunday.[126]

cupier of land to which the alley is appurtenant (Commissioners of Kensington v. Wood, 49 Am. Dec. 582).

[121] Brill v. Flagler, 23 Wend. (N. Y.) 354; Elliotson v. Feetham, 2 Bing. N. C. 134; Street v. Tugwell, 2 Selw. N. P. 1138; Carrington v. Taylor, 11 East, 571; Keeble v. Hickeringill, Id. 574; Rex v. Smith, 2 Strange, 704; Fish v. Dodge, 4 Denio (N. Y.) 311; Dennis v. Eckhardt, 3 Grant, Cas. (Pa.) 390; King v. Lloyd, 4 Esp. 200; Campbell v. Seaman, 63 N. Y. 568; Pickard v. Collins, 23 Barb. 444; Catlin v. Valentine, 9 Paige, 575; Walter v. Selfe, 4 De Gex & S. 315–323.

[122] Bohan v. Port Jervis Gas-Light Co., 122 N. Y. 18, 25 N. E. 246.

[123] A hospital in residential locality, Gilford v. Babies' Hospital (Sup.) 1 N. Y. Supp. 448. A cemetery, Jung v. Neraz, 71 Tex. 396, 9 S. W. 344 (cases collected at page 397, 71 Tex., and page 344, 9 S. W.).

[124] This kind of nuisance is most commonly spoken of by the technical name. Webb, Pol. Torts, 494.

[125] Moak, Underh. Torts, p. 229, side p. 125, citing Add. 155. In this treatise nuisance is discussed under chapter 5, "Of Bodily Injury Caused by Nuisance," and chapter 9, "Of Private Nuisance Affecting Realty." Cases on convenience and enjoyment will be found collected, also, in Webb, Pol. Torts, p. 494. In Johnson v. Porter, 42 Conn. 234, it was held that offensive odors preventing comfortable use of a house do not entitle to recover for diminished value of house. Comminge v. Stevenson, 76 Tex. 642, 13 S. W. 556.

[126] Sparhawk v. Union Passenger R. Co., 54 Pa. St. 401 (opinion of Strong, J., at nisi prius, page 404); First Baptist Church v. Schenectady & T. R. Co., 5 Barb. 79; State v. Linkhaw, 69 N. C. 214; Com. v. Wolf, 3 Serg. & R. 49. Contra, see authorities collected in Sparhawk v. Union Passenger R. Co., 54 Pa. St. 419.

THE ANNOYANCE OR INTERFERENCE.

234. The annoyance or interference constituting a nuisance may arise from either or both—

(a) The use, management, custody, or control of property; or

(b) Personal conduct.

Use of Property.

Nuisance is ordinarily spoken of as a wrong arising where a person uses his own property so as to injure another's.[127] Many nuisances arise from the use of lands, as between adjoining owners with respect to water rights, structures on the land, and generally with respect to the use of the land.[128] So, where premises become dangerous, or are made dangerous, for example, by spring guns and traps, a nuisance may arise,[129] or where offensive agencies, like privies and cesspools, are allowed to exist to the annoyance of a neighborhood, or the pollution of waters;[130] or where a useful element is improperly turned aside.[131]

A nuisance may arise from the ownership or control of personal property, as of dangerous animals;[132] also from the custody or use

[127] Norcross v. Thoms, 51 Me. 503.

[128] Ante, p. 233, "Injury to Property."

[129] Murray v. McShane, 52 Md. 217; Harvey v. De Woody, 18 Ark. 252; Wood, Nuis. § 132. And see, as to spring guns as public nuisance, State v. Moore, 83 Am. Dec. 159.

[130] Jones v. Powell, Hut. 135; Norton v. Scholefield, 9 Mees. & W. 665; Haugh's Appeal, 102 Pa. St. 42; Wahle v. Reinbach, 76 Ill. 322. Cf. Ball v. Nye, 99 Mass. 582, with Middlesex Co. v. McCue, 149 Mass. 103, 21 N. E. 230, and Allen v. Boston, 159 Mass. 324, 34 N. E. 519. State v. Moore, 31 Conn. 479; Ilott v. Wilkes, 3 Barn. & Ald. 304; Dean v. Clayton, 7 Taunt. 489; Bird v. Holbrook, 4 Bing. 628; Jay v. Whitefield, cited in 3 Barn. & Ald. 308; Jordin v. Crump, 8 Mees. & W. 782–787.

[131] Parke v. Kilham, 68 Am. Dec. 310.

[132] Cox v. Burbidge, 9 Jur. (N. S.) 970. "Recent Developments in English Jurisprudence," 4 Am. Law Reg. (N. S.) 1, 129, by Judge Redfield. A diseased animal, Mills v. New York & H. R. Co., 2 Rob. (N. Y.) 326; a savage dog, Nehr v. State, 35 Neb. 638, 53 N. W. 589; a horse unlawfully at large (Baldwin v. Ensign, 44 Am. Rep. 205), whether vicious or not.

of explosives,[133] or of fire [134] or water.[135] In the conduct of business, and especially where vapors [136] or smoke [137] or stenches [138] or dust [139] or noises [140] or jarring, or other similar annoyances arise, actions for nuisance are constantly sustained.[141] The old familiar principles of nuisance are changed, adapted, and extended to meet the emergencies of modern civilization. This is conspicuously true with respect to the commercial uses of electricity.[142] It seems to be

[133] Post, p. 816, "Care." Shooting a gas well is prima facie a nuisance. Tyner v. People's Gas Co., 131 Ind. 408, 31 N. E. 61. Blasting, Morgan v. Bowes, 62 Hun, 623, 17 N. Y. Supp. 22; may be restrained, Rogers v. Hanfield, 14 Daly, 339. Powder magazine a nuisance, Comminge v. Stevenson, 76 Tex. 642, 13 S. W. 556.

[134] Add. Torts, 370–373; Vary v. Thomson, 13 Fac. Col. 491; League v. Journeay, 25 Tex. 172; Burroughs v. Housatonic Ry., 15 Conn. 124; Galpin v. Railroad Co., 19 Wis. 637; Vaughan v. Menlove, 32 E. C. L. 740; Tubervil v. Stamp, 1 Salk, 13; Cuff v. Railroad Co., 35 N. J. Law, 17; Wood, Nuis. §§ 147–149.

[135] Rylands v. Fletcher, L. R. 3 H. L. 330.

[136] Ric. de D. v. Richards, 4 Ass. p. 3, fol. 3; Rex v. Wilcox, 2 Salk, 458; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735; Campbell v. Seaman, 63 N. Y. 568; Huckenstine's Appeal, 70 Pa. St. 102; Crossley v. Lightowler, L. R. 3 Eq. 279; Fogarty v. Junction City Pressed Brick Co., 50 Kan. 478, 31 Pac. 1052; Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. 1000.

[137] Walter v. Selfe, 4 Eng. Law & Eq. 15; Catlin v. Valentine, 9 Paige (N. Y.) 575; Smith v. McConathy, 11 Mo. 331. See Rhodes v. Dunbar, 57 Pa. St. 274; Cartwright v. Gray, 12 Grant, Ch. (U. C.) 399, 400.

[138] As from a pig sty: Aldred's Case, 9 Coke, 58a. Tannery: Francis v. Schoellkopf, 53 N. Y. 152; Pennoyer v. Allen, 56 Wis. 502, 14 N. W. 609; Bliss v. Hall, 4 Bing. N. C. 183. Slaughterhouse: Cf. Ballentine v. Webb, 84 Mich. 38, 47 N. W. 485, with Bishop v. Banks, 33 Conn. 118–121, and Pruner v. Pendleton, 75 Va. 516. Fertilizing factories: Tuttle v. Church, 53 Fed. 422. Cf. Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, with Fertilizing Co. v. Hyde Park, 97 U. S. 659; Meigs v. Lister, 23 N. J. Eq. 199; Appeal of Czarniecki (Pa. Sup.) 11 Atl. 660.

[139] Hutchins v. Smith, 63 Barb. 251; Cooper v. Randall, 53 Ill. 24; Cooper v. North British R. Co., 36 Jur. 169, 2 Macph. 117.

[140] Shepard v. Hill, 151 Mass. 540, 24 N. E. 1025; Dennis v. Eckhardt, 3 Grant, Cas. (Pa.) 390; Bishop v. Banks, 33 Conn. 118–121; State v. Haines, 30 Me. 65.

[141] Demarest v. Keefe, 34 N. J. Eq. 469.

[142] As in Chandler Electric Co. v. Fuller, 21 Can. Sup. Ct. 337. Telegraph

settled, both in England and America, that electrical interference is a statutory nuisance, for which there is no remedy at common law.[143]

Personal Conduct.

A nuisance may be committed by personal conduct without involving property. Thus, indecent exposure in a public place, in the presence of several persons.[144] So, singing a ribald song,[145] swearing, using indecent language in a public place, or uttering loud cries in a public street, may constitute a nuisance.[146] Eavesdropping was, at an early date, regarded as a nuisance,[147] but this "barbarism" (?) has vanished.[148] Personal conduct often combines with use of property to constitute nuisance; as where public drinking saloons[149] or inns[150] are the scenes of noisy carousals by night and by day. So the indecent and boisterous behavior of inmates and visitors of a house of ill fame, although constituting a public nuisance, may also be the basis of recovery of damages and the issuance of an injunction on behalf of private individuals whose property is thereby injured.[151] And so, generally, any business or

poles in street, a nuisance: Barber v. Railway Co., 83 Mich. 299, 47 N. W. 219; Reg. v. United Kingdom Electric Tel. Co., 31 Law J. M. C. 166, 10 Wkly. Rep. 538. As to liability of municipal corporation for allowing telephone poles to be erected in its streets, see Thomp. Electr. § 29. As to power to remove electrical poles, see, Id. § 31.

[143] Hudson River Tel. Co. v. Watervliet Turnpike & R. Co. (N. Y. App.) 32 N. E. 148. And see "Electric Railroads on Public Highways," 2 Am. Law Reg. & Rev. 38.

[144] Boom v. Utica, 2 Barb. 104. Cf. State v. Rose, 32 Mo. 560; Reg. v. Elliott, Leigh & C. 103; State v. Millard, 18 Vt. 574; Rex v. Gallard, 1 W. Kel. 163.

[145] State v. Toole, 106 N. C. 736, 11 S. E. 168.

[146] Wood, Nuis. 75; Com. v. Harris, 101 Mass. 29; Com. v. Oaks, 113 Mass. 8; Com. v. Spratt, 14 Phila. 365; State v. Graham, 3 Sneed (Tenn.) 71; State v. Powell, 70 N. C. 67.

[147] Wood, Nuis. § 55.

[148] Wood, Nuis. § 56. Cf. 1 Bish. Cr. Law, 1124.

[149] State v. Bertheol, 6 Blackf. 474; State v. Buckley, 5 Har. (Del.) 508. As to skating rink erected within a few yards of a dwelling house, Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241.

[150] Hawk. P. C. c. 78, § 182; 3 Bac. Abr. Tit. "Inns."

[151] Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514.

act calling together disorderly crowds in public places is an actionable nuisance.[152]

235. The interference with legal rights, which constitutes a nuisance, does not depend, ordinarily, upon either—

(1) The care exercised by the wrongdoer; or

(2) His motive.

Care Immaterial.

Want of care is not an element of nuisance. "Whoever does an unlawful act in placing in jeopardy the lives or property of others does so at his peril, and if injury results to others as a consequence of such unlawful act, he must respond in damages. The rule is well nigh, if not entirely, universal, that men must so use their own property, and so exercise their own privileges, that they do not thereby destroy or imperil the rights of others; and this is so, even in the exercise of rights not prohibited by law, and in the exercise of trades and business not nuisances per se." It is therefore held that a person who placed a powder magazine in dangerous proximity to another's dwelling is liable for damages resulting from its explosion without his direct negligence.[153] In general, no exercise of care is a defense to the maintenance of a nuisance.[154] In legalized nuisance, however, the question of negligence may be ma-

[152] Wood, Nuis. § 48.

[153] Chicago, W. & V. Coal Co. v. Glass, 34 Ill. App. 364. Et vide Laflin & R. Powder Co. v. Tearney, 131 Ill. 322, 23 N. E. 389; Heeg v. Licht, 80 N. Y. 579; Cheatham v. Shearon, 1 Swan, 213.

[154] Frost v. Berkeley Phosphate Co. (S. C.) 20 S. E. 280, and cases cited; Tarry v. Ashton, 1 Q. B. Div. 314. As to pollution of a well by habitual discharge of filth, to defendant's knowledge, Ball v. Nye, 97 Am. Dec. 56; Kinnaird v. Standard Oil Co., 89 Ky. 468, 12 S. W. 937; Haugh's Appeal, 48 Am. Rep. 193; Hauck v. Pipe-Line Co., 153 Pa. St. 366, 26 Atl. 644; Moses v. State, 58 Ind. 185. Compare Ball v. Nye, 99 Mass. 582; Hodgkinson v. Ennor, 4 Best & S. 229. And, generally, see Fletcher v. Rylands, L. R. 1 Exch. 265; Cahill v. Eastman, 18 Minn. 324 (Gil. 292); McAndrews v. Collerd, 42 N. J. Law, 189; post, p. 788, "Legalized Nuisance." In Dygert v. Schenck, 23 Wend. 446, 447, Cowen, J., held that: "Any act of an individual done to a highway, if it be detracted from the safety of travelers, is a nuisance. * * * Special damages arising from it, therefore, furnish ground for pri-

terial with respect to liability.[155] But if the powers conferred by the legislature are conceded, the liability is independent of negligence, and rests upon the theory of nuisance.[156]

Motive Immaterial.

It is ordinarily said that the intent or motive is immaterial to the determination of the question of whether a given case constitutes or does not constitute a nuisance.[157] This, however, is not safe as a universal proposition. Where a high fence serving no useful or needful purpose is built and maintained out of pure spite and malice, a nuisance is created. "A wanton infliction of damage can never be right. It is a wrong, and a violation of right, and is not without remedy. What right has the defendant, in the light of just and beneficent principles of equity, to shut out God's free air and

vate action, without regard to the question of negligence" in defendant. Congreve v. Smith, 18 N. Y. 79. Et vide Babbage v. Powers, 130 N. Y. 281, 29 N. E. 132; Adams v. Fletcher, 17 R. I. 137, 20 Atl. 263. Obstruction of a highway by the operation and management of a train is a nuisance, irrespective of negligence. Lamming v. Galusha, 135 N. Y. 239, 31 N. E. 1024.

[155] Weld v. Gas-Light Co., 1 Starkie, 189. Thus, where one uses his land in the manufacture of fertilizers, and so, necessarily, in the manufacture of sulphuric acid, in the process of which noxious gases escape, by reason of which injury to his neighbors will either necessarily or probably ensue, he is liable, if such injury does result, even though he may have been reasonably careful. Frost v. Berkeley Phosphate Co. (S. C.) 20 S. E. 280.

[156] Hay v. Cohoes Co., 2 N. Y. 159; Tremain v. Cohoes Co., 2 N. Y. 163; Phinizy v. City Council of Augusta, 47 Ga. 263. In an action against a municipal corporation, however, liability under such circumstances seems to depend on negligence. Lincoln v. City of Detroit, 101 Mich. 245, 59 N. W. 617; 2 Thomp. Neg. 761; ante, p. 175, "Municipal Corporations." And see Boston Belting Co. v. City of Boston, 149 Mass. 44, 20 N. E. 320.

[157] Aldred's Case, 9 Coke, 57a. The owner of land may erect cheap, movable tenement houses to the line of an adjacent owner, and fill them with colored tenants, to punish such owner for refusal to sell. Falloon v. Schilling, 44 Am. Rep. 642. South Royalton Bank v. Suffolk Bank, 27 Vt. 505, in which it was held that motive was immaterial in obstruction of water. So in Brady v. Detroit Steel & Spring Co. (Mich.) 60 N. W. 687, damage from escape of pernicious gas may be recovered, irrespective of intention. Bonnell v. Smith, 53 Iowa, 282, 5 N. W. 128; Ashby v. White, 1 Smith, Lead. Cas. 472, and note; Wood, Nuis. § 6 (but compare sections 141, 818); 16 Am. & Eng. Enc. Law, 930, collecting cases in note 2. But see inconsistency with subd. 2, "Noise," p. 944.

sunlight, not for any benefit or advantage to himself, or profit to his land, but simply to gratify his own wicked malice against his neighbor." [158] In such cases malice is made an essential element of nuisance by statute in Massachusetts.[159] If the person was actuated in the construction of such fence by two motives, one of utility (the fence being used as a bill board) and the other of malice and annoyance, the one injured cannot recover if the former motive controlled.[160] So, it is said that a noise may be a nuisance if mischievously or maliciously made, while a similar noise might not be, if made in carrying on a lawful calling.[161] There is, moreover, a distinct class of nuisances arising from interference by force or fraud by the free exercise of another's trade or occupation.[162] Actual or constructive knowledge is said to be essential to charge a town with damages from defects in a highway, or from any other

[158] Morse, J., in Burke v. Smith, 69 Mich. 380, 37 N. W. 838, affirmed in Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381, affirmed, also, in Kirkwood v. Finegan, 95 Mich. 543, 55 N. W. 457; Kessler v. Letts, 7 Ohio Cir. Ct. 108. The ordinary rule, however, would seem to be that if a man wantonly and maliciously erect on his premises a high fence or window, for the sole purpose of annoying plaintiff, by obstructing the light and air from entering plaintiff's house, and rendering it unhabitable, no action would lie on behalf of plaintiff. Mahan v. Brown, 13 Wend. 261; Jenkins v. Fowler, 24 Pa. St. 308–310; Gerard v. Lewis, L. R. 2 C. P. 305; Jenks v. Williams, 115 Mass. 217; Brothers v. Morris, 49 Vt. 460; McMillin v. Staples, 36 Iowa, 532; Glendon Iron Co. v. Uhler, 75 Pa. St. 467; Auburn & C. P. R. Co. v. Douglass, 9 N. Y. 444; Stevenson v. Newnham, 13 C. B. 285–297; Lucas v. Nockells, 4 Bing. 729, 10 Bing. 157. This is in accord with the earlier conception of the law of tort (ante, c. 1, p. 2) that "as long as a man keeps within the law, by doing no act which violates it, we must leave his motive to Him who searches hearts." Jenkins v. Fowler, 24 Pa. St. 308; Adler v. Fenton, 24 How. 407–412; Hutchins v. Hutchins, 7 Hill, 104; Phelps v. Nowlen, 72 N. Y. 39, 46 N. Y. 511; Benjamin v. Wheeler, 8 Gray, 410; Estey v. Smith, 45 Mich. 402, 8 N. W. 83. One who builds a fence on a traveled highway is guilty of maintaining a public nuisance, though he honestly believes the fence to be on his own land. Com. v. Dicken, 145 Pa. St. 453, 22 Atl. 1043. See Christie v. Davey [1893] 1 Ch. Div. 316.

[159] Smith v. Morse, 148 Mass. 407, 19 N. E. 393; Rice v. Moorehouse, 150 Mass. 482, 23 N. E. 229.

[160] Hunt v. Coggin (N. H.) 20 Atl. 250.

[161] 16 Am. & Eng. Enc. Law, 944 (cases collected in note 7).

[162] Wood, Nuis. § 141; Columbus & H. Coal & Iron Co. v. Tucker, 48 Ohio St. 41, 26 N. E. 630.

nuisance which it is under obligation to remove,[163] or to charge an owner of domestic animals with liability for them as nuisances.[164]

236. The plaintiff in a judicial proceeding against a nuisance is not ordinarily disentitled by having come to the nuisance, unless the right of the defendant amounts to an easement.

The early cases [165] on nuisance held that one who came to a private nuisance by that act disentitled himself to complain of it. This amounted to saying that if the nuisance had been in existence for ever so short a time before the plaintiff came to it, that was enough to justify its continuance. However, this doctrine is exploded.[166] No doubt, when it is once decided that a certain liability or risk shall be attached to a voluntary relation, the party entering into that relation takes that risk, but what risks shall be attached to any relation is a pure question of policy in the particular instance. And it is the policy of the law that a purchaser is not disentitled by having come to a nuisance.[167] "Carrying on an offensive trade for twenty years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of and travelers upon which it is a nuisance." [168] But

[163] Foster v. Boston, 127 Mass. 290; Reed v. Inhabitants of Northfield, 13 Pick. 94; Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co., 51 N. Y. 573; Morse v. Borough of Fair Haven, 48 Conn. 220.

[164] Spalding v. Oakes' Adm'r, 42 Vt. 343; Partlow v. Haggarty, 35 Ind. 178; Kelly v. Tilton, *42 N. Y. 263.

[165] 2 Cooley, Bl. § 403; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900 (reviewing many cases).

[166] Fertilizing Co. v. Hyde Park, 97 U. S. 659; McCallum v. Germantown, 54 Pa. St. 40; Brady v. Weeks, 3 Barb. 157; Smith v. Phillips, 8 Phila. 10; Elliotson v. Feetham, 2 Bing. N. C. 134; Bliss v. Hall, 4 Bing. N. C. 183; Barwell v. Brooks, 1 Law T. 75. And see Hazard Powder Co. v. Volger, 7 C. C. A. 130, 58 Fed. 152; People v. Detroit White Lead Works, 82 Mich. 471–477, 46 N. W. 735.

[167] Holmes, J., in Boston Ferrule Co. v. Hills, 159 Mass. 147–151, 34 N. E. 85, citing cases. Wood, Nuis. §§ 574, 575; 16 Am. & Eng. Enc. Law, 934, note 1, cases collected in number.

[168] Com. v. Upton, 6 Gray, 473.

it is not accurate to say that it is "wholly immaterial" that the plaintiff has come to a nuisance. A distinction is recognized, especially with respect to restraining by an injunction,[169] between a long-established business which has become a nuisance in a locality from increase of business, and a new erection threatened in such vicinity. A right, however, to commit a private nuisance may be acquired by prescription, as by an easement.[170] It seems, also, that an estoppel to object to a nuisance, to the continuance of which there is no prescriptive right because the acquiescence is short of 20 years, may be based upon conduct inducing the party causing the nuisance to incur legal expenditures.[171]

237. In determining what annoyance amounts to a nuisance, the courts are governed by practical considerations as to the thing done, the place where, and the circumstances under which, it is done.[172]

A business which is necessary and useful in large communities, and which is not a nuisance in itself, may become so in view of the circumstances in the neighborhood in which it is proposed.[173] "Two things essential to general prosperity and happiness are useful trades whereby people are supplied with things necessary in life, and healthful and peaceful dwellings. And the structures for habitation and trade cannot well be remote from one another. Here, therefore, are two interests traveling to one ultimate goal,

[169] Wier's Appeal, 74 Pa. St. 230 (where the erection of a powder magazine was restrained). And see City of New Castle v. Raney, 130 Pa. St. 546, 18 Atl. 1066.

[170] Post, p. 792, "Legalized Nuisance," note 250.

[171] Campbell v. Seaman, 63 N. Y. 568; Radenhurst v. Coate, 6 Grant (U. C.) 139; Dewell v. Sanders, Cro. Jac. 490. Cf. City of New Castle v. Raney, 130 Pa. St. 546, 557, 18 Atl. 1066.

[172] John B. Gest, article in 1 Am. Law Reg. & Rev. (N. S.) 112.

[173] Pennoyer v. Allen, 56 Wis. 502, 14 N. W. 609; City of Fresno v. Fresno Canal & Irr. Co., 98 Cal. 179, 32 Pac. 943; Cleveland v. Citizens' Co., 20 N. J. Eq. 201. Et vide Slaughter-House Case, 16 Wall. 36; New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Manuf'g Co., 115 U. S. 650–669, 6 Sup. Ct. 252; Aldred's Case, 9 Coke, 57a; Jones v. Powell, Palm. 536. Cf. Broder v. Saillard, 2 Ch. Div. 692–701; Reinhardt v. Mentasti, 42 Ch. Div. 685.

yet in constant conflict during the journey. And the courts, in administering justice between them, necessarily request each to lay aside something of what pertains to mere convenience and comfort, yet they permit each to stand so far on its own rights as not to be destroyed." [174] In this unavoidable conflict, the courts will interfere with the transaction of business, by means of injunction, with great caution.[175] Public convenience, and even public necessity, does not justify the continuance of a nuisance, or constitute a reason why an injunction should not be issued. Thus, neither the advantage nor need that the city of New York should have some place where it can deposit and utilize its filth justifies a person in carrying on a rendering establishment, so offensive and disagreeable as to render life uncomfortable, nor compels neighboring residents to submit to such consequences as damnum absque injuria.[176] The existence of similar nuisances in the same locality

[174] Bish. Noncont. Law, § 418, citing Sanderson v. Pennsylvania Coal Co., 86 Pa. St. 401; Daniels v. Keokuk Waterworks, 61 Iowa, 549, 16 N. W. 705; McCaffery's Appeal, 105 Pa. St. 253; Daughtry v. Warren, 85 N. C. 136. The leading English cases on this point are Hole v. Barlow, 4 C. B. (N. S.) 334; Rich v. Basterfield, 4 C. B. 783; Bamford v. Turnley, 3 Best & S. 66. And the like will be found discussed in Bigelow, Lead. Cas. 465–467. In Ball, Lead. Cas. (1884) 406–409, the same language is employed (see preface). A further discussion of the English cases will be found in Campbell v. Seaman, 63 N. Y. 568.

[175] "It would have been wrong, as it seems to me, for this court, in the reign of Henry VI., to have interfered with the further use of sea coal in London, because it has been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen Victoria both white and red roses would have ceased to bloom in the temple gardens. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and ship-building town, which would drive the Dryads and their master from their ancient solitudes." James, L. J., in Salvin v. North Brancepeth Coal Co., 9 Ch. App. 705–709, refusing an injunction to stop large commercial works because of alleged smoke nuisance. "A court exercising the power of chancellor, whose arm may fall with crushing force upon the every-day business of men, destroying lawful means of support, and diverting property from the legitimate uses, cannot approach such cases as this with too much caution." Agnew, J., in Huckenstine's Appeal, 70 Pa. St. 102–106. Post, p. 799, "Injunction."

[176] Meigs v. Lister, 23 N. J. Eq. 199–205; Fertilizing Co. v. Hyde Park, 97

is not necessarily an excuse.[177] However, in determining how far locality enters into a nuisance, the courts are governed by practical considerations.[178] The usefulness,[179] the relative convenience,[180]

U. S. 659; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268-280, 20 Atl. 900; Bennington v. Klein, 6 Wkly. Notes Cas. 281; Attorney General v. Council, etc., of Birmingham, 4 Kay & J. 528. So a livery stable: Craven v. Rodenhausen (Pa. Sup.) 21 Atl. 774; Gifford v. Hulett, 62 Vt. 342, 19 Atl. 230; Filson v. Crawford (Sup.) 5 N. Y. Supp. 882; Robinson v. Smith, 53 Hun, 638, 7 N. Y. Supp. 38; Shivery v. Streeper, 24 Fla. 103, 3 South. 865. Et vide livery stable cases collected in Webb, Pol. Torts, p. 505; Wood, Nuis. 679-682, note. Cf. Lippincott v. Lasher, 44 N. J. Eq. 120, 14 Atl. 103. Stock yards: Shirley v. Railway Co., 74 Iowa, 169, 37 N. W. 133. Manufacturing, producing "overpowering, intolerable, and crashing vibrations": McCaffrey's Appeal, 105 Pa. St. 253-255.

[177] Euler v. Sullivan, 75 Md. 616, 23 Atl. 845; Aldrich v. Howard, 8 R. I. 246; Fay v. Whitman, 100 Mass. 76; Crossley v. Tomey, 2 Ch. Div. 533.

[178] Demarest v. Hardham, 34 N. J. Eq. 469. "In the Sanderson Case [Sanderson v. Pennsylvania Coal Co., 86 Pa. St. 401] the property of a coal company could not be used without fouling the water.. The great public interests and the private rights of mining could not be sacrificed to preserve the inferior right and interest of the lower proprietor. The reason for the general rule failed, and the rule was not followed." See Collins v. Chartiers Val. Gas Co., 131 Pa. St. 143-152, 18 Atl. 1012. A slaughterhouse may without offense be located and conducted in the outskirts of a city, away from the abodes of its inhabitants, and in such case it would not be a nuisance; but if the same business should be operated on a residence street, and in close contact with the homes of the people, it might become a great offense and a nuisance that then ought to be abated. Gill, J., in Bielman v. Railroad Co., 50 Mo. App. 151-154, citing Craven v. Rodenhausen (Pa. Sup.) 21 Atl. 774; Whitney v. Bartholomew, 21 Conn. 213; Wylie v. Elwood, 134 Ill. 281, 25 N. E. 570; Flint v. Russell, 5 Dill. 151, Fed. Cas. No. 4,876; State v. Ball, 59 Mo. 321.

[179] Tanner v. Trustees, etc., of Albion, 5 Hill, 121. Circus: Inchbald v. Robinson, 4 Ch. App. 388. Et vide Walker v. Brewster, L. R. 5 Eq. 25. Bawdyhouse: Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514; Miller v. Blue, 43 Kan. 441, 23 Pac. 588; Marsan v. French, 61 Tex. 173; Hamilton v. Whitridge, 11 Md. 128.

[180] Pilcher v. Hart, 1 Humph. (Tenn.) 524; Radcliff v. Mayor, 4 N. Y. 195; Carroll v. Wisconsin Cent. R. Co., 40 Minn. 168, 41 N. W. 661. Cf. Attorney General v. Conservators, 1 Hem. & M. 1; Hilton v. Earl, 5 Q. B. 701; Morris & E. Ry. Co. v. Prudden, 20 N. J. Eq. 530; Richard's Appeal, 57 Pa. St. 105-113. That the mill complained of as a nuisance occasioned no more annoyance than other similar mills is proper evidence. Shepard v. Hill, 151 Mass. 540, 24 N. E. 1025.

priority in establishment,[181] danger,[182] temporary character, lawfulness of object,[183] and similar considerations are given due weight.[184] It is constantly said to be the law, however, that beneficial character will not excuse or justify the continuance of a public nuisance,[185] and that no place is convenient or proper for the maintenance thereof.[186]

238. Annoyance, to constitute a nuisance, must cause substantial damage; for damages are the gist of the wrong, unless there is a physical invasion of, or interference with, another's property, in which case the presence or absence of actual damage is immaterial.

The creating or continuing of a nuisance in any form which involves the physical invasion of or interference with another's property is a wrong for which at least nominal damages may be recover-

[181] Whitney v. Bartholomew, 21 Conn. 213; Wiers' Appeal, 74 Pa. St. 230; Robinson v. Baugh, 31 Mich. 290; Rhodes v. Dunbar, 57 Pa. St. 274.

[182] Ante, p. 769; McAndrews v. Collerd, 42 N. J. Law, 189; Williams v. East India Co., 3 East, 192.

[183] Ball v. Ray, 8 App. Cas. 467; Harrison v. Southwark & V. Water Co. [1891] 2 Ch. 409.

[184] Tuttle v. Church, 53 Fed. 422, in which many cases are collected and considered. As to abatement by improved mechanism: Weil v. Schultz, 33 How. Prac. 7. Constancy of nuisance as an element: Fay v. Whitman, 100 Mass. 76; Meigs v. Lister, 23 N. J. Eq. 199; Campbell v. Seaman, 63 N. Y. 568.

[185] Cases collected in Wood, Nuis. § 19; 16 Am. & Eng. Enc. Law, 932, note 1. In People v. Detroit White Lead Works, 82 Mich. 471–479, 46 N. W. 735, Grant, J., said that no case has been cited, and we think none can be found, sustaining the continuance of a business in the midst of a populous community which constantly produces odors, smoke, and soot of such a noxious character as to such an extent that they produce headache, nausea, vomiting, and other pains and aches injurious to health, and taint the food of the inhabitants. Et vide City of Grand Rapids v. Weiden, 97 Mich. 82, 56 N. W. 233; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900; Lurssen v. Lloyd, 76 Md. 360, 25 Atl. 294.

[186] Bamford v. Turnley, 3 Best & S. 62. The jury cannot be asked whether the causing of a nuisance was a natural and reasonable use of defendant's own land.

ed.[187] Neither absence of actual[188] damages, nor even benefit from the nuisance, nor abatement, will prevent such recovery.[189] Thus, the overhanging of another's land is a nuisance for which an action will lie without allegation or proof of actual damages.[190] So, to cause water to flow wrongfully upon another's land in such a way that its continuance would create an easement is sufficient to justify an injunction, irrespective of damages.[191]

But when the act complained of is lawful in itself, a different rule prevails. Then it is only when some actual damage is done that a right of action ensues.[192] Where the nuisance complained of is injurious to property, the damage must be substantial. "Everything must be looked at from a reasonable point of view. The law does not regard a trifling inconvenience, but only large, sensible inconveniences and injuries, which sensibly diminish the comfort, enjoyment, or value of the property which they affect."[193] To maintain an action for nuisance against the proprietor of a lawful business carried on in neighborhood of another's premises, it must be shown that the latter has suffered a substantial injury because of

[187] Frank v. New Orleans & C. R. Co., 20 La. Ann. 25; Tootle v. Clifton, 22 Ohio St. 247; Casebeer v. Mowry, 93 Am. Dec. 766; Munroe v. Stickney, 48 Me. 462; Blodgett v. Stone, 60 N. H. 167; Alexander v. Kerr, 2 Rawle (Pa.) 83; Cooper v. Dolvin, 56 Am. Rep. 872.

[188] Kimel v. Kimel, 4 Jones (N. C.) 121; Marcy v. Fries, 18 Kan. 353. Et vide Francis v. Schoellkopf, 53 N. Y. 152; Wesson v. Washburn Iron Co., 13 Allen, 95.

[189] Gleason v. Gary, 4 Conn. 418; Call v. Buttrick, 4 Cush. 345.

[190] Tucker v. Newman, 11 Adol. & E. 40; Baxter v. Taylor, 4 Barn. & Adol. 72; Fay v. Prentice, 14 Law J. C. P. (N. S.) 238; Bellows v. Sackett, 15 Barb. 96; Codman v. Evans, 7 Allen, 431; post, p. 799, "Abatement"; ante, p. 746, note 12.

[191] Learned v. Castle, 78 Cal. 454, 18 Pac. 872, and 21 Pac. 11 (see cases collected on pages 455–461, 78 Cal., page 872, 18 Pac., and page 11, 21 Pac.); Cooper v. Randall, 53 Ill. 24. The right of a riparian owner to have the stream flow as it is wont to do by nature, subject to the reasonable use of other proprietors, is a substantial right which a court of equity will enforce though the damages flowing from such diversion are slight or merely nominal (Hoyt, J., dissenting). Rigney v. Tacoma Light & Water Co. (Wash.) 38 Pac. 147.

[192] 3 Suth. Dam. § 1085.

[193] St. Helens Smelting Co. v. Tipping, 11 H. L. Cas. 642; Pickard v. Collins, 23 Barb. 444; Mahan v. Brown, 13 Wend. 261; Barnes v. Hathorn, 54 Me. 124; Rhodes v. Dunbar, 57 Pa. St. 274.

an unlawful act or act of negligence on the part of the proprietor in the conduct of such business. Neither depreciation in the selling or rental value of real estate, nor some personal discomfort or annoyance resulting from such business, necessarily gives a cause of action.[194] If, however, the effect is such that the property cannot be enjoyed as fully as before, or renders it unfit for habitation by increased dangers, or has substantially impaired its value, the law will treat the alleged wrong as a nuisance.[195] It is not necessary that the owner should be driven from his dwelling.[196] It is not, however, strictly accurate to say that the maxim "De minimis non curat lex" applies.[197] A nuisance may be independent of actual damages.[198]

Substantial Interference with Comfort.

Where the wrong complained of is the interference with the ordinary physical comfort of human existence, it is not necessary that the offense should amount to an injury to health. The discomfort must, however, be physical, and not such as depends upon the taste or imagination.[199] In such cases the degree of harm must be greater than in an action for injury to property.[200] It was said in a leading English case that "there may be such a thing as legal nuisance from noise in a manufacturing or other populous town."[201] "But a

[194] Applied to operation of a gas generator, Keiser v. Mahanoy City Gas Co., 143 Pa. St. 276, 22 Atl. 759. Compare Robb v. Carnegie Bros. & Co., 145 Pa. St., 324, 22 Atl. 649.

[195] Ryan v. Copes, 11 Rich. Law (S. C.) 217; Waters-Pierce Oil Co. v. Cook, 6 Tex. Civ. App. 573, 26 S. W. 96; Lansing v. Smith, 8 Cow. 146; Gibson v. Donk, 7 Mo. App. 37.

[196] Bohan v. Port Jervis Gas-Light Co., 122 N. Y. 18, 25 N. E. 246; Waters-Pierce Oil Co. v. Cook, 6 Tex. Civ. App. 573, 26 S. W. 96.

[197] Wood, Nuis. § 7.

[198] Ante, p. 779, notes 187–191.

[199] Cleveland v. Citizens' Gas-Light Co., 20 N. J. Eq. 201; Coker v. Birge, 9 Ga. 425; Salvin v. North Brancepeth Coal Co., 9 Ch. App. 705.

[200] Bigelow, Lead. Cas. 467; Ball, Lead. Cas. 410; Walter v. Selfe, 4 De Gex & S. 315; Beardmore v. Tredwell, 3 Giff. 683; Crump v. Lambert, L. R. 3 Eq. 409; post, p. 847, negligence cases as to blasting, powder magazines, dangerous places, etc.

[201] Soltau v. De Held, 2 Sim. (N. S.) 133. See case above, where the ringing of bells by a Catholic church in London was enjoined. Davis v. Sawyer, 133 Mass. 289; Leete v. Pilgrim Congregational Soc., 14 Mo. App.

nuisance of this kind is much more difficult to prove than when the injury complained of is the demonstrable effect of a visible or tangible case, as when waters are fouled by sewerage, or when the fumes of mineral acids pass through chimneys of factories or other works over lands or houses, producing deleterious physical changes which science can trace and explain. A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree. If my neighbor builds a house against a party wall next to my own, and I hear from the wall more than is agreeable to me of the sounds from his nursery or music room, it does not follow, even if I am nervously sensitive or in infirm health, that I can bring an action or obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as excessive and unreasonable." [202]

590; Harrison v. Rector, etc., of St. Mark's Church, 12 Phila. 259. Compare Rogers v. Elliott, 146 Mass. 349, 15 N. E. 768; Trustees of First Baptist Church v. Utica & S. R. Co., 6 Barb. 313. Steam whistle may constitute a nuisance. Parker v. Union Woolen Co., 42 Conn. 399; Knight v. Goodyear's India Rubber Glove Manuf'g Co., 38 Conn. 438. Et vide interesting note 7, p. 944, 16 Am. & Eng. Enc. Law, by L. M. Countryman, Esq.

[202] Lord Selborne in Gaunt v. Fynney, L. R. 8 Ch. App. 8–11, 27 Ch. Div. 43. Et vide Newson v. Pender, Vice Chancellor Knight-Bruce, quoted in Underh. Torts, 415: The criterion is whether the inconvenience should be considered as more than a mere delicacy or fastidiousness, or an inconvenience materially interfering with the ordinary comfort, physically, of human existence, and not merely according to elegant or dainty habits of living, but according to the plain, sober, and simple notions of English people. Vice Chancellor Knight-Bruce in Walter v. Selfe, 4 De Gex & S. 315–322; Crump v. Lambert, L. R. 3 Eq. 409; Soltau v. De Held, 2 Sim. (N. S.) 133; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317–329, 2 Sup. Ct. 719; Cooke v. Forbes, L. R. 5 Eq. 166; Ross v. Butler, 19 N. J. Eq. 294; Attorney General v. Steward, 20 N. J. Eq. 415; Duncan v. Hayes, 22 N. J. Eq. 25; Columbus Gas Co. v. Freeland, 12 Ohio St. 392–399; Blanchard v. Reyburn, 10 Phila. 427; Cooper v. Randall, 53 Ill. 24. Mere theoretical injury is not sufficient. Thompson v. Crocker, 9 Pick. 59. Compare Oakley Mills v. Neese, 54 Ga. 459. Injury to plaintiff's feelings by being deprived of lateral support to land intended for burial place cannot be considered where the defendant intended no injury, although he was grossly careless. White v. Dresser, 135 Mass. 150; Meagher v. Driscoll, 99 Mass. 281. Plaintiff's recovery for damages occasioned by dumping dead cattle into a stream of water which he uses does not extend to the mental or bodily suffering of his wife or children, nor

KINDS OF NUISANCES.

239. Nuisances for which a private action will lie may be either—

(a) Public, private, or mixed;

(b) Continuing; or

(c) Legalized.

SAME—PUBLIC, PRIVATE, AND MIXED NUISANCES.

240. To entitle a private person to maintain an action for a public nuisance, the injury complained of must be—

(a) Peculiar to the plaintiff in kind, not merely in degree;

(b) Substantial, not fanciful or evanescent;

(c) The proximate result of the conduct complained of.[203]

Kinds of Nuisances for Which a Private Action may Lie.

Public nuisances affect the public, and are annoyances to all the king's subjects. They are public wrongs.[204] They result from the violation of public rights, and produce no special injury to one more than another of the people, and may be said to have a common effect and produce a common damage.[205] The criterion by which to determine whether a particular case is to be classed as a public or a private nuisance seems to depend upon the consideration of whether it be indictable or not. Moreover, while a private nuisance, generally speaking, is created upon the premises of the defendant, a public nuisance may be created either upon defendant's premises or upon the land of the public.[206] Mr. Wood [207] distinguishes mixed nuisances,

to his own mental anguish caused by their suffering. Gulf, C. & S. F. Ry. Co. v. Reed (Tex. Civ. App.) 22 S. W. 283.

[203] Brett, J., in Benjamin v. Storr, L. R. 9 C. P. 400–406.

[204] 3 Bl. Comm. § 217. Et vide Steph. Dig. Cr. Law, art. 176; Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95–101.

[205] Wood, Nuis. § 14.

[206] Bigelow, Lead. Cas. 465. As permitting a sewer to overflow: Waters

[207] Wood, Nuis. § 16.

which are both public and private in their nature (public, in that they produce injury to many persons, or to all the public; and private, because at the same time they produce a special and particular injury to private rights), which subject the wrongdoer to indictment by the public and to damages at the suit of persons injured. Private nuisances, on the other hand, are injuries that result from the violation of private rights and produce damages to but one or a few persons, so that they cannot be said to be public.[208] With public nuisances pure and simple there is no further logical concern here.[209]

v. City of Newark, 56 N. J. Law, 361, 28 Atl. 717; Davis v. Winslow, 81 Am. Dec. 573; Mayor v. Marriott, 66 Am. Dec. 326; Rung v. Shoneberger, 26 Am. Dec. 95; South Carolina R. Co. v. Moore, 73 Am. Dec. 778. Mitchell, J., in Aldrich v. Wetmore, 52 Minn. 164–171, 53 N. W. 1072, says: "It is the nature of the right affected, and not the number who suffer, which determines whether a private action will lie for creating or maintaining a public nuisance."

[208] Burditt v. Swenson, 67 Am. Dec. 665. But a fruit stand on the street is. State v. Berdetta, 38 Am. Rep. 117. Obstruction of an alley has been held not to be a public nuisance. Bagley v. People, 38 Am. Rep. 192.

[209] Some modern cases on public nuisance may, however, be instructive and useful. As to privies, see Com. v. Roberts, 155 Mass. 281, 29 N. E. 522. Deposit of night soil: State v. Board of Health of City of Newark, 54 N. J. Law, 325, 23 Atl. 949 (et vide Dierks v. Commissioners, 142 Ill. 197, 31 N. E. 496; Town v. Carins, 44 Mo. App. 88). Stagnant water: City of Rochester v. Simpson, 134 N. Y. 414, 31 N. E. 871. Manufacturing fertilizers: People v. Rosenberg, 138 N. Y. 410, 34 N. E. 285; State v. Wolf, 112 N. C. 889, 17 S. E. 528; Darcantel v. Refrigerating Co., 44 La. Ann. 632, 11 South. 239; State v. Neidt (N. J. Ch.) 19 Atl. 318; Seacord v. People, 121 Ill. 623, 13 N. E. 194. Brickkiln: Huckenstine's Appeal, 70 Pa. St. 102; Com. v. Miller, 139 Pa. St. 77, 21 Atl. 138. Hog pens: Com. v. Perry, 139 Mass. 198, 29 N. E. 656; Gay v. State, 90 Tenn. 645, 18 S. W. 260. Coal shed: Wylie v. Elwood, 134 Ill. 281, 25 N. E. 570. Fire-engine house: Van De Vere v. Kansas City, 107 Mo. 83, 17 S. W. 695. Permanent obstruction to public street, as a bridge: Rybee v. State, 48 Am. Rep. 175; Reed v. City of Birmingham, 92 Ala. 339, 9 South. 161; Laing v. City of Americus, 86 Ga. 756, 13 S. E. 107; Chicago, B. & Q. R. Co. v. City of Quincy, 136 Ill. 489, 27 N. E. 232; Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. 643. The draining of offensive and dangerous matter of a large factory into the public gutters of a city is a nuisance per se detrimental to health. Board of Health v. Maginnis Cotton Mills, 46 La. Ann. 800, 15 South. 164. Approaches to a bridge: Com. v. Pittston Ferry Bridge Co., 148 Pa. St. 621, 24 Atl. 87. Running traction engine on highway: Com. v. Allen, 148 Pa. St. 358, 23 Atl. 1115. Electric work: United States Illuminating Co. v. Grant, 55 Hun, 222, 7 N. Y. Supp. 788. Powder

Private Action for Public Nuisance.

Although for a public nuisance, so far as it affects the public generally,[210] no private action lies, yet an individual who suffers a special injury or damage more than the rest of the community at large may have an action in respect to his special damage.[211] Such special damage is not sufficient if it be trifling. It must be substantial, as where it seriously affects the substance and value of property.[212] It is not sufficient if remote.[213] To support such an action the damage must

magazine: Laflin & R. Powder Co. v. Tearney, 131 Ill. 322, 23 N. E. 389. Rock-crushing machine: City of Kansas v. McAleer, 31 Mo. App. 433. As to constitutionality of statute defining public nuisances, and providing for their redress and prevention, see Scovill v. McMahon, 62 Conn. 378, 26 Atl. 479; City Council of City of Charleston v. Werner, 38 S. C. 488, 17 S. E. 33; Jenkins v. Ballantyne, 8 Utah, 245, 30 Pac. 760; Ex parte Sing Lee, 96 Cal. 354, 31 Pac. 245; People v. Board of Health, 58 Hun, 595, 12 N. Y. Supp. 561; State v. Earnhardt, 107 N. C. 789, 12 S. E. 426. Abatement by board of health: Greene v. Inhabitants of Milford, 139 Mass. 69, 29 N. E. 376; Hochstrasser v. Martin, 62 Hun, 165, 16 N. Y. Supp. 558; Board of Health & Vital Statistics of Hudson Co. v. New York Horse Manure Co., 47 N. J. Eq. 1, 19 Atl. 1098. As to injunction, see Dierks v. Commissioners, 142 Ill. 197, 31 N. E. 496; Hill v. City of New York, 63 Hun, 633, 18 N. Y. Supp. 399, affirming 15 N. Y. Supp. 393. Cf. Com. v. Croushore, 145 Pa. St. 157, 22 Atl. 807. As to summary condemnation of nuisances by municipal authority, see article by J. B. Uhle, 30 Am. Law Reg. (N. S.) 157. As to mandamus, see People v. Newton, 20 Abb. N. C. 387.

[210] "It seems that, where an indictment may be maintained for a common nuisance,—that is, for that which is an injury to all the queen's subjects,—there is no remedy by action unless you can prove individual damage. That is undisputed law. But I am not aware that the same rule is applied where it has not been an injury to the whole of the public, in contravention of the law, but an injury to the inhabitants of a particular district." Channell, B., in Harrop v. Hirst, 38 Law J. Exch. 1-5, L. R. 4 Exch. 43; Washb. Easem. § 570.

[211] Iveson v. Moore, Ld. Raym. 486. Here plaintiff was prevented, by defendant's obstruction of a highway, from using the way for hauling coals from his colliery. Plaintiff was allowed to recover the special damages suffered by him because of the deterioration in value of the coal by delay. Maynell v. Saltmarsh, 1 Keb. 847; Hart v. Basset, Jones, 156. That the nuisance is also indictable will not prevent action. Hart v. Board (N. J. Sup.) 29 Atl. 490; State v. Wilkinson, 21 Am. Dec. 560.

[212] Talbott v. King, 32 W. Va. 6, 9 S. E. 48; Innis v. Railway Co., 76 Iowa, 165, 40 N. W. 701; Hay v. Weber, 79 Wis. 587, 48 N. W. 859.

[213] Zettel v. City of West Bend, 79 Wis. 316, 48 N. W. 379. The owner of a

differ in kind, as well as in degree, from that suffered in common. That the plaintiff suffers more inconvenience than others, from his proximity to the nuisance, is not enough.[214] A liquor nuisance is ordinarily exclusively a public one.[215] No employer has such a property in his workmen or in their services that he can maintain a suit as for a nuisance against the keeper of a house at which they voluntarily buy intoxicating liquors, and thereby become drunk and unfit for work.[216] The right to maintain a private action for a liquor nuisance may, however, be conferred by statute;[217] and, in a criticised case,[218] a saloon has been held to be a nuisance per se.[219] A public nuisance which may give rise to a private action, but only where the

building, who occupied it as a store, cannot enjoin the erection of bay windows on an adjoining building, extending 18 to 20 inches into the street, the damage which may result from the obstruction of the view being too remote and speculative to constitute the basis of a private action. Hay v. Weber, 79 Wis. 587, 48 N. W. 859. Damage from a liberty pole in a public street, sound, properly secured and protected, but caused to fall by an extraordinary wind, would be too remote. City of Allegheny v. Zimmerman, 40 Am. Rep. 649. But the damage need not be direct. It may be consequential. Hughes v. Heiser, 2 Am. Dec. 459. Iveson v. Moore (1699) Holt, 10; Ricket v. Metropolitan Ry. Co. (1867) L. R. 2 H. L. Cas. 175, 36 Law J. Q. B. 205; Caledonian Ry. Co. v. Walker's Trustees, 7 App. Cas. 259; Ford v. Metropolitan Ry. Co. (1886) 17 Q. B. Div. 12. And see London Ass'n v. London Committee [1892] 3 Ch. 242-270.

[214] 16 Am. & Eng. Enc. Law, 976 (collecting great number of cases under 1 Wood, Nuis. § 653). Where a complaint to abate a nuisance does not explicitly state that plaintiff has sustained an injury different in kind to the general public, it is insufficient on special demurrer; but, when such injury appears by inference, it is proper to overrule a motion for judgment on the pleadings at the commencement of the trial. Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106.

[215] Liquor nuisance: State v. Stanley, 84 Me. 555, 24 Atl. 983; State v. Fleming, 86 Iowa, 294, 53 N. W. 234; State v. McEnturff, 87 Iowa, 691, 55 N. W. 2; Johnson v. People, 44 Ill. App. 642; State v. Farley, 87 Iowa, 22, 53 N. W. 1089. Injunction by state to abate liquor nuisance: State v. Saunders (N. H.) 25 Atl. 588; Maloney v. Traverse, 87 Iowa, 306, 54 N. W. 155.

[216] Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 13 Sup. Ct. 822. Et vide In re Swan, 150 U. S. 637-650, 14 Sup. Ct. 225; Barfield v. Putzel, 92 Ga. 442, 17 S. E. 616.

[217] Craig v. Plumkett, 82 Iowa, 474, 48 N. W. 984.

[218] 7 Harv. Law Rev. 487.

[219] Haggart v. Stehlin, 137 Ind. 43, 35 N. E. 997.

plaintiff shows some wrong done to him different from that suffered by the general public; as that his adjoining property has been injured in value.[220] The unreasonable and unnecessary obstruction of a navigable stream may be a public and at the same time a private nuisance, as to those individuals who suffer a particular damage therefrom distinct and apart from the people at large. The difference must be not merely in extent, but also in kind. Accordingly, the discharge of garbage by a city, interfering with fishing, is an exclusively public wrong. An individual may not enjoin such discharge.[221] On the other hand, where one by dams and storage booms unnecessarily obstructs and delays another's log-driving operations, the latter is entitled to a private action, although the nuisance be also a public one. Streams navigable for flooding logs are governed by the rules for highways.[222]

But mere personal inconvenience, as delay in a highroad, without pecuniary loss, is not sufficient to sustain a private action, even if the degree of personal inconvenience suffered be in excess of that suffered by the rest of the public.[223] On this principle, a private citizen may not maintain a private action for an injury to the highway done by an elevated railway company, where it does not appear that he owns the soil abutting the section of the railway complained

[220] Redway v. Moore, 2 Idaho, 1036, 29 Pac. 104; Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514; Miller v. Blue, 43 Kan. 441, 23 Pac. 588.

[221] Kuehn v. City of Milwaukee, 83 Wis. 583, 53 N. W. 912, where the complaint alleged that a sewer diminished the value of a dock, plaintiff cannot recover if the dock was at all times in possession of his tenant, and there was no diminution in rents because there was no special damage. Attwood v. City of Bangor, 83 Me. 582, 22 Atl. 466. Et vide Robb v. Carnegie, 145 Pa. St. 324, 22 Atl. 649.

[222] Page v. Mille Lacs Lumber Co., 53 Minn. 492, 55 N. W. 608, 1119. So, where the overflow of a dam puts to expense of repairing a highway, a town may recover damages. Inhabitants of Charlotte v. Pembroke Iron Works, 82 Me. 391, 19 Atl. 902. Interference with right to access to navigable stream may be basis of private action. Lyon v. Fishmongers' Co., 1 App. Cas. 662; Rose v. Miles, 4 Maule & S. 101.

[223] Winterbottom v. Lord Derby, L. R. 2 Exch. 316; Caledonian Ry. v. Ogilvy, 2 Macq. H. L. Cas. 229; Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. Cas. 243. Cf. Hubert v. Groves, 1 Esp. 148. Et vide West Jersey R. Co. v. Camden, G. & W. Ry. Co. (N. J. Ch.) 29 Atl. 423. Cf. Kaje v. Chicago, St. P., M. & O. Ry. Co. (Minn.) 59 N. W. 493.

of, or that he has sustained injury by encroachment upon any right appurtenant to his premises.[224] But where, by reason of one's wrongdoing, as by tearing up a street and obstructing the sidewalk,[225] or by causing horses and vans to stand in the street outside of another's shop for an unreasonable length of time,[226] or by otherwise obstructing access to the latter's place of business, whereby his custom falls off and he suffers damages, the latter may maintain his private action. A private action, in general, may be maintained to recover damages to property caused by operating in the vicinity works and machinery which fill the air with smoke and cinders and render it offensive and injurious to the health, and shake the premises so as to render occupation uncomfortable, though all persons owning estates in the vicinity have sustained similar injuries from the same cause.[227]

[224] Adler v. Metropolitan El. R. Co., 138 N. Y. 173, 33 N. E. 935; Pittsburg, Ft. W. & C. Ry. Co. v. Cheevers, 44 Ill. App. 118; Dilley v. Wilkes Barre & K. P. Ry. Co., 12 Pa. Co. Ct. R. 270; Zettel v. City of West Bend, 79 Wis. 316, 48 N. W. 379; Billard v. Erhart, 35 Kan. 611, 12 Pac. 39; Stufflebeam v. Montgomery, 2 Idaho, 763, 26 Pac. 125; ante, p. 764. So, erection of a dam over a navigable stream will not be enjoined on application of one who has sustained no special or personal injury. Esson v. Wattier, 25 Or. 7, 34 Pac. 756.

[225] Aldrich v. City of Minneapolis, 52 Minn. 164, 53 N. W. 1072; Dubach v. Hannibal & St. J. R. Co., 89 Mo. 483, 1 S. W. 86; Glaessner v. Anheuser-Busch Brewing Ass'n, 100 Mo. 508, 13 S. W. 707; Canton Cotton-Warehouse Co. v. Potts, 68 Miss. 637, 10 South. 448; Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618. Compare Lakkie v. Chicago, St. P., M. & O. Ry. Co., 44 Minn. 438, 46 N. W. 912, with Smith v. Putnam, 62 N. H. 369. But damage from obstruction of view from store by erecting a window extending 18 or 20 inches into the street is too remote for private action. Hay v. Weber, 79 Wis. 587, 48 N. W. 859.

[226] Benjamin v. Storr, L. R. 9 C. P. 400; Rose v. Groves, 5 Man. & G. 613.

[227] Wesson v. Washburn Iron Co., 13 Allen, 95, where an iron furnace disturbed the comfort of the guests in the Wesson tavern house, and deprived plaintiff of gains. So a steam engine pulling logs: Adams v. Ohio Falls Car Co., 131 Ind. 375, 31 N. E. 57. A gas factory: Bohan v. Port Jervis Gaslight Co., 122 N. Y. 18, 25 N. E. 246. A fertilizing factory: Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900. Generally as to acid fumes: Rex v. White, 1 Burrows, 333; Crump v. Lambert, L. R. 3 Eq. 409; Cooke v. Forbes, L. R. 5 Eq. 166.

Private Nuisances.

The term "private nuisance" is used indiscriminately for a private nuisance, as defined, and for a mixed nuisance, as distinguished, by Mr. Wood. Indeed, the ordinary conception of a private nuisance would seem to be that it is any nuisance for which an action would lie on behalf of a private individual. There are, however, many cases which would seem to be private nuisances pure and simple,—as nuisance to private ways, to adjacent and subjacent support, water courses, surface waters, overhanging another's land, damages by an upper tenant of a building to a tenant of a lower story.[228] Generally, a landowner is bound to prevent private nuisance to his neighbor by reason of his erection on his own premises.[229]

SAME—CONTINUING NUISANCE.

241. This subject has already been sufficiently considered.[230]

SAME—LEGALIZED NUISANCE.

242. Where the law has authorized the conduct complained of, which would otherwise be a nuisance, there can be no proper interference therewith, either by the act of the party or by judicial proceeding.

Legalized nuisance can scarcely be said to be a felicitous term. It is like calling a crime lawful. However, the term has passed into general use. What it means would seem to be this: To constitute a nuisance there must be a breach of legal right; or, as Mr. Cooley puts it, a mere annoyance without fault is not a nuisance.[231] Accordingly, if authority to do a given act is conferred, either by statute or by common law, which, but for such authority, would constitute a nuisance, the damage suffered in consequence is damnum absque injuria. Such damage is "incident to an authorized act." Within the limits of such authority, the parties defendant are, in

[228] Boston Ferrule Co. v. Hills, 159 Mass. 147, 34 N. E. 85.

[229] Bellows v. Sackett, 15 Barb. 96; Benson v. Suarez, 19 Abb. Prac. 61.

[230] Ante, p. 407.

[231] Cooley, Torts, p. 671.

the absence of negligence, completely protected from interference with the alleged nuisance, either by the act of the parties in the abatement of the nuisance, or by judicial proceedings, public or private, in law or in equity.[232]

Nuisance Authorized by Statute.

The authorization of a statute may be of three types: (1) The statute may authorize a nuisance; (2) it may authorize certain works, provided they be done without causing a nuisance; (3) it may authorize the nuisance itself, if necessary as a last resort.[233] On the one hand, a legislature, or a municipal corporation when sufficiently empowered, may declare places or property, used to the detriment of public interest or to the injury of health, morals, or the welfare of the community, a nuisance, although not such at common law. But neither may decree the destruction or forfeiture of property used so as to constitute a nuisance, and appoint officers to execute its mandate as a punishment of the wrong, or even to prevent the future illegal use of the property, it not being a nuisance per se.[234] On the other hand, the legislature may determine by its laws that not to be a nuisance which would otherwise be a nuisance, upon the ground that the legislature is ordinarily the proper judge of what the public good requires.[235] Thus, it may authorize manu-

[232] Hinchman v. Patterson Horse R. Co., 86 Am. Dec. 252.

[233] Managers of the Metropolitan Asylum Dist. v. Hill, 6 App. Cas. 193; Truman v. Railway Co., 29 Ch. Div. 89–108, 11 App. Cas. 45; Biscoe v. Railway, L. R. 16 Eq. 636; Cogswell v. Railroad Co., 103 N. Y. 10, 8 N. E. 537; Edmondson v. City of Moberly, 98 Mo. 523, 11 S. W. 990; Eastman v. Amoskeag Manuf'g Co., 82 Am. Dec. 201.

[234] Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878; People v. Board of Health of City of Yonkers, 140 N. Y. 1, 35 N. E. 320. But act may be void, e. g. because of class legislation; as where manufacturers were exempted from an ordinance declaring smoke a nuisance, State v. Sheriff of Ramsey Co., 48 Minn. 236, 51 N. W. 112; and where municipal charter does not empower city council to define a public nuisance, City of St. Paul v. Gilfillan, 36 Minn. 298, 31 N. W. 49. Et vide Everett v. City of Council Bluffs, 46 Iowa, 66; Yates v. Milwaukee, 10 Wall. 497; Clark v. Mayor, etc., of Syracuse, 13 Barb. 32; Underwood v. Green, 42 N. Y. 140. A municipal license to carry on an objectionable business is entitled as evidence to high consideration, but is not conclusive that the business is not a private nuisance. Ryan v. Copes, 73 Am. Dec. 106.

[235] Bancroft v. City of Cambridge, 126 Mass. 438–440.

factures to notify their workmen by ringing bells, or using whistles and gongs, in such a way that, but for legislative sanction, a nuisance would exist.[236]

Whenever the exercise of a right conferred by law for the benefit of the public is attended with temporary inconvenience to private parties, in common with the public in general, such parties are not entitled to damages therefor. This, again, is "damage incident to authorized act." Thus, if a bridge, constructed in accordance with legislative authority, interferes with navigation, the injury to private persons is damnum absque injuria.[237] In the same way, the incidental injury which results to the owner of property situated near a railroad, caused by the necessary noise, vibration, dust, and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operations of the railroad were not authorized by the legislature, must, if the running of the trains is so authorized, be borne by the individual without compensation or remedy in any form.[238]

However, the legislative authority, to afford this immunity, must be express, or clearly and unquestionably implied, from powers expressly conferred, so as to make it appear that the legislature contemplated the doing of the very act which occasioned the injury. And even in such a case, the exemption does not extend to the claim of a private citizen for any damage, special inconvenience, or discomfort not experienced by the public at large.[239] Therefore, for example, the owner of a lot abutting on the public street may re-

[236] Sawyer v. Davis, 136 Mass. 239.

[237] Hamilton v. Railroad Co., 119 U. S. 280, 7 Sup. Ct. 206, considered in Rhea v. Railroad Co., 50 Fed. 20; U. S. v. North Bloomfield Gravel Min. Co., 53 Fed. 627.

[238] Carroll v. Wisconsin Cent. R. Co., 40 Minn. 168, 41 N. W. 661; Beideman v. Atlantic City R. Co. (N. J. Ch.) 19 Atl. 731.

[239] Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 25 N. E. 246; Hill v. City of New York, 139 N. Y. 495, 34 N. E. 1090; Id., 63 Hun, 633, 18 N. Y. Supp. 399; Bacon v. City of Boston, 154 Mass. 100, 28 N. E. 9, collecting cases at page 102, 154 Mass., and page 9, 28 N. E.; Evans v. Chicago, St. P., M. & O. Ry. Co., 86 Wis. 597, 57 N. W. 354. Where the terms of a statute are not imperative, but permissive, the fair inference is that the legislature intended that the discretion as to the use of the general powers there conferred should be exercised in strict conformity with private rights. Lord Watson, in Managers v. Hill, L. R. 6 H. L. 193–213.

cover damages against a railroad laid on such street, the operation of which darkened and polluted the air coming from that part of the street upon the lot.[240] However, consequential annoyance, which may necessarily follow the running of the cars on the road with reasonable care, is damnum absque injuria; but the exemption extends only to the limit of legislative authority. When the authority ceases, the exemption ceases.[241] The authority of a railroad company to bring its tracks within the limits of the city of Washington did not authorize it to construct shops and engine houses in the immediate vicinity of a church where services had been held during the week for a number of years before the erection of such shops.[242] While, in England, the power of parliament is omnipotent, and English cases on this subject must be considered with reference thereto,[243] the power of legislature in America is controlled by constitutional provisions.[244] An important distinction exists between corporations clothed with powers of eminent domain

[240] Adams v. Chicago, B. & N. R. Co., 39 Minn. 286, 39 N. W. 629, reviewing many cases; Burkam v. Railway Co., 122 Ind. 344, 23 N. E. 799; Hyland v. Transfer Co. (Ky.) 11 S. W. 79. As to subsequent damages after condemnation proceeding, Ohio & M. Ry. Co. v. Wachter, 123 Ill. 440, 15 N. E. 279; Eaton v. Railroad, 51 N. H. 504; Wood, Nuis. § 764, note 2; Rex v. Pease, 4 Barn. & Adol. 30; Vaughan v. Taff Vale R. Co., 5 Hurl. & N. 679; London, B. & S. C. Ry. Co. v. Truman, 11 App. Cas. 45; Powell v. Fall, 5 Q. B. Div. 397; Sadler v. South Staffordshire & B. D. S. T. Co., 23 Q. B. Div. 17. An article on the nuisances arising from the violation of the common-law rights of a community by electric street railways. 14 Can. Law T. 225.

[241] Evans v. Railway Co., 86 Wis. 597, 57 N. W. 354, collecting cases.

[242] Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719; Id., 137 U. S. 568, 11 Sup. Ct. 185; New York El. R. Co. v. Fifth Nat. Bank, 135 U. S. 432–442, 10 Sup. Ct. 743; Smith v. London & S. W. Ry. Co. L. R. 6 C. P. 14; Village of Pine City v. Munch, 42 Minn. 342, 44 N. W. 197. Although horses were necessary for the working of the tramways, the company were not justified by their statutory powers in using the stables so as to be a nuisance to their neighbors, and it was no sufficient defense to say that they had taken all reasonable care to prevent it. Rapier v. London Tramways Co. [1893] 2 Ch. 588.

[243] Reg. v. Metropolitan Board of Works, 3 Best & S. 710; New River Co. v. Johnson, 2 El. & El. 435.

[244] But an act authorizing an existing nuisance is a mere license, and may be revoked at pleasure, where no consideration is paid. Reading v. Com., 51 Am. Dec. 534.

and those which have no such right.[245] The former may construct and operate their authorized works, and are not liable if damages ensue, if there be no negligence or malice;[246] but they may not take private property without the payment of compensation, ascertained by a jury.[247] Accordingly, legislative grants do not exempt corporations for imposing a burden which amounts to the actual taking of property for public purposes.[248]

Nuisance Authorized by Common Law.

Prescription cannot legitimate a nuisance, properly speaking.[249] But, within the limits of actual user, and not of claim, prescription may give rise to an easement.[250] A public nuisance cannot be legalized by prescription, even so far as the right of a private individual specially injured is concerned. "In such cases, prescription has no application. Every day's continuance is a new offense, and it is no justification that the party complaining came voluntarily within its

[245] Hauck v. Tidewater Pipe-Line Co., 153 Pa. St. 366, 26 Atl. 644. Cf. McAndrews v. Collerd, 42 N. J. Law, 189.

[246] Id. Cf. Booth v. Railroad Co., 140 N. Y. 267, 35 N. E. 592.

[247] Parker v. Catholic Bishop, 146 Ill. 158, 34 N. E. 473.

[248] Wood, Nuis. §§ 759, 760.

[249] Dygert v. Schenck, 35 Am. Dec. 575; Mills v. Hall, 24 Am. Dec. 160; Queen v. Brewster, 8 U. C. C. P. 208; post, p. 803, note 306.

[250] Horner v. Stillwell, 35 N. J. Law, 307; Bunten v. Chicago, R. I. & P. Ry. Co., 50 Mo. App. 414; Mueller v. Fruen, 36 Minn. 273, 30 N. W. 886; Drew v. Hicks (Cal.) 35 Pac. 563; Leckonfield v. Lonsdale, L. R. 5 C. P. 657. Et vide Rolle v. Whyte, L. R. 3 Q. B. 286. To obstruct the flow of water in a natural water course, see Murgatroyd v. Robinson, 7 El. & Bl. 391. Or to carry on a noisy trade, Sturges v. Bridgman, 11 Ch. Div. 852. To pollute water, Wright v. Williams, 1 Mees. & W. 77; Crossley v. Lightowler, 2 App. Cas. 478. Acquiescence of a tenant for life does not affect remainder-men, Wallace v. Fletcher, 10 Fost. (N. H.) 453. In an action for personal injuries received by falling into a cellar way, due to a defective cover, evidence that the cellar way had been maintained for 20 years without objection from the city authorities tends to prove that it was built under permission from the city; and therefore an instruction that it was a nuisance, per se, is erroneous. Jorgensen v. Squire, 66 Hun, 633, 21 N. Y. Supp. 383, affirmed in 144 N. Y. 280, 39 N. E. 373. As maintaining a fever-breeding dam, see Mills v. Hall, 9 Wend. 315. As a city could not, in the absence of express legislative authority, grant the right to erect and perpetually maintain awnings over the sidewalks, no lapse of time will render the license to erect awnings irrevocable. City Council of Augusta v. Barnum, 93 Ga. 68, 19 S. E. 820.

reach. Pure air and comfortable enjoyment of property are as much rights belonging to it as the right of possession and occupancy." [251] The confusion in the cases, and the uncertainty in theory as to what the "natural use of land" is, which allows one to use his own without responsibility to his neighbor for consequent damage, is elsewhere discussed.[252]

PARTIES TO PROCEEDINGS AGAINST.

243. Subject to conventional variations in the normal right to sue, the parties plaintiff in a civil proceeding against a nuisance are in general determined by property interests.

244. Whoever creates or merely maintains a nuisance, after notice to abate, is a proper defendant in such proceedings; but, as a joint tort feasor, only when there is concert in action between the alleged wrongdoers.

Parties Plaintiff.

The parties plaintiff in a civil proceeding against a nuisance are determined primarily by property interests. For example, the reversioner may sue for permanent depreciation of property, or setting up an adverse claim of right; but ordinarily the tenant in possession is the proper party plaintiff.[253] Several distinct owners or

[251] Board of Health v. Lederer (N. J. Ch.) 29 Atl. 444 (a leading case); State v. Holman, 104 N. C. 861, 10 S. E. 758; Reed v. City of Birmingham, 92 Ala. 339, 9 South. 161; Meiners v. Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. 430; Chicago & E. R. Co. v. Loeb (Ill. Sup.) 59 Am. Rep. 341, note (8 N. E. 460); Hargreaves v. Kimberly, 53 Am. Rep. 130, note; Rung v. Shoneberger, 26 Am. Dec. 95; People v. Cunningham, 1 Denio, 524; People v. Maher, 141 N. Y. 330, 36 N. E. 396. And generally, see Wood, Nuis. § 18, note 4.

[252] Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149; Cross v. Mayor of Morristown, 18 N. J. Eq. 305. Befouling percolating waters by passing through a cemetery is damnum absque injuria. City of Greencastle v. Hazelett, 23 Ind. 186. Contra, Clark v. Lawrence, 6 Jones, Eq. (N. C.) 83. Et vide Clemens v. Speed, 93 Ky. 284, 19 S. W. 660.

[253] Lockett v. Ft. Worth & R. G. Ry. Co., 78 Tex. 211, 14 S. W. 562; Beir v. Cooke, 37 Hun, 38; Jones v. Chappell, 20 Eq. Cas. 539; Mott v. School-

tenants may join in a suit to restrain a nuisance which is common to all and affects each in a similar way, but may not so join to restrain that which does a distinct and special injury to the property of each. Thus, annoyance from a lunatic asylum, though given acts do not occur at the same time, nor to the same person, but continually, is not a distinct, but a common, nuisance.[254] Where, however, the action is at law, owners of distinct interests, it has been insisted, must bring separate actions for the same nuisance.[255] A private action for a public nuisance can only be maintained by one who is the owner, or has some legal interest, as lessee[256] or otherwise, in the land which is affected by the nuisance. Therefore, one who lived in his wife's house could not sue for annoyance to himself or his family for corruption of the air by another.[257] Right of possession is sufficient interest.[258] A municipal corporation may be

bred, Id. 22; Simpson v. Savage, 1 C. B. (N. S.) 347; Mumford v. Oxford, W. & W. Ry. Co., 1 Hurl. & N. 34; Metropolitan Ass'n v. Petch, 5 C. B. (N. S.) 504.

[254] Rawbotham v. Jones, 47 N. J. Eq. 337, 20 Atl. 731. Cf. Morris & E. R. Co. v. Prudden, 20 N. J. Eq. 530; Fogg v. Nevada, C. O. Ry. Co., 20 Nev. 429, 23 Pac. 840; Reid v. Gifford, 16 Johns. Ch. 19; Peck v. Elder, 3 Sandf. (N. Y.) 126; Seified v. Hays, 81 Ky. 377; Murray v. Hay, 1 Barb. 59; Town of Sullivan v. Phillips, 110 Ind. 320, 11 N. E. 300; Grant v. Schmidt, 22 Minn. 1. Defendant cannot complain of the admission of life tenants as parties plaintiff with remainder-men in a suit to restrain a nuisance. Rainey v. Herbert, 5 C. C. A. 183, 55 Fed. 446. Lessor and lessee necessary parties in an action to enjoin. O'Sullivan v. New York El. R. Co. (Super. N. Y.) 7 N. Y. Supp. 51.

[255] Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241; Hellams v. Switzer, 24 S. C. 39.

[256] Cooper v. Randall, 59 Ill. 317. By tenant against landlord, see Kern v. Myll, 94 Mich. 477, 54 N. W. 176; Angevine v. Knox-Goodrich (Cal.) 31 Pac. 529; Case v. Minot, 158 Mass. 577, 33 N. E. 700.

[257] Kavanagh v. Barber, 131 N. Y. 211, 30 N. E. 235, reversing 59 Hun. 60, 15 N. Y. Supp. 603. Cf. Ellis v. Kansas City, St. J. & C. B. R. Co., 63 Mo. 131; Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 13 Sup. Ct. 822. Therefore a father should not join with him as plaintiff his minor children in a suit for damages for the nuisance of collecting stagnant water, rendering unhealthy plaintiff's house, and offending the sight and smell of himself and children. Lockett v. Ft. Worth & R. G. Ry. Co., 78 Tex. 211, 14 S. W. 564.

[258] Hopkins v. Baltimore & P. R. Co., 6 Mackey, 311; Crommelin v. Coxe, 68 Am. Dec. 120. A mortgagor in possession after foreclosure, Lurssen v. Lloyd, 76 Md. 360, 25 Atl. 294.

authorized to proceed against a nuisance, such as interference with water courses.[259] A wrongdoer is not entitled to relief from the courts against a nuisance.[260] His consent to the wrong will prevent him from afterwards securing judicial interference,[261] but only so far as such consent extends.[262]

Parties Defendant.

The person primarily liable for a nuisance is he who creates it, whether on his own land or not.[263] He cannot escape liability for its continuance by demising the premises whereon the nuisance is located;[264] nor, on the other hand, is he liable for his grantee's

[259] Newark Aqueduct Board v. City of Passaic, 45 N. J. Eq. 393, 8 Atl. 106.

[260] Topeka Water-Supply Co. v. City of Potwin, 43 Kan. 404, 23 Pac. 578.

[261] Thus, an abutting owner who consents to the occupation of a street by a railroad company cannot afterwards ask the court to enjoin the use of the street or award him damages. Burkam v. Ohio & M. Ry. Co., 122 Ind. 344, 23 N. E. 799. The fact that a person knows that a factory is being built, and the purpose for which it is to be operated, and makes no objection thereto, does not estop him to afterwards sue to abate it as a nuisance, because of the smoke arising therefrom, and to recover for damages caused thereby, unless his conduct influenced the owner in building the factory. Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. 1000. But see Whitney v. Union Ry. Co., 71 Am. Dec. 715.

[262] A parol license permitting a city to discharge the sewage from a particular district on private property does not authorize the discharge of the sewage from a much larger territory; and the licensor is entitled to an injunction against such increased discharge, and is not confined to a legal action for damages. (1 N. Y. Supp. 456, modified.) New York Cent. & H. R. R. Co. v. City of Rochester, 127 N. Y. 591, 28 N. E. 416.

[263] 16 Am. & Eng. Enc. Law, 979; Thompson v. Gibson, 7 Mees. & W. 456. Thus the erector of an obstruction to a right of way is liable, although he is one of several persons claiming the land over which the way is situated. Connor v. Hall (Ga.) 15 S. E. 308. Et vide Williamson v. Tobey, 86 Cal. 497, 25 Pac. 65; Whitenack v. Philadephia & R. R. Co., 57 Fed. 901. So, a railroad company, for soot, smoke, and discomfort of running train, to adjoining owners. Louisville & N. R. Co. v. Orr, 91 Ky. 109, 15 S. W. 8. The purchaser of a railroad is not liable for damages caused by nuisance in its operation by vendor. Louisville & N. R. Co. v. Orr, 91 Ky. 109, 15 S. W. 8. The defense of independent contractor does not avail unless the wrong arise from the manner of doing the work, rather than from the work itself. Ante, p. 228; Skelton v. Fenton Electric Light & Power Co., 100 Mich. 87, 58 N. W. 609; Aldrich v. City of Minneapolis, 52 Minn. 164, 57 N. W. 221.

[264] Ingwersen v. Rankin, 47 N. J. Law, 18. Compare Roswell v. Prior, 12

subsequent conduct whereby the nuisance is created.[265] The bare fact of ownership of real estate imposes no responsibility for a nuisance on it.[266] Indeed, the occupier, and not the owner, is, in general, liable for nuisance thereon.[267] A fair summary of the law on this point would seem to be that where the nuisance complained of is caused by the physical condition of the premises, resulting from acts of commission or omission while in the possession of the owner, he is liable, but where the nuisance arises, not from their physical condition, but from the mode of user, the occupier is liable.[268] He who has created a nuisance on his own land being, accordingly, liable for it, his grantee is not liable, when he was not an actor in creating or actively maintaining it,[269] until it is shown that he failed, upon request, to remove it[270] within a reasonable time.[271] But such notice may be waived.[272]

Mod. 635, with Ryppon v. Bowles, Cro. Jac. 373; Plumer v. Harper, 14 Am. Dec. 333; Fish v. Dodge, 47 Am. Dec. 254; Waggoner v. Jermaine, 45 Am. Dec. 474. An owner who rents a house, knowing it to be used for prostitution, is liable in damages to an adjoining owner. Marsan v. French, 48 Am. Rep. 272.

[265] Moore v. Langdon, 47 Am. Rep. 262.

[266] Schmidt v. Cook (Com. Pl. N. Y.) 23 N. Y. Supp. 799; Dalay v. Savage, 145 Mass. 38, 12 N. E. 841; Fordyce v. Russell, 59 Ark. 312, 27 S. W. 82; Lufkin v. Zane, 157 Mass. 117, 31 N. E. 757; Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193; McCarthy v. York Co. Sav. Bank, 74 Me. 315. Compare Rex v. Pedly, 1 Adol. & E. 822–827, with Gandy v. Jubber, 9 Best & S. 15. The English case of this note will be found reviewed in Rex v. Pedly, 88 Law T. 149. Ante, p. 225, "Landlord and Tenant."

[267] Ante, p. 225, "Landlord and Tenant." In Lufkin v. Zane, 34 Am. St. Rep. 267, will be found citations on liability of grantee or lessee of premises for nuisance on the same.

[268] Clerk & L. Torts, 321–327, collecting cases; Joyce v. Martin, 15 R. I. 558, 10 Atl. 620; Owings v. Jones, 9 Md. 108; Rich v. Basterfield, 4 C. B. 783; ante, p. 225, "Landlord and Tenant." And see Moore v. Browne, 3 Dyer, 319, compared with Irvine v. Wood, 51 N. Y. 224, by Dallas, J., in Philadelphia & R. R. Co. v. Smith, 12 C. C. A. 384, 64 Fed. 679–683.

[269] Whitenack v. Philadelphia & R. R. Co., 57 Fed. 901. There is no presumption that a grantee knows that a dam erected by his grantor on the land was erected without the consent of others affected thereby.

[270] Philadelphia & R. R. Co. v. Smith, 12 C. C. A. 34, 64 Fed. 679 (in

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[271] Rychlicki v. City of St. Louis, 115 Mo. 662, 22 S. W. 908.

[272] As by answer, Bartlett v. Siman, 24 Minn. 448.

All persons who join, aid, or assist in creating and maintaining a nuisance may be jointly and severally liable.[273] But the liability of joint contributors is not necessarily that of joint tort feasors. If the persons who maintain a nuisance act independently, and not in concert with others, each is liable for damages which result from his individual conduct only. And the fact that it may be difficult to actually measure the damage caused by the wrongful act of each contributor to the aggregate result does not affect the rule, or make any one liable for the acts of the others.[274] Each

this case Dallas, J., discusses, inter alia, the following New Jersey cases not in accord with the general rule, viz. Pierson v. Glean, 14 N. J. Law, 36; Beavers v. Wimmer, 25 N. J. Law, 97; Morris Canal & Banking Co. v. Ryerson, 27 N. J. Law, 457). Steinke v. Bentley, 6 Ind. App. 663, 34 N. E. 97: Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 57 Fed. 441; Rouse v. Chicago & E. I. R. Co., 42 Ill. App. 421; Eastman v. Amoskeag Manuf'g Co., 82 Am. Dec. 201; Plumer v. Harper, 3 N. H. 88; Johnson v. Lewis, 13 Conn. 303; Curtice v. Thompson, 19 N. H. 471; Crommelin v. Coxe, 68 Am. Dec. 120; Pillsbury v. Moore, 69 Am. Dec. 91; Nichols v. Boston, 93 Am. Dec. 132; Noyes v. Stillman, 24 Conn. 15; Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co., 51 N. Y. 573; Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193; Grisby v. Clear Lake Water Co., 40 Cal. 396. Tenant for years, see City of McDonough v. Gilman, 80 Am. Dec. 72; Slight v. Gutzlaff, 17 Am. Rep. 476; Castle v. Smith (Cal.) 36 Pac. 859 (notwithstanding Code, § 3483); Penruddock's Case, 5 Coke, 101a; Jones v. Williams, 11 Mees. & W. 176; Pol. Torts, 350–351. Mere failure to remove or repair jetties in a river, whereby plaintiff's crops were damaged, does not make receivers of a railroad liable. They are made liable only by some positive act adopting them. Fordyce v. Russell, 59 Ark. 312, 27 S. W. 82.

[273] Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911; Bigelow, Lead. Cas. 475, 476. A powder magazine, Comminge v. Stevenson, 76 Tex. 642, 13 S. W. 556. Et vide Irvin v. Wood, 4 Robt. (N. Y.) 138; Anderson v. Dickie, 26 How. Prac. 105; Rogers v. Stewart, 5 Vt. 215; Buddington v. Shearer, 20 Pick. 477; Grogan v. Broadway Foundry Co., 87 Mo. 321. For continuing a nuisance the lessor, assignees of lease, lessees, and sublessees are jointly liable. Rogers v. Stewart, 26 Am. Dec. 296.

[274] Loughran v. City of Des Moines, 72 Iowa, 382, 34 N. W. 172; Ferguson v. Firmenich Manuf'g Co., 77 Iowa, 576, 42 N. W. 448; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451; Chipman v. Palmer, 33 Am. Rep. 566; Sellick v. Hall, 47 Conn. 260; Martinowsky v. City of Hannibal, 35 Mo. App. 70; Evans v. Wilmington & W. R. Co., 96 N. C. 45, 1 S. E. 529; Suth. Dam. 257; 1 Add. Torts, 374; Gould, Waters, §§ 222–398; Wood, Nuis. § 831;

must be definitely connected as the proximate,[275] but not as the sole,[276] cause of the wrong. Municipal corporations, subject to statutory exemptions, may be held liable for failure to exercise reasonable care and diligence in not abating a nuisance,[277] or for wrongful exercise of power to abate;[278] and they are generally liable for the maintenance of a nuisance.[279]

Chipman v. Palmer, 77 N. Y. 51. Cf. Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911; Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. 1000; Lull v. Improvement Co., 19 Wis. 112. Cf. Thorpe v. Brumfitt, 8 Ch. App. 650; Blair v. Deakin, 57 Law T. 522, 52 J. P. 327; Nixon v. Tynemouth Union Rural Sanitary Authority, 52 J. P. 504; ante, p. 209, "Joint Tort Feasors."

[275] Russell v. Bancroft, 79 Tex. 377, 15 S. W. 282. Et vide Atlanta & F. R. Co. v. Kimberly, 87 Ga. 161, 13 S. E. 277; Mirkil v. Morgan, 134 Pa. St. 144, 19 Atl. 628.

[276] City of Hannibal v. Richards, 35 Mo. App. 15. Causing and permitting are the same thing, Hochstrasser v. Martin, 62 Hun, 165, 16 N. Y. Supp. 558.

[277] In Taylor v. Mayor, etc., of City of Cumberland, 64 Md. 68, 20 Atl. 1027, a municipal corporation was held liable for coasting on streets. In Lincoln v. City of Boston, 148 Mass. 578, 20 N. E. 329, the city was held not liable for injury occasioned by a running away of a horse frightened by licensed firing of cannon.

[278] City of Orlando v. Pragg, 31 Fla. 111, 12 South. 368.

[279] As for discharging sewage on defendant's premises, see Stoddard v. Village of Saratoga Springs, 127 N. Y. 261, 27 N. E. 1030; Bacon v. City of Boston, 154 Mass. 100, 28 N. E. 9. Et vide City of Sherman v. Langham (Tex. Sup.) 13 S. W. 1042, followed in City of Hillsboro v. Ivey, 1 Tex. Civ. App. 653, 20 S. W. 1012; Miles v. City of Worcester, 154 Mass. 511, 28 N. E. 676; Attwood v. City of Bangor, 83 Me. 582, 22 Atl. 466; Bish. Noncont. Law, 754; Danaher v. City of Brooklyn, 119 N. Y. 241, 23 N. E. 745; Mehrhof Bros. Brick Manuf'g Co. v. Delaware, L. & W. R. Co., 51 N. J. Law, 56, 16 Atl. 12; Taylor v. Mayor, etc., 64 Md. 73, 20 Atl. 1027; Lostutter v. City of Aurora, 126 Ind. 436, 26 N. E. 184; Mootry v. Town of Danbury, 45 Conn. 550; Hubbell v. City of Viroqua, 67 Wis. 343, 30 N. W. 847. If a person has created a nuisance in a public street, and a city is in consequence thereof obliged to pay damages to a traveler on the street, the fact that the city is in fault in not removing the nuisance does not make it in pari delicto with the creator of the nuisance and prevent recovery against him. City of Lowell v. Glidden, 159 Mass. 317, 34 N. E. 459.

REMEDIES.

245. Private remedies for a nuisance[280] not merely statutory[281] may be—

(1) Abatement by act of parties, or by judicial proceeding;

(2) Injunction, and other equitable remedies; or

(3) Action for damages.[282]

Abatement by Act of Party.

The abatement of a nuisance by private persons is one of the oldest of recognized remedies for torts. It is, in general, the removal of the nuisance.[283] Where a party can maintain an action for a nuisance, whether public or private, he may enter and abate it,[284] without breach of the peace,[285] unless the nuisance consists of unlawful and immoral conduct.[286]

[280] As to public remedies, see ante, p. 782, note 206, "Public Nuisances." Public remedies are not exclusive ordinarily of a private remedy for same wrong. Hart v. Board of Chosen Freeholders (N. J. Sup.) 29 Atl. 490.

[281] The statutory and common-law remedy for a nuisance is naturally cumulative. Renwick v. Morris, 7 Hill (N. Y.) 575. Ante, p. 348, "Statutory Remedies." Where a summary method given a town for the abatement of a nuisance confers no right not possessed at common law, it does not preclude a resort to the courts. American Furniture Co. v. Town of Batesville (Ind. Sup.) 38 N. E. 408.

[282] As to choice of remedies, see People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735; City of Grand Rapids v. Weiden, 97 Mich. 82, 56 N. W. 233.

[283] 3 Bl. Comm. 5. "The removal, prostration, or destruction of that which causes a nuisance, whether by breaking or pulling down, or otherwise removing, disintegrating, or effacing it. The remedy which the law allows a party injured by a nuisance of destroying or removing it by his own act, so as he commits no riot in doing it, nor occasions (if the case is private nuisance) any damage beyond what the removal of the inconvenience necessarily requires." Black, Law Dict. p. 5.

[284] Baten's Case, 9 Coke, 53b; Griffith v. McCullum, 46 Barb. 561; Amoskeag Manuf'g Co. v. Goodale, 46 N. H. 53; Burd. Lead. Cas. 313, collecting

[285] Stiles v. Laird, 63 Am. Dec. 110; Mohr v. Gault, 78 Am. Dec. 687.

[286] Gray v. Ayers, 32 Am. Dec. 107.

The right of abatement by the owner is clearly recognized, as to private nuisances. Thus, trees whose branches and roots extend over and into the land of another are nuisances, to the extent that the branches overhang and the roots penetrate the land of another; and the person whose land is injured may cut off the roots and branches only so far as they so penetrate and overhang his land, but he may not cut down the trees.[287] Also, when a public nuisance obstructs the individual right of a private person, he has been allowed to remove it, to enable him to enjoy that right, without being called to answer for so doing.[288] Thus, the right of enjoyment to security of person may justify the killing of a dog at large, so ferocious that he will, of his own disposition, bite persons in the street.[289] Indeed, it is said that a public nuisance may be abated by any person, whether he has been injured by it or not.[290] "If the nuisance is in the nature of a trespass, and cannot be abated without entering on another's land, it does not appear that the wrongdoer is entitled to notice. If, however, the nuisance is on the wrongdoer's own land, he ought to be first warned, and required to abate it him-

cases; Rhodes v. Whitehead, 84 Am. Dec. 631. But the owners of adjoining tracts of land are tenants in common of trees growing on the boundary line between the tracts. Musch v. Burkhart, 83 Iowa, 301, 48 N. W. 1025.

[287] Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623; Hickey v. Railroad Co., 96 Mich. 498, 55 N. W. 989; Norris v. Baker, 1 Rolle, Abr. 393; Earl of Lonsdale v. Nelson, 2 Barn. & C. 311; Hickey v. Michigan Cent. Ry. Co. (Mich.) 21 Lawy. Rep. Ann. 729, and note collecting cases (55 N. W. 989); Buckingham v. Elliot, 52 Am. Rep. 188. Damages after refusal to abate, see article in 50 Alb. Law J. 229. So interference with water course may be abated. Schaefer v. Marthaler, 34 Minn. 487, 26 N. W. 726. So to tear down buildings wrongfully built on one's own land after notice (Burling v. Read, 11 Q. B. 904. If there are people in the house this may be a trespass. Jones v. Jones, 1 Hurl. & C. 1) within a reasonable time (Davies v. Williams, 16 Q. B. 546).

[288] Brown v. Perkins, 12 Gray, 89; Baten's Case, 9 Coke, 53b; Rex v. Rosewell, 2 Salk. 459, 3 Bl. Comm. 5; Crosland v. Pottsville Borough, 126 Pa. St. 511, 18 Atl. 15.

[289] Dunlap v. Snyder, 17 Barb. 561. Et vide Brown v. Carpenter, 26 Vt. 638; Stump v. McNairy, 5 Humph. 363; Oliver v. Loftin, 4 Ala. 240. But see Peckham v. Henderson, 27 Barb. 207.

[290] Gates v. Blincoe, 26 Am. Dec. 440; Wetmore v. Tracy, 28 Am. Dec. 525.

self. After notice and refusal, entry on the land to abate the nuisance may be justified; but it is a hazardous course, at best, for a man to take the law into his own hands, and in modern times it can seldom, if ever, be advisable."[291] However, if the actions of the occupant are in themselves unlawful, and the nuisance is immediately dangerous to life or health, the person injured may enter on the land of such occupant to abate the nuisance without previous request or notice to the occupant to remove it. Such notice or request to the occupant is necessary if, when he acquired possession of the land, the nuisance already existed upon it, and he simply neglected to remove it.[292] In case of the abatement of a public or private nuisance, however, a very pressing exigency is required to justify summary action of this character; particularly, in the case of a public nuisance.[293] The person abating is liable if in removing the nuisance he does more damage than is necessary, or converts the materials composing the nuisance.[294] If it should be proved that the supposed wrong abated was not in fact a nuisance at the time of abatement,[295] liability attaches.[296] And in this respect a

[291] Webb, Pol. Torts, 513, 514; People v. Board of Health of City of Yonkers, 140 N. Y. 1, 35 N. E. 320.

[292] Jones v. Williams, 11 Mees. & W. 176. Removal of filth: Grigsby v. Clear Lake Waterworks Co., 40 Cal. 396; West v. Railway, 8 Bush, 408. Generally, as to notice, see United States Illuminating Co. v. Grant, 55 Hun, 222, 7 N. Y. Supp. 788; Dunsbach v. Hollister, 49 Hun, 352, 2 N. Y. Supp. 94; McGowan v. Missouri Pac. Ry. Co., 23 Mo. App. 203; Groff v. Ankenbrandt, 19 Ill. App. 148; Harvey v. Dewoody, 18 Ark. 252; Sweet v. Sprague, 55 Me. 190; Haggerty v. Thomson, 45 Hun, 398. Statutory requirement of notice, see Verder v. Ellsworth, 59 Vt. 354, 10 Atl. 80.

[293] Ring. Torts, 101; Whetmore v. Tracy, 14 Wend. 252; Davies v. Williams, 16 Q. B. 546; Hicks v. Dorn, 42 N. Y. 47.

[294] Larson v. Furlong, 50 Wis. 681, 8 N. W. 1; Id., 63 Wis. 323, 23 N. W. 584.

[295] Removal of a dock, a public nuisance, by riparian owner, Greenslade v. Halliday, 6 Bing. 379. But a wrongdoer is not entitled to consideration as to the manner of abatement. Roberts v. Rose, L. R. 1 Exch. 82–89; Gates v. Blincoe, 26 Am. Dec. 440; Graves v. Shattuck, 69 Am. Dec. 536.

[296] An owner of land may protect it by embankments from overflow by surface water, and recover damages of an adjoining owner who cuts the embankments for the purpose of allowing the water to flow off his own land. Jean v. Pennsylvania Co., 9 Ind. App. 56, 36 N. E. 159, followed. Jacks v. Lollis, 10 Ind. App. 700, 37 N. E. 728.

city is subject to the same perils and liability as an individual.[297] Liability may attach for excessive abatement.[298]

Abatement by Action.

A nuisance may be abated by an action on principles similar to that which controls the issuance of an injunction,[299] and by proceedings at law.[300] A nuisance may be abated in the same action in which damages are recovered,[301] but one maintaining a public nuisance is not entitled to a jury trial in summary proceedings to abate.[302] A public nuisance may be abated by a suit of the people, by their proper officers.[303] In order that a nuisance may be abated by private action, special,[304] though not necessarily pecuniary, dam-

[297] Cole v. Kegler, 64 Iowa, 59, 19 N. W. 843, collecting cases at page 62, 64 Iowa, and page 843, 19 N. W. Generally, as to abatement, see Griffith v. McCullum, 46 Barb. 561; Brown v. De Groff, 50 N. J. Law, 409, 14 Atl. 219; Fields v. Stokley, 99 Pa. St. 306; Bowden v. Lewis, 13 R. I. 189; Roberts v. Rose, 4 Hurl. & C. 103; Clark v. Lake St. Clair & N. U. R. Ice Co., 24 Mich. 508; Gray v. Ayres, 7 Dana, 375; School Dist. v. Neil, 36 Kan. 617, 14 Pac. 253; City of McGregor v. Boyle, 34 Iowa, 268.

[298] Harrower v. Ritson, 37 Barb. 301; Brightman v. Inhabitants of Bristol, 65 Me. 443; Ely v. Supervisors, 36 N. Y. 297; Earp v. Lee, 71 Ill. 193. If a building is wrongfully used, the use should be stopped, not the building demolished or removed. Barclay v. Com., 64 Am. Dec. 715; Gray v. Ayres, 32 Am. Dec. 107. Et vide Brightman v. Inhabitants of Bristol, 20 Am. Rep. 711. Abatement is not destruction, unless destruction be absolutely necessary. Morrison v. Marquardt, 92 Am. Dec. 444.

[299] As to abate a breakwater, see Nicholson v. Getchell, 96 Cal. 394, 31 Pac. 265. Action by lessee, Hadon v. Brown, 31 Pa. St. 56; obstruction to a private way, Van Bergen v. Van Bergen, 8 Am. Dec. 511; Connor v. Hall, 89 Ga. 257, 15 S. E. 308. Et vide Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. 1000. Cf. Dumesnil v. Dupont, 68 Am. Dec. 750 (where a chancellor declined to decree abatement of a powder house as a nuisance). Equity will abate as well as prevent creation of nuisance, Earl v. De Hart, 72 Am. Dec. 395.

[300] Barclay v. Com., 64 Am. Dec. 715; Tate v. Railroad Co., 71 Am. Dec. 309. Et vide Parsons v. Tuolumne County Water Co., 63 Am. Dec. 76.

[301] Drinkwater v. Sauble, 46 Kan. 170, 26 Pac. 433.

[302] Hart v. Mayor of Albany, 24 Am. Dec. 165.

[303] Township of Hutchinson v. Filk, 44 Minn. 536, 47 N. W. 255; Barclay v. Com., 25 Pa. St. 503; City of Orlando v. Pragg, 31 Fla. 111, 12 South. 368; City of Fresno v. Fresno Canal & Irr. Co., 98 Cal. 179, 32 Pac. 943.

[304] To maintain a private action to abate a nuisance for obstructing street,

ages, must be shown.[305] Prescription is no defense against a private action to abate a public nuisance.[306]

Equitable Remedies.

A court of equity may interfere, on behalf of one complaining of a nuisance, to prevent threatened[307] injury, to abate existing nuisances,[308] or otherwise to effect justice.[309] It exercises this inherent jurisdiction with great caution.[310] It is not sufficient, to procure equitable interference, to show that an act complained of as a nuisance is illegal. "If an act be illegal, I am not to grant an injunction to restrain an illegal act merely because it is illegal. I could not give an injunction to restrain a man from smuggling, which is an illegal act."[311] Equity will not, except for urgent and special rea-

an abutting owner must show special damage. Hogan v. Central Pac. R. Co., 71 Cal. 83, 11 Pac. 876.

[305] Building a house so as to prevent access of abutting owner to public highway may be abated by action, without proof of special pecuniary damages. Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106; Porth v. Manhattan Ry. Co. (Super. N. Y.) 11 N. Y. Supp. 633; Hogan v. Central Pac. R. Co., 71 Cal. 83, 11 Pac. 876; Meiners v. Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. 430.

[306] Applied to a brewery, Meiners v. Frederick Miller Brewing Co., 78 Wis. 364, 47 N. W. 430. Cf. City of New Castle v. Raney, 130 Pa. St. 546, 18 Atl. 1066.

[307] Ex parte Martin, 58 Am. Dec. 321; Wolcott v. Melick, 66 Am. Dec. 790. See cases collected in Ryan v. Copes, 73 Am. Dec. 106–116.

[308] As to require remedy of evils complained of (flour mill) by scientific and skillful appliances. Green v. Lake, 28 Am. Rep. 378. Quære, as to smoke consumers.

[309] As to abolition of equity jurisdiction by statute, see 1 Pom. Eq. Jur. § 281. Rule in New Hampshire, Id. §§ 307, 308; in Massachusetts, Id. § 319; in Maine, Id. § 331.

[310] Ex parte Martin, 58 Am. Dec. 321; Wolcott v. Melick, 66 Am. Dec. 790.

[311] Vice Chancellor Kindersley, in Soltau v. De Held, 2 Sim. (N. S.) 133–154. Therefore a public nuisance may not always be restrained by a private action. Recovery of damages for a permanent injury to property does not necessarily entitle to an injunction or order to abate. Downing v. City of Oskaloosa, 86 Iowa, 352, 53 N. W. 256. Although the unauthorized occupation of a public street by a railway track may be regarded as a nuisance per se, which will be enjoined, an injunction against it will not be granted at the suit of a private person or corporation, unless plaintiff makes out a case of special damage. Larimer & L. St. Ry. Co. v. Larimer St. Ry. Co., 137 Pa. St. 533, 20 Atl. 570.

sons, enjoin an indictable public nuisance.[312] Where there has been failure to exercise reasonable diligence,[313] or acquiescence operating as estoppel, the plaintiff[314] will be left to its remedy at law. Nor will a court of equity interfere where there is conflicting evidence. A chancellor will not attempt to usurp the functions of a jury, and pass upon disputed questions of fact.[315] Accordingly, if the damages complained of are remote and speculative,[316] if there be a dispute as to whether a nuisance exists,[317] or if it is doubtful whether the ap-

[312] Inhabitants of Township of Raritan v Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127. Cf. Henry v. Trustees, 48 Ohio St. 671, 30 N. E. 1122. Et vide Porth v. Manhattan Ry. Co. (Super. N. Y.) 11 N. Y. Supp. 633. Court of equity will not enjoin an act which would otherwise be lawful, but which is made unlawful by an ordinance or by-law of a city or town, unless the act is shown to be a nuisance per se. Warren v. Cavanaugh, 33 Mo. App. 102; Burwell v. Commissioners, 93 N. C. 73; Babcock v. New Jersey Stock Yards Co., 20 N. J. Eq. 296. The question of nuisance or no nuisance, where the evidence is conflicting and a doubt exists, must be first tried by a jury. If the proceeding was by indictment, and the jury doubted whether it was a nuisance or not, they would be bound to acquit; and the same rule applies to a court of chancery. Thus, an injunction will be refused unless plaintiff's disputed prescriptive right has been tried at law. Ingraham v. Dunnell, 5 Metc. (Mass.) 118; Dana v. Valentine, 5 Metc. (Mass.) 8; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; Flight v. Thomas, 10 Adol. & E. 590; Bolivar Manuf'g Co. v. Neponset Manuf'g Co., 16 Pick. 241; Bliss v. Hall, 5 Scott, 500; Goldsmid v. Tumbridge Imp. Com'rs, 1 Ch. App. 349; Campbell v. Seaman, 63 N. Y. 568; Mississippi & M. R. Co. v. Ward, 2 Black (U. S.) 485–495; Parker v. Woollen Co., Id. 545–552; Irwin v. Dixion, 9 How. 10–28; Rhodes v. Dunbar, 57 Pa. St. 274; Earl of Ripon v. Hobart, 1 Coop. t. Brough. 333; Amelung v. Seekamp, 9 Gill. & J. 468; Attorney General v. Hunter, 1 Dev. Eq. 12; Swaine v. Great Northern R. Co., 33 Law J. Ch. 399; Hart v. Mayor, etc., of Albany, 3 Paige, 213.

[313] Clifton Iron Co. v. Dye, 87 Ala. 468, 6 South. 192; Wood, Nuis. § 804; Goodall v. Crofton, 31 Am. Rep. 535; Ellison v. Commissioners, 75 Am. Dec. 430; St. James Church v. Arrington, 76 Am. Dec. 332.

[314] 2 Pom. Eq. Jur. § 817; Wood, Nuis. § 806.

[315] But see State v. Mayor, etc., of Mobile, 30 Am. Dec. 564; Dumesnil v. Dupont, 68 Am. Dec. 750.

[316] As to damage from erection of bay window, interfering with view of a store, Hay v. Weber, 79 Wis. 587, 48 N. W. 859.

[317] Private drain from well in street, Wood v. McGrath, 150 Pa. St. 451, 24 Atl. 682; powder magazine, Born v. Loflin & R. Powder Co., 84 Ga. 217, 10 S. E. 738; saloon interfering with dentist, Barfield v. Putzel, 92 Ga. 442, 17 S. E. 616. Generally, see Wolcott v. Melick, 66 Am. Dec. 790; Dumesnil v. Dupont, 68 Am. Dec. 750.

prehended nuisance may arise,[318] or from what source damage complained of has arisen, no relief will be granted.[319] Nor will equity interfere where damages are an adequate remedy. Mere injury to property, as by depreciation in value, entitles to damages only; but an offensive business, when it reaches the point of discomfort, and becomes injurious to health, calls forth the extraordinary power of a court of chancery to destroy it.[320] But if the injured person has no adequate remedy at law, as where the injury would otherwise be irreparable to individuals, or great public injury ensue,[321] or where a multiplicity

[318] Pollution of water, Newark Aqueduct Board v. City of Passaic, 45 N. J. Eq. 393, 18 Atl. 106, affirmed 46 N. J. Eq. 552, 20 Atl. 54, and 22 Atl. 55; Depierris v. Mattern (Sup.) 10 N. Y. Supp. 626; a pleasure garden, Pfingst v. Senn, 94 Ky. 556, 23 S. W. 358; power house, Powell v. Macon & I. S. R. Co., 92 Ga. 209, 17 S. E. 1027; a privy, Iliff v. School Directors, 45 Ill. App. 419; a cemetery, Dunn v. City of Austin (Tex. Sup.) 11 S. W. 1125. Cf. Clark v. Lawrence, 78 Am. Dec. 241. Et vide Ellison v. Commissioners, 75 Am. Dec. 430; Ross v. Butler, 97 Am. Dec. 654.

[319] Rouse v. Martin, 75 Ala. 510, 51 Am. Rep. 463 (a leading case, citing many authorities). Plaintiff must show whether the water filling his cellar came from defendant's well, complained of, or from springs. Mirkil v. Morgan, 134 Pa. St. 144, 19 Atl. 628. And, generally, see Wood v. McGrath, 150 Pa. St. 451, 24 Atl. 682; Canton Cotton Warehouse Co. v. Potts, 69 Miss. 31, 10 South. 448; Powell v. Bentley & Gerwig Furniture Co., 34 W. Va. 804, 12 S. E. 1085.

[320] Ballentine v. Webb, 84 Mich. 38, 47 N. W. 485 (injunction for maintaining a slaughterhouse refused). People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, distinguished. Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 205, considered. A slaughterhouse, before pronounced a nuisance at law, Minke v. Hofeman, 29 Am. Rep. 63; machinery jarring and shaking plaintiff's house, so as to render it unsafe for habitation, Dittman v. Repp, 33 Am. Rep. 325; Smith v. Ingersoll-Sergeant Rock Drill Co., 7 Misc. Rep. 374, 27 N. Y. Supp. 907. Et vide Evans v. Fertilizing Co., 160 Pa. St. 209, 28 Atl. 702. Special injury not sufficient, Hill v. Mayor, etc., of City of New York (Sup.) 15 N. Y. Supp. 393. A creamery company will be enjoined from causing its waste matter to flow into another's pasture so as to injure the pasture and cattle therein. Price v. Oakfield Highland Creamery Co., 87 Wis. 536, 58 N. W. 1039. Where a saloon keeper causes a piano to be played in his saloon each night from 7 o'clock till 10, and sometimes till 11, o'clock, to the music of which dancing, accompanied by loud noises, is indulged in, the effect of which is to prevent the occupant of an adjoining dwelling from sleeping, a preliminary injunction will, at the suit of such occupant, be granted, restraining the use of the piano after 9 p. m. Feeney v. Bartoldo (N. J. Ch.) 30 Atl. 1101.

[321] State v. Mayor, etc., of Mobile, 30 Am. Dec. 564.

of suits is liable to be occasioned by its repetition or continuance, the court of chancery will assume jurisdiction.[322] By irreparable injury is not meant such injury as is beyond the possibility of repair, or beyond compensation in damage, nor necessarily great injury or great damage, but that species of injury, whether great or small, that ought not to be submitted to, on the one hand, or inflicted on the other, and which, because it is so large on the one hand, or so small on the other, is of such constant and frequent occurrence that no fair or reasonable redress can be had therefor in a court of law.[323] Thus, if the stench from a fertilizing factory in a farming community decreases the value of a person's house, and renders it almost uninhabitable, an injunction will issue.[324] On the other hand, the fact that the owners of a building have temporarily burned therein a quality of coal that produced dense smoke, to the injury of the neighbors, does not justify relief by injunction, since the remedy at law is

[322] Board of Health v. New York H. M. Co., 47 N. J. Eq. 1; Proprietors of Maine Wharf v. Proprietors of Custom House Wharf, 85 Me. 175, 27 Atl. 93.

[323] Wood, Nuis. § 778, citing, inter alia, Clowes v. Staffordshire Potteries Waterworks Co., 8 Ch. App. 125; Wilts & B. C. Nav. Co. v. Swindon Waterworks Co., 9 Ch. App. 451; Webb v. Portland Manuf'g Co., 3 Sumn. 189, Fed. Cas. No. 17,322; Babcock v. New Jersey Stock Yard Co., 20 N. J. Eq. 296; Pol. Torts, 523. Et vide Rhodes v. Dunbar, 57 Pa. St. 274 (opinion of Reed, J., at pages 275–285); Mirkil v. Morgan, 134 Pa. St. 144, 19 Atl. 628; Dittman v. Repp, 50 Md. 516; Topeka Water Supply Co. v. City of Potwin, 43 Kan. 414, 23 Pac. 578; Pfingst v. Senn, 94 Ky. 556, 23 S. W. 358; Powell v. Macon & I. S. R. Co., 92 Ga. 209, 17 S. E. 1027; Talbott v. King, 32 W. Va. 6, 9 S. E. 48; Van Wegenen v. Cooney, 45 N. J. Eq. 24, 16 Atl. 689. When evils complained of can be remedied, an injunction restraining defendant from operating a brass foundry will be modified. McMenomy v. Baud, 87 Cal. 134, 26 Pac. 795. As to when an injunction will be refused, see Rosser v. Randolph, 31 Am. Dec. 712 (damage not irreparable); Bigelow v. Hartford Bridge Co., 36 Am. Dec. 502 (no special damage); Hinchman v. Paterson Horse R. Co., 86 Am. Dec. 252 (Id.); State v. Crawford, 42 Am. Rep. 182 (Id.; a saloon declared by statute to be a nuisance); Burwell v. Vance Co. Com'rs, 53 Am. Rep. 454 (Id.; a jail). An action for damages on account of the pollution of a stream running through plaintiff's farm is not a condition precedent to enjoining construction of sewers causing the pollution. Village of Dwight v. Hayes (Ill. Sup.) 37 N. E. 218. See Indianapolis Water Co. v. American Strawboard Co., 53 Fed. 970, affirmed 57 Fed. 1000.

[324] Evans v. Reading Chemical Fertilizing Co., 160 Pa. St. 209, 28 Atl. 702. And see Fleischner v. Citizens' Real-Estate & Inv. Co., 25 Or. 119, 35 Pac. 174; City of Grand Rapids v. Welden, 97 Mich. 82, 56 N. W. 233.

ample.[325] The destruction of an easement, existing or threatened, will especially be restrained.[326] When the existence of a nuisance has been established at law, equity will issue an injunction, as a matter of course, when the nuisance is of a constantly occurring character, and especially if damages recovered are merely nominal, and therefore inadequate to prevent repetition.[327]

The injunction should be confined in its application to the specific injury.[328] It may be temporary, as to restrain an alleged continuing nuisance,[329] or mandatory,[330] interlocutory,[331] or final. Indeed, the court may retain the cause, and decree full and final relief, including damages or an abatement of whatever caused a nuisance.[332]

[325] Nelson v. Milligan, 151 Ill. 462, 38 N. E. 239.

[326] Pom. Eq. Jur. §§ 350, 351. As to restraining obstruction of street, City of Demopolis v. Webb, 87 Ala. 659, 6 South. 408; Town of Burlington v. Schwarzman, 52 Conn. 181; or an alley, Field v. Barling, 149 Ill. 556, 37 N. E. 850. The authorities as to what are individual instances of irreparable injuries will be found collected in Wood, Nuis. c. 25. Blasting, Wilsey v. Callanan, 66 Hun, 629, 21 N. Y. Supp. 165; Rogers v. Hanfield, 14 Daly, 339; droppings of cattle, Barton v. Union Cattle Co., 28 Neb. 350, 44 N. W. 454; discharge of sewerage, New York Cent. & H. R. R. Co. v. City of Rochester, 127 N. Y. 591, 28 N. E. 416; elevated railway, Berheimer v. Manhattan R. Co., 26 Abb. N. C. 88. Injunction refused: Noise caused by removing scenery, disturbing sleep, Penrose v. Nixon, 140 Pa. St. 45, 21 Atl. 364; Straus v. Barnett, 140 Pa. St. 111, 21 Atl. 253; electric plant, English v. Progress Electric Light & Motor Co., 95 Ala. 259, 10 South. 134; neighborhood squabbles, Medford v. Levy, 31 W. Va. 649, 8 S. E. 302.

[327] Paddock v. Somes, 102 Mo. 226, 14 S. W. 746; Wood, Nuis. § 780.

[328] McMenomy v. Baud, 87 Cal. 134, 26 Pac. 795 (where it was held that the injurious portions of a foundry and machine shop would be abated without stopping entire works). But an injunction against a livery stable will not be limited to restraining the manner of keeping it. Burditt v. Swenson, 67 Am. Dec. 665.

[329] East Tennessee, V. & G. Ry. Co. v. Sellers, 85 Ga. 853, 11 S. E. 543.

[330] As by a city against a railroad company constructing a road over a street. See City of Moundsville v. Ohio River R. Co., 37 W. Va. 92, 16 S. E. 514; Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618. Cf. McMenomy v. Baud, 87 Cal. 134, 26 Pac. 795.

[331] City of Conyers v. Smith (Ga.) 19 S. E. 882; McGuire v. Bloomingdale (Com. Pl.) 29 N. Y. Supp. 580.

[332] 1 Pom. Eq. Jur. § 237; Emory v. Hazard Powder Co., 53 Am. Rep. 730. By statute, Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. 1000. The destruction of building, Kelk v. Pearson, 6 Ch. App. Cas. 809. Cessation of work, Lingwood v. Stowmarket Co., 1 L. R. Eq. 77, 336.

Damages.

Damages may be awarded under circumstances which might not entitle one to an injunction restraining or abating the alleged nuisance. Thus, the proximity of a legal, but undesirable, business may inflict such damages as will entitle the owner of the adjoining premises to redress at law in the form of an award of damages by the jury, in view of all the circumstances.[333] Difference in value between the property with and without the nuisance, by which a sale is defeated,[334] depreciation of property,[335] loss of rents or rental value,[336] loss of profits or crops,[337] are all proper elements for the consideration of a jury in determining compensatory damages. Damages where the nuisance is continuing, have already been con-

[333] Robb v. Carnegie Bros. & Co., 145 Pa. St. 324, 22 Atl. 649; Keiser v. Mahanoy City Gas Co., 143 Pa. St. 276, 22 Atl. 759; ante, p. 803, "Equitable Relief."

[334] Moore v. Langdon, 6 Mackey, 6. Cf. note 2, 16 Am. & Eng. Enc. Law, 984. The measure of damages for the withdrawal of lateral support of land is the diminution of the value of the land caused by the fall of the soil. Schultz v. Bower (Minn.) 59 N. W. 631; McGettigan v. Potts, 149 Pa. St. 155, 24 Atl. 198.

[335] Rosenthal v. Taylor, B. & H. Ry. Co., 79 Tex. 325, 15 S. W. 268; Babb v. Curators of the University of Missouri, 40 Mo. App. 173. Although the property was vacant, Peck v. Elder, 3 Sandf. 126; Dana v. Valentine, 5 Metc. (Mass.) 8. But see Hopkins v. Western Pacific R. Co., 50 Cal. 190. Cf. Francis v. Schoellkopf, 53 N. Y. 152; Wesson v. Washburn Iron Co., 13 Allen, 95.

[336] Willey v. Hunter, 57 Vt. 479; Herbert v. Rainey, 162 Pa. St. 525, 29 Atl. 725; Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427; Stetson v. Faxon, 31 Am. Dec. 123; Woodin v. Wentworth, 57 Mich. 278, 23 N. W. 813; Crawford v. Parsons, 63 N. H. 438; Randolf v. Town of Bloomfield, 77 Iowa, 50, 41 N. W. 562. But see Selma & M. R. Co. v. Knapp, 42 Ala. 480; Baken v. Boston, 22 Am. Dec. 421.

[337] Lawson v. Price, 45 Md. 123; Gibson v. Fischer, 68 Iowa, 29, 25 N. W. 914; Simmons v. Brown, 5 R. I. 299; French v. Connecticut River Lumber Co., 145 Mass. 261, 14 N. E. 113; Lommeland v. St. Paul, M. & M. Ry. Co., 35 Minn. 412, 29 N. W. 119; Folsom v. Apple River Log-Driving Co., 41 Wis. 602; Grand Rapids B. Co. v. Jarvis, 30 Mich. 308. Expense of prosecuting action has been held a proper element of damage in action for injury by obstruction of highway. Linsley v. Bushnell, 15 Conn. 255; Keay v. New Orleans Canal & Banking Co., 7 La. Ann. 259. But not proper in action for flooding land. Good v. Mylin, 8 Pa. St. 51.

sidered.[338] Damages for a nuisance will be limited to title or right of the plaintiff, as in trespass.[339] Nominal damages have already been considered. Special damages must be particularly alleged and proved.[340] A fortiori, in the case of public nuisance, the plaintiff in a private action must plead and prove special damages as to himself.[341] Exemplary damages are awarded on ordinary principles.[342] In general, the same rule of damages applies in nuisance as in trespass.[343] In an action against an adjoining property owner to recover for damage sustained by the caving in of another's property, consequent upon such owner's excavations on his own land, any damage further than the actual caving in—as the obstruction of drains, or destruction of a fence—must be specially alleged, and its money value shown, to entitle the plaintiff to recover therefor.[344]

[338] 3 Suth. Dam. 2272–2277. No damage accruing after the commencement of a suit may be recovered when the injury is continuing; subsequent damages are recoverable by subsequent suit. Schlitz Brewing Co. v. Compton, 142 Ill. 511, 32 N. E. 693; Hudson v. Burk, 48 Mo. App. 314; Comminge v. Stevenson, 76 Tex. 642, 13 S. W. 556.

[339] Francis v. Schoellkopf, 53 N. Y. 152; Seely v. Alden, 61 Pa. St. 302; Staple v. Spring, 10 Mass. 72.

[340] Thus, in an action for a nuisance of a privy, plaintiff was not permitted to show pollution of his well and unmerchantable character of beer made therewith, because not alleged as special damages. Solms v. Lias, 16 Abb. Prac. 311. Et vide Baugh v. Texas & N. O. R. Co., 80 Tex. 56, 15 S. W. 587; Board of Health and Vital Statistics of Hudson County v. New York Horse Manure Co., 47 N. J. Eq. 1, 19 Atl. 1098; Vanderslice v. Newton, 4 N. Y. 30; Griggs v. Fleckenstein, 14 Minn. 81. Special damages from blasting, and putting in fear, 3 Suth. Dam. 2296–2298. Removing lateral support, Id. Injury to business, et sim., Id. 2298–2302.

[341] Hart v. Evans, 8 Pa. St. 13.

[342] Morford v. Woodworth, 7 Ind. 83; McFadden v. Rausch, 119 Pa. St. 507, 13 Atl. 459; Hays v. Askew, 7 Jones (N. C.) 272; Parrott v. Housatonic R. Co., 47 Conn. 575.

[343] 3 Suth. Dam. 2270–2272; ante, p. 692. In an action for diversion of water, the evidence showed that plaintiff, in order to use the water of the stream, had dammed it up so that it formed a pond, which overflowed part of defendant's land, and it did not appear that, without such overflow, defendant could have used the water. Held, that he could only recover nominal damages, since he could not base his right of action on his own wrong. Shotwell v. Dodge (Wash.) 36 P. 254.

[344] Stimmel v. Brown, 7 Houst. (Del.) 219, 30 Atl. 996.

CHAPTER XII.

NEGLIGENCE.

ESSENTIAL ELEMENTS.

246. The essential elements of negligence are:

(a) Failure to exercise commensurate care, involving

(b) A breach of duty, resulting in

(c) Damage to the plaintiff.[1]

History.

Actions for the negligent performance of contracts are very ancient, but it would seem that, until the statute of Westm. II., the

[1] This does not attempt to be a definition, but is designed to distinguish for discussion what are conceived to be the principle elements of the indefinable term "negligence." Many definitions will be found collated in 16 Am. & Eng. Enc. Law, 389. Et vide notes to 11 Am. St. Rep. 548, 12 Am. St. Rep. 700. The current definitions are of many types. As to the conventional type, that of Mr. Cooley—"Negligence is the failure to observe, for the protection of the interest of another, that degree of care, precaution, and vigilance which the circumstances justly demand" (Cooley, Torts, p. 630)—has met with general approbation. City of Terre Haute v. Hudnut, 112 Ind. 542–545, 13 N. E. 686. Et vide Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; Brown v. Congress & B. St. Ry. Co., 49 Mich. 153, 13 N. W. 494. Baron Alderson's definition is famous: "Negligence is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something a prudent

injured party was probably without redress by action at law.[2] The action on the case evolved under this statute was easily applied to trespass or malfeasance.[3] Thus, case was applied to the wrongful shoeing of a horse,[4] or the malpractice of a physician,[5] and to the loss of luggage by an innkeeper.[6] It was finally determined

man would not do." Blyth v. Birmingham Water Works, 11 Exch. 781–784; Bret, J., in Smith v. London & S. W. R. Co. (1870) L. R. 5 C. P. 98–102. Compare Galloway v. Chicago, R. I. & P. Ry. Co., 87 Iowa, 458, 54 N. W. 447; Nitroglycerine Case, 15 Wall. 524. "Where a duty is defined, a failure to perform it is negligence." The analytical type is well represented by that of Shear. & R. Neg. § 5 (approved in Bev. Neg. 5): "Negligence consists in: (1) A legal duty to use care; (2) a breach of that duty; (3) the absence of distinct intention to produce the precise damage, if any, which actually follows. With this negligence, in order to sustain a civil action, there must concur: (1) Damage to the plaintiff; (2) a natural and continuous sequence, uninterruptedly connecting the breach of duty with the damage, as cause and effect." The admirable definition contained in 16 Am. & Eng. Enc. Law, 389, is: "Actionable negligence is the inadvertent failure of a legally responsible person to use ordinary care, under the circumstances, in observing or performing a noncontractual duty, implied by law, which failure is the proximate cause of injury to a person to whom the duty is due." And see Farrell v. Waterbury Horse R. Co., 60 Conn. 239, 21 Atl. 675, and 22 Atl. 544. Of the metaphysical or psychological type, that of Austin (1 Aust. Jur. lect. 20) is pre-eminent: "In cases of negligence, the party performs not an act to which he is obliged; he breaks a positive duty. In case of heedlessness or rashness, the party does an act which he is bound to forbear; he breaks a negative duty. In cases of negligence, he averts not the act which it is his duty to do. In cases of heedlessness, he averts not the consequences of the act he does. In cases of rashness, he adverts to those consequences of the act, but, by reason of some assumption which he examines insufficiently, he concluded that those consequences will not follow the act in the instance before him." Mr. Piggott has formulated what may be called a "rule of thumb,"—which, upon reflection, is not unlikely to prove more practically satisfactory than any other formula: "Legally, 'negligence' may be regarded as a convenient term under which are grouped all those acts, whether of commission or omission, which do not fall under the head of malice or fraudulent injury, nor to which definite names, as 'trespass,' 'slander,' 'libel,' 'false imprisonment,' are applied." Pig. Torts, 208, 229.

[2] Bigelow, Lead. Cas. Torts, 584, 585.

[3] 2 Reeves, Eng. Law, 395; 1 Spence, Eq. Jur. 241.

[4] 46 Edw. III. p. 19.

[5] 48 Edw. III. p. 6.

[6] 42 Edw. III. p. 13.

that an action on the case would lie as well for nonfeasance as for malfeasance.[7] In the celebrated case of Coggs v. Barnard,[8] it was held that, if a man undertook to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage, from his gross negligence, though he was not a common carrier, and was to have nothing for the carriage. In this case, the first extensive examination (by the courts) of the Roman law of negligence, and the first attempt to apply its doctrine to English jurisprudence, was made by Lord Holt. [9] "It so happened, however, that both Lord Holt and Sir W. Jones, who did so much to form opinion in these departments, relied for authority on the scholastic jurists of the middle ages, rather than on the classical jurists of business Rome; and it was but natural that Judge Story and Chancellor Kent—the treatise of Gaius not having been as yet discovered, and the chief accessible summaries of the corpus juris being those of the scholastic jurists—should have followed Lord Holt and Sir W. Jones. Between the scholastic and the classical jurists, however, there is a conflict. * * * The scholastic theories on the above topics are the products of a recluse and visionary jurisprudence scheming for an ideal humanity; the classical theories as contained in the corpus juris are the products of a practical and regulative jurisprudence based, by the tentative processes of centuries, on humanity as it really is, and so framed as to form a suitable code for a nation which controlled, in periods of high civilization, the business of the globe. Hence, when the attempt was made to enforce the scholastic jurisprudence in the business transactions of England and of the United States, it was but natural that judges should stagger at refinements so unsuitable for practical use; and, hence, we can understand also how Judge Story, enthusiastic as was his admiration for the civil law (which includes, in his acceptation of the term, the scholastic jurisprudence), should have shrunk from judicially imposing the subtleties which he accepted as theoretically sound. The consequence was that our adjudications have been on one plane of jurisprudence, and our principles on another plane. The necessities of business life drove us to approach the law of busi-

[7] 21 Hen. VII. p. 41.

[8] 2 Ld. Raym. 909.

[9] Bigelow, Lead Cas. 589.

ness Rome, while the authority of our jurists induced us to still cling to the idealistic fictions of mediævalism." [10]

The bulk of the law of negligence is of modern origin. The application of general principles to questions arising from the modern kinds of common carriers generally, street and ordinary railways especially, and from the various developments of steam and electricity, has necessarily been recent.

Negligence a Distinct Wrong.

"Negligence is not used in legal language with so much strictness as jurisprudence requires." [11] "The undefined latitude of meaning," said Erle, C. J., "in which the word 'negligence' has been used, appears to me to have introduced the evil of uncertain law to a pernicious extent." [12] There may conveniently be said to be two views of negligence. One is historical, and has reference chiefly to the law adjective. At common law, facts constituting negligence gave rise to an action on the case, as distinguished from trespass.[13] This served to distinguish it from assault and battery,[14] false imprisonment, seduction, and the like. Among actions on the case, negli-

[10] Preface, Whart. Neg. (1st Ed.). The New World v. King, 16 How. 469–474.

[11] Pig. Torts, 208; Clerk & L. Torts, p. 10.

[12] Quoted Pig. Torts, p. 229.

[13] Bramwell, B., in Lay v. Midland Ry. Co., 30 Law T. (N. S.) 529.

[14] Negligence and assault and battery are easily distinguished from one point of view. At one extreme, where there is conscious intention to commit the act, trespass is the form of action, and "assault and battery" the name of the wrong. Where, at the other extreme, there is mere carelessness or inadvertence, case is the form of action, and "negligence" the name of the wrong. But between these extremes the line of demarcation is not clear, and has been much confused in fact, as will be seen in the subsequent discussion of willful negligence. There may be actionable assault and battery without actual or specific intent to do that wrong. Reckless disregard of consequences may imply intent in law, as riding a bicycle against an unoffending person. Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132. Contributory negligence of plaintiff may be a bar to an action in case for negligence, but not to an action of trespass for an assault. Anniston Pipe-Works v. Dickey, 93 Ala. 418, 9 South. 720. As to whether or not responsibility attaches in course of handling or using a gun, on the ground of assault and battery or negligence, see Morgan v. Cox, 22 Mo. 373. And see Vincent v. Steinehour, 7 Vt. 61; Wright v. Clark, 50 Vt. 130.

gence and conversion, as has been seen,* sometimes touch each other, but are manifestly distinguishable. Deceit, libel and slander, nuisance,[15] and malicious prosecution, at common law, were, in practice and in historical development, clearly separated from negligence. But negligence and fraud overlap. Negligence is not, and fraud is primarily, a wrong of intent, actual or constructive. Negligence may, however, be evidence of fraud.[16] Negligence, therefore, was used as a residuum. It included what was not taken up by other common-law

* Ante, pp. 718, 270, note 354.

[15] Ante, p. 771, "Nuisance." The difference between negligence and nuisance, properly speaking, may be well illustrated by the cases where percolating waters are polluted, where the liability arises from doing a proper act on defendant's land in so negligent a way as to produce damage. Thus, allowing manure to remain after notice, whereby a well is corrupted, is negligence. Woodward v. Aborn, 35 Me. 271; Stainton v. Woolrych, 23 Beav. 225. See Collins v. Chartiers Val. Gas Co., 139 Pa. St. 111, 21 Atl. 147. But where the water is polluted by the percolation of matters, like oil, offensive in themselves, the wrong is nuisance pure and simple. Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Columbus Gas Light & Coke Co. v. Freeland, 12 Ohio St. 392; Ottawa Gas Light & Coke Co. v. Graham, 28 Ill. 73. But see Collins v. Chartiers Val. Gas Co., 131 Pa. St. 143, 21 Atl. 147.

[16] This distinction between negligence and fraud is well presented by Beardsley, J.: "Fraud and negligence are by no means identical in their nature or effect. Fraud is a deceitful practice or willful device resorted to with intent to deprive another of his right, or in some manner to do him an injury. It is always positive. The mind concurs with the act. What is done is done designedly and knowingly. But in negligence, whatever may be its grade, there is no purpose to do a wrongful act, or to omit the performance of a duty. There is, however, an absence of proper attention, care, or skill. It is, strictly, nonfeasance, not malfeasance. This is the general idea, and it marks the distinction between negligence and fraud. In the first, there is no positive intention to do a wrongful act; but in the latter, a wrongful act is ever designed and intended. Negligence, in its various degrees, ranges between pure accident and actual fraud, the latter commencing where negligence ends. Negligence is evidence of fraud, but still is not fraud." Gardner v. Heartt, 3 Denio (N. Y.) 232, 236, 237. If a register of deeds damages plaintiff by an error in an abstract of title, intentionally, the wrong is fraud; if carelessly only, the wrong is negligence. Smith v. Holmes, 54 Mich. 104, 19 N. W. 767. With respect to sale of deceased animals, see Jeffery v. Biglow, 13 Wend. (N. Y.) 518. Cf. State v. Fox (Md.) 29 Atl. 601. With respect to dangerous instrumentalities, as a gun, see Langridge v. Levy, 2 Mees. & W. 519, 4 Mees. & W. 337. As to constructive fraud and negligence, see Finch, J., in Rich v. New

actions ex delicto.[17] This use of the term leads, inter alia, to the anomaly of classifying under the head of "Negligence" the group of cases of which Rylands v. Fletcher[18] is an exponent. These cases are not determined by the principles of negligence, but involve breach of duty to insure safety. Liability in them is irrespective of the exercise of care. Indeed, no showing or proof of due diligence on the defendant's part will exonerate him.[19] Therefore, at common law, "negligence" was necessarily a vague term.

The more modern view of negligence, emphasized especially by jurisprudents, and necessitated by the abolition of forms of actions, is much broader. It is based on distinctions in the law substantive. It regards negligence as one of the three general bases of liability in torts; that is: (a) in some cases, a man acts at his peril; (b) in others, bad motive determines his liability; and, (c) finally, he may be liable because of negligence proper. Hence, even as to libel and slander, the question may arise whether responsibility cannot, in some instances, be governed by principles of negligence, or be referred to cases in which men act at their peril.[20]

Practically, there is an increasing tendency to regard negligence, not as a general subject capable of a logical division on the lines of general principles but as a set of common rules applying to specified classes of cases; as railway negligence, negligence as between master and servant, negligence of common carriers, and the like. This view of the subject has the advantage of convenience, —not to be made light of, or disregarded.

York Cent. R. Co., 87 N. Y. 382. As to contributory negligence on the part of a person misled, see Smith v. Land Corp., 28 Ch. Div. 7; Redgrave v. Hurd, 20 Ch. Div. 1; David v. Park, 103 Mass. 501; Schwenck v. Naylor, 102 N. Y. 683, 7 N. E. 778. The same rule for damages should apply in cases of fraud and in cases of negligence. Bigelow, Fraud, 634.

[17] Pig. Torts, 208–229.

[18] L. R. 3 H. L. 330.

[19] The English text-books often consider these cases as separate wrongs: "Duties to insure safety." Pol. Torts, p. 11. "Of certain wider duties imposed by the policy of the law in certain cases." Fraser, Torts, 146. Inasmuch, however, as the doctrine of Rylands v. Fletcher, L. R. 3 H. L. 330, has been by no means universally followed in America, and cases involving the same or analogous principles are determined as cases of negligence, a separate division, it is thought, is neither necessary nor useful.

[20] 8 Harv. Law Rev. 200. Ante, p. 546, note 352. As to conversion, see ante, pp. 718, 720, note 354. As to nuisance, ante, p. 752, note 38; p. 746, note 14; p. 747, note 17; pp. 771, 772.

On the other hand, in accordance with the classical jurists, it is insisted that negligence is of two kinds or branches, as distinguished from degrees, viz.: The lack of care which a good specialist would exercise, and the want of ordinary care that is taken by persons who are not specialists.[28]

Instead of adopting these degrees of negligence, the current tendency of the courts and law writers[29] seems to be to recognize only the standard of proportionate or commensurate care.[30] In cases of

may be doubted, however, whether the attempted abandonment of the three degrees of negligence accomplished much. There is no possible escape from the variation in requirement of degrees of care, and it would seem that light is thrown on this difficult subject by the attempts of the courts to define cases in which the respective degrees are required, instead of leaving the law as applied to the facts in chaos. The objections as to indefiniteness to the distinction between the degrees would apply with equal effect to the distinction of damages into nominal, compensatory, and exemplary. No possible theory will enable courts to escape the indefiniteness naturally in the subject. Moreover, as was said by Lord Chelmsford in Giblin v. McMullen, L. R. 2 P. C. 317-337: "Gross negligence is a convenient phrase to express the idea that the degree of care required of defendant is small." "In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence, required in the performance of the various duties and the fulfillment of various contracts, we think they go too far, since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that 'every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it.' Toullier, in his Commentary on the Code, regards this as a happy thought, and a return to the law of nature. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice." Mr. Justice Bradley, in New York Cent. R. Co. v. Lockwood, 17 Wall. 357-383. "It is impossible for the law to furnish, as to the degree of care, any rule like a yardstick applied to the measuring of cloth." Bish. Noncont. Law, § 439.

[28] Bev. Neg. 30, 31; Bigelow, Torts, 293.

[29] A review of the disappearance of degrees of negligence by Frederic C. Woodward will be found in 1 N. Y. Law Rev. 16.

[30] Hall v. Chicago, B. & N. R. Co., 46 Minn. 439, 49 N. W. 239; Meredith v.

pure tort, there is only one standard of conduct (that of ordinary diligence), and only one criterion of diligence (the conduct of the prudent man). In taking into consideration what would be the conduct of a prudent man under the given circumstances, it is, of course, essential, in cases where special skill is required, to distinguish between what would be the conduct of a prudent man possessing the particular skill required, and that of a prudent man who did not possess that skill.[31] This standard may vary in fact, but not in law.[32] Even in cases of gratuitous bailment, gross negligence is nothing more than a failure to bestow the care which the property, in its situation, demands. The omission of the reasonable care required is the negligence which creates the liability.[33] In other words, "commensurate care" and "strict responsibility" may be equivalent.[34] The jury stands in the place of a prudent man, and determines the standard of his conduct.[35] The standard of care required by law is a practical one. Failure to

Reed, 26 Ind. 334. Et vide Barnum v. Terhening, 75 Mich. 557, 42 N. W. 967; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679; Michigan Cent. R. Co. v. Coleman, 28 Mich. 440; Pennsylvania Co. v. O'Shaughnessy, 122 Ind. 588, 23 N. E. 675; Smith v. New York Cent. R. Co., 24 N. Y. 222; Perkins v. New York Cent. R. Co., Id. 196; Hinton v. Dibbins, 1 Q. B. Div. 661; McAdoo v. Richmond & D. R. Co., 105 N. C. 140, 11 S. E. 316; Wyld v. Pickford, 8 Mees. & W. 442; Storer v. Gowen, 18 Me. 174; Story, Bailm. § 11; Lane v. Boston & A. R. R., 112 Mass. 455; 6 Alb. Law J. 313; 22 Am. Law Reg. (N. S.) 126, note.

[31] Perhaps as clear a statement of the test as can be found is this: "What a discreet man should do, or ordinarily do, in such cases, where his own interests are affected, and all the risk his own." Hoffman v. Tuolumne, etc., Co., 10 Cal. 413, Ball, Lead. Cas. Torts, 225, 226; Clerk & L. Torts, 355; Spokane Truck & Dray Co. v. Hoefer, 2 Wash. St. 45, 25 Pac. 1072; Austin & N. W. Ry. Co. v. Beatty, 73 Tex. 592, 11 S. W. 858; Texas & P. R. Co. v. Gorman, 2 Tex. Civ. App. 144, 21 S. W. 158. Not "average." Marsh v. Benton Co., 75 Iowa, 469–471, 39 N. W. 713.

[32] Ames & S. Cas. Torts, 143.

[33] Applied so as to attach liability of bank for bonds received by it for safekeeping, put in their vaults, and stolen by a speculating cashier. Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. 162. "Gross" is a word of description; not of definition. Willis, J., in Grill v. General Iron S. C. Co., L. R. 1 C. P. 600.

[34] But see Whart. Neg. §§ 26, 48.

[35] O. W. Holmes, Jr., 7 Am. L. R. 562.

accomplish an impossibility is not negligence. The rules of law must be reasonable, not oppressive.[36] Where the standard of the law is absolute, the wrong done is not negligence, but a breach of the duty of safety.[37] No analysis of what is due care under the circumstances is likely to be satisfactory. They are infinitely and curiously various. "Commensurate care" varies, not only with dangers inherent in nature, but also with the artificial relations of parties recognized by law,[38] and the property rights of others.[39]

248. The prevailing tendency is to regard negligence not as a state of mind, nor as involving intention, but as requiring inadvertence as an essential element.

Austin's theory of liability in tort led him to accept the doctrine that negligence means a state of the party's mind.[40] He distinguished carefully between negligence, recklessness, and heedlessness. The last two referred to intentional acts. In the simple case of intentional acts, there is a knowledge of the consequences and a deliberate intention that they shall follow the act. Where, however, there is a knowledge of the consequence and no deliberate intention that they shall follow the act, this neglect of consequence is termed recklessness; and where there is no knowledge of the consequence and no regard is paid to whether any or none follows, the intentional act is termed heedlessness. Negligence, on the other hand, implies the neglect of an act.[41] Negligence and heedlessness both suppose unconsciousness. In the first case, the party does not think of a

[36] Michigan Cent. R. Co. v. Burrows, 33 Mich. 6; Batterson v. Chicago & G. T. Ry. Co., 49 Mich. 184, 13 N. W. 508; Michigan Cent. R. Co. v. Dolan, 32 Mich. 514; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537; Davies v. Mann, 10 Mees. & W. 546; Butterfield v. Forrester, 11 East, 60.

[37] Post, p. 832.

[38] Cf. Hall v. Chicago, etc., R. Co., ante, note 30, with McDonough v. Lanpher, 55 Minn. 501, 57 N. W. 152; Wise v. Ackerman, 76 Md. 375–389, 25 Atl. 424.

[39] Steamboat Farmer v. McCraw, 62 Am. Dec. 718.

[40] Aust. Jur. (3d Ed.) 440, 474, 484, lects. 20, 24, 25. Et vide Holmes, Com. Law, p. 82; Innes, Torts, 6; Ball, Lead. Cas. Torts, 322; Thomp. Neg. pref.

[41] Pig. Torts, 207. In Innes on Torts the term "rashness" is used, and is said to be a disregard of rights, and want of due care, shown in the prob-

given act; in the second case, the party does not think of a given consequence.[42]

Heedlessness and recklessness, however, are not independently recognized in the law.[43] And there is no doubt but that in very many cases a party's state of mind, or, more accurately, his knowledge, is an essential element in the determination of what is negligence. Under certain circumstances, knowledge of the facts from which a duty arises is conclusively presumed; in others, the party charging negligence must show that knowledge existed.[44] Vigilance and attention are material elements, and must conform to the nature of the emergency.[45] An extreme view, indeed, is that negligence is a failure of duty, generally unintentional, but sometimes intentional.[46]

Inadvertence Essential to Negligence.

But it is strenuously denied that negligence is a state of the mind,[47] and that it can ever, strictly speaking, be intentional.[48] It

ability that harm will result, being foreseen more or less clearly, and yet risked. Negligent conduct is, in its inception, harmless, and is followed, as an unintended consequence, by injury which might have been avoided by the exercise of due care. Rash conduct on the other hand, results in injury under circumstances where, although it might have had no bad results, it must have, or ought to have, presented itself to his mind as being likely to produce damage, or "as being such conduct as in the absence of a degree of prudence or care on his part, or on the part of others, through whose instrumentality he acted, the continual exercise of which prudence or care could not be expected, entailed a risk, of itself resulting in such interference, and he nevertheless pursued the course of conduct, taking the chances of such effect resulting or not." Cf. Holl. Jur. 94; Whart. Neg. §§ 11–17.

[42] Aust. Jur. lect. 20, § 632.

[43] Pig. Torts, 208. Et vide Louisville & N. R. Co. v. Barker, 96 Ala. 435, 11 South. 453; Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412, 11 South. 262.

[44] Thus, knowledge of the vicious propensity of a wild animal is presumed, but such knowledge of a domestic animal must be shown. Post, p. 853, "Animals."

[45] Hutchinson v. Boston G. L. Co., 122 Mass. 219–222.

[46] Preface to Thomp. Neg.

[47] Pol. Torts, 355, 356; Clerk & L. Torts, 355.

[48] Evidence of defendant's intent is not admissible in an action for negligence. Hankins v. Watkins, 77 Hun, 360, 28 N. Y. Supp. 867. Generally, negligence is not designed. Gove v. Farmers' Ins. Co., 48 N. H. 41.

is urged with great force that negligence is distinguished from criminal wrong or willful tort by the element of inadvertence on the part of the person causing the injury.[49] "When the injury is intentional, the case is infected with malice or dolus, and a suit for negligence cannot be maintained." [50] It would appear certain that the presence of good faith,[51] or the absence of intent,[52] does not prevent liability for negligence. In its ordinary acceptation, negligence does not include malice; and courts have refused to give it any other.[53] Willful wrong differs from wrong arising from mere inadvertence in many practical substantial respects. The measure of damages for mere negligence is compensation; for willful wrong, exemplary damages are awarded.[54] Liability for negligence extends only to proximate consequences; liability for willful wrong extends also to remote consequences.[55] Contributory negligence is a complete answer in an action for negligence, but is not a bar to an action for willful tort.[56] Again, while a carrier may limit his liability to the agreed value of goods shipped, such limitation will not protect him against

[49] 16 Am. & Eng. Enc. Law, 392; Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 90.

[50] Whart. Neg. § 11; 2 Thomp. Neg. 739, note 3; Bish. Noncont. Law, 501.

[51] Lincoln v. Buckmaster, 32 Vt. 652; Louisville & N. R. Co. v. McCoy, 81 Ky. 403.

[52] Sharp v. Bonner, 36 Ga. 418; Tally v. Ayres, 3 Sneed (Tenn.) 677; Danner v. South Carolina R. Co., 4 Rich. Law, 329; Amick v. O'Hara, 6 Blackf. (Ind.) 258; Blaen Avon Coal Co. v. McCulloh, 59 Md. 403; Bish. Noncont. Law, § 499.

[53] Montgomery v. Muskegon Booming Co., 88 Mich. 633–644, 50 N. W. 729; overruled, Richter v. Harper, 95 Mich. 221–226, 54 N. W. 768.

[54] That exemplary damages are allowed in cases where there has been some willful misconduct, or that entire want of care which raises the presumption of a conscious indifference to consequences, is settled by the supreme court of the United States. Fell v. Northern Pac. R. Co., 44 Fed. 248–254; Milwaukee Ry. Co. v. Arms, 91 U. S. 489–495.

[55] 16 Am. & Eng. Enc. Law, 393; ante, p. 382.

[56] If well pleaded: McAdoo v. Railroad Co., 105 N. C. 140, 11 S. E. 316; Kansas City, M. & B. R. R. Co. v. Crocker, 95 Ala. 412, 11 South. 262; Pennsylvania Co. v. Myers, 136 Ind. 242, 36 N. E. 32; Lake Shore & M. S. Ry. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692; Lychfield Coal Co. v. Taylor, 81 Ill. 590, affirmed 33 Ill. App. 479; Durant v. Coal Min. Co., 97 Mo. 62, 10 S. W. 484. Where death results: Louisville Safety-Vault & Trust Co. v. Louisville & N. R. Co., 92 Ky. 233, 17 S. W. 567; Indianapolis Union Ry. Co. v. Boett-

liability for fraud, nor for "intentional, wanton, or reckless negligence." [57] To insist that inadvertence is essential to negligence, and that as soon as conduct ceases to be careless and becomes willful the cause of action is no longer based on negligence, is in accord with the traditional distinction between trespass and case, and with a distinct tendency on the part of modern jurisprudence and the courts to separate from allied wrongs injuries which rest primarily on willful or malicious disregard of, or interference with, the rights of others.[58]

Willful and Wanton Negligence.

It is vigorously insisted that willful negligence involves a contradiction in terms, and is a misleading and dangerous expression.[59] The cases of negligence, as they arise in practice and are found in reports, are not determined by theoretical considerations.[60] The same state of facts may give rise to a cause of action which may be based on either willfulness or negligence. Gross and reckless negligence, indeed, may in law amount to intentional mischief.[61] A plaintiff would naturally claim moral wrong on the defendant's part whenever possible, both for the purpose of increasing the measure

cher, 131 Ind. 82, 28 N. E. 551; Menger v. Lauer, 55 N. J. Law, 205, 26 Atl. 180. Et vide Cooley, Torts, 810; 16 Am. & Eng. Enc. Law, 395, note 3, citing Derby's Adm'r v. Kentucky Cent. R. Co. (Ky.) 4 S. W. 303; Carroll v. Minnesota Val. R. Co., 13 Minn. 30 (Gil. 18); Beach, Contrib. Neg. 49–53; "Contributory Negligence," 4 Am. & Eng. Enc. Law, 80. But the fact that defendant, at a point outside the city limits, was running cars at the rate of 15 miles an hour, and did not give any signal of approach, is not such wanton negligence as will entitle one who attempts to drive across its track without looking to damages sustained by being struck by such a car. Highland Ave. & B. R. Co. v. Maddox, 100 Ala. 618, 13 South. 615.

[57] Louisville & N. R. Co. v. Sherrod, 84 Ala. 178, 4 South. 29. Conversely as to insurance policies. Gove v. Farmers' Ins. Co., 48 N. H. 41. So action for causing death by "willful negligence" may lie when it could not be brought for ordinary carelessness. Louisville & N. R. Co. v. Coniff's Adm'r, 90 Ky. 560, 14 S. W. 543.

[58] See ante, p. 555, "Malicious Interference with Rights."

[59] 16 Am. & Eng. Enc. Law, 394.

[60] Pig. Torts, 208.

[61] St. Louis, I. M. & S. Ry. Co. v. Ledbetter, 45 Ark. 246; Shumacher v. St. Louis & S. F. R. Co., 39 Fed. 174. Et vide Fell v. Northern Pac. R. Co., 44 Fed. 248–252; Cooley, Torts (2d Ed.) 810.

and extent of his damages and to avoid the defense of contributory negligence. If, however, he should fail to prove willfulness, he may be able to recover for negligence. At common law, under some circumstances, this would affect the form of the action and necessitate the use of trespass instead of trespass on the case. Under the code system of pleading there is no corresponding reason why the two wrongs should be separated with greater definiteness than is required to meet the appropriate difference in pleading and evidence. Hence, actions for "willful negligence" and "wanton negligence" are continually brought.[62] And the plaintiff is not required to show the appropriateness of every adjective used in his complaint. Therefore, if he alleges that the defendant willfully, wantonly, negligently,

[62] Willful neglect is defined to be an intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured in either preventing or avoiding the injury. Kentucky Cent. R. Co. v. Gastineau's Adm'r, 83 Ky. 119–128. And see Newport News & M. V. Co. v. Dentzel's Adm'r, 91 Ky. 42, 14 S. W. 958. Knowledge of the probable consequences is the imputation of willfulness in respect to it, and there must be a consciousness, on the part of the person charged with misconduct resulting in injury, that his conduct will necessarily or probably induce a harmful result complained of, before the law will impute to him a willingness to inflict the injury. Georgia Pac. Ry. Co. v. Lee, 92 Ala. 262, 9 South. 230; Richmond & D. R. Co. v. Vance, 93 Ala. 144, 9 South. 574. There may be a willful wrong, without a direct design to do harm,—for example, collision of vessels, taking unruly animals into crowds, carelessly laying out poisons and the like for rats, want of caution towards drunken persons, careless placing of logs on the highways, and the like. Palmer v. Railroad Co., 112 Ind. 250, 14 N. E. 70; Petrie v. Columbia & G. R. Co., 29 S. C. 303, 7 S. E. 515; Emry v. Roanoke Nav. & Water-Power Co., 111 N. C. 94–102, 16 S. E. 18; Jacksonville & S. E. Ry. Co. v. Southworth, 135 Ill. 250, 25 N. E. 1093; Holmes v. Atchison, T. & S. F. R. Co., 48 Mo. App. 79; Shumacher v. St. Louis & S. F. R. Co., 39 Fed. 174; Eskridge's Ex'rs v. Cincinnati, N. O. & T. P. Ry. Co., 89 Ky. 367, 12 S. W. 580; Ensley Ry. Co. v. Chewning, 93 Ala. 24, 9 South. 458; Collins v. Cincinnati, N. O. & T. P. Ry. Co. (Ky.) 18 S. W. 11; Simmons' Adm'r v. Louisville & N. R. Co., Id. 1024; Alabama G. S. R. Co. v. Linn (Ala.) 15 South. 508. Evidence that a locomotive was run in the dark along a much-frequented street at a high and dangerous rate of speed, without headlight lighted or bell ringing, is sufficient to show wanton or willful negligence. East St. Louis Connecting Ry. Co. v. O'Hara, 49 Ill. App. 282, affirmed 150 Ill. 580, 37 N. E. 917. The term "willful neglect" applies only to actions for loss of life involving punitive damages. Chesapeake & O. Ry. Co. v. Yost (Ky.) 29 S. W. 326.

and unlawfully did wrong, he can recover on proof of negligence.[63] But there is no harmony on the point. And it has been held that a complaint which joins in one count the allegation of willful injury and negligence is demurrable.[64]

SAME—DUTY.

249. The duty, violation of which gives rise to a cause of action in negligence, is to exercise due care under the circumstances. Mere carelessness, resulting in harm to another person, is not actionable unless thereby there be violated a duty owed by the wrongdoer to the sufferer, prescribed by—

(a) Common law;

(b) Contract; or

(c) Statute.

Duty and commensurate care are not two distinct ideas. There is a universal, necessary, and inevitable connection between them.

[63] Applied to setting fire. Richter v. Harper, 95 Mich. 221–226, 54 N. W. 768, overruling, as to this point, Montgomery v. Booming Co., 88 Mich. 633, 50 N. W. 729, and citing 2 Thomp. Neg. 1246; Taylor v. Holman, 45 Mo. 371; McCord v. High, 24 Iowa, 336; Panton v. Holland, 17 Johns. (N. Y.) 92. Et vide Chicago & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15. Such an allegation would sustain a willful injury. Indianapolis Union Ry. Co. v. Boettcher, 131 Ind. 82, 28 N. E. 551. But, on the other hand, mere allegation of negligence will not allow recovery for intentional wrong. Nor will a charge of willfulness be maintained by proof of mere negligence. Pennsylvania R. Co. v. Smith, 98 Ind. 42; Highland Ave. & B. R. Co. v. Winn, 93 Ala. 306, 9 South. 509; Chicago, B. & Q. R. Co. v. Dickson, 88 Ill. 431; O'Brien v. Loomis, 43 Mo. App. 29; Indiana, B. & W. Ry. Co. v. Burdge, 94 Ind. 46. Cf. Louisville, N. A. & C. Ry. Co. v. Bryan, 107 Ind. 51, 7 N. E. 807; Belt R. R. & Stock-Yard Co. v. Mann, 107 Ind. 89, 7 N. E. 893; Louisville, N. A. & C. Ry. Co. v. Ader, 110 Ind. 376, 11 N. E. 437. Cf. Terre Haute & I. R. Co. v. Graham, 95 Ind. 286, with Southern Exp. Co. v. Brown, 67 Miss. 260–266, 7 South. 318, and 8 South. 425. But allegation of willfulness, in an action on negligence, is surplusage. Louisville, N. A. & C. Ry. Co. v. Davis, 7 Ind. App. 222, 33 N. E. 451; Moore v. Drayton, 61 Hun, 624, 16 N. Y. Supp. 723. Where, however, the complaint charged simple negligence, it has been held proper to admit evidence of willful or wanton negligence. Louisville & N. R. Co. v. Hurt, 101 Ala. 34, 13 South. 130; Richmond & D. R. Co. v. Farmer, 97 Ala. 141, 12 South. 86.

[64] Verner v. Alabama G. S. R. Co. (Ala.) 15 South. 872.

A logical division of the subject of negligence would be (1) the duty to exercise commensurate care, which is owed by the wrongdoer to the sufferer; (2) the violation of that duty in fact by the tort feasor; (3) damage conforming to the legal standard of the person injured. To adopt this division, however, would be to sacrifice the cases as they occur for the sake of mere orderly arrangement.

"While there may be some shades of difference in the various definitions of 'negligence,' all the authorities agree that its essential element consists in a breach of duty, and that, in order to sustain an action, the plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him." [65] Although there is no dispute as to this most certain of the propositions in the law of negligence, there is no corresponding clearness or certainty in the definition of "duty." Common-law duty is derived from analysis of circumstances. It is determined by the reference of the law to the various conditions which determine what is commensurate care. Contract duty is, perhaps, no more than the application of common-law principles to a state of facts of which a contract is a necessary part. Statutory duty frequently re-enacts the requirements of the common law, and is enforced by common-law principles.

250. The common-law duty of exercising care to avoid harm has reference to—

(a) Course and constitution of nature, as appears especially in cases involving "the use of one's own," or cases also treated under insurance of safety;

(b) Knowledge of parties to the wrong;

(c) Capacity and class of the parties to the wrong;

(d) Custom and license.

[65] Shepherd, J., in Emry v. Roanoke Nav. & Water-Power Co., 111 N. C. 94, 95, 16 S. E. 18, and authorities cited. Et vide Arnold v. Pennsylvania R. Co., 115 Pa. St. 135, 8 Atl. 213; Newhard v. Pennsylvania R. Co., 153 Pa. St. 417, 26 Atl. 105. Cf. Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 South. 51; Macomber v. Nichols, 34 Mich. 212.

250a. What is due care under the circumstances at common law refers, inter alia, to—

(a) The course and constitution of inanimate nature.

(b) The course and constitution of animate nature.

(1) Irrational, or

(2) Rational.

Inanimate Nature.

The exercise of care also has reference to the ordinary course and constitution of nature. On this principle the care to be taken of streets has reference to climatic conditions, in so far as these affect danger caused by accumulations of snow and ice. Thus, as to the climate of Minnesota, it is said by Mitchell, J.:[67] "In this new state, the duty of a city with respect to ice and snow must necessarily be somewhat limited, and care should be taken that they be not held to a degree of diligence beyond what is reasonable, in view of their situation. What reasonable care might require in an older country, or in a milder climate, might be too high a standard in this climate." While, on the one hand, the natural tendency to do harm of things of weight, things in motion, and things explosive must be guarded against with a high degree of care, the law does not, on the other hand, require provisions against an unprecedented storm, floods, or other inevitable casualties caused by the hidden forces of nature, unknown to common experience, and which could not have been reasonably anticipated by a prudent and careful man.[68] Inevitable accident, in other words, is equivalent to the absence of negligence or the absence of thought on the part of the de-

[67] In Wright v. City of St. Cloud, 54 Minn. 94-97, 55 N. W. 819.

[68] Libby v. Maine Cent. R. Co., 85 Me. 34, 26 Atl. 943; Piedmont & C. Ry. Co. v. McKenzie, 75 Md. 458, 24 Atl. 157. A railroad company, in constructing its roadbed, is not bound to provide against an unprecedented flood, but is bound to provide sufficient culverts or other means for the escape of water collected and accumulated by its embankments and excavations in any storm or rain not extraordinary in character and violence. McPherson v. St. Louis, I. M. & S. Ry. Co., 97 Mo. 253, 10 S. W. 846; Brendlinger v. New Hanover Tp., 148 Pa. St. 93, 23 Atl. 1105. The owner of real estate, who keeps the same in a reasonably safe condition, is not liable to a passer-by on the street

fendant.[69] But one who negligently leaves a wire, along which lightning passes so as to set fire to a building, cannot escape liability on the ground that the stroke of lightning was the act of God.[70]

Animate Nature—Animal Nature.

The care which must be exercised with respect to animals has reference—First, to the care of the owners or persons having the charge, custody, or control of animals (which will be subsequently discussed); and, secondly, to the care which other persons must exercise with reference to such animals.

The care which is imposed by the keeping or using of things dangerous in themselves, or which may become dangerous, has regard to the natural and probable effect upon animals, having reference to their peculiar nature.[71] Thus, an engineer, in allowing steam to escape,[72] or in blowing a whistle,[73] must exercise due care when he knows of the presence of horses, and the company is liable if the frightening of the animals was due to the failure to exercise that care which a prudent man would exercise under the circumstances. That the cause of fright complained of was unnecessary is an element to be considered.[74] But, as to damage caused in frightening animals

who is injured by the falling of a fence during a storm of sufficient violence to unroof houses and do like damages. Norling v. Allee (City Ct. Brook.) 13 N. Y. Supp. 791.

[69] As in Cotterill v. Starkey, 8 Car. & P. 691.

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

[71] Generally, as to horses frightened by locomotives, Omaha & R. V. Ry. Co. v. Brady, 39 Neb. 27, 57 N. W. 767; Carraher v. San Francisco Bridge Co., 100 Cal. 177, 34 Pac. 828; Piollet v. Simmers, 106 Pa. St. 95 (the care of an agency like a whitewash barrel, mounted on wheels, has reference to the character of an ordinary horse).

[72] Omaha & R. V. Ry. Co. v. Clarke, 39 Neb. 65, 57 N. W. 545; Presby v. Grand Trunk Ry. Co. (N. H.) 22 Atl. 554; Indianapolis Union Ry. Co. v. Boettcher, 131 Ind. 82, 28 N. E. 551. Not liable, Oxford Lake Line Co. v. Stedham, 101 Ala. 376, 13 South. 553; Cahoon v. Chicago & N. W. Ry. Co., 85 Wis. 570, 55 N. W. 900. It is supposed that horses of ordinary gentleness have become so familiar with portable steam engines as to be safe when under careful guidance. Piollet v. Simmers, 106 Pa. St. 95; Gilbert v. Flint & P. M. Ry., 51 Mich. 488, 16 N. W. 868; Macomber v. Nichols, 34 Mich. 212; Louisville, N. A. & C. Ry. Co. v. Schmidt, 134 Ind. 16, 33 N. E. 774.

[73] Fritts v. New York & N. E. R. Co., 62 Conn. 503, 26 Atl. 347.

[74] Omaha & R. V. Ry. Co. v. Clark, 35 Neb. 867, 53 N. W. 970; Toledo, St. L. & K. C. R. Co. v. Crittenden, 42 Ill. App. 469.

by the natural use of an engine, without negligence, as by the discharge of smoke,[75] or in the course of the performance of statutory duties, as sounding a whistle,[76] there is no liability, because such damage is incident to an authorized act, and does not constitute an injury. Where, however, there is abuse or negligence in the operation of the engine, or the giving of signals, liability exists.[77] Persons are held to know and exercise care with reference also to the natural appetites of animals. Therefore, if a railroad company places salt on its track, it is liable for trespassing animals so lured there, and killed by a passing train.[78]

Same—Human Nature.

Essentially the same principle applies with respect to human beings. On the one hand, for example, the owner of things tempting to children must exercise care to prevent the indulgence in their natural instincts from doing harm.[79] Thus, if the owner of a turntable leaves it unguarded and unprotected, he may be liable for damages

[75] Leavitt v. Terre Haute & I. R. Co., 5 Ind. App. 513, 31 N. E. 860, and 32 N. E. 866. Compare Selleck v. Lake Shore & M. S. Ry. Co., 93 Mich. 375, 53 N. W. 556, distinguishing 58 Mich. 195, 24 N. W. 774.

[76] Cahoon v. Chicago & N. W. Ry. Co., 85 Wis. 570, 55 N. W. 900; Louisville, N. A. & C. Ry. Co. v. Stanger, 7 Ind. App. 179, 32 N. E. 209, and 34 N. E. 688.

[77] Bittle v. Camden & A. R. Co. (N. J. Err. & App.) 28 Atl. 305; Akridge v. Atlanta & W. P. R. Co., 90 Ga. 232, 16 S. E. 81; Carraher v. San Francisco Bridge Co., 100 Cal. 177, 34 Pac. 828; Philadelphia Traction Co. v. Lightcap, 10 C. C. A. 46, 61 Fed. 762.

[78] Burger v. St. Louis, K. & N. W. Ry. Co., 52 Mo. App. 119. And see what is the difference between drawing an animal into a trap by his natural instinct, which he could not resist, and putting him there by manual force. Per Lord Ellenborough, Townsend v. Wathen, 9 East, 277. Or of fowls killed by poisoned meat, Johnson v. Patterson, 14 Conn. 1; Burger v. St. Louis, K. & N. Ry. Co., 52 Mo. App. 119. Further, as to spring guns and traps, see Hooker v. Miller, 37 Iowa, 613; Henry v. Dennis, 93 Ind. 452; Deane v. Clayton, 7 Taunt. 489. However, on the theory that a defendant is not liable for consequences unforeseen, and which a reasonable man would not have foreseen, it was held in Richmond & D. R. Co. v. Yeamans, 90 Va. 752, 19 S. E. 787 (Lewis, P., dissenting), that where a horse backed into a train, whereby plaintiff was injured, defendant was not liable, although the horse was frightened by the steam from the engine.

[79] St. Louis, V. & T. H. R. Co. v. Bell, 81 Ill. 76, distinguished; City of Pekin v. McMahon, 53 Ill. App. 189, affirmed; Id., 154 Ill. 141, 39 N. E. 484.

to a child consequent on such negligence.[80] On the other hand, the law recognizes the right to presume that men will act as persons free from infirmity or defect of sense ordinarily do, in obedience to

[80] A railway company is not required to make its land a safe playground for children, nor is it an insurer of lives or limbs of young children who play about its premises. When, however, it sets before such children a temptation which it believes, or has reason to believe, will lead them into danger, it must use reasonable care to protect them from the danger to which they are exposed. But even as to children strictly non sui juris, not more than ordinary or reasonable care is required. What would be proper care in any case must in general be a question for the jury upon all the circumstances of the case. Keffe v. Milwaukee & St. P. R. Co., 21 Minn. 207-212, per Young, J., approved Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619. As to the reversed opinion of the district court, see 2 Cent. Law J. 170. In Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, a child, without any knowledge of danger, ran onto burning slack, and was injured. There was no fence around the slack, nor was there anything to give warning of its dangerous condition. The place was such as would attract interest and curiosity to passers by. Plaintiff recovered. Barrett v. Southern Pac. Co., 91 Cal. 296, 27 Pac. 666. See cases accumulated in opinion, —page 303,—and cases restricting or departing from this immediate line collected on pages 298, 299. And, generally, see Nagle v. Missouri Pac. R. Co., 75 Mo. 653; Ilwaco Ry. & Nav. Co. v. Hendrick, 1 Wash. 446, 25 Pac. 335; Walsh v. Fitchburg R. Co., 67 Hun, 604, 22 N. Y. Supp. 441, and 78 Hun, 1, 28 N. Y. Supp. 1097; Railroad Co. v. Stort, 17 Wall. 657. Daniels v. New York & N. E. R. Co., 154 Mass. 349, 28 N. E. 283; Wambaugh, Study of Cases, p. 261; note 33, Cent. Law J. 325; Ft. Worth & D. C. R. Co. v. Measles, 81 Tex. 474, 17 S. W. 124. But see Frost v. Eastern Ry. Co., 64 N. H. 220, 9 Atl. 790. The railroad company is not bound to put in such fastenings as a child could not displace. Kolsti v. Minneapolis & St. L. Ry. Co., 32 Minn. 133, 19 N. W. 655. The ordinary manner of fastening is proper matter for consideration of the jury, but is not conclusive. Id.; Doyle v. St. Paul, M. & M. R. Co., 42 Minn. 79, 43 N. W. 787. But not every fastening is sufficient. O'Malley v. St. Paul, M. & M. Ry. Co., 43 Minn. 294, 45 N. W. 440. If, however, a car on grade is checked by brake, set so that it takes two boys to loosen the brake, the company is free from blame as matter of law. Haesley v. Winona & St. P. R. Co., 46 Minn. 233, 48 N. W. 1023. A car with unfastened brakes, Gay v. Essex Electric St. R. Co., 159 Mass. 238, 34 N. E. 186. An unprotected cog wheel, Whirley v. Whiteman, 1 Head (Tenn.) 610. Et vide Powers v. Harlow, 53 Mich. 507, 19 N. W. 257; Harriman v. Pittsburgh, C. & St. L. Ry. Co., 45 Ohio St. 11, 12 N. E. 451. A culvert is not a trap, Fredericks v. Illinois Cent. R. Co., 46 La. Ann. 1180, 15 South. 413; nor windows fastened in a building containing torpedoes, Slayton v.

the instinct of self-preservation, in the avoidance of danger; and it is contributory negligence on the part of a person not to so act.[81] Thus, ordinarily, an engineer has a right to presume that a person on a track, who has abundant opportunitv to get off, will do so in time to avoid being struck.[82] But this is a question of fact, to be determined by the jury in view of all circumstances, especially with reference to notice as to peril and failure to exercise reasonable care to avoid damages, on the part of the wrongdoers, after notice that injury is probable.[83] The law recognizes the right to rely on the exer-

Fremont, E. & M. V. R. Co., 40 Neb. 840, 59 N. W. 510; nor swinging gate, reached by climbing over another, Chicago, K. & W. R. Co. v. Bockoven, 53 Kan. 279, 36 Pac. 322. Further cases where a child trespasser has been held disentitled of his wrong because there was no "implied invitation": Ratte v. Dawson, 50 Minn. 450, 52 N. W. 965. Compare Newdoll v. Young, 80 Hun, 364, 30 N. Y. Supp. 84; Greene v. Linton, 7 Misc. Rep. 272, 27 N. Y. Supp. 891; Hargreaves v. Deacon, 25 Mich. 1; O'Conner v. Illinois Cent. R. Co., 44 La. Ann. 339, 10 South. 678; Hawley v. City of Atlantic (Iowa) 60 N. W. 519; Talty v. City of Atlantic, Id. 516.

[81] Slaughter v. Metropolitan St. Ry. Co., 116 Mo. 269, 23 S. W. 760; Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269.

[82] Thus, an engineer, who saw intestate on the track, was justified in believing up to the last moment, in the absence of knowledge that intestate was deaf or insane, that he would move out of the way. Norwood v. Raleigh & G. R. Co., 111 N. C. 236, 16 S. E. 4. An engineer has a right to presume that defendant, on a railroad bicycle, will get out of train's way, until proximity makes danger of accident probable. Railway Co. v. Hicks, 89 Tenn. 301, 17 S. W. 1036; Syme v. Richmond & D. R. Co., 113 N. C. 558, 18 S. E. 114; High v. Carolina Cent. R. Co., 112 N. C. 385, 17 S. E. 79 (McAdoo v. Railroad Co., 105 N. C. 140, 11 S. E. 316, followed; Deans v. Railroad Co., 107 N. C. 686, 12 S. E. 77; Bullock v. Railroad Co., 105 N. C. 180, 10 S. E. 988; Clark v. Railroad Co., 109 N. C. 430, 14 S. E. 43, distinguished); France's Adm'r v. Louisville & N. R. Co. (Ky.) 22 S. W. 851; Texas & P. R. Co., v. Roberts, 2 Tex. Civ. App. 111, 20 S. W. 960; St. Louis & S. F. Ry. Co. v. Herrin, 6 Tex. Civ. App. 718, 26 S. W. 425; Pittsburgh, C., C. & St. L. R. Co. v. Judd (Ind. App.) 36 N. E. 775; Pennsylvania Co. v. Myers, 136 Ind. 242, 36 N. E. 32. So, in the operation of street-car lines, as to crossings, see Christensen v. Union Trunk Line, 6 Wash. 75, 32 Pac. 1018. And see Doyle v. West End St. Ry. Co., 161 Mass. 533, 37 N. E. 741.

[83] As to occupants in a covered wagon on a track: Hinkle v. Richmond & D. R. Co., 109 N. C. 472, 13 S. E. 884. Et vide Doyle v. West End St. R. Co., 161 Mass. 533, 37 N. E. 741; Schmolze v. Chicago, M. & St. P. R. Co., 83 Wis. 659, 53 N. W. 743, and 54 N. W. 106; Hansen v. Chicago, M. & St. P. R. Co., 83

cise of the care usual with men. "We are entitled to count on the ordinary prudence of our fellow men until we have specific warning to the contrary." [84]

251. No person is liable for damages incidentally occasioned to another by the natural and beneficial use of his own property, or things in his possession or control, or of a franchise granted by the state, unless he be guilty—

(a) Of negligence resulting in damages, or

(b) Of creating or maintaining a nuisance, or

(c) Of producing damage consequent neither upon negligence nor nuisance, but upon the ownership, use, custody, or control of some dangerous instrumentality.

It has been seen that the maxim "sic utere tuo" is a generalization which expresses the spirit of the law, and is too vague and uncertain to be accepted as a proposition from which any specific deduction may be safely made.[85] However, the law recognizes the application of the maxim to instrumentalities, especially if their nature is calculated to do harm. No general formula of the result of this application is likely to be complete or accurate. That of the black-letter text is essentially in the language of Brown, J., in Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co.[86] It is defective, conspicuously, in its failure to recognize the existence of the unsettled classes of cases in which uses of property become actionable

Wis. 631, 53 N. W. 909; Will v. West Side R. Co., 84 Wis. 42, 54 N. W. 30; 4 Bl. Comm. 192; Skelton v. London & N. W. R. Co., L. R. 2 C. P. 631; Pol. Torts, p. 388.

[84] Pol. Torts, p. 388, citing Daniel v. Metropolitan R. Co., L. R. 5 H. L. 45; Gee v. Railroad Co., L. R. 8 Q. B. 161; Adams v. Railway Co., L. R. 4 C. P. 739.

[85] Ante, c. 1.

[86] 42 Fed. 273. And see Clerk & L. Torts, 328. It would seem that perhaps a more accurate and complete statement would be that the exceptions to the nonliability in the use of "one's own" are four, viz.: (a) Negligence, resulting in damage; (b) an actionable nuisance; (c) breach of duty of insuring safety; (d) recognized malicious wrong.

because of malice.* In discussing this general subject, a number of specific classes of cases in which these questions have arisen will be first considered, and the results of the cases thus set forth will be afterwards briefly summarized.

Accumulations of Water.

In the celebrated case of Rylands v. Fletcher [87] the defendants, owners of a mill, erected a reservoir, employing competent persons to construct it. Under the land, the plaintiff, the lessee of mines, worked up to a spot where there were certain old passages of disused mines. When the water was introduced into the reservoir, it broke through some of the shafts, flowed through the old passage, and flooded the plaintiff's mine. No care had been taken by the engineer or contractor to block up the shafts. But, admitting that the defendant was personally free from fault, he was held to be responsible. Two views have been taken of this case. One regards it as laying down specifically the general proposition that where persons, for their own purposes, bring on their lands and collect and keep anything likely to do mischief, if it escape, they are insurers of safety, and that in such cases the happening of an accident creates a prima facie liability, which can be rebutted only by bringing it within a recognized exception,[88] and not by showing merely unsuccessful diligence; and also as co-ordinating in the same category the scattered classes of cases which never became amenable to the test of due care under the circumstances.[89] This would

* "Malicious Wrongs," ante, 555.

[87] Fletcher v. Rylands, L. R. 1 Exch. 265; s. c., 4 Hurl. & C. 263; 12 Jurist (N. S.) 603; 14 Wkly. Rep. 709; 14 Law T. (N. S.) 523; 35 Law J. Exch. 154; L. R. 3 H. L. 330; s. c., 37 Law J. Exch. 161; 19 Law T. (N. S.) 220; s. c., in all the courts, 1 Thomp. Neg. 2. And see Fletcher v. Smith, L. R. 7 Exch. 305, affirmed in 2 App. Cas. 781; Humphries v. Cousins, 2 C. P. Div. 239; Crowhurst v. Amersham Burial Board, 4 Exch. Div. 5, 7 Cent. Law J. 465, 18 Alb. Law J. 514.

[88] See Blackburn, J., Ct. Exch. Chamber.

[89] In 7 Harv. Law Rev. 441–454, Mr. John H. Wigmore regards this sentence of Mr. Justice Blackburn as "epochal in its consequences": "There does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their

seem to be the more generally accepted view.[90] On the other hand, it has been treated, not as laying down the general law of insurance of safety, but as involving only a special rule respecting adjacent landowners.[91] "The defendants might lawfully have used their close for any purpose for which it might, in the ordinary course of the employment of land, be used; and if, in what I might term the 'natural user' of that land, there had been any accumulation of water either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that the result had taken place." This doctrine of Rylands v. Fletcher has been followed in Minnesota,[92] and in Massachusetts.[93] But in both states the tendency is to modify it.[94]

escaping and injuring his neighbor. * * * The duty is the same, and is to keep them in, at his peril."

[90] 1 Am. Law Reg. & Rev. (N. S.) 97 (article by John B. Gest on "Natural Use of Land"); Burbank v. Bethel Steam Mill Co., 75 Me. 373–382.

[91] See opinion of Lord Chancellor Cairns, L. R. 3 H. L. 330–337; Carstairs v. Taylor, L. R. 6 Exch. 217. Further as to expression "Natural User of Land," see Lord Blackburn in Wilson v. Waddell, 2 App. Cas. 95, and Brett and Cotton, L. JJ., in West Cumberland Iron Co. v. Kenyon, L. R. 11 Ch. 783; Madras Ry. v. Zamindar, L. R. 1 Indian App. 385, per Sir R. P. Collier.

[92] Cahill v. Eastman, 18 Minn. 324 (Gil. 292). And see St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277 (Gil. 249).

[93] Gray v. Harris, 107 Mass. 492. And see Gorham v. Gross, 125 Mass. 232. Other cases in which Rylands v. Fletcher has been considered will be found collected in 1 Thomp. Neg. lix.

[94] Cahill v. Eastman, 18 Minn. 324 (Gil. 292), followed in Knapheide v. Eastman, 20 Minn. 479 (Gil. 432; this case was decided after and notwithstanding Losee v. Buchanan, 51 N. Y. 476); Hannem v. Pence, 40 Minn. 131, 41 N. W. 657; Berger v. Minneapolis Gas-Light Co. (Minn.) 62 N. W. 336. In this case, Start, C. J., limits the general statements in Cahill v. Eastman: "We deem it proper, to prevent any misunderstanding, to say that this instruction—that every person who, for his own profit, keeps on his premises anything not naturally belonging there, which, if it escape therefrom, into the premises of another, does damage, is liable for all the consequences of his act, without reference to the degree of care he may have exercised to prevent it from escaping—is too broad; for it is only those things the natural tendency of which is to become a nuisance, or to do mischief if they escape.

The doctrine has also been recognized and approved in Canada.[95] In New York it has been held to be in direct conflict with the law as settled in this country. The rule is laid down in the case of Livingston v. Adams,[96] as follows: "When one builds a mill-dam upon a proper model, and the work is well and substantially done, he is not liable to an action though it break away, in consequence of which his neighbor's dam and mill below are destroyed."[97] There is, of course, no dispute that if one negligently builds or fails to properly repair and safely maintain a dam, and it gives way and injures those below, this is actionable negligence.[98] The doctrine of Rylands v. Fletcher has not been adopted in Pennsylvania.[99]

Exceptions to Rule in Rylands v. Fletcher.

The severity of the rule of Rylands v. Fletcher led, if not to its material modification,[100] at least to the recognition of a number of exceptions. Thus, in Madras Ry. Co. v. Zemindar of Carodenegarum,[101] a zemindar (landowner) in India maintained an extensive reservoir of water for the cultivation of a portion of his territory. Notwithstanding all reasonable care to prevent the escape of the water, the dam burst, and the water destroyed a railroad embank-

which the owner keeps at his peril." And see comment on Cork v. Blossom in 8 Harv. Law Rev. 225.

[95] Chandler Electric Co. v. Fuller (1892) 21 Can. Sup. Ct. 337, in which damages and injunction were allowed for discharge of steam from a stationary engine.

[96] 8 Cow. 175.

[97] Earl, J., in Losee v. Buchanan, 51 N. Y. 476. See Vanderwiele v. Taylor, 65 N. Y. 341. But see Mairs v. Manhattan Real Estate Ass'n, 89 N. Y. 498–504. Where there is neither negligence nor folly in doing a lawful act, the party cannot be charged with the consequences. Burroughs v. Housatonic R. Co., 15 Conn. 124.

[98] Pollett v. Long, 56 N. Y. 200; Inhabitants of Shrewsbury v. Smith, 12 Cush. (Mass.) 177; Inhabitants of Brookfield v. Walker, 100 Mass. 94.

[99] Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. 453.

[100] In addition to the cases subsequently cited, see Cattle v. Stockton Waterworks Co., L. R. 10 Q. B. 453.

[101] L. R. 1 Indian App. 364. Cf. Frye v. Moor, 53 Me. 583.

ment. The landowner was held not liable, because the customary law of India justified the maintenance of the reservoir, and the consequent damage was held to be incident to an authorized act. It was distinctly recognized in Rylands v. Fletcher that the person answerable for damage done by the escape of water could "excuse himself by showing that the escape was owing to the defendant's fault, or, perhaps, that the escape was the consequence of vis major or the act of God." A violent rainstorm was subsequently held to be such an act of God;[102] and an accident caused by a rat gnawing a hole in a water tank was held to be so due to vis major[103] that no liability attached to the owner of the tank. And it would seem that one would be excused whether the damage be produced by vis major or the wrongful act of a third party in releasing water stored in a reservoir.[104]

Things of Weight.

Whoever places a heavy substance in such a position that it is likely to fall, by force of gravitation, to the damage of persons or property, is liable, without further proof of negligence.[105] Thus,

[102] Nichols v. Marsland, L. R. 10 Exch. 255, 2 Exch. Div. 1, 23 Wkly. Rep. 693, 33 Law T. (N. S.) 265, 44 Law J. Exch. 134, 25 Wkly. Rep. 173, 35 Law T. (N. S.) 725, 46 Law J. Exch. 174; Stone v. State, 138 N. Y. 124–127, 33 N. E. 733 (in which was involved a rainstorm which occurred at the same time as the one producing the Johnstown flood).

[103] Carstairs v. Taylor, L. R. 6 Exch. 217, per Kelly, C. B. A railway company artificially raised the surface of their land, whereby the rain water falling on the land made its way to and damaged the plaintiff's house. This was held to disclose a good cause of action. There is a distinction in regard to the application of the maxim, "Sic utere tuo ut alienum non lædas," where the plaintiff and defendant are adjacent owners, and where they are only occupiers of different floors in the same building. In the latter case, an action will only lie where negligence can be proved. Carstairs v. Taylor, L. R. 6 Exch. 217; Ross v. Fedden, L. R. 7 Q. B. 661.

[104] Box v. Jubb, 72 Wkly. Rep. 415 (per Kelly, C. B.) L. R. 4 Exch. Div. 76, 41 Law T. (N. S.) 97, 48 Law J. Exch. (N. S.) 417; Vaughan v. Taff Vale R. Co., 3 Hurl. & N. 743, 5 Hurl. & N. 679; Smith v. London, etc., Ry. Co., 40 Law J. C. P. 21; Jones v. Festiniog Ry. Co., L. R. 3 Q. B. 733, 37 Law J. Q. B. 214.

[105] Innes, Torts, 73; Welfare v. London & B. R. Co., L. R. 4 Q. B. 693, 38 Law J. Q. B. 241.

where an employé repairing a building let fall a chisel, which struck a person working on the sidewalk below, it was held that this established a prima facie case of negligence on the part of the employé. It was presumed that the chisel was dropped because of his negligence.[106] Where, however, the material which drops falls into the interior of the building, the law does not imply an obligation to protect persons in the space below, if it does not appear that their presence was expected.[107] On the same principle, one who maintains a heavy sign over a sidewalk in a frequented part of the city is presumptively negligent, in the absence of proof that it happened out of the ordinary course, if it falls and damages a passer-by.[108] Liability for an overhanging sign has also been regarded from the

[106] Dixon v. Pluns, 98 Cal. 384, 31 Pac. 931, and 33 Pac. 268; Goll v. Manhattan Ry. Co., 125 N. Y. 714, 26 N. E. 756; Anderson v. Manhattan El. R. Co., 1 Misc. Rep. 504, 21 N. Y. Supp. 1; Brooks v. Kings County El. R. Co., 4 Misc. Rep. 288, 23 N. Y. Supp. 1031. As to dropping refuse or things of weight, see Hogan v. Manhattan Ry. Co., 6 Misc. Rep. 295, 26 N. Y. Supp. 792; Treanor v. Manhattan Ry. Co., 28 Abb. N. C. 47, 16 N. Y. Supp. 536. Negligence in hoisting safe in public thoroughfare. Spokane Truck & Dray Co. v. Hoefer, 2 Wash. St. 45, 25 Pac. 1072. Piling lumber in street so carelessly and insecurely that a large stick of timber fell off, to plaintiff's damage. Holly v. Bennett, 46 Minn. 386, 49 N. W. 189. Cf. Hulse v. New York, O. & W. R. Co., 71 Hun, 40, 24 N. Y. Supp. 512. And, generally, see Kearney v. London B. & S. C. Ry. Co., L. R. 5 Q. B. 411, L. R. 6 Q. B. 759; Byrne v. Boadle, 2 Hurl. & C. 722. A high degree of care must be exercised by an electric railway company with respect to the iron forming part of its overhead apparatus. The happening of an accident with respect to it justifies the jury in finding negligence. Uggla v. West End St. Ry. Co., 160 Mass. 351, 35 N. E. 1126.

[107] Angus v. Lee, 40 Ill. App. 304. Cf. McCauley v. Norcross, 155 Mass. 584, 30 N. E. 464, and cases collected on page 587; Emery v. Minneapolis Industrial Exposition, 56 Minn. 460, 57 N. W. 1132.

[108] Railway Co. v. Hopkins, 54 Ark. 209, 15 S. W. 610, citing Morris v. Strobel & Wilken Co., 81 Hun, 1, 30 N. Y. Supp. 571. Et vide Parker, J., dissenting; Mullen v. St. John, 57 N. Y. 567; Kearney v. London B. & S. C. Ry. Co., L. R. 6 Q. B. 759, 10 Cent. Law J. 261. Ante, p. 231, "Independent Contractor." A municipal corporation has also been held liable for awnings over street. Bohen v. City of Waseca, 32 Minn. 176, 19 N. W. 730; Drake v. Lowell, 13 Metc. (Mass.) 292; Day v. Milford, 5 Allen, 98. As to joint tort feasors, owner and city, see Jessen v. Sweigert, 66 Cal. 182, 4 Pac. 1188; City of Lowell v. Glidden, 159 Mass 317, 34 N. E. 459 (in which lia-

point of view of nuisance, independent of negligence.[109] Where a roof is so constructed that water, snow, and ice which collect upon it from natural causes will, in the ordinary course of things, fall upon an adjoining highway, or upon a neighbor's land, the owner of the building is liable for consequent damages.[110] This would not be a question of reasonable care and diligence in the management of such roof, but of the right to erect and maintain it at all in that shape. It would not avail the owner to say that he did all he could to prevent the consequences. He had no right to build it in that way. His act was an attempt to extend his right as proprietor beyond the limits of his own property, at the expense of the safety of the traveling public. He was bound, at his peril, to keep the ice and snow that collected on the roof within his own limits; and, if the shape of his roof was such as necessarily and naturally threw it upon the street, he was responsible for all damages, precisely as if he had, under the same circumstances, thrown it upon the premises of the adjacent owner.[111]

bility is based on the theory of nuisance). It has, however, been held that a city is not liable for defectively hung signs. Hewison v. City of New Haven, 37 Conn. 475; Taylor v. Peckham, 8 R. I. 349.

[109] Wood, Nuis. § 90, and cases cited.

[110] Ordinarily, the occupier, and not the owner, of the premises is liable for damages done because of their defective or dangerous condition. This applies to fall of snow from a roof, if it does not appear that the tenant might not, by the use of reasonable care, have prevented the accident. Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 15 N. E. 84. Cf. Caldwell v. Slade, 156 Mass. 84, 30 N. E. 87.

[111] Mitchell, J., in Hannem v. Pence, 40 Minn. 127, 41 N. W. 657, citing, inter alia, Cahill v. Eastman, 18 Minn. 324 (Gil. 292); Smethurst v. Barton Square Ind. Cong. Church, 148 Mass. 261, 19 N. E. 387. Perhaps the best illustration that can be found of the identity of liability for nuisance and for breach of duty to insure safety is the celebrated case of Shipley v. Fifty Associates. In the first report of this case (101 Mass. 251) the reasoning of the court turns largely on the theory of nuisance (page 254). However, in both this and a subsequent report (106 Mass. 194), the case is sustained essentially on the theory of Rylands v. Fletcher. The cases in which such a roof has been regarded a nuisance will be found in Wood, Nuis. 275. And see Shepard v. Creamer, 160 Mass. 496, 36 N. E. 475; Bryne v. Boadle, 2 Hurl. & C. 722. That liability for such a roof depends on negligence, vide Garland v. Towne, 55 N. H. 55.

The owner of any structure, as a building,[112] a wall,[113] an elevated road,[114] a lumber pile,[115] is bound to take reasonable care that it is kept in a proper condition, so it shall not fall into a street or highway and injure persons lawfully there, and the fact of damage from the fall thereof makes out a prima facie case of negligence.[116] But further proof of negligence is necessary, to enable persons to recover for injuries received while engaged in tearing down a structure.[117] The rule does not apply to the owner of adjacent property injured by the fall of such structure.[118] When part of a building falls without any apparent reason, the owner is not relieved from liability to persons not in his employ [119] by having used care in his plans and the selection of architect and contractor. The liability may be regarded as being based also on nuisance,[120] or as being a breach of duty to insure safety. In the leading case of

[112] Mullen v. St. John, 57 N. Y. 567. The owner of a building is not bound to strengthen it for extraordinary emergencies, like throwing large quantities of water on merchandise therein, to check a fire, Woodruff v. Bowen, 436 Ind. 431, 34 N. E. 1113; nor excessive storm, Norling v. Allee (City Ct. Brook.) 13 N. Y. Supp. 791. But notice of dangerous condition is not essential to liability. Tucker v. Illinois Cent. R. Co., 42 La. Ann. 114, 7 South. 124.

[113] Nordheimer v. Alexander, 19 Can. Sup. Ct. 248; Simmons v. Everson, 124 N. Y. 319, 26 N. E. 911; O'Connor v. Andrews, 81 Tex. 28, 16 S. W. 628; Pasquini v. Lowry (Sup.) 18 N. Y. Supp. 284; Chapin v. Walsh, 37 Ill. App. 526.

[114] Volkmar v. Manhattan Ry. Co., 134 N. Y. 418, 31 N. E. 870.

[115] Earl v. Crouch, 57 Hun, 586, 10 N. Y. Supp. 882; Holly v. Bennett, 46 Minn. 386, 49 N. W. 189.

[116] As to negligence in construction of scaffold which fell while plaintiff was working on defendant's house, see Kaspari v. Marsh, 74 Wis. 562, 43 N. W. 368; Burton v. Davis, 15 La. Ann. 448. "Buildings properly constructed do not fall without cause." Mullen v. St. John, 57 N. Y. 567–569. The falling of a roof, in the absence of other evidence, is itself sufficient evidence of negligence. Barnowski v. Helson, 89 Mich. 523, 50 N. W. 989. Ice-house collapse, see Meier v. Morgan, 82 Wis. 289, 52 N. W. 174.

[117] Weideman v. Tacoma Ry. & Motor Co., 7 Wash. 517, 35 Pac. 414.

[118] City of Anderson v. East, 117 Ind. 126, 19 N. E. 726.

[119] As to liability to employé, see Walton v. Bryn Mawr Hotel Co., 160 Pa. St. 3, 28 Atl. 438.

[120] Wilkinson v. Detroit Steel & Spring Works, 73 Mich. 405, 41 N. W. 490. Cf. Couts v. Neer, 70 Tex. 468–474, 9 S. W. 40; Miles v. City of Worcester, 154 Mass. 511, 28 N. E. 676.

Gorham v. Gross,[121] it was said that the only exceptions to the liability which have been judicially recognized are in cases of the plaintiff's own fault, or of vis major, the act of God, or the acts of third persons, which the owner had no reason to anticipate. And in Cork v. Blossom [122] it was held to be an absolute duty, which rested on the owners of a chimney, to exercise proper care to prevent its fall; and it was said that nothing short of actual exercise of such care, or a fall of the chimney due to some one of the above-excepted causes, would excuse.

Fire.

Actions for mischief done by fire were brought in England under the early common law, but were considered "hard actions." [123] The liability in these cases corresponded to that in trespass. It was enough to prove that fire caused the damage. Negligence on the

[121] 125 Mass. 232; Khron v. Brock, 144 Mass. 516, 11 N. E. 748. It is not necessary that the owner should have had notice of the dangerous condition of a building made unsafe by the act of trespassers, which it was within his power to prevent. Tucker v. Illinois Cent. R. Co., 42 La. Ann. 114, 7 South. 124. Et vide Schachne v. Barnett (Super. N. Y.) 9 N. Y. Supp. 717; Gray v. Boston Gaslight Co., 114 Mass. 149; Harry v. Ashton, 1 Q. B. Div. 314; Gaslight Coke Co. v. Vestry of St. Mary Abbott's, 15 Q. B. Div. 1.

[122] Gorham v. Gross, 125 Mass. 232; Mahoney v. Libbey, 123 Mass. 20; Mears v. Dole, 135 Mass. 508; Wilson v. New Bedford, 108 Mass. 261; Ball v. Nye, 99 Mass. 582; Khron v. Brock, 144 Mass. 516, 11 N. E. 748; Moreland v. Boston & P. R. R., 141 Mass. 31, 6 N. E. 225; Smethurst v. Congregational Church, 148 Mass. 261, 19 N. E. 387; Tarry v. Ashton, 1 Q. B. Div. 314; Nitro-Phosphate & O. C. M. Co. v. London & St. K. Docks Co., 9 Ch. Div. 503; Lawrence v. Jenkins, L. R. 8 Q. B. 274; Benson v. Suarez, 28 How. Prac. 511; Mullen v. St. John, 57 N. Y. 567; Gagg v. Vetter, 41 Ind. 228; Scott v. Bay, 3 Md. 431; Tiffin v. McCormack, 34 Ohio St. 638; Cooper v. Randall, 53 Ill. 24; Cahill v. Eastman, 18 Minn. 324 (Gil. 292); Hannem v. Pence, 40 Minn. 127, 41 N. W. 657; Phinizy v. City Council, 47 Ga. 260; G. B. & L. Ry. Co. v. Eagles, 9 Colo. 544, 13 Pac. 696; Kinnaird v. Standard Oil Co., 89 Ky. 468, 12 S. W. 937.

[123] Smith v. Frompton (1696) 2 Salk. 644; Pantam v. Isham (1702) 1 Salk. 19; Allen v. Stephenson (1700) 1 Lutw. 33; Cudlip v. Rundall (1693) 4 Mod. 9; Hicks v. Downling (1697) 1 Salk. 13. Et vide 1 Rolle, Abr. tit. "Act sur Case," p. 1; Vin. Abr. "Act for Fire," 6. In Turberville v. Stampe (1698) 1 Ld. Raym. 264, it was said as to a man who had started a fire in his field: "He made it, and must see it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another. But if a sudden

part of the defendant was not essential.[124] The statute of Anne,[125] and subsequent enactments,[126] provided that no action should be brought against any one in whose house or chamber or barn or stable, or any other building, or lands, fire should accidentally begin, or any recompense be made by any such person for any damage occasioned thereby. Since these statutes, liability for domestic fires has been governed by principles of negligence, not of trespass.[127] If a "domestic" fire began on a man's own premises,[128] by which those of his neighbors were injured, the latter, in an action brought for such injury, would not be bound to show, in the first instance, how the fire began, but the presumption would be that it arose from the negligence of some person in the house.[129] The English courts, however, have gone so far as to hold that a nondomestic fire is so dangerous an instrument as to attach liability, irrespective of negligence. In the celebrated case of Jones v. Festiniog Ry. Co.,[130] a company not having express statutory powers given it to use locomotive steam engines was held liable at common law for damage done to a haystack by fire caused by sparks from one of the com-

storm had arisen, while he could not stop it, was matter of evidence, and he should have shown it." Construe note of reporter as to statute of Queen Anne with 14 Geo. III. c. 78. See Filliter v. Phippard, 11 Q. B. 347.

[124] Thus, where a man shooting at a bird hit his own house, and set it on fire, and the fire spread to the house of his neighbors and destroyed it, it was held that the firer of the gun was responsible for the damage, although the fire was occasioned rather by an accident or misadventure than by negligence. Anon., Cro. Eliz. 10. See 1 Rolle, Abr. "Act. sur Case," B.

[125] 6 Anne, c. 31, § 67. As to whether this is part of the common law of the United States, see Spaulding v. Railroad Co., 30 Wis. 110; Webb v. Railroad Co., 49 N. Y. 420; Burton v. Smith, 13 Pet. (U. S.) 464.

[126] 12 Geo. III. c. 73; 14 Geo. III. c. 78, especially section 86.

[127] Filliter v. Phippard, 11 Q. B. 357; Vaughan v. Menlove, 3 Bing. N. C. 468. This case was thought by Tendall, C. J., to be of first impression, but by Park, J., to be in principle like Tuberville v. Stampe, 12 Mod. 152. The master is not responsible for his servant's independent wrong in starting a fire. Williams v. Jones, 3 Hurl. & C. 256; McKenzie v. McLeod, 10 Bing. 385.

[128] Filliter v. Phippard, 11 Q. B. 347, construing 14 Geo. III. c. 78, § 86.

[129] Lord Tenterden in Becquet v. MacCarthy, 2 Barn. & Adol. 958. Et vide Taylor v. Stendall, 7 Q. B. 634.

[130] (1868) L. R. 3 Q. B. 733; Powell v. Fall, 5 Q. B. Div. 597; Sadler v. South Staffordshire & B. D. S. T. Co. (1880) 23 Q. B. Div. 17; Pol. Torts, §§ 407–409; Clerk & L. Torts, 337, 338.

pany's engines, although negligence was negatived. This was sustained expressly on the theory that at common law the company was bound to keep its engines from doing injury, in accordance with the theory of Rylands v. Fletcher.

In the United States, fire is recognized as a necessary agent in common use in life, and from damage consequent to its employment, under ordinary circumstances, negligence or wrong is not necessarily inferable, but it may be so used as to make a person using it guilty of a tortious act.[131] In other words, destruction of property by fire does not raise a presumption of negligence, but negligence must ordinarily be alleged and proved. "Negligence," under such circumstances, is a relative term, and denotes the degree of caution

[131] Cark v. Foot, 8 Johns. (N. Y.) 329; Dewey v. Leonard, 14 Minn. 153 (Gil. 120). Compare Krippner v. Biebl, 28 Minn. 139, 9 N. W. 671, with St. Louis, A. & T. Ry. Co. v. McKinsey, 78 Tex. 208, 14 S. W. 645; Bachelder v. Heagan, 18 Me. 32, with Brummit v. Furness, 1 Ind. App. 401, 27 N. E. 656; Jesperson v. Philips, 46 Minn. 147, 48 N. W. 770; Barnard v. Poor, 21 Pick. (Mass.) 378. The courts incline to rule strictly upon the liability of masters for the acts of their servants in kindling and guarding fires in buildings. Compare Armstrong v. Cooley, 10 Ill. 509; McKenzie v. McLeod, 10 Bing. 385; Williams v. Jones, 3 Hurl. & C. 256–602; Wood v. Railway Co., 51 Wis. 196, 8 N. W. 214. As to liability of tenant at will, see Lothrop v. Thayer, 138 Mass. 466; Wright v. Lothrop, 149 Mass. 385, 21 N. E. 963; Ward v. Railway Co., 29 Wis. 144; Read v. Morse, 34 Wis. 315. Compare Moe v. Job, 1 N. D. 140, 45 N. W. 700. Louisville, N. A. & C. Ry. Co. v. Nitsche, 126 Ind. 229, 26 N. E. 51, holding that where a railroad company, in a season of great drought, sets a fire on the right of way, which extends over beds of turf or peat, the same material forming the surface of the body of adjoining land, it is guilty of a positive wrong, and not of mere negligence, and is liable for loss resulting to adjacent owners. So in Fahn v. Reichart, 8 Wis. 105, it was held that a party who sets fire to logs and brush on his own land is not liable to an action though it be blown on the land of his neighbor, and burn his barn, unless the party setting the fire is also guilty of negligence or carelessness in setting it at that place and time. Case v. Hobart, 25 Wis. 654. Thus, where a man who sets and keeps a fire on his own land is liable for injury done by its direct communication to his neighbor's land, whether through the air or through the ground, and whether or not he might reasonably have anticipated the particular manner and direction in which it was communicated, the probability that a fire set under the circumstances would spread to the plaintiff's land is inadmissible to disapprove negligence. Higgins v. Dewey, 107 Mass. 494; Lothrop v. Thayer, 128 Mass. 466. Compare Vaughan v. Menlove, 3 Bing. N. C. 468. And see Adams v. Young (Ohio) 4 N. E. 599.

which would be exercised by a person of ordinary prudence under the peculiar circumstances of each case. The common-law rule has been generally changed by statute.[132]

Where, in addition to the fact that a fire caused damage, circumstances are also shown which ordinarily would cause the fire to spread to other property, such evidence makes out a prima facie case of negligence.[133] Negligently guarding[134] or leaving a fire is a tortious act, which will attach liability.[135] Hence, where the fire is lawful, the burden is on the plaintiff to prove negligence,[136] but it is otherwise as to unlawful fires.[137]

In the pursuance of legal authority, one may cause damage by fire without liability. Such damage would be incident to an authorized act. The thing itself is not to be regarded as a part of the instrumentality, but as something for which the state has

[132] Roberson v. Kirby, 7 Jones (N. C.) 477; Garnier v. Porter, 90 Cal. 105, 27 Pac. 55; Armstrong v. Cooley, 10 Ill. 509; Dunleavy v. Stockwell, 45 Ill. App. 230; Galvin v. Gualala Mill Co., 98 Cal. 268, 33 Pac. 93; Lamb v. Sloan, 94 N. C. 534; Finley v. Langston, 12 Mo. 120; Russell v. Reagan, 34 Mo. App. 242; Kahle v. Hobein, 30 Mo. App. 472; Saussy v. Railroad Co., 22 Fla. 327; Thoburn v. Campbell, 80 Iowa, 338, 45 N. W. 769.

[133] The state of the weather is a circumstance to be considered. Needham v. King, 95 Mich. 303, 54 N. W. 891. The location (e. g. of a brewery in a city) tends to determine the degree of care. Gagg v. Vetter, 41 Ind. 328. That a box was soaked in oil, Perry v. Smith, 156 Mass. 340, 31 N. E. 9. And, generally, see Higgins v. Dewey, 107 Mass. 494; Perley v. Eastern R. Co., 98 Mass. 414; Calkins v. Barger, 44 Barb. (N. Y.) 424; Hanlon v. Ingram, 3 Iowa, 81; Miller v. Martin, 16 Mo. 508; John Mouat Lumber Co. v. Wilmore, 15 Colo. 136, 25 Pac. 556.

[134] Hewey v. Nourse, 54 Me. 257; Hauch v. Hernandez, 41 La. Ann. 992, 6 South. 783.

[135] Hewey v. Nourse, 54 Me. 257. Vide Read v. Pennsylvania R. Co., 44 N. J. Law, 280; Bachelder v. Heagan, 18 Me. 32; Cleland v. Thornton, 43 Cal. 437; Barnard v. Poor, 21 Pick. (Mass.) 378; Tourtellot v. Rosebrook, 11 Metc. (Mass.) 460.

[136] Gregory v. Layton, 36 S. C. 93, 15 S. E. 352; Loeber v. Roberts (Super. N. Y.) 17 N. Y. Supp. 378; Montgomery v. Booming Co., 88 Mich. 633, 50 N. W. 729; McNally v. Colwell, 91 Mich. 527, 52 N. W. 70. As to duty to provide means of extinguishing fire in a lumber mill, Pauley v. Lantern Co., 131 N. Y. 90, 29 N. E. 999, to the effect that, at common law, the owner of a building not peculiarly exposed to the danger of fire is not bound to adopt extra or unusual precaution for the escape of occupants in the case of fire.

[137] Whart. Neg. § 867.

made itself responsible, until there is, on the part of the person keeping and using it, some conduct independent of the mere keeping or using it in the ordinary course, to which the damage can be traced.[138] Thus, if sparks from a passing locomotive set fire to a haystack, the railway company is not to be held responsible if it has taken all reasonable care in the construction and use of the engine.[139] The railroad company must exercise care proportionate to the danger, in favor of the public, to as great an extent as in favor of its patrons.[140] Carelessness in the operation of, or defects in, the engine, may constitute actionable negligence, and may be inferred from circumstances; as the emission of an unusual quantity of sparks, or coals of an unusual size,[141] running at

[138] Innes, Torts, 76; King v. Pease, 4 Barn. & Adol. 30 (see Queen v. Bradford Nav. Co., 34 L. J. Q. B. 191); King v. Morris & E. R. Co., 18 N. J. Eq. 397.

[139] Jones v. Festiniog Ry. Co., L. R. 3 Q. B. 733; Metropolitan, etc., Dist. v. Hill, L. R. 6 App. Cas. 193; Nitro-Phosphate & O. C. M. Co. v. London, etc., Co., 9 Ch. Div. 503; Gas Light & Coke Co. v. Vestry of St. Mary Abbott's, 15 Q. B. Div. 1, 54 L. J. Q. B. 414; Madras Ry. Co. v. Zemindar of Carvatenagarum, L. R. Indian App. 364. But see Powell v. Fall, 5 Q. B. Div. 597, where it was held that defendant, operating a steam traction engine in accordance with statute, without negligence started a fire, damaging plaintiff, was liable, because the engine was a dangerous machine. Henderson v. Philadelphia & R. R. Co., 144 Pa. St. 461, 22 Atl. 851; Vaughan v. Taffvale R. Co., 3 Hurl. & N. 742, 5 Hurl. & N. 678.

[140] Babcock v. Fitchburg R. Co., 67 Hun, 469, 22 N. Y. Supp. 449; Fischer v. Bonner (Tex. Civ. App.) 22 S. W. 755; Eddy v. Lafayette, 1 C. C. A. 441, 49 Fed. 807; Martin v. Texas & P. Ry. Co., 87 Tex. 117, 26 S. W. 1052. The danger involved in the use of such dangerous machines as locomotives is so great as to be said to require of a railroad company a higher degree of care than is usually exercised by a prudent man about his own property. This has been carried so far as to make proof of cause of fire a prima facie case of negligence. Illinois Cent. R. Co. v. Mills, 12 Ill. 407; Miller v. St. Louis, I. M. & S. Ry. Co., 90 Mo. 389, 2 S. W. 439; post, p. 845.

[141] Cincinnati, L., St. L. & C. Ry. Co. v. Smock, 133 Ind. 411, 33 N. E. 108; Flinn v. New York Cent. & H. R. R. Co., 67 Hun, 631, 22 N. Y. Supp. 473, reviewing earlier New York cases; Wheeler v. New York Cent. & H. R. R. Co., 67 Hun, 639, 22 N. Y. Supp. 561; Kurz & Huttenlocher Ice Co. v. Milwaukee & N. R. Co., 84 Wis. 171, 53 N. W. 850. Compare Stacy v. Milwaukee, L. S. & W. Ry. Co., 85 Wis. 237, 54 N. W. 779; Hockstedler v. Dubuque & S. C. R. Co., 88 Iowa, 236, 55 N. W. 74. Defendant may show the distance at which sparks emitted by engine kindled fire. Hinds v. Barton, 25 N. Y. 544.

an unlawful rate of speed,[142] or the production of other fires near the same time.[143] But while the cases are essentially agreed that recovery in such a case must be based on negligence [144] and that negligence may be shown by purely circumstantial evidence,[145] there is a direct conflict of authority as to whether the plaintiff must prove negligence on the part of the defendant, or whether the defendant must show that his engine was properly constructed, equipped, and operated. Perhaps the prevailing opinion in America is that, if it be shown that the fire originated from the defendant's engine, negligence on his part need not be proved.[146] Proof of negligence, under such circumstances, is made unnecessary by statute in some states; in others, railroad companies are made insurers against damage by fire.[147]

[142] Martin v. Western Union R. Co., 23 Wis. 437; Lake Erie & W. R. Co. v. Middlecoff, 150 Ill. 27, 37 N. E. 960.

[143] Smith v. Chicago, M. & St. P. Ry. Co. (S. D.) 55 N. W. 717; Gulf, C. & S. F. R. Co. v. Johnson, 4 C. C. A. 477, 54 Fed. 474; Flinn v. New York Cent. & H. R. R. Co., 67 Hun, 631, 22 N. Y. Supp. 473; Railway Co. v. Richardson, 91 U. S. 454, followed in Chicago, St. P., M. & O. R. Co. v. Gilbert, 3 C. C. A. 264, 52 Fed. 711; Northern Pac. R. Co. v. Lewis, 2 C. C. A. 446, 51 Fed. 658; Martin v. St. Louis, I. M. & S. Ry. Co., 55 Ark. 510, 19 S. W. 314; Campbell v. Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936. But not evidence as to fire caused several years before, Galveston, H. & S. A. Ry. Co. v. Rheiner (Tex. Civ. App.) 25 S. W. 971; nor other fire along the line of the road, unless it is shown that defendant caused them, St. Louis & S. F. Ry. Co. v. Jones, 59 Ark. 105, 26 S. W. 595; or using wood in a coal-burning engine may be negligence, Briggs v. New York Cent. R. Co., 72 N. Y. 26; but evidence of what other engines, handled by other engineers, did on other occasions, is immaterial, Tribette v. Illinois Cent. R. Co., 71 Miss. 212, 13 South. 899.

[144] Burroughs v. Housatonic R. Co., 15 Conn. 124; Mississippi Home Ins. Co. v. Louisville, N. O. & T. R. Co., 70 Miss. 119, 12 South. 156; Inman v. Elberton Air-Line R. Co., 90 Ga. 663, 16 S. E. 958; Day v. H. C. Akeley Lumber Co., 54 Minn. 522, 56 N. W. 243.

[145] Union Pac. R. Co. v. Keller, 36 Neb. 189, 54 N. W. 420; Kurz & Huttenlocher Ice Co. v. Milwaukee & N. R. Co., 53 N. W. 850, 84 Wis. 171; Stacy v. Milwaukee, L. S. & W. Ry. Co., 54 N. W. 779, 85 Wis. 237. Plaintiff may show the distance at which sparks emitted by the engine kindled fires. Hinds v. Barton, 25 N. Y. 544.

[146] The cases on this point are classified by states in 8 Am. & Eng. Enc. Law, 9, 10; Spaulding v. Chicago & N. Ry. Co., 30 Wis. 110–121.

[147] Connecticut, Martin v. New York & N. E. R. Co., 62 Conn. 331, 25 Atl.

Where a railway company starts a fire on its own premises, directly, and not by sparks, it is liable as any other individual might be, without reference to statutory privileges.[148] On the same principle, if it should allow combustibles to be or accumulate on its right of way in such quantities, at such places and during such seasons, as render it liable to be ignited and cause damage to adjacent property, negligence may be imputed to it; and the fact that fire is communicated by a passing locomotive is prima facie evidence of negligence.[149] Its subsequent diligence in attempting to prevent the spread of the fire is no excuse.[150]

239; Colorado, Denver & R. G. R. Co. v. Morton, 3 Colo. App. 42, 32 Pac. 345 (et vide Union Pac. Co. v. Askew, 2 Colo. App. 159, 29 Pac. 103); Denver & R. G. R. Co. v. De Graff, 2 Colo. App. 42, 29 Pac. 664; Michigan, Hagan v. Chicago, D. & C. G. T. J. R. Co., 86 Mich. 615, 49 N. W. 509; South Carolina, Mobile Ins. Co. v. Columbia & G. R. Co. (S. C.) 19 S. E. 858; Hunter v. Columbia, N. & L. R. Co. (S. C.) 19 S. E. 197 (liability absolute); Massachusetts, Lyman v. Boston & W. R. Co., 4 Cush. 288 (compare Bassett v. Connecticut River R. Co., 145 Mass. 129, 13 N. E. 370); Illinois, Chicago & N. R. Co. v. McCahill, 56 Ill. 28; Missouri, Mathews v. St. Louis & S. F. Ry. Co., 121 Mo. 298, 24 S. W. 591 (liability absolute); New Hampshire, Rowell v. Railway Co., 57 N. H. 132; Maine, Stearns v. Atlantic & St. L. Ry. Co., 46 Me. 95; Maryland, Baltimore & O. R. Co. v. Dorsey, 37 Md. 19; Wisconsin, Spaulding v. Chicago & N. R. Co., 30 Wis. 110; Montana, Spencer v. Montana Cent. R. Co., 11 Mont. 164, 27 Pac. 681; Kentucky (statute as to spark arrester), Louisville & N. R. Co. v. Taylor, 92 Ky. 55, 17 S. W. 198; Kentucky Cent. R. Co. v. Barrow, 89 Ky. 638, 20 S. W. 165. As to Rev. St. U. S. § 4470, see Cheboygan Lumber Co. v. Delta Transp. Co., 100 Mich. 16, 58 N. W. 630; Pierce, R. R. 437, 438; 2 Shear. & R. Neg. §§ 676, 677; Cooley, Torts (2d Ed.) 703.

[148] Louisville, N. A. & C. R. Co. v. Nitsche, 126 Ind. 229, 26 N. E. 51. Fire set by section men, Gould v. Northern Pac. R. Co., 50 Minn. 516, 52 N. W. 924.

[149] Eddy v. Lafayette, 1 C. C. A. 441, 49 Fed. 807; Black v. Aberdeen & W. E. R. Co., 20 S. E. 713; Smith v. London & S. W. Ry. Co., L. R. 5 C. P. 98; Gordon v. Grand Rapids & I. R. Co. (Mich.) 61 N. W. 549; Innes, Torts, 77; Chicago, St. L. & P. R. Co. v. Williams, 131 Ind. 30, 30 N. E. 696. An allegation that engine from which the coal was dropped or thrown was improperly constructed or driven is not, under such circumstances, necessary. Delaware, L. & W. R. Co. v. Salmon, 39 N. J. Law, 299. Combustibles may be grass or brush, Genung v. New York & N. E. R. Co., 66 Hun, 632, 21 N. Y. Supp. 97; St. Louis & S. F. R. Co. v. Richardson, 47 Kan. 517, 28 Pac. 183; Terre Haute & L. R. Co. v. Walsh (Ind. App.) 38 N. E. 534; San Antonio & A. P. Ry. Co. v.

[150] Chicago & E. R. Co. v. Ludington, 10 Ind. App. 636, 38 N. E. 342.

Explosives.

Liability for keeping an explosive has been regarded as based on the theory of nuisance,[151] and as a breach of duty to insure safety.[152] On the other hand, it is denied that responsibility can be attached under such circumstances without fault, although it is recognized that the only exoneration is the exercise of the most watchful care and most active diligence.[153] Accordingly, in the

Oakes (Tex. Civ. App.) 26 S. W. 1116; Pittsburgh, C. & St. L. R. Co. v. Nelson, 51 Ind. 150; sawdust, Kurz & Huttenlocher Ice Co. v. Milwaukee & N. R. Co., 84 Wis. 171, 53 N. W. 850; shingle roof, Cincinnati, N. O. & T. P. Ry. Co. v. Barker, 94 Ky. 71, 21 S. W. 347; rubbish, Chicago & E. R. Co. v. House, 10 Ind. App. 134, 37 N. E. 731; weeds, Gulf, C. & S. F. Ry. Co. v. Cusenberry, 5 Tex. Civ. App. 114, 26 S. W. 43; Texas & P. R. Co. v. Gains (Tex. Civ. App.) 26 S. W. 443. Generally, see Chicago, St. P., M. & O. R. Co. v. Gilbert, 3 C. C. A. 264, 52 Fed. 711; Haugen v. Chicago, M. & St. P. R. Co., 3 S. D. 394, 53 N. W. 769; Lake Erie & W. R. Co. v. Clark, 7 Ind. App. 155, 34 N. E. 587; 2 Shear. & R. Neg. §§ 676-678, and citations. Montana statute, Spencer v. Montana Cent. R. Co., 11 Mont. 164, 27 Pac. 681. As to combustibles belonging to plaintiff placed near the right of way, see Martin v. Texas & P. Ry. Co. (Tex. Sup.) 26 S. W. 1052.

[151] Thus, a powder magazine may be per se a nuisance, and liability for damage consequent upon it may attach without proof of negligence. "It will be seen * * * that whoever does an unlawful act, placing in jeopardy the lives or property of others, does so at his peril, and that, if injury results to others as a consequence of such an unlawful act, he must respond in damages. The rule is well-nigh (if not entirely) universal, that men must use their own property and so exercise their own privileges that they do not destroy or imperil the rights of others; and this is even so in the exercise of rights not prohibited by law, and in the exercise of trades and business not a nuisance per se. This rule is so consistent with reason and justice that it would seem no argument can add to its force, or the citation of authorities to its justice." Chicago, W. & V. Coal Co. v. Glass, 34 Ill. App. 364; Commings v. Stevenson, 76 Tex. 642, 13 S. W. 556. Compare Heeg v. Licht, 80 N. Y. 579, reversing 16 Hun, 257; Myers v. Malcolm, 41 Am. Dec. 744; Cheatham v. Shearon, 55 Am. Dec. 734.

[152] Clerk & L. Torts, 339. The storage of explosives is commonly regulated by statute. The English explosive act (1875) is 38 Vict. c. 17. Vide Wright v. Chicago & N. W. R. Co., 27 Ill. App. 200. Prohibition against transportation of explosives by vehicles engaged in interstate traffic. U. S. v. Saul, 58 Fed. 763.

[153] Hadley v. Cross, 34 Vt. 586. Et vide Kilpatrick v. Richardson, 37 Neb. 731, 56 N. W. 481; Wellington v. Dover Kerosene Oil Co., 104 Mass. 68; Marshall v. Welwood, 38 N. J. Law, 339; Spencer v. Campbell, 9 Watts &

celebrated Nitroglycerine Case,[154] where a package of nitroglycerine, shipped by a carrier, who did not know its contents, exploded, it was held that there was no want of ordinary care or skill on the part of the carrier, and that no liability attached. Under such circumstances, the shipper who failed to give notice of the dangerous character of the contents of the package is guilty of actionable negligence.[155] With respect to the use of explosives, as in blasting, there is a corresponding confusion in the cases.[156] As to gas, while its manufacture may produce damages recoverable as a nuisance without proof

S. 32; McAndrews v. Collerd, 42 N. J. Law, 189; Beauchamp v. Saginaw M. Co., 50 Mich. 163, 15 N. W. 65; Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395; Allison v. Western N. C. R. Co., 64 N. C. 383.

[154] 15 Wall. 524. The shipper of naphtha, described as "carbon oil" in the freight bill, in barrels marked "unsafe for illuminating purposes," is liable to the conductor of the train, who was injured by an explosion, while in the car where the naphtha was, with a lamp, if he did not know what was in the barrel, although the carrier had been informed of their contents. Standard Oil Co. v. Tierney (1891) 92 Ky. 367, 17 S. W. 1025. Negligence on the part of an oil company will not be inferred from the mere fact that burning oil from its yard flowed down a pipe to a lighter loaded with petroleum at its wharf, causing the lighter to explode and destroy a vessel at an adjacent wharf. Cosulich v. Standard Oil Co., 122 N. Y. 118, 25 N. E. 259.

[155] Boston & A. R. Co. v. Carney, 107 Mass. 568. But consigners of gunpowder to be sold on commission are not liable for damages resulting from an explosion of the powder while stored by the consignees, the doctrine of respondeat superior having no application. Abrahams v. California Powder Co. (N. M.) 23 Pac. 785. As to explosion by naphtha, see Lee v. Vacuum Oil Co., 54 Hun, 156, 7 N. Y. Supp. 426. Damage from explosion from dynamite magazine is actionable only when negligence is shown. Laflin & R. Powder Co. v. Tearney (Ill. Sup.) 21 N. E. 516.

[156] As to nuisance, see Brennan v. Schreiner (Super. N. Y.) 20 N. Y. Supp. 130; Wilsey v. Callanan (Sup.) 21 N. Y. Supp. 65; Morgan v. Bowes, 62 Hun, 623, 17 N. Y. Supp. 22; Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395. As to insurer of safety, see Hay v. Cohoes Co., 2 N. Y. 159 (but see Benner v. Atlantic Dredging Co., 134 N. Y. 156, 31 N. E. 328; Booth v. Railroad Co., 140 N. Y. 267, 35 N. E. 592, where nuisance is also referred to; Roemer v. Striker, 142 N. Y. 134, 36 N. E. 808; Prentice v. Village of Wellsville (Sup.) 21 N. Y. Supp. 820; Munro v. Pacific Coast Dredging & Reclamation Co., 84 Cal. 515, 24 Pac. 303; Scott v. Bay, 3 Md. 431. As to negligence, see Cameron v. Vandegriff, 53 Ark. 381, 13 S. W. 1092; Harris v. Simon, 32 S. C. 593, 10 S. E. 1076. Where blasting was done in a deep cut, so situated that covering could have been easily constructed so as to protect intestate against danger, it was negligence not to pro-

of negligence,[157] the tendency of the courts is to base responsibility for damages consequent upon its accumulation upon the theory of negligence.[158] The test is whether the defendants omitted to do something which in the exercise of ordinary care and skill they ought to have done, or whether they did any act dangerous in itself, or under circumstances in which it was not consistent with ordinary care and prudence that it should be done.[159] It is the duty of the person who conducts it through pipes to exercise every reasonable precaution suggested by experience and the known dangers of the

vide such structure. Blackwell v. Lynchburg & D. R. Co., 111 N. C. 151, 16 S. E. 12. If the locality on which a person is blasting on his own land is not such as to render blasting a nuisance, he has been held liable for consequent damages only when he has been negligent. Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991; Id., 8 Wash. 162, 35 Pac. 621. Under such circumstances, however, liability will be attached only to wanton or willful negligence. Emry v. Roanoke Navigation & Water-Power Co., 111 N. C. 94, 16 S. E. 18. Blasting may be a nuisance, but no damages will be awarded if fair warning is given. Graetz v. McKenzie, 9 Wash. 696, 35 Pac. 377. The person engaged in blasting is bound to take proper precaution to guard against danger, as by giving actual and timely notice before firing the blast, or by effectually covering it, Blackwell v. Lynchburg & D. R. Co., 111 N. C. 151, 16 S. E. 12; Simmons v. McConnell's Adm'r, 86 Va. 494, 10 S. E. 838; Harris v. Simon, 32 S. C. 593, 10 S. E. 1076; especially where failure so to do violates a municipal ordinance requiring such covering, Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Hare v. McIntire, 82 Me. 240, 19 Atl. 453. The liability of municipality for blasting in the highway depends upon negligence. City of Joliet v. Harwood, 86 Ill. 110; City of Joliet v. Seward, 99 Ill. 267; Dean v. Randolph, 132 Mass. 475; City of Logansport v. Dick, 70 Ind. 65; Murphy v. Lowell, 128 Mass. 396.

[157] Bohan v. Port Jervis Gaslight Co., 122 N. Y. 18, 25 N. E. 246. Ante, p. 771, "Nuisance."

[158] Finnegan v. Fall River Gas Works Co., 159 Mass. 311, 34 N. E. 523. In Smith v. Boston Gaslight Co., 129 Mass. 318, the court declined to inquire whether, with respect to gas, defendant was bound at his peril not to permit its escape. Et vide Hutchinson v. Boston Gaslight Co., 122 Mass. 219-222; Holly v. Boston Gaslight Co., 8 Gray (Mass.) 123. As to negligence in imperfectly cutting off supply of gas, Lanigan v. New York Gas Co., 71 N. Y. 29. Et vide Holden v. Liverpool Gas & Coke Co., 3 C. B. 1.

[159] 1 Thomp. Neg. p. 108, § 11, collecting cases; Blenkiron v. Great Central Gas Consumers' Co., 3 Law T. (N. S.) 317; 2 Fost. & F. 437, per Cockburn, C. J.; Powers v. Boston Gaslight Co., 158 Mass. 257, 33 N. E. 523; Schmeer v. Gaslight Co. of Syracuse (Sup.) 20 N. Y. Supp. 168.

substance. "This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to prevent the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of all leaks that might occur from the deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in the business." [160]

In the celebrated case of Losee v. Buchanan [161] it was held that an explosion of a boiler purchased from a reputable manufacturer, in which there was an unknown latent defect, does not attach responsibility for consequent damages. In such a case, the defendant is bound to use the degree of care which ordinary prudence and forethought would, under the circumstances, suggest; but the mere fact of the accident is not proof of negligence.[162] It is, however,

[160] Koelsch v. Philadelphia Co., 152 Pa. St. 355-364, 25 Atl. 522, and cases cited; Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344; Schmeer v. Gaslight Co. of Syracuse, 65 Hun, 378, 20 N. Y. Supp. 168; Mississinewa Min. Co. v. Patton, 129 Ind. 472, 28 N. E. 1113; Keiser v. Mahanoy City Gas Co., 143 Pa. St. 276, 22 Atl. 759; District of Columbia v. W. G. Co., 19 Wash. Law Rep. 354; Lannen v. Albany Gaslight Co., 44 N. Y. 459. And see Butcher v. Providence Gas Co., 18 Alb. Law J. 372. Accordingly, a gas fitter, who injures plaintiff by allowing gas to accumulate because of defective plumbing, and which exploded when plaintiff struck a light in the room, is liable for negligence. Parry v. Smith, 4 C. P. Div. 325. Burrows v. March Gas & Coke Co., L. R. 5 Exch. 67, L. R. 7 Exch. 96, would seem to turn wholly upon contract. The opinion of Cockburn, J., in Clark v. Chambers, 3 Q. B. Div. 327, 47 Law J. Q. B. 427; 38 Law T. (N. S.) 455. As to inspection of pipes, see Mose v. Hastings & St. L. Gas Co., 4 Fost. & F. 324. And see Holden v. Liverpool Gas & Coke Co., 3 C. B. 1. Generally, as to negligence of gas fitters, see Cleveland v. Spier, 16 C. B. (N. S.) 399. As to natural gas, Mississinewa Min. Co. v. Patton, 129 Ind. 472, 28 N. E. 1113.

[161] 51 N. Y. 476, collating and discussing questions of trespass and negligence, distinguishing Hay v. Cohoes Co., 2 N. Y. 159, affirming Fletcher v. Ryland, L. R. 1 Exch. 265, and questing same case, L. R. 3 H. L. 330; Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537; Marshall v. Welwood, 38 N. J. Law, 339, Chase, Lead. Cas. 221; 1 Thomp. Neg. p. 112.

[162] Reiss v. New York Steam Co., 128 N. Y. 103, 28 N. E. 24. Applied to the blowing out of a bonnet allowing steam to escape, injuring plaintiff's goods. Nor from the explosion of petroleum. Cosulich v. Standard Oil Co.,

insisted that a boiler explosion is prima facie evidence of negligence, which may be rebutted by showing due diligence.[163] The explosion of fireworks in the streets of a city has been regarded as a public nuisance rendering all persons concerned in doing the act or causing it to be done liable for all damages proximately resulting therefrom.[164] The discharge of fireworks at suitable places, however, when not prohibited by statute or municipal regulation, cannot be said to be unlawful, and the burden is on the plaintiff to show such circumstances as will make it culpable negligence.[165] Even where the display is in a public highway, the better opinion seems to be that a voluntary spectator assumes the risk of danger.[166]

But the plaintiff's case may be based on such a reckless disregard of the rights of others as to entitle him to recover on mere proof of cause and damage.[167] The user of firearms does not deal with them

122 N. Y. 118, 25 N. E. 259. As to liability of vendor to third person, see Losee v. Clute, 51 N. Y. 494. A nuisance, moreover, is, properly speaking, something which works harm while in integro; that is, in the condition in which the defendant has put or left it. A reservoir or boiler, not being in itself a nuisance, does not become such by bursting. Ball, Lead. Cas. 322.

[163] Grimsley v. Hankins, 46 Fed. 400. Et vide Morris Co. v. Burgess, 44 Ill. App. 27. Where there are no eyewitnesses of the accident, it is proper to show that deceased was a careful and competent engineer, to raise the presumption that he was exercising due care at the time of the explosion. Toledo, St. L. & K. C. R. Co. v. Bailey, 145 Ill. 159, 33 N. E. 1089; Illinois Cent. R. Co. v. Philips, 49 Ill. 234, 55 Ill. 194; Spencer v. Campbell, 9 Watts & S. 32. By section 13 (5 Stat. 306) explosion of a boiler on a steamboat was made prima facie evidence of neglect. This is not limited in its application to actions by passengers, but extends to actions by others. Connolly v. Davidson, 15 Minn. 519 (Gil. 428). Et vide McMahon v. Davidson, 12 Minn. 357 (Gil. 232); Fay v. Davidson, 13 Minn. 298 (Gil. 275).

[164] Jenne v. Sutton, 43 N. J. Law, 257. Explosion of firecracker under plaintiff's house, Conklin v. Thompson, 29 Barb. 218.

[165] Dowell v. Guthrie, 99 Mo. 653, 12 S. W. 900; Colvin v. Peabody, 155 Mass. 104, 29 N. E. 59; King v. Ford, 1 Starkie, 421. Compare Waixel v. Harrison, 37 Ill. App. 323; Cooley, Torts (2d Ed.) 705.

[166] Scanlon v. Wedger, 156 Mass. 462, 31 N. E. 642, dissenting opinion of Morton, J. (page 464, 156 Mass., and page 642, 31 N. E.), and cases collected on page 466, 156 Mass., and page 642, 31 N. E. If he be an infant, Bradley v. Andrews, 51 Vt. 530. What constitutes negligence in firing will be necessarily relative to time and place. Smith v. London & S. W. Ry. Co., L. R. 6 C. P. 14.

[167] Scott v. Shepherd, 2 W. Bl. 892,—trespass by throwing a squib.

at his peril. He is not an insurer against harm; but he is bound to a standard of duty which is variable and shifts with the facts developed, whether, under the circumstances, a reasonable and proper degree of care was exercised.[168] The early cases, however, went so far as to hold that an officer commanding a militia at regimental drill was answerable for damages caused by firing guns in or near a highway.[169] Even a hunter may be liable for shooting another person while hunting, although he did not know of his presence.[170] It has been held, moreover, that to constitute a valid defense in such cases the injury must be shown to have resulted from some controlling, superior agency, and without the defendant's fault.[171] The requirement at law that persons having in their custody instruments of danger should keep them with the utmost care renders it actionable negligence to place a loaded gun in the hands of a person incompetent to use it.[172] But an air gun is not so obviously and intrinsically dangerous as to render it negligence for a father to place it in the hands of his infant son.[173]

Poisons.

In a number of cases persons have been held liable for damages consequent on the use, ownership, custody, or control of substances poisonous or offensive, essentially on theory of Rylands v. Fletcher or on analogy to that of nuisance.[174] Thus, where one planted yew trees on his own land, and permitted the branches

[168] Morgan v. Cox, 22 Mo. 373; McCleary v. Frantz, 160 Pa. St. 535, 28 Atl. 929.

[169] Castle v. Duryee, *41 N. Y. 169; Moody v. Ward, 13 Mass. 299; Weaver v. Ward, Hob. 134.

[170] Hankins v. Watkins, 77 Hun, 360, 28 N. Y. Supp. 867; Bizzell v. Booker, 16 Ark. 308. Compare McCleary v. Frantz, supra.

[171] Knott v. Wagner, 16 Lea (Tenn.) 481, 1 S. W. 155.

[172] Dixon v. Bell, 5 Maule & S. 198; Ball, Lead. Cas. 210; Bigelow, Lead. Cas. 568. So one who sells gunpowder to an inexperienced child is liable to it for subsequent explosion. Carter v. Towne, 98 Mass. 567.

[173] Chaddock v. Plummer, 88 Mich. 225, 50 N. W. 135, where boy was 9 years old; Harris v. Cameron, 81 Wis. 239, 51 N. W. 437, where boy was 11 years old. In the latter case the question of negligence on the part of the father in making the purchase was held to be a question of law for the court. Compare Binford v. Johnston, 82 Ind. 426.

[174] Pol. Torts, c. 12.

to overhang another's meadow, and horses running in the meadow ate the branches and died, the owner of the trees was held liable.[175] So, where wire fencing decayed, and the pieces fell into the adjoining pasture belonging to another person, and were eaten by his cow, which died from the effects, the owner of the cow was held entitled to damages.[176] So, a landlord has been held liable for knowingly letting infected premises.[177] Many cases on this subject arise from sales of poisonous substances, not only as between vendor and vendee, but also as between the vendor and third persons. These cases will be subsequently considered.[178] Similar questions, as has been seen, also arise in connection with the doctrine of fraud and deceit.[179]

Animals.

Whoever owns or keeps animals of a kind likely to do harm does so at his peril, and is liable, on proof of damage, without further proof of negligence.

"If they are such as are naturally mischievous, he shall answer for hurt done by them without any notice; but, if they are of a tame nature, there must be notice of the ill quality." [180]

In the leading case, May v. Burdett,[181] a woman was bitten by a monkey. Its owner, knowing its mischievous and ferocious nature, was held liable in case, without an averment of negligence or de-

[175] Crowhurst v. Amersham Burial Board, 4 Exch. Div. 5.

[176] Firth v. Bowling Iron Co., 3 C. P. Div. 254; Durgin v. Kennett (N. H.) 29 Atl. 414. Further, as to poisons, see Callahan v. Warne, 40 Mo. 132; post, p. 906; Thomas v. Winchester, 6 N. Y. 397.

[177] Cesar v. Karutz, 60 N. Y. 229. Cf. Ballard v. Tomlinson, 54 Law J. Ch. 454. In an action for personal injuries, it appeared that plaintiff's intestate fell on some ice which defendant had wrongfully allowed to accumulate on the sidewalk, and was fatally injured by a large and very sharp knife which he was carrying to use in his trade. The knife was wrapped in several cloth garments, and tied with a string, and it appeared that decedent had carried it in this manner for several years. A witness for defendant testified that he had warned decedent that it was dangerous to carry the knife as he did. Held, that it could not be said as a matter of law that decedent was negligent. McGoldrick v. New York Cent. & H. R. R. Co., 66 Hun, 629, 20 N. Y. Supp. 914.

[178] Post, p. 906.

[179] Ante, p. 574, "Deceit."

[180] Holt, C. J., in Mason v. Keeling, 12 Mod. 332; Holmes, Com. Law, 22.

[181] May v. Burdett, 9 Q. B. 101.

fault on his part in securing or keeping the monkey. Here the owner had actual knowledge of the vicious propensities of the animal. But, though he "have no particular notice that it did any such thing before, yet if it be a beast that is feræ naturæ, as a lion, a bear,[182] a wolf,[183] yea, an ape or a monkey,[184] if he get loose and do harm to any person, the owner is liable to an action for the damage."[185] The tameness of the disposition of such an animal, however, may operate by way of mitigation of damages.[186]

As to animals domitæ naturæ, there is no distinction between the case of an animal which breaks from the tameness of his nature and becomes fierce and one who is feræ naturæ, provided the owner has knowledge.[187] He is not liable for negligent failure to keep a domestic animal, not known to be vicious, confined to his own premises, except for consequences which may be anticipated because of its well-known disposition and habits.[188] A part of the natural propensity of such an animal is to stray wherever its instinct leads it. Accordingly, there is, at common law, an absolute liability for all damages consequent upon the gratification of such instinct.[189] Such damage includes, not only trespass on and injury to real estate, but also injury to person or personal property. In an action for the

182 Marguet v. La Duke, 96 Mich. 596, 55 N. W. 1006.

183 Manger v. Shipman, 30 Neb. 352, 46 N. W. 527.

184 May v. Burdett, 9 Q. B. 101.

185 1 Hale, P. C. p. 430; May v. Burdett, 9 Q. B. 101; Jenkins v. Turner, 1 Ld. Raym. 109; Mason v. Keeling, Id. 606. An elephant is in the dangerous class. Filburn v. People's Palace & Aquarium Co., 25 Q. B. Div. 258. As to animals as nuisances, ante, p. 768, "Nuisance," note 132.

186 Besozzi v. Harris, 1 Fost. & F. 92. Et vide Worth v. Gilling, L. R. 2 C. P. 1.

187 Ram, Jackson v. Smithson, 5 Mees. & W. 563; a stallion, Hammond v. Melton, 42 Ill. App. 186 (compare Knickerbocker Ice Co. v. De Hass, 37 Ill. App. 195); a bull, Lettis v. Horning, 67 Hun, 627, 22 N. Y. Supp. 565, distinguishing early New York cases; a steer, Curtis v. Schossler, 14 Pa. Co. Ct. R. 600.

188 Klenberg v. Russell, 125 Ind. 532, 25 N. E. 596 (where a cow damaged plaintiff), collecting cases on page 534, 125 Ind., and page 596, 25 N. E.; Smith v. Donohue, 45 N. J. Law, 548.

189 Cox v. Burbidge, 13 C. B. (N. S.) 430; Dewell v. Sanders, Cro. Jac. 490; Hannam v. Mockett, 2 Barn. & C. 934; Myers v. Parker, 74 Hun, 129, 26 N. Y. Supp. 308; North Pennsylvania R. Co. v. Rehman, 49 Pa. St. 101, reviewing cases.

latter kind of injury, it is not necessary to allege and prove scienter on the part of the owner where it is alleged or proved that the injury was committed where the animal was negligently permitted by such owner to trespass on the plaintiff's premises.[190] On the other hand, if one be driving cattle through a street, and they stray and do damage, his act has the authorization of law, and he is not liable unless he has failed to exercise the care of a prudent man to prevent harm.[191] In the absence of knowledge of vicious propensities, the owner is liable only, at common law,[192] for damage caused by the natural propensity of the animal; and this is to be determined by a consideration of normal disposition. Thus, while it is natural for horses to kick each other, it is not their ordinary nature to kick human beings. Hence, where a horse strayed on a highway, and kicked a child, the owner was not held liable, in the absence of knowledge of the horse's vicious temper;[193] but if, although not vicious, it has kicked another animal, he has been held liable.[194] If

[190] Van Leuven v. Lyke, 1 N. Y. 515; Marsh v. Hand, 120 N. Y. 315, 24 N. E. 463; Burke v. Daley, 32 Ill. App. 326; Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 103, and authority cited; Malone v. Knowlton, 60 Hun, 585, 15 N. Y. Supp. 506. If a bull break into an inclosure and gore a horse, the owner of the bull is liable. Dolph v. Ferris, 7 Watts & S. 367; Lee v. Ryley, 18 C. B. (N. S.) 722; Ellis v. Loftus Iron Co., L. R. 10 C. P. 10.

[191] Tillett v. Ward, 10 Q. B. Div. 17; Moynahan v. Wheeler, 117 N. Y. 285, 22 N. E. 702. But see Meier v. Shrunk, 79 Iowa, 17, 44 N. W. 209. If defendant admits, after the injury, that it was careless to lead a bull, in the manner in which his servant led it, through a street, this justifies the jury in finding against him. Linnehan v. Sampson, 126 Mass. 506.

[192] As illustrations of statutory changes, Hussey v. King, 83 Me. 568, 22 Atl. 476; Conway v. Grant, 88 Ga. 40, 13 S. E. 803.

[193] Cox v. Burbidge, 13 C. B. (N. S.) 430–441.

[194] Barnes v. Chapin, 4 Allen (Mass.) 444. So if an agister of cattle place plaintiff's horse in a field with a number of heifers, near a bull in adjoining field, he may be liable for damage to the horse, although he did not know that the bull was of mischievous disposition. Smith v. Cook, 1 Q. B. Div. 79. In Oklahoma it is held that, unless the owner of a mule has knowledge of a propensity on its part to attack colts, he is not liable for a colt killed by it while running at large. Meegan v. McKay, 1 Okl. 59, 30 Pac. 232. Compare Johanson v. Howells, 55 Minn. 61, 56 N. W. 460. Merely trying a horse of unknown disposition in a highway is no evidence of negligence. Hammack v. White, 11 C. B. (N. S.) 588; nor trying carriage horses in a double harness, Holmes v. Mather, supra. But while known disposition of a horse may affect

a dog be of a savage disposition, and accustomed to bite, the owner or keeper[195] is liable only if he knows these facts;[196] but if the owner is aware of such viciousness, and permits the dog to run at large, he is liable, without allegation or proof of negligence, for its indulgence in the propensity to bite.[197] The liability is the same if the plaintiff be bitten while lawfully on the defendant's premises.[198] There is probably a natural propensity in all dogs to chase and destroy game, and to worry sheep and cattle.[199] As to what is notice

measure of care, this does not apply where a driver failed to use care to relieve his horse, who was entangled in a harness, whereby he ran away. Wissler v. Walsh, 165 Pa. St. 352, 30 Atl. 981.

[195] Hornbein v. Blanchard, 4 Colo. App. 92, 35 Pac. 187; Garrison v. Barnes, 42 Ill. App. 21; Whittemore v. Thomas, 153 Mass. 347, 26 N. E. 875; Galvin v. Parker, 154 Mass. 346, 28 N. E. 244. But see Jennings v. D. G. Burton Co., 73 Hun, 545, 26 N. Y. Supp. 151.

[196] Warner v. Chamberlain (Del. Super.) 30 Atl. 638, 7 Houst. 18; Robinson v. Marino, 3 Wash. St. 434, 28 Pac. 752; Dockerty v. Hutson, 125 Ind. 102, 25 N. E. 144; Simpson v. Griggs, 58 Hun, 393, 12 N. Y. Supp. 162. As between master and servant, Auchmuty v. Ham, 1 Denio, 495. "An uncle who permits a minor nephew, living with him, to keep a known vicious dog, is liable for injuries to a child caused by it." Snyder v. Patterson, 162 Pa. St. 98, 28 Atl. 1006. A wife, living with her husband on premises owned by her is not liable for injuries caused by the bite of a vicious dog kept on such premises, though Code, § 2345, provides that a married woman shall be alone liable for her torts. Strouse v. Leipf, 101 Ala. 433, 14 South. 667. Compare Quilty v. Battie, 135 N. Y. 201, 32 N. E. 47. As to directors of an almshouse, Sproat v. Directors of Poor, 145 Pa. St. 598, 23 Atl. 380; landlord and tenant, Garrison v. Barnes, 42 Ill. App. 21. Compare Jennings v. D. G. Burton Co., 73 Hun, 545, 26 N. Y. Supp. 151. The occupier of a place where a dog is kept is, for purposes under discussion, the owner of the dog,—in England, 28 & 29 Vict., c. 60; in Scotland, Camp. Neg. 53–55.

[197] Twigg v. Ryland, 62 Md. 380; Harris v. Fisher, 115 N. C. 318, 20 S. E. 461; State v. Remhoff (N. J. Sup.) 26 Atl. 860; Bundschuh v. Mayer, 81 Hun, 111, 30 N. Y. Supp. 622.

[198] Sylvester v. Maag, 155 Pa. St. 225, 26 Atl. 392; Jacoby v. Ockerhausen, 59 Hun, 619, 13 N. Y. Supp. 499; Melsheimer v. Sullivan, 1 Colo. App. 22, 27 Pac. 17.

[199] Reed v. Edwards, 17 C. B. (N. S.) 245; Fleeming v. Orr, 2 Macq. 14. Et vide Wright v. Pearson, L. R. 4 Q. B. 582; Smith v. Donohue, 49 N. J. Law, 548–552, 10 Atl. 150; Murry v. Young, 12 Bush, 337. As to statutory regulation of dogs killing live stock, Davis v. Town of Seymour, 59 Conn. 531, 21 Atl. 1004; Jones v. Town of Chester (N. H.) 29 Atl. 452; Jacobsmeyer

of an unnatural, vicious propensity, the jury are to judge, in view of all the circumstances; as, that the animal has attacked other persons or animals, its general reputation in the neighborhood, and the manner in which it is ordinarily restrained.[200] The law recognizes that the habit of an animal is a continuous fact, to be shown by proof of successive acts of a similar kind. Therefore proof of disposition before and after the injury is admissible.[201]

Where an animal suffers from a contagious disease, which is likely

v. Poggemoeller, 47 Mo. App. 560; Wealland v. Palmer, 2 Pa. Dist. R. 777; Laws Wis. 1891, c. 218, p. 255; State v. Township Committee of Neptune, 52 N. J. Law, 487, 20 Atl. 61; dogs running at large, Nehr v. State, 35 Neb. 638, 53 N. W. 589; Jones v. Perry, 2 Esp. 482.

[200] Fake v. Addicks, 45 Minn. 37, 47 N. W. 450; Keenan v. Hayden, 39 Wis. 558; Linck v. Scheffell, 32 Ill. App. 17; Turner v. Craighead, 83 Hun, 112, 31 N. Y. Supp. 369; Murry v. Young, 12 Bush, 337; Brice v. Bauer, 108 N. Y. 428, 15 N. E. 695; Meier v. Shrunk, 79 Iowa, 17, 44 N. W. 209. And see 1 Greenl. Ev. § 107, Hahnke v. Frederich, 140 N. Y. 224, 35 N. E. 487 (where a dog was usually kept chained and muzzled). So in Kessler v. Lockwood, 62 Hun, 619, 16 N. Y. Supp. 677; Robinson v. Marino, 3 Wash. St. 434, 28 Pac. 752. In Smith v. Pelah, 2 Strange, 1264, the chief justice ruled "that if a dog has once bit a man, and the owner thereof, with notice, keeps the dog, and lets him go about or lie at his door, an action lies at the suit of the person who is bit, though it happened by such person's treading on the dog's toes, for it was owing to his not hanging the dog on the first notice, and the safety of the king's subject is not afterwards to be endangered." Wood, Nuis. § 766; Muller v. McKesson, 73 N. Y. 200, 201. In an action for injuries inflicted by a runaway team of defendant, the vicious or dangerous character of the horses is a question for the jury, where there is evidence that the horses had previously run away, and that defendant knew it. Benoit v. Troy & L. R. Co., 77 Hun, 576, 28 N. Y. Supp. 1024. Notice of viciousness of horse to superior hostler is notice to street-railway companies. McGarry v. New York & H. R. Co. (Super. N. Y.) 18 N. Y. Supp. 195. Generally, as to notice through servant, Baldwin v. Casella, L. R. 7 Exch. 325; Applebee v. Percy, L. R. 9 C. P. 647. And, generally, as to notice, Worth v. Gilling, L. R. 2 C. P. 1; Gladman v. Johnson, 36 Law J. C. P. 153; Jones v. Perry, 2 Esp. 482; Deck v. Dyson, 4 Camp. 198; Judge v. Cox, 1 Starkie, 285.

[201] Todd v. Rowley, 8 Allen, 51–58, per Bigelow, C. J.; Chamberlain v. Enfield, 43 N. H. 356; Maggi v. Cutts, 123 Mass. 535; Kennon v. Gilmer, 131 U. S. 22, 9 Sup. Ct. 696. But see Cameron v. Bryan (Iowa) 56 N. W. 434; Knickerbocker Ice Co. v. De Hass, 37 Ill. App. 195; Worth v. Gilling, L. R. 2 C. P. 1.

to affect other animals, its owner, keeper, or person having it in control [202] is liable, at common law, for allowing it to escape, if he knew or ought to have known of its diseased condition.[203] The keeping of such animals is now largely regulated by statute.[204]

Things Dangerous because Put in Motion.

Where the instrument by which wrong is done is innocent in itself, and does harm only when it is started in motion, the liability naturally depends upon the exercise of care proportioned to probable harm. Thus, a coupling pin attached to a moving car,[205] or a rope dragged behind a moving vehicle,[206] a board thrown back from a

[202] As to liability of railroad company communicating disease by shipping infected cattle, see Pike v. Eddy, 53 Mo. App. 505; Grimes v. Eddy (Mo. Sup.) 27 S. W. 479; Furley v. Chicago, M. & St. P. Ry. Co. (Iowa) 57 N. W. 719.

[203] Cooke v. Waring, 2 Hurl. & C. 332; State v. Fox (Md.) 29 Atl. 601 (a leading case of sale of a glandered horse); St. Louis, I. M. & S. Ry. Co. v. Goolsby, 58 Ark. 401, 24 S. W. 1071. There is no liability on warranty, in selling a glandered horse, in the absence of representations as to health, Hill v. Balls, 2 Hurl. & N. 299; Mullett v. Mason, L. R. 1 C. P. 559; although liability may attach for fraud, Mullett v. Mason, supra. Texas fever: Clarendon Land, Inv. & Agency Co. v. McClelland (Tex. Civ. App.) 21 S. W. 170 (reversed in 86 Tex. 179, 23 S. W. 576, 1100). Evidence that the fact that native cattle, treading over the ground after Texas cattle, are liable to contract Texas fever, is a matter of general notoriety does not show that defendant company had knowledge of the fact. Grimes v. Eddy (Mo. Sup.) 27 S. W. 479. As to hydrophobia communicated by a dog: French v. Wilkinson, 93 Mich. 322, 53 N. W. 530. Liability for sheep rot: Wilcox v. McCoy, 21 Ohio St. 655; Herrick v. Gary, 83 Ill. 85; Peterkin v. Martin, 30 La. Ann. 894.

[204] As to English act, see 41 & 42 Vict. c. 74. Laws N. M. 1891, c. 62; Laws Kan. 1891, c. 201, p. 346; Laws N. D. 1891, c. 125, p. 314; 26 Stat. c. 839, p. 414; Laws Tex. 1892, p. 11; Id. 1893, c. 56; Laws N. Y. 1892, p. 981, Laws Nev. 1893, c. 44, p. 37. Et vide Miller v. Horton, 152 Mass. 540, 26 N. E. 100; Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854; Stryker v. Crane, 33 Neb. 690, 50 N. W. 1132; Furley v. Chicago, M. & St. P. Ry. Co. (Iowa) 57 N. W. 719.

[205] Doyle v. Chicago, St. P. & K. C. Ry. Co., 77 Iowa, 607, 42 N. W. 555. Injury to plaintiff by stick of wood which fell or was thrown from passing engine is prima facie due to defendant's negligence. Savannah, F. & W. R. Co. v. Slater, 92 Ga. 391, 17 S. E. 350.

[206] Barnes v. Brown, 95 Mich. 576, 55 N. W. 439. Cf. McCaffrey v. Twenty-Third St. Ry. Co., 47 Hun, 404, where it was held that no liability attaches because of damage done by wire accidentally attached to axle of street car.

circular saw,[207] a hammer in use,[208] a swinging sack,[209] or a beer barrel swung from a wagon turning suddenly from a car track,[210] however harmless in themselves, will attach liability if negligently controlled. On the same principle, a bicycle is in itself an innocent vehicle. It is entitled to the rights of the road (but not of the sidewalk)[211] equally with a carriage or other vehicle; and, if it is going at such a rate of speed as to frighten horses, there is liability on the part of the rider only when his want of care can be shown.[212] Carriages and other vehicles drawn by horses become dangerous because of the motion given to them, and because of the tendency of horses to run away and otherwise do damage. It is convenient, however, to postpone the discussion of these cases.[213]

A car with a defective brake is not such an immediately dangerous instrument as to render a railroad company liable to any one injured thereby, in the absence of contract or other relation;[214] but "certainly the absence of slight care in the management of so dangerous an agency as a railroad train in motion is gross negligence."[215] A railroad corporation is, therefore, bound to adopt and use tried and proved modern machinery and appliances in the operation of the road, and in the management and control of the trains. And failure to equip even freight cars with air brakes may be actionable

[207] Frazier v. Lloyd (Pa. Sup.) 16 Atl. 418.

[208] Parish v. Williams, 88 Iowa, 66, 55 N. W. 74; Witte v. Dieffenbach, 54 N. Y. Super. Ct. 508; McCaull v. Bruner (Iowa) 59 N. W. 37.

[209] Brown v. Leclerc, 22 Can. Sup. Ct. 53 (Gwynne, J., dissenting).

[210] Ledig v. Germania Brewing Co., 153 Pa. St. 298, 25 Atl. 870.

[211] Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132.

[212] Holland v. Bartch, 120 Ind. 46, 22 N. E. 83. Generally, as to law of bicycles, see 47 Alb. Law J. 404.

[213] Post, pp. 861, 877.

[214] Roddy v. Missouri Pac. Ry. Co., 104 Mo. 234, 15 S. W. 112; Lake Shore & M. S. Ry. Co. v. Hundt, 140 Ill. 525, 30 N. E. 458. Nor an unguarded hand car, Robinson v. Oregon, S. L. & U. N. R. Co., 7 Utah, 493, 27 Pac. 689; except when in rapid motion, Conklin v. New York Cent. & H. R. R. Co. (Sup.) 17 N. Y. Supp. 651.

[215] Louisville & N. R. Co. v. Mitchell, 87 Ky. 327–337, 8 S. W. 706; Richardson v. New York Cent. & H. R. R. Co., 133 N. Y. 563, 30 N. E. 148; Thomas v. Chicago & G. T. Ry. Co., 86 Mich. 496, 49 N. W. 547; Lapsley v. Union Pac. R. Co., 50 Fed. 172.

negligence.[216] The sudden starting of a train while one is boarding a car is actionable negligence.[217] The law throws upon those who launch a vessel the obligation of doing so with the utmost precaution, and giving such a notice as is reasonable and sufficient to prevent any injury happening from the launch.[218] Collisions between railroad trains[219] or street cars,[220] and injury to pedestrians,[221] or

[216] Chicago, B. & Q. R. Co. v. Grablin, 38 Neb. 90, 56 N. W. 796.

[217] Jury should determine whether it is negligence to give a signal before starting a train, when people are crossing between cars. Burger v. Missouri Pac. Ry. Co., 112 Mo. 238, 20 S. W. 439. Generally, as to passing between obstructing cars, see Id.; Flynn v. Eastern Ry. Co., 83 Wis. 238, 53 N. W. 494; Pannell v. Nashville, F. & S. R. Co., 97 Ala. 298, 12 South. 236; Henderson v. St. Paul & D. Ry. Co., 52 Minn. 479, 55 N. W. 53; Eddy v. Powell, 4 U. S. App. 259, 1 C. C. A. 448, and 49 Fed. 814. Hart v. West Side R. Co., 86 Wis. 483, 57 N. W. 91; Mt. Adams & Eden P. Ry. Co. v. Doherty, 8 Ohio Cir. Ct. R. 349; Hickenbotton v. Delaware, L. & W. R. Co., 122 N. Y. 91, 25 N. E. 279; Myers v. Dean, 132 N. Y. 72, 30 N. E. 259; Fuller v. Jamestown St. Ry. Co., 75 Hun, 273, 26 N. Y. Supp. 1078. Shunting cars against a person unloading is a question of negligence, for the jury. Spotts v. Wabash West. Ry. Co., 111 Mo. 380, 20 S. W. 190. As to shunting cars past crossing: Negligence per se, Alabama & V. Ry. Co. v. Summers, 68 Miss. 566, 10 South. 63; gross negligence, Schindler v. Milwaukee, L. S. & W. Ry. Co., 87 Mich. 400, 49 N. W. 670. A collection of authorities on the duty of a railroad company to maintain lookouts on its trains. Smith v. Norfolk & S. Ry. Co. (N. C.) 25 Lawy. Rep. Ann. 287, 19 S. E. 863, 923.

[218] The Andalusian, 2 Prob. Div. 233. Collisions between steamers depend upon negligence, with due reference to inspector's rule and general marine law. Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264; The Marpesia, L. R. 4 P. C. 212.

[219] Evansville & T. H. R. Co. v. Krapf (Ind. Sup.) 36 N. E. 901. This subject is governed largely by statute. E. g. Byrne v. Kansas City, Ft. S. & M. R. Co., 9 C. C. A. 666, 61 Fed. 605; Richmond & D. R. Co. v. Greenwood, 99 Ala. 501, 14 South. 495.

[220] Collision on intersecting lines. Gulf, C. & S. F. R. Co. v. Pendery (Tex. Civ. App.) 27 S. W. 213; Chicago City Ry. Co. v. McLaughlin, 40 Ill. App. 496. Evidence of negligence of driver of car at other times is inadmissible. Little Rock & M. R. Co. v. Harrell, 58 Ark. 454, 25 S. W. 117.

[221] Texas & N. O. R. Co. v. Hare, 4 Tex. Civ. App. 18, 23 S. W. 42; Gurley v. Missouri Pac. R. Co., 122 Mo. 141, 26 S. W. 953; Blount v. Grand Trunk Ry. Co., 9 C. C. A. 526, 61 Fed. 375; Johnson v. Chicago & N. W. R. Co. (Iowa) 59 N. W. 66; Trowbridge v. Danville S. R. Co., 19 S. E. 780; Dunseath v. Pittsburg, A. & M. Traction Co., 161 Pa. St. 124, 28 Atl. 1021.

persons driving vehicles,[222] or to property,[223] resulting from being struck by railroad trains or street cars, are governed by the test of commensurate care in view of all the circumstances of the case.[224] A company running trains is not an insurer of safety.[225] The rate of speed, apart from statute,[226] and failure to use a headlight or to

[222] Peterson v. St. Paul City Ry. Co., 54 Minn. 152, 55 N. W. 906; Greeley v. Federal St. & P. V. Pass. Ry., 153 Pa. St. 218, 25 Atl. 796; Will v. West Side R. Co., 84 Wis. 42, 54 N. W. 30. One is not necessarily negligent in driving on a cable-car track. Fleckenstein v. Dry-Dock, E. B. & B. R. Co., 105 N. Y. 655, 11 N. E. 951; Cambies v. Third Ave. R. Co., 1 Misc. Rep. 158, 20 N. Y. Supp. 633. Et vide O'Neil v. Dry-Dock, E. B. & B. R. Co., 129 N. Y. 125, 29 N. E. 84; Piper v. Pueblo City Ry. Co., 4 Colo. 424, 36 Pac. 158; Little v. Superior Rapid Transit Co., 88 Wis. 402, 60 N. W. 705; Glazebrook v. West End St. R. Co., 160 Mass. 239, 35 N. E. 553; Richmond & D. R. Co. v. Yeamans, 90 Va. 752, 19 S. E. 787; Haney v. Pittsburgh, A. & M. Traction Co., 159 Pa. St. 395, 28 Atl. 235; Kerrigan v. West End St. Ry. Co., 158 Mass. 305, 33 N. E. 523; Atchison, T. & S. F. R. Co. v. McClurg, 8 C. C. A. 322, 59 Fed. 860; Kestner v. Pittsburgh & B. Traction Co., 158 Pa. St. 422, 27 Atl. 1048; Wilson v. New York, N. H. & H. R. Co. (R. I.) 29 Atl. 300; Swain v. Fourteenth St. R. Co., 93 Cal. 179, 28 Pac. 829; Riegelman v. Third Ave. R. Co., 9 Misc. Rep. 51, 29 N. Y. Supp. 299; Shea v. St. Paul City R. Co., 50 Minn. 395, 52 N. W. 902; Thoresen v. La Crosse City R. Co., 87 Wis. 597, 58 N. W. 1051; Smith v. Citizens' Ry. Co., 52 Mo. App. 36; Piper v. Pueblo City R. Co., 4 Colo. App. 424, 36 Pac. 158. As to whether injury results from fright of horses or negligence of motorman, see Omaha St. Ry. Co. v. Duvall, 40 Neb. 29, 58 N. W. 531; Gibbons v. Wilkes-Barre & S. St. Ry. Co., 155 Pa. St. 279, 26 Atl. 417. It is not negligence in matter of law to drive between tracks of railroad. Reifsnyder v. Chicago, M. & St. P. Ry. Co. (Iowa) 57 N. W. 692. A collection of authorities on the liability of a street railway for injuries by collision with vehicles and horses. Hicks v. Citizens' Ry. Co. (Mo. Sup.) 25 Lawy. Rep. Ann. 508, 27 S. W. 542.

[223] As a dog, Meisch v. Rochester Electric Ry. Co., 72 Hun, 604, 25 N. Y. Supp. 244. And see Omaha St. Ry. Co. v. Duvall, 40 Neb. 29, 58 N. W. 531; Scott v. Yazoo & M. V. Ry. Co. (Miss.) 16 South. 205; Missouri, K. & T. Ry. Co. v. Palmer (Tex. Civ. App.) 27 S. W. 889; Harrison v. Chicago, M. & St. P. Ry. Co. (S. D.) 60 N. W. 405. As to liability of electric cars, see Watson v. Minneapolis St. R. Co., 53 Minn. 551, 55 N. W. 742; McKillop v. Duluth St. R. Co., 53 Minn. 532, 55 N. W. 739; Lincoln Rapid Transit Co. v. Nichols, 37 Neb. 332, 55 N. W. 872.

[224] Accidents at railroad crossings will be found discussed in 9 Law. Rep. Ann. 157, note, where the earlier cases are collected.

[225] Chicago, K. & W. R. Co. v. Fisher, 49 Kan. 460, 30 Pac. 462.

[226] Gilmore v. Federal St. & P. V. Pass. Ry. Co., 153 Pa. St. 31, 25 Atl. 651;

ring a bell when the engine is running in the dark,[227] may be sufficient to show negligence, and even willful and wanton negligence. The running of railroad trains over crossings in the open country at a high rate of speed is not, however, negligence per se,[228] and even in a city;[229] but it is a high degree of negligence for a railroad company to make a running or flying switch in the populous part of a city.[230] Prudent men are accustomed to observe a less degree of care to avoid teams on a city highway than they would, under the same circumstances, to avoid cars on a railroad highway.[231] What precautions are necessary to prevent running over or being run over is commonly a matter of fact, and not of law.[232] The danger of rapidly moving machinery calls for the exercise of care on the part of its owner to avoid damage to persons lawfully near it, and to youthful or inexperienced employés, as circumstances may determine. To the person injured, however, such machinery is suggestive of danger, and he must exercise care accordingly.[233] And disre-

Watson v. Minneapolis St. Ry. Co., 53 Minn. 551, 55 N. W. 742; Quincy Horse Ry. & C. Co. v. Gnuse, 38 Ill. App. 212 (reversed in another point, 137 Ill. 264, 27 N. E. 190).

[227] East St. Louis Connecting R. Co. v. O'Hara, 150 Ill. 580, 37 N. E. 917.

[228] Childs v. Pennsylvania R. Co., 150 Pa. St. 73, 24 Atl. 341. Compare Lapsley v. Union Pac. R. Co., 50 Fed. 172.

[229] The running of a passenger train on schedule time across a highway in a city of 17,000 inhabitants at a rate of 25 miles an hour is not, in the absence of an ordinance limiting the speed to a lower rate, negligence per se. Tobias v. Michigan Cent. R. Co. (Mich.) 61 N. W. 514. This ruling may be regarded as carrying to an extreme the submission of questions of fact to the jury. Ordinary cases of the kind should of course go to the jury. Lederman v. Pennsylvania R. Co., 165 Pa. St. 118, 30 Atl. 725; Link v. Philadelphia & R. R. Co., 165 Pa. St. 75, 30 Atl. 820.

[230] Kentucky Cent. R. Co. v. Smith, 93 Ky. 449, 20 S. W. 392. Et vide York v. Maine Cent. R. Co., 84 Me. 117, 24 Atl. 790; Ohio & M. R. Co. v. McDaneld, 5 Ind. App. 108, 31 N. E. 836; Ward v. Chicago, St. P., M. & O. Ry. Co., 85 Wis. 601, 55 N. W. 771.

[231] Post, p. 959, "Contributory Negligence"; Patterson v. Townsend (Iowa) 59 N. W. 205; Muncie St. Ry. Co. v. Maynard, 5 Ind. App. 372, 32 N. E. 343.

[232] Purtell v. Jordan, 156 Mass. 573, 31 N. E. 652; Norton v. Ittner, 56 Mo. 351; Sandifer v. Lynn, 52 Mo. App. 552; Central Ry. Co. v. Coleman (Md.) 30 Atl. 918; Thatcher v. Central Traction Co. (Pa. Sup.) 30 Atl. 1048; Iaquinta v. Citizens' Traction Co. (Pa. Sup.) 30 Atl. 1131.

[233] Post, p. 1065; Russell v. Tillotson, 140 Mass. 201, 4 N. E. 231; Cool-

gard of such danger, as to put one's hand in a revolving machine, is contributory negligence sufficient to bar recovery.[234]

Electricity.

In the employment of electricity, wrongs may be done by the machinery, poles, wires, and other appliances, without a special reference to the dangerous character of the electricity. Such wrongs may be regarded from the point of view of nuisance[235] or trespass[236] or negligence.[237] As to such appliances, a person who owns, uses, or controls, is held to a degree of care at least corresponding to similar agencies in other lines of business.[238]

Where the electrical current is involved, liability would seem to be determined by rules of negligence,—that is, by care proportionate to the danger,[239]—and not by the principles involved in the duty

broth v. Maine Cent. R. Co., 77 Me. 168; Prentiss v. Kent Furniture Manuf'g Co., 63 Mich. 478, 30 N. W. 109.

[234] Muldowney v. Illinois Cent. R. Co., 36 Iowa, 462; Money v. Lower View Coal Co., 55 Iowa, 671, 8 N. W. 652; Seefeld v. Chicago, M. & St. P. R. Co., 70 Wis. 217, 35 N. W. 278; Glascock v. Central Pac. R. Co., 73 Cal. 137, 14 Pac. 518.

[235] Telegraph pole. Reg. v. United Kingdom Electric Tel. Co., 31 Law J. Mag. Cas. 166, 10 Wkly. Rep. 538; 1 Dill. Mun. Corp. § 374; New York & N. J. Tel. Co. v. East Orange, 42 N. J. Eq. 490, 8 Atl. 289.

[236] Memphis Bell Tel. Co. v. Hunt, 16 Lea (Tenn.) 456, 1 S. W. 159; Tissot v. Telephone Co., 39 La. Ann. 996, 3 South. 261; Clay v. Postal Tel. Co., 70 Miss. 406, 11 South. 658.

[237] In order to sustain an action against a street-railway company for maintaining an electric pole in the street in a dangerous manner, it must be shown that it failed in the degree of care for the public safety which it should have had, and that plaintiff was without fault. Cleveland v. Bangor St. Ry., 86 Me. 232, 29 Atl. 1005.

[238] By improper location of poles. Sheffield v. Central Union Tel. Co., 36 Fed. 164; Wolfe v. Erie Telegraph & Telephone Co., 33 Fed. 320. Et vide ante, p. 145, "Damage Incident to Authorized Act," note 182.

[239] Thomp. Electr. 66, 67; Southwestern Telegraph & Telephone Co. v. Robinson, 1 C. C. A. 684, 50 Fed. 810; Ahern v. Oregon Telegraph & Telephone Co., 24 Or. 276, 33 Pac. 403, and 35 Pac. 549. Where, however, a city ordinance under which an electric lighting company is originated required it to have its splices on its wires perfectly insulated, the failure to do so is negligence. Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 South. 51. A telephone company has, however, been required to exercise such care as will guard the public against the injury of a live wire hanging down on a

to insure safety,[240] nor in nuisance.[241] A live wire, however, is exceedingly dangerous. So that proof of contact therewith and consequent damages makes out a complete case of prima facie negligence, and throws the burden on the defendant to show that such wire was in the streets without fault on his part.[242] Generally, companies using electricity on lines along a street are charged with the highest degree of care, having due reference to existing knowledge,[243] in the construction, inspection, and repair of their wires and poles, and in use of devices to guard against harm.[244] In the leading case of Cumberland Tel. & Tel. Co. v. United Electric Ry. Co.,[245] it was specifically held that, in the present state of elec-

sidewalk. As to absolute liability, Kankakee El. Ry. Co. v. Whittemore, 45 Ill. App. 484.

[240] The English courts would consistently class such cases with Rylands v. Fletcher, L. R. 3 H. L. 330. In that case Kekewich, J. (in National Tel. Co. v. Baker [1893] 2 Ch. 186), states the principle to be that "if the owner of land uses it for any purpose which, from its character, may be called 'nonnatural user,'—such as, for example, the introduction onto the land of something which in the natural condition of the land is not upon it,—he does so at his peril, and is liable if sensible damage results to his neighbor's land, or if the latter's legitimate enjoyment of his land is thereby materially curtailed."

[241] 3 Minn. Law J. 54, comparing Cumberland Tel. & Tel. Co. v. United El. Ry. Co., 42 Fed. 284, with Hudson River Tel. Co. v. Watervliet Turnpike & Ry. Co., 135 N. Y. 393–409, 32 N. E. 148.

[242] Uggla v. West End. St. Ry. Co., 160 Mass. 351, 35 N. E. 1126. Compare Hector v. Boston Electric Light Co., 161 Mass. 558, 37 N. E. 773; Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344.

[243] It is, therefore, a question of fact, for the jury, whether a company operating an electric railroad is negligent in not maintaining a guard wire over its trolley wire, so as to prevent a fallen telephone wire from resting on its trolley wire, and becoming charged with the trolley current, to the injury of one driving along the street. Block v. Milwaukee St. Ry. Co., 89 Wis. 371, 61 N. W. 1101.

[244] Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344; Arkansas Tel. Co. v. Ratteree, 57 Ark. 429, 21 S. W. 1059. Concurrent negligence of railway company and telegraph company: Electric Ry. Co. v. Shelton, 89 Tenn. 423, 14 S. W. 863; Dillingham v. Crank, 87 Tex. 104, 27 S. W. 93. A review of recent decisions caused by the great advances in the use of telegraph and telephone wires, and by the increase of litigation with reference to the rights and wrongs connected with such use, will be found in 58 J. P. 617.

[245] Cumberland Tel. & Tel. Co. v. United El. Ry. Co., 42 Fed. 273.

trical science, a telephone company cannot maintain a bill for an injunction against the operation of an electric railway to prevent damages incidentally sustained by escape of electricity from its rails. However, the supreme court of Tennessee [246] held that when a telephone company, already in operation, is injured by the effects of the more powerful electric current used by a trolley company operating on the street on which the wires of the telephone company are placed, by reason of the trolley current invading the telephone exchange and the houses of subscribers, the trolley company is liable for the damage done to the business of the telephone company; and none the less so because the latter did not obviate the effects of conduction by making the necessary changes in its plant. Being first on the ground, it was not bound to make such change.

Summary.

The common-law duty to exercise care to avoid doing harm to others may be derived from the ownership, custody, control, or use of instrumentalities which may of necessity, or in reasonable probability, inflict damage. In determining liability for injuries caused by such instrumentalities, the courts have not thoroughly distinguished whether such liability is to be referred to principles governing: (a) nuisance; (b) duty to insure safety; (c) negligence; or (d) malicious wrongs.[247] More specifically (and leaving malicious wrongs out of view) accumulations of water, things of weight, fire, explosives, poisons, wild or vicious animals, have been regarded from the point of view of nuisance, negligence, and absolute duty to keep safe; while things in motion and elec-

[246] Cumberland Tel. & Tel. Co. v. United El. Ry. Co. (Tenn.) 29 S. W. 104. "This commends itself to the justice, as well as the judgment, of mankind, far better than the contrary position taken by the Ohio courts in Cincinnati Inclined Plane Ry. Co. v. City & Suburban Telegraph Ass'n, 48 Ohio St. 390, 27 N. E. 890, or the refusal of the supreme court of New York to enjoin the erection of an electric road (Hudson River Tel. Co. v. Watervliet Turnpike & Ry. Co., 135 N. Y. 393, 32 N. E. 148), which was followed in National Tel. Co. v. Baker [1893] 2 Ch. 186." And see a short article on the liability for escape of electricity, with citations of the most recent cases, by E. W. Huffcut, in 1 N. Y. Law Rev. 56.

[247] Ante, c. 9.

tricity are generally regarded from the point of view of either negligence or nuisance.

The English rule is[248] essentially as follows: Irresponsible instruments may be such as are not dangerous apart from the conduct of the keeper or user of them, and such as are dangerous in themselves. Everything is deemed dangerous to rights which either causes actual damage thereto, or which does so in the absence of a degree of care and prudence the continual exercise of which cannot be expected. As to things not dangerous in themselves, the owner or keeper is not held responsible for harm caused thereby, provided he does not know of the mischief or danger, or only knows of it as existing in certain circumstances, and the harm that occurs does not arise from these circumstances, and he has taken the care which a prudent man would take in keeping or using such thing according to the nature and properties of things of its class. But as to irresponsible instrumentalities dangerous in themselves, and such instrumentalities which, though not necessarily or ordinarily in this class, are, and are known actually or by imputation of law to the owner or keeper to be, dangerous to rights, the duty imposed on the owner or keeper is not to harm; and harm done, however careful he may have been to avoid it, is still imputed to him as an effect arising from his having risked the chance of harm occurring from the instrumentality employed by him. This doctrine is largely modified, and is subject to, at least, the following exceptions: (a) The act of God or vis major; (b) the wrongful interference of third persons; (c) the plaintiff's own fault; (d) artificial work maintained for the common benefit of the plaintiff and the defendant (as in Carstairs v. Taylor); and

[248] The matter following is substantially in the language of Mr. Innes (Torts, pp. 73-92). In chapter 12, under title "Duties of Insuring Safety," Mr. Pollock discusses the subject with eminent clearness and ability. See, also, Clerk & L. Torts, 333, and Pig. Torts, 107, for further English cases on the subject. Jackson v. Smithson, 15 Mees. & W. 563, 15 Law J. Exch. 311; Card v. Case, 5 C. B. 622 (compare Popplewell v. Pierce, 10 Cush. 509); Farrant v. Barnes, 11 C. B. (N. S.) 553; Williams v. Clough, 3 Hurl. & N. 258; Assop v. Yates, 2 Hurl. & N. 768; Powell v. Fall, 5 Q. B. Div. 597. As to damage incident to authorized act, Madras Ry. v. Zemindar of Carvetinagarum, supra.

(e) where, by virtue of a custom, there is damnum absque injuria (as in the Zemindar Case).

The American courts have only partially, and by no means uniformly, accepted these views. They incline to test liability, under such circumstances, by principles of negligence; to hold the owner and keeper of such instrumentalities to the exercise of a proportionately high degree of care; and to recognize the production of damage by such instrumentalities as prima facie evidence of wrongdoing.

252. What is due care under the circumstances may have reference to a person's knowledge of the danger. Knowledge of danger may be either actual or presumed by law.

Knowledge.

The duty to take care "must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge and one state of circumstances would be gross negligence with different knowledge and in changed circumstances." [249] "Facts which were known to the defendant, or by use of proper diligence would have been known to a man in his place, come into account as part of the circumstances" [250] which determine due care. Knowledge of facts out of which a duty springs is especially an element to be considered in determining the care to be exercised in the use of some mechanical [251] or natural agency [252]

[249] Nitroglycerine Case, 15 Wall. 524.

[250] Pol. Torts, 356. That plaintiff had never ridden on electric car before may be proved, to show cause of failure to alight from car in safety. Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406. And, generally, see Griffin v. Auburn, 58 N. H. 121–124; Robinson v. Cone, 22 Vt. 213.

[251] As an elevator. Smith v. Whittier, 95 Cal. 279, 30 Pac. 529.

[252] A knowledge of the ground upon which a dam is constructed. Hoffman v. Tuolumne Water Co., 10 Cal. 413. It is on the same principle that scienter must be alleged and shown to attach liability to owner or keeper of domestic animals. As to this there is also a principle involved in the Dynamite Case, ante, p. 847, "Explosions."

whose superior force demands skill in its management to prevent its getting beyond ordinary control.

On the same principle, the owner of places likely to be dangerous to an innocent third party may be held liable for not keeping them safe, if he knew, or ought to have known, their dangerous condition. The possibility of harm puts on him the duty of keeping them in proper condition. His knowledge of the condition, therefore, may be actual or constructive. This is well illustrated in the liability of a municipal corporation for the defective and dangerous condition of its street. If it has not actual knowledge of such condition, notice may be imputed to it.[253] In the absence of actual notice, however, it is liable for only such defects in its sidewalks and streets as are apparent or are suggested by appearance, or are disclosed by a test in the nature of the ordinary use of such streets or walks.[254] Thus, the presence of a guide rope for two days and nights over a fashionable and crowded thoroughfare is sufficient to justify the inference of notice, by lapse of time, to the city authorities.[255] Even nine hours has been held sufficient time in which to discover and remedy

[253] Lindholm v. City of St. Paul, 19 Minn. 245 (Gil. 204); 2 Thomp. Neg. 762, note 5. And see City of Austin v. Colgate (Tex. Civ. App.) 27 S. W. 896; Loberg v. Town of Amherst, 87 Wis. 634, 58 N. W. 1048; Butler v. Town of Malvern (Iowa) 59 N. W. 50; Riddle v. Village of Westfield, 65 Hun, 432, 20 N. Y. Supp. 359. A petition to a village board for a new sidewalk seven feet wide in place of one four feet wide does not show knowledge by the board of defects existing in the old walk six months later. Barrett v. Village of Hammond, 87 Wis. 654, 58 N. W. 1053.

[254] Montgomery, J., dissenting. Hembling v. City of Grand Rapids, 99 Mich. 292, 58 N. W. 310; Moore v. City of Minneapolis, 19 Minn. 300 (Gil. 258). A petition that alleges that defendant city, at the date of the injury complained of, and for a long time prior thereto, negligently permitted a street railroad to be maintained on a street so as to dangerously obstruct travel, is sufficient, in the absence of a demurrer or motion, to charge defendant with notice. Union St. Ry. Co. v. Stone, 54 Kan. 83, 37 Pac. 1012. In an action for injuries caused by a defective sidewalk, evidence showing the condition of the walk in the vicinity is admissible to charge the city with notice of the defect. Edwards v. Common Council of Village of Three Rivers (Mich.) 60 N. W. 454; Lynch v. Hubbard, 101 Mich. 43, 59 N. W. 443; Smith v. City of Rochester (Sup.) 29 N. Y. Supp. 539.

[255] City of Chicago v. Fowler, 60 Ill. 322. Seven days is not sufficient. City of Chicago v. McCarthy, 75 Ill. 602.

a dangerous defect on a much-traveled highway.[256] What length of time is enough to impute notice where there is no actual notice is a question to be decided in view of all circumstances, ordinarily by the jury, but sometimes by the court.[257]

So the knowledge, actual or constructive, of a master as to appliances,[258] place,[259] or improper fellow servants,[260] may be material to his negligence.[261] So, one who, with knowledge, actual or constructive, of danger, goes into a dangerous place, assumes the

[256] Stellwagen v. City of Winona, 54 Minn. 460, 56 N. W. 51. A village which has granted the right to construct a street railroad is chargeable with knowledge of what is being done under the grant, and therefore is liable for injuries caused by an excavation left at night without signal lights or guards, though the excavation was made on the day of the injury. Hoyer v. Village of North Tonawanda (Sup.) 29 N. Y. Supp. 650.

[257] Kirk v. Village of Homer (Sup.) 28 N. Y. Supp. 1009; City of Chicago v. Fowler, and cases cited, supra; Loberg v. Town of Amherst, 87 Wis. 634, 58 N. W. 1048.

[258] Houston v. Brush, 66 Vt. 331, 29 Atl. 380. Cf. Union Pac. Ry. Co. v. James, 6 C. C. A. 217, 56 Fed. 1001; Columbus, H. V. & T. Ry. Co. v. Erick (Ohio Sup.) 37 N. E. 128 (under statute); Louisville & C. Ry. Co. v. Allen, 47 Ill. App. 465; Haskins v. New York Cent. & H. R. R. Co. (Sup.) 29 N. Y. Supp. 274 (blocking of frog).

[259] The petition in an action against a railroad company for injuries to an employé resulting from a defect in defendant's roadbed, alleged to have been either a defect in original construction, or caused by washing, was insufficient where it did not aver that defendant had notice of the defect, or facts showing that it had existed for such a time and under such circumstances that defendant could be charged with notice. Parrott v. New Orleans & N. E. R. Co., 62 F. 562. Kansas City, M. & B. R. Co. v. Burton, 97 Ala. 240, 12 South. 88; Louisville & N. R. Co. v. Earl's Adm'x, 94 Ky. 368, 22 S. W. 607; Murphey v. Wabash R. Co., 115 Mo. 111, 21 S. W. 862; O'Driscoll v. Faxon, 156 Mass. 527, 31 N. E. 685; Smith v. The Serapis, 8 U. S. App. 49, 2 C. C. A. 102, 51 Fed. 91. And see Wallace v. Central Vt. R. Co., 138 N. Y. 302, 33 N. E. 1069; Louisville, E. & St. L. C. R. Co. v. Utz, 133 Ind. 265, 32 N. E. 881.

[260] In an action by an engineer against a railroad company for personal injuries caused by the negligence of a brakeman, it is proper, after giving evidence that the brakeman had been drinking just before the accident, to show his reputation for intemperance, for the purpose of charging defendant with knowledge of his intemperate habits. Norfolk & W. R. Co. v. Hoover (Md.) 29 Atl. 994.

[261] The master is charged with knowledge which he actually has, and such knowledge as he ought to have in the exercise of reasonable care and dili-

apparent risk, and cannot complain of consequent injuries.[262] Indeed, failure to recognize obvious defects may be negligence.[263] No doubt, if a man voluntarily runs into a danger which he fully appreciates, in common cases he cannot recover for it; and it is rather a question of words than of substance whether he shall be called negligent or shall be said to have taken the risk.[264] Thus if a patient directs an operation to be performed, relying on his own judgment, a surgeon is not liable for the injuries resulting therefrom.[265] But a man does not take a risk of any danger which may arise from certain causes merely because, in a general way, he is aware of the existence of these causes.[266] Nor is previous knowledge of danger conclusive evidence of contributory negligence. For

gence on his part in the performance of his duty as a master. Noyes v. Smith, 28 Vt. 59; Gibson v. Pacific Ry. Co., 46 Mo. 163; Deering, Neg. § 200; 3 Wood. R. R. § 376.

[262] Gulf, C. & S. F. Ry. Co. v. Montgomery, 85 Tex. 64, 19 S. W. 1015; Platt v. Chicago, St. P., M. & O. Ry. Co., 84 Iowa, 694, 51 N. W. 254; Williams v. City, 19 Can. Sup. Ct. 159. But see Dollard v. Roberts, 130 N. Y. 269, 29 N. E. 104. And, further, see Wright v. City of St. Cloud, 54 Minn. 94, 55 N. W. 819; Walker v. Town of Reidsville, 96 N. C. 382, 2 S. E. 74; Miner v. Connecticut R. R. Co., 153 Mass. 398, 26 N. E. 994; Town of Gosport v. Evans, 112 Ind. 133, 13 N. E. 256; Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 South. 51; Louisville & N. R. Co. v. Schmetzer, 94 Ky. 424, 22 S. W. 603; Prewitt v. Eddy, 115 Mo. 283, 21 S. W. 742. Plaintiff's decedent, a railroad brakeman, was struck and killed by a skidway near the track, the existence of which he had knowledge of, while standing on the step of a passing car, leaning forward and looking backward and under the car. Held that, because of decedent's contributory negligence, plaintiff could not recover for his death from the owner of the skidway. Walker v. Redington Lumber Co., 86 Me. 191, 29 Atl. 979. In an action for injuries caused by a defective sidewalk, where plaintiff knew of the defect, and was watching for it when injured, but came to it sooner than she expected, and could not see it on account of the night being dark and stormy, she was not, as a matter of law, guilty of contributory negligence. Sias v. Village of Reed City (Mich.) 61 N. W. 502.

[263] Allis v. Columbian University, 19 D. C. 270; Boylan v. Brown, 63 Hun, 627, 17 N. Y. Supp. 648.

[264] Miner v. Connecticut R. R. Co., 153 Mass. 398, 26 N. E. 994.

[265] Gramm v. Boener, 56 Ind. 497; Hancke v. Hooper, 7 Car. & P. 81.

[266] Holmes, J., in Powers v. City of Boston, 154 Mass. 60–63, 27 N. E. 995, citing Thomas v. W. U. Tel. Co., 100 Mass. 156–158; Baston v. Springfield, 110 Mass. 131; Dewire v. Bailey, 131 Mass. 169; Lawless v. Connecticut River

example, it is not necessary that the thoughts of a traveler should at all times be fixed on a defect in a public thoroughfare of which he may have had notice.[267] It has been clearly recognized by the courts that knowledge of defect or danger is not necessarily appreciation of risk.[268] The application of these principles is very commonly made to cases of master and servant; but the principles are general. On similar principles, knowledge of danger, even to a trespasser or wrongdoer, creates a duty of avoiding injury.[269]

253. The common-law standard of diligence is absolute. It does not vary with the ability of the individual. The individual is held only to the exercise of such care as can be reasonably expected of persons of the recognized class to which he belongs. The law recognizes three classes of persons, as to capacity:

(1) Persons deprived of reason, as a child or lunatic.

(2) Persons of defective capacity or sense.

(3) Ordinary persons.

It is insisted that one of the essential elements of negligence—a fortiori, of contributory negligence—is that the person to whom it

R. Co., 136 Mass. 1–5; Ferren v. Old Colony R. Co., 143 Mass. 197, 9 N. E. 608; Kelly v. Blackstone, 147 Mass. 448–451, 18 N. E. 217. And see Texas & P. R. Co. v. Volk, 151 U. S. 73, 14 Sup. Ct. 239.

[267] City of Aurora v. Dale, 90 Ill. 46; Village of Clayton v. Brooks, 31 Ill. App. 62, affirmed 150 Ill. 97, 37 N. E. 574; Chilton v. City of Carbondale, 160 Pa. St. 463, 28 Atl. 833; Cumisky v. City of Kenosha, 87 Wis. 286, 58 N. W. 395.

[268] Fitzgerald v. Paper Co., 155 Mass. 155, 29 N. E. 464, and cases collected, page 161, 155 Mass., and page 464, 29 N. E. Post, p. 1021, "Master and Servant."

[269] Ante, c. 1: Plaintiff a wrongdoer. Et vide Louisville, N. O. & T. Ry. Co. v. Williams, 69 Miss. 631, 12 South. 957; Reardon v. Missouri Pac. Ry. Co., 114 Mo. 384, 21 S. W. 731; Goodwin v. Railroad Co., 96 Ala. 445, 11 South. 393; Wren's Adm'r v. Louisville, St. L. & T. Ry. Co. (Ky.) 20 S. W. 215; Union Pac. Ry. Co. v. Mertes, 35 Neb. 204, 52 N. W. 1099; Norwood v. Raleigh & G. R. Co., 111 N. C. 236, 16 S. E. 4, following Lay v. Richmond & D. R. Co., 106 N. C. 404, 11 S. E. 412. Guenther v. Railway Co., 108 Mo. 18, 18 S. W. 846; Strudley v. Railway Co., 48 Minn. 249, 51 N. W. 115; Georgia Railroad & Banking Co. v. Daniel, 89 Ga. 463, 15 S. E. 538.

is to be attributed should be legally responsible. This follows necessarily from the view that negligence means a state of the party's mind, or that responsibility for torts depends upon culpability. The courts, irrespective of theories, however, have clearly recognized the doctrine that responsibility is graduated according to capacity, and determined by recognized classes.

As will be seen, children non sui juris cannot have contributory negligence attributed to them.[270] So unconscious agents[271] and lunatics—persons entirely bereft of reason—cannot be held responsible for personal negligence, or have contributory negligence imputed to them.[272] With respect to children, however, there comes a period at which the child is responsible. This period is not definite, and the liability is graduated according to experience. "All the cases agree that the measure of a child's responsibility is his capacity to see and appreciate danger, and the rule is that, in the absence of clear evidence of the lack of it, he will be held to such measure of discretion as is usual in those of his age and experience."[273] The measure varies with the course of each additional year, but the increase of responsibility is graduated.[274] It has, however, been held to be within the limits of the discretion of a trial judge to admit testimony from the plaintiff's former school-

[270] Post, p. 987, "Infants," note 717. But see Mangan v. Atterton, L. R. 1 Exch. 239.

[271] Parrot v. Wells, 15 Wall. 524; Pierce v. Winsor, 2 Cliff. 18, Fed. Cas. No. 11,150; Hoffman v. Water Co., 10 Cal. 413; Todd v. Cochell, 17 Cal. 97.

[272] 16 Am. & Eng. Enc. Law, 406, subd. 6; Whart. Neg. § 88; Washington v. Baltimore & O. R. Co., 17 W. Va. 190, per Green, J.

[273] Huff v. Ames, 16 Neb. 139, 19 N. W. 623; Beach, Contrib. Neg. § 46; Shear. & R. Neg. § 73; Whit. Smith, Neg. p. 411; Railroad Co. v. Stout, 17 Wall. 657.

[274] Mitchell, J., in Kehler v. Schwenk, 144 Pa. St. 348, 22 Atl. 910; Greenway v. Conroy, 160 Pa. St. 185, 28 Atl. 692; Lay v. Midland Ry. Co., 34 Law T. (N. S.) 30; Elkins v. Railroad Co., 115 Mass. 190; Railroad Co. v. Gladmon, 15 Wall. 401; Lynch v. Smith, 104 Mass. 52; Union Pac. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619; Lynch v. Nurdin, 1 Q. B. 29, 35, 36; Reed v. City of Madison, 83 Wis. 171, 53 N. W. 547; Chicago, B. & Q. R. Co. v. Grablin, 38 Neb. 90, 56 N. W. 796, and 57 N. W. 522; Central Railroad & Banking Co. v. Phillips, 91 Ga. 526, 17 S. E. 952; Omaha & R. V. Ry. Co. v. Morgan, 40 Neb. 604, 59 N. W. 81; Powers v. Railway Co. (Minn.) 59 N. W. 307; Mitchell v. Tacoma Ry. & Motor Co., 9 Wash. 120, 37 Pac. 341.

teacher that she was an unusually dull girl, although at the time of trial she was 17 years old.[275]

The care which a person defective as to physical sense must exercise has reference to his capacity, to the actual or constructive knowledge thereof by the defendant, and his consequent exercise of care with reference thereto. A blind or deaf man has as much right to walk on the streets as any other man,[276] but he must exercise more care than a person physically sound. Thus, a deaf person must be more careful in keeping a lookout for passing vehicles than if his hearing was not defective.[277] However, a blind person, falling into a hole on the sidewalk carelessly left open, is entitled to recovery.[278] But one having notice of another's defective physical condition must exercise corresponding care to avoid injuring him.[279] No recovery can be had if intoxication was the cause of the accident. Indeed, drunkenness may tend to show contributory negligence.[280]

The standard of care adopted by the courts is that of the average prudent or reasonable man; that is, of a man of ordinary prudence in the nonexpert degree, or a good business or professional man in his specially expert degree.[281] It does not vary with the

[275] Connors v. Grilley, 155 Mass. 575, 30 N. E. 218. A master's duty to instruct a minor servant as to danger of employment in which he is to be engaged is to be measured by the circumstances of each particular case, and not by the knowledge and experience of ordinary youth of the same age. Keller v. Gaskill, 9 Ind. App. 679, 36 N. E. 303.

[276] Pol. Torts, 372, 373.

[277] Fenneman v. Holden, 75 Md. 1, 22 Atl. 1049

[278] City of Franklin v. Harter, 127 Ind. 446, 26 N. E. 882.

[279] As to giving special warning of blast to deaf plaintiff, see City of Champaign v. White, 38 Ill. App. 233.

[280] Bish. Noncont. Law, § 513; 1 Shear. & R. Neg. 93; Alger v. Lowell, 3 Allen (Mass.) 402; Beach, Contrib. Neg. 66; Illinois Cent. R. Co. v. Cragin, 71 Ill. 177; Fitzgerald v. Town of Weston, 52 Wis. 355, 9 N. W. 13; Welty v. Indianapolis & V. R. Co., 105 Ind. 55, 4 N. E. 410; Buddenberg v. Transportation Co., 108 Mo. 394, 18 S. W. 970; Hubbard v. Town of Mason City, 60 Iowa, 400, 14 N. W. 772; Bradwell v. Railway Co., 153 Pa. St. 105, 25 Atl. 623; Monk v. Town of New Utrecht, 104 N. Y. 552, 11 N. E. 268; East Tennessee & W. N. C. R. Co. v. Winters, 85 Tenn. 240, 1 S. W. 790; Fisher v. Railroad Co., 39 W. Va. 366, 19 S. E. 578.

[281] Whart. Neg. § 48.

judgment of an individual. That a man acts according to his best judgment is no defense. In Vaughan v. Menlove,[282] an action was held to lie against defendant for so negligently constructing a hayrick on his own land that, in consequence of its spontaneous ignition, his neighbor's house was burned. Tindall, C. J., said, as to the ruling, that the question ought to have been whether the defendant had acted honestly and bona fide, to the best of his own judgment. "That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various." Accordingly, neither sex [283] nor ignorance [284] nor personal ability nor skill[285] affect the standard of duty. On the one hand, mental absorption or reverie, induced by grief or business, will not excuse the omission to look and listen for an approaching train.[286] But, on the other hand, the fact that a man may be called upon to act without opportunity to deliberate is to be considered, in determining what is care under the circumstances.[287]

With respect to contributory negligence, however, the theory of the law is not consistent. Nor is the distinction between an error of judgment and negligence easily determined. It is certain that mere want of success, where there has been the exercise of one's best judgment, does not constitute negligence. "No one can be charged with carelessness when he does that which his judgment approves of, or where he omits that of which he has no time to judge. Such action or omission, if faulty, may be called a mistake, but not neg-

[282] 3 Bing. N. C. 468–474. And see Berg v. City of Milwaukee, 83 Wis. 599, 53 N. W. 890; Com. v. Pierce, 138 Mass. 165; Bailey, J., in Jones v. Bird, 5 Barn. & Ald. 837; Worthington v. Mencer, 96 Ala. 310, 11 South. 72.

[283] Simms v. South Carolina R. Co., 27 S. C. 268, 3 S. E. 301; Ridenhour v. Kansas City Cable Ry. Co., 102 Mo. 270, 13 S. W. 889, and 14 S. W. 760; Hassenyer v. Michigan Cent. R. Co., 48 Mich. 205, 12 N. W. 155.

[284] Jones v. Fay, 4 Fost. & F. 525.

[285] Post, p. 911 et seq., "Physician and Attorney."

[286] Havens v. Erie R. Co., 41 N. Y. 296; Mann v. Stock-Yard Co., 128 Ind. 138, 26 N. E. 819.

[287] Defendant gave warning of approaching car containing lumber by shouting "Boy." Plaintiff relied on this, was absorbed in his work, signal was not given, and injury occurred. Held not contributory negligence. Anderson v. Northern Mill Co., 52 Minn. 424, 44 N. W. 315.

ligence."[289] Accordingly, it has been held that where a the exercise of his best judgment and skill, piloted a vess destruction, he is not liable for her loss, although the resu.. shows that his best judgment was wrong.[290] And there is authority for the proposition that an attorney at law is not liable if he acts honestly, and to the best of his ability.

254. What is due care under the circumstances is determined by reference, among other things, to—

(a) Custom and usage affecting the plaintiff's conduct;

(b) License and invitation.

Among the circumstances to be considered in determining what is negligence, the law recognizes existing usage and custom. The usage and custom may amount to almost positive law (as the law of the road, in the absence of statute),[291] or, falling short of this, it may depend upon general business usage (as in the case of landing of steamboats),[292] or upon the general practice of the parties in the particular case at issue (as use of a path by licensee).[293] Care,

[289] Brown v. French, 104 Pa. St. 604; Williams v. Le Bar, 141 Pa. St. 149, 21 Atl. 525.

[290] Mason v. Ervine, 27 Fed. 459. Et vide The Tom Lysle, 48 Fed. 690.

[291] Post, p. 877, "Law of Road."

[292] Thus, plaintiff, an employé of a Mississippi steamer, must conform to a well-known custom of landing. He assumes the risk incident thereto, and, if thereby injured, he cannot recover. Red River Line v. Cheatham, 9 C. C. A. 124, 60 Fed. 517, overruling 56 Fed. 248. So as to a ship placed in peril by another's improper navigation, takes a wrong course, and is damaged. The Bywell Castle, 4 Prob. Div. 219. Care to be exercised with reference to a switch crossing the street has reference to its ordinary use. Quirk v. St. Louis United Elevator Co. (Mo. Sup.) 28 S. W. 1080. In view of a custom of placing unfinished cars on a side track to be completed, the presence of new cars on such track may be considered by a jury as sufficient notification to those in charge of a locomotive on the track that workmen were probably engaged on the cars during ordinary working hours. Cleveland, C., C. & St. L. Ry. Co. v. Zider. 10 C. C. A. 151, 61 Fed. 908.

[293] Generally, as to admission of evidence as to habits of plaintiff, defendant, and employés, see Chicago, St. P. & K. C. Ry. Co. v. Anderson, 47 Ill. App. 91; Connors v. Morton, 160 Mass. 333, 35 N. E. 860; Kennedy v. Spring, 160 Mass. 203, 35 N. E. 779; Toledo, St. L. & K. C. R. Co. v. Bailey, 145 Ill. 159, 33 N. E. 1089; Towle v. Pacific Imp. Co., 98 Cal. 342, 33 Pac. 207; Chi-

with reference to a usage or custom, is sometimes confused with customary or usual care, but the two things are entirely distinct. On the one hand, if a person exercises usual or customary care, it may be evidence, although not conclusive, of the exercise of diligence.[294] On the other hand, he must exercise care with reference to a usage or custom, known or which ought to be known, which custom or usage may affect the probability of harm ensuing from a given course of conduct.

The consideration of these cases is intimately connected and sometimes identified with care having reference to conditional permission, or what are sometimes called "non-contractual relations." Such consideration may depend upon whether the plaintiff is a licensee, an invited person, or a mere volunteer, or a trespasser. The determination of such cases does not rest merely upon any one view of the circumstances, but upon them all. It will be convenient to consider these cases as follows: First, the duty to persons in public places; and, second, the duty to persons on the defendant's premises. Duties peculiar to the relationship of master and servant, or of contractee and common carriers, will be subsequently considered, under "Contractual Duties." Injuries to persons in public places, where no questions as to exemptions of the state, or municipal or similar corporations, are involved, constantly arise (a) from the operation of engines, trains, electric cars, and the like over crossings and on streets; (b) from the ordinary use of highways by driving, riding, and the like; and (c) from some act of the defendant making a highway dangerous and unsafe.

cago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, and 34 N. E. 218; Jagger v. Bank, 53 Minn. 386, 55 N. W. 545.

[294] Day v. H. C. Akeley Lumber Co., 54 Minn. 522, 56 N. W. 243.

255. Due care requires that, as to public highways, owners, drivers, or keepers of vehicles or horses, and travelers regard—

(a) The custom or law of the road;[295]

(b) The danger likely to result from ordinary and extraordinary use.

The owner, driver, or rider[296] of horses being driven or ridden along a highway is bound to exercise that care which a reasonably prudent person uses in the management of the ordinary affairs of life. There can be no liability unless there is negligence or willful misconduct on the part of rider or driver.[297]

"Foot passengers have equal rights in the streets with those mounted on horseback, or driving in carriages. Neither can have a priority of right over the other. Both are bound to exercise reasonable care to avoid collision."[298] A bicyclist stands in the same position.[299] But a bicycle, ordinarily, may not lawfully be used on a sidewalk.[300] With respect to damages to pedestrians, or from collisions with other vehicles, the liability is governed by the ordinary considerations of fact, and by reference to the law of the road. The rights and obligations of pedestrians and driver are correlative, and

[295] A short article on the "Law of the Road," by Israel H. Peres, will be found in 4 Yale Law J. 137.

[296] The rule of the road applies as well to saddle horses as to vehicles. Turley v. Thomas, 8 Car. & P. 103.

[297] Silsby v. Michigan Car. Co., 95 Mich. 204, 54 N. W. 761. Compare Barnes v. Brown, 95 Mich. 576, 55 N. W. 439; Holmes v. Mather, L. R. 10 Exch. 261 (Bramwell, B.): "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this (and it is intelligible enough): If the act which does the injury is an act of direct force, vi et armis, trespass is the proper remedy (if there is any remedy), where the act is wrongful, either as being willful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable. That is the effect of the decisions." It would seem that this case overrules Michael v. Alestree, 2 Lev. 172.

[298] Stringer v. Frost, 116 Ind. 477, 19 N. E. 331; Belton v. Baxter, 54 N. Y. 245.

[299] Thompson v. Dodge (Minn.) 60 N. W. 545. And see 47 Alb. Law J. 404.

[300] Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132.

each owes the other a duty to avoid accidents.[301] Among considerations of fact there should be considered rate of speed at which the horse is going, the harness and other tackle with which it is provided, the attention of the driver, and similar matters.[302] The common American law of the road, requiring persons to turn to the right in traveling upon the highway or street,[303] and not on diagonal crossing,[304] applies only when there is a contingency. The traveler or driver is not obliged to turn to the right rather than to the left unless he is about to meet or pass another person or vehicle.[305] But then traveling on the wrong side of a road may be such con-

[301] Reens v. Mail & Express Pub. Co., 10 Misc. Rep. 122, 30 N. Y. Supp. 913; Eckensberger v. Amend, 10 Misc. Rep. 145, 30 N. Y. Supp. 915.

[302] "Evidence that the driver of an express wagon drove at a trot, looking at the stores along one side of the street for business, without observing or managing his team with reference to pedestrians using the crossing, shows negligence." Thompson v. National Exp. Co., 66 Vt. 358, 29 Atl. 311. Whether a driver of a wagon at a street crossing could resume his course, after checking his horse to allow a foot passenger to get out of the way, without negligence, is for the jury. Crowley v. Strouse (Cal.) 33 Pac. 456. Compare Menger v. Lauer, 55 N. J. Law, 205, 26 Atl. 180. Et vide Post v. United States Exp. Co., 76 Mich. 574, 43 N. W. 636; Cotton v. Wood, 8 C. B. (N. S.) 568; Orr v. Garabold, 85 Ga. 373, 11 S. E. 778; Perrins v. Devendorf, 22 Ill. App. 284; Landa v. McDermott (Tex. Sup.) 16 S. W. 802. Racing along a highway is not per se negligence. Potter v. Moran, 61 Mich. 60, 27 N. W. 854. Compare Middlestadt v. Morrison, 76 Wis. 265, 44 N. W. 1103. Improper speed is evidence of negligence. Schwartz v. Brahm, 130 Pa. St. 411, 18 Atl. 643. Compare Keck v. Sandford (City Ct. N. Y.) 22 N. Y. Sup. 78. The question of speed and caution is of special importance at crossings. Williams v. Richards, 3 Car. & K. 81. Pulling a wrong rein is evidence of negligence, Wakeman v. Robinson, 1 Bing. 213; or spurring a horse which is within kicking distance of plaintiff, North v. Smith, 10 C. B. (N. S.) 572. As to tackle, Welsh v. Lawrence, 2 Chit. 262. The Scottish law on this subject will be found discussed in 6 Sc. Law Rep. 121.

[303] Earing v. Lansingh, 7 Wend. 185.

[304] The law of the road does not regulate the manner in which persons shall drive when they meet at the junction of two streets. Norris v. Saxton, 158 Mass. 46, 32 N. E. 954. In England the law of the road is to turn to the left. 7 Green Bag, 96.

[305] Brember v. Jones (N. H.) 30 Atl. 411; Parker v. Adams, 12 Metc. (Mass.) 415–419; Brooks v. Hart, 14 N. H. 307; Johnson v. Small, 5 B. Mon. 25; Lovejoy v. Dolan, 10 Cush. 495; Damon v. Scituate, 119 Mass. 66–68.

tributory negligence as to bar recovery for damage done.[306] If, however, for courtesy or other reasons, a driver waives his right of way, and goes to the left side of the road, this does not exonerate a wrongdoer who caused a dangerous place to exist in the road.[307] It is not itself negligence to drive a wagon on the left of the traveled part of the road; but this is a circumstance to be considered, in connection with everything else, in determining whether the driver was reasonably careful.[308] Moreover, if a collision can be better avoided by going on the wrong side, it is not merely justifiable to do so, but obligatory.[309] The rule is the same where a light vehicle gives place to a heavier one,[310] or where the right side of the street is crowded or dangerous.[311]

And, on the other hand, merely because one may have the right of way, he is not authorized to run another down, even if the latter be in fault.[312]

Care of horses on public streets has due reference to the probability of harm ensuing to other users of the highway because of

[306] Damon v. Scituate, 119 Mass. 66; O'Malley v. Dorn, 7 Wis. 204; Norris v. Litchfield, 35 N. H. 271. A bicycle, Randolph v. O'Riordon, 155 Mass. 331, 29 N. E. 583. Et vide Schimpf v. Sliter, 64 Hun, 463, 19 N. Y. Supp. 644; O'Neil v. Town of East Windsor, 63 Conn. 150, 27 Atl. 237; Thoresen v. La Crosse City Ry. Co., 87 Wis. 597, 58 N. W. 1051.

[307] Atlanta St. Ry. Co. v. Walker, 93 Ga. 462, 21 S. E. 48.

[308] Meservey v. Lockett, 161 Mass. 332, 37 N. E. 310, citing, inter alia, Lloyd v. Ogleby, 5 C. B. (N. S.) 667; Cotterill v. Starkey, 8 Car. & P. 691. In driving from one side to the other of a street in which a railroad track is laid, it is not negligence as a matter of law to cross the track obliquely. Lynch v. Village of New Rochelle, 78 Hun, 207, 28 N. Y. Supp. 962. Peculiar care must be exercised by the person not driving on the regular side of the road. Pluckwell v. Wilson, 5 Car. & P. 375; Lack v. Seward, 4 Car. & P. 106. Generally, see Spurrier v. Front St. Cable Ry. Co., 3 Wash. St. 659, 29 Pac. 346; O'Neil v. Town of East Windsor, 63 Conn. 150, 27 Atl. 237; Riepe v. Elting (Iowa) 56 N. W. 285; Randolph v. O'Riordan, 155 Mass. 331, 29 N. E. 583.

[309] Clay v. Wood, 5 Esp. 44; Schimpf v. Sliter, 64 Hun, 463, 19 N. Y. Supp. 644.

[310] Grier v. Sampson, 27 Pa. St. 183.

[311] Mooney v. Trow Directory Printing & Bookbinding Co., 2 Misc. Rep. 238, 21 N. Y. Supp. 957.

[312] Ante, p. 195.

runaways.[313] Leaving a horse unattended is evidence of negligence, and may in itself support an inference of negligence.[314] Indeed, it is insisted that leaving a horse unhitched and unattended in a street is prima facie evidence of negligence, to be rebutted by showing there were circumstances of excuse or justification.[315] But the liability of the owner or keeper is determined by principles of negligence. There is no duty to insure safety. And a person is not liable for damage done by a runaway unless fault can be traced to him.[316] The care to be exercised to prevent it depends on the character of the horse, and of the surroundings, including the neighborhood, the atmosphere, and the like. On the same principle, ordinary care and watchfulness in crossing a street must be exercised. And, while not bound to use the regular crossings exclusively, one should exercise unusual caution if he crosses at an unusual place.[317]

[313] Phillips v. Dewald, 79 Ga. 732, 7 S. E. 151, and cases cited; McMahon v. Kelly (City Ct. Brook.) 9 N. Y. Supp. 544; Griffith v. Clift, 4 Utah, 462, 11 Pac. 609.

[314] Broult v. Hanson, 158 Mass. 17, 32 N. E. 900. It is negligence per se to leave a horse standing unfastened and unattended at a railroad station. Edwards v. Philadelphia & R. R. Co., 148 Pa. St. 531, 23 Atl. 894. Et vide Gilmore v. Federal St. & P. V. Pass. Ry., 153 Pa. St. 31, 25 Atl. 651. One who leaves unhitched and unattended, within 19 feet of a railroad track, a team of horses, young, high-lifed, and afraid of cars, is negligent as a matter of law. Olson v. Chicago, M. & St. P. Ry. Co., 81 Wis. 41, 50 N. W. 412, 1096. Compare Hill v. Scott, 38 Mo. App. 370; Hudson v. Houser, 123 Ind. 309, 24 N. E. 243.

[315] Henry v. Klopfer, 147 Pa. St. 178, 23 Atl. 337, 338. Compare Illidge v. Goodwin, 5 Car. & P. 190. Post, p. 951, discussion as to whether or not an act is ever negligent for the court, or whether it is evidence of negligence for the jury.

[316] Holmes v. Mather, L. R. 10 Exch. 261; Brown v. Collins, 53 N. H. 442; Sullivan v. Scripture, 3 Allen, 564; Lynch v. Brooklyn City R. Co., 52 Hun, 614, 5 N. Y. Supp. 311; O'Brien v. Miller, 60 Conn. 214, 22 Atl. 544; Thorp v. Minor, 109 N. C. 152, 13 S. E. 702; Hammack v. White, 11 C. B. (N. S.) 588; Manzoni v. Douglas, 6 Q. B. Div. 145; Riepe v. Elting (Iowa) 56 N. W. 285. Compare Luedtke v. Jeffery, 89 Wis. 136, 61 N. W. 292.

[317] Henry v. Grand Ave. R. Co., 113 Mo. 525, 21 S. W. 214.

256. Care to be exercised at level railroad crossings has reference—

(a) To the conduct on the part of railroad company justifying the assumption that the line is clear.

(b) To arrangements and surroundings affecting ability to ascertain whether the lines are clear.[319]

Conduct of Railroad Companies.

Thus, if a railroad company voluntarily establishes a gate at a highway crossing, there is an implied assurance that the tracks may be safely crossed if the gates are open. Accordingly, leaving them open when a train is approaching is evidence of negligence.[320] If a railway company has recognized and acquiesced in the use of a private crossing over its tracks, and adopted the usual signals therefor on the approach of its trains, it cannot lawfully discontinue the signals without notice;[321] and it is immaterial whether the requirement

[319] Pol. Torts, § 367.

[320] Wilson v. New York, N. H. & H. R. Co. (R. I.) 29 Atl. 258. A fortiori, where the gates were required by city ordinance. Missouri Pac. Ry. Co. v. Hackett, 54 Kan. 316, 38 Pac. 294; Evans v. Lake Shore & M. S. R. Co., 88 Mich. 442, 50 N. W. 386; Rhode v. Chicago & N. W. Ry. Co., 86 Wis. 309, 56 N. W. 872; Gurley v. Missouri Pac. Ry. Co., 122 Mo. 141, 26 S. W. 953 (opening between cars for passer-by). And see Metropolitan St. R. Co. v. Johnson, 91 Ga. 466, 18 S. E. 816; Chicago, M. & St. P. Ry. Co. v. Carpenter, 5 C. C. A. 551, 56 Fed. 451 (cattle men walking on top of cars); Colf v. Railway Co., 87 Wis. 273, 58 N. W. 408 (habit of employés to jump off moving cars is no excuse); Rumpel v. Railway Co. (Idaho) 35 Pac. 700 (nor is the habit of going under cars which block the street an excuse). However, it is not per se contributory negligence to stop a train in accordance with long mutual acquiescence at a track crossing, where a collision follows through failure of an approaching train to stop within 50 feet of the crossing (Act Ky. March 10, 1894), because of defective brakes. Louisville & N. R. Co. v. East Tennessee, V. & G. Ry. Co., 9 C. C. A. 314, 60 Fed. 993. Et vide Matthews v. Philadelphia & R. R. R., 161 Pa. St. 28, 28 Atl. 936. The question of implied invitation or license to the public to cross a railroad track where there is no highway is treated in a Massachusetts case (Chenery v. Fitchburg R. Co., 35 N. E. 554) with somewhat greater strictness than in other cases, holding that it can only arise from such appearances or circumstances as would lead ordinarily prudent and intelligent persons to understand that the crossing was public.

[321] Westaway v. Chicago, St. P., M. & O. Ry. Co., 56 Minn. 28, 57 N. W. 222; Hinkle v. Railroad Co., 109 N. C. 472, 13 S. E. 884, and cases cited, affirmed

of signals is statutory or merely customary.[322] And, when the trains are running at unusual times (as on Sunday), particular caution on approaching a crossing must be exercised by those in charge.[323] Moreover, circumstances making a crossing exceptionally dangerous, as where a much-used highway is shut off from the view of the track, may justify a finding by a jury that a company is negligent in not providing a gate and a flagman.[324] And while the duty in approaching a crossing with a train or engine is to exercise commensurate, and not the highest, care,[325] it is a breach of duty to back a train of flat cars over a crossing in the suburbs of a city on a dark night without having on it any brakeman, light, or other signal.[326]

Conduct of Travelers.

It is negligence per se on the part of a traveler to disregard the usual rate of speed and the times at which trains pass over a given crossing.[327] It is his clear duty, as he comes or goes upon a railroad crossing, to use every reasonable precaution to avoid injury. He

Ward v. Railroad Co., 113 N. C. 566, 18 S. E. 211; McGrath v. Railway Co., 63 N. Y. 522; Pittsburgh, C. & St. L. Ry. Co. v. Yundt, 78 Ind. 373; Casey v. New York Cent. & H. R. R. Co., 78 N. Y. 518. Customary speed, Shaber v. Railway Co., 28 Minn. 103, 9 N. W. 575. Custom at yard as to running in cars, Pennsylvania Co. v. Stoelke, 104 Ill. 201.

[322] Vandewater v. New York & N. E. R. Co., 74 Hun, 32, 26 N. Y. Supp. 397. Et vide Artz v. Railroad Co., 34 Iowa, 53. So as to a gate. Marfill v. South Wales Ry. Co., 8 C. B. (N. S.) 525. And generally see Delaware, L. & W. R. Co. v. Shelton, 55 N. J. Law, 342, 26 Atl. 937. Compare Vallance v. Boston & A. R. Co., 55 Fed. 364; Lahey v. Railroad Co., 2 Misc. Rep. 537, 22 N. Y. Supp. 380, distinguishing Schmidt v. Railway Co., 132 N. Y. 566, 30 N. E. 389. Owens v. People's Pass. Ry. Co., 155 Pa. St. 334, 26 Atl. 748.

[323] Hyde Park v. Gay, 120 Mass. 589. Compare Koehler v. Railway Co., 66 Hun, 566, 21 N. Y. Supp. 844. Running a train behind schedule time does not excuse plaintiff's failure to exercise ordinary care. Jenkins v. Railroad Co., 89 Ga. 756, 15 S. E. 655.

[324] Hubbard v. Boston & A. R. Co., 162 Mass. 132, 38 N. E. 366.

[325] Chicago, R. I. & P. Ry. Co. v. Caulfield, 11 C. C. A. 552, 63 Fed. 306.

[326] Chicago, R. I. & P. Ry. Co. v. Sharp, 11 C. C. A. 337, 63 Fed. 532.

[327] Alabama G. S. R. Co. v. Linn (Ala.) 15 South. 508; Gulf, C. & S. F. R. Co. v. Welch (Tex. Civ. App.) 27 S. W. 166; Elkins v. Boston & A. R. Co., 115 Mass. 190; Retan v. Railway Co., 94 Mich. 146, 53 N. W. 1094. A railroad employé is negligent in not keeping a lookout for customary shunting of cars. Schaible v. Railway Co., 97 Mich. 318, 56 N. W. 565.

should look both ways.[328] And failure or delay with respect to customary or statutory signals on the part of a railroad company does not exempt him from the performance of this duty if the surroundings are such as to admit of such a precaution.[329] Any one who voluntarily attempts to cross a track in front of a moving train approaching the crossing at no considerable distance, where there is nothing to obscure the vision, is guilty of contributory negligence,

[328] Gorton v. Erie Ry. Co., 45 N. Y. 66; International & G. N. R. Co. v. Neff, 87 Tex. 303, 28 S. W. 283. Compare Pittsburg, C., C. & St. L. Ry. Co. v. Burton (Ind. Sup.) 38 N. E. 594.

[329] Failure to ring bell or sound whistle does not exempt. Chicago, B. & Q. R. Co. v. Harwood, 80 Ill. 88; McGill v. Railway, 152 Pa. St. 331, 25 Atl. 540; Wesley v. Railway Co., 84 Iowa, 441, 51 N. W. 163; Jennings v. Railway Co., 112 Mo. 268, 20 S. W. 490; Cleveland, C. & C. R. Co. v. Crawford, 24 Ohio St. 631; Mann v. Stock-Yard Co., 128 Ind. 138, 26 N. E. 819; Stubley v. London & N. W. Ry. Co., L. R. 1 Exch. 13. Where it is a physical impossibility for plaintiff not to see defendant's train if she had looked, there can be no recovery. Campbell v. Union Ry. Co. of New York City (Com. Pl. N. Y.) 30 N. Y. Supp. 246; Groner v. Delaware, etc., Canal Co., 153 Pa. St. 390, 26 Atl. 7; Graf v. Railway Co., 94 Mich. 579, 54 N. W. 388. Compare Wright v. Railway Co., 94 Ky. 114, 21 S. W. 581. Et vide Hogan v. Tyler, 90 Va. 19, 17 S. E. 723, following Mark's Adm'r v. Railroad Co., 88 Va. 1, 13 S. E. 299; Magner v. Truesdale, 53 Minn. 436, 55 N. W. 607; Southeast & St. L. R. Co. v. Stotlar, 43 Ill. App. 94. But it is not negligence per se for a person intending to cross a street-railway track to fail to look in both directions. Shea v. St. Paul City Ry. Co., 50 Minn. 395, 52 N. W. 902. It is not negligence as a matter of law to cross a street without looking both ways for approaching vehicles. Reens v. Mail & Express Pub. Co. (Com. Pl. N. Y.) 30 N. Y. Supp. 913. And see Pyne v. Railroad Co. (Com. Pl. N. Y.) 19 N. Y. Supp. 217, following Moebus v. Herrmann, 108 N. Y. 349, 15 N. E. 415. But see contra, Ehrisman v. Railway Co., 150 Pa. St. 180, 24 Atl. 596; Wheelahan v. Traction Co., 150 Pa. St. 187, 24 Atl. 688; Ward v. Railway Co., 63 Hun, 624, 17 N. Y. Supp. 427. Where one is struck by a train at a railway crossing and killed, and there is no direct evidence to prove that he looked and listened, but there is some evidence that, if he had done so, he could not have seen the approaching train in time to avert a collision, the question of his contributory negligence is for the jury. Struck v. Chicago, M. & St. P. Ry. Co. (Minn.) 59 N. W. 1022. One who drives on a railroad track at a point where there is an unobstructed view of the track for 200 feet, and does not notice an approaching train, the usual warning and signals having been given, is guilty of contributory negligence. Shires v. Fonda, J. & G. R. Co., 80 Hun, 92, 30 N. Y. Supp. 175. Plaintiff's intestate was struck and killed

as a matter of law.[330] But, unless the evidence clearly shows that the accident was due to want of ordinary care on the part of the injured person, the tendency of modern authority is to leave the matter very much at large for the jury.[331] The same degree of care is not required on the part of one crossing the track where the train is irregular or on unusual time as if it were a regular train and on

by defendant's train while driving over its crossing. The train was a wild train, running 30 miles an hour, and passed the crossing at that time of the day when it was most used. Though the train was light, and though its speed might have been readily checked, it ran 600 feet beyond the crossing before it was stopped. Held that, though the whistle was blown when the train came within 1,300 feet of the crossing, and the bell was rung continuously till it was reached, defendant's negligence was a question for the jury. Struck v. Chicago, M. & St. P. Ry. Co. (Minn.) 59 N. W. 1022. While crossing a track at night, near defendant's station, plaintiff's decedent was killed by a car, running at the rate of five miles an hour, in charge of a switching crew. There was no light on the car, and, because of darkness, the switchman present could not see decedent in time to warn him of his peril, and decedent could not hear the approaching car because of noise by steam escaping from a passenger engine standing near. Held, that plaintiff could recover for decedent's death, though decedent may have been guilty of negligence contributing thereto. Texas & P. Ry. Co. v. Nolan, 11 C. C. A. 202, 62 Fed. 552; Shea v. Boston & M. R. Co., 154 Mass. 31, 27 N. E. 672, Kerkfetz v. Humphreys, 145 U. S. 418–421, 12 Sup. Ct. 835; Lynch v. Boston & A. R. Co., 159 Mass. 536, 34 N. E. 1072; Davis v. Railroad Co., 159 Mass. 532, 34 N. E. 1070, where the cases are reviewed by Holmes, J.

[330] Delaware, L. & W. R. Co. v. Hefferan (N. J. Err. & App.) 30 Atl. 578; Grostick v. Railroad Co. (Mich.) 51 N. W. 67 (and see able and exhaustive dissenting opinion of McGrath, J.); Magner v. Truesdale, 53 Minn. 426, 55 N. W. 607; Ohio & M. Ry. Co. v. Hill, 117 Ind. 56, 18 N. E. 461; Dawe v. Flint, etc., R. Co. (Mich.) 60 N. W. 838 (McGrath, C. J., dissenting); Heaney v. Long Island R. Co., 112 N. Y. 122, 19 N. E. 422; Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697; Hayden v. Missouri, K. & T. Ry. Co. (Mo. Sup.) 28 S. W. 74; Tulley v. Fitchburg R. Co., 134 Mass. 499; Nelson v. Duluth, S. S. & A. Ry. Co., 88 Wis. 392, 60 N. W. 703; Norwood v. Raleigh & G. R. Co., 111 N. C. 236, 16 S. E. 4; Miller v. New York Cent. & H. R. R. Co., 81 Hun, 152, 30 N. Y. Supp. 751; Rigg v. Boston, R. B. & L. R. Co., 158 Mass. 309, 33 N. E. 512.

[331] Pol. Torts, p. 367. Compare Dublin, W. & W. R. Co. v. Slattery, 3 App. Cas. 1155, with Ellis v. Great Western R. Co., L. R. 9 C. P. 551. And see Chicago, St. L. & P. R. Co. v. Butler, 10 Ind. App. 244, 38 N. E. 1, following Pittsburg, C., C. & St. L. Ry. Co. v. Burton (Ind. Sup.) 37 N. E. 150; Bradwell v. Pittsburgh & W. E. Pass. Ry. Co., 153 Pa. St. 105, 25 Atl. 623; Northern

usual time.[332] The rules with respect to street crossings as between persons using the highway and a street-railway company are essentially the same. "Each have the right to cross, and must cross. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other." [333]

257. The law recognizes the duty of avoiding interference with highways so as to make their customary use dangerous.

Liability for interference with the right of the public to enjoy a public highway with ease and security, even by the use of a man's own property, has been based on the theory of nuisance.[334] As to ponderous articles suspended over a street, owners have been held to the duty of insuring safety from the damage thereby.[335] But the ordinary basis for responsibility for damage to a traveler on a pub-

Pac. R. Co. v. Austin, 12 C. C. A. 97, 64 Fed. 211; Atchison, T. & S. F. R. Co. v. Hague, 54 Kan. 284, 38 Pac. 257; Illinois Cent. R. Co. v. Larson, 38 N. E. 784; Gilmore v. Cape Fear & Y. V. R. Co., 115 N. C. 657, 20 S. E. 371. Et vide dissenting opinions of Shepherd, C. J., and Burwell, J.

[332] Continental Imp. Co. v. Stead, 95 U. S. 161; Parsons v. New York Cent. & H. R. R. Co., 114 N. Y. 355, 21 N. E. 145.

[333] Omaha St. Ry. Co. v. Cameron, 43 Neb. 297, 61 N. W. 606; Rohe v. Third Ave. R. Co., 10 Misc. Rep. 740, 31 N. Y. Supp. 797; Jones v. Brooklyn Heights R. Co., 10 Misc. Rep. 543, 31 N. Y. Supp. 445; Citizens' St. R. Co. v. Lowe (Ind. App.) 39 N. E. 165; Young v. Atlantic Ave. Ry. Co., 10 Misc. Rep. 541, 31 N. Y. Supp. 441; Omaha St. Ry. Co. v. Duvall, 40 Neb. 29, 58 N. W. 531; North Baltimore Pass. Ry. Co. v. Arnreich (Md.) 28 Atl. 809; Czezewzka v. Benton-Bellefontaine Ry. Co., 121 Mo. 201, 25 S. W. 911. One who attempts to drive across a street-railroad track, which he was unable to see as he approached, owing to a covering on both sides of his wagon, is guilty of such negligence as will defeat recovery for injuries caused by a collision with a car. Boerth v. West Side R. Co., 87 Wis. 288, 58 N. W. 376.

[334] Barnes v. Ward, 9 C. B. 392. This subject is discussed at length in Wood, Nuis. c. 7; ante, p. 764, "Nuisance."

[335] Ante, p. 836, "Things of Weight."

lic [336] or customary [337] way is negligence [338] with respect to the duty to abstain from so dealing or interfering therewith as to make it dangerous for ordinary and proper use.[339] The duty extends to the exercise of care that nothing shall drop from above the surface. It does not, however, ordinarily apply beyond the limits of the highway, and attach liability for the proper use of the mere surface of the owner's own land.[340] A barbed-wire fence—"a string of suspended daggers"—on such land does not make its owner liable to one thrown on it by a fractious horse,[341] but it will be otherwise if it were negligently constructed, even on a man's own land,[342] or if the

[336] Clark v. Chambers, 3 Q. B. Div. 327, 4 L. J. 427, reviewing many cases; Graves v. Thomas, 95 Ind. 362; Beck v. Carter, 68 N. Y. 283; Young v. Harvey, 16 Ind. 314. Et vide Deane v. Clayton, 7 Taunt. 489; Hooker v. Miller, 37 Iowa, 613.

[337] Philips v. Library Co., 55 N. J. Law, 307, 27 Atl. 478; Johnson v. Lake Superior Terminal & Transfer Co., 86 Wis. 64, 56 N. W. 161; Texas & P. Ry. Co. v. Watkins (Tex. Civ. App.) 26 S. W. 760; Rascher v. East Detroit & G. P. Ry. Co., 90 Mich. 413, 51 N. W. 463; Holland v. Sparks, 92 Ga. 753, 18 S. E. 990; McKenna v. Missouri Pac. Ry. Co., 54 Mo. App. 161. But see Eggman v. St. Louis, A. & T. H. R. Co., 47 Ill. App. 507; Norwood v. Raleigh & G. R. Co., 111 N. C. 236, 16 S. E. 4; Louisville & N. R. Co. v. Schmetzer (Ky.) 22 S. W. 603; Burg v. Chicago, R. I. & P. Ry. Co. (Iowa) 57 N. W. 680; Adams v. New York, L. E. & W. R. Co., 66 Hun, 634, 21 N. Y. Supp. 681. Perhaps the true solution of cases of this kind is that the question of use is one of license, expressed or implied, to be determined by the jury. Chenery v. Railroad Co., 160 Mass. 211, 35 N. E. 554; Louisville, N. O. & T. Ry. Co. v. Hirsch, 69 Miss. 126, 13 South. 244.

[338] In Babbage v. Powers, 130 N. Y. 281, 29 N. E. 132, where a flagstone over a vault under the sidewalk broke, plaintiff could not recover for consequent injury, because no actual negligence on the part of the lot owner was shown.

[339] So an action will lie for leaving an unmarked obstruction in a river. Casement v. Brown, 148 U. S. 615, 13 Sup. Ct. 672; Jutte v. Keystone Bridge Co., 146 Pa. St. 400, 23 Atl. 235; Hill v. Winsor, 118 Mass. 251. Unguarded hole in ice near highway no liability, if runaway horse run into it, if its speed was so great that ordinarily proper guard would not have prevented the casualty. Sowles v. Moore, 65 Vt. 322, 26 Atl. 629.

[340] A collection of authorities as to the liability of abutting owners for the dangerous condition of private grounds beside a highway or frequented path. Lepnick v. Gaddis, 26 L. R. A. 686 (Miss.) 16 South. 213.

[341] Worthington v. Wade, 82 Tex. 26, 17 S. W. 520.

[342] Sisk v. Crump, 112 Ind. 504, 14 N. E. 381. Et vide Wabash, St. L. &

fence is without warning put across a way used by the public.[342] But, although the owners of land abutting the highway owe no duty to persons who deviate from the road and come on such property, the dangerous character of an excavation below the surface of such

P. Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391. Negligence; use and custom; barb-wire fences: Williams v. Midgett, 2 Tex. L. R. 338. Cf. Atlantic & W. P. R. Co. v. Hudson, 62 Ga. 679, where damages were recovered against a railroad company for negligently running an engine so as to drive frightened cattle into such a fence maintained by a railroad company. It would seem that such a fence is not per se a nuisance, but may become such if allowed to get out of repair so as to become essentially dangerous. Hillyard v. Grand Trunk R. Co., 8 Ont. 583; Lowe v. Guard (Ind. App.) 39 N. E. 428; Loveland v. Gardner, 79 Cal. 317, 21 Pac. 766; Sisk v. Crump, 112 Ind. 504, 14 N. E. 381; Carskaddon v. Mills, 5 Ind. App. 22, 31 N. E. 559. A complaint alleging that it was defendant's duty to construct and maintain part of a partition fence between his land and adjoining land in which plaintiff's horse was pastured; that this was done negligently, the posts being too far apart to support the wires, and the wires sagging in such a manner as to induce horses to attempt to cross the fence, and become entangled therein; and that plaintiff's horse became entangled in such wires, and was killed by wounds from the barbs thereon,—is sufficient on demurrer. McFarland v. Swihart (Ind. App.) 38 N. E. 483. Where defendant moved a barbed-wire fence across a path used by plaintiff's horses in going to water, whether plaintiff was guilty of contributory negligence in turning his horse into the pasture, when he knew the nature of the fence and its change of location, was a question for the jury. Boyd v. Burkett (Tex. Civ. App.) 27 S. W. 223.

[342] Carskaddon v. Mills, 5 Ind. App. 22, 31 N. E. 559. Cf. Clark v. Chamber, 3 Q. B. Div. 327, 47 Law J. Q. B. 427, 38 Law T. (N. S.) 454. Robertson v. Wooley, 5 Tex. Civ. App. 237, 23 S. W. 828. If the fence be unlawful, damage therefrom to plaintiff's horse may be recovered. Boyd v. Burkett (Tex. Civ. App.) 27 S. W. 223. A toboggan slide. Haden v. Clarke (Sup.) 10 N. Y. Supp. 291. In Hurst v. Taylor, 33 Wkly. Rep. 582, a lawful but dangerous diversion of an old footpath, without light or other precaution to indicate the change, whereby plaintiff, passing along in a dark night, suffered damage, was held actionable negligence. Circumstances, in the absence of statute regulating the giving of signals and the employment of flagmen, may make defendant liable for failure to give usual signals and station a flagman. Hermans v. New York Cent. & H. R. R. Co., 63 Hun, 625, 17 N. Y. Supp. 319; Hinkle v. Railroad Co., 109 N. C. 472, 13 S. E. 884; Tierney v. Chicago & N. W. R. Co., 84 Iowa, 641, 51 N. W. 175. Leaving an unguarded open ditch is actionable negligence. Pine Bluff Water & Light Co. v. Derreuisseaux, 56 Ark. 132, 19 S. W. 428. It is no defense to an action against the owner of abutting property for injury caused by his defective sidewalk to injured party. McDaneld v. Logi, 143 Ill. 487, 32 N. E. 423. But this would seem

land, rather than its distance from the street, would seem to be the true, but by no means certainly settled, criterion of liability.[344]

Customary Use.

Highways must be kept safe by the person on whom that duty falls; and interference therewith is actionable in so far as it affects the ordinary and customary use of such highway. Therefore, in an action against a town for injuries caused by the breaking of a bridge

to be largely a matter of statute. Sammins v. Wilhelm, 6 Ohio Cir. Ct. R. 565.

[344] City of Norwich v. Breed, 30 Conn. 535. Substantially adjoining: Burnes v. Ward, supra; Binks v. South Yorkshire R. Co., 3 Best & S. 244; Jones v. Nichols, 46 Ark. 207. Et vide cases collected at McIntire v. Roberts, 149 Mass. 452, 22 N. E. 13. A man is bound to use his own with due care to avoid injury to others, and having reference to the ordinary instincts of human nature. If the abutting owners were to quarry stone so as to place "a yawning precipice immediately next a sidewalk, and take no precaution to prevent travelers made dizzy falling into the excavation, it is hard to see why this would not be negligence." See Hounsell v. Smyth, 7 C. B. (N. S.) 731. See, however, Hardcastle v. South Yorkshire R. Co., 4 Hurl. & N. 67; Blyth v. Topham, Cro. Jac. 158; Howland v. Vincent, 10 Metc. (Mass.) 371; McIntire v. Roberts, 149 Mass. 450, 22 N. E. 13. In this case (where there was an unguarded elevator well near the street, into which a horse backed a wagon on the sidewalk, causing travelers to jostle and push plaintiff through the opening), Field, J., said (page 453, 149 Mass., and page 13, 22 N. E.): "In this commonwealth the obligation of a city or town to put up guards against pitfalls which are so near to a highway as to make it unsafe for travelers, is similar to the obligation which, it seems, is imposed upon abutters by the English law. We are not aware that it has ever been decided here that excavations made by the owner of land outside the limits of a highway, but so near to it as to make it unsafe for travelers, constitute a public nuisance, for creating or maintaining which the landowner may be punished, or that, in assessing damages for land taken for a highway, any allowance is made to the landowner for the loss of any right to use the land not taken, in the same manner as if a highway had not been laid out." While it is the duty of the supervisors to do what is practicable and reasonable, under all the circumstances, to make the public road safe, not only as against causes existing in the roadway itself, but also as to those in such close proximity as to render it natural and probable that injury to travelers will result if the cause is not removed, or proper safeguards be provided, yet, where no danger may be anticipated from a cause existing beyond the limits of the roadway, no duty in respect to such cause devolves upon the supervisors. Worrilow v. Upper Chichester Tp., 149 Pa. St. 40, 24 Atl. 85.

under the weight of a steam thresher, the defendant cannot complain of a charge that, if the bridge was properly constructed and maintained with reference to ordinary travel when it was reconstructed, the defendant would not be liable, though the moving of steam threshers had in the meantime become an ordinary use of the highway.[345] And a side of a street may be in such form, and so used, with the knowledge and acquiescence of the town, as to be a portion of the traveled part of the way, though no work has been done on it to fit it for the use of pedestrians.[346]

258. "The owner or occupier of real estate owes certain duties to those who come thereon, according to the cause of their entry, and the nature of the danger to which they are exposed.

(a) To trespassers it is only against active injury;

(b) To licensees it is to give notice of hidden dangers or traps;

(c) While to invited persons (as that term is understood by the law) the owner is bound to use reasonable care, having respect to the person and character of the business to be carried on, to save his guest from injury while upon the premises."[347]

[345] Coulter v. Pine Tp., 164 Pa. St. 543, 30 Atl. 490.

[346] Moran v. Inhabitants of Town of Palmer, 162 Mass. 196, 38 N. E. 442. But see King v. Thompson, 87 Pa. St. 365, distinguishing McNerney v. City of Reading, 150 Pa. St. 611, 25 Atl. 57.

[347] 34 Am. Law Reg. & Rev. 197. It is, however, said: "The authorities appear to have classified this subject under these heads, to wit: (1) Bare licensees, or volunteers; (2) those who are expressly invited or induced by the active conduct of the defendant to go upon the premises; (3) customers and others, who go there on business with the occupier. Each case must largely depend upon the circumstances attending the occurrence, and it is not infrequently found to be difficult to determine whether the injured party is a mere licensee, or whether he is on the premises by the implied invitation or enticement of the owner or occupier." Benson v. Baltimore Traction Co., 77 Md. 535, 26 Atl. 973.

Trespassers.

That the owner of premises owes no duty to a trespasser to keep the premises in a safe condition has already been considered.[348] Even in these cases, however, it would seem that the ordinary rule as to care under the circumstances will apply; but it must be carefully borne in mind, in consideration of the circumstances, that the trespasser is a wrongdoer.[349] There is a manifest tendency in the cases to recognize the duty of the owner of premises and instrumentalities to avoid doing harm to other persons even though they be wrongdoers.[350]

Volunteers and Licensees.

A mere volunteer or licensee, if he is on the premises by the owner's passive acquiescence, is entitled to the exercise of no duty on the part of the owner as to the safety of the premises. "A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owners or persons in possession to provide against danger of accident."[351] The licensee must take the permission with concommitant conditions, and, it may be, perils.[352] "Suppose the owner of land near the sea gives another leave to walk on the edge of the cliff, surely it would be absurd to contend that such permission cast upon the

[348] Ante, p. 196. A person who steals a ride on a train is not a passenger. Pennsylvania R. Co. v. Price, 96 Pa. St. 256; Mason v. Chicago, St. P., M. & O. Ry. Co., 89 Wis. 151, 61 N. W. 300; Barney v. Hannibal & St. J. R. Co. (Mo. Sup.) 28 S. W. 1069; Bricker v. Philadelphia & R. R. Co., 132 Pa. St. 4, 18 Atl. 983; Atlanta & C. Air-Line Ry. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550; Cleveland, C., C. & St. L. Ry. Co. v. Tartt, 12 C. C. A. 625, 64 Fed. 830; Illinois Cent. Ry. Co. v. Lee, 71 Miss. 895, 16 South. 349; International & G. N. R. Co. v. De Bajligethy (Tex. Civ. App.) 28 S. W. 829; McGuire v. Vicksburg, S. & P. R. Co., 46 La. Ann. 1543, 16 South. 457.

[349] Ante, c. 2, p. 189.

[350] Ante, p. 196. Emery v. Minneapolis Industrial Exposition, 56 Minn. 460, 57 N. W. 1132; Kansas City, Ft. S. & M. R. Co. v. Berry, 53 Kan. 112, 36 Pac. 53; Everett v. Oregon, S. L. & U. N. Ry. Co., 9 Utah, 340, 34 Pac. 289.

[351] Bigelow, C. J., in Sweeny v. Old Colony & N. R. Co., 10 Allen, 372.

[352] Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221; Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Byrne v. Railroad Co., 104 N. Y. 362, 10 N. E. 539.

former the burden of fencing." [353] And, if a landlord allows tenants to use the flat roof for drying clothes, he is not liable if one of them fall from the roof because of a defect in the iron rail around it.[354] It would seem to be a generally accepted doctrine that firemen and policemen are mere licensees, and that the owners of buildings are not liable to them when injured therein in the discharge of their duties.[355] The owner of premises may not, however, actively injure

[353] Tounsell v. Smythe, 7 C. B. (N. S.) 731; Barnes v. Ward, 9 C. B. 392; Hardcastle v. Railway Co., 4 Hurl. & N. 67; Bolch v. Smith, 7 Hurl. & N. 736; Scott v. London Docks Co., 11 Law T. (N. S.) 383; Hargreaves v. Deacon, 25 Mich. 1 (pitfalls in highways and private property); Maenner v. Carroll, 46 Md. 193.

[354] Ivay v. Hedges, 9 Q. B. Div. 80. Cf. Billows v. Moors, 162 Mass. 42, 37 N. E. 750. So, in a water-closet case, plaintiff, going to it in accordance with permission of owner of the soil, stumbled and caught his arm in moving machinery, and could not recover. Bolch v. Smith, 7 Hurl. & N. 736. Cf. Sweeny v. Barrett, 151 Pa. St. 600, 25 Atl. 148; post, note 362. Et vide Cornman v. Eastern Counties Ry. Co., 4 Hurl. & N. 781; Coupland v. Hardingham, 3 Camp. 398; Jarvis v. Dean, 3 Bing. 447; Jordin v. Crump, 8 Mees. & W. 782; Gautret v. Egerton, L. R. 2 C. P. 371; Burchell v. Hickisson, 50 Law J. Q. B. 101; Batchelor v. Fortescue, 11 Q. B. Div. 474. A bare licensee, according to the American cases, goes on another's land or property at his own risk, and must take the same as he finds it. Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Truax v. Chicago, St. P., M. & O. Ry. Co., 83 Wis. 547, 53 N. W. 842; Cahill v. Layton, 57 Wis. 600, 16 N. W. 1; Benson v. Baltimore Traction Co., 77 Md. 535, 26 Atl. 973; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182; Pelton v. Schmidt, 97 Mich. 231, 56 N. W. 689; Stevens v. Nichols, 155 Mass. 472, 29 N. E. 1150 (distinguishing Holmes v. Drew, 151 Mass. 578, 25 N. E. 22); Hector v. Boston Electric Light Co., 161 Mass. 558, 37 N. E. 773; De Gruy v. Aiken, 43 La. Ann. 798, 9 South. 747; Sterger v. Van Sicklen, 132 N. Y. 499, 30 N. E. 987 (following Larmore v. Crown Point Iron Co., 101 N. Y. 391, 4 N. E. 752); Plummer v. Dill, 156 Mass. 426, 31 N. E. 128; Walker v. Winstanley, 155 Mass. 301, 29 N. E. 518.

[355] Low v. Grand Trunk R. Co., 72 Me. 313; cases collected in 11 N. Y. Law J. 690; Learoyd v. Godfrey, 138 Mass. 315; Beehler v. Daniels (R. I.) 29 Atl. 6. Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182, affirming 37 Ill. App. 344; Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113. Where plaintiff runs across a lot to extinguish a fire, its owner owes him no duty to keep premises safe. He cannot recover if he fall into a hole. Kohn v. Lovett, 44 Ga. 251. No liability to a constable serving civil writ. Blatt v. McBarron, 161 Mass. 21, 36 N. E. 468; Plummer v. Dill, 156 Mass. 426, 31 N. E. 128, and cases cited. But as to a policeman lawfully entering a building it is otherwise (Parker v.

such a licensee;[356] and if the licensee comes upon the premises by virtue of express permission, even though it may not amount to an invitation, he is entitled to be warned of any hidden danger in the premises known to the owner or occupier.[357]

The doctrine of invitation, express or implied, applies, at least so far as active peril goes, to those cases where one by his conduct has induced the public to use a way in the belief that it is a street or public way, or where it has been recognized as a crossing.[358] In such cases all persons have a right to use it, and are entitled to the exercise of care.[359] Thus, if a railroad company knows of the dan-

Barnard, 135 Mass. 116); especially if at request of tenant to make a proper arrest (Learoyd v. Godfrey, 138 Mass. 315).

[356] Bird v. Holbrook, 4 Bing. 628. Cf. Sullivan v. Boston & A. R. Co., 156 Mass. 378, 31 N. E. 128.

[357] Bolch v. Smith, supra (per Channell and Wilde, BB.); Corby v. Hill, 4 C. B. (N. S.) 556 (per Willes, J.); Bramwell, B., in Southcote v. Stanley, 1 Hurl. & N. 247, 25 Law J. Exch. 339; Farrant v. Barnes, 11 C. B. (N. S.) 553, 31 Law J. C. P. 137. There is said to be a resemblance between this class of cases and those founded on the rule as to voluntary loans and gifts. There is no remedy against lender or giver for damages sustained from the loan or gift, except in the case of unusual danger known to and concealed by the lender or giver. Willes, J., in Indermaur v. Dames, L. R. 1 C. P. 274, citing Macarthy v. Younge, 6 Hurl. & N. 329, 30 Law J. Exch. 227. And see Gautret v. Egerton, 2 C. P. 371.

[358] Johnson v. Lake Superior Terminal & Transfer Co., 86 Wis. 64, 56 N. W. 161. (Vide cases collected on page 69, 86 Wis., and page 161, 56 N. W.) If a railroad company has knowingly acquiesced for a long time in the use of private crossing or other customary path on its right of way, without objection or attempt to prevent, it must exercise due care with reference to such usage. Clampit v. Chicago, St. P. & K. C. R. Co., 84 Iowa, 71–74, 50 N. W. 673 (collecting cases). Cf. Barber v. Richmond & D. R. Co., 34 S. C. 444, 13 S. E. 630, and Sanborn v. Detroit, B. C. & A. R. Co., 91 Mich. 538, 52 N. W. 153. Et vide Gurley v. Missouri Pac. Ry. Co., 122 Mo. 141, 26 S. W. 953; Cahill v. Cincinnati, N. O. & T. P. Ry. Co., 92 Ky. 345, 18 S. W. 2; Reifsnyder v. Chicago, M. & St. P. Ry. Co. (Iowa) 57 N. W. 692; Maxey v. Missouri Pac. Ry. Co., 113 Mo. 1, 20 S. W. 654. Cf. Alabama G. S. R. Co. v. Linn (Ala.) 15 South. 508; Illinois Cent. R. Co. v. Beard, 49 Ill. App. 232; O'Neil v. Duluth, S. S. & A. Ry. Co., 101 Mich. 437, 59 N. W. 836; Stewart v. Cincinnati, W. & M. R. Co., 89 Mich. 315, 50 N. W. 852; Lillstrom v. Northern Pac. R. Co., 53 Minn. 464, 55 N. W. 624 (following Kelly v. Southern Minnesota Ry. Co., 28 Minn. 98, 9 N. W. 588).

[359] Sweeny v. Old Colony & N. R. Co., 10 Allen, 368; Holmes v. Drew, 151

gerous practice of throwing mail bags from a moving car to the depot platform, it is liable to an ignorant licensee walking thereon.[360] But if a stranger to the company stands on its land to see a crane catch a mail pouch he is entitled to no duty as to keeping the crane in safe condition.[361] And, generally, premises used by many people must be kept safe with reference to such constant use. Such places are presumed to be safe.[362] While the line in the English cases as to mere licensees would seem to be quite clearly drawn, the line of distinction between these and subsequent classes of persons is by no means distinct, and the term "licensee" is often applied to persons of the following class:

Invited Persons.

The leading case as to the injury done to persons invited or specially induced by the conduct of the owner of the premises to go thereon is Indermaur v. Dames.[363] In this case the plaintiff went on the defendant's premises (a sugar refinery), in which he (or his employer) and the defendant both had an interest, and fell into a

Mass. 578, 25 N. E. 22. But cf. Hounsell v. Smith, 6 Jur. (N. S.) 897; Bradford v. Boston & M. R. Co., 160 Mass. 392, 35 N. E. 1131; Ohio & M. Ry. Co. v. Simms, 43 Ill. App. 260; Snow v. Fitchburg R. Co., 49 Am. Rep. 40.

[360] Galloway v. Chicago, M. & St. P. Ry. Co., 56 Minn. 346, 57 N. W. 1058.

[361] Poling v. Ohio River R. Co., 38 W. Va. 645, 18 S. E. 782.

[362] As to water closets, Toomey v. London, B. & S. C. Ry. Co., 3 C. B. (N. S.) 146. Cf. Bolch v. Smith, 7 Hurl. & N. 736; Sweeny v. Barrett (Pa Sup.) 25 Atl. 148; ante note 354. A platform around weighing scales, Cornman v. Eastern Counties Ry. Co., 4 Hurl. & N. 781. Platforms generally, Longmore v. Great Western Ry. Co., 19 C. B. (N. S.) 183; James v. Missouri Pac. Ry. Co., 107 Mo. 480, 18 S. W. 31; New York, C. & St. L. R. Co. v. Mushrush (Ind. App.) 37 N. E. 954; Texas & P. Ry. Co. v. Best, 66 Tex. 116, 18 S. W. 224; Dillingham v. Teeling (Tex. Civ. App.) 24 S. W. 1094; Redigan v. Boston & M. R. Co. (Mass.) 28 N. E. 1133. Steps in common use, Crafter v. Metropolitan Ry. Co., L. R. 1 C. P. 300; Bennett v. Railroad Co., 102 U. S. 577. And see McDonald v. Union Pac. Ry. Co., 42 Fed. 579; Id., 152 U. S. 262, 14 Sup. Ct. 619. The use for lowering baggage into a steamship of the same companion way used by passengers and their friends in passing up and down, where the ship has more than one that could be so used, is want of care for which the ship is liable to such a person injured by the fall of a trunk caused by its handle breaking while being so lowered. Unitus v. The Dresden, 62 Fed. 438. Unused way, damage to employé by engine in motion, no recovery, O'Donnell v. Duluth, S. S. & A. Ry. Co., 89 Mich. 174, 50 N. W. 801.

[363] Indermaur v. Dames, L. R. 1 C. P. 274–288, 2 C. P. 311.

dangerous hole or chute. It was held that an action lay on his part against the defendant for breach of duty towards him in suffering the hole to be unfenced. Willis, J., pointed out that the protection would extend to customers, and that "the class to which customers [364] belong includes persons who go, not as mere volunteers or licensees or guests [365] or servants or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied." [366] The owner of a building occupied by a tenant owes him and those employed by such tenant the duty not to expose them to a dangerous condition of the place which reasonable care on his part would have prevented.[367] It is not necessary, how-

[364] Brosnan v. Sweetser, 127 Ind. 1, 26 N. E. 555. Where plaintiff was in a store to make purchase, and was injured. Being a stranger in the store, "she had a right to rely upon the floor's being in good, safe condition. She was not called upon to anticipate danger, and to be looking and listening for dangerous signals, though it was her duty to make use of her faculties and guard against and avoid danger. The warning should be such as would under the circumstances be reasonably calculated to attract attention and warn of danger. When a person puts a dangerous pitfall at a place where he invites people to come, he is under stronger obligations to guard it, and more vigilance is required in the guarding of it, than if it was placed at some point where the public are not invited to come and are less liable to visit. Hendricken v. Meadows, 154 Mass. 599, 28 N. E. 1054; Clopp v. Mear, 134 Pa. St. 203, 19 Atl. 504; Gordon v. Cummings, 152 Mass. 513, 25 N. E. 978; Freed v. Cameron, 4 Rich. Law, 228; O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269 (excursion wharf); Campbell v. Portland Sugar Co., 62 Me. 552 (excursion wharf). If, however, plaintiff comes into defendant's store, without invitation, on his own business, and is injured by a fall into the elevator shaft in a part of the store unfrequented by visitors, he is a bare licensee. Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028.

[365] Southcote v. Stanley, 1 Hurl. & N. 247; Plummer v. Dill, 156 Mass. 426, 31 N. E. 128; Hart v. Cole, 156 Mass. 475, 31 N. E. 644 (see cases collected on page 479, 156 Mass., page 644, 31 N. E.); Woolwine's Adm'r v. Chesapeake & O. R. Co., 36 W. Va. 329, 15 S. E. 81; Webb, Pol. Torts, 641, 642.

[366] Evansville & T. H. R. Co. v. Griffin, 100 Ind. 221; Howe v. Ohmart, 7 Ind. App. 32, 33 N. E. 466.

[367] Holmes v. Drew, 151 Mass. 578, 25 N. E. 22; Leydecker v. Brintnall, 158 Mass. 292, 33 N. E. 399; Crane Elevator Co. v. Lippert, 11 C. C. A. 521, 63 Fed. 94. However, it was held, in an action against a landlord for injuries to a child by the breaking of a platform used for hanging out washing, where it appeared that the platform was in the same condition when the acci-

ever, that there should be privity of contract between the parties to the action. Thus, where a laborer was killed by falling from a defective staging which the defendant had contracted with his employer to furnish, recovery of statutory damages was allowed.[368] The class of invited licensees includes persons generally having a right to be on the premises where the injury is received, as where one was injured by placing materials on a private road which he was entitled to use.[369] A passenger wrongfully ejected from a

dent occurred as when plaintiff's father hired the house as it was, and that its defects could have been discovered by him by exercising reasonable care, plaintiff cannot recover. Moynihan v. Allyn, 162 Mass. 270, 38 N. E. 497.

[368] Bright v. Barnett & R. Co., 88 Wis. 299, 60 N. W. 418, citing, as to implied invitation, inter alia, Devlin v. Smith, 89 N. Y. 470; Gilbert v. Nagle, 118 Mass. 278; Elliott v. Pray, 10 Allen, 378; Pickard v. Smith, 10 C. B. (N. S.) 470; Holmes v. North Eastern R. Co., L. R. 4 Exch. 254; Coughtry v. Globe Woolen Co., 56 N. Y. 124; Mulchey v. Methodist Religious Soc., 125 Mass. 487. And as to the doctrine of Winterbottom v. Wright, 10 Mees. & W. 109, inter alia, Hayes v. Philadelphia & R. Coal & Iron Co., 150 Mass. 457, 23 N. E. 225; Elliott v. Hall, 15 Q. B. Div. 315; Bennett v. Railroad Co., 102 U. S. 577; New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649; Cooley, Torts, 604–607; Whart. Neg. §§ 349–352; Corby v. Hill, 4 C. B. (N. S.) 562; Powers v. Harlow, 53 Mich. 507, 19 N. W. 257; Campbell v. Portland Sugar Co., 62 Me. 552; Van Winkle v. Insurance Co. (N. J. Sup.) 19 Atl. 472; 16 Am. & Eng. Enc. Law, 413, 414; Heaven v. Pender, 11 Q. B. Div. 503; Francis v. Cockrell, L. R. 5 Q. B. 184–195.

[369] Corby v. Hill, 4 C. B. (N. S.) 556 (see Channell, B., in Bolch v. Smith, 7 Hurl. & N. 736); Krey v. Schlussner, 62 Hun, 620, 16 N. Y. Supp. 695. An employé of a railroad corporation who is engaged in delivering a car to another railroad corporation upon the latter's tracks, in the regular course of business between the two corporations, is not a mere licensee. Turner v. Boston & M. R. R., 158 Mass. 261, 33 N. E. 520. Cf. Montgomery's Ex'rs v. Alabama G. S. R. Co., 97 Ala. 305, 12 South. 170; Louisville & N. R. Co. v. Hairston, 97 Ala. 351, 12 South. 299. Child a licensee, see Mexican Nat. Ry. Co. v. Crum, 6 Tex. Civ. App. 702, 25 S. W. 1126. Employés of a railroad company have ordinarily no authority by invitation or employment or permission to make a stranger to the company a passenger or licensee to whom duty of care is due. Id.; Cooper v. Lake Erie & W. R. Co., 136 Ind. 366, 36 N. E. 272; Houston, C. A. & N. Ry. Co. v. Bolling, 59 Ark. 395, 27 S. W. 492. But see Buck v. Power Co., 108 Mo. 179, 18 S. W. 1090, affirmed 46 Mo. App. 555. Persons loading and unloading cars are entitled to exercise of care. Chadderdon v. Michigan Cent. R. Co., 100 Mich. 293, 58 N. W. 998; International & G. N. Ry. Co. v. Hall (Tex. Civ. App.) 25 S. W. 52; Toledo, St. L. & K. C. R. Co. v. Hauck, 8 Ind. App. 367, 35 N. E. 573; Conlan v. Railroad Co., 74

train is not guilty of contributory negligence unless he fails to get off the track at the earliest practicable opportunity that a reasonably prudent man would have discovered and seized.[370]

Test of Mutuality.

An invitation to go on the premises of another imposes a duty to prevent harm to a person accepting it. Such invitation may be express or implied, and depends upon mutuality of interest. Invitation, therefore, in the technical sense, differs from invitation in the ordinary sense, implying the relation of host and guest.[371] "It is well settled that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant."[372] For example, if a person called at the office of a manufacturer's establishment for, and is granted, permission to see an employé, and while searching for such employé is injured by the machinery, the peril of which was hidden, there can be no recovery. "To require the proprietor of a steamboat, factory, or a mill, conducted in the usual manner, whenever a man should ask permission to see an employé engaged in his duties, to anticipate that such person might become involved

Hun, 115, 26 N. Y. Supp. 659, distinguishing Nicholson v. Railroad Co., 41 N. Y. 525; De Bolt v. Railway Co., 123 Mo. 496, 27 S. W. 575 (where, however, plaintiff's own negligence was held to cause his death). But if, after the car has been loaded, plaintiff get onto the car to remove a chute, he is a mere licensee or trespasser, and defendant is not liable for an accident caused negligently but not willfully. Cleveland, C., C. & St. L. Ry. Co. v. Stephenson (Ind. Sup.) 37 N. E. 720.

[370] Ham v. Canal Co., 155 Pa. St. 548, 26 Atl. 757, explaining Id., 142 Pa. St. 617, 21 Atl. 1012. One who is wrongfully ejected from train has no right to travel on the railroad tracks, if there is any other safe and convenient route. Verner v. Alabama G. S. R. Co. (Ala.) 15 South. 872.

[371] Campb. Neg. § 44.

[372] Plummer v. Dill, 156 Mass. 426, 427, 31 N. E. 128. And see Pelton v. Schmidt (Mich.) 62 N. W. 552 (teamster delivering goods); Pol. Torts, p. 427; Whart. Neg. § 350; Southcote v. Stanley, 1 Hurl. & N. 247, criticised in Clerk & L. Torts, 59; Pol. Torts, p. 427.

in some dangerous machinery, hidden or open, would be to exact too high a degree of diligence; but the presumption should be indulged that the person making the inquiry is acquainted with the machinery, its construction and position, and needs no attendant, or otherwise he would have made a request to that effect." [373] It has, however, been held that where a former student of a school, in accordance with an invitation sent out with the approval of the college authorities, attended a meeting of a society of which he was a member, and, while leaving the room, fell into an opening in the floor of the hallway, only partially covered, he could recover for injury caused thereby.[374] The solution of the difficulty probably lies in the division of the subject into express and implied invitation, and in limiting the mutuality of the rule to the latter cases only.[375]

259. While normally a breach of a contract gives rise to a cause of action ex contractu, a contract may impose a duty on the part of the defendant, as party to it, for the violation of which the plaintiff may recover ex contractu or ex delicto, at his option. The common-law liability, however, within the limits allowed by law, is regulated by the terms

[373] Maltbie, J., in Galveston Oil Co. v. Morton, 70 Tex. 400, 405, 7 S. W. 756. And see Woolwine's Adm'r v. Chesapeake & O. Ry. Co., 36 W. Va. 329, 15 S. E. 81. So in Benson v. Baltimore Traction Co., 77 Md. 535, 26 Atl. 973, one of a class of boys viewing machinery by defendant's permission fell into an unfenced pit of hot water. Because of absence of mutuality of interest, the permission was held not to be an invitation, and recovery was denied. And see Lackat v. Lutz, 94 Ky. 287, 22 S. W. 218; Sterger v. Van Sicklen, 132 N. Y. 499, 30 N. E. 987; Larmore v. Crown Point Iron Co., 101 N. Y. 391, 4 N. E. 752; Walker v. Winstanley, 155 Mass. 301, 29 N. E. 518. See, also, Gillis v. Pennsylvania R. Co., 59 Pa. St. 129; Redigan v. Boston & M. R. Co., 155 Mass. 44, 28 N. E. 1133; Metcalfe v. Cunard S. S. Co., 147 Mass. 66, 16 N. E. 701; Parker v. Portland Pub. Co., 69 Me. 173; Sullivan v. Waters, 14 Ir. Com. Law. 460.

[374] Howe v. Ohmart, 7 Ind. App. 32, 33 N. E. 466. And see Davis v. Central Congregational Soc., 129 Mass. 367; Southcote v. Stanley, 1 Hurl. & N. 247; Plummer v. Dill, 156 Mass. 426, 31 N. E. 128; Pol. Torts, p. *427.

[375] 34 Am. Law Reg. 196, 202, citing Bigelow, Torts, 326; Cooley, Torts, 604-607; Plummer v. Dill, 156 Mass. 426, 31 N. E. 128.

of the contract, and a party to such contract, being a party plaintiff, is determined in his cause of action by the terms of that contract, so far as the law will sustain them.

While normally, as has been seen, a breach of contract gives rise to an action ex contractu, the common-law courts were liberal in allowing the use of an action ex delicto,[376] and especially where there was negligence in the performance of such contract.

All persons contracting to do certain things owe a duty not to injure the person or property of another while in the performance of the contract. That duty does not necessarily depend on, or grow out of, the contract. Thus, if one undertook the construction of a ditch so as to drain the water off another's land, but, instead, the ditch was constructed so as to gather surface water and empty it on his land, the latter may maintain an action of tort for the damage resulting from the negligence, and is not confined to an action for a breach of contract.[377] An action for damages, on a similar principle, may be maintained for failure to discharge duty imposed by contract,—to fence a railway track and to maintain guards and gates,—whereby an adjoining landowner's stock is killed.[378] The

[376] Ante, p. 25; Fromm v. Ide, 68 Hun, 310, 23 N. Y. Supp. 56.

[377] Stock v. City of Boston, 149 Mass. 410, 21 N. E. 871. Tort will lie for negligent construction or maintenance of a reservoir, though petition is the remedy given for injuries resulting from a proper exercise of the authority of the statute for its construction. Aldworth v. City of Lynn, 153 Mass. 53, 26 N. E. 229. As to recovery in the same proceeding of a cause of action sounding in tort and a cause of action in contract, because arising from the same transaction, see Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co., 63 Conn. 551, 29 Atl. 76; Central Vermont R. Co. v. Soper, 8 C. C. A. 341, 59 Fed. 879; Whitworth v. Darbishire, 5 Reports, 198. As to contract and fraud, see Steinam v. Bell, 7 Misc. Rep. 318, 27 N. Y. Supp. 905. Contract not fraud or conversion. Stafford v. Azbell, 6 Misc. Rep. 89, 26 N. Y. Supp. 41. The action against an abstractor is ex contractu. Wacek v. Frink, 51 Minn. 282, 53 N. W. 633. Generally, as to election to sue ex contractu or ex delicto, see City of Elgin v. Joslyn, 136 Ill. 525, 26 N. E. 1090; Aldine Manuf'g Co. v. Barnard, 84 Mich. 632, 48 N. W. 280; Parker v. Knox, 60 Hun, 550, 15 N. Y. Supp. 256; Barndt v. Frederick, 78 Wis. 1, 47 N. W. 6; People v. Wood, 121 N. Y. 522, 24 N. E. 952; Nysewander v. Lowman, 124 Ind. 584, 24 N. E. 355; Township of Buckeye v. Clark, 90 Mich. 432, 51 N. W. 528.

[378] Toledo, St. L. & K. C. R. Co. v. Burgan, 9 Ind. App. 604, 37 N. E. 31;

duty of a railroad company, under such a contract, is a continuing one, running with the land.[379]

Applied to Master and Servant.

The duty owed the servant, for example, in respect to the condition of premises and machinery, has been supposed to exist by virtue of contract.[380] But duty, if derived from contract at all, is only implied in it; and, if new terms are to be inserted into the agreement, every duty which the master owes might be treated as contractual, and thus the servant might sue the master in contract for assault and battery. The universal trend of authority on analogous cases is to regard such duty as not contractual, but as of the general law. It does not appear why the duty due from a carrier to a passenger should be under the general law, and that due a servant by the carrier should be contractual, where both the passenger and servant are injured by the same accident.[381]

Applied to Telegraph Companies.

A telegraph or telephone company, even if not held to the same duties, or to the performances of duties in the same manner, as a common carrier,[382] is engaged in a quasi public employment, and owes a recognized public duty.[383] Such a company is bound to exercise due diligence both to correctly[384] and promptly[385] transmit

Toledo, St. L. & K. C. R. Co. v. Fenstemaker, 3 Ind. App. 151, 29 N. E. 440; Toledo, St. L. & K. C. R. Co. v. Cosand, 6 Ind. App. 222, 33 N. E. 251.

[379] Midland R. Co. v. Fisher, 125 Ind. 19, 24 N. E. 756; Terre Haute & I. R. Co. v. Schaefer, 5 Ind. App. 86, 31 N. E. 557; Lake Erie & W. R. Co. v. Fishback, 5 Ind. App. 403, 32 N. E. 346; Bond v. Evansville & T. H. R. Co., 100 Ind. 301.

[380] Albro v. Jaquith, 4 Gray (Mass.) 99; Coombs v. New Bedford Cordage Co., 102 Mass. 572.

[381] Bigelow, Lead. Cas. 707; Jervis, C. J., in Marshall v. York, N. & B. Ry. Co., 11 C. B. 655. A plaintiff injured by the wrongful act of defendant in running trains faster than the ordinance allowed is determined as to his right by the ordinance, and not by the contract of employment. Bluedorn v. Missouri Pac. R. Co., 108 Mo. 439, 18 S. W. 1103.

[382] Ante, p. 298, "Discharge of Torts by Contract before a Wrong."

[383] Ayer v. W. U. Tel. Co., 79 Me. 493, 10 Atl. 495; Dorgan v. Telegraph Co., 1 Am. Law T. (N. S.) 406, per William, J.

[384] Cahn v. W. U. Tel. Co., 48 Fed. 810 (where there was no liability); White v. W. U. Tel. Co., 14 Fed. 710; Jones v. W. U. Tel. Co., 18 Fed. 817. And see post, p. 959, "Damages."

[385] Fleischner v. Pacific Postal Tel. Co., 55 Fed. 738.

the message and to deliver it to the person to whom it is sent.[386] But it owes no duty to a person not a party to the contract, when there is no information, direct or indirect, that the contract is for his benefit.[387] However, the measure of damages for breach of duty to the sender of a message is rather that of contract, not of torts.[388] Accordingly, the law of torts would seem to apply to the recipient of the message, who is a stranger to the contract, rather than to the sender, who is a party to it.[389]

Applied to Bailments.

An action in tort, for negligence, lies against a bailee for breach of recognized duty.[390]

The bailee is bound to take care of property intrusted to him. If, without negligence on his part of which the bailor can complain, and without abuse of the terms of this bailment, damage ensues, there can be no recovery. His liability continues only during the period[391] of the contract.[392]

[386] W. U. Tel. Co. v. Timmons, 93 Ga. 345, 20 S. E. 649; W. U. Tel. Co. v. Bates, 93 Ga. 352, 20 S. E. 639.

[387] W. U. Tel. Co. v. Wood, 6 C. C. A. 432, 57 Fed. 471. And see W. U. Tel. Co. v. Fore (Tex. Civ. App.) 26 S. W. 783.

[388] Garrett v. W. U. Tel. Co. (Iowa) 58 N. W. 1064; W. U. Tel. Co. v. Hall, 124 U. S. 444, 8 Sup. Ct. 577. Cf. Playford v. United Kingdom Electric Tel. Co., L. R. 4 Q. B. 706; Dickson v. Reuter's Tel. Co., 3 C. P. Div. 1. As to remoteness of damage, see Cahn v. W. U. Tel. Co., 46 Fed. 40; Id., 1 C. C. A. 107, 48 Fed. 810. Where plaintiff, through delay in receiving a telegram, made a journey which he would not have made until later if it had been received, he is entitled to recover only the increased expenses of the premature journey. W. U. Tel. Co. v. Bates, 93 Ga. 352, 20 S. E. 639; ante, c. 5, "Sentimental Damages."

[389] New York & W. P. Tel. Co. v. Dryburg, 35 Pa. St. 298. The sendee of a telegraphic message cannot maintain an action against a telegraph company for delay or nondelivery of a message, in the absence of a showing that it was sent by his agent or for his benefit, and that the company had notice that it was so sent. Butner v. W. U. Tel. Co. (Okl.) 37 Pac. 1087.

[390] As to burden of proof, see Wintringham v. Hayes, 144 N. Y. 1, 38 N. E. 999; Townsend v. Rich (Minn.) 60 N. W. 545. A mere depositary is answerable only for such gross negligence as is equal to fraud. Foster v. Bank, 17 Mass. 479; Sodowsky v. M'Faland, 3 Dana (Ky.) 204.

[391] Brown v. Hitchcock, 2 Williams (Vt.) 452.

[392] A bailee, after expiration of hiring, and pending return of property

While failure to return property involved in a bailment may give rise to an action in trover,[393] the loss of a hired chattel while in the possession of the hirer may be actionable as negligence.[394] But mere failure to return the property is not negligence, unless there be proof of carelessness on the part of the bailee. Thus, property may be stolen,[395] an animal may die, and no liability attach to the bailee. As has been shown, Coggs v. Bernard [397] established the law as to the degrees of care, respectively, required in various kinds of bailments. Accordingly, gross negligence may make liable gratuitous bailees of securities left as a special deposit, stolen by a cashier.[398] And, on the other hand, assumpsit may be maintained if the destruction of the property involved in the bailment was occasioned by actionable negligence.[399]

What the terms of a particular bailment may require is partially subject to control by the parties, but also, in large measure, to regulation by the state. It is not feasible in this book to undertake the discussion at length of the subjects of innkeepers, warehousemen, and the like.[400] The general principles involved, however, may be well illustrated in the case of common carriers.

would not seem to be liable for failure to insure. Young v. Leary, 135 N. Y. 569, 32 N. E. 607.

[393] American Preservers' Co. v. Drescher, 4 Misc. Rep. 482, 24 N. Y. Supp. 361. As to liability of a miller, see Wallace v. Canaday, 4 Sneed (Tenn.) 364. A warehouseman need not show the precise manner in which the loss occurred. Lichtenhein v. Boston & P. R. Co., 11 Cush. (Mass.) 70.

[394] U. S. v. Yukers, 9 C. C. A. 171, 60 Fed. 641.

[395] Cass v. Boston & L. R. Co., 14 Allen (Mass.) 448. Cf. Chenowith v. Dickinson, 8 B. Mon. (Ky.) 156.

[397] 2 Ld. Raym. 909.

[398] Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. 162; Gray v. Merriam, 148 Ill. 179, 35 N. E. 810. Cf. Hibernia Bldg. Ass'n v. McGrath, 154 Pa. St. 296, 26 Atl. 377. Where defendant borrowed coins from plaintiff for exhibition in its museum, it is liable for their loss by reason of its gross negligence, though it passed a resolution that it would not be responsible in any way, and so notified plaintiff. Smith v. Library Board of City of Minneapolis (Minn.) 59 N. W. 979.

[399] Zell v. Dunkle, 156 Pa. St. 353, 27 Atl. 38. And see Ballou v. Earle, 17 R. I. 441, 22 Atl. 1113.

[400] The law of innkeepers is a branch of the law bailments. An inn is "a house where a traveler is furnished with everything he has occasion for while on his way." Thompson v. Lacy, 3 Barn & Ald. 283. A boarding

Applied to Carriers.

There can be no question as to the right of one injured in person or property by a common carrier to sue ex delicto or ex contractu; that is, to sue on the common-law duty arising from the relationship, or on the contract entered into.[401] And, when he sues ex delicto, he does not sue on the agreement, but on the common-law duty

house is not an inn. Dansey v. Richardson, 3 El. & Bl. 144. But a restaurant keeper is liable, in the absence of due care, for the loss of a customer's wraps left in his charge. Bunnell v. Stern, 25 N. E. 910, 122 N. Y. 539, and Bird v. Everard (Com. Pl. N. Y.) 23 N. Y. Supp. 1008, followed. Buttman v. Dennett (Com. Pl. N. Y.) 30 N. Y. Supp. 247. An innkeeper is by common law responsible for the loss in his inn (infra hospitium) of the goods of a traveler who is his guest, except when the loss arises from the wrong of the guest, the act of God, or of the public enemy. Berry, J., in Lusk v. Belote, 22 Minn. 468; 2 Kent, Comm. 592–597; Shaw v. Berry, 31 Me. 478; Sibley v. Aldrich, 33 N. H. 553; Hulett v. Swift, 33 N. Y. 571; Wilkins v. Earle, 44 N. Y. 172; 1 Chit. Cont. (11th Am. Ed.) 674–677, and notes. For the innkeeper is bound in law to keep his guest's goods and chattels within his inn without any stealing or purloining; and it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he is lodged, and that he left the chamber unlocked. But the innkeeper is not liable if his guest's horse has been put in pasture by his owner's request, and is stolen; for this is not infra hospitium. Calye's Case, 8 Coke, 32; Smith, Lead. Cas. (H. &. W.'s Ed.) *194, and notes. Commonly, modern statutes provide for modification of the liability, and for the discharge of liability on the part of the landlord, on compliance with statutory requirements of posting notice that all valuables must be left in the safe of the office of the inn. Under such a statute a guest at a public inn may retain personal custody of necessary wearing apparel; and jewelry worn daily by her need not be deposited with the innkeeper, when not in use, to make him liable for its loss by fire. (26 Pac. 1099, affirmed) Fay v. Pacific Imp. Co., 93 Cal. 253, 28 Pac. 943. An interesting article on the liability of innkeepers for the commission of illegal acts on their premises, with numerous English authorities. J. P., reprinted in 23 Ir. Law T. 382. The Pullman Palace-Car Co. has been held to the same liability as an innkeeper. Pullman Palace-Car Co. v. Lowe, 28 Neb. 239, 44 N. W. 226. As to liabilities of owners and operators of elevators, see Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873: Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266. And see authorities collected in Mitchell v. Marker, 25 Lawy. Rep. Ann. 33, 62 Fed. 139.

[401] Common carriers may be sued either in case on the custom or in assumpsit on their contract. Orange v. Brown, 9 Wend. 85. And see McCall v. Forsyth, 4 Watts & S. (Pa.) 179; Porter v. Hildebrand, 14 Pa. St. 129–132; Mershon v. Hobensack, 22 N. J. Law, 373; Atchison, T. & S. F. R.

to carry safely.[402] Indeed, the original liability of a common carrier was exclusively ex delicto.[403] The first innovation, the result of which was to allow assumpsit to be brought, is said to have been made in 1750 in Dale v. Hall.[404] The obligations and liability of a railroad company are of a general and public character, and do not depend primarily upon the contract between the parties.[405] Therefore, recovery may be had against a railroad company for its failure to care properly for the safety and security of the public, where it would not lie on the contract.[406]

Under the code pleading, formal distinctions between actions are

Co. v. Dill, 48 Kan. 210, 29 Pac. 148; Baltimore City R. Co. v. Kemp, 61 Md. 619; Nevin v. Pullman, etc., Co., 106 Ill. 222; Central Railroad & Banking Co. v. Pickett, 87 Ga. 734, 13 S. E. 750. Cf. Chattanooga, R. & C. R. Co. v. Palmer, 89 Ga. 161, 15 S. E. 34. The court determines whether the contract of the carrier is on the custom or is a special contract. Kimball v. Rutland & B. R. Co., 26 Vt. 247. And see as to effect of deviation from prescribed mode of shipment, Pavitt v. Lehigh Val. R. R., 153 Pa. St. 302, 25 Atl. 1107. The Queen of Pacific, 61 Fed. 213; Bancroft-Whitney Co. v. Pacific Coast Steamship Co., Id.

[402] Bretherton v. Wood, 3 Brod. & B. 54; Baltimore City R. Co. v. Kemp. 61 Md. 619; Wheeler v. Oceanic Steam Nav. Co., 125 N. Y. 155–162, 26 N. E. 248; Citizens' St. R. Co. of Indianapolis v. Willoeby, 134 Ind. 563, 33 N. E. 627; Central Railroad & Banking Co. v. Pickett, 87 Ga. 734, 13 S. E. 750.

[403] Merritt v. Earle, 31 Barb. 38; People v. Willett, 26 Barb. 79; Heirn v. McCaughan, 32 Miss. 17; Johnson v. Richardson, 17 Ill. 303; Bretherton v. Wood, 3 Brod. & B. 54;

[404] 1 Wils. 281.

[405] But the ordinary action for damages by a passenger is ex delicto, not ex contractu. Therefore, if plaintiff sues one of two railroad companies for injuries caused by derailment, and is defeated, this is no bar to a suit against the other, Atlantic & P. R. Co. v. Laird, 7 C. C. A. 489, 58 Fed. 760. And see Hannibal R. Co. v. Swift, 12 Wall. 262; Philadelphia & R. R. Co. v. Derby, 14 How. 468. So action for refusal to stop at destination is usually ex delicto, not ex contractu. Fordyce v. Nix, 58 Ark. 136, 23 S. W. 967. Thus putting a passenger off at a point not destination gives a cause of action ex delicto, not ex contractu. New Orleans, J. & G. N. R. Co. v. Hurst. 36 Miss. 660. An action against a railway company for refusing to deliver goods to an unpai vendor, who has stopped them in transit, is an action ex delicto. Pontifex v. Midland R. Co., 3 Q. B. Div. 23, 47 Law J. Q. B. 28.

[406] Sawyer v. Rutland & B. R. Co., 27 Vt. 370.

abolished. Regard is had to the facts constituting the cause of complaint, and the plaintiff is entitled to the most ample redress and relief which the facts will justify; and, unless a special contract very clearly appears to be made the gravamen, an objection to the complaint in an action against a common carrier, as for example in carrying a passenger beyond his destination, is founded in tort.[407] Where there is a special contract, varying the liability of the carrier within limits allowed by law, the action is properly brought on the special contract, but not counting in tort upon the public duty of the carrier.[408] Where a common carrier limits his liability, not caused by negligence, through a contract stipulation, the owner of goods destroyed by fire must sue in contract, and not on the common-law liability, ex delicto.[409]

260. A contract ordinarily creates no duty, except to parties and privies. Therefore, the normal rule is that no action ex delicto may be maintained by strangers to it for its negligent breach.

Thus, in actions against members of the bar for negligence, it is well settled that only the person with whom the attorney contracts can maintain the action, for it is to him alone that the at-

[407] Heirn v. McCaughan, 32 Miss. 17; New Orleans, J. & G. N. R. v. Hurst, 36 Miss. 660.

[408] 2 Am. & Eng. Enc. Law, 903; Bliss, Code Pl. § 14; 1 Bate, Pl. 372; Oxley v. Railway Co., 65 Mo. 629; Boaz v. Central R. Co., 87 Ga. 463, 13 S. E. 711; Indianapolis, D. & W. Ry. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138; Louisville & N. R. Co. v. Touart, 97 Ala. 514, 11 South. 756; Johnstone v. Richmond & D. R. Co., 39 S. C. 55, 17 S. E. 512.

[409] Indianapolis & D. W. Ry. Co. v. Forsythe, 4 Ind. App. 326, 29 N. E. 1138. But where the carrier does not stipulate in a special contract against liability for his own negligence (even if it could do so effectively), the existence of such special contract for the shipment of live stock, with certain stipulations therein exempting the carrier from liability, is no obstacle to the maintenance of an action of tort based on its legal duty, and a breach thereof by negligence. The special contract will be a defense only in connection with evidence showing that the loss or injury complained of was not caused by the negligence alleged. Nicoll v. East Tennessee, V. & G. R. Co., 89 Ga. 260, 15 S. E. 309. And see White v. Great Western R. Co., 2 C. B. (N. S.) 7.

torney owes a particular duty.[410] On the same principle, it has been held that, where a servant, having a ticket, is injured while riding on a railway train, he can sue in contract or tort, but the master cannot maintain his action against the company for the loss of the service of his servant, because it was caused by a breach of contract to which he was not a party.[411] So, in Winterbottom v. Wright,[412] the defendant hired a mail coach from the postmaster general, and contracted to keep it in repair. A third person also contracted to furnish horses for the coach, and the plaintiff hired to drive it for such third person. The coach broke down, and the plaintiff was injured; and he was not allowed to recover, because, "if we were to hold that the plaintiff could sue in such a case, there is no point at which such action would stop. The only safe rule is to confine the right to recover to those who enter into the contract. If we go one step beyond that, there is no reason why we should not go fifty." A further reason assigned is that "the object of the parties in inserting in their contract specific undertakings with respect to the work to be done is to create obligations and duties inter sese. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in the contract, in the nature of a duty to have it performed as contracted

[410] Dundee Mortgage & Trust Inv. Co. v. Hughes, 20 Fed. 39; Savings Bank v. Ward, 100 U. S. 195; Fish v. Kelly, 17 C. B. (N. S.) 194. So a notary is liable only to party to original deed as to whom he had made a false certificate. Ware v. Brown, 2 Bond, 267, Fed. Cas. No. 17,170. A register of deeds is liable in damages for a false certificate of title only to the party employing him to make a search, and not to his assignee or alienee. Houseman v. Girard Mut. Bldg. & Loan Ass'n, 81 Pa. St. 256. Where, under coverture, the wife could not contract, and her alleged servant was guilty of negligence, the action is against the husband, and not against the wife. Ferguson v. Neilson, 17 R. I. 81, 20 Atl. 229.

[411] Alton v. Midland R. Co., 19 C. B. (N. S.) 23. Et vide Berringer v. Great Eastern R. Co., 4 C. P. Div. 163. Cf. Gladwell v. Steggall, 5 Bing. N. C. 733; Clerk & L. Torts, 158.

[412] 10 Mees. & W. 109. Et vide Parry v. Smith, 4 C. P. Div. 325, 48 Law J. C. P. 731, 41 Law T. (N. S.) 93; Heaven v. Pender, 9 Q. B. Div. 302; George v. Skivington, L. R. 5 Exch. 1; Collett v. London & N. R. Co., 16 Q. B. 984. These and other English cases will be found discussed in Ball, Lead. Cas. Torts, tit. "Negligence."

for, the parties will be deprived of control over their own contract." [413]

261. Neither the contract itself nor its limitations exclude liability to third persons for negligence where it would attach under the logical application of the normal principles of negligence. Actions for damages may be maintained by persons who are neither parties nor privies to a contract, when the injury complained of arises from want of care—

(a) With respect to a dangerous thing sold;

(b) Occurring in the performance of a contract resulting in direct and immediate damage to one's person or property.

Damage Caused by Dangerous Things.

If a common-law duty results from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract.[414] This applies to articles which are imminently dangerous.[415] Thus, in the celebrated case of Thomas v. Winchester,[416] a manufacturer of and dealer in vegetable extracts for medical purposes was sued by a stranger for damages suffered by him because of the use of one of such preparations, labeled as extract of dandelion, a harmless medicine, but which was, in fact, the extract of belladonna, a poison. It was held that the defendant's negligence had put human life into imminent danger, and that his duty arose out of the nature of the business and the danger to others incident to his mismanagement. He was therefore held

[413] Marvin Safe Co. v. Ward, 46 N. J. Law, 19; White v. Norfolk & S. R. Co., 115 N. C. 631, 20 S. E. 191. In this case it was held that a corporation chartered as a common carrier, with power to use steamboats as well as trains, is liable as a carrier to a passenger on one of its boats, though the boat is at the time let for an excursion, where it also lets the crew, which is still in its pay, and subject to be discharged or changed by it. And, generally, see Whitt. Smith, Neg. pp. 10, 11.

[414] 1 Chit. Pl. 135.

[415] 2 Suth. Dam. 435.

[416] In Heaven v. Pender, 11 Q. B. Div. 503, Brett, M. R., said he doubted whether this case did not go too far.

liable in damages, although there was no privity between him and the injured party. In Langridge v. Levy,[417] A. bought a gun, which was warranted. He gave this gun to B., who was injured by its explosion. It was held that A. alone could sue in contract, and that B.'s cause of action was in tort.

Poisons,[418] spoiled food,[419] or materials otherwise mischievous [420]

[417] 2 Mees. & W. 519, 4 Mees. & W. 337. And see George v. Skivington, L. R. 5 Exch. 1. Cf. Dixon v. Bell, 5 Maule & S. 198; Harris v. Cameron, 81 Wis. 239, 51 N. W. 437. And see Renner v. Canfield, 36 Minn. 90, 30 N. W. 435.

[418] Walton v. Booth, 34 La. Ann. 913. Sulphate of zinc sold for Epsom salts: "The question is whether the delivery at a drug store of a deleterious drug to one who calls for one that is harmless, and damage resulting therefrom, of themselves, give a right of action, even though there may have been no intentional wrong, and the jury may believe there is no negligence. That such an error might occur without fault on the part of the druggist or his clerk is readily supposable. He might have bought his drugs from a reputable dealer, in whose warehouse they have been tampered with for the purpose of mischief. It is easy to suggest accident after they come to his own possession, or wrongs by others, of which he would be ignorant, and against which a high degree of care would not give perfect protection. But how misfortune occurs is unimportant, if, under all circumstances, the fact of occurrence is attributable to him as a legal fault. The case is one in which a high degree of care may justly be required. * * * It is proper and reasonable that the care required shall be proportionate to the danger involved. But we do not find that the authorities have gone so far as to dispense with actual negligence as a necessary element in the liability when a mistake has occurred." Brown v. Marshall, 47 Mich. 576, 11 N. W. 392. Norton v. Sewall, 106 Mass. 143; Savings Bank v. Ward, 100 U. S. 195. Where a passenger on a steamer was injured by a mistake of a physician in giving a dose of calomel in response to a request for quinine, natural confusion aboard ship was held to negative negligence. Allan v. State S. S. Co., 132 N. Y. 91, 30 N. E. 482. Et vide Quin v. Moore, 15 N. Y. 432; Hansford v. Payne, 11 Bush (Ky.) 381. The use of a dye, like mordant, ordinarily harm-

[419] Craft v. Parker, Webb & Co., 96 Mich. 245, 55 N. W. 812. As to contaminated water, see Buckingham v. Plymouth Water Co., 142 Pa. St. 221, 21 Atl. 824.

[420] As distinguished from a trespass, Gwynn v. Duffield, 66 Iowa, 708, 24 N. W. 523; or one who took an overdose of poison, not labeled according to statute, but with respect to which he had been actually warned, Wohlfahrt v. Beckert, 92 N. Y. 490. Cf. Osborne v. McMasters, 40 Minn. 903, 41 N. W. 543.

or dangerous,[421] which do damage to innocent third persons, attach liability to the vendor or manufacturer only when he has been guilty of negligence.[422] His duty is not ordinarily absolute, but he must exercise a very high degree of care. He is not liable for latent defects in things sold,—for example, machinery,—but he is liable for obvious defects.[424] "The rule is limited, however, and justly so, to instrumentalities and articles in their nature calculated to do injury, such as are essentially and in their elements

less, does not make the manufacturer liable to a purchaser poisoned by handling cloth, when he neither knew, nor had reason to know, that the cloth so dyed would be injurious. Gould v. Slater Woolen Co., 147 Mass. 315, 17 N. E. 531. Defendant sold food for animals, containing a small quantity of lead, accidentally mixed with it during a fire, and was held liable for the value of the cattle poisoned. Wilson v. Dunville, 6 Ir. Law Rep. 210; French v. Vining, 102 Mass. 132. And, generally, see George v. Skivington, L. R. 5 Exch. 1; Bruff v. Mali, 36 N. Y. 400; Bishop v. Weber, 139 Mass. 411, 1 N. E. 154; Davis v. Guarnieri, 45 Ohio, 470, 15 N. E. 350; Look v. Litchfield, 42 N. Y. 351.

[421] As chloride of lime stored in vessel. Brass v. Maitland, 6 El. & Bl. 470, per Crompton, J. Et vide Farrant v. Barnes, 11 C. B. (N. S.) 553 (carboy of nitric acid). Explosive oil, Quin v. Moore, 15 N. Y. 432; Elkins v. McKean, 79 Pa. St. 493. Et vide Fleet v. Hollenkemp, 13 B. Mon. (Ky.) 219, where defendant's liability was held to be absolute.

[422] Where a vendor of a horse fraudulently conceals the fact that it is afflicted with glanders, he is liable for the death of one employed by the owner to take care of the horse, who contracts the disease as a natural and probable consequence. State v. Fox (Md.) 29 Atl. 601 (reviewing cases). Cf. Hill v. Balls, 2 Hurl. & N. 299.

[424] A manufacturer is not liable for explosion of a steam thrashing engine because of defects not known to him. Heizer v. Kingsland & Douglass Manuf'g Co., 110 Mo. 605, 19 S. W. 630. And see Losee v. Clute, 51 N. Y. 494; Loop v. Litchfield, 42 N. Y. 351; Losee v. Buchannan, 51 N. Y. 476; King v. New York Cent. Ry. Co., 66 N. Y. 181, 72 N. Y. 607; Davidson v. Nichols, 11 Allen, 514; Marshall v. Welwood, 38 N. J. Law, 339; Horsfall v. Thomas, 1 Hurl. & C. 90. The manufacturer and vendor of a steam boiler is only liable to the purchaser for defective material, or for any want of care and skill in its construction, and if, after delivery to and acceptance by the purchaser, and while in use by him, an explosion occurs, in consequence of such defective construction, to the injury of a third person, the latter has no cause of action, because of such injury, against the manufacturer. Losee v. Clute, 51 N. Y. 494; Wyllie v. Palmer, 137 N. Y. 248, 33 N. E. 381.

instruments of danger, and to acts that are ordinarily dangerous to life and property." [425] By way of contrast, a car with defective brakes is not such an imminently dangerous instrument as to render the company liable to any one injured thereby, in the absence of any contractual or other relation.[426] It was held, in Richmond & D. R. Co. v. Elliott,[427] that if a railroad company, in purchasing a locomotive "from a manufacturer of recognized standing, * * * made such reasonable examination as was possible without tearing the machinery to pieces, and subjected it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination and tests had disclosed no defect, it cannot, in an action by one who is a stranger to the company, be adjudged guilty of negligence."

Damage in Course of Negligent Performance of Contract.

Where, under a contract to which the plaintiff is not a party, damage is done immediately to his person or property by the negligence or otherwise wrongful performance of such contract, he may recover. Thus, an attorney, while not liable on his opinion to persons not parties to a contract, is liable for any wrong he may do to a party in course of the performance of such contract, as for negligence or wrong in seizing goods.[428] So a physician rendering service to a charity patient is liable for injury resulting from carelessness in treatment, although he may be paid by the county.[429]

[425] Jenkins, J., in Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A. 253, 63 Fed. 400–402, citing Loop v. Litchfield, 42 N. Y. 351–357. And see Bailey v. Gas Co., 4 Ohio Cir. Ct. R. 471 (natural gas engine); Davidson v. Nichols, 11 Allen, 514 (sulphide of antimony delivered instead of black oxide of manganese). And see Collis v. Selden, L. R. 3 C. P. 495, approved Savings Bank v. Ward, 100 U. S. 195; Blakemore v. Railway Co., 8 El. & Bl. 1035; Burdick v. Cheadle, 26 Ohio St. 393; Curtain v. Somerset, 140 Pa. St. 70, 21 Atl. 244.

[426] Roddy v. Missouri Pac. Ry. Co., 104 Mo. 234, 15 S. W. 1112.

[427] 149 U. S. 266, 13 Sup. Ct. 837.

[428] Weeks, Attys. p. 628. On the other hand, he may be liable to third persons for malpractice, trespass, and malicious prosecution. Id. §§ 133, 134. Negligence is a good offset to action for services. Caverly v. McOwens, 123 Mass. 574; Weeks, Attys. p. 607. Action on the case is the usual procedure. Russel v. Palmer, 2 Wils. 325.

[429] The physician of an almshouse may be held liable for malpractice at the suit of a charity patient. Dubois v. Decker, 130 N. Y. 325, 29 N. E. 313. And see Becker v. Janinski (Com. Pl.) 15 N. Y. Supp. 675. The child injured

The principle is the same where the damage is to the property. Similarly, if a contractor who agrees to move and fit up a building in a workmanlike manner, makes a subcontract with another to do the work, the latter is liable to the owner of the building for negligence and misfeasance in performing the same, although there is no privity of contract between them.[430] One person may sustain different relations to another, as well as different relations to different persons.[431]

Effect of Limitations as to Third Persons.

It has been seen that many limitations on liability which may be regarded and remedied as tortious may be altered by agreement.[432] Such limitations, however, affect only the parties to the contract, and not third persons who may be entitled to recovery for a wrong a part of which is a breach of contractual duty. Thus, limitations in the telegraph contract limiting responsibility to messages repeated, applies to the sender, and not to the recipient. Accordingly, where the latter receives a telegram sent from Staten Island, but reading as if sent from South Carolina, whereby he was misled into taking a fruitless trip to South Carolina, he can recover damages from the telegraph company, notwithstanding the absence of privity between him and it.[433]

262. Negligence in the performance of a contract includes want of competent skill. Diligence includes competency.

In general, when a person offers his services to the public in any business, trade, or profession, there is an implied engagement with those who employ him that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by per-

by a surgeon's malpractice may recover, although the contract was made with the parent. Gladwell v. Steggall, 5 Bing. N. C. 733; Pippin v. Sheppard, 11 Price, 400; Baird v. Gillett, 1 Alb. Law J. 238 (reversed on another point, 47 N. Y. 186).

430 Bickford v. Richards, 154 Mass. 163, 27 N. E. 1014; Toomey v. Donovan, 158 Mass. 232, 33 N. E. 396.

431 Toomey v. Donovan, 158 Mass. 232–237, 33 N. E. 396.

432 Ante, p. 298, "Discharge by Contract."

433 Tobin v. W. U. Tel. Co., 146 Pa. St. 375, 23 Atl. 324; New York P. & Tel. Co. v. Dryburg, 35 Pa. St. 298.

sons in the same business, trade, and profession, and which is ordinarily regarded by the community and by those conversant with that employment as necessary and sufficient to qualify him to engage in such business, trade, or profession, and that he will perform matters intrusted to him diligently and faithfully.[434] As no prudent person would, unless possessed of competent skill, undertake the doing of any act which in the absence of skill would cause great risk of injury to another, the doing of such acts by an unskilled person will amount to negligence.[435] Undertaking to exercise judgment without skill in a matter which requires skill is not a mere error of judgment, but it is negligence.[436] Therefore negligence includes the want of competent skill, as where an incompetent person produces injury in the management of horses,[437] or of a railway train.[438] Where, however, an emergency elicits a volunteer to act without pretending to possess special qualifications, the law recognizes the necessity as forming an exception to the general rule requiring skill.[439] This has been regarded, not as an exception as to the standard of conduct of a prudent man.[440] On the other hand, Mr. Bigelow argues that the test of the prudent man's conduct does not hold good where the defendant has stepped out of his own business.[441]

Medical Men.

The implied contract of a physician or surgeon (a "medical man," as he is called in England) [442] is not to cure, but to possess and employ in the treatment of a case such reasonable skill and diligence

[434] Shepley, J., in Odlin v. Stetson, 17 Me. 244; Cayford v. Wilbur, 86 Me. 414, 29 Atl. 1117; Bell, J., in Leighton v. Sargeant, 7 Fost. (N. H.) 460; Cooley, Torts, 647; Smith v. Holmes, 54 Mich. 104, 19 N. W. 767. And see Chase v. Heaney, 70 Ill. 268; Clark v. Marshall, 34 Mo. 429; Savings Bank v. Ward, 100 U. S. 195.

[435] Clerk & L. Torts, 356.

[436] City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686.

[437] Hammack v. White, 11 C. B. (N. S.) 588.

[438] Hutchinson v. York, N. & B. R. Co., 5 Exch. 343.

[439] Higgins v. McCabe, 126 Mass. 13; Beardslee v. Richardson, 11 Wend. (N. Y.) 25; Gladwell v. Steggall, 5 Bing. N. C. 733.

[440] Pol. Torts, p. 359; Ball, Lead. Cas. 225, 226.

[441] Bigelow, Lead. Cas. 590. Et vide Pig. Torts, 218, 219.

[442] Hastings, Torts, 189.

as are ordinarily exercised in his profession by thoroughly educated physicians; and in judging of the degree of skill required, regard is had to the advanced stage of the profession at the time. The law does not require the highest degree of skill and science.[443] The standard must be a practical and attainable one. The standard of ordinary skill may vary, even in the same state, according to greater or less opportunity afforded by the locality for the observation and practice from which alone the highest skill can be acquired.[444] A physician does not insure that his treatment will be successful; and a failure to effect a cure does not raise a presumption of want of skill or failure to exercise diligence.[445]

The courts will take no notice of different "schools" in medicine. They recognize all systems as legitimate and require the physician to practice according to his professed and avowed system.[446] The right of the state to prescribe the rule and test for the ascertainment of the qualifications for the applicants for authority to practice medicine as a livelihood is a part of the police power which has

[443] Saybord v. Wilbur, 86 Me. 414, 29 Atl. 1117; McCandless v. McWha, 22 Pa. St. 261, approved Smothers v. Hanks, 34 Iowa, 286; Leighton v. Sargeant, 7 Fost. (N. H.) 460, cases collected; Peck v. Hutchinson, 88 Iowa, 320, 55 N. W. 511; Hewitt v. Eisenbart, 36 Neb. 794, 55 N. W. 252; Lawson v. Conaway, 37 W. Va. 159, 16 S. E. 564; 1 Hil. Torts (2d Ed.) 253; Tefft v. Wilcox, 6 Kan. 46; McNevins v. Lowe, 40 Ill. 209; Wood v. Clapp, 4 Sneed (Tenn.) 65; Lamphier v. Phipos, 8 Car. & P. 475. Cf. Seare v. Prentice, 8 East, 348. Defendant cannot show that he was generally reputed to possess a high degree of skill in his profession, where plaintiff did not allege or offer to prove that he lacked ordinary skill. Carpenter v. Blake, 60 Barb. 490, 50 N. Y. 696, explained. Degnan v. Ransom, 83 Hun, 267, 31 N. Y. Supp. 966.

[444] Smothers v. Hanks, 34 Iowa, 286; Shear. & R. Neg. p. 491, § 436; Hewitt v. Eisenbart, 36 Neb. 794, 55 N. W. 252; Peck v. Hutchinson, 88 Iowa, 320, 55 N. W. 511.

[445] Lawson v. Conaway, 37 W. Va. 159, 16 S. E. 564. A short note as to the skill and care required of a physician, 38 Am. St. Rep. 30.

[446] A homeopath's care is to be measured by homeopath's peculiar standard. Force v. Gregory, 63 Conn. 167, 27 Atl. 1116. And see Burnham v. Jackson, 1 Colo. App. 237, 28 Pac. 250. Accordingly, evidence to prove that defendant's treatment of a case was according to the botanic system of practicing medicine, which he professed and was known to follow, is admissible. Bowman v. Woods, 1 G. Greene (Iowa) 441; Com. v. Thompson, 6 Mass. 134; Patten v. Wiggen, 51 Me. 594. Et vide Dr. Groenvelt's Case, Esp. 601. There is, however, a civilized tendency to test malpractice according to well-

been constantly exercised by the legislatures. Such statutes do not alter the law of negligence of licensees, however they may affect the question of initial skill; and if a person act as a medical practitioner, he is liable for malpractice, though he may not have conformed to the statutes.[447]

A physician's liability does not depend upon the person by whom

settled rules of medical and surgical science. Mucci v. Houghton (Iowa) 57 N. W. 305. But see Winner v. Lathrop, 67 Hun, 511, 22 N. Y. Supp. 516. Fractures near shoulder joint, Baird v. Morford, 29 Iowa, 531; Tefft v. Wilcox, 6 Kan. 46. Fractures near elbow joint, Wilmont v. Howard, 39 Vt. 447. Fracture near wrist joint, Smothers v. Hanks, 34 Iowa, 286; Ritchey v. West, 23 Ill. 385; Scudder v. Crossan, 43 Ind. 343; Stevenson v. Gelsthorpe, 10 Mont. 563, 27 Pac. 404. Fracture near ankle joint, Almond v. Nugent, 34 Iowa, 300. Generally, as to fractures, Young v. Mason, 8 Ind. App. 204, 35 N. E. 521; Gedney v. Kingsley, 62 Hun, 620, 16 N. Y. Supp. 792. Dislocation, Carpenter v. Blake, 60 Barb. (N. Y.) 488. "Colles' fracture," Link v. Sheldon, 136 N. Y. 1, 32 N. E. 696. Amputation, Alder v. Buckley, 1 Swan (Tenn.) 69; Howard v. Grover, 28 Me. 97. One of the most celebrated of malpractice cases, in which alleged malpractice consisted in opening an abscess, is Walsh v. Sayre, 52 How. Prac. 335. Et vide Kay v. Thompson, 10 Am. Law Reg. (N. S.) 594. Failure to discover serious rupture of perineum is negligence. Lewis v. Dwinell, 84 Me. 497, 24 Atl. 945. Cf. Langford v. Jones, 18 Or. 307, 22 Pac. 1064; Beck v. German Klinik, 78 Iowa, 696, 43 N. W. 617. In obstetric cases, Grainnis v. Branden, 5 Day (Conn.) 260. In venesection, Hancke v. Hooper, 7 Car. & P. 81. Treatment of frost bite, Kay v. Thompson, 10 Am. Law Reg. (N. S.) 594; Patten v. Wiggin, 51 Me. 594. Liability of hospital physician for nurse, Perionowsky v. Freeman, 4 Fost. & F. 977. Vaccination, Landon v. Humphrey, 9 Conn. 209. A felon, Twombly v. Leach, 11 Cush. 397. Erysipelas, Cochran v. Miller, 13 Iowa, 128. In medical case, Peck v. Martin, 17 Ind. 115; Rex v. Long, 4 Car. & P. 398–423; Com. v. Thompson, 6 Mass. 134.

[447] Ruddock v. Lowe, 4 Fost. & F. 519, note a, p. 521; Jones v. Fay, Id. 525, note a, p. 526. As to diploma as evidence of competency, under statute and at common law, cf. Stough v. State, 88 Ala. 234, 7 South. 150, and Townshend v. Gray, 62 Vt. 373, 19 Atl. 635, with Hunter v. Blount, 27 Ga. 76. Et vide Ordronaux, Jur. Med. 26. And generally, as to liability of physician and surgeon, see Rowe v. Lent, 62 Hun, 621, 17 N. Y. Supp. 131; Barney v. Pinkham, 29 Neb. 350, 45 N. W. 694; Becker v. Janinski (Com. Pl.) 15 N. Y. Supp. 675; Hitchcock v. Burget, 38 Mich. 501; Hesse v. Knippel, 1 Mich. N. P. 109; Getchell v. Hill, 21 Minn. 464; Getchell v. Lindley, 24 Minn. 265; Reynolds v. Graves, 3 Wis. 371; Gates v. Fleischer, 67 Wis. 504, 30 N. W. 674; Briggs v. Taylor, 28 Vt. 180; Wood v. Clapp, 4 Sneed (Tenn.) 65; Alder v. Buckley, 1 Swan (Tenn.) 69; Graham v. Gautier, 21 Tex. 111; Hathorn v.

he is paid. A city physician owes to a patient in an almshouse the exercise of professional skill.[448]

Richmond, 48 Vt. 557; Potter v. Warner, 91 Pa. St. 362; Haire v. Reese, 7 Phila. 138; Fowler v. Sergeant, 1 Grant, Cas. 355; Small v. Howard, 128 Mass. 131; Branner v. Stormont, 9 Kan. 51; Utley v. Burns, 70 Ill. 162; Fisher v. Niccolls, 2 Ill. App. 484; Quinn v. Donovan, 85 Ill. 194; Long v. Morrison, 14 Ind. 595; Jones v. Angell, 95 Ind. 376; Tefft v. Wilcox, 6 Kan. 46; Peck v. Martin, 17 Ind. 115; Gramm v. Boener, 56 Ind. 497; Holtzman v. Hoy, 19 Ill. App. 459; Landon v. Humphrey, 9 Conn. 209; Ritchey v. West, 23 Ill. 385; McNevins v. Lowe, 40 Ill. 209; Kendall v. Brown, 74 Ill. 232; Barnes v. Means, 82 Ill. 379; Driscoll v. Com., 93 Ky. 393, 20 S. W. 431; Hargan v. Purdy, 93 Ky. 424, 20 S. W. 432; Nelson v. State, 97 Ala. 79, 12 South. 421; Brooks v. State, 88 Ala. 122, 6 South. 902; Harrison v. State (Ala.) 15 South. 563; State v. Hathaway, 115 Mo. 36, 21 S. W. 1081; State v. Carey, 4 Wash. 424, 30 Pac. 729; Roberts v. Levy (Cal.) 31 Pac. 570; State v. Van Doran, 109 N. C. 864, 14 S. E. 32; Moore v. Bradford, 148 Pa. St. 342, 23 Atl. 896; Craig v. Board, 12 Mont. 203, 29 Pac. 532; State v. Kellogg, 14 Mont. 451, 36 Pac. 1077; Haworth v. Montgomery, 91 Tenn. 16, 18 S. W. 399; Girard v. Bissell (Kan.) 25 Pac. 232; Underwood v. Scott, 43 Kan. 714, 23 Pac. 942; Townshend v. Gray, 62 Vt. 373, 19 Atl. 635; Stewart v. Raab, 55 Minn. 20, 56 N. W. 256; State v. Buswell, 40 Neb. 158, 58 N. W. 728 (as to Christian Scientists); Whitlock v. Com., 89 Va. 337, 15 S. E. 893; State v. Mosher, 78 Iowa, 321, 43 N. W. 202; State v. Jones, 18 Or. 256, 22 Pac. 840; State v. Hathaway, 115 Mo. 36, 21 S. W. 1081. As to English medical act, vide Leeson v. General Council, 43 Ch. Div. 366. As to liability of irregular practitioner, vide Ruddock v. Lowe, 4 Fost. & F. 519.

[448] Du Bois v. Decker, 130 N. Y. 325, 29 N. E. 313. The action against a physician for negligence is not ex contractu, but ex delicto. Gladwell v. Steggall, 5 Bing. N. C. 733. Bellinger v. Craigue, 31 Barb. 534, treats the question as principally one of contract. Either case or assumpsit will lie for improper treatment. Kuhn v. Brownfield, 34 W. Va. 252, 12 S. E. 519. Whether required by statute, or assuming the duty, the master who employs a physician to attend his employés, the carrier who employs one to attend its passengers, or the hospital or other institution that employs one to attend its inmates, is only bound to procure one who is competent, and when that duty has been performed, he is free from all liability for the physician's negligence. 2 Am. Law Reg. & Rev. 163; Union Pac. Ry. Co. v. Artist, 9 C. C. A. 14, 60 Fed. 365; South Florida R. Co. v. Price, 32 Fla. 46, 13 South. 638; O'Brien v. Cunard S. S. Co., 154 Mass. 272, 28 N. E. 266; McDonald v. Massachusetts Gen. Hospital, 120 Mass. 432; Laubheim v. De Koninglyke N. S. Co., 107 N. Y. 228, 13 N. E. 781; Allan v. State S. S. Co., 132 N. Y. 91, 30 N. E. 482 (reversing [Sup.] 8 N. Y. Supp. 803). And see Eighmy v. Union Pac. Ry. Co. (Iowa) 61 N. W. 1056; Campbell v. Northern Pac. R. Co., 51

Lawyers.

As to attorneys, Tindal, C. J., has said:[449] "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking and that crasse negligentia or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, * * * appear to establish, in general, that he is liable for the consequences of ignorance or nonobservance of the rules of practice of this court;[450] for the want of care in the preparation of the cause for trial,[451] or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence or of nice or doubtful construction." "God forbid that it should be imagined that an attorney, or even a judge, is bound to know all the law."[452] The liability of an English

Minn. 488, 53 N. W. 768; Clark v. Missouri Pac. R. Co. (Wash.) 29 Pac. 1138. And see Richardson v. Carbon Hill Coal Co. (Wash.) 39 Pac. 95. But if the physician is incompetent, or unfit to perform his duties, the employer is liable; though, if he has used ordinary care, he is not responsible, even when the hospital is supported by the forced contributions of the employés. 2 Am. Law Reg. & Rev. 163, citing Richardson v. Carbon Hill Coal Co. (Wash.) 39 Pac. 95.

[449] Godefroy v. Dalton, 6 Bing. 467–469. Further as to difference between English members of the bar, see Ireson v. Pearman, 3 Barn. & C. 799. An action for professional negligence will not lie against the barrister. Swinfen v. Chelmsford, 5 Hurl. & N. 918, 29 Law J. Exch. 382.

[450] Caldwell v. Hunter, 10 Q. B. 83; Bracey v. Carter, 12 Adol. & E. 373. Negligently suffering judgment by default. Godefroy v. Jay, 7 Bing. 413; Hoby v. Built, 3 Barn. & Adol. 350.

[451] Or bringing an action in a court without jurisdiction. Williams v. Gibbs, 6 Nev. & M. 788; Cox v. Leech, 1 C. B. (N. S.) 617, 26 Law J. C. P. 125. Compare Meredith v. Woodward, 16 Wkly. Notes Cas. 146.

[452] Abbott, C. J., in Montriou v. Jeffreys, 2 Car. & P. 133. Lord Mansfield's saying in Pitt v. Yalden, 4 Burrows, 2060, 2061, is famous: "That part of the profession which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honor and integrity; and they ought to be protected when they act to the best of their skill and knowledge. But every man is liable to error, and I should be very sorry that it should be taken for granted that an attorney is

attorney or solicitor [453] is essentially that of a member of the bar in America, viz. he is required to exercise such diligence as a good lawyer is accustomed to apply under similar circumstances.[454] He cannot be held liable for a mistake in reference to a matter as to which members of the profession possessed of reasonable skill and knowledge may differ as to the law, until it has been settled in the courts; nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers.[455]

The standard of skill required of lawyers is substantially the same as that of physicians.[456] It is determined by the particular practice of the particular bar. "A metropolitan standard is not to be ap-

answerable for every error or mistake. * * * A counsel may mistake, as well as an attorney. Yet no one will say that a counsel who has been mistaken shall be charged. * * * Not only a counsel, but judges, may differ or doubt, or take time to consider. Therefore, an attorney ought not to be liable in case of a reasonable doubt." The saying of Lord Cottenham in Hart v. Frame, 6 Clark & F. 193, is also much quoted. Et vide Laidler v. Elliott, 3 Barn. & C. 738; Russell v. Palmer, 2 Wils. 325.

[453] Hart v. Frame, 6 Clark & F. 193; Caldwell v. Hunter, 10 Q. B. 83; Parker v. Rolls, 14 C. B. 691; Purves v. Landell, 12 Clark & F. 91.

[454] Whart. Neg. § 749; Sprague v. Baker, 17 Mass. 586; Kepler v. Jessupp (Ind. App.) 37 N. E. 655; Isham v. Parker, 3 Wash. St. 755, 29 Pac. 835; White v. Washington, 1 Barnes, Notes Cas. 411; Holmes v. Peck, 1 R. I. 242; Stevens v. Walker, 55 Ill. 151; Wilson v. Russ, 20 Me. 421; Stubbs v. Beene, 37 Ala. 627; Gambert v. Hart, 44 Cal. 542. Reasonable care and diligence. Kepler v. Jessupp (Ind. App.) 37 N. E. 655. A contract for the services of members of a legal profession is not a hiring of labor, but a mandate. Gurley v. City of New Orleans, 41 La. Ann. 75, 5 South. 659. Generally, as to liability of attorneys for erroneous advice, see 4 Yale L. J. 65, by William B. Bosley.

[455] Citizens' Loan Fund & Sav. Ass'n v. Friedley, 123 Ind. 143, 23 N. E. 1075. Compare Cochrane v. Little, 71 Md. 323, 18 Atl. 698. An attorney cannot be charged with negligence when he accepts, as a correct exposition of the law, a decision of the supreme court of his state in another case upon the question of the liability of stockholders of corporations of the state, in advance of any decision thereon in his own case. Marsh v. Whitmore, 21 Wall. 178. Nor is he liable for an insufficient affidavit in attachment. Ahlhauser v. Butler, 57 Fed. 121.

[456] Watson v. Muirhead, 57 Pa. St. 161. "The law is not a mere art, but a science." Sharswood, J. Citizens' Loan Fund & Sav. Ass'n v. Friedley, 123 Ind. 145, 23 N. E. 1075, reviewing many cases. Approved 126 Ind. 490.

plied to a rural bar." [457] A lawyer is not expected to guaranty success.[458] This standard would not seem consistent with the early theory that an attorney-at-law is not liable if he acts honestly and to the best of his ability.[459] Of course, he must exercise reasonable diligence generally in the conduct of his client's business.[460] Thus, in examination of titles he must scrutinize vigilantly, and is liable, for example, for failure to note the existence of an incumbrance.[461] But as to doubtful points of law it is sufficient if he conforms to the standard of good professional men of the place.[462]

[457] Weeks, Attys. § 289; Pennington v. Yell, 11 Ark. 212; Whart. Neg. § 750.

[458] Weeks, Attys., § 290.

[459] Lynch v. Com., 16 Serg. & R. 368; Crosby v. Murphy, 8 Ir. C. L. 301; Kemp v. Burt, 4 Barn. & Adol. 424; Gilbert v. Williams, 8 Mass. 57; post, note 153. He has, however, been held liable for gross negligence. Purves v. Landell, 12 Clark & F. 91; Baikie v. Chandless, 3 Camp. 17; Elkington v. Holland, 9 Mees. & W. 661.

[460] In not commencing an action against a debtor in failing circumstances, Rhines v. Evans, 66 Pa. St. 192; in time to avoid bar by the statute of limitations, Fox v. Jones (Tex. Sup.) 14 S. W. 1007; Hett v. Pun Pong, 18 Can. Sup. Ct. 290; to be present when his case is reached, City of Lincoln v. Staley, 32 Neb. 63, 48 N. W. 887; to advise client as to expenses on appeal, Jamison v. Weaver, 81 Iowa, 212, 46 N. W. 996; not to make negligent investments, Blyth v. Fladgate [1891] 1 Ch. 337 (et vide Mellish, L. J., in Sawyer v. Goodwin, 1 Ch. Div. 351); loaning money, Whitney v. Martine, 88 N. Y. 535; for not notifying his client of impending tax sales, Wain v. Beaver, 161 Pa. St. 605, 29 Atl. 114; for negligence in preparing mechanic's lien, Joy v. Morgan, 35 Minn. 184, 28 N. W. 237; generally, for misdescription, Taylor v. Gorman, 4 Ir. Eq. 550; for loss of bond, Walpole v. Carlisle, 32 Ind. 415. Not liable for failure to transfer insurance policy to vendee, Herbert v. Lukens, 153 Pa. St. 180, 25 Atl. 1116. When not liable for failure to plead statutory limitations, Thompson v. Dickinson, 159 Mass. 210, 34 N. E. 262.

[461] Pennoyer v. Willis (Or.) 32 Pac. 57. But, even under such circumstances, the question of negligence has been left to the jury. Pinkston v. Arrington, 98 Ala. 489. And see Hinckley v. Krug (Cal.) 34 Pac. 118.

[462] Watson v. Muirhead, 57 Pa. St. 161; Whart. Ag. § 597; Potts v. Dutton, 8 Beav. 493; Taylor v. Gorman, 4 Ir. Eq. 550; Wilson v. Tucker, 3 Starkie, 154, Dowl. & R. N. P. 30; Knights v. Quarles, 4 Moore, 532; Allen v. Clark, 7 Law T. R. (N. S.) 781, 1 N. R. 358; Drax v. Scroope, 2 Barn. & Adol. 581; Stannard v. Ullithorne, 10 Bing. 491; Ireson v. Pearman, 5 Term R. 687; Howell v. Young, 5 Barn. & C. 259; Whitehead v. Greetham, 2 Bing. 464, 10 Moore, 183; Dartnall v. Howard, 6 Term R. 438, 4 Barn. & C. 345; Brumbridge v. Massey, 28 Law J. Exch. 59; Cooper v. Stephenson, 21

Special Cases of Contract Duty.

The violations of duty which arise from contract or from a state of facts of which a contract forms a necessary part, giving rise to an action based on negligence, are almost infinite in variety and occurrence. They are illustrated in all main features in two important classes of cases, viz. master and servant, and common carriers. These subjects will be considered at length in subsequent chapters for sake of convenience of arrangement.

263. In order that a complainant may recover for negligence in the performance of statutory duty, he must show—

(a) That he is within the class for whose benefit legislation creating not a purely public duty was designed;

(b) That there was a negligent violation of statutory requirement by the defendant;

(c) That he suffered damage as the proximate result of such violation.

It has already been shown that an action may lie on behalf of a person injured by a breach of a statutory duty. As the principle is sometimes stated, all that is necessary to entitle one to recover under such circumstances is to show the statutory requirement, its nonperformance, and special injury to himself.[463] But, as has been seen, this general principle has been modified in at least three respects.* So far as liability for negligence is concerned, the principal propositions would seem to be as stated in the black-letter text.

Purely Public Duty.

If the duty is wholly public, and not at all for the benefit of private individuals, no private person can recover for its violation.

Law J. Q. B. 292; Hayne v. Rhodes, 8 Q. B. 342, 10 Jur. 71, 15 Law J. Q. B. 137.

[463] Chamberlaine v. Chester & B. R. Co., 1 Exch. 870; Couch v. Steel, 3 El. & Bl. 402 (in this noted case a seaman recovered from a shipowner for damages suffered because of breach of statutory duty to keep medicine aboard a ship).

* Ante, p. 98.

Thus, in the celebrated Atkinson Case,[464] a water company, required by statute to keep the pressure in their pipes so as to reach the highest story in the highest house in the area supplied, was not held liable to one who suffered special damage by fire to his house because of insufficient pressure. The act was held to be in the nature of a private legislative bargain, and not to create a duty to such person. Even if a public duty be created and special damage ensue, the right of an individual action does not necessarily follow. While it is generally conceded that, in the absence of statutory obligation,[465] no liability rests on the owner of a lot abutting a street to repair or maintain in safe condition the street or sidewalk, it is insisted by many authorities that failure, for example, to remove snow, as required by an ordinance, is a breach of duty to the public from which an individual action does not arise.[466] The general opinion, however, on this point would sustain an action by private individuals against the municipality for negligence in the breach of a charter requiring the municipality to keep its streets and sidewalks in a good and safe condition.[467]

[464] Atkinson v Newcastle & G. Water Works, L. R. 6 Exch. 404, 2 Exch. Div. 441. Et vide Stevens v. Jeacocke, 11 Q. B. 731; Davis v. Clinton Water Works Co., 37 Am. Rep. 185. A collection of recent decisions on their liability for loss by fire due to lack of adequate water supply will be found in 23 L. R. A. 146. A municipal corporation maintaining waterworks, however, may be liable to a private individual under such circumstances. Springfield Fire & Marine Ins. Co. v. Village of Keeseville, 80 Hun, 162, 29 N. Y. Supp. 1130. The liability of a water company often depends on construction of contract. Mott v. Cherryvale Water & Manuf'g Co., 48 Kan. 12, 28 P. 989.

[465] Dill. Mun. Corp. (4th Ed.) § 976.

[466] Taylor v. Lake Shore & M. S. R. Co., 45 Mich. 74, 7 N. W. 728. And see cases collected in Hayes v. Michigan Cent. R. Co., 111 U. S. 228–240, 4 Sup. Ct. 369. Flynn v. Canton Co., 40 Md. 312–323; Kirby v. Boylston Market Ass'n, 14 Gray, 249; Moore v. Gadsden, 93 N. Y. 12; Hartford v. Talcott, 48 Conn. 525; Smith v. Donohue, 49 N. J. Law, 548, 10 Atl. 150; Heeney v. Sprague, 11 R. I. 456. The rule was once laid down in Pennsylvania that "a municipal ordinance creates no new liability in favor of one injured by the negligence of another." Philadelphia & R. R. Co. v. Ervin, 89 Pa. St. 71; Philadelphia & R. Ry. Co. v. Boyer, 2 Am. & Eng. R. Cas. 172. Et vide Vandyke v. Cincinnati, 1 Disn. (Ohio) 532; Central Ohio R. Co. v. Lawrence, 13 Ohio St. 66; Meek v. Pennsylvania Ry. Co., 38 Ohio St. 632.

[467] City of Rochester v. Campbell, 123 N. Y. 405, 25 N. E. 937. In this case Chief Justice Ruger in an elaborate opinion lays down seven proposi-

Private Duty.

The statute or ordinance may create, not only a public duty, but a duty to private persons, a breach of which may be actionable negligence; and yet an individual may not be able to recover, because he is not of the class of persons for whose benefit the statute was designed. Thus, it has been held that an ordinance requiring a railroad company to keep flagmen at street crossings was not intended for the protection of the company's employés, and creates as to them no duty, the violation of which, resulting in damage, is actionable negligence.[468] So an ordinance requiring precautions to be taken

tions as to liability of corporations for streets and sidewalks, which embody the substance of the law on this point. Many cases usually cited as sustaining the former doctrine may be brought within the construction of language and purview of statute so as to deny creation of private duty or remedy within the principle that a breach of mere ordinance is not necessarily conclusive evidence of negligence, but is to be considered as evidence of want of due care, in connection with the other facts in the case. The other would seem to be at variance with prevalent ideas as to the responsibility of municipal corporations. McNerney v. Reading City, 150 Pa. St. 611, 25 Atl. 57; McRickard v. Flint, 114 N. Y. 222, 21 N. E. 153; Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488; Cook v. Johnston, 58 Mich. 437, 25 N. W. 388; Siemers v. Eisen, 54 Cal. 418; Rainey v. New York Cent. & H. R. R. Co., 68 Hun, 495, 23 N. Y. Supp. 80. The general current of opinion sustains the rule as already stated. Pennsylvania Co. v. Hensil, 70 Ind. 569; Bott v. Pratt, 33 Me. 323; Mason v. Shawneetown, 77 Ill. 533; Flynn v. Canton Co., 40 Md. 312; Jackson v. Shaw, 29 Cal. 267; Lane v. Atlantic Works, 111 Mass. 136; Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451; Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 4 Sup. Ct. 369.

[468] Kansas City, Ft. S. & M. R. Co. v. Kirksey, 9 C. C. A. 321, 60 Fed. 999. In absence of statute imposing such duty, it has been held that negligence cannot be predicated by railroad company for failure to station a flagman or maintain gates and lights at highway crossings. Case v. New York Cent. & H. R. R. Co., 75 Hun, 527, 27 N. Y. Supp. 496. Perhaps a true view is that the jury is to determine the question of negligence as to this point under all the circumstances of the case. Omaha & R. V. Ry. Co. v. Brady, 39 Neb. 27, 57 N. W. 767. Cf. Artz v. Railroad Co., 34 Iowa, 153. Where the statute creates a liability for injury to stock running at large caused by failure to fence, an action will not lie for personal injury received by the driver of horses and wagon. Cohoon v. Chicago, B. & Q. R. Co. (Iowa) 57 N. W. 727. Et vide Case v. New York Cent. & H. R. R. Co., 75 Hun, 527, 27 N. Y. Supp. 496. As to blowing whistle, Toudy v. Norfolk, etc., Ry. Co., 38 W. Va. 694. A railroad company will be liable to its engineer for injury caused by collision or

to secure the safety of buildings applies only to citizens in them on business, and not to a fireman going there to extinguish a fire.[469] And a statute requiring railway companies to block "frogs" in their yards and terminal stations does not render them liable to a trespasser for injuries resulting from a failure to comply therewith.[470] When the statute or ordinance is manifestly for the benefit of a particular class, persons within that class can recover.[471] Thus, where a statute requires the owner of tenement houses to provide them with fire escapes, and he fails to comply therewith, he is liable for damages caused his tenant by breach of this duty.[472]

engine with a bull which has come on the track through defect in the fence. Dickson v. Omaha & St. L. Ry. Co., 124 Mo. 140, 27 S. W. 476. To the same effect, Atchison, T. & S. F. R. Co. v. Reesman, 9 C. C. A. 20, 60 Fed. 370. Cf. French v. Western N. Y. & P. R. Co., 72 Hun, 469, 25 N. Y. Supp. 229; Dean v. Railroad Co., 54 Mo. App. 647; Millhouse v. Railway Co., 7 Ohio Cir. Ct. R. 466. See Morse v. Boston & L. R. Co. (N. H.) 28 Atl. 286. A statute requiring certain notice as to blasting, so that all persons or teams approaching may have time to retire safely, does not create a duty towards workmen in a quarry. "Approaching" is a word of limitation. Hare v. McIntire, 82 Me. 240. Et vide Harty v. Central R. Co., 42 N. Y. 468. And, generally, as to what is within the scope of statutory duty, see Fennell v. Seguin St. Ry. Co., 70 Tex. 670, 8 S. W. 486; Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619.

[469] Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113. And see Pauley v. Steam-Gauge & Lantern Co., 131 N. Y. 90, 29 N. E. 999. A city ordinance which requires machinery that is so located as to endanger the lives and limbs of those employed in the building to be so covered or guarded as to insure such employés against injury, gives no right of action to an injured person who is not an employé. Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182.

[470] Akers v. Chicago, St. P., M. & O. Ry. Co. (Minn.) 60 N. W. 669.

[471] Where an ordinance required a motorman to watch for persons on the track or moving towards it, it was held to be actionable for him to be looking back and talking to some one on the car, whereby plaintiff was injured. Dallas Rapid-Transit Ry. Co. v. Elliott (Tex. Civ. App.) 26 S. W. 455. Damages caused to landowner by defective fence, Gulf, C. & S. F. Ry. Co. v. Simonton, 2 Tex. Civ. App. 558, 22 S. W. 285; Welles v. Northern Cent. Ry. Co., 150 Pa. St. 620, 25 Atl. 51; Nelson v. St. Louis & S. F. Ry. Co., 49 Kan. 165, 30 Pac. 178. A collection of statutory regulations for the protection and safety of workmen in mines, with the decisions thereon. Consolidated Coal & Min. Co. v. Clay's Adm'r (Ohio) 25 Lawy. Rep. Ann. 848, 38 N. E. 610.

[472] Willy v. Mulledy, 78 N. Y. 310; McLaughlin v. Armfield, 58 Hun, 376, 12 N. Y. Supp. 164; Perry v. Bangs, 161 Mass. 35, 36 N. E. 683.

Damages may be recovered when caused by obstructing a highway in violation of the provisions of a statute prohibiting railway companies from obstructing a street crossing longer than five minutes.[473] Moreover, the courts are inclined to liberally view the purpose of a statute, and to so construe it as to include, not only the class for whose benefit it is primarily intended, but to extend its protection to all who need such protection.[474]

In Hayes v. Michigan Cent. R. Co.,[475] an action was brought by an infant for personal injury sustained because of the alleged negligence of the railroad company in not fencing its track from a park, as required by statute. The statute was held not to be a mere contract for the benefit of the public, but to create a duty, "not to the city as a municipal body, but to the public considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery."

Negligent Violation.

Where a statute has defined precautions to be exercised to avoid doing harm, compliance with such requirements exonerates. There

[473] Patterson v. Detroit, L. & L. N. R. Co., 56 Mich. 172, 22 N. W. 260. An action for damages lies on behalf of a person injured through defendant's omission in disregarding of statute to protect a hatchway with a railing. Parker v. Barnard, 135 Mass. 116. Defendant is liable to a party injured through negligent omission to comply with city ordinance providing mode of protection for vaults in public streets. Owings v. Jones, 9 Md. 108–117.

[474] See Brewer, C. J., in Atchison, T. & S. F. R. Co. v. Reesman, 9 C. C. A. 20, 60 Fed. 370, 373. This case held, inter alia, that where an animal, through failure of a railroad company to fence as required by statute, gets on track, and causes derailment of a train, whereby plaintiff, an employé on the train, is injured, he can recover. A short note on the rights of employés of a railroad company injured by violation of statute requiring maintenance of fences. Dickson v. Omaha & St. L. Ry. Co. (Mo. Sup.) 59 Am. & Eng. R. Cas. 312, 27 S. W. 476.

[475] Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 4 Sup. Ct. 369. Et vide Union Pac. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619; Chicago v. Robbins, 2 Black, 418, 4 Wall. 657; Doran v. Flood, 47 Fed. 543. And generally, as to fencing, see Donnegan v. Erhardt, 119 N. Y. 468, 23 N. E. 1051; Dayton v. New York, L. E. & W. R. Co., 81 Hun, 284, 30 N. Y. Supp. 783; Quackenbush v. Wisconsin & M. R. Co., 62 Wis. 411, 22 N. W. 519; Price v. Railroad Co., 49 Mo. 438–440. And see Thornt. R. R. Fences, 571 et seq.

would seem to be no duty of extrastatutory care;[476] but the statutory duty may not exclude an additional common-law duty.[477] No custom or usage will justify the disregard of a positive statutory regulation;[478] nor can the consent[479] or other conduct[480] not

[476] Thus, if a railroad company provide a bell and whistle of given character, to be used in a prescribed way at crossings, the company has performed its duty when it has furnished and used such bell and whistle, and is not liable, although the signal so given may not be heard or heeded by a person crossing the track. New York, L. E. & W. R. Co. v. Leaman, 54 N. J. Law, 202, 23 Atl. 691. Cf. Calhoun v. Gulf, C. & S. F. R. Co., 84 Tex. 226, 19 S. W. 341.

[477] The giving of the statutory signals is not always the full measure of the railroad company's duty to those who may be passing over a crossing. Atchison, T. & S. F. R. Co. v. Hague, 54 Kan. 284, 38 Pac. 257. Therefore, even if defendant have complied with statutory requirements that his fences should prevent the escape of his domestic animals, he may still be liable for breach of common-law duty to maintain the fence required by statute in a reasonably safe condition, and unlikely to injure his neighbor's animals while they are on his neighbor's land. Durgin v. Kennett (N. H.) 29 Atl. 414, citing Firth v. Iron Co., 3 C. P. Div. 254; Alabama & V. R. Co. v. Philips, 70 Miss. 14, 11 South. 602; Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280; McGill v. Pittsburgh & W. Ry. Co., 152 Pa. St. 331, 25 Atl. 540; McDonald v. International & G. N. Ry. Co., 86 Tex. 1, 22 S. W. 939.

[478] An employé in a factory cannot waive the protection afforded by Laws 1892, c. 673, requiring the machinery to be properly guarded. Simpson v. New York Rubber Co., 80 Hun, 416, 30 N. Y. Supp. 339. See Billings v. Breinig, 45 Mich. 65, 7 N. W. 722, where it is customary to violate duty to exhibit lights on boats moving at night. That ordinance regulating speed is absolute, is no defense. Cleveland, C., C. & I. R. Co. v. Harrington, 131 Ind. 426, 30 N. E. 37.

[479] Knott v. Wagner, 16 Lea, 481, 1 S. W. 155; ante, p 203, "Consent," note 429; Durant v. Lexington Coal Min. Co., 97 Mo. 62, 10 S. W. 484 (here, however, the question was willful violation); Hines v. New York Cent. & H. R. R. Co., 78 Hun, 239, 28 N. Y. Supp. 829. Assumption of risk by plaintiff will not excuse breach of positive statutory duty. Thomas v. Quartermaine, 56 Law J. Q. B. 340. And see Baddeley v. Granville, 19 Q. B. Div. 423, 56 Law J. Q. B. 501.

[480] A railway company is not relieved of liability for cattle killed by its trains from its failure to fence its right of way because the owner of the cattle, whose land adjoins the railroad, maintains a fence between his pasture land and the right of way. San Antonio & A. P. Ry. Co. v. Peterson (Tex. Civ. App.) 27 S. W. 969.

amounting to contributory negligence [481] of one individual be construed into a license justifying such violation of law. An employé has, however, been held to assume the risk incident to known violation of statutory requirements of precaution for his benefit.[482] A person to whom the statutory duty is owed has a right to assume, in the absence of contrary knowledge, that such duty has been performed.[483]

Question for Jury.

On the one hand, the violation of a duty prescribed by a statute or ordinance is regarded as negligence per se, and as entitling an injured party to recover, if no other consideration (as his own negligence, or failure to connect as cause) prevents.[484] On the other hand,

[481] One who, knowing of an obstruction on a street, negligently falls over the same, cannot predicate her right to recover on an ordinance requiring a light to be placed on the obstruction. Davis v. California Street Cable R. Co., 105 Cal. 131, 38 Pac. 647.

[482] Post, p. 1013, "Master and Servant."

[483] A person skating on a river is not negligent in assuming that guards had been placed, as required by Pen. Code, § 429, wherever the ice had been cut. Sickles v. New Jersey Ice Co., 80 Hun, 213, 30 N. Y. Supp. 10. The traveler has the right to assume that statutory signals will be given. Fusili v. Missouri Pac. R. Co., 45 Mo. App. 535; Crumpley v. Hannibal & St. J. R. Co., 111 Mo. 152, 19 S. W. 820. Cf. Richmond v. Chicago & W. M. R. Co., 87 Mich. 374, 49 N. W. 621; Duncan v. Missouri Pac. R. Co., 46 Mo. App. 198. But failure to give signals is not actionable, if defendant actually knew of the approach of engine or train on a track. Barber v. Richmond & D. R. Co., 34 S. C. 444, 13 S. E. 650.

[484] Thomp. Neg. 419, 1232; Correll v. Burlington, C. R. & N. Ry. Co., 38 Iowa, 120; Shear. & R. Neg. §§ 484, 485; Schlereth v. Missouri Pac. Ry. Co., 115 Mo. 87, 21 S. W. 1110; Platte & D. Canal & Milling Co. v. Dowell, 17 Colo. 376, 30 Pac. 68; Pennsylvania Co. v. Hensil, 70 Ind. 569 (failure to keep flagman at crossing). So it is negligence per se to run a train of cars faster than the ordinance allows. Pennsylvania Co. v. Horton, 132 Ind. 189, 31 N. E. 45; Dahlstrom v. St. Louis, I. M. & S. R. Co., 108 Mo. 525, 18 S. W. 919. In Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543, in an opinion of simplicity and clearness, Mitchell, J., held that it was negligence per se in a druggist to fail to label a poison as required by statute. But it is otherwise if he fully explained the dangerous character of the drug to plaintiff. Wohlfart v. Beckert, 92 N. Y. 490. In Siemers v. Eisen, 54 Cal. 418, proof that plaintiff was injured by a runaway horse, left unfastened in the street in violation of an ordinance, fully established defendant's negligence. Et vide Bott v. Pratt, 33 Minn. 323, 23 N. W. 237. Cf. Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488. Blowing a whistle in violation of statute is

there are many authorities which regard such violation not as negligence per se, or as matter of law, but merely as evidence of negligence to be considered in connection with all the circumstances of the case.[485] The statute itself may determine this question.[486] The

negligence per se. Dugan v. St. Paul & D. R. Co., 40 Minn. 545, 42 N. W. 538. Cf. Northern Pac. R. Co. v. Sullivan, 3 C. C. A. 506, 53 F. 219. Et vide Evison v. Chicago, St. P., M. & O. R. Co., 45 Minn. 370, 48 N. W. 6. It is negligence at law to fail to give statutory signals at a street crossing only when the damage is done to persons or animals endeavoring or intending to cross the track upon street or highway. Maney v. Chicago, B. & Q. R. Co., 49 Ill. App. 105. Cf. Atchison, T. & S. F. R. Co. v. Elder, 149 Ill. 173, 36 N. E. 565. Plaintiff may recover damages occasioned by the falling of a sign (in an extraordinary gale) which had been suspended by defendant over a street, contrary to the city ordinance, although defendant was not otherwise negligent. Salisbury v. Herschenroder, 106 Mass. 458. In Lane v. Atlantic Works, 111 Mass. 136, it was held that, where injury was consequent on a truck standing in the streets, the jury may consider that such standing was forbidden by the ordinance. Steele v. Burkhardt, 104 Mass. 59. In Hanlon v. South Boston H. R. Co., 129 Mass. 310, driving at a rate of speed prohibited by ordinance was held to be evidence, but not conclusive evidence, of negligence on the part of its owner. That fact alone, however, it was said, would entitle a plaintiff without fault to recover. Et vide Hall v. Ripley, 119 Mass. 135; Damon v. Scituate, Id. 66. In Hyde Park v. Gay, 120 Mass. 589, running a train in violation of the Sunday law was held to be actionable, if it directly produced damage to plaintiff, without further proof of negligence. Et vide Newcomb v. Boston Protective Department, 146 Mass. 596, 16 N. E. 555; Parker v. Barnard, 135 Mass. 116; Hanlon v. South Boston H. R. Co., 129 Mass. 310. Where a powder magazine is maintained in city limits in violation of city ordinance, and explodes, the owner is liable for injury caused to stranger by explosion, from whatever cause resulting. Here the magazine was regarded as a nuisance. Hazard Powder Co. v. Volger, 7 C. C. A. 136, 58 Fed. 152. So, as to blasting in disregard to city ordinance, see Brannock v. Elmore, 114 Mo. 55, 21 S. W. 451.

[485] Vandewater v. New York & N. E. R. Co., 135 N. Y. 583, 32 N. E. 636; Cook v. Johnston, 58 Mich. 437, 25 N. W. 388 (where it was held not to be negligence per se to put ashes into a wooden barrel, in violation of an ordinance). So, in Rainey v. New York Cent. & H. R. R. Co., 68 Hun, 495, 23 N. Y. Supp. 80, failure of defendant to operate its gates at night is evidence bearing upon the question of negligence. In Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488, proof of violation of ordinance prohibiting the leaving of horse untied or unattended upon the street does not establish negligence per se. It is competent, but not conclusive, evidence to be submitted to the jury. Et vide

[486] See note 486 on following page.

statute may, for example, prescribe the duty of insuring safety; as to construct a boom so as to keep logs safely. Upon proof of failure to keep logs safely, liability is shown, although there is no evidence

Moore v. Gadsden, 93 N. Y. 12. In Bott v. Pratt, 33 Minn. 323-333, 23 N. W. 237, this case is said to be of not much value as an authority. In McRickard v. Flint, 114 N. Y. 222, 21 N. E. 153, omission of an owner of a building to comply with statutory requirements for protecting elevator openings is prima facie evidence of negligence. Et vide Rainey v. New York Cent. & H. R. R. Co., 68 Hun, 495, 23 N. Y. Supp. 80; Massoth v. Delaware & H. Canal Co., 64 N. Y. 524; Brown v. Buffalo & S. L. R. R. Co., 22 N. Y. 191-198; McGrath v. New York Cent. & H. R. R. Co., 63 N. Y. 522; Allis v. Leonard, 58 N. Y. 288; Jetter v. New York & H. R. Co., 2 Abb. Dec. 458; Knupfle v. Knickerbocker Ice Co., 84 N. Y. 491; Beisiegel v. New York Cent. R. Co., 14 Abb. Prac. (N. S.) 29; Devlin v. Gallagher, 6 Daly (N. Y.) 494; Wasner v. Delaware, L. & W. R. Co., 80 N. Y. 212. The same rule is followed in Nebraska. Burlington & M. R. R. Co. v. Wendt, 12 Neb. 76, 10 N. W. 456; Union Pac. Ry. Co. v. Rassmussen, 25 Neb. 810, 41 N. W. 778. In Galveston, H. & S. A. R. Co. v. Walter (Tex. Civ. App.) 25 S. W. 163, it was held that failure to keep a fence in good repair, where defendant could have discovered the defect by the exercise of ordinary care, was sufficient, and that plaintiff need show no further negligence on the part of defendant. Cf. Atchison, T. & S. F. R. Co. v. Elder, 149 Ill. 173, 36 N. E. 565. One doing a lawful act in a manner forbidden by law is not absolutely liable to an injury caused to third person by the act. Such violation of law is not conclusive evidence of negligence. Lockwood v. Chicago & N. W. Ry. Co., 55 Wis. 50, 12 N. W. 401; Spofford v. Harlow, 3 Allen, 176; Kidder v. Dunstable, 11 Gray, 342; Gilmore v. Ross, 72 Me. 194; Larrabee v. Sewall, 66 Me. 376; Baker v. Portland, 58 Me. 199; Burbank v. Bethel Steam-Mill Co., 75 Me. 373; Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 4 Sup. Ct. 369; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679; Northern Pac. R. Co. v. Sullivan, 3 C. C. A. 506, 53 Fed. 219; Meek v. Pennsylvania R. Co., 38 Ohio St. 632.

[486] As where failure to free track from combustibles is made prima facie evidence of negligence, Northern Pac. R. Co. v. Lewis, 2 C. C. A. 446, 51 Fed. 658. So right of action sometimes expressly depends upon willful violation of act. Litchfield Coal Co. v. Taylor, 81 Ill. 590; Durant v. Lexington Coal Min. Co., 97 Mo. 484. Gross contributory negligence on plaintiff's part is no defense to statutory negligence on defendant's part as to customary signals. Louisville & N. R. Co. v. Howard, 90 Tenn. 144, 19 S. W. 116; Wall v. Des Moines & N. W. Ry. Co. (Iowa) 56 N. W. 436; Memphis & C. R. Co. v. Davis (Ala.) 14 South. 643; Hodgins v. Minneapolis, St. P. & S. Ste. M. R. Co., 3 N. D. 382, 56 N. W. 139; Straub v. Eddy, 47 Mo. App. 189; Cleveland, C., C. & St. L. Ry. Co. v. Abney, 43 Ill. App. 92.

of negligence.[487] A law affecting railroads, making every railroad company liable for "damages inflicted upon the persons of passengers, while being transported over its road," except where the injury arises from the criminal negligence of the person injured, or "when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice," has been held constitutional.[488]

Even in that class of cases which hold a breach of statutory duty to be negligence per se, in actual practice, the question of negligence is still submitted to the jury in the great majority of instances. The jury must ordinarily determine whether there has been a breach of such duty in fact. According to the better opinion, an ordinance and a statute stand on essentially the same basis in this respect.[489] Thus, where there is a complete failure and omission to comply with the requirements of law, there may be negligence per se; but if there is an attempt at such compliance which is

[487] Brown v. Susquehanna Boom Co., 109 Pa. St. 57, 1 Atl. 156. And see West Branch Boom Co. v. Pennsylvania Joint Lumber & Land Co., 121 Pa. St. 143, 15 Atl. 509. But this has been held to be a question for the jury. Turner v. Boston & M. R. Co., 178 Mass. 261, 33 N. E. 520.

[488] Union Pac. R. Co. v. Porter, 38 Neb. 226, 56 N. W. 808. But Gen. St. c. 93, §§ 13, 14, as amended by Sess. Laws 1895, p. 304, and Sess. Laws 1891, p. 281 (known as "Railroad Stock-Killing Acts"), making railroad companies absolutely liable for stock killed, and arbitrarily fixing the amount to be paid, contravene the constitutional provision for equal protection and due process of law. (Rio Grande Western R. Co. v. Vaughn, 3 Colo. App. 465, 34 Pac. 264, followed.) Rio Grande Western R. Co. v. Chamberlin, 4 Colo. App. 149, 34 Pac. 1113. But Gen. St. S. C. § 1511, making every railroad company liable for the property of persons injured from fire from its locomotives, but allowing it to insure any such property, is not a taking of property from a railroad without due process of law, or a denial of equal protection, within Const. U. S. Amend. 14. McCandless v. Richmond & D. R. Co., 38 S. C. 103, 16 S. E. 429; Union Pac. Ry. Co. v. De Busk, 12 Colo. 294, 20 Pac. 752; Mathews v. St. Louis & S. F. R. Co. (Mo. Sup.) 24 S. W. 591; Campbell v. Missouri Pac. R. Co., 121 Mo. 340, 25 S. W. 936.

[489] Ante, p. 99. In Northern Pac. R. Co. v. Sullivan, 3 C. C. A. 506, 53 Fed. 219, it is said that there are three classes of cases: (1) The nonobservance of a city ordinance is not any evidence whatever of negligence. (2) It is evidence of negligence to go to the jury. (3) It is conclusive evidence of negligence. Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679. "Perhaps the better and more generally accepted rule [relative to the effect

imperfect originally, or if there be carelessness in the subsequent inspection or maintenance of statutory precautions, and there is dispute with respect to the facts on these points, the decision of such dispute is for the jury. Thus, the jury is called on to pass upon actual observance and other considerations of fact as to statutory requirements of signals,[490] telltales,[491] fences and cattle guards,[492] and

of the nonobservance of an ordinance] is that such an act on the part of the railroad company is always to be considered by the jury as, at least, a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence." Whelan v. New York, L. E. & W. R. Co., 38 Fed. 15; Clason v. City of Milwaukee, 30 Wis. 316; Baltimore & O. R. Co. v. State, 29 Md. 252; Flynn v. Canton Co., 40 Md. 312 (a leading case); Baltimore City Passenger Ry. Co. v. McDonnell, 43 Md. 534; Baltimore & O. Ry. Co. v. Mali (Md.) 5 Atl. 87; Owings v. Jones, 9 Md. 108.

[490] McCormick v. Kansas City, Ft. S. & M. Ry. Co., 50 Mo. App. 109; Lee v. Chicago, R. I. & P. Ry. Co., 80 Iowa, 172, 45 N. W. 739; Horn v. Baltimore & O. R. Co., 4 C. C. A. 346, 54 Fed. 301; Lees v. Philadelphia & R. R. Co., 154 Pa. St. 56, 25 Atl. 1041; Palmer v. St. Paul & D. R. Co., 38 Minn. 415, 38 N. W. 100; McNamara v. New York Cent. & H. R. R. Co., 136 N. Y. 650, 32 N. E. 765; Louisville, N. O. & T. Ry. Co. v. French, 69 Miss. 121, 12 South. 338; Alexander v. Richmond & D. R. Co., 112 N. C. 720, 16 S. E. 896; Hager v. Southern Pac. R. Co., 98 Cal. 309, 33 Pac. 119; Thayer v. Flint & P. M. R. Co., 93 Mich. 150, 53 N. W. 216; Hubbard v. Boston & A. R. Co., 159 Mass. 320, 34 N. E. 459; Vallance v. Boston & A. R. Co., 55 Fed. 364; Newhard v. Pennsylvania R. Co., 153 Pa. St. 417, 26 Atl. 105; Bennett v. New York Cent. & H. R. R. Co., 133 N. Y. 563, 30 N. E. 1149.

[491] Hines v. New York Cent. & H. R. R. Co., 78 Hun, 239, 28 N. Y. Supp. 829. But see Neff v. New York Cent. & H. R. R. Co., 80 Hun, 394, 30 N. Y. Supp. 323.

[492] Parker v. Lake Shore & M. S. Ry. Co., 93 Mich. 607, 53 N. W. 834; Jacksonville, etc., Ry. Co. v. Prior, 34 Fla. 271, 15 South. 760; Manwell v. Burlington, C. R. & N. Ry. Co. (Iowa) 57 N. W. 441; New York, C. & St. L. R. Co. v. Zumbaugh (Ind. App.) 38 N. E. 531; Wines v. Rio Grande W. Ry. Co., 9 Utah, 228, 33 Pac. 1042; Schuyler v. Fitchburg R. Co., 65 Hun, 622, 20 N. Y. Supp. 287; Gulf, C. & S. F. Ry. Co. v. Rowland (Tex. Civ. App.) 23 S. W. 421; Clarke v. Ohio River R. Co., 39 W. Va. 732, 20 S. E. 696; Chicago, B. & Q. R. Co. v. Dennell, 48 Ill. App. 251; Moeckley v. Chicago & N. W. Ry. Co. (Iowa) 61 N. W. 227; Fremont, E. & M. V. R. Co. v. Pounder, 36 Neb. 247, 54 N. W. 509; Toledo, St. L. & K. C. R. Co. v. Fly, 8 Ind. App. 602, 36 N. E. 215; Toledo, St. L. & K. C. R. Co. v. Cupp, 9 Ind. App. 244, 36 N. E. 445; Chisholm v. Northern Pac. R. Co., 53 Minn. 122, 54 N. W. 1061; Kennedy v. Chicago & N. W. Ry. Co. (Iowa) 57 N. W. 862; Ham v. Newburgh, D. & C. R. Co., 69 Hun, 137, 23 N. Y. Supp. 197; Wabash R. Co. v. Ferris, 6 Ind.

the rate of speed at which a train [493] or vehicle [494] is moving, and the like. Moreover, a breach of statutory duty cannot be the basis of recovery, unless it is proximately connected as the cause of the wrong; [495] and the jury determines the question of connection as cause.[496] Such questions are also carried before a jury by the consideration of contributory negligence, or assumption of risk on behalf of the defendant.[497]

Connection as Cause of Harm.

The mere fact that one is a wrongdoer, we have seen, does not disqualify him to recover in tort, unless his wrong is connected as a

App. 30, 32 N. E. 112; Taft v. New York, P. & B. R. Co., 157 Mass. 297, 32 N. E. 168; Peet v. Chicago, M. & St. P. Ry. Co., 88 Iowa, 520, 55 N. W. 508.

[493] Running a train in a populous city at a rate of speed greatly in excess of the limit fixed by ordinance may be such gross and wanton negligence as to attach liability, despite plaintiff's contributory negligence. Louisville & N. R. Co. v. Webb, 97 Ala. 308, 12 South. 374; Gratiot v. Missouri Pac. R. Co., 116 Mo. 450, 21 S. W. 1094. The construction of a statute is for the court. Wilson v. New York, N. H. & H. R. Co. (R. I.) 29 Atl. 300; East St. Louis Connecting Ry. Co. v. O'Hara, 150 Ill. 580, 37 N. E. 917, affirming 49 Ill. App. 282; Jenson v. Chicago, St. P., M. & O. Ry. Co., 86 Wis. 589, 57 N. W. 359; Driscoll v. Market St. Cable R. Co., 97 Cal. 553, 32 Pac. 591. So the reasonableness of an ordinance regulating speed of street cars is for the court, unless particular facts are disputed, and such facts, in the opinion of the court, are material. Metropolitan St. R. Co. v. Johnson, 90 Ga. 500, 16 S. E. 49. Cf. Central Railroad & Banking Co. v. Brunswick & W. R. Co., 87 Ga. 386, 13 S. E. 520.

[494] Lind v. Beck, 37 Ill. App. 430.

[495] Post, p. 941.

[496] Billings v. Breinig, 45 Mich. 65, 7 N. W. 722; Louisville, N. A. & C. Ry. Co. v. Ousler (Ind. App.) 36 N. E. 290; ante, c. 1.

[497] Sandifer v. Lynn, 52 Mo. App. 553; Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 South. 51; Maxey v. Missouri Pac. R. Co., 113 Mo. 1, 20 S. W. 654; Hansen v. Chicago, M. & St. P. Ry. Co., 83 Wis. 631, 53 N. W. 909; Hector v. Boston Electric Light Co., 161 Mass. 558, 37 N. E. 773; Illingsworth v. Boston Electric Light Co., 161 Mass. 583, 37 N. E. 778; Texas & P. R. Co. v. Bryant, 6 C. C. A. 138, 56 Fed. 799; Cleveland, C., C. & I. R. Co. v. Elliott, 28 Ohio, 340; Wilcox v. Rome & W. R. Co., 39 N. Y. 358 (reviewing New York cases); Galena & C. Union R. Co. v. Dill, 22 Ill. 265. See Artz v. Chicago, R. I. & P. R. Co., 34 Iowa, 154; Spencer v. Illinois Cent. R. Co., 29 Iowa, 55; Lee v. Chicago, R. I. & P. Ry. Co., 80 Iowa, 172, 45 N. W. 739; Chicago, B. & Q. R. Co. v. Harwood, 80 Ill. 88; Ernst v. Hudson R. R. Co.,

cause of the damage complained of.[498] This logical application of the general doctrine of cause is extended to the converse proposition. A defendant, although he may have been violating a statutory duty owed to the plaintiff at the time of the alleged wrong, is not liable to him in damages, unless such violation caused the damage. Thus, city ordinances requiring elevators to be built and protected in a certain way, and to be periodically inspected, do not create a civil liability against a person who violates them towards one who is injured by an accident that was in no way caused by such violation.[499]

39 N. Y. 61; Gorton v. Erie R. Co., 45 N. Y. 660; Korrady v. Lake Shore & M. S. Ry. Co., 131 Ind. 261, 29 N. E. 1069; Bellefontaine Ry. Co. v. Hunter, 33 Ind. 335; Leavenworth, L. & G. R. Co. v. Rice, 10 Kan. 426; Baxter v. Troy & B. R. Co., 41 N. Y. 502; Cadwallader v. Louisville, N. A. & C. Ry. Co., 128 Ind. 518, 521, 27 N. E. 161. When a boy only nine years old, while walking on a railroad track, which is usually so used by the people of that neighborhood, is run over by a train running at a rate of speed prohibited by ordinance, whether he was guilty of contributory negligence is for the jury. Illinois Cent. R. Co. v. Varnadore (Miss.) 15 South. 933.

[498] Where animals are injured because of a railroad company's failure to fence its road as required by law, the fact that their owner permitted them to run at large, contrary to law, does not, as between him and the company, necessarily constitute contributory negligence. Erickson v. Duluth & I. R. R. Co. (Minn.) 58 N. W. 822; Austin & N. W. R. Co. v. Saunders (Tex. Civ. App.) 26 S. W. 128.

[499] Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182; Hayes v. Railway Co., 111 U. S. 228, 240, 4 Sup. Ct. 369; Union Pac. R. Co. v. McDonald, 152 U. S. 262–283, 14 Sup. Ct. 619. And see cases collected in 10 Am. & Eng. Enc. Law, 423, note 1. But see Railroad Co. v. Walker, 11 Heisk. (Tenn.) 383; Hill v. Louisville & N. R. Co., 9 Heisk. (Tenn.) 823. As breach of municipal ordinance as to regulation of fire, Briggs v. New York Cent. & H. R. R. Co., 72 N. Y. 26. Failure to build, protect, and inspect elevators creates no liability in favor of plaintiff, whose injury was in no way caused by such violation. Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182. Failure to give statutory signal at crossing: Leavitt v. Railroad Co., 5 Ind. App. 513, 31 N. E. 860, and 32 N. E. 866; Horn v. Baltimore & O. R. Co., 4 C. C. A. 346, 54 Fed. 301; Chicago, B. & Q. R. Co. v. Wells, 42 Ill. App. 26; McDonald v. Railway Co., 86 Tex. 1, 22 S. W. 939; Cleveland, C., C. & St. L. Ry. Co. v. Richey, 43 Ill. App. 247; Smith v. Railroad Co., 47 Mo. App. 546. Compare Galveston, H. & S. A. Ry. Co. v. Balkam (Tex. Civ. App.) 20 S. W. 860. Killing of animals by trains running at unlawful rate of speed will be presumed to be the result of defendant's negligence, in the absence of contrary evidence. Cleveland, C., C. & St. L. Ry. Co. v. Ahrens, 42 Ill. App. 434. But see St. Louis

264. In order that liability may attach for negligent conduct, two steps must be taken: Facts must be shown sufficient to justify an inference of negligence, and that inference must be drawn. Ordinarily, dispute in testimony as to fact, and drawing the inference of negligence therefrom, is for the jury; but both matters may be determined by the court as questions of law.

Province of Court and Jury.

"The jury are not judges of law in any case, civil or criminal. The determination of the law applicable to the cause on trial is no part of their right or duty." [500] The court determines the admissibility of evidence, passes upon the law, and instructs the jury with reference thereto; and the jury applies the law to the facts in evidence.[501] It is therefore the normal function of the jury both to find whether the facts in evidence are sufficient to justify the inference and to draw or deny the inference of actionable negligence, and to determine the extent of the recovery. In many cases, however, courts pass not only upon the law, but also upon the facts, and either instruct the jury as to what their verdict shall be or take the case away from them.[502]

& S. F. Ry. Co. v. Sageley, 56 Ark. 549, 20 S. W. 413; Georgia Railroad & Banking Co. v. Parks, 91 Ga. 71, 16 S. E. 266; Georgia Railroad & Banking Co. v. Middlebrooks, 91 Ga. 76, 16 S. E. 989; Birmingham M. R. Co. v. Harris, 98 Ala. 326, 13 South. 377; Vallance v. Boston & A. R. Co., 55 Fed. 364. Cases as to violation of statutory duty as proximate cause of damage will be found collected in 16 Am. & Eng. Enc. Law, p. 423, note 1.

[500] Com. v. McManus (Pa. Sup.) 22 Atl. 761. See 30 Am. Law Reg. 731, collecting cases in great number. There is no respectable adverse English decision, and only one single well-considered American case, State v. Croteau, 23 Vt. 14, in which the court was divided. A ballad was, however, in vogue at the time of the Fox libel act (1792), "For twelve honest men have decided the cause, who are judges alike of the facts and the laws." State v. Croteau, 30 Am. Law Reg. 745. And this anomaly in libel is still recognized. Ante, p. 500, "Defamation."

[501] Sears v. Chicago, B. & Q. R. Co., 43 Neb. 720, 62 N. W. 68, and cases collected.

[502] As applied to negligence, generally, see Cope v. Hampton Co. (S. C.) 19 S. E. 1018; Wabash, St. L. & P. Ry. Co. v. Locke, 112 Ind. 404, 14 N. E. 391; Evans v. Adams Exp. Co., 122 Ind. 362, 23 N. E. 1039; Directors, etc., v.

Same—Analysis of Functions.

The confused subject of when negligence is a question of law, and when of fact, may, perhaps, be clarified by analyzing what matters may properly be for the court, and what for the jury.[503] Three different elements essential to the plaintiff's recovery may be either for the court or for the jury, as circumstances may determine: (a) Facts showing the existence of a duty owed by the defendant to the plaintiff; (b) the violation of that duty in fact by the defendant; (c) damages to the plaintiff, conforming to legal standards.

The facts to be proved may or may not show the duty owed to the plaintiff by the defendant. With respect to the violation of a common-law duty, the same proof usually shows the duty and its violation. So, in cases to which res ipsa loquitur applies, and, a fortiori, where an instrumentality is so dangerous that its ownership or custody attaches responsibility, despite the exercise of greatest diligence, the inference of duty is a matter of law. And, generally, where undisputed facts show negligence which is the primary, substantial cause of the injury complained of, and there is

Jackson, L. R. 3 H. L. 193; Ohio & M. R. W. Co. v. Collarn, 73 Ind. 261; Baltimore & O. & C. R. Co. v. Walborn, 127 Ind. 142, 26 N. E. 207; Cincinnati, H. & I. R. Co. v. Butler, 103 Ind. 31, 2 N. E. 138; Chicago & E. I. Ry. Co. v. Hedges, 118 Ind. 5, 20 N. E. 530; Indiana, B. & W. Ry. Co. v. Hammock, 113 Ind. 1, 14 N. E. 737; Schofield v. Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125; Bellefontaine Ry. Co. v. Hunter, 33 Ind. 335; Indiana, B. & W. Ry. Co. v. Greene, 106 Ind. 279, 6 N. E. 603. However, it is error to state to the jury a group of circumstances as to which there has been evidence on the trial, and instruct that such facts amount to negligence per se; the question of negligence being for the jury. Chicago, B. & Q. R. Co. v. Oleson, 40 Neb. 889, 59 N. W. 354. And it is said in Clerk & Lindsell on Torts (357-391) that the common practice is to speak of certain classes of acts as negligent acts, and not merely as evidence of negligence; but it is apprehended that negligence can never be predicated of an act as matter of law, the character of the act being in each case a question for the jury. Even though the inference of want of due care be irresistible, still the judge cannot withdraw the question of negligence from the jury, and, if the jury choose perversely to find that there was no negligence, the only remedy is, apparently, a new trial.

[503] See article on "Law and Fact in Jury Trial," by J. B. Thayer, in 4 Harv. Law Rev. 147. For illustration of a prudent man's conduct, as defined by a judge, see Cox v. Burbidge, 13 C. B. (N. S.) 430; Dixon v. Bell, 5 Maule & S. 198.

no just ground for imputing contributory negligence to the plaintiff, it is not error to instruct the jury that the defendant is guilty of negligence, and that the disputed issue is the question of damages.[505]

On the other hand, there may be conduct inducing harm (i. e. violation and damage), but, as a matter of law, no duty;[506] as in the clearest cases of an independent contractor. This is also true in cases of damages incident to authorized act. And, again, the facts may be undisputed, and the jury be called upon to determine whether the conduct was negligent.[507] But with respect to contract duty, proof of contract, for example, with a common carrier of goods, is distinct from proof of its violation, for example, by destruction of the goods. Here the court finds the duty as a matter of law, and, if there is dispute as to facts, the violation and damage may be left to the jury. If there is no dispute as to the facts, because the plaintiff wholly fails to sufficiently prove a contract or dam-

[505] Union Pac. R. Co. v. McDonnald, 42 Fed. 579, affirmed in 152 U. S. 262, 14 Sup. Ct. 619. And see opinion of Macfarlane, J., in Bluedorn v. Missouri Pac. Ry. Co. (Mo. Sup.) 24 S. W. 57-60.

[506] When the facts are clearly settled, and the course which common prudence dictated can be clearly discerned, the courts should decide the question as a matter of law. Shear. & R. Neg. § 56, citing Beislegal v. Railroad Co., 40 N. Y. 9; Stubley v. Railroad Co., L. R. 1 Exch. 13; Crafter v. Metropolitan R. Co., L. R. 1 C. P. 300. And see Bev. Neg. 11; Hathaway v. Railroad Co., 29 Fed. 489; Abbett v. Railway Co., 30 Minn. 482, 16 N. W. 266; Reading & C. R. Co. v. Ritchie, 102 Pa. St. 425; Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99. Thus, it is negligence which will justify the withdrawal of a case from the jury for a licensee to walk on or near a track in a railroad yard when, in the exercise of due care, it is admitted that he could have walked safely by the side of the track. Tucker v. Baltimore & O. R. Co., 8 C. C. A. 416, 59 Fed. 968. And this is true although the defendant introduced no evidence. Kane v. Railway Co., 128 U. S. 91, 9 Sup. Ct. 16; Mitchell v. Railroad Co., 146 U. S. 513, 13 Sup. Ct. 259; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569; Central Transp. Co. v. Pullman's Palace-Car Co., 139 U. S. 24, 11 Sup. Ct. 478. Cf. Shaw v. Philadelphia, 159 Pa. St. 487, where it was left to the jury to determine the amount of damages caused by plaintiff's being thrown from a wagon because of dangerous highway, the testimony being such "as to leave no doubt as to the alleged negligence of the defendant."

[507] Vinton v. Schwab, 32 Vt. 612; Ohio & M. R. W. Co. v. Collarn, 73 Ind. 261.

age, the court may withdraw the case from the jury; or, if the facts be sufficiently proved, a recovery may be directed, and the amount of the judgment left to the jury. And so, with respect to a statutory duty, in many cases only violation and damage need be shown, inasmuch as the court judicially knows all general laws, including the particular statute by which a duty is created. But especially where the cause of action accrued under the statute peculiar to one state, and the suit is brought under the different statutes of another state, then it may be necessary both to plead and prove such statutes. On proof of the violation of such duty, sometimes the court will instruct the jury to draw a conclusive presumption, sometimes a prima facie presumption, of actionable negligence, and sometimes it will leave such violation to the jury, to be considered, in connection with other circumstances, in determining the defendant's liability.

And, finally, proving damages is, strictly speaking, an essential part of the plaintiff's duty, although not the whole. He cannot, however, show actionable negligence without proof of damage. Courts may leave the extent of his recovery to the jury, but they will determine what damages are legal. Thus, they will exclude remote damages, and will determine, in some cases, what damages are remote. They will also find as a matter of law that damages of other descriptions are too trifling, uncertain, speculative, or otherwise objectionable in their character, to become the basis of responsibility.

265. The burden of proof is on the plaintiff to show the negligence of the defendant, except—

EXCEPTIONS—(a) Where proof of some contract or undertaking, and damage, makes out a prima facie case;

(b) Where the thing is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care; and

(c) Where this rule is changed by statute.

There is logically applied to the law of negligence the ordinary rule governing the production of evidence, that the obligation of proving the fact lies upon the party who substantially asserts the affirmative of the issue.[508] "Where the evidence is equally consistent with either view,—the existence or nonexistence of negligence,—it is not competent for the judge to leave the matter to the jury." [509] Indeed, the law, so far from not presuming negligence without evidence, recognizes a presumption that at least ordinary care was used.[510] The plaintiff must establish his case by a preponderance of evidence; [511] but the rule of criminal law does not apply, and he is not bound to establish it beyond a reasonable doubt,[512] or to the satisfaction of the jury.[513] The mere happening of an accident is not sufficient evidence of negligence to be left to the jury. The plaintiff must show some affirmative evidence of the defendant's negligence.[514] Thus, no inference of negligence follows from the

[508] 1 Greenl. Ev. § 74. In Ohlweiler v. Lohmann, 85 Wis. 75, 59 N. W. 678, the burden was on plaintiff as to one proposition, and on defendant as to another. Futher, see Hayes v. Michigan Cent. R. Co., 111 U. S. 228, 4 Sup. Ct. 369; Rosenfield v. Arrol, 44 Minn. 395, 46 N. W. 768; Searles v. Manhattan Ry. Co., 101 N. Y. 661, 5 N. E. 66; Welch v. Jugenheimer, 56 Iowa, 11, 8 N. W. 673; Allen v. Willard, 57 Pa. St. 374; Dowell v. Guthrie, 99 Mo. 653, 12 S. W. 900.

[509] Williams, J., in Cotton v. Wood, 8 C. B. (N. S.) 568. And see Hammack v. White, 11 C. B. (N. S.) 588, 31 Law J. C. P. 129; Marfell v. South Wales R. Co., 8 C. B. (N. S.) 525.

[510] Weiss v. Pennsylvania R. Co., 79 Pa. St. 387, 390; Lansing v. Stone, 37 Barb. (N. Y.) 15; Lyndsay v. Connecticut & P. R. Co., 27 Vt. 643; Brown v. Congress & B. St. Ry. Co., 49 Mich. 153, 13 N. W. 494; Allen v. Willard, 57 Pa. St. 374. And see Watson v. Bauer, 4 Abb. Prac. (N. S.) 273; McCully v. Clarke, 40 Pa. St. 399.

[511] Daniel v. Metropolitan R. Co., L. R. 3 C. P. 216, 591, affirmed in Williams v. Great Western R. Co., L. R. 9 Exch. 157; Philadelphia, W. & B. R. Co. v. Stibbing, 62 Md. 504; Hayes v. Michigan Cent. R. Co., 111 U. S. 228–241, 4 Sup. Ct. 369. And see Crandell v. Goodrich Transp. Co., 16 Fed. 75; Seybolt v. New York, L. E. & W. R. Co., 95 N. Y. 562.

[512] Whitney v. Clifford, 57 Wis. 156, 14 N. W. 927; Welch v. Jugenheimer, 56 Iowa, 11, 8 N. W. 673; Ellis v. Buzzell, 60 Me. 209; Elliott v. Van Buren, 33 Mich. 49.

[513] Stratton v. Central City H. R. Co., 95 Ill. 25.

[514] Hammack v. White, 11 C. B. (N. S.) 588; Curtis v. Railway Co., 18 N. Y. 534; Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999. The plaintiff was bound

collision on a public way of two persons, or of a traveler and a vehicle, or of two vehicles.[515] It cannot be assumed, in the absence of all explanation, that a train ran over a man, more than that a man ran against a train.[516] The circumstances under which the mere happening of an accident is inaccurately said to give rise to a presumption of that negligence will be subsequently considered.[517]

The burden of proof imposes on the plaintiff the necessity of showing the defendant to have been the juridical cause of the damage.[518] Absolute proof is not necessary, but the matter must not

to introduce evidence from which the jury might properly infer that the accident was caused by the defendant's negligence, but was not required to point out the particular act or omission which caused the accident. Griffin v. Boston & A. R. Co., 148 Mass. 143, 19 N. E. 166; Stewart v. Ohio River R. Co. (W. Va.) 20 S. E. 922; Mooney v. Connecticut River Lumber Co., 154 Mass. 407, 28 N. E. 352; Mobile & O. R. Co. v. Godfrey, 155 Ill. 78, 39 N. E. 590.

[515] Hazel v. People's Pass. Ry. Co., 132 Pa. St. 96, 18 Atl. 1116; Piollet v. Simmers, 106 Pa. St. 95; North Side St. Ry. Co. v. Tippins (Tex. App.) 14 S. W. 1067; Broschart v. Tuttle, 59 Conn. 1, 21 Atl. 925; Cotton v. Wood, 8 C. B. (N. S.) 568, 29 Law J. C. P. 333.

[516] Lord Halsbury, in Wakelin v. London & S. W. R. Co., 12 App. Cas. 41, at page 45.

[517] Post, p. 938.

[518] Thus, where a section hand stepped aside to let a passenger train pass, and a stone fell out of ballast and injured him, he could not recover unless he could show what force threw the stone. Steffen v. Chicago & N. W. Ry. Co., 46 Wis. 259, 50 N. W. 348. Cause may be proved by opinion evidence based on personal knowledge; e. g. where fire started, Union Pac. R. Co. v. Gilland (Wyo.) 34 Pac. 953; or that embankment caused overflow, Gulf, C. & S. F. R. Co. v. Haskell, 4 Tex. Civ. App. 550, 23 S. W. 546; or that defect in roadbed caused accident, Horan v. Chicago, St. P., M. & O. Ry. Co. (Iowa) 56 N. W. 507. That an inexperienced fireman ran the engine which damaged plaintiff does not show connection as cause. Mexican Nat. Ry. Co. v. Mussette, 86 Tex. 708, 26 S. W. 1075. Evidence that, while plaintiff was attempting to uncouple cars in a yard, the cars moved suddenly, throwing him off, and injuring him, and that the railroad company had failed to promulgate and enforce rules in regard to its work, is insufficient to justify a recovery, in the absence of any evidence showing a causal connection between the accident and the failure to have rules. Rutledge v. Missouri Pac. Ry. Co., 110 Mo. 312, 19 S. W. 38. But where plaintiff's intestate, about half an hour after starting home, was found on the sidewalk at the end of a temporary bridge over an excavation in the sidewalk, and the hand rail at that end of the bridge was broken, and there is evidence that the bridge was

be left in equilibrio.[519] The proof may be so clear as to justify the court in directing the jury to find for the plaintiff,[520] or so insufficient as not to sustain a verdict.[521] Thus, the mere occurrence of an abcess a year after a fall does not sufficiently establish the connection of the defendant's negligence occasioning the fall as the cause of the injury complained of.[522] Ordinarily, connection as cause is for the jury.[523]

Contract or Undertaking.

The burden of proof of negligence, notwithstanding its negative character is on the party making the allegation of nonfeasance or negligence.[524] Thus, the burden of proof resting on the plaintiff

defective, it is sufficient to sustain a finding that intestate's death was caused by the defective condition of the bridge. Willdigg v. City of Brooklyn (Sup.) 30 N. Y. Supp. 75.

[519] Orth v. St. Paul, M. & M. Ry. Co., 47 Minn. 384, 50 N. W. 363. In an action for injuries causing death, where the evidence showed that deceased was found lying beside defendant's tracks, severely injured, soon after defendant's train, from which he had alighted, had passed, but failed to show more particularly how the injury was received, though it appeared that deceased, while on the train, was obviously ill, and in need of defendant's help to reach a place of safety, a judgment for defendant will not be disturbed. Brady v. Old Colony R. Co., 162 Mass. 408, 38 N. E. 710.

[520] Bluedorn v. Missouri Pac. Ry. Co. (Mo. Sup.) 24 S. W. 57.

[521] Mere theories as to possible cause of movement of an elevator, causing plaintiff's death, does not justify verdict for plaintiff. Murphy v. Hays, 68 Hun, 450, 23 N. Y. Supp. 70. The mere starting of a freight train, unexpectedly throwing a brakeman off a rear car, is not actionable unless it was done suddenly, violently, or negligently. Johnston v. Canadian Pac. Ry. Co., 50 Fed. 886. But see Northeastern R. Co. v. Barnett, 89 Ga. 399, 15 S. E. 492. Sudden and unexplained starting of "blood mill" out of usual manner of its operation is evidence of some want of care in its construction or condition. Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149. As to leakage of throttle valve, see Connors v. Durite Manuf'g Co., 156 Mass. 163, 30 N. E. 559. Unexpected backing up of engine may be negligence. Barnett v. Northeastern R. Co., 87 Ga. 199, 13 S. E. 646. And see Latremouille v. Bennington & R. Ry. Co., 63 Vt. 336, 22 Atl. 656; Wanamaker v. City of Rochester (Sup.) 17 N. Y. Supp. 321. As to sudden starting of machinery, see Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149; Connors v. Durite Manuf'g Co., 156 Mass. 163, 30 N. E. 559; Hudson v. Charleston, C. & C. Ry. Co., 55 Fed. 248.

[522] St. Louis & S. F. Ry. Co. v. Farr, 6 C. C. A. 211, 56 Fed. 994.

[523] Ante, c. 1.

[524] Crowley v. Page, 7 Car. & P. 789; Clark v. Spence, 10 Watts (Pa.) 335; Story, Bailm. §§ 454–457; 1 Greenl. Ev. § 81.

to show negligence on the part of a physician,[525] a lawyer or other professional man,[526] is not sustained by mere proof of contract, and of damage. With respect to carriers of passengers [528] and of freight, proof of contract, of the commencement of passage or transportation, and of damage, raises a presumption of negligence on the part of the carrier, without further proof on plaintiff's cause. On similar principles, it has been held that where a message, delivered to a telegraph company for transmission as an unrepeated message, is plainly and distinctly written, and such mistake is made in its transmission that it reaches the connecting company, after passing over only a single line, in a materially altered condition, there is, in the absence of explanation, sufficient evidence of negligence to justify a recovery against the company.[529]

Res Ipsa Loquitur.

"While it is true, as a general proposition, that the burden of showing negligence on the part of the one occasioning an injury rests in the first instance upon the plaintiff, yet, * * * when he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus rests upon the defendant to prove that the injury was caused without his fault." [530] When the physical facts surrounding an accident in themselves create a reasonable probability that the accident resulted from negligence, the physical facts themselves are evidential, and furnish what the law terms evidence of negligence, in conformity with the maxim, "Res ipsa loquitur." [531] It would seem more accurate to say, not that negligence is presumed from the mere fact of the injury or accident, but, rather, that it may be inferred from the facts and circumstances disclosed, in the absence of evidence showing

[525] Swanson v. French (Iowa) 61 N. W. 407.

[526] Allan v. State S. S. Co., 132 N. Y. 91, 95, 30 N. E. 482, and cases cited.

[528] Post, p. 1078.

[529] Marr v. W. U. Tel. Co., 85 Tenn. 529, 3 S. W. 496.

[530] Ruger, C. J., in Seybolt v. New York, L. E. & W. R. Co., 95 N. Y. 562. Fall of hydraulic elevator raises presumption on part of defendant, its owner. Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266; Dehring v. Comstock, 78 Mich. 53, 43 N. W. 1049.

[531] Houston v. Brush, 66 Vt. 331, 29 Atl. 380, 383 (a leading case, collecting and commenting on authorities).

that it occurred without negligence.[532] Thus, "whenever a car or train leaves the track, it proves either that the track or the machinery, or some other portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in the proper condition, and to operate it with the necessary prudence and care, has in some respect violated this duty; and the court may properly charge that such owner was bound to show some explanation of the cause of the accident."[533] So, in the leading English case of Byrne v. Boadle,[534] a barrel of flour fell from a warehouse, and struck the plaintiff, who was lawfully passing on a public street; and in Kearney v. Railway Co.,[535] a brick fell from a bridge and struck and injured the plaintiff. It was held that the maxim, "Res ipsa loquitur," applied to the cases.[536] In Mullen v. St. John,[537]

[532] Huey v. Gahlenbeck, 121 Pa. St. 238, 15 Atl. 520; Alpern v. Churchill, 53 Mich. 607, 19 N. W. 549; Holbrook v. Railway Co., 12 N. Y. 236, 64 Am. Dec. 502, note. Compare Shear. & R. Neg. § 13.

[533] Grover, J., in Edgerton v. New York & H. R. Co., 39 N. Y. 227, 229.

[534] 2 Hurl. & C. 722, 33 Law J. Exch. 13; Bigelow, Lead. Cas. 578, where a valuable discussion will be found. Compare Scott v. London & St. K. Docks Co., 3 Hurl. & C. 596, 34 Law J. Exch. 220, 393.

[535] L. R. 6 Q. B. 759–762. Et vide Tarry v. Ashton, 1 Q. B. Div. 314; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551–554, 11 Sup. Ct. 653; The William Branfoot, 3 C. C. A. 155, 52 Fed. 390; Miller v. Railway Co., 25 N. Y. 753. But the fact that a fractured limb is shorter when the patient is discharged is not prima facie evidence of physician's negligence. Piles v. Hughes, 10 Iowa, 579.

[536] Brigg v. Oliver, 4 Hurl & C. 403; Skinner v. London, B. & S. C. R. Co., 5 Exch. 787 (inference of negligence from collision); Scott v. London & St. K. Dock Co., 3 Hurl. & C. 596; Whit. Smith, Neg. § 22.

[537] 57 N. Y. 567. And see Gleeson v. Virginia Midland R. Co., 140 U. S. 435, 11 Sup. Ct. 859 (landslide). Lyons v. Rosenthal, 11 Hun, 46; Kirst v. Railroad Co., 46 Wis. 489, 1 N. W. 89; Smith v. Gaslight Co., 129 Mass. 318; Clare v. Bank, 1 Sweeny, 539; Brehm v. Railway Co., 34 Barb. 256; Sullivan v. Railroad Co., 39 La. Ann. 800, 2 South. 586; Hays v. Gallagher, 72 Pa. St. 136; Thomas v. Telegraph Co., 100 Mass. 156; Dixon v. Pluns, 98 Cal. 384, 33 Pac. 268; Cummings v. National Furnace Co., 60 Wis. 603, 18 N. W. 742. "Cases resting in contract have frequently received our consideration, and they are generally free from difficulty, because the mere happening of the accident will be prima facie evidence of a breach of contract, without further proof; while in those not resting in contract it must not only appear that the accident happened, but the surrounding circumstances must be such

the walls of a building, without any special circumstances of storm and violence, fell into one of the streets of the city of Brooklyn, knocking down a woman who was on the sidewalk, and seriously injuring her. Dwight, C., said: "There was some evidence tending to show that it was out of repair. Without laying any stress upon the affirmative testimony, it is as impossible to conceive of this building so falling, unless it was badly constructed or in bad repair, as it is to suppose that a seaworthy ship would go to the bottom in a tranquil sea and without collision. The mind, necessarily, seeks for a cause for the fall. That is apparently the bad condition of the structure. This, again, leads to the inference of negligence, which the defendant should rebut."

On the other hand, for example, a switchback at a pleasure resort on the line of a street-railway company which advertises it, is not in itself dangerous or unlawful. Therefore, such street-railway company is not liable, on mere proof of damage caused by the carelessness of the owner of the switchback or his servants.[538] Indeed, the English courts have held that the presumption of negligence could not be extended to all accidents, but only to those where the accident happens in course of the defendant's business, over which he is bound to exercise proper control.[539]

as to raise the presumption of a failure of duty on the part of the defendant towards the plaintiff." Article, "Res Ipsa Loquitur," Judge Seymour D. Thompson, in 10 Cent. Law J. 261, approved in Howser v. Cumberland & P. R. Co. (Md.) 30 Atl. 906. This case held that in an action for injuries caused by plaintiff, who was walking along a pathway outside of a railroad company's right of way, being struck by cross-ties as they fell from a moving train, the mere fact that the ties fell from a gondola car, on which they were loaded, is, under the doctrine of "res ipsa loquitur," prima facie evidence of negligence on the part of the railway company. (McSherry and Fowler, JJ., dissenting.)

[538] Knottnerus v. North Park St. Ry. Co., 93 Mich. 348, 53 N. W. 529. And see Galvin v. Gualala Mill Co., 98 Cal. 268, 33 Pac. 93 (starting fire); Cross v. California St. Cable Ry. Co., 102 Cal. 313, 36 Pac. 673 (driving heavily loaded team on street-car track); Rascher v. East Detroit & G. P. Ry. Co., 90 Mich. 413, 51 N. W. 463; Dehring v. Comstock, 78 Mich. 153, 43 N. W. 1049; Corrigan v. Union Sugar Refinery, 98 Mass. 577.

[539] Scott v. London & St. K. Dock Co., 3 Hurl. & C. 596; Higgs v. Maynard, 12 Jur. (N. S.) 705; Welfare v. Railway Co., L. R. 4 Q. B. 693; Smith v. Railway Co., L. R. 2 C. P. 10; Pol. Torts, 224.

Statutory Changes.

Many statutes have changed the common-law rule of the various states as to the matter of proof of negligence. New rules have been directly introduced. Thus, it has been enacted that the burden is on the owners of reservoirs to exonerate themselves by rebutting the statutory presumption of negligence from the escape of waters.[540] So a presumption that damages produced by a railroad company to persons, servants, strangers, or property, in some states, is by statute created from the happening of an accident.[541] The presumption of negligence from the starting of fires is constitutional.[542] Whether or not a violation of a statutory duty is negligence per se, or only evidence of negligence, to be considered with other circumstances, has been previously considered.[543]

266. The burden of showing contributory negligence is generally, but not invariably, held to be on the defendant.

It is a generally recognized rule that contributory negligence is a defense, to be specially pleaded;[544] and that the burden is on the defendant to establish contributory negligence by evidence.[545] He

[540] Larimer County Ditch Co. v. Zimmerman, 4 Colo. App. 78, 34 Pac. 1111.

[541] Laws Fla. 1890, p. 113, c. 40; Duval v. Hunt, 34 Fla. 85, 15 South. 876; Jacksonville, T. & K. W. Ry. Co. v. Jones, 34 Fla. 286, 15 South. 924. So in Georgia. Georgia Midland & G. R. Co. v. Evans, 87 Ga. 673, 13 S. E. 580; Savannah, F. & W. Ry. Co. v. Slater (Ga.) 17 S. E. 350.

[542] Campbell v. Missouri Pac. Ry. Co., 121 Mo. 340, 25 S. W. 936. And see Galvin v. Gualala Mill Co., 98 Cal. 268, 33 Pac. 93.

[543] Ante, p. 918, "Statutory Negligence."

[544] Union Pac. Ry. Co. v. Tracy, 19 Colo. 331, 35 Pac. 537; Bouknight v. Charlotte, C. & A. R. Co. (S. C.) 19 S. E. 915; House v. Meyer, 100 Cal. 592, 35 Pac. 308; Richmond & D. R. Co. v. Hissong (Ala.) 12 South. 393; Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412, 11 South. 262; Willis v. City of Perry (Iowa) 60 N. W. 727; Louisville & N. R. Co. v. Markee (Ala.) 15 South. 511.

[545] Hough v. Railway Co., 100 U. S. 213; Amato v. Northern Pac. R. Co., 46 Fed. 561; Texas & P. R. Co. v. Volk, 151 U. S. 73, 14 S. Ct. 239; Pennsylvania Co. v. Roy, 102 U. S. 451; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551–557, 11 Sup. Ct. 653, New York, L. E. & W. R. Co. v. Madison, 123 U. S. 524, 8 Sup. Ct. 246; Baker v. Westmoreland & C. Nat. Gas Co., 157

may also avail himself of any evidence given by the plaintiff.[546] But the defense may be founded on facts shown by the plaintiff's evidence alone.[547] And if the evidence shows the plaintiff to be guilty of contributory negligence, he cannot recover.[548] On the other hand, however, in some jurisdictions this rule is not in force, and the plaintiff must aver [549] and prove [550] that he exercised due care, or was not guilty of contributory negligence.

Pa. St. 593, 27 Atl. 789; Downey v. Pittsburg, A. & M. Traction Co., 161 Pa. St. 131, 28 Atl. 1019; Card v. Eddy (Mo. Sup.) 24 S. W. 746; Bluedorn v. Missouri Pac. Ry. Co. (Mo. Sup.) 24 S. W. 57; Southern Pac. Co. v. Tomlinson (Ariz.) 33 Pac. 710; Thorpe v. Missouri Pac. Ry. Co., 89 Mo. 650, 2 S. W. 3; Fulks v. St. Louis & S. F. Ry. Co., 111 Mo. 335, 19 S. W. 818; Crumpley v. Hannibal & St. J. R. Co., 111 Mo. 152, 19 S. W. 820; Jordan v. City of Asheville, 112 N. C. 743, 16 S. E. 760; Bromley v. Birmingham Mineral R. Co., 95 Ala. 397; 11 South. 341; Birmingham Mineral R. Co. v. Wilmer, 97 Ala. 165, 11 South. 886; Denver & R. G. R. Co. v. Ryan, 17 Colo. 98, 28 Pac. 79; Spurrier v. Front St. Cable Ry. Co., 3 Wash. St. 659, 29 Pac. 346; Merrill v. Eastern R. Co., 139 Mass. 252, 29 N. E. 666; City of Omaha v. Ayer, 32 Neb. 375, 49 N. W. 445; Anderson v. Chicago, B. & Q. Ry. Co., 35 Neb. 95, 52 N. W. 840; St. Louis & S. F. Ry. Co., v. Weaver, 35 Kan. 412, 11 Pac. 408; Dugan v. Chicago, St. P., M. & O. Ry. Co., 85 Wis. 609, 55 N. W. 894; Jones v. Malvern Lumber Co., 58 Ark. 125, 23 S. W. 679; Lorimer v. St. Paul City Ry. Co., 48 Minn. 391; Dublin, W. & W. R. Co. v. Slattery, 3 App. Cas. 1155 (per Lord Hatherly, page 1169; per Lord Penzance, page 1173); Wakelin v. London & S. W. Ry. Co., 12 App. Cas. 41, 43, 47, per Lord Watson; Bridges v. North London Ry. Co., L. R. 7 Eng. & Ir. App. 213, 232.

[546] Waterman v. Chicago & A. R. Co., 82 Wis. 613, 52 N. W. 247; Washington & G. R. Co. v. Tobriner, 147 U. S. 571, 13 Sup. Ct. 557.

[547] Horn's Adm'x v. Baltimore & O. R. Co., 4 C. C. A. 346, 54 Fed. 301, 6 U. S. App. 381. Running a train at a high rate of speed in a city and populous district, or failure to keep a lookout at such point, renders the company liable, though the injured person was guilty of contributory negligence, and the trainmen were without fault after they discovered his danger. Nave v. Alabama G. S. R. Co., 96 Ala. 264, 11 South. 391. But in Parker v. Pennsylvania Co., 134 Ind. 673, 34 N. E. 504, it was held that a similar state of facts does not constitute such willfulness as renders the company liable notwithstanding contributory negligence.

[548] Smith v. Chicago, M. & St. P. Ry. Co. (S. D.) 55 N. W. 717; McMurtry v. Louisville, N. O. & T. R. Co., 67 Miss. 601, 7 South. 401.

[549] Terre Haute St. Ry. Co. v. Tappenbeck, 9 Ind. App. 422, 36 N. E. 915. Et vide New York, C. & St. L. R. Co. v. Mushrush (Ind. App.) 37 N. E. 954; Ev-

[550] See note 550 on following page.

267. Negligence is a conclusion, to be drawn from facts proved, and not a matter to be proved, ordinarily—

(a) By expert and opinion evidence;[551] or

(b) By evidence as to custom.

Expert and Opinion Evidence.

Negligence, as has been seen, is an inference drawn by the jury from the facts in evidence. It is not, ordinarily, the subject of direct proof.[552] Circumstantial evidence is sufficient.[553] The prem-

ansville & T. H. R. Co. v. Krapf (Ind. Sup.) 36 N. E. 901; Richmond Gas Co. v. Baker (Ind. Sup.) 39 N. E. 552; Lake Erie & W. R. Co. v. Griffin, 8 Ind. App. 47, 35 N. E. 396; Gregory v. Woodworth (Iowa) 61 N. W. 962 (under statute as to damages caused by animals); Board of Com'rs v. Creviston, 133 Ind. 39, 32 N. E. 735; Chicago & I. Coal Ry. Co. v. McDaniels, 134 Ind. 166, 32 N. E. 728; Di Marcho v. Builders' Iron Foundry (R. I.) 27 Atl. 328; State v. Baltimore & L. R. Co., 77 Ind. 489, 26 Atl. 865; Walker v. Chester Co., 40 S. C. 342, 18 S. E. 936 (under statute). A reply is necessary to an answer alleging contributory negligence, although the complaint denies it. Louisville & N. R. Co. v. Copas, 95 Ky. 460, 26 S. W. 179.

[550] The absence of contributory negligence need not be directly alleged. The allegation is involved substantially in the averment that defendant's negligence occasioned the injury. In an action for negligence the burden is on the plaintiff to establish that he did not cause or contribute to the injury. Lee v. Troy Citizens' Gas Light Co., 98 N. Y. 115; Pittsburgh, C. & St. L. Ry. Co. v. Bennett, 9 Ind. App. 92, 35 N. E. 1033. But see Illinois Cent. R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358; Ryan v. Town of Bristol, 63 Conn. 26, 27 Atl. 309; Lauster v. Chicago, M. & St. P. Ry. Co., 43 Ill. App. 534; Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 South. 51 (cf. Ryan v. Louisville, N. O. & T. Ry. Co., 44 La. Ann. 806, 11 South. 30); Owens v. Railroad Co., 88 N. C. 506; Keller v. Gaskill, 9 Ind. App. 670, 36 N. E. 303; Buttons v. Hudson River R. Co., 18 N. Y. 252 (cf. Tolman v. Syracuse, B. & N. Y. R. Co., 98 N. Y. 198). And see Dobbins v. Brown, 119 N. Y. 188, 23 N. E. 537; Reynolds v. New York Cent. & H. R. R. Co., 58 N. Y. 248; Cordell v. New York Cent. & H. R. R. Co., 75 N. Y. 330; Bond v. Smith, 113 N. Y. 378, 21 N. E. 128; Stone v. Dry-Dock, E. B. & B. Ry. Co., 115 N. Y. 111, 21 N. E. 712; The Frank and Willie, 45 Fed. 494.

[551] Black, Prac. & Pl. Acc. Cas. pp. 46–52.

[552] Callahan v. Warne, 40 Mo. 132–137; post, p. 952. Et vide Illinois Cent. Ry. v. Cragin, 71 Ill. 177; Garrett v. Chicago & N. W. R. Co., 36 Iowa, 121; Griffin v. Overman Wheel Co., 9 C. C. A. 542, 61 Fed. 568; Dobbins v. Brown, 119 N. Y. 188, 193, 23 N. E. 537.

[553] Waycross Lumber Co. v. Guy, 89 Ga. 148, 15 S. E. 22; Rosenfield v. Arrol, 44 Minn. 395, 46 N. W. 768.

ises from which it follows may be shown by the direct testimony, but the wrong itself is a conclusion, to be drawn, not proved.[554] Therefore evidence should be confined to showing facts and circumstances, but not conclusions.[555] Witnesses who are not experts are confined in their testimony to statements of facts. They are not allowed to give opinions as to matters requiring skill or knowledge, because they are not experts;[556] and as to other classes of matters, because the inference from the fact is to be drawn, not by them, but by the jury. Therefore, for example, it is not competent for a witness to state that he used all the means he had to avoid the accident. He should state what means were at hand.[557] But

[554] See Wilson v. Reedy, 33 Minn. 503, 24 N. W. 191; Lester v. Town of Pittsford, 7 Vt. 158; Pennsylvania Co. v. Stoelke, 104 Ill. 201.

[555] Milwaukee & St. P. Ry. Co. v. Kellogg, 94 U. S. 469; Lester v. Town of Pittsford, 7 Vt. 158; Freeberg v. St. Paul Plow Works, 48 Minn. 99, 50 N. W. 1026; Simmons v. St. Paul & C. Ry. Co., 18 Minn. 184–194 (Gil. 168); Hinds v. Keith, 6 C. C. A. 231, 57 Fed. 10; Madden v. Missouri Pac. R. Co., 50 Mo. App. 666; Alton L. & C. Co. v. Calvey, 47 Ill. App. 343; Healy v. Visalia & T. R. Co., 101 Cal. 585, 36 Pac. 125; Baltimore & O. R. Co. v. Rambo, 8 C. C. A. 6, 59 Fed. 75; Johnson v. Oregon S. L. & U. N. Ry. Co., 23 Or. 94, 31 Pac. 283; Kendrick v. Central Railroad & Banking Co., 89 Ga. 782, 15 S. E. 685; Dowdy v. Georgia R. Co., 88 Ga. 726, 16 S. E. 62; Brunker v. Cummins, 133 Ind. 443, 32 N. E. 732. It is beyond the scope of this book to consider when expert evidence is admissible and when it is not. See 1 Thomp. Neg. 513; Shafter v. Evans, 53 Cal. 32; White v. Ballou, 8 Allen (Mass.) 408; Wood v. Railway Co., 51 Wis. 196, 8 N. W. 214; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

[556] Peteler Portable Ry. Manuf'g Co. v. Northwestern Adamant Manuf'g Co. (Minn.) 61 N. W. 1024 (stone mason not competent to give opinion in evidence as to cause of collapse of building). Cf. Ouillette v. Overman Wheel Co., 162 Mass. 305, 38 N. E. 511 (as to oscillation of shaft), and Washington, C. & A. Turnpike Case (Md.) 30 Atl. 571 (defective bridge).

[557] Hart v. Hudson River Bridge Co., 84 N. Y. 56; 2 Thomp. Neg. p. 799, § 14, note 2; Pennsylvania Co. v. Stoelke (1882) 104 Ill. 201; Coates v. Burlington, C. R. & N. Ry. Co. (1883) 62 Iowa, 486, 17 N. W. 760; Michigan Cent. R. Co. v. Gilbert (1881) 46 Mich. 176, 9 N. W. 243; Bayley v. Eastern R. Co. (1878) 125 Mass. 62; Lund v. Inhabitants of Tyngsborough (1851) 9 Cush. (Mass.) 36; Tanner's Ex'r v. Railroad Co. (1877) 60 Ala. 621; North Pennsylvania R. Co. v. Kirk (1879) 90 Pa. St. 15; Town of Albion v. Hetrick (1883) 90 Ind. 545; Hollenbeck v. City of Marshalltown (1883) 62 Iowa, 21, 17 N. W. 155; Street R. Co. v. Nolthenius (1883) 40 Ohio St. 376; Wright v. City of Ft. Howard (1884) 60 Wis. 119, 18 N. W. 750.

where expert testimony is properly admitted,[558] it is often a matter of great nicety and uncertainty to determine how far an expert may express his opinion without testifying to this inference which the jury should draw. At the one extreme, if he gives his opinion directly, that the conduct in issue was or was not negligence, he clearly usurps the functions of the jury;[559] and it would seem that he does this also indirectly if he testifies that such conduct was or was not "safe,"[560] "proper,"[561] "necessary,"[562] or the like, or that

[558] Neubauer v. Northern Pac. R. Co. (Minn.) 61 N. W. 912 (large ice tongs).

[559] Hankins v. Watkins, 77 Hun, 360, 28 N. Y. Supp. 867; Louisville, E. & St. L. C. R. Co. v. Berry, 9 Ind. App. 63, 35 N. E. 565, and 36 N. E. 646 (careless); Print v. Patten, 91 Ga. 422, 18 S. E. 311 (careful as he should have been); Mantel v. Chicago, M. & St. P. R. Co., 33 Minn. 62, 21 N. W. 853; Butler v. Railroad Co., 87 Iowa, 206, 54 N. W. 208 (skill of engineer for jury).

[560] Prendible v. Connecticut River Manuf'g Co., 160 Mass. 131, 35 N. E. 675 (whether a staging can safely carry a given load); Harley v. Buffalo Car Manuf'g Co., 142 N. Y. 31, 36 N. E. 813 (safety and fitness of fasteners in a belt); Godsell v. Taylor, 41 Minn. 207, 42 N. W. 873; Flanagan v. Railroad Co., 83 Hun, 522, 32 N. Y. Supp. 84 (operation of railroad gates); Atchison, T. & S. F. R. Co. v. Myers, 11 C. C. A. 439, 63 Fed. 793 (not admissible to prove particular mode of coupling cars to be specially dangerous). But an expert witness may testify as to whether a car furnished for the shipment of stock was reasonably safe for such purpose. Betts v. Chicago, R. I. & P. Ry. Co. (Iowa) 60 N. W. 623. So, evidence by those familiar with oil used for illuminating purposes is competent to show that it was not dangerous for one, in the use of ordinary care, to enter with a lighted lamp a car containing that substance. Standard Oil Co. v. Tierney (Ky.) 27 S. W. 983. And see McGonigle v. Kane (Colo. Sup.) 38 Pac. 367 (elevator).

[561] Houston v. Brush, 66 Vt. 331, 29 Atl. 380; Armstrong v. Railway Co., 45 Minn. 85, 47 N. W. 459 (whether a stable was suitable and proper). But see Hayward v. Knapp, 23 Minn. 430. It is error to admit the opinion of an expert as to whether it was a defect in a freight car that there was nothing on the end of it for a brakeman, after uncoupling for a flying switch, to lay hold of. Dooner v. Delaware & H. Canal Co., 164 Pa. St. 17, 30 Atl. 269. But a medical expert has been allowed to testify whether given treatment was proper. Wright v. Hardy, 22 Wis. 334. A witness may be asked what course a carrier should properly pursue with respect to live stock suffering from heat in transit, Lindsley v. Railway Co., 36 Minn. 539, 33 N. W. 7; or

[562] Receivers International & G. N. Ry. Co. v. Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236 (position of shipper of live stock on drawhead of car). But see Terre Haute & L. R. Co. v. Walsh (Ind. App.) 38 N. E. 534 (what will be necessary to drain meadow). And see Pennsylvania Co. v. Conlan, 101 Ill. 93.

certain things should or should not have been done.[563] So to pass on the merits of the case is not commonly justifiable, and certainly not where the drawing of such inference requires no particular skill or knowledge; but the jury, in the light of the evidence and by the exercise of sound judgment, can infer as well as the witness.[564] On the other hand, if the expert is confined to the mere statement of the facts, and the principles of his science, and the methods, instrumentalities, and effects of that science as applied, mere comment on such testimony and upon the other facts by the counsel is often inadequate to present the case to the jury properly, if, indeed, intelligibly.[565] But this is the safe, and perhaps the only safe, course

what is a proper position, e. g. of a brakeman, under the circumstances, Czezewzka v. Railway Co., 121 Mo. 201, 25 S. W. 911; Cincinnati & Z. R. Co. v. Smith, 22 Ohio St. 227; Schlaff v. Railroad Co., 100 Ala. 377, 14 South. 105. So, expert evidence may show position of brakeman is at air brake to make a flying switch. Reifsnyder v. Railway Co. (Iowa) 57 N. W. 692. And experts may testify to imperfections of contrivances by which an electric lamp was suspended. Excelsior Electric Co. v. Sweet (N. J. Sup.) 30 Atl. 553.

[563] Hoffman v. Metropolitan St. Ry. Co., 51 Mo. App. 273; Cleveland, C., C. & St. L. Ry. Co. v. De Bolt, 10 Ind. App. 174, 37 N. E. 737. But see Galveston, H. & S. A. Ry. Co. v. Croskell, 6 Tex. Civ. App. 160, 25 S. W. 486; Alabama G. S. R. Co. v. Linn (Ala.) 15 South. 508. Cf. Frost v. Railroad Co., 96 Mich. 470, 56 N. W. 19; Bennett v. Morris (Cal.) 37 Pac. 929 (whether given conduct is practicable in hydraulic mining); Watson v. Minneapolis St. Ry. Co., 53 Minn. 551, 55 N. W. 742 (within what distance street car going at given rate of speed can be stopped). Tholen v. Brooklyn City R. Co., 10 Misc. Rep. 283, 30 N. Y. Supp. 1081. But see, as to same matter, Adams v. Chicago, M. & St. P. Ry. Co. (Iowa) 61 N. W. 1059; St. Louis & S. F. Ry. Co. v. Farr, 6 C. C. A. 211, 56 Fed. 994 (expert testimony received to show whether or not a given defect could have been discovered on inspection).

[564] Thus, the jury only can determine whether a walk was in condition of reasonable repair and reasonably safe for public travel. Girard v. City of Kalamazoo, 92 Mich. 610, 52 N. W. 1021. And see Cross v. Lake Shore & M. S. Ry. Co., 69 Mich. 363, 37 N. W. 361, distinguished in Meyer v. Brooklyn City R. Co., 10 Misc. Rep. 11, 30 N. Y. Supp. 534; Overby v. Chesapeake & O. Ry. Co., 37 W. Va. 534, 16 S. E. 813; Nutt v. Southern Pac. R. Co., 25 Or. 291, 35 Pac. 653; Clifford v. Richardson, 18 Vt. 620, 626; Fraser v. Tupper, 29 Vt. 409; Bryant v. Central Vt. R. Co., 56 Vt. 710; Carpenter v. Corinth, 58 Vt. 214, 2 Atl. 170; Bemis v. Central Vt. R. Co., 58 Vt. 637, 3 Atl. 531; Moore v. Haviland, 61 Vt. 58, 17 Atl. 725.

[565] The conclusions of such a witness from facts which he observed are not incompetent where they are inferences from many minor details, which could

to pursue, notwithstanding a manifest tendency to relax the rigid operation of the rule. A greater liberality is extended as to opinion evidence applied to cases where there is a personal knowledge of facts on which the opinion is based.[566]

Evidence as to Custom.

Testimony of experts as to what witness would or would not do under the same or similar circumstances is objectionable, because the standard of diligence is absolute, and the question is, not what care a particular individual would exercise, but what is reasonable care under the circumstances.[567] This reasoning, however, does not exclude proof of general usage and custom and good practice among prudent and competent men in the same

not be adequately presented to the jury except by the statement of such inference or opinion. Baltimore & O. R. Co. v. Rambo, 8 C. C. A. 6, 59 Fed. 75. For this reason, a physician may testify as to the cause of personal injury. Edwards v. Common Council of Three Rivers, 96 Mich. 625, 55 N. W. 1003; Vosburg v. Putney, 86 Wis. 278, 56 N. W. 480; Manufacturers' Accident Indemnity Co. v. Dorgan, 7 C. C. A. 581, 58 Fed. 945. So, whether or not plaintiff was apparently well. Robinson v. Exempt Fire Co. of San Francisco, 103 Cal. 1, 36 Pac. 955. In an action for injuries, the attending physician may testify as to the probable result of the injuries upon plaintiff's health and life. Barr v. City of Kansas, 121 Mo. 22, 25 S. W. 562. Probable effect, Sabine & E. T. R. Co. v. Ewing (Tex. Civ. App.) 26 S. W. 638; probable or possible and immediate effect, Bliss v. New York Cent. & H. R. R. Co., 160 Mass. 447, 36 N. E. 65; permanency, Louisville, N., A. & C. Ry. Co. v. Holsapple (Ind. App.) 38 N. E. 1107. And see "Cause," ante, p. 936, note 518.

[566] Thus, a witness with personal knowledge may testify as to control of a driver of a horse, and that he seemed to drive carefully, Wilson v. New York, N. H. & H. R. Co. (R. I.) 29 Atl. 300; or that he was driving at a safe rate of speed, Houston City St. Ry. Co. v. Richart (Tex. Civ. App.) 27 S. W. 918; whether a driver could have seen cars in time to avoid accident, Alabama G. S. R. Co. v. Linn (Ala.) 15 South. 508. So as to movement in speed of trains. Sears v. Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389; Campbell v. Warner (Tex. Civ. App.) 24 S. W. 703; San Antonio & A. P. R. Co. v. Parr (Tex. Civ. App.) 26 S. W. 861; Ryan v. Town of Bristol, 63 Conn. 26, 27 Atl. 309 (condition of highway); Noble v. St. Joseph & B. H. St. Ry. Co., 98 Mich. 249, 57 N. W. 126. And, generally, see Gulf, C. & S. F. R. Co. v. Haskell 4 Tex. Civ. App. 550, 23 S. W. 546; Louisville, N. A. & C. Ry. Co. v. Miller (Ind. Sup.) 37 N. E. 343; Ward v. Charleston City Ry. Co. (1883) 19 S. C. 521, Yahn v. City of Ottumwa (1883) 60 Iowa, 429, 15 N. W. 257.

[567] But see Miller v. Illinois Cent. Ry. Co. (Iowa) 57 N. W. 418.

class,[568] although such standard of care is not conclusive.[569] Such general usage may itself be negligent. Under such circumstances, failure to conform thereto is not evidence of negligence.[570] To give such usage, custom, or practice a final effect would substitute the care commonly exercised in fact for the care required by court and jury.[571] Moreover, besides thus making the standard of care commercial, as distinguished from legal, this would tend to limit the progress which may reasonably be made in requiring increased care as means of avoiding harm. No custom justifies conduct negligent in law.[572]

[568] Experts may testify as to practice of physicans as to consultation, but not as to measure of defendant's responsibility to patient. Mertz v. Detweiler, 8 Watts & S. (Pa.) 376; Jeffrey v. Railway Co., 56 Iowa, 546, 9 N. W. 884 (uncoupling cars in motion; unusual); Houston & T. C. R. Co. v. Cowser, 57 Tex. 293 (ordinary mode of switching cars); Aldrich v. Monroe, 60 N. H. 118 (usage as to loaded teams on steep highway); Coates v. Burlington, C. R. & N. Ry. Co., 62 Iowa, 486, 17 N. W. 760 (blocking frogs); Hart v. Hudson R. Bridge Co., 84 N. Y. 56 (gates in drawbridge); Kolsti v. Railway Co., 32 Minn. 133, 19 N. W. 655 (fastening turntable). Cf. Gulf, C. & S. F. R. Co. v. Evansich, 61 Tex. 3; Fitts v. Cream City R. Co., 59 Wis. 323, 18 N. W. 186. And, generally, see North Chicago Rolling-Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186; Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Kansas City, M. & B. R. Co. v. Burton, 97 Ala. 240, 12 South. 88. But see East Tennessee, V. & G. R. Co. v. Kane, 92 Ga. 187, 18 S. E. 18; Holmes v. South Pac. Coast R. Co., 97 Cal. 161, 31 Pac. 834; Doyle v. St. Paul, M. & M. Ry. Co., 42 Minn. 79, 43 N. W. 787; O'Malley v. St. Paul, M. & M. Ry. Co., 43 Minn. 289, 45 N. W. 440.

[569] Congdon v. Howe Scale Co., 66 Vt. 255, 29 Atl. 253; Flanders v. Chicago, St. P., M. & O. Ry. Co., 51 Minn. 193, 53 N. W. 544. An instruction that if the employés in charge of defendant's train, when they injured plaintiff, were endeavoring to make what is known as a "flying" switch, and that such conduct was dangerous and not permitted by railway companies exercising care in managing their trains, defendant was liable, is improper, as it bases the question of negligence on the conduct of other railway companies. Gulf, C. & S. F. Ry. Co. v. Smith, 87 Tex. 348, 28 S. W. 520.

[570] Austin v. Chicago, R. I. & P. Ry. Co. (Iowa) 61 N. W. 849 (building switches).

[571] Hill v. Portland & R. R. Co., 55 Me. 438.

[572] Central R. Co. v. De Bray, 71 Ga. 406; Cleveland v. New Jersey Steamboat Co., 5 Hun, 523; Mason v. Missouri Pac. R. Co., 27 Kan. 83; Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

Evidence Must be Relevant.

It is beyond the scope of this book to discuss the rules of evidence, with regard to relevancy, as applied to negligence, beyond a brief reference to a few considerations having a general bearing.

Relevancy of evidence to prove negligence is determined, inter alia, by the connection of the fact sought to be proved as the cause of damage complained of.[573] Testimony admitted is generally limited to the period and the circumstances immediately involved. Therefore, one is not allowed by the prevailing,[574] but not uni-

[573] Louisville & N. R. Co. v. Pearson, 97 Ala. 211, 12 South. 176; Reich v. Union Ry. Co., 78 Hun, 417, 28 N. Y. Supp. 1105; Williams v. Gilman, 71 Me. 21 (where evidence as to cause of death of a colt, in gelding, was held admissible). Evidence as to intent is not admissible. Hankins v. Watkins, 77 Hun, 360, 28 N. Y. Supp. 867. A short note on the question of evidence admissible to show injuries received in accident on a railroad train. Cooper v. St. Paul Ry. Co., 58 Am. & Eng. Ry. Cas. 602 (Minn.) 56 N. W. 42.

[574] Opinion of Mitchell, J., in Morse v. Minneapolis & St. L. Ry. Co., 30 Minn. 465, 16 N. W. 358, approved by Gray, J., in Columbia & P. S. R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591; Aldrich v. Concord & M. R. R. (N. H.) 29 Atl. 408, overruling Martin v. Towle, 59 N. H. 31; Clapper v. Town of Waterford, 131 N. Y. 382, 30 N. E. 240; Nalley v. Hartford Carpet Co., 51 Conn. 524; McGuerty v. Hale, 161 Mass. 51, 36 N. E. 682; Terre Haute Ry. Co. v. Clem, 123 Ind. 15, 23 N. E. 965; Barber Asphalt Pav. Co. v. Odasz, 8 C. C. A. 471, 60 Fed. 71; Ely v. Railway Co., 77 Mo. 34; Cramer v. City of Burlington, 45 Iowa, 627; Anderson v. Chicago, St. P., M. & O. Ry. Co., 87 Wis. 195, 58 N. W. 79; Missouri Pac. Ry. Co. v. Hennessey, 75 Tex. 155, 12 S. W. 608; Morse v. Minneapolis & St. L. Ry. Co., 30 Minn. 465, 468, 16 N. W. 358; Holt v. Spokane & P. Ry. Co. (Idaho) 35 Pac. 39; Corcoran v. Village of Peekskill, 108 N. Y. 151, 15 N. E. 309; Dougan v. Champlain Transp. Co., 56 N. Y. 1; Day v. H. C. Akeley Lumber Co., 54 Minn. 522, 56 N. W. 243; Lombar v. Village of East Tawas, 86 Mich. 14, 48 N. W. 947; Hodges v. Percival, 132 Ill. 53, 23 N. E. 423, affirmed City of Streator v. Hamilton, 49 Ill. App. 449; Shinners v. Proprietors of Locks & Canals, 154 Mass. 168, 28 N. E. 10; Hager v. Southern Pac. R. Co., 98 Cal. 309, 33 Pac. 119; Atchison, T. & S. F. R. Co. v. Parker, 5 C. C. A. 220, 55 Fed. 595. This is also the English rule. Hart v. Lancashire & Y. Ry. Co., 21 Law T. N. S. 261. But in an action for the death of a child run over at a street crossing, evidence that defendant, soon after the accident, erected gates at the crossing at which it occurred, is proper, where the jury is permitted to view the premises and see the gates. Lederman v. Pennsylvania R. Co., 165 Pa. St. 118, 30 Atl. 725.

versal,[575] opinion, to show that, subsequently to the damage, precautions were taken and alterations made to avoid recurrence of similar harm. Nor may he show the occurrence of similar accidents.[576] However, the condition of the place when the alleged injury was inflicted, a reasonable time before and after the time of its occurrence,[577] and the immediately subsequent operation of the instrumentality of harm may be shown.[578] Indeed, the cases, under appropriate circumstances, have allowed the admission of evidence to show defects other than strictly the ones producing damage.[579]

[575] Alberts v. Village of Vernon, 96 Mich. 549, 55 N. W. 1022; Woods v. Missouri, K. & T. R. Co., 51 Mo. App. 500 (not to show negligence, but duty). And see Willitts v. Chicago, B. & K. C. Ry. Co., 88 Iowa, 281, 55 N. W. 313; Stone v. Town of Poland, 81 Hun, 132, 30 N. Y. Supp. 748.

[576] E. g. another elevator at another time, Wise v. Ackerman, 76 Md. 375, 25 Atl. 424; or negligence of same servant at other times, Burke v. New York Cent. & H. R. R. Co., 66 Hun, 627, 20 N. Y. Supp. 808 (and see Kennedy v. Spring, 160 Mass. 203, 35 N. E. 779); City Council of Augusta v. Lombard, 93 Ga. 284, 20 S. E. 312; or that other horses caught feet in same crossing, North Chicago St. R. Co. v. Hudson, 44 Ill. App. 60; or that same overhead bridge struck other brakemen, Schlaff v. Louisville & N. R. Co., 100 Ala. 377, 14 South. 105; Dorman v. Ames, 12 Minn. 451 (Gil. 347). But see Morse v. Minneapolis & St. L. Ry. Co., 30 Minn. 465, 16 N. W. 358; Bemis v. Temple, 162 Mass. 342, 38 N. E. 970; Wooley v. Grand St. & N. R. Co., 83 N. Y. 121; Higley v. Gilmer, 3 Mont. 90; Field v. Davis, 27 Kan. 400; Smith v. City of Des Moines, 84 Iowa, 685, 51 N. W. 77; Kent v. Town of Lincoln, 32 Vt. 591.

[577] Shepard v. Creamer, 160 Mass. 496, 36 N. E. 475; Phelps v. Winona & St. P. R. Co., 37 Minn. 485, 35 N. W. 273, and cases cited at page 487, 37 Minn., and page 273, 35 N. W.; Swadley v. Missouri Pac. Ry. Co., 118 Mo. 268, 24 S. W. 140; Jessup v. Osceola Co. (Iowa) 60 N. W. 485; Chicago, P. & St. L. R. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960 (but see Gerdes v. Christopher & S. A. Iron & Foundry Co. [Mo. Sup.] 25 S. W. 557); City of Chicago v. Powers, 42 Ill. 169. Especially if it be shown that the place remained the same. Sullivan v. City of Syracuse, 77 Hun, 440, 29 N. Y. Supp. 105. Cf. Hoyt v. City of Des Moines, 76 Iowa, 430, 41 N. W. 63. And see Munger v. City of Waterloo, 83 Iowa, 559, 49 N. W. 1028. But see House v. Metcalf, 27 Conn. 631; Hill v. Portland & R. R. Co., 55 Me. 438; Piggott v. Eastern Counties Ry. Co., 3 C. B. 229.

[578] E. g. a defective brake. Mixter v. Imperial Coal Co., 152 Pa. St. 395, 25 Atl. 587.

[579] E. g. defective condition of track several hundred feet on each side of

The character of the defendant's conduct in a case at issue has immediately to do with the damage caused; but his character for care or caution,[580] or his general conduct,[581] has no logical connection with the wrong. Such evidence is, therefore, excluded.

268. Negligence is ordinarily a question of fact, not of law, to be determined by the jury, not by the court. And this is true whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them.[582] But there are circumstances under which the court may pass upon the sufficiency or insufficiency of the evidence of negligence presented as a matter of law.

In determining when the courts will take a case from the jury and decide as a matter of law either that there is or is not negligence proved, the cases are very much at sea. It was early suggested as a test that, if there be a scintilla of evidence showing negligence, this would be sufficient to send the case to the jury.[583]

At the other extreme, it has been insisted that cases of negligence form no exception to the rule that it is the judge's duty to nonsuit wherever a verdict for the plaintiff would be clearly against the weight of evidence.[585] A mere scintilla, therefore, is not

place of accident. Ohio Val. R. Co. v. Watson's Adm'r, 93 Ky. 654, 21 S. W. 244. Defective condition of brakes on other cars. Bailey v. Rome, W. & O. R. Co., 139 N. Y. 302, 34 N. E. 918.

[580] Hays v. Millar, 77 Pa. St. 238; Tenney v. Tuttle, 1 Allen (Mass.) 185; Dunham v. Rackliff, 71 Me. 345; Hill v. Snyder, 44 Mich. 318, 6 N. W. 674.

[581] Bannon v. Baltimore & O. R. Co., 24 Md. 108, and see Darling v. Westmoreland, 52 N. H. 401.

[582] Richmond & D. R. Co. v. Powers, 149 U. S. 43, 13 S. Ct. 748.

[583] Pennsylvania R. Co. v. Horst, 110 Pa. St. 226, 1 Atl. 217; Robinson v. Railroad Co., 2 Lea, 594; Dick v. Railroad Co., 38 Ohio St. 389; Mercier v. Mercier, 43 Ga. 323. And see, generally, Improvement Co. v. Munson, 14 Wall. (U. S.) 442–448; Smith v. Sioux City & P. R. Co., 15 Neb. 583, 19 N. W. 638; Hathaway v. East Tennessee, etc., R. Co., 29 Fed. 489; Parks v. Rose, 11 How. (U. S.) 362; Pleasants v. Fant, 22 Wall. (U. S.) 116–121.

[585] Wild's Adm'r v. Hudson River R. Co., 24 N. Y. 430.

enough.[586] Thus, against positive, affirmative testimony of creditable witnesses that a customary signal was given, mere "I did not hear" of one or more witnesses will not authorize submission to a jury.[587]

Weight of Evidence and Failure of Proof.

But courts incline to generally accept, although in varying words, the somewhat vague principle that the weight of evidence is for the jury, and failure of proof is for the court. This would appear to be the gist of the many different phases assumed by the cases, and of the equally numerous formulæ of the court.[588] It may clarify the subject to consider some conspicuous rulings.

A very clear statement of the general theory on which the question is now decided will be found in Callahan v. Warne:[589] "Negligence is a thing which, by its very nature, pertains to human conduct and the action of the mind and will. It is something invisible, intangible, and, for the most part, incapable of direct proof, like sensible facts or physical events. It is, in general, a matter of inference from other facts and circumstances which admit of direct proof, and which may raise a presumption of the truth of the main fact to be proved. These facts and circumstances must be such as would warrant a jury in inferring from them the fact of negligence by reasoning in the ordinary way, according to the natural and proper relation of things, and consistently with the common sense and experience of mankind. A jury is not to be left or permitted to act or reason in any other way on such facts. Where it is plain that the jury could not find a verdict on the evidence offered with-

586 Dwight v. Germania Life Ins. Co., 103 N. Y. 341, 8 N. E. 654.

587 Culhane v. New York Cent. & H. R. R Co., 60 N. Y. 133.

588 Commissioners of Marion Co. v. Clark, 94 U. S. 278–284; Cooper v. Waldron, 50 Me. 80; Morton v. Frankfort, 55 Me. 46; Mason v. Lewis, 1 G. Greene (Iowa) 494; Bailey v. Kimball, 26 N. H. 351; Colt v. Sixth Ave. R. Co., 49 N. Y. 671. In Jeansch v. Lewis, 48 N. W. 128, this court stated the rule applicable to such cases as follows: "Where, in a case tried by a jury, the evidence is conflicting, this court will not weigh the evidence, or go further than determine therefrom whether or not the party has given sufficient legal evidence to sustain his verdict, without regard to the evidence given by the other party, except so far as such evidence tends to sustain the plaintiff's case." Brewing Co. v. Mielenz, 5 Dak. 136, 37 N. W. 728.

589 40 Mo. 132, 136, 137.

out reasoning irrationally, against all ordinary common sense, and against all proper notions of justice and right, or against law, or without being influenced by undue sympathy, prejudice, gross misjudgment, or mistaken impression of law and facts of the case, the court will declare as a matter of law that there is no competent evidence to be submitted to the jury." [590]

In Gardner v. Michigan Cent. R. Co.[591] the rule was laid down that a question as to the existence of negligence should not be withdrawn from the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts which the evidence tends to establish. And more definitely, it was said in Grand Trunk Ry. Co. v. Ives [592] that "there is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under all the circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms as are applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury,

[590] 1 Greenl. Ev. §§ 44–48; Smith v. Hannibal & St. J. R. Co., 37 Mo. 287.

[591] 150 U. S. 349, 14 S. Ct. 140, per Fuller, C. J.

[592] 144 U. S. 408–417, 12 S. Ct. 679; Northern Pac. R. Co. v. Everett, 152 U. S. 107, 14 Sup. Ct. 474 (where a switchman, in the line of his regular duty, undertook to couple cars, one of which was loaded in an unusual and dangerous way with bridge timbers); Richmond & D. R. Co. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748 (where a man was killed while crossing a track). And, generally, see Texas & P. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, and cases at page 606, 145 U. S., and page 905, 12 Sup. Ct. Sioux City & P. R. Co. v. Stout, 17 Wall. 657; Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 13 Sup. Ct. 557; Washington & G. R. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044; Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569; Tucker v. Baltimore & O. R. Co., 8 C. C. A. 416, 59 Fed. 968; Missouri Pac. R. Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921; Boyer v. St. Paul City Ry. Co., 54 Minn. 127, 55 N. W. 825; Kansas City, Ft. S. & M. R. Co. v. Kirksey, 9 C. C. A. 321, 60 Fed. 999; Sullivan v. New York, N. H. & H. R. Co., 154 Mass. 524–527, 28 N. E. 911; Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 14 Sup. Ct. 140; Illinois Cent. R. Co. v. Foley, 3 C. C. A. 589, 53 Fed. 459; Gulf, C. & S. F. Ry. Co. v. Ellis, 4 C. C. A. 454, 54 Fed. 481.

under proper instructions of the court. It is their province to note the special circumstances and surroundings of each particular case, and then to say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law."

In Crane Elevator Co. v. Lippert,[593] a boy, while walking slowly through an unlighted hall, in the dark, stumbled over an obstruction, and was injured. He could not see the obstruction, but he knew it was there, and he tried to go around it, but miscalculated the distance. It was held that the question of contributory negligence was for the jury. So, where a brakeman was injured while coupling cars by stepping into a hole covered with snow and slush, it was the province of the jury to determine whether the company had discharged its duty of keeping the track in a reasonably safe condition, and, if not, whether its neglect was the proximate cause of the injury, unmixed with any contributory negligence.[594]

[593] 11 C. C. A. 521, 63 Fed. 942.

[594] Northern Pac. R. Co. v. Teeter, 11 C. C. A. 332, 63 Fed. 527. Where a brakeman standing on a box car was injured by overhead beams of a railroad bridge, held, that the questions of negligence and contributory negligence were for the jury. Northern Pac. R. Co. v. Mortenson, 11 C. C. A. 335, 63 Fed. 530. Brown v. Burlington, C. R. & N. R. Co. (Iowa) 60 N. W. 779 (negligence of engineer injuring brakeman engaged in coupling); Baltzer v. Chicago, M. & N. R. Co., 89 Wis. 257, 60 N. W. 716 (coupling from pilot); Bowers v. Connecticut River R. Co., 162 Mass. 312, 38 N. E. 508 (negligence in allowing lateral motion of drawbars); Brouillette v. Connecticut River R. Co., 162 Mass. 198, 38 N. E. 507 (spare brakeman engaged in electric signal service); Louisville, N. A. & C. R. Co. v. Sears (Ind. App.) 38 N. E. 837 (negligence of minor plaintiff); Tholen v. Brooklyn City R. Co. (City Ct. Brook.) 30 N. Y. Supp. 1081; Whalen v. Citizens' Gas Co. (City Ct. Brook.) 30 N. Y. Supp. 1077 (negligence of woman 70 years old); Excelsior Electric Co. v. Sweet (N. J. Sup.) 30 Atl. 553 (fall of electric lamp suspended by imperfect rope); Kansas City, Ft. S. & M. R. Co. v. Kirksey, 9 C. C. A. 321, 60 Fed. 999 (signals); Ward's Adm'r v. Chesapeake & O. R. Co., 39 W. Va. 46, 19 S. E. 389 (Id.); Hennessy v. City of Boston, 161 Mass. 502, 37 N. E. 668 (caving

This rule has been generally accepted.[595] In New York, however, the supreme court has gone so unreasonably far as to hold conduct to be contributory negligence as a matter of law, although

in sewer); Stuber v. McEntee, 142 N. Y. 200, 36 N. E. 878 (caving of street excavation); Cameron v. Union Trunk Line (Wash.) 39 Pac. 128 (walking on street-car track); Central R. Co. v. Coleman (Md.) 30 Atl. 918; Central Pass. It. Co. v. Chatterson (Ky.) 29 S. W. 18 (collision of street car with carriage); Jaquinta v. Citizens' Traction Co. (Pa. Sup.) 30 Atl. 1131 (Id.); Thatcher v. Central Traction Co. (Pa. Sup.) 30 Atl. 1048; Denver & B. P. Rapid-Transit Co. v. Dwyer (Colo. Sup.) 36 Pac. 1106 (riding on platform of motor with feet on step); McGivern v. Wilson, 160 Mass. 370, 35 N. E. 864 (failure of stevedores to discover a defect in a guy rope); Birnburg v. Schwab, 55 Minn. 495, 56 N. W. 341 (falling down elevator shaft); Robertson v. Boston & A. R. Co. 160 Mass. 191, 35 N. E. 775 (negligence of engineer in not leaving his engine, to avoid danger); Texarkana Gas & Electric Light Co. v. Orr, 59 Ark. 215, 27 S. W. 66 (electric wire); Otterback v. City of Philadelphia, 161 Pa. St. 111, 28 Atl. 991 (asphyxia from escaping gas); American Water-Works Co. v. Dougherty, 37 Neb. 373, 55 N. W. 1051 (where plaintiff was drunk); McCleary v. Frantz, 160 Pa. St. 535, 28 Atl. 929 (contributory negligence of hunters); Ryan v. Town of Bristol, 63 Conn. 26, 27 Atl. 309 (defective highway); Coffin v. Inhabitants of Palmer, 162 Mass. 192, 38 N. E. 509 (defective highway). Compare Casey v. City of Fitchburg, 162 Mass. 321, 38 N. E. 499.

[595] American Waterworks Co. v. Dougherty, 37 Neb. 373, 55 N. W. 1051, followed in Omaha & R. V. R. Co. v. Morgan, 40 Neb. 604, 59 N. W. 81; Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120-1125; Bannon v. Lutz, 158 Pa. St. 166, 27 Atl. 890; Brezee v. Powers, 80 Mich. 182, 45 N. W. 130; Roux v. Blodgett & Davis Lumber Co., 85 Mich. 519, 48 N. W. 1032; Swaboda's Case, 40 Mich. 424; Hagen v. Chicago, D. & C. G. T. J. Ry. Co., 86 Mich. 615, 49 N. W. 510; Adams v. Iron Cliffs Co., 78 Mich. 271, 44 N. W. 270; Luke v. Wheat Min. Co., 71 Mich. 364, 39 N. W. 11; Chicago, B. & Q. Ry. Co. v. Oleson, 40 Neb. 889, 59 N. W. 354; American Waterworks Co. v. Dougherty, 37 Neb. 373, 55 N. W. 1051, followed in Omaha & R. V. R. Co. v. Brady, 39 Neb. 27, 57 N. W. 767; Ft. Worth & N. O. Ry. Co. v. Wallace, 74 Tex. 581, 12 S. W. 227; Campbell v. Goodwin (Tex. Civ. App.) 26 S. W. 864; Chicago, B. & Q. Ry. Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120; Chicago, B. & Q. Ry. Co. v. Wilgus, 40 Neb. 660, 58 N. W. 1125; McCleary v. Frantz, 160 Pa. St. 535, 28 Atl. 929; Newark Pass. Ry. Co. v. Block, 55 N. J. Law, 605, 27 Atl. 1067; Emery v. Minneapolis Industrial Exposition, 56 Minn. 460, 57 N. W. 1132; Illinois Cent. R. Co. v. Turner, 71 Miss. 402, 14 South. 450. And see Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120; Chicago, B. & Q. R. Co. v. Oleson, 40 Neb. 889, 59 N. W. 354; American Waterworks Co. v. Dougherty, 37 Neb. 373, 55 N. W. 1051, followed in Omaha & R. V. R. Co. v. Brady, 39 Neb. 27, 57 N. W. 767.

members of the deciding bench could not reach the conclusion that there was contributory negligence.[596]

The English rule is even more favorable to the plaintiff than is the American rule. The view of a majority of the court in Dublin, etc., R. Co. v. Slattery[597] is that whenever there is evidence of negligence on the part of the defendant, conducing to the accident, upon which evidence, apart from any consideration of the character of the plaintiff's conduct, the jury might not unreasonably find a verdict for the plaintiff, the judge can never nonsuit.[598]

On the other hand, however, where the undisputed evidence is so conclusive as to plaintiff's contributory negligence that the court would be compelled to set aside a verdict returned in opposition to it, the case may be withdrawn from the consideration of the jury, and a verdict directed for the defendant. Thus, if an experienced railroad man deliberately steps on a track in front of an approaching train, without looking or taking any precaution for his own safety, as a matter of law he is guilty of such contributory negligence as will defeat his recovery.[599] So where a boy, riding on a

[596] Hunter v. Cooperstown & S. V. R. Co., 126 N. Y. 18, 26 N. E. 958.

[597] 3 App. Cas. 1155,—per Lord Cairns, page 1167; per Lord Selborne, page 1189; per Lord O'Hagan, page 1182; per Lord Gordon, page 1216. But see Ryder v. Wombwell, L. R. 4 Exch. 32; Dublin, W. & W. R. Co. v. Slattery, supra, per Lord Blackburn, page 1199, and per Lord Hatherley, page 1168. And see Davey v. London & S. W. Ry. Co., 12 Q. B. Div. 70; Wakelin v. Railroad Co., 12 App. Cas. 41.

[598] Clerk & L. Torts, 390. Ante, p. 932, note 502.

[599] Elliott v. Chicago, M. & St. P. Ry. Co., 150 U. S. 245, 14 Sup. Ct. 85. Et vide Delaware, L. & W. R. Co. v. Converse, 139 U. S. 469–472, 11 Sup. Ct. 569; Anderson Co. Com'rs v. Beal, 113 U. S. 227, 5 Sup. Ct. 433; Rehm v. Pennsylvania R. Co., 164 Pa. St. 91, 30 Atl. 356; Chaffee v. Old Colony R. Co., 17 R. I. 658, 24 Atl. 141; Louisville & N. R. Co. v. Markee (Ala.) 15 South. 511; Carroll v. Minnesota Val. R. Co., 13 Minn. 30 (Gil. 18); Griggs v. Fleckenstein, 14 Minn. 81 (Gil. 62); St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277 (Gil. 249); Barbo v. Bassett, 35 Minn. 485, 29 N. W. 198; Rosenfield v. Arrol, 44 Minn. 395, 46 N. W. 768; Shoner v. Pennsylvania Co., 130 Ind. 170, 28 N. E. 616, and 29 N. E. 775; Rogers v. Leyden, 127 Ind. 50, 26 N. E. 210 (a full citation of authorities). Cf. Sobieski v. St. Paul & D. R. Co., 41 Minn. 169, 42 N. W. 863; Robel v. Chicago, M. & St. P. Ry. Co., 35 Minn. 84, 27 N. W. 305. One who rushes on a street-car track without looking or listening for a car which he knows is approaching, is guilty of contributory negligence. Hickey v. St. Paul City Ry. Co. (Minn.) 61 N. W. 893. As to contributory

familiar elevator, stuck his head eight or ten inches outside of it, and was injured, the case was properly taken from the jury.[600] So failure on the plaintiff's part to heed warnings and signals may justify the court in directing a verdict for the defendant,[601] but evidence of such failure is more commonly for the jury.[602]

In the "invitation to alight" group,[603] the cases in which a recovery has been allowed notwithstanding the fact that the passenger undertook to leave a car in motion are exceptional, and depend uppend upon peculiar circumstances. Alighting from a moving train may justify the court in taking the case from the jury.[604] And on the same principle, where a passenger attempts to get on a train moving at a dangerous rate of speed, whereby he is killed, it is

negligence in failure to discover and repair defects in instrumentalities, see Richmond & D. R. Co. v. Dudley (Va.) 18 S. E. 274; Gulf, C. & S. F. Ry. Co. v. Kizziah, 86 Tex. 81, 23 S. W. 578; Chicago, etc., R. Co. v. Branyan, 10 Ind. App. 570, 37 N. E. 190; Gibson v. Minneapolis, St. P. & S. S. M. Ry. Co., 55 Minn. 177, 56 N. W. 686; Louisville & N. R. Co. v. Pearson, 97 Ala. 211, 12 South. 176.

[600] Ludwig v. Pillsbury, 35 Minn. 256, 28 N. W. 505. Vide Barbo v. Bassett, 35 Minn. 485, 29 N. W. 198. But resting a hand on and partially out of a street-car window, so that a projecting sewer plank injures it, leaves the question of contributory negligence to the jury. Dahlberg v. Minneapolis St. Ry. Co., 32 Minn. 404, 21 N. W. 545.

[601] Lendberg v. Brotherton Iron Min. Co., 97 Mich. 443, 56 N. W. 846.

[602] Kansas City, etc., R. Co. v. Kirksey, 9 C. C. A. 321, 60 Fed. 999; Ward's Adm'r v. Chesapeake & O. R. Co., 39 W. Va. 46, 19 S. E. 389.

[603] Leading English cases: Metropolitan Ry. Co. v. Jackson, 3 App. Cas. 193; Bridges v. North London Ry. Co., L. R. 7 H. L. 213; post, p. 964, note 630.

[604] Rapalje, J., in Burrows v. Railway Co., 63 N. Y. 556–559; Pennsylvania Co. v. Kilgore, 32 Pa. St. 292; Filer v. New York Cent. R. Co., 49 N. Y. 47; Montgomery & E. Ry. Co. v. Stewart, 91 Ala. 421, 8 South. 708; Renner v. Northern Pac. R. Co., 46 Fed. 344; Gavett v. Manchester & L. R. Co., 16 Gray (Mass.) 501; Lake Shore & M. S. Ry. Co. v. Bangs, 47 Mich. 470, 11 N. W. 276; Kirchner v. Detroit City Ry. Co., 91 Mich. 400, 51 N. W. 1059; Pennsylvania R. Co. v. Aspell, 23 Pa. St. 147; Chicago & A. R. Co. v. Randolph, 53 Ill. 510; Chicago, B. & Q. R. Co. v. Hazzard, 26 Ill. 373; Dougherty v. Railroad Co., 86 Ill. 467; Damont v. Railroad Co., 9 La. Ann. 441; Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; Jeffersonville R. Co. v. Swift, Id. 459. A passenger who alights from a moving car, after seeing one immediately in front of him fall in getting off, is guilty of contributory negligence, and the carrier is not liable for his injuries. Brown v. Barnes, 151 Pa. St. 562, 25 Atl. 144. A passenger on a freight train wished to get off at a station where

proper to instruct the jury to find for the defendant.[605] This, however, does not apply where one has safely boarded the moving car, and is injured by the subsequent negligence of the defendant, as in suddenly starting the car.[606] And the tendency of the cases would seem to be to leave such matters to the jury.[607] This is also true of the "level crossing" cases.[608] And again, a court may find as a matter of law that there is no negligence or contributory negligence.[609]

the train was accustomed to slowing up, so that passengers could alight without danger. On this occasion the train did not slacken at the station, and shortly after passing it the passenger jumped therefrom, and received injuries which caused his death. Held, in an action by his administratrix, that deceased's contributory negligence would defeat a recovery. Brown v. Chicago, M. & St. P. R. Co., 80 Wis. 162, 49 N. W. 807.

[605] Bacon v. Delaware, L. & W. R. Co., 143 Pa. St. 14, 21 Atl. 1002. Et vide Finnegan v. Railway Co., 48 Minn. 378, 51 N. W. 122.

[606] Sahlgaard v. St. Paul City Ry. Co., 48 Minn. 232, 51 N. W. 111.

[607] Plaintiff, half asleep, was aroused as the train was leaving his destination. Held negligence on part of conductor. Ordinarily, jumping from moving train is prima facie evidence of contributory negligence, but not here. Jones v. Chicago, M. & St. P. Ry. Co., 42 Minn. 183, 43 N. W. 1114. Whether or not jumping from a moving street car is negligence is a question for the jury. It is not negligence per se. Schacherl v. St. Paul City Ry. Co., 42 Minn. 42, 43 N. W. 837. After a train has stopped, and a passenger proceeds to alight, it is not negligence, per se, for her to alight at the invitation and with the assistance of the brakeman after the train has started again, unless the speed is so great that the danger is obvious. McCaslin v. Lake Shore & M. S. Ry. Co., 93 Mich. 553, 53 N. W. 724. And see Strand v. Chicago & W. M. Ry. Co., 64 Mich. 216, 31 N. W. 184. See pages 219–220, 64 Mich., and page 184, 31 N. W. Whether an employé was negligent in jumping fron an engine to perform his duty is for jury. Colf v. Chicago, St. P., M. & O. Ry. Co., 87 Wis. 273, 58 N. W. 408; Missouri, K. & T. Ry. Co. v. Woods (Tex. Civ. App.) 25 S. W. 741.

[608] Ante, p. 881.

[609] Tucker v. Baltimore & O. R. Co., 8 C. C. A. 416, 59 Fed. 968; Elliott v. Chicago, M. & St. P. R. Co., 150 U. S. 245, 14 Sup. Ct. 85; Union Pac. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619; Missouri Pac. Ry. Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921.

SAME—DAMAGES.

269. A cause of action for negligence cannot be made out without proof of damage of the kind required by law. Damage is the gist of the wrong.

The distinct common-law remedy for negligence was case. That is to say, it gives rise to a cause of action in which the damages are not direct, are never presumed, but must be pleaded and proved.[610] It may be stated as axiomatic that no negligence will be actionable unless it results in an injury or damage.[611] Thus an attorney's error, arising from carelessness, is not the basis of recovery against him unless it produce damage.[612] The plaintiff is confined to proof of such damages as he has pleaded. If special damages are not pleaded, they may not be recovered.[613] So if the proof fails as to damages in toto, there can be no recovery. The damages pleaded and proved must comply with the legal standard. If they are too petty, the law will apply the maxim "De minimis non curat lex." If they are purely sentimental, they will not complete the cause of action. And so, if they be remote, the plaintiff may show the other two elements of negligence, and for failure to show the third—proximate damage—will fail to recover.

CONTRIBUTORY NEGLIGENCE.

270. To maintain successfully an action for negligence the ordinary rule is that it must appear that the injury was occasioned by actionable negligence on the defendant's part, and it must not appear that there was contributory negligence on the plaintiff's part.[614] But contributory negligence is no defense to a willful or wanton wrong.

[610] Pig. Torts, 179.

[611] Bluedorn v. Missouri Pac. R. Co. (Mo. Sup.) 24 S. W. 57-60.

[612] Ante, p. 915.

[613] Hinckley v. Krug (Cal.) 34 Pac. 118.

[614] Washington & G. R. Co. v. Gladmon, 15 Wall. 401.

The doctrine of contributory negligence seems to be founded upon these considerations: (1) The mutual wrong and negligence of the parties and the reluctance of the law to attempt an apportionment of the wrong between them. (2) The principle which requires every suitor who seeks to enforce his rights or redress his wrongs to go into court with clean hands, and which will not permit him to recover for his own wrong. (3) The policy of making the personal interests of parties dependent upon their care and prudence.[615] (4) The logical necessity of recognizing that, if the plaintiff's own negligence caused the damage, the defendant is not connected as the juridical cause. Such considerations seem to control courts at present, rather than the misleading application of the maxim "In pari delicto potior est conditio defendentis."[616]

Analogy to the Defendant's Negligence.

Negligence, as the word is commonly used, is the tort of the defendant; but much superficial criticism has arisen from a failure to attend adequately to the similarity of the plaintiff's negligence, or contributory negligence, and that of the defendant. In the consideration of the general subject upon this point, the negligence of the plaintiff and the negligence of the defendant have intentionally not been separated. In many respects they are identical. Both involve the exercise of care proportionate to the circumstances, whenever a duty is placed on either party to exercise such care.[617] But, on the one hand, the duty of the plaintiff to exercise care is a negative one. The obligation is imperfect. Its violation is not actionable. He cannot be sued for a breach of such duty.[618] On the other hand, unless he has been guilty of a breach of duty, the question of con-

[615] The matter of burden of proof is subsequently considered.

[616] Davis v. Guarnieri, 45 Ohio St. 470–489, 15 N. E. 350; Pol. Torts, 360; Clerk & L. Torts, 389; Lord Halsbury in Wakelin v. London & S. W. Ry. Co., 12 App. Cas. 41.

[617] Brick v. Bosworth, 162 Mass. 334, 39 N. E. 36. But see Cleveland, C., C. & St. L. Ry. Co. v. Sloan (Ind. App.) 39 N. E. 174. And see Cloutier v. Grafton & U. R. Co., 162 Mass. 471, 39 N. E. 110.

[618] Unless, indeed, such contributory negligence should, in its turn, become an affirmative, original cause of damage to defendant's property or person. Such damage might then be set up by defendant as a counterclaim to plaintiff's cause of action.

tributory negligence cannot arise. Any damage resulting from his conduct, not otherwise actionable, is damnum absque injuria.[619] Moreover, the duty, the violation of which involves contributory negligence, is the duty to avoid doing harm; and contributory negligence is a defense only to a breach of such duty. If one negligently and proximately contributes to his injury, he cannot recover, no matter how negligent the defendant may have been, unless such negligence is so gross as to imply a willful intention to inflict the injury.[620] But when the harm is intentional, as in cases of assault and battery,[621] or is the result of willful or wanton negligence,[622] it does not avail to prevent recovery. For essentially the same reason, contributory negligence is no defense to an action for nuisance.[623] But negligence and fraud are so closely related from certain points of view that contributory negligence may bar recovery in fraud.[624]

[619] Ante, p. 86.

[620] Carrington v. Louisville & N. R. Co., 88 Ala. 472, 6 South. 910. Et vide McAdoo v. Richmond & D. R. Co., 105 N. C. 140, 11 S. E. 316.

[621] Ruter v. Foy, 46 Iowa, 132; Steinmetz v. Kelly, 72 Ind. 442; Anniston Pipe-Works v. Dickey, 93 Ala. 418, 9 South. 720.

[622] Florida South. R. Co. v. Hirst, 30 Fla. 1, 11 South. 506; Brown v. Scarboro, 97 Ala. 316, 12 South. 289; Louisville & N. R. Co. v. Markee (Ala.) 15 South. 511; Christian v. Illinois Cent. R. Co. (Miss.) 12 South. 710; Lake Shore & M. S. R. Co. v. Bodemer, 139 Ill. 596, 29 N. E. 692; Louisville Safety-Vault & Trust Co. v. Louisville & N. R. Co., 92 Ky. 233, 17 S. W. 567; Louisville & N. R. Co. v. Coniff's Adm'r (Ky.) 27 S. W. 865; Catlett v. Young, 143 Ill. 74, 32 N. E. 447; Louisville & N. R. Co. v. Markee (Ala.) 15 South. 511; McDonald v. International & G. N. R. Co. (Tex. Civ. App.) 21 S. W. 774. On the other hand, in admiralty, defendant's contributory negligence will not defeat plaintiff's cause of action, unless his fault is willful, gross, or inexcusable. The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29. Under the English admiralty rule in case of collision, when both vessels are at fault the damage is divided. Sherwood, L. T. 16. The contributory negligence of a person injured, on failure of the engineer to observe the statutory precautions, will not bar a recovery, but the jury must consider such contributory negligence in mitigation of damages. Western & A. R. Co. v. Roberson, 9 C. C. A. 646, 61 Fed. 592. Cf. Catlett v. Young, 143 Ill. 74, 32 N. E. 447.

[623] Philadelphia & R. R. Co. v. Smith, 12 C. C. A. 384, 64 Fed. 679. Contributory negligence, however, has been recognized as a defense to nuisance. Mayor & City Council of Baltimore v. Marriott, 66 Am. Dec. 326.

[624] Ante, p. 595, "Deceit."

SAME—ELEMENTS OF CONTRIBUTORY NEGLIGENCE.

271. To make out the defense of contributory negligence, the plaintiff's conduct must have the three essential elements of negligence; i. e.:

(a) A duty to exercise care;

(b) A violation of that duty in fact; and

(c) Connection as cause of the damage complained of.

272. The duty of exercising care to avoid injury includes, inter alia—

(a) The duty of not voluntarily exposing one's person or property to harm.

(b) The duty of avoiding harm before or after the damage is done, when voluntary and deliberate action is allowed by circumstances.

272a. The duty of exercising care does not require one to anticipate a wrongful act.

Exposure to Danger.

The care to be exercised by the plaintiff is governed by the same principles which determine the negligence of the defendant. It varies with the apparent risk. The plaintiff may be negligent in exposing himself to known dangers, or dangers which he should know.[625] Thus the plaintiff may be negligent in interfering with a dog fight.[626] If a drunken man goes to sleep on a railway track, he takes his chances of being killed before his peril is discovered and averted.[627] So, where a brakeman deliberately put his foot

[625] Lebanon Light, Heat & Power Co. v. Leap (Ind. Sup.) 39 N. E. 57 (meddling with natural gas pipe).

[626] Matteson v. Strong, 159 Mass. 497, 34 N. E. 1077; Boulester v. Parsons, 161 Mass. 182, 36 N. E. 790; Raymond v. Hodgson, 161 Mass. 184, 36 N. E. 791; Farley v. Picard, 78 Hun, 560, 29 N. Y. Supp. 802. Where a person voluntarily and unnecessarily provokes a vicious animal, and thus invites or induces the injury, knowing the probable consequences, he is not entitled to recover. Lynch v. McNally, 73 N. Y. 350. So a woman driving a horse near an electric road. Benjamin v. Holyoke St. Ry. Co., 160 Mass. 3, 35 N. E. 95. Cf. City of Denver v. Peterson (Colo. App.) 36 Pac. 1111.

[627] O'Keefe v. Railroad Co., 32 Iowa, 467; Donaldson v. Milwaukee & St.

into an unblocked frog, and, before he could extricate it, was killed, his recklessness will prevent a recovery.[628] But a pedestrian is not necessarily negligent in attempting to pass over a road which he knows to be dangerous, provided a man of ordinary intelligence would reasonably believe that he could go there.[629]

P. Ry. Co., 21 Minn. 293; Schmolze v. Chicago, M. & St. P. Ry. Co., 83 Wis. 659, 53 N. W. 743 (a leading case).

[628] Southern Pac. Co. v. Seley, 152 U. S. 145–156, 14 Sup. Ct. 530. Generally, as to contributory negligence in getting into a place of risk, see Dixon v. Pluns, 98 Cal. 384, 33 Pac. 268; Mau v. Morse, 3 Colo. App. 359, 33 Pac. 283; Knox v. Hall Steam-Power Co., 69 Hun, 231, 23 N. Y. Supp. 490 (elevators); Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 South. 51; Colvin v. Peabody, 155 Mass. 104, 29 N. E. 59; Van Steinburg's Case, 17 Mich. 99; Williams' Case, 31 Mich. 276; Miller's Case, 46 Mich. 532, 9 N. W. 841; Staal's Case, 57 Mich. 244, 23 N. W. 795; Dickinson's Case, 53 Mich. 47, 18 N. W. 553; Guggenheim's Case, 57 Mich. 488, 24 N. W. 827; Id., 66 Mich. 157, 33 N. W. 161; Klanowski's Case, 57 Mich. 528, 24 N. W. 801; Harris' Case, 64 Mich. 447, 31 N. W. 425; Little's Case, 78 Mich. 207, 44 N. W. 137; Richmond's Case, 87 Mich. 374, 49 N. W. 621; Kinney v. Folkerts, 78 Mich. 697, 44 N. W. 152; Id., 84 Mich. 619, 48 N. W. 283. Further, as to contributory negligence on part of servant in taking needless risks: Piper v. Cambria Iron Co., 78 Md. 249, 27 Atl. 939 (falling while unloading iron); Richmond & D. R. Co. v. Bivins (Ala.) 15 South. 515 (catching clothes in switch); Towner v. Missouri & P. R. Co., 52 Mo. App. 648 (coupling cars moving four to six miles an hour). Et vide Romona Oolitic Stone Co. v. Tate, (Ind. App.) 37 N. E. 1065; York v. Railway Co., 117 Mo. 405, 22 S. W. 1081. Use of defective appliances: Illinois Cent. R. Co. v. Bowles, 71 Miss. 1003, 15 South. 138; Seaboard Manuf'g Co. v. Woodson, 98 Ala. 378, 11 South. 733; Carter v. Oil Co., 37 S. C. 604, 15 S. E. 928; Hopkins Bridge Co. v. Burnett, 85 Tex. 16, 19 S. W. 886.

[629] Skjeggerud v. Railway Co., 38 Minn. 61, 35 N. W. 572. Cf. Gates v. Pennsylvania R. Co., 154 Pa. St. 567, 26 Atl. 598. The fact that a traveler chooses to cross a bridge on foot, knowing that there are no barriers to protect foot passengers from teams and animals crossing the bridge, though it may be evidence of negligence, does not constitute negligence per se. St. Louis Bridge Co. v. Miller, 138 Ill. 465, 28 N. E. 1091; Korrady v. Lake Shore & M. S. Ry. Co., 131 Ind. 261, 29 N. E. 1069; Cadwallader v. Railway Co., 128 Ind. 518, 27 N. E. 161; Clayards v. Dethick, 12 Q. B. 439; Wright v. City of St. Cloud, 54 Minn. 94, 55 N. W. 819; Hall v. Incorporated Town of Manson (Iowa) 58 N. W. 881; Parcells v. City of Auburn, 77 Hun, 137, 28 N. Y. Supp. 471; Town of Fowler v. Linquist (Ind. Sup.) 37 N. E. 133; Lynch v. Erie City, 151 Pa. St. 380, 25 Atl. 43. As between master and servant, see Galvin v. Old Colony R. Co., 162 Mass. 533, 39 N. E. 186.

The "invitation to alight" [630] and the "level crossing" [631] groups of cases are familiar illustrations of careless exposure to dangers. The same principle applies to contributory negligence as to property. Thus, leaving an article exposed may prevent recovery for the loss

[630] Lax v. Mayor, 49 Law J. Q. B. 106. The question of contributory negligence in getting on or off is ordinarily for the jury, Merritt v. New York, N. H. & H. R. Co., 162 Mass. 326, 38 N. E. 447; Bischoff v. People's Ry. Co., 121 Mo. 216, 25 S. W. 908; New Orleans & C. R. Co. v. Schneider, 8 C. C. A. 571, 60 Fed. 210; North Chicago St. R. Co. v. Eldridge, 151 Ill. 542, 38 N. E. 246; but not always, Victor v. Pennsylvania R. R., 164 Pa. St. 195, 30 Atl. 381 (where plaintiff alighted after the car started); Tillett v. Lynchburg & D. R. Co., 115 N. C. 662, 20 S. E. 480; Butler v. St. Paul & D. R. Co. (Minn.) 60 N. W. 1090; Reed v. Covington & C. Bridge Co. (Ky.) 28 S. W. 149; Burgin v. Richmond & D. R. Co., 115 N. C. 673, 20 S. E. 473; Toledo, St. L. & K. C. R. Co. v. Wingate (Ind. Sup.) 37 N. E. 274 (woman with bundles). The New York rule is very strict in respect to boarding a train in motion. Distler v. Long Island R. Co., 78 Hun, 252, 28 N. Y. Supp. 865; Fahr v. Manhattan Ry. Co., 9 Misc. Rep. 57, 29 N. Y. Supp. 1. However, it is not, as a matter of law, contributory negligence for a passenger, after having signaled the driver of a stage to stop, to attempt to enter the stage before it has fully stopped, where "its motion was hardly perceptible." Frobisher v. Fifth Ave. Transp. Co., 81 Hun, 544, 30 N. Y. Supp. 1099. The belief that the train from which plaintiff stepped while in motion was standing still does not rebut the presumption of contributory negligence, in the absence of evidence showing that such belief was reasonable. Chicago, B. & Q. R. Co. v. Landauer, 39 Neb. 803, 58 N. W. 434. As to the right of passenger to believe that the place at which he alighted is safe, see Cazneau v. Fitchburg R. Co., 161 Mass. 355, 37 N. E. 311; Falk v. Railroad Co., 56 N. J. Law, 380, 29 Atl. 157; St. Louis S. W. Ry. Co. v. Johnson, 59 Ark. 122, 26 S. W. 593. It is not contributory negligence for a passenger on a strett car to remain on the platform when there is no room inside. Marion St. R. Co. v. Shaffer, 9 Ind. App. 486, 36 N. E. 861. Where an intoxicated passenger refuses to go into the car after being requested to do so by the conductor, but remains on the platform, from which he afterwards falls, he cannot recover for the injury (Holt, J., dissenting, on the ground that the conductor should have compelled him to enter the car, or leave the train at a station). Fisher v. West Virginia & P. R. Co., 39 W. Va. 366, 19 S. E. 578; ante, p. 957, note 603.

[631] Buelow v. Chicago, St. P. & K. C. Ry. Co. (Iowa) 60 N. W. 617 (running switch); Hayes v. Norcross, 162 Mass. 546, 39 N. E. 282 (boy 5½ years old, crossing street); Winey v. Chicago, M. & St. P. Ry. Co. (Iowa) 61 N. W. 218 (railway crossing); Link v. Philadelphia & R. R. Co., 165 Pa. St. 75, 30 Atl. 820, 822 (Id.); Tobias v. Michigan Cent. R. Co. (Mich.) 61 N. W. 514 (Id.). Ante, p. 881.

or damage, for example, by fire.[632] One's knowledge, actual or constructive, may be a material element in determining contributory negligence. Therefore, where the owner of a carriage, with whom the plaintiff was riding, carelessly drove over a pile of sand in the street, with full knowledge of the obstruction, at a rate of speed not allowed by ordinance, overturning the carriage, and causing the injuries complained of, there can be no recovery.[633] But such knowledge does not necessarily control. In an action against a town for personal injuries caused by the plaintiff's wagon colliding with a post in the street, it appeared that the team became frightened and got beyond control, but that it was not accustomed to run away, and that the post was several feet from the traveled road. It was held, even though plaintiff knew of the post, he was not guilty of contributory negligence.[634] On the same principle, the

[632] Bex v. Kelse, 5 Wash. 360, 31 Pac. 973; Curran v. Weiss, 6 Misc. Rep. 138, 26 N. Y. Supp. 8; Richter v. Harper, 95 Mich. 221, 54 N. W. 768; Denver & R. G. R. Co., v. Morton (Colo. App.) 32 Pac. 345. But see Great Western Ry. Co. v. Hawarth, 39 Ill. 347 (open window); Fero v. Railroad Co., 22 N. Y. 209 (open door); Philadelphia & Reading R. Co. v. Hendrickson, 80 Pa. St. 183 (roof); Toledo, W. & W. Ry. Co. v. Maxfield, 72 Ill. 95 (Id.). As to failure to plow trench, see Burlington & M. R. Co. v. Westover, 4 Neb. 268, and Jefferis v. Philadelphia, W. & B. Ry. Co., 3 Houst. (Del.) 447. As to exposure of animals to damages by barb-wire fences, see Boyd v. Burkett (Tex. Civ. App.) 27 S. W. 223. But where defendant railroad company, in repairing its road, altered its embankment on the sides of a stream running through plaintiff's land, so as to extend the embankment further into the stream, and causing it at times to pond back on plaintiff's land, plaintiff is not guilty of contributory negligence because he planted crops on the land knowing that such land was liable to be overflowed and the crops injured. Knight v. Albemarle & R. R. Co., 111 N. C. 80, 15 S. E. 929.

[633] Mullen v. City of Owasso, 100 Mich. 103, 58 N. W. 663 (see dissenting opinion); Goodlander Mill Co. v. Standard Oil Co., 11 C. C. A. 253, 63 Fed. 400 (where a consignee undertook to draw oil from a leaking car, whereby the oil ran into his engine room, exploded, and destroyed his mill. The negligence of defendant, the shipper of the car, was held not to be the proximate cause); Louisville & N. R. Co. v. Ward, 10 C. C. A. 166, 61 Fed. 927 (switchman and hole in the track); Boyd v. Burkett (Tex. Civ. App.) 27 S. W. 233 (barb-wire fence over path).

[634] Town of Fowler v. Linquist (Ind. Sup.) 37 N. E. 133. How far courts go in sending contributory negligence to a jury is seen in the holding that where a youth was killed by picking up the end of an electric-light wire, lying on a street crossing, which showed no signs of being alive, the question of

momentary diversion of a person's attention, while walking on a sidewalk, does not, as matter of law, constitute contributory negligence, so as to prevent a recovery for injuries due to defects in the sidewalk.[635]

Avoiding Threatened Danger Before Damage is Done.

Where there was any considerable interval of time between the discovery of the negligence and its injurious effect, the jury ought to be made acquainted with the rule of law which requires the plaintiff to exercise ordinary care to avoid the consequences of the negligence. A failure, under ordinary circumstances, to make diligent use of available means to avoid a known or apprehended danger, when it is apparent that if such means had been used the danger would have been averted, will be regarded as contributory negligence.[637] But where there are two or more different lines of actions, any one of which may be taken, and a person of ordinary skill, in the

contributory negligence is for the jury, though, when touching a dead wire, a few minutes before, he was warned to be careful, and though, while he was standing there, and in a position to see, a hog on the other side of the road had come in contact with a live wire, and given evidence of receiving a shock. Texarkana Gas & Electric Light Co. v. Orr, 59 Ark. 215, 27 S. W. 66.

[635] West v. City of Eau Claire (Wis.) 61 N. W. 313.

[637] Green v. Louisville, N. O. & T. R. Co. (Miss.) 12 South. 826; Christian v. Illinois Cent. R. Co., Id. 710; Bartlett v. Boston Gaslight Co., 122 Mass. 209. In Keefe v. Chicago & N. W. Ry. Co. (Iowa) 60 N. W. 503, plaintiff's intestate, while standing idle on the track in defendant's yard, was killed by an engine which was backing away from a switch. The court said: "It is certain that he was in a place of danger. The presence of the tracks, and cars thereon, and the movement of engines, were constant warnings to him of danger. It is the duty of persons employed in such places to be reasonably diligent in guarding against accidents, and especially to observe and keep out of the way of moving engines and cars. They have no right to rely wholly upon the persons in charge of them to prevent accidents, but must use due care to avoid danger. These rules are founded upon the necessities of the business of operating railways. They are reasonably just, and are fully sustained by the decisions of this and other courts. Collins v. Railway Co., 83 Iowa, 346, 49 N. W. 848; Magee v. Railway Co., 82 Iowa, 250, 48 N. W. 92; Haden v. Railroad Co. (Iowa) 48 N. W. 733; Elliott v. Railway Co., 150 U. S. 245, 14 Sup. Ct. 85; Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835. The jury would have been justified in finding that the negligence of Keefe contributed to the injury." It was accordingly held that plaintiff was guilty of contributory negligence.

presence of imminent danger, is compelled to choose one or the other, and does so in good faith, the mere fact that it is afterwards discovered, by the result, that his choice was not the best means of escape, or that no harm would have resulted if he had done nothing, such choice cannot be imputed to him as negligence.[638] This is clearly true where the danger to which he is exposed is the result of another's negligence.[639] Thus, if a passenger jump,[640] or does not jump [641] from a moving car, train, or engine, to avoid an impending

[638] Schultz v. Chicago & N. W. R. Co., 44 Wis. 638; Gumz v. Chicago, St. P. & M. Ry. Co., 52 Wis. 672, 10 N. W. 11; Stackman v. Chicago & N. W. Ry. Co., 80 Wis. 428, 50 N. W. 404. But see Baltzer v. Chicago, M. & N. R. Co., 83 Wis. 459, 53 N. W. 885; Grand Rapids & I. R. Co. v. Cox, 8 Ind. App. 29, 35 N. E. 183; Hass v. Chicago, M. & St. P. R. Co. (Iowa) 57 N. W. 894; Spaulding v. W. N. Flynt Granite Co., 159 Mass. 587, 34 N. E. 1134; Adams v. Lancashire & Y. Ry. Co., L. R. 4 C. P. 739; Peoria, D. & E. Ry. Co. v. Rice, 144 Ill. 227, 33 N. E. 95; Blackwell v. Lynchburg & D. R. Co., 111 N. C. 151, 16 S. E. 12; Clayards v. Dethick, 12 Q. B. 439. But see, per Bramwell, L. J., Lax v. Darlington, 5 Exch. Div. 28; Stokes v. Saltonstall, 13 Pet. 181; New Jersey R. Co. v. Pollard, 22 Wall. 341; Buel v. New York Cent. R. Co., 31 N. Y. 314; Johnson v. West Chester R. Co., 70 Pa. St. 357; Toledo, W. & W. Ry. Co. v. O'Connor, 77 Ill. 391; Mobile & M. R. Co. v. Ashcraft, 48 Ala. 15. But see Chicago & E. Ill. R. Co. v. Roberts, 44 Ill. App. 179; Lincoln Rapid Transit Co. v. Nichols, 37 Neb. 332, 55 N. W. 872. Where the jury find defendants were in fault in not giving timely notice of the blast whereby decedent was killed, or in failing to construct a covering, it is immaterial whether or not deceased took refuge in a safe place, it being sufficient that he made an effort to protect himself. Blackwell v. Lynchburg & D. R. Co., 111 N. C. 151, 16 S. E. 12.

[639] Kreider v. Lancaster, E. & M. Turnpike Co., 162 Pa. St. 537, 29 Atl. 721; Trowbridge's Adm'r v. Danville Street Car Co. (Va.) 19 S. E. 780; Baltzer v. Chicago, M. & N. R. Co., 83 Wis. 459, 53 N. W. 885; Dublin, W. & W. R. Co. v. Slattery, 3 App. Cas. 1155.

[640] Georgia Railroad & Banking Co. v. Rhodes, 56 Ga. 645; Stephenson v. Southern Pac. Co., 102 Cal. 143, 34 Pac. 618, and 36 Pac. 407; Louisville & N. R. Co. v. Rains (Ky.) 23 S. W. 505; Haney v. Pittsburgh, etc., Ry. Co., 38 W. Va. 570, 18 S. E. 748; Eckert v. Railroad Co., 43 N. Y. 502; Simmons v. East Tennessee, V. & G. R. Co., 92 Ga. 658, 18 S. E. 999. So jumping out of room on account of fire makes contributory negligence a question for the jury. Gorman v. McArdle, 67 Hun, 484, 22 N. Y. Supp. 479. So as to natural gas burning plaintiff's house. Stoughton v. Manufacturers' Natural Gas Co., 159 Pa. St. 64, 28 Atl. 227. Losing hold of hand car in sudden danger not contributory negligence. Clarke v. Pennsylvania R. Co., 31 N. E. 808, 132 Ind. 199.

[641] Spaulding v. W. N. Flynt Granite Co., 159 Mass. 587, 34 N. E. 1134; Hass

collision, or other danger,[642] he is not guilty of contributory negligence, and the act will not bar his recovery. Or if a woman in terror spring aside to avoid a threatened danger from an express wagon, and injures herself against a wall, she can recover, although she would have received no injury, had she remained passive on the sidewalk.[643] But the sudden peril which will excuse what would otherwise be contributory negligence on the part of the plaintiff

v. Chicago, M. & St. P. R. Co. (Iowa) 57 N. W. 894. Though a flagman may have signaled persons in a carriage to advance over the crossing, yet on discovering a train almost on the crossing, and the carriage coming in disregard of it, he is not negligent in stopping the horse by any means in his power, even if in doing so he frighten the horse,—a thing which, with cooler judgment, he might have avoided. Floyd v. Philadelphia & R. R. Co., 162 Pa. St. 29, 29 Atl. 396. So, in crossing a street, failure to take the best course is not contributory negligence. Crowley v. Strouse (Cal.) 33 Pac. 456.

[642] Piper v. Minneapolis St. Ry. Co., 52 Minn. 269, 53 N. W. 1060.

[643] Coulter v. Adams Exp. Co., 56 N. Y. 585. And see Richmond & D. R. Co. v. Farmer, 97 Ala. 141, 12 South. 86. Further, as to increasing peril by effort to avoid, Gibbons v. Wilkesbarre St. R. Co., 155 Pa. St. 279, 26 Atl. 417; Dunham Towing & Wrecking Co. v. Dandelin, 41 Ill. App. 175 (affirmed 143 Ill. 409, 32 N. E. 258, but not on this point). But see Graetz v. McKenzie, 9 Wash. 696, 35 Pac. 377. Where a passenger on a street-railway car is brought into apparent imminent danger from a collision at a railroad crossing by the negligence of the motor-man in attempting to cross where he could see that there was a probability of the engine reaching there first, she can recover for injuries received in attempting to flee from it, though she would have been uninjured if she had kept her seat; but, if the car would not have been brought into such danger except for the sudden, unexpected, and unanticipated obstruction by a wagon, then there would be no liability on the part of the company. Shankenbery v. Metropolitan St. Ry. Co., 46 Fed. 177. If plaintiff, trying to escape a kicking mule, jumps into an excavation rendering the street dangerous, to defendant's knowledge, plaintiff can recover for consequent damages. Bassett v. City of St. Joseph, 53 Mo. 290. Contra, Moulton v. Inhabitants of Sandford, 51 Me. 127; Liermann v. Chicago, M. & St. P. Ry. Co., 82 Wis. 286, 52 N. W. 91; Robinson v. Manhattan Ry. Co., 25 N. Y. Supp. 91; Menger v. Lauer, 55 N. J. Law, 205, 26 Atl. 180. But compare Watson v. Camden & A. R. Co., 55 N. J. Law, 125, 25 Atl. 136. Approach of a train at a crossing is a distracting circumstance for the jury to consider in determining whether or not plaintiff acted prudently. Loucks v. Chicago, M. & St. P. Ry. Co., 31 Minn. 526, 18 N. W. 651. So jumping off car in motion, which had run off the track, would not be a new, independent cause between derailment and injury. Smith v. St. Paul, M. & M. Ry. Co., 30 Minn. 169, 14 N. W. 797.

must ordinarily have been caused by the action of the defendant, and not of a third person.[644] However, negligence cannot be imputed by law to a person in his effort to save the life of another in extreme peril, unless made under such circumstances as to constitute rashness, in the judgment of prudent persons.[645] Such exception to ordinary liability for failure to avoid harm does not exist where a person voluntarily and negligently brings an injury on himself, or puts himself in a place of danger.[646] But, where the negligence complained of resulted in death, the natural instinct of avoiding harm is a proper consideration for the jury.[647]

Avoiding Unnecessary Damage After Injury.

After injury has occurred because of the defendant's negligence, the plaintiff must take care to avert what harm he can, and, if he fails so to do, his own carelessness becomes an efficient cause, and he, and not the defendant, should suffer for such subsequent negligence. Therefore, in an action to recover damages done to the plaintiff's premises by fire alleged to have been negligently started on the defendant's land, it appearing that the plaintiff discovered the fire shortly after it reached his premises, and neglected to extinguish it, though he could have done so, it was held that he had no right to neglect the obvious means of lessening the damage, and that he could not recover for any loss sustained by the fire subsequent to the time he had discovered it and neglected to extinguish it.[648] In an action for personal injury the defendant may show that the injury was enhanced by the plaintiff's continued use of intoxicating liquors,[649] or

[644] Trowbridge's Adm'r v. Danville Street-Car Co. (Va.) 19 S. E. 780.

[645] Ackert v. Long Island R. Co., 43 N. Y. 502. And see Spooner v. Delaware, L. & W. R. Co., 115 N. Y. 22, 21 N. E. 696; Linnehan v. Sampson, 126 Mass. 506; Pennsylvania Co. v. Roney, 89 Ind. 453; Cottrill v. Chicago, M. & St. P. Ry. Co., 47 Wis. 634, 3 N. W. 376; Simmons v. East Tennessee, V. & G. Ry. Co., 92 Ga. 658, 18 S. E. 999; Pennsylvania Co. v. Langendorf, 48 Ohio St. 316, 28 N. E. 172; Gibney v. State, 137 N. Y. 1, 33 N. E. 142.

[646] Vreeland v. Chicago, M. & St. P. Ry. Co. (Iowa) 60 N. W. 542.

[647] Hopkinson v. Knapp & Spaulding Co. (Iowa) 60 N. W. 653.

[648] Talley v. Courter, 93 Mich. 473, 53 N. W. 621. And see Hogle v. New York Cent. & H. R. R. Co., 28 Hun, 363; Loker v. Damon, 17 Pick. 284 (failure to close opening in plaintiff's fence made by defendant); Krum v. Anthony, 115 Pa. St. 431, 8 Atl. 598.

[649] Boggess v. Metropolitan St. Ry. Co., 118 Mo. 328, 23 S. W. 159, and 24 S. W. 210.

that the plaintiff's imprudence caused new injury.[650] Moreover, the plaintiff's subsequent wrong, if it does not bar recovery, may mitigate damages.[651]

No Duty to Anticipate Negligence.

On the other hand, the law recognizes no duty to anticipate the negligence of others. The presumption is that every person will perform the duty enjoined by law or imposed by contract.[652] Therefore, a repairer has the right to rely upon compliance with an ordinance requiring insulation of wires, and is bound to look for patent defects

[650] Carpenter v. McDavitt, 53 Mo. App. 393. And see City of Galesburg v. Rahn, 45 Ill. App. 351, where plaintiff, not a physician, undertook to treat herself. Childs v. New York, O. & W. Ry. Co., 77 Hun, 539, 28 N. Y. Supp. 894. In an action for personal injuries the court properly refused to direct the jury to disregard the testimony of plaintiff that she did not procure medical attendance because her husband was out of employment. Feather v. City of Reading, 155 Pa. St. 187, 26 Atl. 212. And see Alexander v. Richmond & D. R. Co., 112 N. C. 720, 16 S. E. 896. A patient is guilty of contributory negligence if he fail to follow treatment and directions. Potter v. Warner, 91 Pa. St. 362; Geiselman v. Scott, 25 Ohio St. 86. So, if he negligently throw off splints and walk on crutches. Hichcock v. Burgett, 38 Mich. 501.

[651] Lurch v. Holder (N. J. Ch.) 27 Atl. 81 (failure to use remedy for black rot); Burger v. St. Louis, K. & N. W. R. Co., 52 Mo. App. 119 (where defendant could not diminish damage by showing breach of—alleged, but not found—duty of utilizing carcasses of animals for killing of which the act was brought). If plaintiff can remedy defect in machinery, and does not, he cannot complain. Frick Co. v. Falk, 50 Kan. 644, 32 Pac. 360. But not if plaintiff could only remedy by committing a wrong (as abating ditch by going on third person's land). Fromm v. Ide, 68 Hun, 310, 23 N. Y. Supp. 56. And see Pennsylvania R. Co. v. Washburn, 50 Fed. 335 (failure to remove cargo from careened boat because stevedores demanded double wages); Childs v. New York, O. & W. Ry. Co., 77 Hun, 539, 28 N. Y. Supp. 894 (where plaintiff, caused to alight by defendant's negligence at wrong place, walked to destination, although she could have found a place to stay all night, she cannot recover for injury to her health). Cf. Schumaker v. St. Paul & D. R. Co., 46 Minn. 39, 48 N. W. 559.

[652] It was said in Engel v. Smith, 82 Mich. 1, 46 N. W. Rep. 21, that "it is a sound rule of law that it is not contributory negligence not to look out for danger where there is no reason to apprehend any." In Thomas v. Railway Co., 8 Fed. 729, it was held that "it was correct to instruct the jury that plaintiff had a right to assume that the defendant would use more care, in view of the obstructed condition of the crossing, than ordinary. The law will never hold it imprudent in any one to act upon the presumption that another, in his conduct, will act in accordance with the rights and duties of both."—cit-

only.[653] On the same principle, a teamster has a right to assume that an engine driver will use ordinary care.[654] Even children are presumed to know of statutory duty. A boy of 10 is presumed to know of the statutory duty of a railway company to keep a crossing in safe condition.[655] He may act on conventional invitation to go over a public crossing.[656]

273. In order that the plaintiff's contributory negligence may bar his recovery, it must be connected as at least a part of the legal cause of the damage.[657]

274. There may be a recovery, notwithstanding mutual negligence on the part of the plaintiff and the defendant—

(a) If the injury would have happened although the plaintiff had been in no wise negligent;

(b) If the defendant, after he has discovered the danger to which the plaintiff is exposed by his own negligence, refuses or neglects to exercise due care, under the circumstances, to avoid harm.[658]

ing Newson v. Railroad Co., 29 N. Y. 383; Liddy v. Railway, 40 Mo. 507; Langhoff v. Railroad Co., 19 Wis. 515; Hegan v. Railway Co., 15 N. Y. 383; Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60–72; Garrett v. W. U. Tel. Co. (Iowa) 58 N. W. 1064; Gee v. Metropolitan Ry. Co., L. R. 8 Q. B. 161; Wyatt v. Great Western Ry. Co., 6 Best & S. 709; Cooley, Torts, 659–661.

[653] Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 South. 51. Cf. Haynes v. Raleigh Gas Co., 114 N. C. 203, 19 S. E. 344.

[654] Hobson v. New Mexico & A. R. Co. (Ariz.) 11 Pac. 545; Northeastern R. Co. v. Wanless, L. R. 7 H. L. 12–15; Dublin, W. & W. Ry. Co. v. Slattery, 3 App. Cas. 1155; Bridges v. North London R. Co., 7 H. L. Cas. 213; Praeger v. Bristol & E. R. Co., 24 Law T. (N. S.) 105.

[655] Louisville, N. A. & C. R. Co. v. Red, 47 Ill. App. 662.

[656] Applied to a boy of 13, crossing over bumpers. Faulk v. Central R. & B. Co., 91 Ga. 360, 18 S. E. 304.

[657] Missouri Pac. Ry. Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 925.

[658] Carrico v. West Virginia Cent. & P. Ry. Co., 35 W. Va. 389, 14 S. E. 12. This statement of the rule is selected because its clearness overbalances its inaccuracy or incompetency.

The requirement that contributory negligence, to bar the right of action, must be the proximate cause, without which the damage would not have occurred, is the logical application of the general principle that the plaintiff's wrongdoing, in order to disentitle him to recover, must be the cause, in law, of the damage. If the wrong be merely collateral, it does not affect the right to legal redress. Thus, it would be manifestly absurd to hold that if a passenger was sitting with his arm out of a window, and the injury inflicted would have been just the same if his elbow had been inside of the window,' he could not recover, on account of his position.[659] So, if one be negligent in boarding a moving train, this does not affect his right to recover for damages consequent upon the violence of the brakeman in pushing him off the car.[660] And a surgeon called to set a leg carelessly broken will not be heard to say, in an action for his own carelessness in treating his patient, that the latter's negligence in breaking his leg caused the crooked or shortened limb.[661] On the other hand, a person is not responsible for damages proximately caused by any person except himself. If the damage complained of was legally caused by the plaintiff, he must bear it, as the consequence of his own act. In such a case, and in case the damage was caused

[659] 2 Wood, Ry. Law, 1257; Gulf, C. & S. F. Ry. Co. v. Danshank, 6 Tex. Civ. App. 385, 25 S. W. 295; Carrico v. West Virginia, Cent. & P. Ry. Co., 39 W. Va. 86, 19 S. E. 571. The same principle applies to intoxicated persons. Ante, p. 165. "Wrongdoer." Et vide Loftus v. Inhabitants of North Adams, 160 Mass. 161, 35 N. E. 674; Ward v. Chicago, St. P., M. & O. Ry. Co., 85 Wis. 601, 55 N. W. 771. Cf. Bradwell v. Pittsburgh & W. E. Pass. Ry. Co., 153 Pa. St. 105, 25 Atl. 623; Buddenberg v. Charles P. Chouteau Transp. Co., 108 Mo. 394, 18 S. W. 970. So, riding on baggage car (Jacobus v. St. Paul & C. R. Co., 20 Minn. 125, Gil. 110), or on a street-car platform (Matz v. St. Paul City Ry. Co., 52 Minn. 159, 53 N. W. 1071), may be forbidden, but are not necessarily contributory negligence (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).

[660] Reed v. Pennsylvania R. Co., 56 Fed. 184. Et vide Gale v. Lisbon, 52 N. H. 174; Smith v. Conway, 121 Mass. 216; Spofford v. Harlow, 3 Allen, 176; Welch v. Wesson, 6 Gray, 505. As to fire as a remote cause, see Atchison, T. & S. F. R. Co. v. Bales, 16 Kan. 252; Atchison, T. & S. F. R. Co. v. Stanford, 12 Kan. 354; Doggett v. Richmond & D. R. Co., 78 N. C. 305.

[661] Lannen v. Albany Gaslight Co., 44 N. Y. 459–463; Hibbard v. Thompson, 109 Mass. 286–289. And see Bartlett v. Boston Gaslight Co., 117 Mass. 533; Clayards v. Dethick, L. R. 12 Q. B. 439–495.

by a third person,[662] the defendant is not a legal cause, and cannot be logically held responsible.

Avoidable Consequences—English Rule.

In Davies v. Mann,[663] the plaintiff negligently allowed his fettered donkey to be in a highway, and the defendant's wagon was driven in broad daylight over the donkey. The defendant was held to be aware of the plaintiff's negligence; but, as his rate of speed was improper, he was held liable for damages, notwithstanding the plaintiff's negligence in allowing the animal to run at large. This case, while criticised,[664] seems to be a simple and logical application of the principle of proximate cause.[665] There is no necessary, although there may be an imaginary, inconsistency between the case and Butterfield v. Forrester.[666] Here a person riding violently down a street in daylight was injured by coming in contact with a pole placed across the street. It was held, in an action against the owner of the pole, that the plaintiff could not recover because he might have evaded the consequence of the owner's negligence. In Tuff v. Warman,[667] a barge negligently operated without a lookout was run down by a steamer. It was distinctly held that the plaintiff's negligence would not prevent his recovery, unless it be such

[662] Arey v. City of Newton, 148 Mass. 598, 20 N. E. 327, and cases cited page 602, 148 Mass., and page 327, 20 N. E.

[663] 10 Mees. & W. 546. See State v. Sauer (N. J. Sup.) 26 Atl. 180; Stiles v. Geesey, 71 Pa. St. 439.

[664] Mr. Beach (Contrib. Neg. § 5) considers this a persistent and mischief-making authority.

[665] The shallowness of this criticism is manifest in the opinion of Carpenter, J., in Nashua, I. & S. Co. v. Worcester & N. R. Co., 62 N. H. 159. "This case has been much misunderstood and maligned, and its principles put to very unjust uses and applications. Analysis of it will demonstrate the perfect soundness of its reasoning, and the validity of the principle there laid down." Priest, District Judge, in Kirtley v. Railway Co., 65 Fed. 386. In this case it was held that recovery cannot be had for a person killed on a track, where the engineer did not discover him in time to prevent the accident, though by ordinary care he might have done so, deceased being negligent.

[666] 11 East, 60; Day v. Highland St. Ry. Co., 135 Mass. 113.

[667] 2 C. B. (N. S.) 740, 5 C. B. (N. S.) 573, and 27 Law J. C. P. 322. Cf. Murphy v. Deane, 101 Mass. 455, 466. And see Horrigan v. Inhabitants of Clarksburg, 150 Mass. 218–220, 22 N. E. 897, and Pierce v. Cunard S. S. Co., 153 Mass. 87–89, 26 N. E. 415.

that, without it, the harm complained of could not have happened; "nor if the defendant, by the exercise of care on his part, might have avoided the consequence of the negligence or carelessness of the plaintiff." In Radley v. London & Northwestern Ry. Co.,[668] a railway corporation ran trucks on a siding under a bridge 8 feet from the ground. One truck contained another. Their joint height amounted to 11 feet. The driver of the engine, feeling resistance when the trucks struck the bridge, pushed ahead, and broke the bridge. It was originally held that the owner of the bridge could only recover if the accident happened solely through negligence of the engineer, and that, if both sides were negligent, so as to contribute to the accident, no recovery could be had. This was, on appeal, regarded to be a misdirection, because the result might have been avoided by the exercise of ordinary care and diligence. These cases have settled the English rule to the effect that, in the case of successive acts of negligence, the one who had the last opportunity of avoiding harm by the exercise of due care, under the circumstances, is liable if he did not do so.

Same—American Rule.

The supreme court of the United States held, in Inland & Seaboard Coasting Co. v. Tolson,[669] that any negligence on the part of the plaintiff, directly contributing to his injury, would incapacitate him from recovery; but that such negligence on his part would not have this effect if the defendant might, by the exercise of reasonable care and prudence, have avoided the consequence of the plaintiff's negligence. It was therefore left to the jury to decide the question of contributory negligence, where a steamboat negligently crashed into a wharf and damaged a person's foot, which he had carelessly placed between the planking. The same general doctrine is recognized in many subsequent cases.[670]

[668] L. R. 1 App. Cas. 754.

[669] 139 U. S. 551, 11 Sup. Ct. 653. Et vide page 558, 139 U. S., and page 653, 11 Sup. Ct., reviewing cases. Et vide 3 Harv. Law Rev. 263.

[670] If the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the persons injured, an action for the injury cannot be maintained unless it further appears that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. Lamar, J., in Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679; Clark v. Wilmington

Connection as Cause.

The term "proximate cause," in this connection, the English authorities do not regard as the best possible term. It is suggested that "decisive cause" or "decisive antecedent" would convey the meaning better,[671] and that "where the respective negligences are equal, the party who was the 'efficient cause' is responsible." [672] The supreme court of the United States uses the terms "proximate," "direct," and "efficient." [673]

Whatever phrase be employed, however, care should be used to avoid requiring the contributory negligence on the part of plaintiff to have "materially" contributed to the injury. "Courts are inclined to regard as error any limitation upon the effect of any degree of contributory negligence of the plaintiff as defeating his right of recovery." [674] And the question is not which is the "more proximate" of two possible causes.[675]

& W. R. Co., 14 S. E. 43; Spencer v. Illinois Cent. R. Co., 29 Iowa, 55; Newport News & M. V. Co. v. Howe, 3 C. C. A. 121, 52 Fed. 363; Morris v. Chicago, B. & Q. Ry. Co., 45 Iowa, 29; Deeds v. Chicago, R. I. & P. R. Co., 69 Iowa, 164, 28 N. W. 488; Czezewzka v. Railway Co. (Mo. Sup.) 25 S. W. 911; McKean v. Railroad Co., 55 Iowa, 192, 7 N. W. 505; O'Rourke v. Chicago, B. & Q. Ry. Co., 44 Iowa, 526; Denver & B. P. Rapid Transit Co. v. Dwyer (Colo. Sup.) 36 Pac. 1106; Nashua, I. & S. Co. v. Worcester & N. R. Co., 62 N. H. 159; Indiana Stone Co. v. Stewart, 7 Ind. App. 563, 34 N. E. 1019; Tobin v. Omnibus Cable Co. (Cal.) 34 Pac. 124. And cf. Holmes v. South. Pac. Coast Ry. Co., 97 Cal. 161, 31 Pac. 834, with Overby v. Chesapeake & O. Ry Co., 37 W. Va. 524, 16 S. E. 813; Pierce v. Cunard S. S. Co., 153 Mass. 87, 26 N. E. 415; Evarts v. St. Paul, M. & M. Ry. Co. (Minn.) 57 N. W. 459; Keefe v. Chicago & N. W. Ry. Co. (Iowa) 60 N. W. 503; Little v. Superior Rapid Transit Ry. Co. (Wis.) 60 N. W. 705. This rule applies usually in cases when the plaintiff or his property is in some position of danger from a threatened contact with some agency under control of the defendant, when the plaintiff cannot, and the defendant can, prevent the injury.

[671] Pol. Torts, § 380.

[672] Clerk & L. Torts, 383.

[673] Case in note 669, supra.

[674] Monongahela City v. Fischer, 111 Pa. St. 9, 2 Atl. 87; Oil City Fuel Supply Co. v. Boundy, 122 Pa. St. 449, 15 Atl. 865; Mattimore v. City of Erie, 144 Pa. St. 14, 22 Atl. 817; Erie Tel. & Tel. Co. v. Grimes, 82 Tex. 89, 17 S. W. 831; Banning v. Chicago, R. I. & P. Ry. Co. (Iowa) 56 N. W. 277. Et vide Portman v. City of Decorah, Id. 512; North Birmingham St. R. Co. v. Calderwood, 89 Ala. 247, 7 South. 360.

[675] If plaintiff is on a track, and walk on it without looking behind him,

But, while the authorities are generally agreed as to this fundamental proposition, in its application there is much uncertainty and confusion. There is material error in the common statement that, if a person's injury could not have occurred except for his negligence, or if his negligence contributed to his injury, he cannot recover.[676] His negligence may be a sine qua non of the damage, and be prior to, concurrent with, or subsequent to the defendant's negligence. In any of these cases the negligence may be contributory. Merely verbal reasoning on such "an unsafe and much too loose" [677] term as contributory negligence has naturally produced dire confusion in reasoning and adjudication. It may be a condition, and not a cause.[678] It may be remote, but not proximate. It may be of such a character as to put upon one person the duty of avoiding harm to another even though such other be a wrongdoer, and although damage could not have happened to him but for his wrong. The violation of this duty may be actionable.

The ignorance of the plaintiff and the defendant, respectively, and the fact as to which one is in motion and which one, or whether both, are present at the time the damage is done, may also affect their relative rights.[679] These considerations are often overlooked

and is struck by an engine, where there was failure to ring a bell, his negligence directly contributed to the wrong. Missouri Pac. R. Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921.

[676] In other words, that plaintiff's negligence bars recovery when it is a sine qua non of his damage. "When a person's own negligence or want of ordinary care or caution so far contributes to an injury to himself that but for such negligence or want of ordinary care or caution on his part the injury would not have happened, he cannot recover therefor." Baltimore & P. Ry. Co. v. Jones, 95 U. S. 439. It is almost equally misleading to say that plaintiff cannot recover if he, "by some negligence on his part, directly contributed to the injury, it was caused by the joint negligence of both, and no longer solely by the negligence of the defendant, and that formed a defense to the action." Lord Esher, in Thomas v. Quartermaine, 18 Q. B. Div. 685. The statement of Bowen, J., in the same case, is much clearer. And see McGrath v. City & S. Ry. Co., 93 Ga. 312, 20 S. E. 317; Walker v. City of Vicksburg, 71 Miss. 899, 15 South. 132.

[677] Crompton, J., in Tuff v. Warman, 5 C. B. (N. S.) 573.

[678] As blindness of an unattended traveler killed by a collision, even if escape might have been possible if he had had his sense of sight. St. Louis, I. M. & S. R. Co. v. Maddry, 57 Ark. 306, 21 S. W. 472.

[679] Clerk & L. Torts, 380–383, incl. In Butterfield v. Forrester, 11 East, 60, and Radley v. London & N. W. R. Co., 1 App. Cas. 754, defendant was

in determining whether, in a given case, a person's negligence is such as to prevent his recovery at law.

Perhaps the most philosophical statement of the law of contributory negligence to be found is that of Mr. Innes:[680] "If a person is harmed by the negligence of another, and he has by his own conduct contributed to bring about the harm, he is still entitled to redress from the other person, if he was unable to avoid the consequences of the other person's conduct.[681] If a person is harmed by the negligence of another, and he, by his own conduct, contributed to bring about the harm, and if he was able to avoid the consequences of the negligence of the other person, but did not avoid them, he is still entitled to redress, if the other person was able to avoid the effects of the conduct of the person harmed, but did not avoid them.[682] If a person is harmed by the negligence of another, and he has by his own conduct contributed to bring about the harm, if he was able to avoid the consequences of the conduct of the other person, but did not do so, and the other person was not able to avoid the effects of the conduct of the person harmed, the person harmed is not entitled to redress." [683]

ignorant of negligence of plaintiff. But in the former plaintiff was in motion at the time of the accident, and in the latter he was not. And see Nashua Iron & Steel Co. v. Worcester & N. Ry. Co., 62 N. H. 159.

[680] Innis, Torts, c. 5, § 123, p. 136.

[681] Davies v. Mann, 10 Mees. & W. 545; ante, p. 973. Here plaintiff could recover despite his precedent act of negligence, if he could not have avoided the consequence of defendant's subsequent conduct producing damage. Compare Richardson v. Metropolitan Ry. Co., 37 L. J. C. P. 300. Butterfield v. Forrester, supra, involves a precedent act of defendant and subsequent act of plaintiff producing damage. Et vide Flower v. Adam, 2 Taunt. 314. Simultaneous act of a defendant producing damage to plaintiff, no recovery. Hill v. Warren, 2 Starkie, 377. And see Northern Central Ry. Co. v. State, 29 Md. 420.

[682] Radley v. London & N. W. R. Co., 1 App. Cas. 754, 46 L. J. Exch. 573.

[683] Mangan v. Atterton, 4 Hurl. & C. 388 (criticised by Cockburn, J., in Clark v. Chambers, 3 Q. B. Div. 32); Abbott v. Maxfie, 2 Hurl. & C. 744; Neal v. Gillett, 23 Conn. 437. Cf. Bailey v. Cincinnati, N. O. & T. P. R. Co. (Ky.) 20 S. W. 198; Stanley v. Union Depot R. Co., 114 Mo. 606, 21 S. W. 832. No one can justly complain of another's negligence, which, but for his own interposition, would be harmless. Parker v. Adams, 12 Metc. (Mass.) 415; Nashua Iron & Steel Co. v. Worcester & N. R. Co., 62 N. H. 159–163; State v. Manchester L. R. Co., 52 N. H. 528, 557; White v. Winnisimmet Co., 7 Cush.

SAME—COMPARATIVE NEGLIGENCE.

275. The doctrine of comparative negligence is not generally recognized. Courts decline to apportion damage according to the blame.

If one is guilty of gross negligence, it has been held that he cannot set up a trifling negligence or inadvertence on the part of another as a defense.[684] Therefore, if a railroad company is grossly negligent at a railroad crossing, the slight negligence of a youthful driver will not deprive him of his right to damages.[685] But, while some cases have fully recognized the doctrine of comparative negligence, and have undertaken to strike a legal balance between the negligence of the two persons,[686] the general trend of opinion is

(Mass.) 155–157; Robinson v. Cone, 22 Vt. 213. If a patient's own negligence contributes to her damages as well as the malpractice of defendant, she cannot recover. Becker v. Janeniski, 27 Abb. N. C. 45. Accordingly, if a druggist by mistake sell one medicine for another, and injuries result to plaintiff from taking it, it is no defense that a physician negligently treated the case. But it is otherwise if the negligence of the physician and patient concur. Brown v. Marshall, 47 Mich. 576, 11 N. W. 392. Compare Murdock v. Walker, 43 Ill. App. 590. While this holding may accord with the rule that the legal cause need not be the sole cause of the harm complained of, the line is a fine one. And it is insisted in Du Bois v. Decker, 130 N. Y. 325, 29 N. E. 313, that plaintiff's fault should operate only by way of mitigation of damages.

[684] 4 Am. & Eng. Enc. Law, 367; Bailey, Mast. & S. 403.

[685] Schindler v. Milwaukee, L. S. & W. Ry. Co., 87 Mich. 400, 49 N. W. 670. Compare Long v. Township of Milford, 137 Pa. St. 122, 20 Atl. 425, with Mattimore v. City of Erie, 144 Pa. St. 14, 22 Atl. 817. Et vide Galena & C. Ry. Co. v. Jacobs, 20 Ill. 478–497, per Breese, J.; North Chicago Rolling Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186; East Tennessee, V. & G. Ry. Co. v. Aiken, 89 Tenn. 245, 14 S. W. 1082. In Kentucky the rule applies only as to cases resulting in death. Illinois Cent. R. Co. v. Dick, 91 Ky. 434, 15 S. W. 665.

[686] Jacobs' Case, 20 Ill. 478; Chicago, etc., Ry v. Gregory, 58 Ill. 272; North Chicago Rolling-Mill Co. v. Johnson, 114 Ill. 57, 29 N. E. 186; Chicago, B. & Q. R. Co. v. Warner, 123 Ill. 38, 14 N. E. 206; Tomle v. Hampton, 129 Ill. 379, 21 N. E. 800; Willard v. Swansen, 126 Ill. 381, 18 N. E. 548; Louisville, N. A. & C. Ry. Co. v. Johnson, 44 Ill. App. 56; City of Beardstown v. Smith, 150 Ill. 169, 37 N. E. 211; Calumet Iron & Steel Co. v. Martin, 115

to determine the defendant's liability by the test of proximate, efficient, or distinctive cause.[687] Even in Illinois, the latest decisions no longer recognize the doctrine of comparative negligence.[688] The true rule seems to be that "it is an incontestable principle that where the injury complained of is the product of mutual or concurrent negligence, no action for damages will lie. The parties being mutually at fault, there can be no apportionment of damages. The law has no scale to determine in such cases whose wrongdoing weighed most in the compound that occasioned the mischief." It has, however, been held by the circuit court of appeals, in Alaska Treadwell Gold Min. Co. v. Whelan,[690] that "gross negligence of a defendant may excuse slight contributory negligence of the plaintiff."

Ill. 358, 3 N. E. 456, followed in Atchison, T. & S. F. Ry. Co. v. Feehan, 149 Ill. 202, 36 N. E. 1036; Kentucky Cent. Ry. Co. v. Smith, 93 Ky. 449, 20 S. W. 392; Louisville, C. & L. Ry. Co. v. Mahony, 7 Bush (Ky.) 235; Sullivan v. Louisville Bridge Co., 9 Bush (Ky.) 81; Jacobs v. Louisville & N. R. Co., 10 Bush (Ky.) 263. The admiralty rule is to divide damage. The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29. However, in a common-law action for a maritime tort based on collision, this rule does not apply, and, if both vessels are culpable in respect of faults operating directly and immediately to produce a collision, neither can have damages for injuries so caused. Belden v. Chase, 150 U. S. 674, 14 Sup. Ct. 264; Atlee v. Packet Co., 21 Wall. 389.

[687] Ante, p. 971. Et vide Rowen v. New York, N. H. & H. Ry. Co., 59 Conn. 364, 21 Atl. 1073; Erie Tel. & Tel. Co. v. Grimes, 82 Tex. 89, 17 S. W. 831; Galveston, H. & S. A. Ry. Co. v. Thornsberry (Tex. Sup.) 17 S. W. 521; Prescott & A. C. Ry. Co. v. Rees (Ariz.) 28 Pac. 1134; Dennis v. Harris (Sup.) 19 N. Y. Supp. 524; Fenneman v. Holden, 75 Md. 1, 22 Atl. 1049; O'Keef v. Chicago R. Co., 32 Iowa, 467 (per Cole, J.); Johnson v. Tilson, 36 Iowa, 89; A. L. & J. J. Reynolds Co. v. Third Ave. R. Co., 8 Misc. Rep. 313, 28 N. Y. Supp. 734; Boyd v. Burkett (Tex. Civ. App.) 27 S. W. 223; Chicago, K. & N. R. Co. v. Brown, 44 Kan. 384, 24 Pac. 497.

[688] City of Lanark v. Dougherty, 153 Ill. 163, 38 N. E. 892.

[690] 12 C. C. A. 225, 64 Fed. 462.

SAME—VICARIOUS NEGLIGENCE.

276. The contributory negligence of a person other than the plaintiff is a proximate cause of harm, and operates as a bar to recovery, only when such person sustains a relation to the plaintiff which makes the latter liable to third persons for the negligence of such other person.

Where third persons are involved in the alleged contributory negligence, the plaintiff is not deprived of his remedy unless it be shown that such persons and himself are so identified by the law that their negligence may be imputed to him. Thus, as between master and servant, the same principle which makes the master liable for the negligence of his servant attributes to the master the contributory negligence of his servant in dealing with his master's business, and prevents recovery by the master for wrong caused by his servant's negligence.[691] On the other hand, an employé is not so identified with a coemployé that the latter's negligence is necessarily imputed to the employé.[692]

The doctrine of identification was applied in Thorogood v. Bryan [693] (1849) so as to hold that a passenger in one omnibus injured by a collision caused by the negligence of the driver was so identified with such driver as to prevent his recovery of damage because of the driver's contributory negligence. This doctrine though subsequent-

[691] La Riviere v. Pemberton, 46 Minn. 5, 7, 48 N. W. 406. Here the defense of contributory negligence of plaintiff's servant in allowing cattle to go at large availed to defendant in an action by the master to recover damages for cattle which dropped through a hole in the ice made by icemen. The negligence of a nurse injuring a child is imputable to the parents of the child. Schlenks v. Central Pac. Ry. Co. (Ky.) 23 S. W. 589.

[692] Poor v. Sears, 154 Mass. 539, 28 N. E. 1046, applied so that negligence of coemployés in not warning plaintiff of a falling shaft was not imputed to plaintiff. Wrong of children in vexing a ram is not attributable to teacher whom the ram attacked. Kinmouth v. McDougall, 64 Hun, 636, 19 N. Y. Supp. 771.

[693] Thorogood v. Bryan, 8 C. B. 115. Et vide Bridge v. Grand Junction Ry. Co., 3 Mees. & W. 244; Cattlin v. Hills, 8 C. B. 123.

ly followed,[694] was finally overruled in England. In The Bernina [695] (1887) a collision occurred between two steamships, through the negligence of the master and crews of both vessels, and an engineer and passenger on board of one of the ships were drowned. Neither had anything to do with the negligent navigation. The representatives of the deceased persons were held entitled to recover against the owners of the colliding vessel on which they were not riding.

Lord Herschell said, in commenting on the three reasons assigned in Thorogood v. Bryan: "To say that it [the negligence of the driver] is a defense, because the passenger is identified with the driver, appears to me to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defense, the validity of which is the very point in issue. * * * What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? * * * And when it is attempted to apply this reasoning to passengers traveling in steamships or on railways, the unreasonableness of such a doctrine is even more glaring. * * * If the master in such case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that, if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third persons. The learned judge would, I imagine, in that case, see a reason why a passenger in the omnibus stood in a better position than the master of the driver."

In rendering this decision, the English followed the lead of the American courts. The original doctrine had been previously rejected in Chapman v. New Haven R. Co.,[696] and by the supreme court of the United States in Little v. Hackett.[697] It was held in the latter case that a person who had hired a public hack, and

[694] Armstrong v. Lancashire & Y. R. Co., L. R. 10 Exch. 47. And see Child v. Hearn, L. R. 9 Exch. 176.

[695] L. R. 13 App. Cas. 1; Chase, Lead. Cas. 233.

[696] Chapman v. New Haven R. Co., 19 N. Y. 341.

[697] (1886) 116 U. S. 366, 6 Sup. Ct. 391,—"a decision of the supreme court of United States, whose decisions, on account of its high character for learning and ability, are always to be regarded with respect." Herschell, J., in The

given the driver directions as to the place to which he wished to be conveyed, but exercised no other control over the conduct of the driver, was not responsible for the latter's acts or negligence, nor prevented from recovering against a railroad company for injury suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and the driver. It is the almost universally accepted opinion that the negligence of a public or hired carriage is not to be imputed to a passenger who in the management of the conveyance exercised no control.[698] If, however, the person being conveyed by such vehicle assumes control, and gives the driver directions, beyond merely naming his destination, he may become a dominus pro tempore, and make the driver his servant.[699] But one who rides by invitation, with an apparently safe horse, and a driver whom he has no reason to believe incompetent, and exercises no control over either, is not chargeable with any negligence of the driver contributing to an accident.[700] While

Bernina, 13 App. Cas. 10. This case settled the law in this country, and seems to have convinced the English judges of the error in Thorogood v. Bryan, 8 C. B. 115. Sanborn, J., in Union Pac. Ry. Co. v. Lapsley, 2 C. C. A. 149, 51 Fed. 174–178.

[698] Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co., 41 Fed. 316; Larkin v. Burlington, C. R. & N. Ry. Co., 85 Iowa, 492, 52 N. W. 480; East Tennessee, V. & G. Ry. Co. v. Markens, 88 Ga. 60, 13 S. E. 855; Little Rock & M. R. Co. v. Harrell, 58 Ark. 454, 25 S. W. 117; Bunting v. Hogsett, 139 Pa. St. 363–375, 21 Atl. 31, 33, 34; Becke v. Missouri Pac. Ry. Co., 102 Mo. 544, 13 S. W. 1053; Garteiser v. Galveston, H. & S. A. Ry. Co., 2 Tex. Civ. App. 230, 21 S. W. 631 (hand car).

[699] Thus, a livery stable keeper is liable for his driver's negligence, but if the hirer directs or perhaps duly sanctions rash or careless acts, as by forcing a coach through a crowd, he is liable. McLaughlin v. Pryor, 4 Man. & G. 48; Holmes v. Mather, L. R. 10 Exch. 261.

[700] Union Pac. R. Co. v. Lapsley, 2 C. C. A. 149, 51 Fed. 174 (a leading case), and cases cited at page 178, 51 Fed., and page 149, 2 C. C. A.; Philadelphia, W. & B. R. Co. v. Hogeland, 66 Md. 149, 7 Atl. 105, followed in Baltimore & O. R. Co. v. State (Md.) 29 Atl. 518; Metropolitan St. Ry. v. Powell, 89 Ga. 601, 16 S. E. 118; Alabama & V. R. Co. v. Davis, 69 Miss. 444, 13 South. 693; Follman v. City of Mankato, 35 Minn. 522, 29 N. W. 317; Board of Com'rs of Boone Co. v. Mutchler, 137 Ind. 140, 36 N. E. 534. But see Whittaker v. City of Helena, 14 Mont. 124, 35 Pac. 904; Johnson v. Gulf, C. & S. F. Ry. Co., 2 Tex. Civ. App. 139, 21 S. W. 274.

there is some difference of opinion on the subject, arising in part from peculiarities of the statutory status of husband and wife,[701] it is generally regarded that the negligence of either in driving is not necessarily to be attributed to the other.[702] The original English doctrine of imputing the negligence of the person in charge of a vehicle or conveyance on which a person may be riding is generally rejected in America.[703]

[701] Toledo, St. L. & K. C. R. Co. v. Crittenden, 42 Ill. App. 469; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274 (a level crossing case); Louisville, N. A. & C. Ry. Co. v. Creek, 130 Ind. 139, 29 N. E. 481. And see McCullough v. Railroad Co., 101 Mich. 234, 59 N. W. 618.

[702] Honey v. Chicago, B. & Q. Ry. Co., 59 Fed. 423 (per Shiras, J.). Here it was held that, to render the contributory negligence of a wife as the agent or servant of her husband imputable to him, the circumstances must be such that he would be liable for her negligent act if it had resulted in injury to a third person. Et vide Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, and 34 N. E. 218. The negligence of a husband who is driving his wife over a railroad crossing, where she is injured, cannot be imputed to the wife. Lake Shore & M. S. Ry. Co. v. McIntosh (Ind. Sup.) 38 N. E. 476.

[703] New York, L. E. & W. R. Co. v. Steinbrenner, 47 N. J. Law, 161; Robinson v. New York Cent. & H. R. R. Co., 66 N. Y. 11; Noyes v. Boscawen, 64 N. H. 361, 10 Atl. 690; State v. Boston & M. R. Co., 80 Me. 430, 15 Atl. 36; Nesbit v. Town of Garner, 75 Iowa, 314, 39 N. W. 516; Philadelphia, W. & B. R. Co. v. Hogeland, 66 Md. 149, 7 Atl. 105; St. Clair St. Ry. Co. v. Eadie, 43 Ohio St. 91, 1 N. E. 519; Brickell v. New York Cent. & H. R. R. Co., 120 N. Y. 290, 24 N. E. 449; Randolph v. O'Riordon, 155 Mass. 331, 29 N. E. 583; Bennett v. New York Cent. & H. R. R. Co., 133 N. Y. 563, 30 N. E. 1149; Cahill v. Cincinnati, N. O. & T. P. Ry. Co., 92 Ky. 345, 18 S. W. 2; Darling v. Passadumkeag Log Driving Co., 85 Me. 221, 27 Atl. 109; Elyton Land Co. v. Mingea, 89 Ala. 521, 7 South. 666 (a fireman on an overturned hose cart). In Wisconsin, however, the driver of a private conveyance is the agent of the person in such conveyance, so that his contributory negligence will defeat his action. Houfe v. Town of Fulton, 29 Wis. 296; Prideaux v. City of Mineral Point, 43 Wis. 513. In Michigan the same ruling has been followed. Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Mullen v. City of Owosso, 100 Mich. 103, 58 N. W. 663. Where a person was killed while in a wagon crossing a railroad track, negligence on the part of the driver of the wagon is imputable to deceased, who was blind, and unable to take care of himself, and who, of his own volition, confided himself to the care of such driver, his father. Johnson v. Gulf, C. & S. F. Ry. Co., 2 Tex. Civ. App. 494, 21 S. W. 274. The contributory negligence of a gripman under the control of a conductor will not be imputed to the latter. Minister v. Citizens' Ry. Co., 53 Mo. App. 276.

277. While the doctrine that the negligence of the custodian of a child of such tender years as to be non sui juris is imputed to it so far as to bar the cause of action for damages caused by the negligence of another is recognized, such doctrine would seem to be opposed alike to the weight of reasoning and of authority.[704]

The doctrine of identification has been carried so far beyond the limits of Thorogood v. Bryan as to take away from a child non sui juris the right to recover damages suffered by it in consequence of another's negligence. In England, Waite v. Northeastern Ry. Co.[705] is supposed to be authority for the proposition that "they have succeeded in performing the dialectical feat of identifying a child with its grandmother." In this case a child of five years was taken to a railroad station by its grandmother. The ground of decision was that "the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge." The needful foundation of liability is wanting in this case, viz. that the defendant's negligence, and not something else, for which he is not answerable, and which he had no reason to anticipate, should be the proximate cause.[706] No English decision goes to the length of depriving the child of redress on the ground that a third person's negligence allowed it to go alone.[707] In America, however, the doctrine has been frequently recognized[708] since its first enunciation[709] in Hat-

[704] 1 Shear. & R. Neg. (4th Ed.) § 75; Whart. Neg. § 311; 2 Wood, Ry. Law, 322.

[705] El., Bl. & El. 719.

[706] Pol. Torts, 382.

[707] Pol. Torts, 383, where it was said of Mangan v. Atterton, L. R. 1 Exch. 239: "We think it not law." But see Child v. Hearn, L. R. 9 Exch. 176.

[708] Hartfield v. Roper, 21 Wend. (N. Y.) 615; Meeks v. Southern Pac. R. Co., 52 Cal. 602; Toledo, W. & W. R. Co. v. Grable, 88 Ill. 441; Pittsburgh, Ft. W. & C. R. Co. v. Vining's Adm'r, 27 Ind. 513; Hathaway v. Toledo, W.

[709] Beasley, J., in Newman v. Phillipsburg Horse-Car R. Co., 52 N. J. Law, 446, 19 Atl. 1102.

field v. Rofer & Newell.[710] Thus, where two children, aged respectively seven and fourteen years, undertook to cross a railroad track, the negligence of the attendant was not attributed to the older child, and her conduct was considered with respect to the capacity and discretion which at her age she was presumed to possess. "The wholly irresponsible infant has imputed to it without limit or qualification the conduct of the parent or other person standing in loco parentis, but this is not the rule of reason or of law in the case of the child which has arrived at an age where capacity and discretion are presumed."[711] The "reasons and considerations are (1) the mutuality of the wrong entitling each party alike, when both are injured, to his action against the other, if it entitles either; (2) the impolicy of allowing a party to recover for his own wrong; and (3) the policy of making personal interest of parties dependent on their own prudence and care."[712] But to disentitle an infant to recover, the contributory act must be negligent. While the negligence of a parent in allowing a child non sui juris to go unattended on the street may be a bar to the recovery by such child for damages, this is not true if, while so unattended, the child does nothing which would be deemed dangerous or lacking in due care, provided its movements had been directed by an adult person of reasonable and

& W. R. Co., 46 Ind. 25; Lafayette & I. R. Co. v. Huffman, 28 Ind. 287; Fitzgerald v. St. Paul, M. & M. R. Co., 29 Minn. 336, 13 N. W. 168; Wright v. Malden & M. R. Co., 4 Allen (Mass.) 283; Stillson v. Hannibal & St. J. R. Co., 67 Mo. 671; Flynn v. Hatton, 4 Daly (N. Y.) 552, 43 How. Prac. (N. Y.) 333; Mangam v. Brooklyn R. Co., 38 N. Y. 455; Cauley v. Pittsburgh, C. & St. L. Ry. Co., 95 Pa. St. 398; Dudley v. Westcott (Com. Pl.) 18 N. Y. Supp. 130, overruling 15 N. Y. Supp. 952; Foley v. New York Cent. & H. R. R. Co., 78 Hun, 248, 28 N. Y. Supp. 816; Mattise v. Consumers' Ice Manuf'g Co., 46 La. Ann. 1535, 16 South. 400 (dangerous boiler).

[710] 21 Wend. (N. Y.) 615.

[711] Louisville, N. O. & T. Ry. Co. v. Hirsch, 69 Miss. 126, 13 South. 244. Where one is intrusted by a father with the care of his minor son, and, by reason of his gross negligence, the son is killed, such negligence is imputable to the father, but not to the mother. Atlanta & C. Air-Line Ry. Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550; Railway Co. v. Wilcox, 27 N. E. 899, 138 Ill. 370; City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484.

[712] Welch, J., in Bellefontaine & I. R. Co. v. Snyder, 18 Ohio St. 399, 408, 409. And see Glassey v. Hestonville Ry. Co., 57 Pa. St. 172.

278. Where the action is by the parent for the loss of service caused by an injury to the child, the contributory negligence of the plaintiff is a good defense.[718]

Parents of children of tender years must exercise care with reference to the tender years and discretion of the child, to the family exigencies, and to known dangers, or dangers that might be known by the exercise of ordinary diligence. The care of the custodian of children has reference alike to the tender age of the child and to any defect in its faculties.[719] The parent is not necessarily negligent in allowing the child to go in company of another, personally capable of caring for it, near a concealed danger unknown to both.[720] Domestic exigencies, as the sickness of the mother,[721] or her exhausted condition,[722] are proper matters for consideration. Thus, where a sick mother sends her boy across the street on a necessary errand, such act is not necessarily contributory negligence.[723]

[718] Erie City Pass. Ry. Co. v. Schuster, 113 Pa. St. 412, 6 Atl. 269; Smith v. Railway Co., 92 Pa. St. 450; Albertson v. Keokuk & D. M. Ry. Co., 48 Iowa, 292; Pratt Coal & Iron Co. v. Brawley, 83 Ala. 371, 3 South. 555; Evansville & C. Ry. Co. v. Wolf, 59 Ind. 89; Huff v. Ames, 16 Neb. 139, 19 N. W. 623; Beach, Contrib. Neg. 44; 1 Shear. & R. Neg. 71; Slattery v. O'Connell (Mass.) 26 N. E. 430.

[719] It is not contributory negligence to allow an epileptic child of 14 to be at large unattended. Platte & D. Canal & Milling Co. v. Dowell, 17 Colo. 376, 30 Pac. 68. But the jury is generally called upon to determine the contributory negligence of allowing a defective child to go at large unattended. Lynch v. Metropolitan St. Ry. Co., 112 Mo. 420, 20 S. W. 642.

[720] Union Pac. R. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619.

[721] Citizens' St. R. Co. of Indianapolis v. Stoddard, 10 Ind. App. 278, 37 N. E. 723; McMahon v. Northern Cent. Ry. Co., 39 Md. 438; Atchison, T. & S. F. R. Co. v. Calvert, 52 Kan. 547, 34 Pac. 978; Wiswell v. Doyle, 160 Mass. 42, 35 N. E. 107.

[722] Slattery v. O'Connell, 153 Mass. 94, 26 N. E. 430. Et vide Rosenkranz v. Lindell Ry. Co., 108 Mo. 9, 18 S. W. 890; Gunderson v. Northwestern Elevator Co., 47 Minn. 161, 49 N. W. 694; Avey v. Galveston, H. & S. A. Ry. Co. (Tex. Sup.) 17 S. W. 31. So an escape through a door left open for a few moments is not necessarily contributory negligence on the mother's part. Weissner v. St. Paul City Ry. Co., 47 Minn. 468, 50 N. W. 606. Et vide Strutzel v. St. Paul City Ry. Co., 47 Minn. 543, 50 N. W. 690; City of St. Paul v. Kuby, 8 Minn. 154 (Gil. 125).

[723] Cases cited in preceding note.

The care that is to be exercised has reference to dangers customary in the given place,[724] and to other dangers known, or which ought to be known. But the parent is bound to exercise care with reference to circumstances, and is not bound to anticipate carelessness on the part of others. And if the defendant, in the exercise of ordinary care, could have averted the parent's negligence, the infant or his representative may recover.[726] The question of the negligence of parents is ordinarily for the jury; not for the court.[727] If, however, the danger of the child could have been discovered by the defendant in time to avoid injury to it by the exercise of ordinary care, neither the parent's nor the child's right to recover is barred by this alleged contributory negligence in allowing it to be at large unattended.[728] Thus it is contributory negligence for a mother not to recognize her own child sitting on a track in full view.[729]

[724] Applied to jars customary in coupling cars. De Mahy v. Morgan's L. & T. R. R. & S. S. Co., 45 La. Ann. 1329, 14 South. 61.

[726] Louisville, N. A. & C. R. Co. v. Shanks, 132 Ind. 395, 31 N. E. 1111. Citizens' St. Ry. Co. v. Stoddard, 10 Ind. App. 278, 37 N. E. 723. Ante, p. 973, contributory negligence of the parent as a bar to action for injury to a child.

[727] Creed v. Kendall, 156 Mass. 291, 31 N. E. 6; Baker v. Flint & P. M. Ry. Co., 91 Mich. 298, 51 N. W. 897; Tobin v. Missouri Pac. Ry. Co. (Mo. Sup.) 18 S. W. 996; Meagher v. Cooperstown & C. V. R. Co., 75 Hun, 455, 27 N. Y. Supp. 504; Huerzeler v. Central Cross Town R. Co., 139 N. Y. 490, 34 N. E. 1101; Lederman v. Pennsylvania R. Co., 165 Pa. St. 118, 30 Atl. 725.

[728] Gunn v. Ohio River R. Co., 36 W. Va. 165, 14 S. E. 465; Id., 37 W. Va. 421, 16 S. E. 628; Baltimore C. P. Ry. Co. v. McDonnell, 43 Md. 534; McEnery, J., dissents in McGuire v. Vicksburg, S. & P. R. Co., 46 La. Ann. 1543, 16 South. 457. Where a driver of a car, after discovering a child on the track, notwithstanding that he had ample time and opportunity to avert an accident, injured the child, the latter's negligence in being on the track would not prevent its recovery. Huerzeler v. Central Cross Town R. Co., 1 Misc. Rep. 136, 20 N. Y. Supp. 676.

[729] Johnson v. Reading City Pass. Ry. Co., 160 Pa. St. 647, 28 Atl. 1001. Et vide Grant v. City of Fitchburg, 160 Mass. 16, 35 N. E. 84; Alabama G. S. R. Co. v. Dobbs, 101 Ala. 219, 12 South. 770.

CHAPTER XIII.

MASTER AND SERVANT.

MASTER'S DUTIES TO SERVANT.

279. A master owes to his servant certain inalienable, nonassignable duties peculiar to the relationship, based in general upon the duty not to expose him to unnecessary or unreasonable risks. The servant has a right to assume that his employer has performed these duties.[1] They consist in the exercise of reasonable care with reference to—

(a) Providing and maintaining suitable appliances, machinery, and places to work.

[1] This will be found discussed in the text under the various specific duties of the master. For example, the servant may rely on the presumption that the master will furnish safe machinery, and, in the absence of notice, actual or constructive, is under no primary obligation to investigate and test. Chicago & E. I. R. Co. v. Hines, 132 Ill. 161, 23 N. E. 1021. Et vide Chicago & E. R. Co. v. Branyan (Ind. App.) 37 N. E. 190; Richland's Iron Co. v. Elkins, 90 Va. 249, 17 S. E. 890; Pringle v. Chicago, R. I. & P. Ry. Co., 64 Iowa, 613–616, 21 N. W. 108; Rigdon v. Alleghany Lumber Co., 59 Hun, 627, 13 N. Y. Supp. 871; Helm v. O'Rourke, 46 La. Ann. 178, 15 South. 400; Grannis v. Chicago, St. P. & K. C. Ry. Co., 81 Iowa, 444, 46 N. W. 1067; Evans v. Chamberlain, 40 S. C. 104, 18 S. E. 213; Banks v. Wabash Ry. Co., 40 Mo. App. 458; Beard's Adm'r v. Chesapeake & O. R. Co., 90 Va. 351, 18 S. E. 559; Ohio & M. Ry. Co. v. Pearcy, 128 Ind. 197, 27 N. E. 479; Heltonville Manuf'g Co. v.

(b) Providing proper fellow servants in sufficient number.

(c) Making and promulgating rules for the regulation of servants and giving warning and instruction especially to youthful and inexperienced employes, with reference to danger, whether—

(1) Naturally incident to the employment, or

(2) Arising from causes extraneous to it.

(d) Inspecting appliances, machinery, and places to work, supervising fellow servants, and securing the observance of rules.[2]

Duties are Peculiar to the Relationship.

The liability of the master to his servant is governed by the ordinary principles of tort. The burden is on the servant to show a breach of duty by the master.[3] The law presumes that the master has done his duty. These peculiar duties apply only when the relation of the master and servant exist.[4] Therefore, ordinarily a mere volunteer assisting a servant cannot recover. If he is injured by the negligence of the servant, he can have no recourse against the master.[5] The assent of the master, however, may be implied to the act of a volunteer in rendering prudent and reasonable assist-

Fields (Ind. Sup.) 36 N. E. 529; Chicago & E. R. Co. v. Branyan (Ind. App.) 37 N. E. 190; Houston v. Brush, 66 Vt. 331, 29 Atl. 380; post, p. 1003, note 55.

[2] In 24 Am. Law Rev. 184, will be found an interesting article on this general subject by the Honorable J. F. Dillon; and in a note to White v. Kennon, 39 Am. & Eng. Ry. Cas. 332 (Ga.; 9 S. E. 1082), will be found a collection of cases on various points. And see Watts v. Hart & T. E. Ry. Co., 59 Am. & Eng. Ry. Cas. 399 (Wash., 34 Pac. 423).

[3] Wood, Mast. & S. §§ 382, 419.

[4] A wife living with her husband is not liable for injuries to a domestic servant who, at her request, went to a loft on the husband's premises, and was injured because the ladder to the loft was not suitable for the purpose. Steinhauser v. Spraul (Mo. Sup.) 28 S. W. 620. A collection of authorities as to who are employés of a railroad company, 59 Am. & Eng. Ry. Cas. 120, 125 (Pa. Sup., 25 Atl. 497).

[5] Flower v. Pennsylvania R. Co., 69 Pa. St. 210; New Orleans, J. & G. N. R. Co. v. Harrison, 48 Miss. 112; Osborne v. Knox & L. R. Co., 68 Me. 49; Mayton v. Texas & P. R. Co., 63 Tex. 77; McIntire St. Ry. Co. v. Bolton, 43 Ohio St. 224, 1 N. E. 333; Eason v. Railroad Co., 65 Tex. 577; Degg v. Mid-

ance in the master's business in accordance with the actual or implied requests of his servants.[6] Conversely, the fact that the damage done to a servant was caused by a stranger or a volunteer, will not excuse a master who was guilty of a breach of duty to the servant. The master is bound to exercise due care for the safety of his employés; and, if he fails to do so, his wrong is the legal cause, notwithstanding the intervention of some unauthorized actor.[7] A substitute hired by an employé stands in the employé's place, with all of his responsibilities and liabilities, so far as the master is concerned; and a fellow servant with the employé is a fellow servant with the substitute, though no contractual relation exists between the substitute and the master, and though the employé alone is responsible for the substitute's wages.[8] The master owes peculiar duties to the servant only when the servant is in his employ and doing his work. At other times he owes him the same duty he owes to a third person in a corresponding situation. Whether the servant when injured was acting within the scope of his employment and on the line of his duty, or as a mere stranger, is ordinarily a question of fact for the jury.[9]

The hours of labor afford a material test of when the given individual is engaged in the service of his master. When, however, the master provides trains in which the servant rides in coming and going to his work, the servant is in his employ while riding on such trains, and, as such servant, is entitled to the performance of duties due a servant by a master, and is limited in his right to recover

land Ry. Co., 1 Hurl. & N. 773; Potter v. Faulker, 1 Best. & S. 800. But see Cleveland v. Spier, 16 C. B. (N. S.) 399; Althrof v. Wolfe, 22 N. Y. 355.

[6] McIntire St Ry. Co. v. Bolton, 43 Ohio St. 224, 1 N. E. 333; Marks v. Rochester Ry. Co., 77 Hun, 77, 28 N. Y. Supp. 314; Eason v. Railroad Co., 65 Tex. 577; Wright v. Railway Co., 1 Q. B. Div. 252; Holmes v. Northeastern Ry. Co., L. R. 4 Exch. 254.

[7] Southern Pac. R. Co. v. Lafferty, 6 C. C. A. 474, 57 Fed. 536.

[8] Anderson v. Guineau, 9 Wash. 304, 37 Pac. 449.

[9] Mullin v. Northern Mill Co., 53 Minn. 29, 55 N. W. 1115; Walbert v. Trexler, 156 Pa. St. 112, 27 Atl. 65. Where a servant was injured by being caught in a set screw which projected a little beyond the pulleys and belt, but was almost in their line of motion, the fact that he was not told about the set screw does not make the master liable, when the servant knew that the pulleys, belt, and shaft were dangerous. Rooney v. Sewall & Day Cordage Co., 161 Mass. 153, 36 N. E. 789.

by limitations peculiar to the relationship and by the doctrine of fellow servant.[10]

Providing Appliances.

The employer is bound, at least, to exercise reasonable care to furnish his employés with appliances and machinery suitable to carry on the employment, having reference to its character, the state of the art which it involves, and statutory requirements. Thus, a railroad company must exercise care to furnish a reasonably, but not absolutely, safe roadbed and tracks,[11] switches,[12] hand cars,[13] cars,[14]

[10] See ante, 280, "Master and Servant."

[11] Budict v. Missouri Pac. Ry. Co., 123 Mo. 221, 27 S. W. 453; Swadley v. Missouri Pac. Ry. Co., 118 Mo. 268, 24 S. W. 140; Drymala v. Thompson, 26 Minn. 40, 1 N. W. 255; Ford v. Chicago, R. I. & P. Ry. (Iowa) 59 N. W. 5 (cattle guard); Murphy v. Wabash R. Co., 115 Mo. 111, 21 S. W. 862; Ragon v. Toledo, A. A. & N. M. Ry. Co., 97 Mich. 265, 56 N. W. 612 (ballast); Tuttle v. Detroit, G. H. & M. R. Co., 122 U. S. 189, 7 Sup. Ct. 1166 (sharp curve); St. Louis, I. M. & S. Ry. Co. v. Robbins, 57 Ark. 377, 21 S. W. 886 (switch engine); Kansas City, M. & B. R. Co. v. Webb, 97 Ala. 157, 11 South. 888 (track under statute); Kansas City, M. & B. R. Co. v. Burton, 97 Ala. 240, 12 South. 88. And see cases 59 Am. & Eng. Ry. Cas. 209.

[12] Birmingham Railway & Electric Co. v. Allen, 99 Ala. 359, 13 South. 8; Mary Lee Coal & Ry. Co. v. Chambliss, 97 Ala. 171, 11 South. 897; Hoosier Stone Co. v. McCain, 133 Ind. 231, 31 N. E. 956.

[13] Northern Pac. R. Co. v. Charless, 2 C. C. A. 380, 51 Fed. 562 (defective brake); Anderson v. Minnesota & N. W R. Co., 39 Minn. 523, 41 N. W. 104. But an engineer in temporary charge of a train, in the absence of any conductor, cannot waive a rule, well known to a brakeman, absolutely prohibiting brakemen from coupling and uncoupling cars except with a stick, by ordering such brakeman to go between cars, and place in position, by hand, a bent coupling link, which cannot be controlled with coupling sticks. Finley v. Richmond & D. R. Co., 59 Fed. 420, reversed. Richmond & D. R. Co. v. Finley, 12 C. C. A. 595, 63 Fed. 228.

[14] Le Clair v. First Division St. P. & P. R. Co., 20 Minn. 9 (Gil. 1); Salem Stone & Lime Co. v. Griffin (Ind. Sup.) 38 N. E. 411; Chicago, R. I. & P. Ry. Co. v. Linney, 7 C. C. A. 656, 59 Fed. 45 (coupling); Texas & P. Ry. Co. v. Robertson, 82 Tex. 657, 17 S. W. 1041 (defective brake beam); Eddy v. Prentice (Tex. Civ. App.) 27 S. W. 1063; Graham v. Boston & A. R. Co., 156 Mass. 4, 30 N. E. 359 (absence of handle in coupling); Dooner v. Delaware & H. Canal Co. (Pa. Sup.) 30 Atl. 269 (customary handles, ladders, and safeguards); Rodney v. St. Louis & S. W. Ry. Co. (Mo. Sup.) 28 S. W. 887 (defective drawhead); Chicago & E. I. R. Co. v. Kneirim (Ill. Sup.) 39 N. E. 324 (brake wheel).

engines,[15] bridges,[16] and other instrumentalities.[17] Failure to exercise care so to equip its road and roadbed is negligence.

But knowledge by a master of the defective condition of machinery does not make him liable for injuries resulting therefrom to one of his servants, unless he had a reasonable opportunity, after acquiring such knowledge, to remedy the defect,[18] and no action will lie against a master for damages caused by a defective tool where the employé injured could have obtained a proper one at any or within a reasonable time.[19]

The rule applies alike to animate and inanimate instrumentali-

[15] Texas & P. Ry. Co. v. Patton, 9 C. C. A. 487, 61 Fed. 259.

[16] Conlon v. Oregon S. L. & U. N. Ry. Co., 23 Or. 499, 32 Pac. 397. Overhead bridge: Cleveland, C., C. & St. L. R. Co. v. Walter, 147 Ill. 60, 35 N. E. 529; Pennsylvania Co. v. Sears, 136 Ind. 460, 34 N. E. 15; Galveston, H. & S. A. Ry. Co. v. Daniels (Tex. Civ. App.) 28 S. W. 711. But see Louisville & N. R. Co. v. Banks (Ala.) 16 South. 547.

[17] And, generally, see 59 Am. & Eng. Ry. Cas. 150, 158, 173, 189, 197, 246. Scaffolding, Cadden v. American Steel-Barge Co., 88 Wis. 409, 60 N. W. 800. And, generally, see Painton v. Northern Cent. Ry. Co., 83 N. Y. 7; O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239; Philadelphia, W. & B. R. Co. v. Keenan, 103 Pa. St. 124. As to negligence on part of the master with respect to elevators, see Thompson v. Johnston Bros. Co., 86 Wis. 576, 57 N. W. 298; Wise v. Ackerman, 76 Md. 375, 25 Atl. 424; McCormick Harvesting Mach. Co. v. Burandt, 136 Ill. 170, 26 N. E. 588. Defective rope suspending a tub filled with coal, Cunard S. S. Co. v. Carey, 119 U. S. 245, 7 Sup. Ct. 1360. Negligent adjustment of discharging gear provided by the ship, Cameron v. Nystrom [1893] 1 App. Cas. 308.

[18] Seaboard Manuf'g Co. v. Woodson, 98 Ala. 378, 11 South. 733.

[19] Allen v. G. W. & F. Smith Iron Co., 160 Mass. 557, 36 N. E. 581; Carroll v. Western Union Tel. Co., 160 Mass. 152, 35 N. E. 456. Compare Oellerich v. Hayes, 8 Misc. Rep. 211, 28 N. Y. Supp. 579. Et vide East Tennessee, V. & G. Ry. Co. v. Perkins, 88 Ga. 1, 13 S. E. 952; Birmingham Furnace & Manuf'g Co. v. Gross, 97 Ala. 220, 12 South. 36. Where the blocks of wood necessary for doing certain work can be picked up at any time around the workshop, the failure of the master to specially furnish them does not render him liable for injuries to an employé, caused by their nonuser. Hathaway v. Illinois Cent. Ry. Co. (Iowa) 60 N. W. 651. Nor is the master liable for failure of employés to use enough of appliances furnished. Applied to light and torches, Kaare v. Troy Steel & Iron Co., 139 N. Y. 369, 34 N. E. 901. Thyng v. Fitchburg R. R. (Mass.) 30 N. E. 169; Rawley v. Colliau, 90 Mich. 31, 51 N. W. 350, following Hefferen v. Northern Pac. R. Co., 45 Minn. 471, 48 N. W. 1, 526.

ties. The employer may be liable for negligence in furnishing unfit or dangerous horses for his servant's use.[20] The fact that the employer may be using the appliances of a third person does not exempt him from the performance of this duty. Therefore, whoever uses a car may be liable for negligence if its defects result in damage, although the car may have belonged to some one else.[21]

The employer, however, is not bound to provide the best, safest, or newest instruments, although he must discontinue insecure or unsafe methods.[22] On the one hand, he is not required to invest in

[20] Hammond Co. v. Johnson, 38 Neb. 244, 56 N. W. 967; Martin v. Wrought Iron Range Co., 4 Tex. Civ. App. 185, 23 S. W. 387. Cf. Craven v. Smith, 89 Wis. 119, 61 N. W. 317.

[21] Louisville & N. R. Co. v. Williams, 95 Ky. 199, 24 S. W. 1; Spaulding v. W. N. Flynt Granite Co., 159 Mass. 587, 34 N. E. 1134; Eddy v. Prentice (Tex. Civ. App.) 27 S. W. 1063; Bowers v. Connecticut River R. Co., 162 Mass. 312, 38 N. E. 508; Dooner v. Delaware & H. Canal Co., 164 Pa. St. 17, 30 Atl. 269; Bennett v. Northern Pac. R. Co., 2 N. D. 112, 49 N. W. 408; Id. (N. D.) 61 N. W. 18; Fay v. Minneapolis & St. L. Ry. Co., 30 Minn. 231, 15 N. W. 241; Gulf, C. & S. F. Ry. Co. v. Dorsey, 66 Tex. 148, 18 S. W. 444. But mere difference in style of coupling cars is not necessarily an actionable defect, especially where carriers are required by law to handle cars of other companies. Thomas v. Missouri Pac. Ry. Co., 109 Mo. 187, 18 S. W. 980. Et vide post, p. 1088. It has, however, been held that a master is not bound to test the safety of such cars, but may assume it, unless the contrary appears. Ballou v. Chicago, M. & St. P. Ry. Co., 54 Wis. 257, 41 N. W. 559; Michigan Cent. R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791. A railroad company is not responsible to its switchman for injuries caused by defects in a foreign car, if it has inspected the car, and warned him of its defects. Atchison, T. & S. F. R. Co. v. Myers, 11 C. C. A. 439, 63 Fed. 793. And see article by E. J. Marshall, 1 N. Y. L. Rev. 23. But see Kohn v McNulta, 147 U. S. 238, 13 Sup. Ct. 298.

[22] Washington & G. R. Co. v. McDade, 135 U. S. 554–570, 10 Sup. Ct. 1044; Rooney v. Sewall & Day Cordage Co., 161 Mass. 153, 36 N. E. 789; Harley v. Buffalo Car Manuf'g Co., 142 N. Y. 31, 36 N. E. 813; Roughan v. Boston & L. Block Co., 161 Mass. 24, 36 N. E. 461; La Pierre v. Chicago & G. T. Ry. Co., 99 Mich. 212, 58 N. W. 60; Schroeder v. Michigan Car Co., 56 Mich. 132, 22 N. W. 220; Walsh v. Whiteley, 21 Q. B. Div. 371, 378, 379; Sweeney v. Berlin & J. Env. Co., 101 N. Y. 520–524, 5 N. E. 358; Steinhauser v. Spraul (Mo. Sup.) 28 S. W. 620; Lyttle v. Chicago & W. M. Ry. Co., 84 Mich. 289, 47 N. W. 571. The testimony of experts is admissible. Richmond & D. R. Co. v. Jones, 92 Ala. 218, 9 South. 276. The jury determines the question. Muirhead v. Hannibal & St. J. R. Co., 103 Mo. 251, 15 S. W. 530; Gibson v. Pacific Ry. Co., 46 Mo. 163.

experiments. The utility of the device which it is insisted he should have used must have been demonstrated before the law will require him to use it. Thus, an electric street-car company is not bound to use a reduction coil in its experimental stages.[23] On the other hand, the employer must exercise due care in introducing "untried novelties." [24]

The master is bound to comply with statutory requirements designed for the safety of his employés. In many cases the statutes are declaratory of common-law requirements for the protection of servants. Thus, where, in the absence of statute, an unprotected frog caused the accident, it was determined that the finding of negligence was sustained by evidence that devices (e. g. wooden blocks) practicable, reasonable, adequate, and inexpensive, were known to the railroad company for protection against such danger. It was held bound to use devices for the protection of its employés known to it or ascertainable by the use of proper diligence, intelligence, and care.[25] This common-law duty of blocking frogs is commonly subject to statutory enactment.[26]

Providing Safe Place for Work.

The general duty of the master to the servant requires him to exercise reasonable care in seeing that the place where the servant works is safe for the purpose;[27] and this duty extends not only to

[23] Lorimer v. St. Paul City Ry. Co., 48 Minn. 391, 51 N. W. 125. In 9 Nat. Corp. R. 143, will be found an article discussing the duty of a railroad company to adopt scientific appliances.

[24] Applied to revolving shaper head. Marshall v. Widdicomb Furniture Co., 67 Mich. 167, 34 N. W. 541.

[25] Sherman v. Chicago, M. & St. P. Ry. Co., 34 Minn. 159, 25 N. W. 593, collecting cases. Cf. Missouri Pac. R. Co. v. Baxter (Neb.) 60 N. W. 1044. But see Southern Pac. Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530; Sheets v. Chicago & I. Coal Co. (Ind. Sup.) 39 N. E. 154.

[26] Holum v. Chicago, M. & St. P. Ry. Co., 80 Wis. 299, 50 N. W. 99; Bohan v. St. Paul & D. R. Co., 49 Minn. 488, 52 N. W. 133. Statutory duty as to elevator shaft, Dieboldt v. United States Baking Co., 81 Hun, 195, 30 N. Y. Supp. 745. Props for roofs of mine, Victor Coal Co. v. Muir (Colo. Sup.) 38 Pac. 378; Consolidated Coal & M. Co. v. Clay's Adm'r (Ohio Sup.) 38 N. E. 610.

[27] Fosburg v. Phillips Fuel Co. (Iowa) 61 N. W. 400. Cf. Collins v. Crimmins (Super. N. Y.) 31 N. Y. Supp. 860. And see Blonden v. Oolite Quarry Co. (Ind. App.) 37 N. E. 812, affirmed in 39 N. E. 200.

such unnecessary and unreasonable risks as are in fact known to employer, but also to such as he ought to have known, in the exercise of proper diligence. Therefore the jury must determine the question of negligence of the master in allowing his servant to work near the standing walls of a burnt elevator, where the walls, designed to sustain direct, but not lateral, pressure, were in fact subjected to lateral pressure, and, giving way, damaged the servant.[28] The servant has a right to rely upon the performance of the duty of his master to protect him against the obvious hazard of the place of his work. Thus, where a car repairer is engaged under a jacked-up car, and an engine moves up the track and strikes the car, whereby the servant is injured, the master is liable, although the act of the engineer was in violation of rules.[29] But a master is not bound to provide a safe place, where the work on which the servant is engaged is such as to render the place where it is done temporarily insecure.[30]

The care that is to be exercised has reference to the danger to which the customary use of the place or appliances is likely to expose the servant. Where a brakeman, while descending a ladder on the side of a car, to open a switch, was struck by a section house built near the track, evidence that brakemen customarily passed

[28] Prendible v. Connecticut River Manuf'g Co., 160 Mass. 131, 35 N. E. 675 (platform and support); Denning v. Gould, 157 Mass. 563, 32 N. E. 862 (same); Cougle v. McKee, 151 Pa. St. 602, 25 Atl. 115 (same); Union Pac. R. Co. v. Jarvi, 10 U. S. App. 439, 3 C. C. A. 433, 53 Fed. 65 (support in mine); Lineoski v. Susquehanna Coal Co., 157 Pa. St. 153, 27 Atl. 577; Linton Coal-Min. Co. v. Persons (Ind. App.) 39 N. E. 214 (roof of mine); Union Pac. Ry v. Erickson, 41 Neb. 1, 59 N. W. 347 (coal thrown from locomotive tender), Muncie Pulp Co. v. Jones (Ind. App.) 38 N. E. 547 (large hole covered by rotten canvas); Hennessy v. City of Boston, 161 Mass. 502, 37 N. E. 668; Norfolk & W. R. Co. v. Ward (Va.) 19 S. E. 849 (excavation). Cf. Victor Coal Co. v. Muir (Colo. Sup.) 38 Pac. 378.

[29] St. Louis, A. & T. Ry. Co. v. Triplett, 54 Ark. 289, 15 S. W. 831, and 16 S. W. 266; Cleveland, C., C. & St. L. Ry. Co. v. Brown, 6 C C. A. 142, 56 Fed. 804 (falling shed); Fitzsimmons v. City of Taunton, 160 Mass. 223, 35 N. E. 549 (caving in of bank); Joliet Steel Co. v. Shields, 146 Ill. 603, 34 N. E. 1108 (falling of upright steel molds); Vanesse v. Catsburg Coal Co., 159 Pa. St. 403, 28 Atl. 200 (roof of mine); Consolidated Coal Co. v. Bruce, 47 Ill. App. 444 (same).

[30] Gulf, C. & S. F. Ry. Co. v. Jackson, 12 C. C. A. 507, 65 Fed. 48.

down the sides of cars, while in motion, to open switches, was admissible to prove that he was not negligent, and also that the company had located its structure in an improper place.[31] The master however is not responsible where the place or appliances are put to an unusual test,[32] or to a use not anticipated.[33]

Providing Fellow Servants.

The same degree of care which an employer should take in providing and maintaining its machinery, place, and appliances must be observed in selecting and retaining its employés.[34] The employer is not justified in subjecting his servant to injury from incompetent,[35] unskillful,[36] drunken,[37] habitually negligent,[38] or oth-

[31] Flanders v. Chicago, St. P., M. & O. Ry. Co., 51 Minn. 193, 53 N. W. 544. The rule that one who attempts to cross a railroad track without looking and listening, when, by so doing, he may discover the danger from an approaching train, is guilty of negligence per se, does not apply to the case of one who is employed in a railroad yard, and whose duties frequently make it necessary for him to go on the tracks. (Gilfillan, C. J., dissenting.) Jordan v. Chicago, St. P., M. & O. Ry. Co. (Minn.) 59 N. W. 633. Foster v. Missouri Pac. R. Co., 115 Mo. 165, 21 S. W. 916; Goodes v. Boston & A. R. Co., 162 Mass. 287, 38 N. E. 500; Ford v. Chicago, R. I. & P. R. Co. (Iowa) 59 N. W. 5. Cf. Galvin v. Old Colony R. Co., 162 Mass. 533, 39 N. E. 186.

[32] Preston v. Chicago & W. M. Ry. Co., 98 Mich. 128, 57 N. W. 31.

[33] Richmond & D. R. Co. v. Dickey, 90 Ga. 491, 16 S. E. 212.

[34] An extensive collection of authorities on the liability of a master for injuries caused to one servant by the incompetency of a fellow servant. 25 Lawy. Rep. Ann. 710.

[35] Galveston, H. & S. A. Ry. Co. v. Arispe, 81 Tex. 517, 17 S. W. 47; St. Louis, I. M. & S. Ry. Co. v. Hackett, 58 Ark. 381, 24 S. W. 881; Louisville, N. A. & C. Ry. Co. v. Breedlove, 10 Ind. App. 657, 38 N. E. 357; Campbell & Zell

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[36] East Tennessee & W. N. C. R. Co. v. Collins, 85 Tenn. 227, 1 S. W. 883. In five or six years a fireman can graduate into an engineer. Roblin v. Kansas City, St. J. & C. B. R. Co., 119 Mo. 476, 24 S. W. 1011.

[37] Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860 (drunken engineer). How often a servant can get drunk without making his master legally aware of such habit is for the jury. Tonnesen v. Ross, 58 Hun, 415, 12 N. Y. Supp. 150, 151. As to admissibility of general reputation for intemperance, see Norfolk & W. R. Co. v. Hoover (Md.) 29 Atl. 994; Cosgrove v. Pitman, 103 Cal. 268, 37 Pac. 232; Stevens v. San Francisco & N. P. R. Co., 100 Cal. 554, 35 Pac. 165.

[38] See note 38 on following page.

erwise unfit fellow servants.[39] He is liable if he knew, or, in the exercise of reasonable diligence, could have known, of such unfitness, incompetency, intemperance, or insufficiency.[40] He has the right to rely upon the presumption that the servant will continue

Co. v. Roediger, 78 Md. 601, 28 Atl. 901; Ohio & M. Ry. Co. v. Dunn (Ind. Sup.) 36 N. E. 702; McGuerty v. Hale, 161 Mass. 51, 36 N. E. 682; Hathaway v. Illinois Cent. Ry. Co. (Iowa) 60 N. W. 651. Whether a master is guilty of negligence in employing an incompetent servant is a question of fact, not reviewable in the supreme court. Western Stone Co. v. Whalen, 151 Ill. 472, 38 N. E. 241. An expert may testify that a given person was not a competent foreman. Bunnell v. St. Paul, M. & M. Ry. Co., 29 Minn. 305, 13 N. W. 129. Evidence of specific acts of negligence are inadmissible to show that a servant was incompetent. Kennedy v. Spring, 160 Mass. 203, 35 N. E. 779; Connors v. Morton, 160 Mass. 333, 35 N. E. 860. The fact that the engineer of a hoisting engine, whose negligence in mishoisting the cage caused the death of a miner, had once before made a mishoist, would not make the owner liable for such death, unless he had notice of it. Mulhern v. Lehigh Val. Coal Co., 161 Pa. St. 270, 28 Atl. 1087; O'Boyle v. Lehigh Val. Coal Co., 161 Pa. St. 270, 28 Atl. 1088. Compare Norfolk & W. R. Co. v. Thomas' Adm'r, 17 S. E. 884, and Lebbering v. Struthers, 157 Pa. St. 312, 27 Atl. 720, with Timm v. Michigan Cent. R. Co., 98 Mich. 226, 57 N. W. 116; Mayor, etc., of Baltimore v. War, 77 Md. 593, 27 Atl. 85.

[38] Where there was evidence that plaintiff, a freight conductor, was injured without fault on his part, and wholly from the negligence of a flagman, who was habitually careless, and whose unfitness for the position was known to the defendant long enough before the accident to enable it to procure some one else, the liability of defendant is a question for the jury. Hughes v. Baltimore & O. R. Co., 164 Pa. St. 178, 30 Atl. 383. Where an injury has occurred through the negligence of a servant, evidence that he was generally known to be unfit, reckless, or unskillful is competent to show that the master was negligent in employing him. (51 Ill. App. 512, affirmed.) Western Stone Co. v. Whalen, 151 Ill. 472, 38 N. E. 241.

[39] A one-armed watchman is not a fit brakeman. Louisville & N. R. Co. v. Davis, 91 Ala. 487, 8 South. 552. Whether a boy was a proper person to work on a machine is not a proper question for an expert. McGuerty v. Hale, 161 Mass. 51, 36 N. E. 682.

[40] Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590. As to what is notice of incompetency, Latremouille v. Bennington & R. Ry. Co., 63 Vt. 636, 22 Atl. 656; Cameron v. New York Cent. & H. R. R. Co., 77 Hun, 519, 28 N. Y. Supp. 898; Mulhern v. Lehigh Valley Coal Co., 161 Pa. St. 270, 28 Atl. 1087; Craig v. Chicago & A. R. Co., 54 Mo. App. 523; St. Louis, A. & T. H. R. Co. v. Corgan, 49 Ill. App. 229 (Crazy Pete). Knowledge by a chief train dispatcher of the incompetency of a station agent and telegraph

careful and skillful, and, when notified that he has become careless, he is ordinarily not bound to discharge him without an investigation into the charge, unless notice is accompanied by such evidence as leaves no reasonable doubt of the truth of the charge. A rule that would require the master to discharge a servant, careful and competent when employed, without an investigation of a charge of carelessness, would be a hard one, and would often result in great injustice to employés.[41] The employer may be negligent in supplying an insufficient force of workmen.[42] Thus, it is the duty of a railroad company to take reasonable precautions to prevent its engines being tampered with or moved while in a yard and unused; and whether the employment of one person to take care of the engines and to act as watchman was such reasonable precaution, the jury must determine. If an engine be left with fire up, and water in the boiler, the railroad company cannot excuse itself to an employé damaged because of the engine's unexpected motion by saying that it would not have started, except for the unauthorized interference of a stranger. It is required to exercise due care to prevent such interference.[43]

operator employed by the same company, but without authority on the part of the dispatcher to hire or discharge such servants, cannot be imputed to the company. Lewis v. Seifert, 116 Pa. St. 628, 11 Atl. 514, distinguished in Reiser v. Pennsylvania Co., 152 Pa. St. 38, 25 Atl. 175.

[41] Chapman v. Erie R. Co., 55 N. Y. 579; Moss v. Pacific R. Co., 49 Mo. 167; Blake v. Maine Cent. R. Co., 70 Me. 60; Lake Shore & M. S. R. Co. v. Stupak, 123 Ind. 210–230, 23 N. E. 246.

[42] Harvey v. New York Cent. & H. R. R. Co., 57 Hun, 589, 10 N. Y. Supp. 645. Cf. Georgia Pac. Ry. Co. v. Propst, 90 Ala. 1, 7 South. 635; Reichel v. New York Cent. & H. R. R. Co., 130 N. Y. 682, 29 N. E. 763; Relyea v. Kansas City, Ft. S. & G. Ry. Co. (Mo. Sup.) 19 S. W. 1116. If he simply use the usual number of crew sufficient for ordinary occasions, there is no negligence. Relyea v. Kansas City, Ft. S. & G. R. Co., 112 Mo. 86, 20 S. W. 480. And see Alberts v. Bache, 69 Hun, 255, 23 N. Y. Supp. 502. Proof of negligence as to insufficient force is not admissible under allegation of incompetency. Parrish v. Pensacola & A. Ry. Co., 28 Fla. 251, 9 South. 696. Testimony of expert is admissible to show whether one brakeman was sufficient to control speed of gravel train. Union Pac. Ry. Co. v. Novak, 9 C. C. A. 629, 61 Fed. 573.

[43] Southern Pac. Ry. Co. v. Lafferty, 6 C. C. A. 474, 57 Fed. 536.

Rules.

The employer is bound to make and promulgate general rules for the conduct of employés exposed to danger whenever the nature of the work demands it.[44] If he fails to do so, he will be liable for damage consequent upon such negligence.[45] If he had made them, and they are violated, he may still be responsible.[46] The servant has a right to rely upon the obedience to such rules on the part of other employés. Thus, workmen engaged in track repairing are not bound to keep out of the way of moving trains, unless the required signals are given. If the trainmen give the proper signals, they may then go ahead; but, if they discover that their warning was unheeded, they must try to stop the train. If the rules of the company do not require such signals, this is neglect of duty.[47] How-

[44] Lake Shore & M. S. Ry. Co. v. Lavalley, 36 Ohio St. 221; Pittsburg, F. W. & C. Ry. Co. v. Powers, 74 Ill. 341. And, generally, see Berrigan v. New York, L. E. & W. R. Co., 131 N. Y. 582, 30 N. E. 57; Richmond & D. R. Co. v. Williams, 88 Ga. 16, 14 S. E. 120; Abel v. President, etc., 128 N. Y. 662, 28 N. E. 663; Morgan v. Iron Co., 133 N. Y. 666, 31 N. E. 234; Gordy v. Railroad Co., 75 Md. 297, 23 Atl. 607. The reasonableness of such a rule is a question of law. Kansas City, Ft. S. & M. Ry. Co. v. Hammond, 58 Ark. 324, 24 S. W. 723. The master must exercise such supervision as to have reason to believe that the business is conducted in pursuance to such rule. Warn v. New York Cent. & H. R. R. Co., 80 Hun, 71, 29 N. Y. Supp. 897. Officers are charged with notice of customary breach. Lowe v. Railway Co. (Iowa) 56 N. W. 519. Cf. Richmond & D. R. Co. v. Hissong, 97 Ala. 187, 13 South. 209, modifying 91 Ala. 514, 8 South. 776.

[45] A valuable note on the duties of railroad companies to adopt and enforce rules, and the effect of a failure of an employé to obey the same, 59 Am. & Eng. Ry. Cas. 574.

[46] Northern Pac. R. Co. v. Nickels, 1 C. C. A. 625, 50 Fed. 718; Fay v. Minneapolis & St. L. Ry. Co., 30 Minn. 234, 15 N. W. 241; Hayes v. Bush & D. Manuf'g Co., 41 Hun, 407; Sprang v. New York Cent. R. Co., 58 N. Y. 56.

[47] Erickson v. St. Paul & D. R. Co., 41 Minn. 500, 43 N. W. 332; Moran v. Eastern Ry. Co., 48 Minn. 46, 50 N. W. 930; Schulz v. Railway Co. (Minn.) 59 N. W. 192; Sobieski v. St. Paul & D. R. Co., 41 Minn. 169, 42 N. W. 863; Anderson v. Mill Co., 42 Minn. 424, 44 N. W. 315 (logs on slide). Failure to give signals is not one of the usual and ordinary risks assumed by a section hand on a hand car, as an incident to his employment. Northern Pac. R. Co. v. Charless, 7 U. S. App. 359, 2 C. C. A. 380, and 52 Fed. 562. Evidence that plaintiff, a brakeman, who was directed by the conductor to go between moving cars to uncouple them, caught his foot in

ever, a uniform custom may be a sufficient substitute for a formal rule; as that only the person uncoupling cars should give the signals for the movement of the train.[48] It is the duty of the servant to regulate his conduct with due reference to the master's rules, which he knows, or ought to know, provided such rules are reasonable, and if he fails to do so he cannot recover.[49] But a master cannot escape liability for negligence by prescribing rules, any more than he can by expressly contracting against liability for it. Accordingly, he may not, by rule, provide that employés must look after, and be responsible for, their own safety. Therefore, a rule was held to be properly excluded which required brakemen to examine brakes before leaving the terminal station, and to report any found out of order.[50] But where a road requires the signature of an employé to its rules, calling his attention, inter alia, to differences in coupling apparatus, and to the danger naturally incident thereto, and also expressly allows time for examination, this takes away the right of the employé to rely on presumption of performance of duty by the master, and increases the care which the servant is bound to exercise; that is, while the master may not contract against negligence on his part, he may secure additional care on the part of his employé by such a rule.[51]

Warning and Instructing as to Incidental Dangers.

If the servant knows all the master could teach him, he is, under ordinary circumstances, entitled to no warning or instruction from the master.[52] The right of the servant to assume that the employer

the guard rail, and was run over and injured because of the conductor's neglect to stop the cars in accordance with plaintiff's signal, is sufficient to sustain a verdict for plaintiff. Alabama Great Southern R. Co. v. Fulghum (Ga.) 19 S. E. 981. As to when rules are not required by the nature of business, see Texas & N. O. Ry. Co. v. Echols, 87 Tex. 339, 27 S. W. 60, and 28 S. W. 517 (ties, creosote works).

[48] Kudik v. Lehigh Val. R. Co., 78 Hun, 492, 29 N. Y. Supp. 533; Rutledge v. Missouri Pac. Ry. Co., 123 Mo. 121, 24 S. W. 1053, affirmed 27 S. W. 327.

[49] Post, p. 1018, "Assumption of Risk—Rules."

[50] Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 South. 360.

[51] Bennett v. Northern Pac. R. Co., 2 N. D. 112, 49 N. W. 408. And see Michigan Cent. R. Co. v. Smithson, 45 Mich. 212, 7 N. W. 791. But see Chicago, St. L. & P. R. Co. v. Fry, 131 Ind. 319, 28 N. E. 989.

[52] Hickey v. Taaffe, 105 N. Y. 26, 12 N. E. 286. Et vide Foley v. Pettee

has performed his duty includes the right to rely on the principle that when he is placed in a situation of danger requiring engrossing attention the master will not without warning subject him to other perils unknown to him.[53] And in general the master should give warning as to perils not obvious, or known to him only, whether he actually knew of them, or should have known of them in the exercise of reasonable care.[54] Thus, where a man is sent to work to undermine a bank which is expected to fall by the law of gravitation, and where he was expected to look out for himself, the danger would be obvious, and the master under no obligation to give warning.[55] But where the work is such that the servant did not know of the danger of a bank falling by force of gravitation, and the master's superintendent recognized and intended, but failed, to guard against the danger, the jury must determine the question of negligence of the master.[56] And generally the master is bound to give

Mach. Works, 149 Mass. 294, 21 N. E. 304; Delaware River Iron Ship-Building Co. v. Nuttall, 119 Pa. St. 149, 13 Atl. 65; Thain v. Old Colony R. Co., 161 Mass. 353, 37 N. E. 309; White v. Wittemann Lith. Co., 131 N. Y. 631, 30 N. E. 236; Cincinnati, N. O. & T. P. Ry. Co. v. Mealer, 1 C. C. A. 633, 50 Fed. 725; Hughes v. Chicago, M. & St. P. Ry. Co., 79 Wis. 264, 48 N. W. 259; Railroad Co. v. Fort, 17 Wall. 553; Dowling v. Allen, 74 Mo. 13; Morbach v. Home Min. Co., 53 Kan. 731, 37 Pac. 122. As to raising issue outside of pleading with respect to warning, rules, and providing servants, see Alaska Treadwell Gold Min. Co. v. Whelan, 12 C. C. A. 225, 64 Fed. 462; Yeager v. Burlington, C. R. & N. Ry. Co. (Iowa) 61 N. W. 215 (railroad company is not bound to instruct experienced brakeman how to mount moving cars).

[53] Michael v. Roanoke Mach. Works, 90 Va. 492, 19 S. E. 261; St. Louis, A. & T. Ry. Co. v. Triplett, 54 Ark. 289, 15 S. W. 831, and 16 S. W. 266; ante, p. 280; Louisville, E. & St. L. C. R. Co. v. Hanning, 131 Ind. 528, 31 N. E. 187.

[54] As to the vicious working propensity of a horse, Helmke v. Stetler, 69 Hun, 107, 23 N. Y. Supp. 392; Lowe v. Railway Co. (Iowa) 56 N. W. 519; a broncho, Leigh v. Omaha St. Ry. Co., 36 Neb. 131, 54 N. W. 134. Et vide Williams v. Clough, 3 Hurl. & N. 258; Malone v. Haweley, 46 Cal. 409.

[55] Griffin v. Ohio & M. Ry. Co., 124 Ind. 326, 24 N. E. 888; Swanson v. City of Lafayette, 134 Ind. 625, 33 N. E. 1033.

[56] Lynch v. Allyn, 160 Mass. 248, 35 N. E. 550. Et vide Railsback v. President, etc., 10 Ind. App. 622, 38 N. E. 221; Larich v. Moles (R. I.) 28 Atl. 661. But see St. Louis, A. & T. Ry. Co. v. Torrey, 58 Ark. 217, 24 S. W. 244, to the effect that a bridge carpenter was not entitled to warning where there was no evidence of inexperience or necessity for special training.

warning of latent defects and natural dangers not obvious, of which he knew, or ought to have known.[57] In Bohn Manuf'g Co. v. Erickson [58] the law on this subject is stated by Sanborn, J., with great clearness. It is the duty of the master to notify the servant of latent dangers. "Obviously the line between dangers apparent and latent varies with the varying experience and capacity of the servants employed. Risks and dangers that are apparent to the man of long experience and of a high order of intelligence may be unknown to the inexperienced and ignorant. Hence, if the youth, inexperience, and incapacity of a minor who is employed in a hazardous occupation are such that a master of ordinary intelligence and prudence would know that he is unaware of, or does not appreciate the ordinary risks of, his employment, it is his duty to notify him of them, and instruct him how to avoid them. This notice and instruction should be graduated to the age, intelligence, and experience of the servant. They should be such as a master of ordinary prudence and sagacity would give under like circumstances, for the purpose of enabling the minor [59] not only to know the dangerous nature of his work, but also to understand and appreciate its risks, and avoid its dangers. They should be governed, after

[57] Salem Stone & Lime Co. v. Griffin (Ind. Sup.) 38 N. E. 411. Whether the tendency of a revolving saw to throw upward any object touching it at the back was such a latent danger as defendant was required to warn his employé thereat (a minor) was for the jury. And see Hopkinson v. Knapp & Spaulding Co. (Iowa) 60 N. W. 653 (unlighted elevator shaft). But see Siddall v. Pacific Mills, 162 Mass. 378, 38 N. E. 969 (minor working at tank containing hot caustic for bleaching. Master held not in fault in having failed to notify plaintiff what to do in case fellow servant was negligent). And see Griffin v. Glen Manuf'g Co. (N. H.) 30 Atl. 344.

[58] 55 Fed. 943. This was applied to a boy of 15 employed at a wood-working machine. It was held that the revolving knives were an obvious peril assumed by the boy, unless they created a suction, tending to draw his hand into them, unknown to the boy. In the subsequent trial of the case the jury viewed the premises, and found against the existence of such suction. Chicago Anderson Pressed-Brick Co. v. Reinneiger, 140 Ill. 334, 29 N. E. 1106; Dowling v. Allen, 74 Mo. 13-16; St. Louis & S. E. Ry. Co. v. Valirius, 56 Ind. 511-518; Buckley v. Gutta-Percha & Rubber Manuf'g Co., 113 N. Y. 540, 21 N. E. 717; Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594-598. Cf. Pullman Palace-Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285.

[59] Railroad Co. v. Fort, 17 Wall. 553.

all, more by the experience and capacity of the servant than by his age, because the intelligence and experience of men measure their knowledge and appreciation of the dangers about them far more accurately than their years." [60] By way of illustration, a master has a right to expect a minor to keep his hands out of a revolving machine, just as he would keep away from a locomotive in motion.[61] If, however, the danger be concealed, the minor may be allowed to

[60] Experienced engineer is not entitled to detailed notice of physical peculiarity of the road or engine. Thain v. Old Colony R. Co., 161 Mass. 353, 37 N. E. 309; Bellows v. Pennsylvania & N. Y. Canal & R. Co., 157 Pa. St. 51, 27 Atl. 685. Revolving machinery, Richstain v. Washington Mills Co., 157 Mass. 538, 32 N. E. 908; couplers, Cincinnati, N. O. & T. P. Ry. Co. v. Mealer, 1 C. C. A. 633, 50 Fed. 725.

[61] Berger v. St. Paul, M. & M. R. Co., 39 Minn. 78, 38 N. W. 814; Cheney v. Middlesex Co., 161 Mass. 296, 37 N. E. 175; Kaillen v. North Western Bedding Co., 46 Minn. 187, 48 N. W. 779; Mackin v. Alaska Refrigerator Co., 100 Mich. 276, 58 N. W. 999; McCool v. Lucas Coal Co., 150 Pa. St. 638, 24 Atl. 350; McCue v. National Starch Manuf'g Co., 142 N. Y. 106, 36 N. E. 809; International & G. N. Ry. Co. v. Hinzie, 82 Tex. 623, 18 S. W. 681; Briggs v. Newport News & M. V. Co. (Ky.) 24 S. W. 1069. But to set a minor to work on a heavy piece of iron near a steam trip hammer is negligence. Yeaman v. Noblesville Foundry & Mach. Co. (Ind. App.) 30 N. E. 10; Leistritz v. American Zylonite Co., 154 Mass. 382, 28 N. E. 294. Et vide Reisert v. Williams, 51 Mo. App. 13; Keller v. Gaskill, 9 Ind. App. 670, 36 N. E. 303. An employer should explain to an inexperienced lad the danger of a brakeman's life. Texas & P. R. Co. v. Brick, 83 Tex. 598, 20 S. W. 511; St. Louis, I. M. & S. R. Co. v. Davis, 55 Ark. 462, 18 S. W. 628. So the danger of cleaning a "woolen mule." Tagg v. McGeorge, 155 Pa. St. 368, 26 Atl. 671. The question is for the jury to determine as to existence of special and not obvious danger, and the necessity of warning or teaching because of inexperience. May v. Smith, 92 Ga. 95, 18 S. E. 360; Harris v. Shebek, 151 Ill. 287, 37 N. E. 1015. In Chicago Anderson Pressed-Brick Co. v. Reinneiger, 140 Ill. 334, 29 N. E. 1106, a very satisfactory statement of the principle will be found, as follows: That, to exculpate the master for damage done by danger not obvious, he must show fact of instruction, capacity of the minor to receive instruction, understanding of the danger in fact by the minor, and the minor's fitness for working. However, the employment of a child under age allowed by employment act is per se negligence. Evidence that the same kind of machines were used without guards in another factory, where the boy had previously worked, was also competent, as bearing on the question whether, if the boy had only been accustomed to the machine with a guard, and might be liable, from force of habit or ignorance of the increased danger, to push his finger too close to the rolls, he would have been entitled

recover.[62] Inexperienced servants, on the same principle, are entitled to instruction whenever the dangers or means of avoiding danger are not obvious.[63] Thus where an inexperienced brakeman, who has been told how to couple cars with single deadwood, but has never seen nor been told of coupling with double deadwood, was injured by the latter, he has a cause of action against his employer.[64] The duty as to warning does not apply where the servant received the needed information from persons other than the employer, or where such information may be attributed to him as the ordinary danger of the service.[65]

to special instruction as to the danger. Reese v. Hershey, 163 Pa. St. 253, 29 Atl. 907.

[62] Haynes v. Erk, 6 Ind. App. 332, 33 N. E. 637 (concealed knives); Armstrong v. Forg, 162 Mass. 544, 39 N. E. 190 (treadle machine); Owens v. Ernst, 1 Misc. Rep. 388, 21 N. Y. Supp. 426 (where a combination of starch, heat, and dampness, and a hot cylinder caused injury); Chicago Anderson Pressed-Brick Co. v. Reinneiger, 140 Ill. 334, 29 N. E. 1106 (where the machine, inter alia, had a jerky motion). And see Atlanta & W. P. R. Co. v. Smith (Ga.) 20 S. E. 763.

[63] Atlas Engine Works v. Randall, 100 Ind. 293; Walsh v. Peet Valve Co., 110 Mass. 23; Cayzer v. Taylor, 10 Gray, 274; Connolly v. Paillon, 41 Barb. 366; Baxter v. Roberts, 44 Cal. 187.

[64] Reynolds v. Boston & M. R. Co., 64 Vt. 66, 24 Atl. 134. Cf. McLaren v. Williston, 48 Minn. 299, 51 N. W. 373. So as to an inexperienced lad. St. Louis, I. M. & S. Ry. Co. v. Davis, 55 Ark. 462, 18 S. W. 628. Cf. Arizona Lumber & Timber Co. v. Mooney (Ariz.) 33 Pac. 590 (circular saw); Texas & P. Ry. Co. v. White, 82 Tex. 543, 18 S. W. 478 (unusual brake beam); Darling v. New York, P. & B. R. Co., 17 R. I. 708, 24 Atl. 462 (telltale of unusual height); Bennett v. Northern Pac. R. Co., 2 N. D. 112, 49 N. W. 408 (drawbars of unusual dimensions); St. Louis, I. M. & S. Ry. Co. v. Higgins, 53 Ark. 458, 14 S. W. 653 (links).

[65] Consolidated Coal Co. v. Scheller, 42 Ill. App. 619; Downey v. Sawyer, 157 Mass. 418, 32 N. E. 654; Truntle v. North Star Woolen Mills Co. (Minn.) 58 N. W. 832; Alabama Connellsville Coal & Iron Co. v. Pitts, 98 Ala. 285, 13 South. 135; Benfield v. Vacuum Oil Co., 75 Hun, 209, 27 N. Y. Supp. 16; East Tennessee, V. & G. Ry. Co. v. Turvaville, 97 Ala. 122, 12 South. 63; Louisville & N. R. Co. v. Boland, 96 Ala. 626, 11 South. 667; Cincinnati, N. O. & T. P. Ry. Co. v. Mealer, 1 C. C. A. 633, 50 Fed. 725; Gibson v. Oregon S. L. & U. N. Ry. Co., 23 Or. 493, 32 Pac. 295. But the master does not discharge his duty of warning of danger by notifying a fellow servant who fails to communicate to plaintiff. Pullman Palace-Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285.

Warning and Instructing as to Extraneous Dangers.

It is to be remembered, however, that the master's liability is broader than for mere negligence in its popular sense. The master may be bound to give to his employé all the information he may possess with regard to the danger of employment, whether arising from the nature of the occupation or from extraneous causes, to enable the employé to determine for himself whether he is willing to incur the hazard for the wages offered. The liability of the master in cases of negligence usually arises from his failure to protect against, or to advise as to the existence of, dangers incident to the employment. He is bound, however, to protect his employé from danger known to him to arise from the felonious or tortious designs of third persons acting in hostility to the employer.[66] The master may expose the servant to danger of arrest in an employment which the master knows to be in violation of an injunction of a court having jurisdiction, as to the existence of which the servant is ignorant.[67]

Inspection, Supervision, and Enforcement.

The general duty of the master includes the duty and involves the exercise of care in maintaining [68] such appliances, machinery, and place of work in proper condition and safety, and in making tests and examinations at proper intervals.[69] If a defect in the construction of a railroad track, which the servant had just inspected

[66] Baxter v. Roberts, 44 Cal. 187. A principal is bound to reimburse his agent where the agent has innocently taken personal property which, though claimed adversely by another, he had reasonable ground to believe belonged to his principal. Moore v. Appleton, 26 Ala. 633. And see Guirney v. St. Paul, M. & M. Ry. Co., 43 Minn. 496, 46 N. W. 78. And, generally, see Strahlendorf v. Rosentahl, 30 Wis. 674.

[67] Guirney v. St. Paul, M. & M. Ry. Co., 43 Minn. 496, 46 N. W. 78.

[68] Galveston, H. & S. A. R. Co. v. Templeton, 87 Tex. 42, 26 S. W. 1066 (brake socket).

[69] Fuller v. Jewett, 80 N. Y. 46; Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590; Brann v. Chicago, R. I. & P. R. Co., 53 Iowa, 595, 6 N. W. 5. In an action against a railroad company by a conductor on an engine for injuries caused by the breaking of the flange of a wheel of the tender, it appeared that it was the duty of the engineer to inspect such wheels. There was evidence of an old, rusty crack in the flange, which could have been discovered by a reasonably careful inspection. Held, that a demurrer to the evidence by defendant was properly overruled. Coontz v. Missouri Pac. Ry. Co., 121 Mo. 652, 26 S. W. 661.

in the course of his employment, caused the accident in which he was injured, it is immaterial whether in inspecting it he had acted as the company's engineer or as an arbitrator in its behalf.[70] This duty is a continuing one, and daily use of appliances and place in safety is not sufficient to show the performance of the duty of inspection.[71] Thus a railroad company is bound to inspect the wheels of its cars, and is liable if it negligently permits a car to go into service in a train with one of its wheels in a dangerously defective condition, which could have been detected without difficulty, and, in consequence of the wheel giving way, injury results.[72] The duty of inspection is affirmative, and must be continuously fulfilled, and positively performed.[73] Accordingly, to render the master liable for an injury to a servant, caused by defective machinery, appliances, and place, it is not necessary that the master have actual knowledge of the defect or danger. It is sufficient to show that he could have discovered the defect or danger by the exercise of reasonable care and diligence in the performance of his duties.[74] If,

[70] Evansville & R. R. Co. v. Barnes, 137 Ind. 306, 36 N. E. 1092; Chicago & E. R. Co. v. Branyan, 10 Ind. App. 570, 37 N. E. 190; Missouri, K. & T. Ry. Co. v. Walker (Tex. Civ. App.) 26 S. W. 513.

[71] Tangney v. J. B. Wilson & Co., 87 Mich. 453, 49 N. W. 666 (rusty chain over pulley); Moynihan v. Hills Co., 146 Mass. 586, 16 N. E. 574; Myers v. Hudson Iron Co., 150 Mass. 125, 22 N. E. 631; Ryalls v. Mechanics' Mills, 150 Mass. 190, 22 N. E. 766; Babcock v. Old Colony R. Co., 150 Mass. 467, 23 N. E. 325; Mooney v. Connecticut R. Lumber Co., 154 Mass. 407, 28 N. E. 352; Toy v. United States Cartridge Co., 159 Mass. 313, 34 N. E. 461. But see Reilly v. Campbell, 8 C. C. A. 438, 59 Fed. 990.

[72] Coontz v. Missouri Pac. R. Co., 121 Mo. 652, 26 S. W. 661; Kennedy v. Chicago, M. & St. P. R. Co. (Minn.) 58 N. W. 878 (brake and jack screw); Sheedy v. Chicago, M. & St. P. R. Co., 55 Minn. 357, 57 N. W. 60 (brake staff); Bailey v. Rome, W. & O. R. Co., 139 N. Y. 302, 34 N. E. 918 (a rod); McDonald v. Chicago, St. P., M. & O. R. Co., 41 Minn. 439, 43 N. W. 380 (turntable); Gilman v. Eastern R. R. Co., 13 Allen, 443; Lake Shore & M. R. Co. v. Fitzpatrick, 31 Ohio St. 479; Anderson v. Minnesota & N. W. R. Co., 39 Minn. 523, 41 N. W. 104 (hand cars).

[73] Buzzell v. Manufacturing Co., 48 Me. 113, 77 Am. Dec. 212 (and see note, p. 220); Brann v. Chicago, R. I. & P. R. Co., 53 Iowa, 595, 6 N. W. 5.

[74] Houston v. Brush, 66 Vt. 331, 29 Atl. 380 (machinery); Chicago & E. R. Co. v. Branyan, 10 Ind. App. 570, 37 N. E. 190 (a car). Cf. Illinois Cent. R. Co. v. Bowles, 71 Miss. 1003, 15 South. 138; Columbus, H. V. & T. R. Co. v. Erick (Ind. Sup.) 37 N. E. 128 (engine, by statute); Lake Erie & W. R. Co. v.

however, a defect in an appliance is shown to be structural, and is of such character as renders it unsafe, it may be inferred that the employer was aware of the defect. The burden does not rest on the employé, when injured thereby, to produce further evidence that the master had notice thereof.[75] Actual knowledge of defect or danger is sufficient to attach liability.[76] On the same principle, the master must supervise his servants and see that they do their duty.[77] Thus he must follow them in making needed repairs.[78] The master must also see that his rules are enforced. Therefore a railroad company is liable for negligence if it permits its servants habitually to disregard regulations the enforcement of which is necessary to the safety of other servants. It is responsible for negligence in allowing a dangerous method of doing its work to be followed.[79]

McHenry, 10 Ind. App. 525, 37 N. E. 186 (engine, common law); Finley v. Richmond & D. R. Co., 59 Fed. 419 (Id.); Ohio & M. Ry. Co. v. Heaton (Ind. App.) 35 N. E. 687 (switch lock); Beardsley v. Minneapolis St. Ry. Co., 54 Minn. 504, 56 N. W. 176 (bucking electric car).

[75] Thayer, J., in Union Pac. R. Co. v. James, 6 C. C. A. 217, 56 Fed. 1001–1003, collecting cases. This was applied to injury caused by a frog which had never been blocked. If the frog should have been originally blocked, and the blocking came out, defendant is only liable in case of actual or constructive notice. Haskins v. New York Cent. & H. R. R. Co., 79 Hun, 159, 29 N. Y. Supp. 274. And see Salem Stone & Lime Co. v. Tepps, 10 Ind. App. 516, 38 N. E. 229; Northern Pac. R. Co. v. Herbert, 116 U. S. 642–646, 6 Sup. Ct. 590.

[76] Union Stock Yards Co. of Omaha v. Larson, 38 Neb. 492, 56 N. W. 1079 (drawhead). Cf. Evans v. Chamberlain, 40 S. C. 104, 18 S. E. 213.

[77] A railroad company, which has provided a competent switchman, is not, so far as its employés are concerned, required to see that he remains at his post. Parker v. New York & N. E. R. Co. (R. I.) 30 Atl. 849; Connors v. Durite Manuf'g Co., 156 Mass. 163, 30 N. E. 559.

[78] Sweat v. Boston & A. R. Co., 156 Mass. 84, 31 N. E. 296, collecting cases.

[79] Cooley, Torts, 539; Mitchell v. Crassweller, 13 C. B. 237. A railroad company is guilty of negligence in permitting its order forbidding a fireman to handle its engine to be violated by an engineer. Ohio & M. R. Co. v. Collarn, 73 Ind. 261. And, generally, see Warn v. New York Cent. & H. R. R. Co. (Sup.) 29 N. Y. Supp. 879.

SAME—MASTER NOT AN INSURER.

280. A master is liable only for failure to exercise reasonable care in the performance of his duties to his servant. He is not an insurer.

The master is not an insurer.[80] He is liable for failure to exercise care proportionate to the danger. This care is not controlled by the custom or current usage and practice among other employers in the same line of business,[81] but has reference to the care of a prudent man [82] in avoiding natural perils, and in using known devices for avoiding them.[83] The employer is, however, required to know what appliances are suitable, and in common and ordinary use, for the purpose.[84] The master is not liable for latent defects.[85] Thus,

[80] Peoria, D. & E. R. Co. v. Hardwick, 48 Ill. App. 562; Camp Point Manuf'g Co. v. Ballou, 71 Ill. 417; Chicago, R. I. & P. R. Co. v. Lonergan, 118 Ill. 41, 7 N. E. 55; Reilly v. Campbell, 8 C. C. A. 438, 59 Fed. 990; Burke v. Witherbee, 98 N. Y. 562; Powers v. New York, L. E. & W. R. Co., Id. 274; Nutt v. Southern Pac. R. Co., 25 Or. 291, 35 Pac. 653; Lake Shore & M. S. Ry. Co. v. McCormick, 74 Ind. 440; Chicago & A. R. Co. v. Kerr, 148 Ill. 605, 35 N. E. 1117; Watts v. Hart, 7 Wash. 178, 34 Pac. 423, 771; Texas & P. R. Co. v. Patton, 9 C. C. A. 487, 61 Fed. 259; Illinois Cent. R. Co. v. Bowles (Miss.) 15 South. 138; Galveston, H. & S. A. Ry. Co. v. Gormley (Tex. Civ. App.) 27 S. W. 1051.

[81] McCormick Harvesting Mach. Co. v. Burandt, 136 Ill. 170, 26 N. E. 588.

[82] But evidence, for example, that, at another place besides defendant's, similar machines are used without guards, is admissible. Reese v. Hershey, 163 Pa. St. 253, 29 Atl. 907. Et vide Kehler v. Schwenk, 144 Pa. St. 348, 22 Atl. 910; Gates v. Southern Minnesota Ry. Co., 28 Minn. 110, 9 N. W. 579; Van Winkle v. Chicago, M. & St. P. R. Co. (Iowa) 61 N. W. 929; Dougan v. Champlain Transp. Co., 56 N. Y. 1; Goodnow v. Walpole & G. Emery Mills, 146 Mass. 261, 15 N. E. 576; Washington & G. R. Co. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044. Generally, as to precaution of prudent persons before accident, see Wabash, St. L. & P. R. Co. v. Locke, 112 Ind. 404, 14 N. E. 391; Chicago, B. & Q. R. Co. v. Stumps, 55 Ill. 367.

[83] The exercise of customary care with respect to instruments, as a turntable is no defense. Koons v. Railroad Co., 65 Mo. 592; Deer. Neg. § 9.

[84] Bannon v. Lutz, 158 Pa. St. 166, 27 Atl. 890. Hammer test of boiler strength, Jones v. Malvern Lumber Co., 58 Ark. 125, 23 S. W. 679.

[85] In other words, the master must have knowledge or notice of defect. Ma-

he cannot be held responsible for a hidden defect in switches.[86] But, on the other hand, for example, if a hook holding a very heavy weight has a crack plainly in sight, the master is negligent in allowing it to be used.[87] The jury determines the exercise of care.[88] That an appliance is simple in construction, has been in use a long time, and duly inspected, are matters, the consideration of which may justify a court in taking the case from the jury.[89] The master seems to be liable for only such damages as are likely to occur, or may be reasonably apprehended, because of an alleged unsafe condition of the place or appliance furnished.[90]

The duty of the master is sometimes stated with reference to the results of care, i. e. that he is bound to furnish instrumentalities, place, and servants reasonably safe as a matter of fact. On the other hand, however, it is insisted by the later cases that this is inaccurate and objectionable, especially because it is likely to confuse his duty with insurance, and that the rule should have refer-

honey v. New York Cent. & H. R. R. Co., 64 Hun, 638, 19 N. Y. Supp. 511; Chicago, St. L. & P. R. Co. v. Fry, 131 Ind. 319, 28 N. E. 989; Sweat v. Boston & A. R. Co., 156 Mass. 284, 31 N. E. 296.

[86] Ladd v. New Bedford Ry. Co., 119 Mass. 412.

[87] Spicer v. South Boston Iron Co., 138 Mass. 426. Cf. Reichla v. Gruensfelder, 52 Mo. App. 143; Kansas City & P. R. Co. v. Ryan, 52 Kan. 637, 35 Pac. 292 (lifting jack).

[88] As to appliances: Use of safety chains in connection with cinder pot. Tennessee C., I. & R. Co. v. Herndon, 100 Ala. 451, 14 South. 287. Et vide Tabler v. Hannibal & St. J. R. Co., 93 Mo. 79, 5 S. W. 810; Muirhead v. Hannibal & St. J. R. Co., 103 Mo. 251, 15 S. W. 530.

[89] Bradbury v. Kingston Coal Co., 157 Pa. St. 231, 27 Atl. 400. Cf. La Pierre v. Chicago & G. T. R. Co., 99 Mich. 212, 58 N. W. 60. Et vide Laffiin v. Buffalo & S. W. Ry. Co., 106 N. Y. 136, 12 N. E. 599; Stringham v. Hilton, 111 N. Y. 188, 18 N. E. 870.

[90] Hence, if a brakeman lean down on the ladder of a moving car to ascertain why stones were being thrown under the car, the employer is not liable if he should strike a cattle guard. McKee v. Chicago, R. I. & P. R. Co., 83 Iowa, 616, 50 N. W. 209. Even if the machinery be defective, but no danger be supposable under the circumstances, the injured servant cannot recover. Trinity County Lumber Co. v. Denham, 85 Tex. 56, 19 S. W. 1012. So, if servants undertake to use machinery or instruments for purposes for which they were not designed, and for which the employer had no reason to suppose they would be used, it is their own fault or folly if harm comes from it. Stewart v. Harvard College, 12 Allen, 58; Felch v. Allen, 98 Mass. 572.

ence, not to the result, but to the exercise of care.[91] The duty of the master, according to this line of authorities, is performed if he uses due care and diligence in the performance of his duty.[92]

The line of distinction, however, between the duty of exercising reasonable care to provide safe instrumentalities, and the like, and of providing such instrumentalities, is a fine one.[93] Essentially the same limitations on liability may be introduced, whether the care be referred to either formula; for example, whether the reasonable care be determined by the state of art or science, or whether the safety of the instrumentality is reasonable, having due regard to the state of art or science. In either view, the physical facts in the case in issue (for example, with reference to the danger of place or instrumentality) are the natural and customary basis of proof. To change this rule and practice, and make the subject-matter of the jury's inquiry not the actual performance of the master's duty (for example, the condition of place or instrumentality), but the conduct of the master with respect thereto (for example, his department of tests or system of inspection), would put the servant at an unfair and unreasonable disadvantage. The physical facts which caused the injury complained of, he ought to be able, and may reasonably be required, to show; but that part of the management of an employer's business which results in the exercise of due care is peculiarly within such employer's knowledge and control. Investigation thereof would be likely to be as inquisitorial to a defendant

[91] Chicago, R. I. & P. R. Co. v. Linney, 7 C. C. A. 656, 59 Fed. 45 (coupling apparatus of cars); Union Pac. R. Co. v. Jarvi, 3 Wyo. 375, 23 Pac. 398; Illinois River Paper Co. v. Albert, 49 Ill. App. 363; Dewey v. Detroit, G. H. & M. Ry. Co., 97 Mich. 329, 52 N. W. 942, and 56 N. W. 756; St. Louis S. W. R. Co. v. Jagerman, 59 Ark. 98, 26 S. W. 591; Gulf, C. & S. F. R. Co. v. McNeill (Tex. Civ. App.) 25 S. W. 647; Missouri, K. & T. Ry. Co. v. Woods, Id. 741; Eddy v. Adams (Tex. Sup.) 18 S. W. 490. Cf. Brymer v. Southern Pac. Co., 90 Cal. 496, 27 Pac. 371, with Sappenfield v. Main St. & A. P. R. Co., 91 Cal. 48, 27 Pac. 590.

[92] St. Louis S. W. R. Co. v. Jagerman, 59 Ark. 98, 26 S. W. 591; Park Hotel Co. v. Lockhart (Ark.) 28 S. W. 23.

[93] In Louisville & N. R. Co. v. Kelly, 11 C. C. A. 260, 63 Fed. 407, it was held that the master is not liable for the carelessness or unskillfulness of a fellow servant, if due care had been exercised in his employment; and that it was error to refuse to instruct the jury that, if the instrumentality involved (a car) was reasonably and ordinarily safe, plaintiff could not recover.

as impracticable to a plaintiff. Many well-considered cases, moreover, retain the earlier phraseology, of requiring the master to furnish reasonably safe place, instrumentality, and the like.[94]

However, with respect to the employment of a fellow servant, the law seems to be quite definitely settled that the duty of an employer is discharged by the exercise of reasonable care in the selection of his servants. Thus, if a railway company employ a competent physician to take care of an injured employé, it is not liable for the death of the employé through a mistake of the physician.[95] But the exercise of the greatest diligence on the part of the master in the selection of his servant is no excuse to third persons not in his employ, if such servant, by his negligence, does damage to any one to whom the master owes a duty.[96]

The doctrine would seem to be fully sustained, from whatever point of view it be regarded, that the master is only exonerated by showing that he actually exercised due care. Accordingly, neither having prescribed regulations nor having enforced them will exculpate the master for liability to servant injured by a defective engine, unless there resulted the actual exercise of due care.[97]

ASSUMPTION OF RISK BY SERVANT.

281. On entering service, a servant is said to impliedly contract that he possesses the ordinary skill and experience of those engaged in the occupation he undertakes, that he will exercise ordinary care to protect himself while engaged in that occupation,[98]

[94] Houston v. Brush (1894) 66 Vt. 331, 29 Atl. 380.

[95] Atchison, T. & S. F. R. Co. v. Zeiler, 54 Kan. 340, 38 Pac. 282; Louisville & N. R. Co. v. Kelly, 11 C. C. A. 260, 63 Fed. 407.

[96] And see "Fellow Servants," post. p. 1029; Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543.

[97] Missouri Pac. R. Co. v. McElyea, 71 Tex. 386, 9 S. W. 313.

[98] Russell v. Tillotson, 140 Mass. 201, 4 N. E. 231. Custom may be evidence of due care. In an action against a railroad company for the death of a switchman caused by his attempting to get on a defective footboard on an engine, evidence as to a custom of switchmen, in yards other than defendant's, of getting on footboards of moving engines, is admissible, as the measure of decedent's care is the prudence of careful switchmen, no matter by

and that he will assume the risks of his occupation.[99]

282. The risks which the servant assumes may arise—

(a) From circumstances exclusive of the risk of fellow servants, and may be either—

(1) The ordinary risks of the employment;

(2) The extraordinary risks of the employment.

(b) From the negligence of fellow servants.

SAME—ORDINARY RISKS.

283. Excluding the negligence of fellow servants, a servant assumes the ordinary risks[100] of his employment, with the instrumentalities, in the place, and under the rules of the work for which he is engaged, which are reasonably necessary and incidental to it, and which are apparent to ordinary observation: provided—

(a) He knew and appreciated, or should have known and appreciated, the risks and dangers, in the prudent

whom employed. O'Mellia v. Kansas City, St. J. & C. B. R. Co., 115 Mo. 205, 21 S. W. 503.

[99] However finely settled this doctrine may be, it is subject to much criticism. The objections will be found stated in the argument for plaintiff in Freeberg v. St. Paul Plow Works, 48 Minn. 101, 50 N. W. 1026. A statement of the rule favorable for servant will be found in Little Rock, M. R. & T. Ry. Co. v. Leverett, 48 Ark. 333–347, 3 S. W. 50; for matter, in Hamilton v. Rich Hill Coal Min. Co., 108 Mo. 364, 18 S. W. 977. Bohn Manuf'g Co. v. Erickson, 5 C. C. A. 341, 55 Fed. 946. An employé is not presumed to know whether his employer has furnished appliances which are reasonably safe and in ordinary use in case of latent danger, and in such case he is not chargeable with an assumption of the risks involved in the failure to provide them. Bannon v. Lutz, 158 Pa. St. 166, 27 Atl. 890. A brakeman does not assume a risk of a telltale not maintained as required by law. Hines v. New York Cent. & H. R. R. Co., 78 Hun, 239, 28 N. Y. Supp. 829. But see Mattise v. Consumers' Ice Manuf'g Co., 16 South. 400.

[100] In Stewart v. Ohio River R. Co. (W. Va.) 20 S. E. 922, it was pointed out that the servant assumes all the ordinary hazards incident to the employment, whether the employment be dangerous or otherwise; and that the

exercise of his senses and common sense, regard being had to his age, capacity, and experience;

(b) The master has exercised reasonable care to prevent them.[101]

Instrumentalities.

The servant assumes risks ordinarily incidental to the instrumentalities of his employment. Thus, cars carrying rails, in course of travel, disarranged such rails so as to make coupling cars impossible in the ordinary way. The cars stopped at a station long enough to enable the rails to be properly placed. An accident occurred, partly on account of irregular position of rails. It was held that the disarrangement was a natural result of the transportation; that the danger was obvious, and the risk assumed. If the servant knew, or by the use of ordinary observation could or ought to have known, that danger arose from the splintered rails, or if he knew and appreciated, or ought to have known or appreciated, the nature and extent of danger therefrom, he should be presumed to have assumed the risk of employment.[102] A brakeman does not assume the

test of liability is the negligence of the master, not the danger of the employment, though the danger of the employment may determine the ordinary care required in the case.

[101] The servant and the master do not stand on the same footing as to ascertaining risks. The servant has by no means the same opportunity for inspecting as the master has. Ryan v. Fowler, 24 N. Y. 410; Noyes v. Smith, 28 Vt. 59; Hayden v. Smithville Manuf'g Co., 29 Conn. 548. And see Louisville & N. R. Co. v. Kelly, 63 Fed. 407–410, 11 C. C. A. 260. A foreman of a blacksmith shop does not assume risks arising from the failure of the master to use reasonable care in providing and keeping in repair the appliances furnished for use in the shop. Nicholds v. Crystal Plate Glass Co. (Mo. Sup.) 28 S. W. 991.

[102] Doyle v. St. Paul, M. & M. Ry. Co., 42 Minn. 79, 43 N. W. 787. Et vide Jacksonville, T. & K. W. R. Co. v. Galvin, 29 Fla. 636, 11 South. 231. Cf. Northern Pac. R. Co. v. Everett, 152 U. S. 107, 14 Sup. Ct. 474. But see Dewey v. Detroit, G. H. & M. R. Co. (Mich.) 56 N. W. 756. Uneven new side track, O'Neal v. Chicago & I. C. R. Co., 132 Ind. 110, 31 N. E. 669. Appliances generally, Texas & P. R. Co. v. Rogers, 6 C. C. A. 403, 57 Fed. 378; Craven v. Smith, 89 Wis. 119, 61 N. W. 317; McGuirk v. Shattuck, 160 Mass. 45, 35 N. E. 110; McNamara v. Logan, 100 Ala. 187, 14 South. 175. The servant assumes the danger of moving a "dead" engine in daylight. Anglin v. Texas & P. R. Co., 9 C. C. A. 130, 60 Fed. 553; Schulz v. Johnson,

risk of injury from a defective track or roadbed.[102] By way of contrast, in a cold climate, railroad employés assume the risks incident to the accumulation of snow and ice on the tracks.* They assume manifest risks of instrumentalities, although not necessarily incidental to the service. Thus, if an employé voluntarily and without specific command as to time and manner uses a ladder for adjusting electric wires, and that ladder is known to both employer and employé to be obviously defective, they both stand on common ground. The employé elects to take the risk, and cannot recover for resulting damage.[104] But where a common laborer was set to work near the fumes of nitric acid, as to the injurious effects of which on the human system under the circumstances experts disagree, the danger

7 Wash. 403, 35 Pac. 130 (saw); Crown v. Orr, 140 N. Y. 450, 35 N. E. 648; Essex County Electric Co. v. Kelly (N. J. Sup.) 29 Atl. 427 (electric pole); Johnson v. Hovey, 98 Mich. 343, 57 N. W. 172 (saw frame working improperly because of dust and dirt); McGuerty v. Hale, 161 Mass. 51, 36 N. E. 682 (uncovered gearing of machine in plain sight). Cf. McCue v. National Starch Manuf'g Co., 142 N. Y. 106, 36 N. E. 809, reversing 66 Hun, 632, 21 N. Y. Supp. 551; Burnell v. West Side R. Co., 87 Wis. 387, 58 N. W. 772 (commutator of electric motor); Red River Line v. Cheatham, 9 C. C. A. 124, 60 Fed. 517, reversing 56 Fed. 248 (steamboat custom).

[103] Gulf, C. & S. F. Ry. Co. v. Dohl (Tex. Civ. App.) 29 S. W. 1131; Steinhauser v. Spraul (Mo. Sup.) 28 S. W. 620. So an unexpected starting of machinery, Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149.

* Lawson v. Truesdale (Minn.) 62 N. W. 546.

[104] Jenney Electric Light & Power Co. v. Murphy, 115 Ind. 566, 18 N. E. 30. Steinhauser v. Spraul (Mo. Sup.) 30 S. W. 102. Et vide Burns v. Ocean S. S. Co., 84 Ga. 709, 11 S. E. 493; O'Neal v. Chicago & I. Coal Ry. Co., 132 Ind. 110, 31 N. E. 669; Matchett v. Cincinnati, W. & M. Ry. Co., 132 Ind. 334, 31 N. E. 792. So with respect to defective telegraph pole. Foley v. Electric Light Co., 54 N. J. Law, 411, 24 Atl. 487. And see Junior v. Missouri Electric Light & Power Co. (Mo. Sup.) 29 S. W. 988. Chipping from a tool is naturally incident to riveting. H. S. Hopkins Bridge Co. v. Burnett, 85 Tex. 16, 19 S. W. 886. Where the evidence shows that the danger of the work in which the plaintiff was engaged must have been as obvious to himself as to his employer, and that there was no emergency requiring him to expose himself to the danger, he is not entitled to recover. Hazlehurst v. Brunswick Lumber Co. (Ga.) 19 S. E. 756. In an action by an employé for injuries caused by a machine, a charge which assumes that plaintiff did not know the machine was dangerous is erroneous when plaintiff had seen the machine in operation for six months. B. F. Avery & Sons v. Meek (Ky.) 28 S. W. 337.

was not so apparent that he could be held to have voluntarily assumed it.[105]

Place.

The risks assumed include the obvious dangers of the place at which the servant is engaged. Thus an employé who, while engaged in removing a wrecked train, goes upon an obviously new and temporary bridge, defects of which are visible, assumes the risks arising from such defects.[106] On the other hand, however, an en-

[105] Wagner v. H. W. Jayne Chemical Co., 147 Pa. St. 475, 23 Atl. 772.

[106] McGrath v. Texas & P. Ry. Co., 9 C. C. A. 133, 60 Fed. 555. So, if brakeman knew of low bridge, and failed to stoop, he cannot recover for injury caused by striking it. Chesapeake & O. R. Co. v. Hafner's Adm'r, 90 Va. 621, 19 S. E. 166. So in Gibson v. Erie Ry. Co., 63 N. Y. 449; Odell v. Railroad Co., 120 N. Y. 325, 24 N. E. 478; Quick v. Minnesota Iron Co., 47 Minn. 361, 50 N. W. 244 (bell in mine); Chesapeake, O. & S. W. R. Co. v. McDowell (Ky.) 24 S. W. 607 (unrailed platform); Kaare v. Troy Steel & Iron Co., 139 N. Y. 369, 34 N. E. 901; Feely v. Pearson Cordage Co., 161 Mass. 426, 37 N. E. 368 (well, obvious and known); Connors v. Morton, 160 Mass. 333, 35 N. E. 860; Kleinest v. Kunhardt, 160 Mass. 230, 35 N. E. 458 (slippery floor and exposed pulley). Cf. Scharenbroich v. St. Cloud Fiber-Ware Co. (Minn.) 60 N. W. 1093; Ragon v. Railway Co., 97 Mich. 265, 56 N. W. 612 (visible hole in roadbed); McNeil v. New York, L. E. & W. R. Co., 142 N. Y. 631, 37 N. E. 566; Id., 71 Hun, 24, 24 N. Y. Supp. 616 (foot caught in unblocked guard rail), following Appel v. Railway Co., 111 N. Y. 550, 19 N. E. 93; Cincinnati, N. O. & T. Ry. Co. v. Mealer, 1 C. C. A. 633, 50 Fed. 725 (this would seem to be an extreme case. A switchman coupling cars in a yard stumbled over a piece of coke dropped from one of the cars he was coupling. The court took the case from the jury, on the theory of assumption of risk). And, generally, see Emma Cotton-Seed Oil Co. v. Hale, 56 Ark. 232, 19 S. W. 600; Gulf, C. & S. F. Ry. Co. v. Jackson, 12 C. C. A. 507, 65 Fed. 48; Seidmore v. Milwaukee, L. S. & W. Ry. Co. (Wis.) 61 N. W. 765; Coal Creek Min. Co. v. Davis, 90 Tenn. 711, 18 S. W. 387 (where defendant assumed the risk of suffocation from smoke in a mine). And see Baltimore & P. R. Co. v. State, 75 Md. 152, 23 Atl. 310; Paule v. Florence Min. Co., 80 Wis. 350, 50 N. W. 189 (where a "trammer," assisting in work on the roof of a "stope," was injured by falling rock), distinguishing Gill v. Homrighausen, 79 Wis. 634, 48 N. W. 862; Brooks v. Northern Pac. R. Co., 47 Fed. 687 (where the drawhead was manifestly and dangerously short); Rutledge v. Missouri Pac. Ry. Co., 110 Mo. 312, 19 S. W. 38 (ordinary movement of train); Berrigan v. Railroad Co., 131 N. Y. 582, 30 N. E. 57; Mobile & O. R. Co. v. George, 94 Ala. 199, 10 South. 145 (giving slack); Louisville & N. R. Co. v. Banks (Ala.) 16 South. 547.

gineer working on a mountain division does not assume the risks of faulty construction and maintenance of the road, whereby sand and gravel accumulate on the track, and cause derailment of engine, and his injury.[107]

Rules.

If an employé has assented to certain reasonable rules of his master, his conduct must conform to them, and, if his damage complained of is the consequence of their violation he cannot recover.[108] Such assent is not objectionable as being an illegal limit on the master's liability for negligence. Thus, if the rules of a railroad company forbid coupling without the use of a stick, and a servant is injured while undertaking to make a coupling without a stick, he cannot recover.[109] But an employé is not bound by such a rule unless it is actually or constructively brought to his attention.[110] However, if, with the actual or constructive acquiescence of the

[107] Union Pac. Ry. Co. v. O'Brien, 1 C. C. A. 354, 49 Fed. 538; Mollie Gibson Consol. Mining & Milling Co. v. Sharp (Colo. App.) 38 Pac. 850; St. Louis, A. & T. H. R. Co. v. Holman, 155 Ill. 21, 39 N. E. 573.

[108] Mason v. Richmond & D. R. Co., 114 N. C. 718, 19 S. E. 362; Johnson v. Chesapeake & O. Ry. Co., 38 W. Va. 206, 18 S. E. 573 (coupling moving cars); Richmond & D. R. Co. v. Dudley, 90 Va. 304, 18 S. E. 274 (allowing cars to go down grade without engine).

[109] Russell v. Richmond & D. R. Co., 47 Fed. 204; Norfolk & W. R. Co. v. Briggs (Va.) 14 S. E. 753; Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168, 31 N. E. 564; Richmond & D. R. Co. v. Williams, 88 Ga. 16, 14 S. E. 120; Ford v. Chicago, R. I. & P. Ry. Co. (Iowa) 59 N. W. 5; Bennett v. Northern Pac R. Co., 2 N. D. 112, 49 N. W. 408; McGrath v. New York & N. E. R. Co., 15 R. I. 95, 22 Atl. 927 (where there was failure to put out signal flags to protect trackman against coming trains). Et vide Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999; Francis v. Kansas City, St. J. & C. B. R. Co., 110 Mo. 387, 19 S. W. 935 (where, contrary to rules, plaintiff, standing in middle of track, jumped on, and was injured by moving engine).

[110] Fay v. Minneapolis & St. L. Ry. Co., 30 Minn. 231, 15 N. W. 241. And, generally, see Central R. R. of Georgia v. Ryals, 84 Ga. 420, 11 S. E. 499. Railroad switchmen who, in violation of a rule of the company, habitually board moving switch engines from the middle of the track by stepping on the footboard of the engine as it approaches, assume the risks ordinarily incident thereto, but do not assume the danger of injury from incompetency of the engineer. Francis v. Kansas City, St. J. & C. B. R. Co. (Mo. Sup.) 28 S. W. 842. As to when a rule is brought to the servant's notice, see La Croy v. New York, L. E. & W. R. Co., 132 N. Y. 570, 30 N. E. 391. As to their mis-

master, the rule is habitually ignored, the master may be liable.[111] On the same principle, a brakeman may assume the risk occasioned by the running of a train at a rate of speed greater than is allowed by an ordinance, if such violation is customary.[112]

SAME—EXTRAORDINARY RISKS.

284. The servant cannot recover from his employer for damages consequent upon extraordinary risks which he has knowingly assumed.

A servant cannot recover against his master for personal injury resulting from manifestly defective and dangerous appliances[113] or

construction, see Harris' Adm'r v. Norfolk & W. R. Co., 88 Va. 560, 14 S. E. 535. As to cases in which the rule does not apply, see Richmond & D. R. Co. v. Mitchell, 92 Ga. 77, 18 S. E. 290.

[111] Northern Pac. R. Co. v. Nickels, 1 C. C. A. 625, 50 Fed. 718. Nor where directed by his superior. Hannah v. Connecticut River R. Co., 154 Mass. 529, 28 N. E. 682. Nor where the only way the work could be done was by violation of rule. Memphis & C. R. Co. v. Graham, 94 Ala. 545, 10 South. 283. Where a rule of a railway company had been habitually disregarded by its employés, and officers of the company had witnessed its violation, the question of whether the officers had knowledge of and had approved of its disregard was for the jury. White v. Louisville, N. O. & T. Ry. Co. (Miss.) 16 South. 248; Newport News & M. V. R. Co. v. Campbell (Ky.) 25 S. W. 267; Lowe v. Chicago, St. P., M. & O. R. Co. (Iowa) 56 N. W. 519; Richmond & D. R. Co. v. Hissong, 97 Ala. 187, 13 South. 209.

[112] Abbott v. McCadden, 81 Wis. 563, 51 N. W. 1079; Bengtson v. Chicago, St. P., M. & O. Ry. Co., 47 Minn. 486, 50 N. W. 531. And his contributory negligence may exist, although the conductor assented to the violation of the rule. Atchison, T. & S. F. R. Co. v. Reesman, 9 C. C. A. 20, 60 Fed. 370; Richmond & D. R. Co. v. Rush, 71 Miss. 987, 15 South. 133; Lehigh Val. R. Co. v. Snyder, 56 N. J. Law, 326, 28 Atl. 376.

[113] Texas & P. Ry. Co. v. Rogers, 6 C. C. A. 403, 57 Fed. 378; Clark v. St. Paul & S. C. R. Co., 28 Minn. 128, 9 N. W. 581; Louisville, E. & St. L. C. R. Co. v. Allen, 47 Ill. App. 465; Rooney v. Sewall & Day Cordage Co., 161 Mass. 153, 36 N. E. 789; Hatter v. Illinois Cent. R. Co., 69 Miss. 642, 13 South. 827. Cf. Texas & P. R. Co. v. Minnick, 6 C. C. A. 387, 57 Fed. 362; Bradshaw's Adm'r v. Louisville & N. R. Co. (Ky.) 21 S. W. 346; Wheeler v. Berry, 95 Mich. 250, 54 N. W. 876 (where the work was without the scope of employment, and plaintiff protested). Et vide Southern Kan. Ry. Co. v. Moore, 49 Kan. 616, 31 Pac. 138; White v. Wittemann Lith. Co., 131 N. Y. 631, 30 N. E. 236 (meddling with unguarded machinery).

places,[114] especially when warned. This is sometimes put on the ground of waiver and sometimes on the ground of contributory negligence.[115] But he does not assume such extraordinary risks unless he has knowledge, actual or constructive, of the danger.[116] If, however, he voluntarily, without any expressed or implied direction from his employer, undertakes hazardous work, he cannot complain.[117] Thus, where a brakeman, standing in front of cars on a repair track originally marked "In bad order," but at the time without such mark, took hold of the brake staff, and stepped on the brake beam to get out of the way, and the brake staff broke, and the brakeman was killed, it was held that he had assumed the risk.[118] So a trackman, whose duty it is to watch for and protect himself against wild trains, assumes the danger of a collision between a wild train and a hand car which he is pushing.[119]

[114] Smith v. Winona & St. P. R. Co., 42 Minn. 87, 43 N. W. 968 (where a brakeman was notified of a dangerous pile of stones, he was held to be unable to recover damage on being knocked off the car thereby). Hammering a steam radiator despite warning. Moeller v. Brewster, 131 N. Y. 606, 30 N. E. 124. A watchman of a building known to be dangerously dilapidated assumes the risk. Paland v. Chicago, St. L. & N. O. R. Co., 44 La. Ann. 1003, 11 South. 707. So, where the servant willfully encounters known dangers. Knight v. Cooper, 36 W. Va. 232, 14 S. E. 999. Et vide Haley v. Lumber Co., 81 Wis. 412, 51 N. W. 326, 956 (wrecking a logging train); Lasky v. Canadian Pac. Ry. Co., 83 Me. 461, 22 Atl. 367.

[115] Greene v. Minneapolis & St. L. Ry. Co., 31 Minn. 249, 17 N. W. 378.

[116] Richland's Iron Co. v. Elkins, 90 Va. 249, 17 S. E. 890. If defendant actually inspected the road, and knew of defect which caused his injury, he assumes it. Evansville & R. R. Co. v. Barnes, 137 Ind. 306, 36 N. E. 1092.

[117] Goff v. Chippewa River & M. Ry. Co., 86 Wis. 237, 56 N. W. 465. As where section hand works where no one can give him notice of approaching train. Rutherford v. Chicago, M. & St. P. Ry. Co. (Minn.) 59 N. W. 302.

[118] Kelley v. Railway Co., 35 Minn. 490, 29 N. W. 173; Rodney v. St. Louis S. W. Ry. Co. (Mo. Sup.) 28 S. W. 887; Rooney v. Carson, 161 Pa. St. 26, 28 Atl. 996. And, generally, see Dumas v. Stone, 65 Vt. 442, 25 Atl. 1097.

[119] Sullivan v. Fitchburg R. Co., 161 Mass. 125, 36 N. E. 751.

SAME—EXCEPTIONS.

285. But the principles as to assumption of risk do not apply—

(a) Where the servant may know of the defect or danger, but does not necessarily or reasonably know of or appreciate the consequent risk.

(b) Where the injured servant was, without proper notice of increased risk, put to a service outside of and more dangerous than the employment for which he was engaged. This exception has been particularly applied to the employment of persons of immature age.[120]

(c) Where the master has clearly promised the servant to remove the peril, unless the damage be so immediate and imminent that an ordinarily prudent man would not continue in the service; and not then

(d) Where the duty to continue in the dangerous service is required or justified by an emergency approved by law.

(e) Where the assumption of risk by the servant cannot be held to be voluntary.

Appreciation of Risk.

Knowledge of defect or imperfection is not necessarily knowledge of risk. The servant is not bound to inspect the risk as closely as his master. He has a right to presume that his master will do his duty.[121] He does not necessarily assume the risk incident to the use of unsafe instrumentalities because he knows its character and condition. It is necessary also that he understands, or by the exercise of common observation ought to have known, the risk to which he was exposed by its use. Before he can be held to have assumed the risk, it must appear that he knew all the facts material to the risk, and appreciated and understood it.[122] Thus, if a

120 Pierce, R. R. 379.

121 Ante, p. 1002, note 52.

122 Steen v. St. Paul & D. R. Co., 37 Minn. 310, 34 N. W. 113; Hungerford

servant undertook to couple a baggage car having a Miller coupler to an engine with an ordinary freight coupler, it was held to be a question of fact whether such servant did understand, or ought to have understood, the risks as well as the peculiarities of the instrumentalities with which he worked.[123] On the other hand, a boy who has lived near the sea shore all his life is held to know and appreciate that there might be danger of getting entangled in the loose end of a taut rope.[124] Knowledge of imperfection or danger, as well as appreciation of risk, is affected by the experience and age of the parties.[125] Appreciation and assumption of risk are ordi-

v. Chicago, M. & St. P. Ry. Co., 41 Minn. 444, 43 N. W. 324. But a brakeman who, in order to get employment as such, has pretended to an experience which he has not, and, being ordered onto a flat car to pull the pin for a running switch, instead of lying down on the rear end of the car, kneels down, and in that position is jerked off by the sudden start of the engine after the uncoupling, has no cause of action against the company. Stanley v. Chicago & W. M. Ry. Co., 101 Mich. 202, 59 N. W. 393.

[123] Russell v. Minneapolis & St. L. R. Co., 32 Minn. 230, 20 N. W. 147; Reynolds v. Boston & M. R. Co., 64 Vt. 66, 24 Atl. 134. Under many circumstances, however, the risk of making unmatched couplings may be held, as a matter of law, to have been assumed by the servant. Kohn v. McNulta, 147 U. S. 238, 13 Sup. Ct. 298, and cases cited. Further, see Norfolk & W. R. Co. v. McDonald's Adm'r, 88 Va. 352, 13 S. E. 706; Thomas v. Missouri Pac. R. Co., 109 Mo., 187, 18 S. W. 980 (following Hulett's Case, 67 Mo. 239); Pittsburg & L. E. R. Co. v. Henly, 48 Ohio St. 608, 29 N. E. 575. The cases, however, fully sustain the proposition that a person cannot be said to take a risk, unless he knows, not only the condition of the thing, but also that a danger exists in such condition. Coombs v. New Bedford Cordage Co., 102 Mass. 572–596; Mellor v. Merchants' Manuf'g Co., 150 Mass. 362, 23 N. E. 100; Davidson v. Cornell, 132 N. Y. 228, 30 N. E. 573.

[124] Williams v. Churchill, 137 Mass. 243. So, where plaintiff uses a platform for weeks without objection, he is able to appreciate the risk arising from its defective width. Kaare v. Troy Steel & Iron Co., 139 N. Y. 369, 34 N. E. 901. Cf. Prendible v. Connecticut River Manuf'g Co., 160 Mass. 131, 35 N. E. 675. A man of 25 must take notice of the law of gravitation, and assumes the risk of moving a heavy stone. Walsh v. St. Paul & D. R. Co., 27 Minn. 367, 8 N. W 145.

[125] Alcorn v. Chicago & A. Ry. Co., 108 Mo. 81, 18 S. W. 188 (unblocked switch rails); Northern Pac. Coal Co. v. Richmond, 7 C. C. A. 485, 58 Fed. 756. Cf. Greenway v. Conroy, 160 Pa. St. 185, 28 Atl. 692 (where it was held that a minor does not assume a risk), with Ogley v. Miles, 139 N. Y. 458, 34

narily questions of fact [126] for the jury,[127] and suggestion of danger by appearance of machinery is for the jury, and not for experts.[128]

Other Modifications.

Similarly, a servant does not assume a risk when it could be ascertained by inspection, and he has no chance to make the necessary inspection.[129] So knowledge of the risk of the employment does not constitute an assumption of that risk unless it comes in time to be of use in avoiding danger.[130] But the risk must be a reasonable one. A servant does not assume all the risks, known and unknown, which could possibly result from any conceivable act or negligence on part of the master,[131] nor unknown risks not ordi-

N. E. 1059 (where it was held that he did). And cf. Williamson v. S. Marble Works, 26 Atl. 669, with Toledo, St. L. & K. C. R. Co. v. Trimble, 8 Ind. App. 333, 35 N. E. 716. Et vide International & G. N. Ry. Co. v. Hinzie, 82 Tex. 623, 18 S. W. 681; Evansville & R. R. Co. v. Henderson, 134 Ind. 636, 33 N. E. 1021; Beckham v. Hillier, 47 N. J. Law, 12; Pennsylvania Co. v. Congdon, 134 Ind. 226, 33 N. E. 795. And see ante, p. 1002, "Warning to Inexperienced and Youthful Employés," and "Standard of Care, Whether Absolute."

[126] But the court sometimes takes the case from the jury. Ogley v. Miles, 139 N. Y. 458, 34 N. E. 1059; St. Louis, A. & T. R. Co. v. Torrey, 58 Ark. 217, 24 S. W. 244.

[127] Clarke v. Holmes, 7 Hurl. & N. 937; Mellors v. Shaws, 1 Best & S. 437; Whart. Neg. § 217; Ingerman v. Moore, 90 Cal. 410, 27 Pac. 306; Coombs v. New Bedford Cordage Co., 102 Mass. 572; Haley v. Case, 142 Mass. 316, 7 N. E. 877; Ferren v. Old Colony R. Co., 143 Mass. 197, 9 N. E. 608, and cases page 200, 143 Mass., and page 608, 9 N. E.; Chopin v. Badger Paper Co., 83 Wis. 192, 53 N. W. 452; Colf v. Chicago, St. P., M. & O. Ry. Co., 87 Wis. 273, 58 N. W. 408; Craver v. Christian, 36 Minn. 413, 31 N. W. 457; McDonald v. Chicago, St. P., M. & O. Ry. Co., 41 Minn. 439, 43 N. W. 380; Hungerford v. Chicago, M. & St. P. Ry. Co., 41 Minn. 444, 43 N. W. 324.

[128] Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873. The jury passes on the question whether the plaintiff was justified in believing that defendant's servants could do his work properly. New York & T. S. S. Co. v. Anderson, 1 C. C. A. 529, 50 Fed. 462.

[129] Cook v. St. Paul, M. & M. Ry. Co., 34 Minn. 45, 24 N. W. 311. Et vide Consolidated Coal Co. of St. Louis v. Haenni, 146 Ill. 614, 35 N. E. 162; Chicago, St. L. & P. R. Co. v. Frey, 131 Ind. 319, 28 N. E. 989.

[130] Louisville & N. R. Co. v. Kelly, 11 C. C. A. 260, 63 Fed. 407.

[131] Hall v. Chicago, B. & N. R. Co., 46 Minn. 439, 49 N. W. 239; Criswell v. Pittsburgh, St. L. & C. Ry. Co., 30 W. Va. 798, 6 S. E. 31.

narily and usually incidental to the class of operations in which he is engaged.[132]

Assumption of Risk as Affected by Original Services.

Most of the cases as to assumption of risk refer to risks assumed on entering the service. The tendency of recent decisions is to hold that, in regard to dangers growing out of the master's negligence which are not covered by the implied contract between the master and servant when the service was undertaken, it is a question of fact, to be independently decided, whether a servant who works on, appreciating the risk, assumes it voluntarily, or endures it because he feels constrained so to do.[133] "If a servant of full age and ordinary intelligence, upon being required by his master to perform other duties more dangerous and complicated than those embraced in his original hiring, undertakes such duties knowing their dangerous character, although unwillingly and from fear of losing his employment, and he is injured, he cannot maintain an action for the injury."[134] So a servant who voluntarily, and without direction from

[132] As those peculiar to the operation of a particular mine, Bergguist v. Chandler Iron Co., 49 Minn. 511, 52 N. W. 136. The servant does not assume the risk of negligent direction of work. Schroeder v. Chicago & A. R. Co., 108 Mo. 322, 18 S. W. 1094. Et vide Nall v. Louisville, N. A. & C. Ry. Co., 129 Ind. 260, 28 N. E. 183, 611. Where the evidence, in an action for the death of a workman by a fall from a defective staging in a grain elevator, showed that the defect was a knot in a plank, and that the deceased could not possibly have seen it, by reason of the darkness, no contributory negligence is established. Bright v. Barnett & Record Co., 88 Wis. 299, 60 N. W. 418. In an action by an employé for injuries caused by the fall of an elevator, it was proper to allow plaintiff to state whether he had ever been advised of or knew the condition of the elevator, as to its being safe or unsafe. McGonigle v. Kane (Colo. Sup.) 38 P. 367. A freight car was left standing on a side track without sufficient brakes to hold it. Started by its weight, or wind, it moved down, and injured plaintiff. This was held to be a natural peril of the service. Henry v. Wabash West Ry. Co., 109 Mo. 488, 19 S. W. 239.

[133] Fitzgerald v. Connecticut River Paper Co., 155 Mass. 155, 29 N. E. 464; Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366; Orman v. Mannix, 17 Colo. 564, 30 Pac. 1037.

[134] Leary v. Boston & A. R. Co., 139 Mass. 580, 2 N. E. 115; Hogan v. Northern Pac. R. Co., 53 Fed. 519. See cases collected in 14 Am. & Eng. Enc. Law, p. 859, note 1.

the master, goes into hazardous work outside of his contract, assumes the consequent risk.[135]

However, in Smith v. Baker[136] a servant continued in a work which exposed him to danger resulting from his employer's negligence, and fully understood and appreciated by him. It was held that he did not assume this risk by his implied contract when he entered into the service, and that he did not, as a matter of law, assume it by merely remaining in a place which his master's fault had made dangerous.

But, while the American cases have scarcely gone so far as this, they do distinguish between the danger of the service into which the servant originally entered and subsequent work which he may be directed to, and may actually, undertake. The implied assumption of risk does not apply to work outside the scope of original employment where there are dangers peculiar to it, and unfamiliar to the servant.[137] And it is a universally recognized principle that where a youthful and inexperienced employé is, without his parents' consent, put to work more difficult and more dangerous than that for which he is employed, the risks are not assumed.[138] The parent is negligent who allows his child to be employed in a dangerous place, as a mine, without stipulating for employment that will

[135] Pittsburgh, C. & St. L. Ry. Co. v. Adams, 105 Ind. 151, 5 N. E. 187; Wormell v. Maine Cent. R. Co., 79 Me. 397–410, 10 Atl. 49; Prentiss v. Kent Furniture Manuf'g Co., 63 Mich. 478–482, 30 N. W. 109.

[136] [1891] App. Cas. 325; Mahoney v. Dore, 155 Mass. 513, 30 N. E. 366; O'Maley v. South Boston Gaslight Co., 158 Mass. 136, 32 N. E. 1119.

[137] Ft. Smith Oil Co. v. Slover, 58 Ark. 168, 24 S. W. 106; Consolidated Coal Co. v. Haenni, 48 Ill App. 115, affirmed 146 Ill. 614, 35 N. E. 162 (where a blacksmith was suddenly called from his shop to assist in hoisting a heavy smokestack, without a chance to inspect hoisting apparatus); Boettger v. Scherpe & Koken Architectural Iron Co., 124 Mo. 87, 27 S. W. 466, (where the question was whether the selection of lumber for scaffold was unusual course of employment. He did not under such circumstances assume the negligence of a fellow servant in the new employment); Lalor v. Chicago, B. & Q. R. Co., 52 Ill. 401; Michael v. Roanoke Mach. Works, 90 Va. 492, 19 S. E. 261. However, if the servant is instructed as to and familiar with the dangers and use of the outside work (as of a saw), he assumes the risk. Wheeler v. Berry, 95 Mich. 250, 54 N. W. 876.

[138] Union Pac. R. Co. v. Fort, 17 Wall. 553; Id., 2 Dill. 259, Fed. Cas. No. 4,952; Northern Pac. Coal Co. v. Richmond, 7 C. C. A. 485, 58 Fed. 756.

not expose him to danger disproportioned to his years and experience.[139]

Promise to Remedy.

If the servant, on discovering the danger, complain thereof to the master, and the master directs the servant to continue his employment notwithstanding, and promises to remedy the danger, the servant can sue for damages resulting from such danger.[140] The leading case on this familiar rule is Hough v. Railway Co.[141] In this case the plaintiff was injured by an accident which happened because of the defect in the whistle which allowed steam to escape over him when the accident occurred, and because of the defective condition of the cowcatcher. The plaintiff did not know of the defect in the whistle, but did know of the defective condition of the cowcatcher, and had complained thereof to both master mechanic and foreman of the roundhouse. They had promised that it would be properly remedied. The court accepts as well established the English and American rule, as follows: "If the servant [of such company] notes the defects in machinery, gives notice thereof to the proper officer, and is promised that they shall be remedied, his subsequent use of it, in the well-grounded belief that it will be put in proper condition within a reasonable time, does not necessarily, as a matter of law, make him guilty of contributory negligence. It is a question for the jury whether in relying upon such promise, and using the machinery after he knew its defective or insufficient condition, he was in the exercise of due care. The burden of proof in such a case is upon the company to show contributory negligence."

But it must appear that the master, and not some unauthorized

[139] Weaver v. Iselin, 161 Pa. St. 386, 29 Atl. 49 (a mine).

[140] This principle applies to appliances and place. Hough v. Texas & P. Ry. Co., 100 U. S. 213; Greene v. Minneapolis & St. L. Ry. Co., 31 Minn. 248, 17 N. W. 378; Wuotilla v. Duluth Lumber Co., 37 Minn. 153, 33 N. W. 551; Lyberg v. Northern Pac. R. Co., 39 Minn. 15, 38 N. W. 632.

[141] 100 U. S. 213. Et vide New Jersey & N. Y. R. Co. v. Young, 1 C. C. A. 428, 49 Fed. 723; Indianapolis & St. L. Ry. Co. v. Watson, 114 Ind. 20–27, 14 N. E. 721, and 15 N. E. 824; Chicago Drop Forge & Foundry Co. v. Van Dam, 149 Ill. 337, 36 N. E. 1024; Schlitz v. Pabst Brewing Co. (Minn.) 59 N. W. 188.

person, made the promise to repair,[142] and the promise must be clear.[143] There is, however, a limit to this rule. If the instrumentalities of place are so defective and dangerous, imminently and immediately, that a man of ordinary prudence would have refused to continue work, the servant is negligent.[144]

Justification in Law.

But the servant is not bound to give up his employment merely because his master directs him to undertake extraordinarily hazardous work. He has a right to have his fears allayed by judgment of his master, involved in command. Thus, if a laborer employed to unload cars is directed by his master to couple cars, and, while so doing, has his hands crushed, he can recover.[145] This is especially true when the unusual danger is not apparent to a mind like the servant's.[146] If, however, the call to do unusual work is for a foreman's personal benefit, the company is not liable.[147] A fortiori, in many cases the public interest is a good reason for the obedience on the part of servants to the direction of the employer to under-

[142] Chesapeake & O. S. W. R. Co. v. McDowell (Ky.) 24 S. W. 607; Ehmcke v. Porter, 45 Minn. 338, 47 N. W. 1066.

[143] Wilson v. Winona & St. P. R. Co., 37 Minn. 326, 33 N. W. 908. A mere acknowledgment of defect, with comment that he (the master) was busy, is not a promise to remedy. Breig v. Chicago, W. & M. Ry. Co., 98 Mich. 222, 57 N. W. 118. But see Indianapolis Union Ry. Co. v. Ott (Ind. App.) 38 N. E. 842; Rothenberger v. Northwestern Consol. Milling Co. (Minn.) 59 N. W. 531. Where there is complaint without redress within a reasonable time, employé cannot recover. Morbach v. Home Min. Co., 53 Kan. 731, 37 Pac. 122. But mere complaint (e. g. of an unmanageable horse) is not enough. Mahan v. Clee, 87 Mich. 161, 49 N. W. 556.

[144] Greene v. Minneapolis & St. L. Ry. Co., 31 Minn. 248, 17 N. W. 378; Russell v. Tillotson, 140 Mass. 201, 4 N. E. 231; Indianapolis Union Ry. Co. v. Ott (Ind. App.) 35 N. E. 517, 38 N. E. 842.

[145] Lalor v. Chicago, B. & Q. Ry. Co., 52 Ill. 401. Et vide Jackson v. Georgia R. Co., 77 Ga. 82. But cf. Leary v. Boston & A. R. Co., 139 Mass. 580, 2 N. E. 115, and Wormell v. Maine Cent. R. Co., 79 Me. 397–410, 10 Atl. 49. But an employé who, knowing that men inside a box car, unloading ties, had not been warned of his approach, attempted to pass near the car without cautioning the men, and was struck by a tie, was guilty of contributory negligence, though his orders required him to pass the car and to "hurry." Thoman v. Chicago & N. W. Ry. Co. (Iowa) 60 N. W. 612.

[146] Colorado M. Ry. Co. v. O'Brien, 16 Colo. 219, 27 Pac. 701.

[147] Hurst v. Chicago, R. I. & P. R. Co., 49 Iowa, 76.

take unusual risk. Thus, in Campbell v. Railroad Co.[148] a hand car was run ahead of a train past due. The court said: "There is, of course, more than ordinary danger in operating a hand car upon a track where a train is past due from either direction. Yet, we have no doubt it is sometimes necessary that this should be done. If section hands should refrain from going upon the road at such times, the road would be uninspected no inconsiderable portion of the time. The necessity of inspection and repairs must be as great when the trains are past due as at any other time. Indeed, it must often be greater. * * * The safety of passengers requires that vigilance respecting the roadbed should not be relaxed at all times when trains are past due."

Assumption not Properly Voluntary.

As has been shown, the maxim "Volenti non fit injuria" does not apply where there is no real exercise of option in conduct. A specific application of this general principle is made to the risks assumed by a servant. If a seaman is by statute bound to obey orders, he does not assume the risks incident to operating an uncovered winch, in compliance with the command of his superior officer.[149] So, a convict working under a contract does not assume the risks of a dangerous place, even if those risks be known to him, because his movements are controlled by a guard.[150] On the same principle, if the servant is, by the wrong of the master, placed in a position of immi-

[148] 45 Iowa, 76. Et vide Frandsen v. Chicago, R. I. & P. R. Co., 36 Iowa, 372; Schroeder v. Chicago & A. Ry. Co., 108 Mo. 322, 18 S. W. 1094. A servant may rely on a vice principal's promise to protect him notwithstanding a violation of a rule where there is an emergency. Moore v. Wabash, St. L. & P. R. Co., 85 Mo. 588. Cf. Kansas City, Ft. S. & M. R. Co. v. Hammond, 58 Ark. 324, 24 S. W. 723. And see Fox v. Chicago, St. P. & K. C. R. Co., 86 Iowa, 368, 53 N. W. 259; East Tennessee, V. & G. Ry. Co. v. Bridges, 92 Ga. 399, 17 S. E. 645. An engineer discovering defects after commencement of trip is not necessarily negligent in not immediately abandoning same. Fordyce v. Edwards (Ark.) 30 S. W. 758. Where plaintiff, a brakeman acting under orders from his superior, attempted to couple cars, knowing that a passenger train was soon due, and that unless the coupling was made there would be danger of collision, his knowledge of defects in a pilot bar used in coupling will not preclude a recovery for injuries caused thereby. Strong v. Iowa Cent. Ry. Co. (Iowa) 62 N. W. 799.

[149] Eldridge v. Atlas S. S. Co., 134 N. Y. 187, 32 N. E. 66.

[150] Chattahoochee Brick Co. v. Braswell, 92 Ga. 631, 18 S. E. 1015.

nent peril, he is not guilty of contributory negligence if, in his endeavor to escape dangers for which the master provided no escape, he takes the means to preserve his life which result in his death.[151]

SAME—RISK OF FELLOW SERVANTS.

286. "A servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow servant when he is acting in the discharge of his duty as servant of him who is the common master to both,"[152] unless,

(a) The master's negligence in the employment of such fellow servant, or

(b) His wrong in some other respect, was the juridical cause of the injury.

The rule as to fellow servants is of modern origin, and is judge-made law. The earliest case on the point is said to be Priestly v. Fowler (1837).[153] This is regarded as not strictly a fellow-servant case, at all.[154] English courts, however, consider it the first case.[155] The rule was first indisputably enunciated in 1841, in a South Carolina case (Murray v. Railroad Co.).[156] The opinion, however, which

[151] This was applied in Louisville & N. R. Co. v. Shivell's Adm'r (Ky.) 18 S. W. 944, to this set of facts. Plaintiff's intestate was endeavoring to remove driftwood lodged against defendant's temporary bridge. The bridge was in imminent danger of giving way. The bridge gave way, and defendant, to save his life, swam ashore. Other workmen escaped by remaining on part of the drift which remained stationary. Plaintiff's intestate was drowned, but recovery was allowed. And see Schmidt v. Montana Cent. Ry. Co. (Mont.) 38 Pac. 226.

[152] Tunney v. Midland Ry. Co. (1866) L. R. 1 C. P. 291–296. And see Lovell v. Howell (1876) 1 C. P. Div. 161–167.

[153] 3 Mees. & W. 1. In 1850 (Hutchinson v. Railway Co., 5 Exch. 343) the English courts adopted the rule fully and completely. See, also, Wigmore v. Jay, Id. 354.

[154] 24 Am. Law Rev. 179.

[155] Griffiths v. Earl of Dudley, 9 Q. B. Div. 357–365.

[156] 1 McMul. (S. C.) 385.

really established the doctrine, was that of Chief Justice Shaw in Farwell v. Boston & W. R. Co., in 1842.[157] In 1858 the Scottish courts adopted the rule, and in the case of Bartonshill Coal Co. v. Reid [158] reported in full Chief Justice Shaw's masterly judgment.

Adoption of the Rule.

The rule as to master and servant thus came to be accepted by the English-speaking people. It is unknown, however, beyond them.[159] The doctrine of Farwell's Case has never been judicially denied in Great Britain. Justice Gray [160] has called attention to two cases having a tendency to support the opposite conclusion,—one in Tennessee,[161] and another in Wisconsin.[162] The latter case has been overruled.[163] Other courts have excepted from the rule certain cases.[164] Mr. Justice Brewer says, in its defense:[165] "The principles in Farwell's Case may not be obviously and unquestionably correct. They may be, ere long, entirely overthrown. But, if overthrown, it should be by legislative action, and not by judicial decision. * * * Farwell's Case may be limited by the legislatures, but its general principle rests on reason and the nature of things, and will remain. I cannot, however, doubt the soundness of the utterance that after 50 years of almost universal acceptance it has become incorporated into our general law, and that it is not within the rightful competency of the judicial power either to overthrow or to substantially sustain it." The federal courts, accordingly, rec-

157 4 Metc. (Mass.) 49.

158 3 Macq. 266. In Wilson v. Merry (1868) L. R. 1 H. L. Sc. 326, the rule was extended to injuries caused to a workman by a foreman occupying a position of superintendent in the same department.

159 Pol. Torts, p. 85.

160 Randall v. Baltimore & O. R. Co., 109 U. S. 478–484, 3 Sup. Ct. 322.

161 Haynes v. East Tennessee & G. R. Co., 3 Cold. 222.

162 Chamberlain v. Milwaukee & M. R. Co. (1860) 11 Wis. 248.

163 Moseley v. Chamberlan, 18 Wis. 731; Cooper v. Milwaukee & P. Ry. Co., 23 Wis. 668.

164 Gillenwater v. Madison & I. R. Co., 5 Ind. 339; Fitzpatrick v. New Albany & S. R. Co., 7 Ind. 436; Little Miami R. Co. v. Stevens, 20 Ohio, 415; Cleveland, C. & C. R. Co. v. Kerry, 3 Ohio St. 201.

165 Howard v. Denver & R. G. Ry. Co., 26 Fed. 837. A collection of cases will be found in Randall v. Baltimore & O. R. Co., 109 U. S. 478–484, 3 Sup. Ct. 322, in Mechem, Ag. § 667, and in Wood, Mast. & Serv. § 427, note 6.

ognized the general doctrine, and, when construing the common law of a particular state on this point (in the absence of statute), they regard the question as of construction of general contract of service, and not as a rule of property. Therefore, under such circumstances, local decisions do not control.[166]

Reason of the Rule.

The doctrine of the assumption by the servant of the risk of the negligence of his fellow servant is justified on several grounds.

Thus, it is urged that it is expedient to throw the risk on those who can best guard against it,[167] and that its moral effect tends to secure the exercise of a greater degree of care and caution by employés.[168] However, the opposite rule would tend to secure greater diligence on the part of the employer in securing the employé against such danger.

It is more generally, and in addition, assigned as a reason, that the servant enters into a contract with reference to, and impliedly assumes the risks resulting from, the negligence of his fellow servants.[169] Ordinarily, however, there is no actual or real consent, either expressed or implied, on the part of the servant, to such risks. In the great majority of cases, he is likely to know nothing of such

[166] Newport News & M. V. Co. v. Howe, 3 C. C. A. 121, 52 Fed. 362. As to Kentucky rule that brakeman and engineer are not fellow servants, see Louisville & N. R. Co. v. Brooks' Adm'x, 83 Ky. 131. And see Louisville & N. R. Co. v. Brantley's Adm'r (Ky.) 28 S. W. 477.

[167] This was urged, inter alia, by Shaw, C. J., in Farwell v. Boston & W. R. Corp., 4 Metc. (Mass.) 49. It is contended in argument by defendant in error in Northern Pac. R. Co. v. Hambly, 154 U. S., at page 352, 14 Sup. Ct. 983, that this was not a good reason when enunciated, and, when applied to railroad corporations of the present day, it is entirely unfounded and misleading.

[168] Sullivan v. Mississippi & M. R. Co., 11 Iowa, 421.

[169] "Strangers can hold the master liable for the negligence of a servant about his business. But, in the case where the person injured is himself a servant in the same business, he is not in the same position as a stranger. He has of his free will entered into the business, and made it his own. He cannot say to the master, 'You shall so conduct your business as not to injure me by want of due care and caution therein'; for he has agreed with the master to serve in that business, and his claims on the master depend on the contract of service. Why should it be an implied term of that contract, not being an express one, that the master shall indemnify him against the negligence of a fellow servant or any other current risk? It is rather to be implied that he

rule, and is surprised, after damage done, to learn of it. The rule, therefore, cannot be said to be justified by any such implied promise as is inferred from mere purchase and delivery of goods, to pay their reasonable value. The rule is implied into the contract in this sense: That a contract practically consists of three things: (a) Its terms; (b) the law applicable to it, in existence, inter alia, at the time of its execution;[170] and (c) the surrounding circumstances, in the light of which it is to be explained and applied.[171] Accordingly, the established rule of law as to the assumption of the risk of the negligence of a fellow servant is incorporated into the contract, without reference to the knowledge or consent of the parties, just as interest is added to a bare promise to pay.

As to the rule itself, thus incorporated, if it were the application to the relationship of master and servant of the general principle of assumption of risk by all persons, mutatis mutandis, no objection would seem reasonable. Every person may assume risk, and prevent recovery for consequent damages.

A servant should come under this rule, and be held to assume certain risks peculiar to his employment. But here arises the difficulty, i. e. in changing the general doctrine of the assumption of risk to meet changes in the relationship. The risk of negligence of a fellow servant might have been at one time fairly classed as one of the ordinary risks of the service. Employments were simple, and not hazardous. Fellow servants were comparatively few in number, and, as a rule, well known in the community. But the con-

contracted with the risk before his eyes, and that the dangers of the service, taken all round, were considered in fixing the rate of payment." Pol. Torts, 85. And see Pol. Jur. & Ethics, pp. 127, 128, 131, 133; Lord Cranworth, in Bartonshill Coal Co. v. Reid, 3 Macq. 382; Cairns, L. C., in Wilson v. Merry, L. R. 1 H. L. Sc. 326; Priest, D. J., in Martin v. Chicago & A. Ry. Co., 65 Fed. 384; Justice Field, in Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590; Justice Harlan, in Hough v. Texas & P. Ry. Co., 100 U. S. 213; Gibson v. Railroad Co., 46 Mo. 163.

[170] Stahl v. Mitchell, 41 Minn. 325, 43 N. W. 385.

[171] Thus, a custom may be incorporated into a contract. Where a contract of shipment by rail does not define what shall constitute a car load, a general custom among railroad men and shippers, by which a car load is made to consist of a certain number of pounds, governs the contract. Good v. Chicago, R. I. & P. Ry. Co. (Iowa) 60 N. W. 631.

servatism of the courts has preserved the rule, since its first bold enunciation, when strict logic would have justified its modification and adaptation to the changes in the risks to which it applies. Present developments of steam and electricity; the wonderful speed, the enormous weight, and marvelous power of modern machinery; the great number of employés; the impossibility of knowing or ascertaining their characters; the inability of men to estimate the dangers to which they are exposed,—have brought it to pass that the rule is felt to work great injustice and unjustifiable hardship. This feeling is especially justified inasmuch as the rights of the servant seem to be almost the only ones not regulated by the general law, and inasmuch as passengers, for example, find all presumptions of law in their favor, and even strangers receive fair application of general rules.[172] In some measure, the courts have met this feeling by treating the assumption of risk as a question of fact, to be determined by the jury, and by allowing the jury to determine the relationship of fellow servant.[173] However, as a matter of fact, in a great many cases, courts decide the question as a matter of law.

In order that the fellow-servant rule should apply, it is necessary that the complainant and the servant whose negligence causes the wrong should have a common master.[174] It applies only where the

[172] On this general subject Mr. David Gibbon says: "The common sense of servants rebels against this law. Witness the many actions they have brought. The common sense of masters does not confirm it. When a servant is slain or mutilated in a master's business, assisting to make his fortune, he feels and knows that a claim on him arises different in nature from that which a sufferer by a calamity has upon the public. Some masters make compensation as a matter of right; others, while deploring the accident and not admitting legal liability, are willing to make the servant a present. None recommend the applicant to seek a general subscription, or mock him by telling him that the wages he has received are the agreed compensation for his loss." Note on "Negligence" in Gale. Easm. 429.

[173] Wenona Coal Co. v. Holmquist, 152 Ill. 581, 38 N. E. 946; Mexican Nat. R. Co. v. Finch (Tex. Civ. App.) 27 S. W. 1028; Northern Pac. Coal Co. v. Richmond, 7 C. C. A. 485, 58 Fed. 756; Lake Erie & W. R. Co. v. Middleton, 142 Ill. 550, 32 N. E. 453.

[174] Sullivan v. Tioga R. Co., 112 N. Y. 643, 20 N. E. 569; Sanford v. Standard Oil Co., 118 N. Y. 574, 24 N. E. 313; Johnson v. Netherlands Am. Steam Nav. Co., 132 N. Y. 576–578, 30 N. E. 505; Devlin v. Smith, 89 N. Y. 470; Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; Johnson v. Spear, 76 Mich. 139, 42 N. W. 1092.

servant sues his own master.[175] Therefore, damages to a servant for injury to his wife produced by the negligence of a fellow servant may be recovered from the employer.[176]

Where a servant in the general employ of one master is by him placed temporarily under the order of another, to do the latter's work, the servant of the latter, and the servant so placed to work with him, are fellow servants in that work, and neither master is liable for the damages resulting to one of those servants from the negligence of the other while performing the same.[177] The rule does not apply where the employment is the same but the masters different.[178] And, if the master personally assist in the common work,

[175] Smith v. New York & H. R. Co., 19 N. Y. 127-132; Young v. New York Cent. R. Co., 30 Barb. 229; Gerlach v. Edelmeyer, 88 N. Y. 645; Burke v. Norwich & W. R. Co., 34 Conn. 124. Unless the person sought to be rendered liable for the negligence of his servant can show that the person so seeking to make him liable was held in his service, the defense of common employment is not to him. Johnson v. Lindsay [1891] App. Cas. 371; Cameron v. Nystrom [1893] 1 Reports, 362, App. Cas. 308. Et vide Abraham v. Reynolds, 5 Hurl. & N. 142; Swainson v. Northeastern Ry. Co., 3 Exch. Div. 341; Warburton v. Great Western Ry. Co., L. R. 2 Exch. 30; Farrant v. Barnes, 11 C. B. (N. S.) 553.

[176] Campbell v. Harris, 4 Tex. Civ. App. 636, 23 S. W. 35; Gannon v. Housatonic R. R., 112 Mass. 234. And see Brown v. Sullivan, 71 Tex. 470, 10 S. W. 288.

[177] Cregan v. Marston, 126 N. Y. 573, 27 N. E. 952; Coyle v. Pierrepont, 33 Hun, 311; Burke v. De Castro & D. S. R. Co., 11 Hun, 354; Winterbottom v. Wright, 10 Mees. & W. 109; Murray v. Currie, L. R. 6 C. P. 24; The Harold, 21 Fed. 428; The Islands, 28 Fed. 478; Illinois Cent. R. Co. v. Cox, 21 Ill. 20; Svenson v. Atlantic Mail S. S. Co., 57 N. Y. 108; Abraham v. Reynolds, 5 Hurl. & N. 142. While a coal train of defendant railroad company, whose tracks ran over the docks of a coal company, was delivering coal to the latter company, a brakeman of the coal company, engaged in coupling cars of the train, was injured by the negligence of defendant's engineer. Held, that such engineer was not a fellow employé of the injured brakeman, he not being under the power and direction of the coal company, engaged exclusively in doing its work or "lent" to it for the occasion. (Ewan v. Lippincott, 47 N. J. Law, 192; Johnson v. Boston, 118 Mass. 114; Rourke v. White Moss Colliery Co., 46 Law J. C. P. 283,—distinguished.) Central Railroad of New Jersey v. Stoermer, 2 C. C. A. 360, 51 Fed. 518.

[178] Kelly v. Johnson, 128 Mass. 530; Louisville, N. O. & T. R. Co. v. Conroy, 63 Miss. 562; Phillips v. Chicago, M. & St. P. Ry. Co., 64 Wis. 475, 25 N. W. 544. As where servants of different masters are engaged on the

he is liable to his employés for his negligence.[179] Where one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him; and, if the servant receives injuries in such employment from the negligence of a servant of the person to whom he is lent, he cannot recover therefor.[180] The rule applies to volunteers.[181] A person who, in the transaction of common interest, assists the servant of another employer, with such employer's consent, however, has been held entitled to recovery for the latter's negligence.[182] Servants of different connecting lines are not fellow servants, whatever the agreement between those connecting lines may be.[183] Servants of an employer

same building. Morgan v. Smith, 159 Mass. 570, 35 N. E. 101; Burrill v. Eddy, 160 Mass. 198, 35 N. E. 483. And, generally, as to servants of different masters, see Conlan v. New York Cent. & H. R. R. Co., 74 Hun, 115, 26 N. Y. Supp. 659; Robertson v. Boston & A. R. Co., 160 Mass. 191, 35 N. E. 775; Union Pac. Ry. Co. v. Kelley, 4 Colo. App. 325, 35 Pac. 923; Alton Lime & Cement Co. v. Calvey, 47 Ill. App. 343. A driver of a team was not a fellow servant of one employed on city work, though they were working to a common end, if, in backing the team, he was not under the control and direction of the city foreman. Reagan v. Casey, 160 Mass. 374, 36 N. E. 58; Gannon v. Housatonic R. Co., 112 Mass. 334; Svenson v. Atlantic Mail S. S. Co., 33 N. Y. Super. Ct. Rep. 277, affirmed 57 N. Y. 108; Devlin v. Smith, 89 N. Y. 470; Harkins v. Standard Sugar Refinery, 122 Mass. 400; Johnson v. Spear, 76 Mich. 139, 42 N. W. 1092; Zeigler v. Danbury & N. R. Co., 52 Conn. 543; Lake Superior Iron Co. v. Erickson, 39 Mich. 492; Stetler v. Chicago & N. W. Ry. Co., 46 Wis. 497, 1 N. W. 112.

[179] Ashworth v. Stanwix, 3 El. & El. 701; Lorentz v. Robinson, 61 Md. 64; Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493.

[180] Hasty v. Sears, 157 Mass. 123, 31 N. E. 759.

[181] Potter v. Faulkner, 31 Law J. Q. B. 30; Holmes v. Northeastern Ry. Co., L. R. 4 Exch. 254; Millsaps v. Louisville, N. O. & T. Ry. Co., 69 Miss. 423, 13 South. 696.

[182] Eason v. Sabine & E. T. Ry. Co., 65 Tex. 577; Chicago, M. & St. P. Ry. Co. v. West, 125 Ill. 320, 17 N. E. 788.

[183] Sullivan v. Tioga R. Co., 112 N. Y. 643, 20 N. E. 569; Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; Sawyer v. Rutland & B. R. Co., 27 Vt. 370; Stetler v. Chicago & N. W. R. Co., 46 Wis. 497, 1 N. W. 112; Smith v. New York & H. R. Co., 19 N. Y. 127; Merrill v. Central Vt. R. Co., 54 Vt. 200; Connolly v. Davidson, 15 Minn. 519 (Gil. 428); Taylor v. Western Pac. R.

and the servants of his independent contractors are not fellow servants,[184] nor are servants of a subcontractor fellow servants of the contractor's employer.[185]

287. The English courts determine the relationship of fellow servants by the test of common employment.

The English cases have rejected the doctrine of vice principal or deputy master. Such a principle was apparently assumed in Murphy v. Smith,[186] but has been abandoned.[187] "I cannot say that Thomas (the manager of the mine) was here anything more than a vice principal or manager, and he was therefore a fellow servant." Mr. Pollock states the rule as to common employment as follows: "All persons engaged under the same employer for the purposes of the same business, however different in detail those purposes may be, are fellow servants. The kind of work need not be the same; the employer must be. They need not be engaged in the same department of service, but they must be working for a common object."[188] Thus, where the one in the employment of a rail-

Co., 45 Cal. 323; Zeigler v. Danbury & N. R. Co., 52 Conn. 343; Gray v. Philadelphia & R. R. Co., 24 Fed. 168.

[184] Coughtry v. Globe Woolen Co., 56 N. Y. 124; Haas v. Philadelphia & S. M. S. S. Co., 88 Pa. St. 269; Cunningham v. International R. Co., 51 Tex. 503; Goodfellow v. Boston, H. & E. R. Co., 106 Mass. 461; Lake Superior Iron Co. v. Erickson, 39 Mich. 492. And see Svenson v. Atlantic Mail S. S. Co., 57 N. Y. 108; Louisville, N. O. & T. R. Co. v. Conroy, 63 Miss. 562. But see Ewan v. Lippincott, 47 N. J. Law, 192; Johnson v. City of Boston, 118 Mass. 114; Illinois Cent. R. Co. v. Cox, 21 Ill. 20; Charles v. Taylor, 3 C. P. Div. 492.

[185] Wiggett v. Fox, 11 Exch. 832; Murray v. Currie, L. R. 6 C. P. 24; Curley v. Harris, 11 Allen, 112.

[186] 19 C. B. (N. S.) 361.

[187] Smith, Mast. & S. 257; Wilson v. Merry, L. R. 1 H. L. Sc. 326; Howells v. Landore, etc., Steel Co. (1874) L. R. 10 Q. B. 62; The Petrel, 1 Pet. 651; Thomp. Neg. 1026–1031.

[188] Pol. Torts, 86–88. Under statute, see Dantzler v. De Bardeleben Coal & Iron Co., 101 Ala. 309, 14 South. 10; Jenkins v. Richmond & D. R. Co., 39 S. C. 507, 18 S. E. 182; Conley v. Portland, 78 Me. 217, 3 Atl. 658. In 25 Am. Law Reg. 676, fellow servants are defined to be those who are (1) employés of the same master, (2) under the same control, (3) in the same common employment.

way company as carpenter to do any carpenter's work for the general purposes of the company was standing on the scaffolding at work on a shed close to the line of the railway, when some porters in the service of the company carelessly shifted an engine so that it struck the support of the scaffolding, thereby throwing the carpenter down and injuring him, the company was held not liable.[189] The test is exceedingly unsatisfactory, because of the unavoidable difficulty of determining what is a common employment. This varies with the circumstances of the case. And so the test is so broad as to be of doubtful value in practical application. It almost leaves every case to be decided on its own facts. "The difficulty with the definition is that it needs defining." [190]

288. The American cases[191] incline to adopt, as the test of whether the plaintiff and another servant are fellow servants of the same master, the doctrine of vice principal.

289. A vice principal, as distinguished from a fellow servant, is one to whom the master has delegated some absolute duty owed by the master to his servants. For the negligence of such vice principal, at least so long as he is engaged in the performance of such duty, the master is responsible to other servants.

Confusion in Opinion.

There is probably no subject connected with the law of negligence that has given rise to more variety of opinion than that of fellow

[189] Morgan v. Vale of Neath Ry. Co., 5 Best & S. 570, L. R. 1 Q. B. 149; Swainson v. North Eastern Ry. Co., 3 Exch. Div. 341. Et vide Catawissa R. Co. v. Armstrong, 49 Pa. St. 186; Chicago & A. R. Co. v. Kelly, 127 Ill. 637, 21 N. E. 203; Joliet Steel Co. v. Shields, 134 Ill. 209, 25 N. E. 569; Moynihan v. Hills Co., 146 Mass. 586–594, 16 N. E. 574; Webb v. Denver & R. G. R. Co., 7 Utah, 363, 26 Pac. 981; Dixon v. Chicago & A. R. Co., 109 Mo. 413, 19 S. W. 412. Et vide Griffiths v. Wolfram, 22 Minn. 185; Osborne v. Morgan, 130 Mass. 102.

[190] Cooley, Torts, 544, note 1; Thomp. Neg. 1026–1031; 3 Wood, R. R. § 388; Beach, Contrib. Neg. § 324.

[191] Hawkins v. New York, L. E. & W. R. Co. (N. Y. App.) 37 N. E. 466; Monmouth Min. & Manuf'g Co. v. Erling (Ill. Sup.) 36 N. E. 117. And see

servants. The authorities are hopelessly divided upon the general subject, as well as upon the question here involved. "It is useless to attempt an analysis of the cases which have arisen in the courts of the several states, since they are wholly irreconcilable in principle, and too numerous even to justify citation." [192] It would seem, however, that there is a very general tendency on the part of American cases to refuse to determine the relation by mere refer-

Bailey, Mast. & S. cc. 12-18, wherein the rules adopted in various states are formulated.

[192] Mr. Justice Brown, in Northern Pac. R. Co. v. Hambly, 154 U. S. 349-355, 14 Sup. Ct. 983. The confusion on the subject appears fully in the cases of railroad employés. Among the recent cases in which such persons have been held to be fellow servants are Rutledge v. Missouri Pac. Ry. Co., 123 Mo. 121, 24 S. W. 1053, affirmed in 27 S. W. 327 (switchman and engineer); Northern Pac. R. Co. v. Charless, 2 C. C. A. 380, 51 Fed. 567, distinguished, and McKaig v. Northern Pac. R. Co., 42 Fed. 288, approved, in Cincinnati, N. O. & T. P. R. Co. v. Clark, 6 C. C. A. 281, 57 Fed. 125 (telegraph operator and fireman); Kerlin v. Chicago, P. & St. L. R. Co., 50 Fed. 185, followed in Becker v. Baltimore & O. R. Co., 57 Fed. 188 (conductor and brakeman); La Pierre v. Chicago & G. T. Ry. Co., 99 Mich. 212, 58 N. W. 60 (Id.); Campbell v. Cook, 86 Tex. 630, 26 S. W. 486 (Id.); South Florida R. Co. v. Price, 32 Fla. 46, 13 South. 638 (engineer, brakeman, and conductor); Jenkins v. Richmond & D. R. Co., 39 S. C. 507, 18 S. E. 182 (fireman and conductor); Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914; Jarman v. Chicago & G. T. Ry. Co., 98 Mich. 135, 57 N. W. 32 (fireman and conductor); Schaible v. Lake Shore & M. S. Ry. Co., 97 Mich. 318, 56 N. W. 565 (trackman and trainman); Ellington v. Beaver Dam Lumber Co., 93 Ga. 53, 19 S. E. 21; Watts v. Hart, 7 Wash. 178, 34 Pac. 423, 771 (engineer, fireman, and laborer); Atchison, T. & S. F. R. Co. v. Martin (N. M.) 34 Pac. 536 (conductor, engineer, and laborer); Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983 (conductor, engineer, and laborer); Northern Pac. R. Co. v. Smith, 8 C. C. A. 663, 59 Fed. 993 (conductor, engineer, and laborer). Among the recent cases in which such employés have been held not to be fellow servants, see McGill v. Southern Pac. Co. (Ariz.) 33 Pac. 821 (section foreman and conductor); Atchison, T. & S. F. R. Co. v. Seeley, 54 Kan. 21, 37 Pac. 104 (brakeman and station agent); Hankins v. New York, L. E. & W. R. Co., 142 N. Y. 416, 37 N. E. 466 (train dispatcher and fireman); Little Rock & M. R. Co. v. Barry, 58 Ark. 198, 23 S. W. 1097 (train dispatcher and engineer); Wooden v. Western N. Y. & P. R. Co., 5 Misc. Rep. 537, 25 N. Y. Supp. 977 (conductor and brakeman); Illinois Cent. R. Co. v. Spence, 93 Tenn. 173, 23 S. W. 211; Chicago, M. & St. P. Ry. Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, distin-

ence to decisions that men in specified relations are or are not fellow servants, but to rest the determination of such questions upon the philosophical basis of performance of duty, and to adopt the doctrine of vice principal as a test of fellow servant.[193]

Negatively as to Who is a Vice Principal.

Many of the cases, and especially the earlier ones, undertook to define a fellow servant by contrasting him with some one having superintendence or control; that is, a "superior servant."[194] The

guished in Baltimore & O. R. Co. v. Baugh, supra (engineer and fireman); Core v. Ohio R. Co., 38 W. Va. 456, 18 S. E. 596 (engineer and brakeman); Louisville, E. & St. L. C. R. Co. v. Hawthorn, 147 Ill. 226, 35 N. E. 534, and 45 Ill. App. 635 (fence builder and engineer); Haney v. Railway Co., 38 W. Va. 570, 18 S. E. 748 (conductor, signal operator, and section hand); Union Pac. Ry. Co. v. Ericson, 41 Neb. 1, 59 N. W. 347 (section man and fireman). And, generally, see Schlereth v. Missouri Pac. Ry. Co., 115 Mo. 87, 21 S. W. 1110; Armstrong v. Railway Co., 8 Utah, 420, 32 Pac. 693; Evans v. Louisville, N. O. & T. Ry. Co., 70 Miss. 527, 12 South. 581; New York & N. E. R. Co. v. Hyde, 5 C. C. A. 461, 56 Fed. 188; Evansville & R. R. Co. v. Henderson, 134 Ind. 636, 33 N. E. 1021; Peoria, D. & E. Ry. Co. v. Rice, 144 Ill. 227, 33 N. E. 951; Texas & P. Ry. Co. v. Easton, 2 Tex. Civ. App. 378, 21 S. W. 575; Charles v. Taylor, 3 C. P. Div. 492; Randall v. Baltimore & O. R. Co., 109 U. S. 478, 3 Sup. Ct. 322; Miller v. Missouri Pac. Ry. Co., 109 Mo. 350, 19 S. W. 58; Daniel's Adm'r v. Chesapeake & O. Ry. Co., 36 W. Va. 397, 15 S. E. 162.

[193] Greenway v. Conroy, 160 Pa. St. 185, 28 Atl. 692; Union Pac. Ry. Co. v. Kelley, 4 Colo. App. 325, 35 Pac. 923; Card v. Eddy (Mo. Sup.) 24 S. W. 746; Flike v. Boston & A. R. Co., 53 N. Y. 549; Crispin v. Babbitt, 81 N. Y. 516; Gunter v. Graniteville Manuf'g Co., 18 S. C. 262; Moon's Adm'r v. Richmond & A. R. Co., 78 Va. 745; Brown v. Minneapolis & St. L. Ry. Co., 31 Minn. 553, 18 N. W. 834; Hawkins v. Railroad Co., 11 N. Y. Law J. 84, quoting the Harvard Law Review to the effect that the doctrine of vice principal has been accepted by the courts of about 10 states, and by the supreme court of the United States. The position of the supreme court of the United States is subsequently considered.

[194] An assistant road master in control of a gang of men, and with power to direct their work and discharge any of them, is a superior servant, for whose negligent acts the master is liable. Harrison v. Railroad Co., 79 Mich. 409, 44 N. W. 1034, followed in Palmer v. Michigan Cent. R. Co., 93 Mich. 363, 53 N. W. 397. Et vide post, p. 1043, note 201; Newport News & M. V. Co. v. Dentzel's Adm'r, 91 Ky. 42, 14 S. W. 958. And see note by James M. Kerr to Garraby v. Kansas City, St. J. & C. B. R. Co., 25 Fed. 258, 263.

test is, however, generally abandoned, and it is generally accepted that difference in rank, position, or control does not determine whether or not given men are fellow servants.[195] Therefore, a section man and a section foreman are fellow servants.[196]

[195] Hofnagle v. New York Cent. & H. R. R. Co., 55 N. Y. 608; McCosker v. Long Island R. Co., 84 N. Y. 77; Allen, J., in Wright v. New York Cent. R. Co., 25 N. Y. 562-565; Hanna v. Granger (R. I.) 28 Atl. 659; Atchison, T. & S. F. R. Co. v. Martin (N. M.) 34 Pac. 536. The mere fact that an employé occasionally had authority to require other employés to help him does not render him a vice principal at such times, though they were then under his orders. Hathaway v. Illinois Cent. Ry. Co. (Iowa) 60 N. W. 651.

[196] Olson v. St. Paul, M. & M. Ry. Co., 38 Minn. 117, 35 N. W. 866. Further, as to a foreman as a fellow servant, see Atchison, T. & S. F. R. Co. v. Martin (N. M.) 34 Pac. 536; Noyes v. Wood (Cal.) 36 Pac. 766; Larich v. Moies (R. I.) 28 Atl. 661; Fordyce v. Briney, 58 Ark. 206, 24 S. W. 250. But cf. Cheeney v. Ocean S. S. Co., 92 Ga. 726, 19 S. E. 33; Cleveland, C., C. & St. L. Ry. Co. v. Brown, 6 C. C. A. 142, 56 Fed. 804; Davis v. New York, N. H. & H. R. Co., 159 Mass. 532, 34 N. E. 1070. Cf. last case with O'Brien v. Rideout, 161 Mass. 170, 36 N. E. 792. A train dispatcher, employed by the division superintendent, though he has power to employ and discharge brakemen and flagmen, and has general charge of the movement of trains, is a fellow servant of an engineer who is also subject to the instructions of the division superintendent. Norfolk & W. R. Co. v. Hoover (Md.) 29 Atl. 994. Railroad section men and laborers on repair trains, employed by the same master for the same general purpose of keeping the roadbed and track in order, are fellow servants; and the employer is not liable for injuries to one, caused by negligence of another, though such other has control over a gang of men. Thom v. Pittard, 10 C. C. A. 352, 62 Fed. 232. A superintendent may be a fellow servant. Howard v. Hood, 155 Mass. 391, 29 N. E. 630. A truck packer and a foreman of a roundhouse are fellow servants, though the former was subject to the orders of the latter. Gonsior v. Minneapolis & St. L. Ry. Co., 36 Minn. 385, 31 N. W. 515; Wilson v. Merry, L. R. 1 H. L. Sc. 326; O'Brien v. Rideout, 161 Mass. 170, 36 N. E. 792 (foreman and circular saw); McGuerty v. Hale, 161 Mass. 51, 36 N. E. 682; Dowd v. Boston & A. R. Co., 162 Mass. 185, 38 N. E. 440; De Marcho v. Builders' Iron Foundry (R. I.) 28 Atl. 661 (employé injured by foreman throwing box on iron posts). But see Chicago Anderson Pressed-Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572. Where a laborer on a work train is injured by the negligence of one who is both conductor of the train, and also foreman of the laborers,—having, in the latter capacity, power to hire and discharge the laborers at his discretion,—the question whether they are fellow servants is for the jury. (Baker, J., dissenting. Abend v. Railroad Co., 111 Ill. 202, distin-

It is quite clear, also, that, while thus a vice principal is not determined by rank, position, or control, neither is he determined by difference in employment. It is, however, by no means a necessary consequence that the doctrine of vice principal should exclude the test of common employment.[197] Such exclusion is likely to work great hardship, and to mark the departure as to master and servant from

guished. 52 Ill. App. 556, affirmed.) Mobile & O. R. Co. v. Massey, 152 Ill. 144, 38 N. E. 787. A review of the law as to the liability of a master for the negligence of a fellow servant, as applied in the courts of Illinois, with numerous citations, by James P. Harrold, 39 Cent. Law J. 467. A brakeman and conductor may be fellow servants. Campbell v. Cook, 85 Tex. 630, 26 S. W. 486. And, generally, see Northern Pac. R. Co. v. Peterson, 2 C. C. A. 157, 51 Fed. 182–185; The Frank & Willie, 45 Fed. 494, 495, and cases collected; Kerlin v. Chicago, P. & St. L. R. Co., 50 Fed. 185; Hanna v. Granger (R. I.) 28 Atl. 659; Wilson v. Merry, L. R. 1 H. L. Sc. 326; Crispin v. Babbitt, 81 N. Y. 516; McCosker v. Long Island R. Co., 84 N. Y. 77; Brick v. Rochester, N. Y. & P. R. Co., 98 N. Y. 211; Loughlin v. People, 105 N. Y. 159, 11 N. E. 371; Hussey v. Coger, 112 N. Y. 614, 20 N. E. 556; Cullen v. Norton, 126 N. Y. 1, 26 N. E. 905. Foremen and persons engaged in superintendence were held to be fellow servants among recent cases. City of Minneapolis v. Lundin, 7 C. C. A. 344, 58 Fed. 525; Griffiths v. New Jersey & N. Y. R. Co., 5 Misc. Rep. 320, 25 N. Y. Supp. 812; New Pittsburgh Coal & Coke Co. v. Peterson, 136 Ind. 398, 35 N. E. 7; Watts v. Hart, 7 Wash. 178, 34 Pac. 423; Harley v. Louisville & N. R. Co., 57 Fed. 144; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914; Kennedy v. Spring, 160 Mass. 203, 35 N. E. 779. Held not to be fellow servants: Ft. Worth & D. C. R. Co. v. Peters (Tex. Civ. App.) 25 S. W. 1077; Cheeney v. Ocean S. S. Co., 92 Ga. 726, 19 S. E. 33; Chicago Anderson Pressed-Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; Libby, McNeill & Libby v. Scherman, 146 Ill. 540, 34 N. E. 801; Cleveland, etc., R. Co. v. Brown, 6 C. C. A. 142, 56 Fed. 804; Davis v. New York, N. H. & H. R. Co., 159 Mass. 532, 34 N. E. 1070; Prendible v. Connecticut R. Manuf'g Co., 160 Mass. 131, 35 N. E. 675; Zintek v. Stimson Mill Co. (Wash.) 37 Pac. 340. And, generally, see Allen v. Goodwin, 92 Tenn. 385, 21 S. W. 760; Moody v. Hamilton Manuf'g Co., 159 Mass. 70, 34 N. E. 185; Gilmore v. Oxford Iron & Nail Co., 55 N. J. Law, 39, 25 Atl. 707; Bloyd v. St. Louis & S. F. Ry. Co., 58 Ark. 66, 22 S. W. 1089; Hoosier Stone Co. v. McCain, 133 Ind. 231, 31 N. E. 956; Roseback v. Aetna Mills, 158 Mass. 379, 33 N. E. 577; Kansas City, M. & B. R. Co. v. Burton, 97 Ala. 240, 12 South. 88. As to the rule in admiralty torts, see The Egyptian Monarch, 36 Fed. 773; The Queen, 40 Fed. 694; The City of Alexandria, 17 Fed. 390; Grinsley v. Hankins, 46 Fed. 400; The City of Norwalk, 55 Fed. 98–102; The Julia Fowler, 49 Fed. 277.

[197] As against the abolition of the consociation test, see Evans v. Carbon

the general rule of law.[198] The tendency, however, would seem to be to hold that one who is not a vice principal is a fellow servant.[199] On this general subject the supreme court of the United States has said: "To hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of

Hill Coal Co., 37 Fed. 437; Nashville & C. R. Co. v. Carroll, 6 Heisk. 347; Dixon v. Chicago & A. R. Co., 109 Mo. 413, 19 S. W. 412; Hobson v. New Mexico & A. R. Co. (Ariz.) 11 Pac. 545; Chicago & N. W. R. Co. v. Moranda, 93 Ill. 302.

[198] The general rule of law as to assumption of risk is based on knowledge of danger on the part of some one who then voluntarily assumes the risk. Ante, p. 1014. Indeed, this is the general rule as to servants where the ironclad artificial formula as to fellow servant is not applied. Post, p. 1053. But, if the test of vice principal be adopted and defined so as to exclude considerations as to common employment, a servant will be held to assume negligence of another of whose existence he is not aware. It is hard to see how any actual or natural assumption of risk can be found in such a case as Neal v. Northern Pac. R. Co. (Minn.) 59 N. W. 312. This has been recognized by the supreme court of the United States quite distinctly in Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, post, p. 1049, and indirectly in Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, in these words: "Thus, between the law department of a railway corporation and the operating department there is a natural and distinct separation,—one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So sometimes there is in the affairs of such corporations what may be called a manufacturing or repair department, and another strictly operating department; these two departments are in their relations to each other as distinct and separate as though the work of each was carried on by a separate corporation." Query: A party composed, inter alia, of a clerk in the law department of a railway and of invited guest left Portland, Or., for the East. After they started, a certain switchman, 1,000 miles to the East, is employed by the master of the clerk. Through the negligence of the switchman the entire party suffered damage. Can that clerk be held to have consented to the risk of the negligence of such switchman? Did the guest assume the risk?

[199] Ever since the leading and pioneer case of Farwell v. Boston & C. Ry. Co., 4 Metc. (Mass.) 49, the overwhelming majority of authorities have repudiated the "same department" or "consociation" theory. Neal v. Northern Pac. R. Co. (Minn.) 59 N. W. 312. Men employed by a railroad company, under the direction of a foreman, in blasting and quarrying stone along the road, and the lineman employed by the same company, under the direction of the superintendent of telegraphy, in repairing the telegraph line, which

the same general service, would result in frittering away the whole doctrine of fellow service." [200]

Performance of Duty the Test.

Positively one employé becomes vice principal of another only when he is intrusted with the performance of some absolute and personal duty of the master himself. These duties are not only absolute, but they are also inalienable and nonassignable. They may be devolved on others by the master, but not without recourse to him. For negligence in the discharge of these duties he is liable. It is immaterial whether such negligence is his own or that of his servant. In this sense the servant is the alter ego of the master or vice principal.[201] The master's absolute and personal duties

was broken by the blasting, and who was assisted, when necessary, by the quarrymen, are fellow servants. Id. Generally, as to the adoption of the test of vice principal to the exclusion of the doctrine of common employment, see Brown v. Winona & St. P. R. Co., 27 Minn. 162, 6 N. W. 484; Foster v. Minnesota Cent. Ry. Co., 14 Minn. 360 (Gil. 277); Collins v. St. Paul & S. C. R. Co., 30 Minn. 31, 14 N. W. 60; Brown v. Minneapolis & St. L. R. Co., 31 Minn. 553, 18 N. W. 834; Chamberlain v. Milwaukee & M. R. R. Co., 7 Wis. 425; Moseley v. Chamberlain, 18 Wis. 700; Cooper v. Milwaukee & P. D. Ry. Co., 23 Wis. 668; Howland v. Milwaukee, L. S. & W. Ry. Co., 54 Wis. 226, 11 N. W. 529; Hoth v. Peters, 55 Wis. 405, 13 N. W. 219; Dwyer v. American Exp. Co., 55 Wis. 453, 13 N. W. 471; Blazinski v. Perkins, 77 Wis. 9, 45 N. W. 947; Johnson v. Ashland Water Co., 77 Wis. 51, 45 N. W. 807; Peschel v. Chicago, M. & St. P. Ry. Co., 62 Wis. 338, 21 N. W. 269; Chapman v. Erie Ry. Co., 55 N. Y. 579; Dewey v. Detroit, G. H. & M. Ry. Co., 97 Mich. 329, 56 N. W. 756; Wilson v. Hudson River Water Power & Paper Co., 71 Hun, 292, 24 N. Y. Supp. 1072; Jenkins v. Richmond & D. R. Co., 39 S. C. 507, 18 S. E. 182; Baltimore & O. Ry. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914; Potter v. New York Cent. & H. R. R. Co., 136 N. Y. 77, 32 N. E. 603; Stutz v. Armour, 84 Wis. 623, 54 N. W. 1000; Schaible v. Lake Shore & M. S. Ry. Co., 97 Mich. 318, 56 N. W. 565.

[200] Brown, J., in Northern Pac. R. Co. v. Hambly, 154 U. S. 349-360, 14 Sup. Ct. 983.

[201] Dillon, J., in 24 Am. Law Rev. 184. Et vide Johnson v. Boston Towboat Co., 135 Mass. 209; Sullivan v. Hannibal & St. J. Ry. Co., 97 Mo. 66, 17 S. W. 748; Greenway v. Conroy, 160 Pa. St. 185, 28 Atl. 692; Cincinnati, N. O. & T. P. R. Co. v. Clark, 6 C. C. A. 281, 57 Fed. 125; Chicago Anderson Pressed-Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; New Pittsburgh Coal & Coke Co. v. Peterson, 136 Ind. 398, 35 N. E. 7; McElligott v. Randolph, 61 Conn. 157, 22 Atl. 1094; Gabrielson v. Waydell, 135 N. Y. 1, 31 N. E. 969; Dube v. City of Lewiston, 83 Me. 211, 22 Atl. 112; Hussey v. Coger, 112 N. Y. 614, 20 N. E. 556; Chicago, St. P., M. & O. Ry. Co. v. Lundstrom, 16

have been already considered. Breach of any one of them by a servant is the master's wrong.

Thus, where the determination of the sufficiency of appliances for holding a railroad train in descending a grade was left to the conductor, the decision of the conductor was the decision of the railroad company, and the company was liable for the death of a brakeman on such train, caused by the insufficiency of the appliances used.[202]

Servants who are charged with the duty of supplying safe machinery are not to be regarded as fellow servants with those who are engaged in operating it.[203]

The negligence of the superintendent of a mine in failing to take proper precaution to protect the workmen from the fall of a mass of rock from an overhanging cliff is the negligence of the master, and not that of a fellow servant.[204] So, if a conductor is charged

Neb. 254, 20 N. W. 198; Sioux City & P. R. Co. v. Smith, 22 Neb. 775, 36 N. W. 285. The master of a steamboat, while in command and directing her movements, is a vice principal of the owner, and not a fellow servant of the engineer. (55 Fed. 98, reversed.) 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. The train dispatcher of a division, who, in directing the movements of two trains which are being run entirely on special orders, makes a mistake, whereby the trains collide, is a vice principal as to the fireman on the engine of one of them, who is injured thereby. Hankins v. New York, L. E. & W. R. Co., 142 N. Y. 416, 37 N. E. 466.

[202] Wooden v. Western N. Y. & P. R. Co. (Super. Ct. Buff.) 16 N. Y. Supp. 840; Pantzar v. Tilly Foster I. M. Co., 99 N. Y. 368, 2 N. E. 24; Chase, Lead. Cas. 242; Cadden v. American Steel-Barge Co., 88 Wis. 409, 60 N. W. 800.

[203] Ford v. Fitchburg R. R., 110 Mass. 240; Houston v. Brush (Vt.) 29 Atl. 380; Nixon v. Selby Smelting Lead Co., 102 Cal. 458, 36 Pac. 803; Hughlett v. Ozark Lumber Co., 53 Mo. App. 87. A conductor whose duty is to handle a switch is a vice principal. Mase v. Northern Pac. R. Co., 57 Fed. 283.

[204] Pantzar v. Tilly Foster Iron Min. Co., 99 N. Y. 368, 2 N. E. 24; Northern Pac. R. Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590; Hough v. Railway Co., 100 U. S. 213; Benzing v. Steinway, 101 N. Y. 547, 5 N. E. 449; Stringham v. Hilton, 111 N. Y. 188, 18 N. E. 870; Tuttle v. Detroit, G. H. & M. Ry. Co., 122 U. S. 189, 7 Sup. Ct. 1166; Libby, McNeill & Libby v. Scherman, 146 Ill. 540, 34 N. E. 801; Hayden v. Smithville Manuf'g Co., 29 Conn. 548; Cole Bros. v. Wood (Ind. App.) 36 N. E. 1074; Yeaton v. Boston & L. R. Corp., 135 Mass 418; Washington & G. R. Co. v. McDade. 135 U. S. 554, 10 Sup. Ct. 1044; Rogers v. Ludlow Manuf'g Co., 144 Mass. 198, 11 N. E. 77; Buzzell v. Laconia

with the care and management of switches, he is not a fellow servant of an engineer injured by a switch negligently left open.[205]

The negligence of inspectors is not the negligence of a fellow servant, but of a vice principal, and entitles a servant injured thereby to recover against the master.[206]

The duty to warn of special danger,[207] or to warn and instruct an ignorant employé,[208] or to communicate orders,[209] falls on a vice principal, and not on a fellow servant.

Manuf'g Co., 48 Me. 113. But a "filler" in a coal mine, whose duty it is to post and prop the roof of the mine, is a fellow servant of the miner. Consolidated Coal & Min. Co. v. Clay's Adm'r (Ohio Sup.) 38 N. E. 610. And a mine owner is not responsible for the death of miners caused by the negligence of the engineer of the hoist engine, in mishoisting the cage in which they are ascending the shaft. Mulhern v. Lehigh Val. Coal Co., 161 Pa. St. 270, 28 Atl. 1087; O'Boyle v. Lehigh Val. Coal Co., 161 Pa. St. 270, 28 Atl. 1088. So, if a foreman were negligent in ordering his men to go on shoveling sand under a bank, after warning that it was dangerous, such negligence was that of a fellow servant, not of a vice principal. Larich v. Moles (R. I.) 28 Atl. 661.

[205] Mase v. Northern Pac. R. Co., 57 Fed. 283. And see Louisville & N. R. Co. v. Ward, 10 C. C. A. 166, 61 Fed. 927.

[206] Chicago & E. I. R. Co. v. Kneirim, 48 Ill. App. 243, 39 N. E. 324. The negligence of defendant's foreman in failing to notice the defect in machinery when it came from the manufacturer, or in failing afterwards to discover the defect, is the negligence of a servant in the discharge of a duty which the master owes his other servants, and not the negligence of a fellow servant. Houston v. Brush, 66 Vt. 331, 29 Atl. 380. Duty to inspect a coupling link (Little Rock & M. R. Co. v. Moseley, 6 C. C. A. 225, 56 Fed. 1009) or a defective wheel of an engine falls on the vice principal (Coontz v. Missouri Pac. R. Co., 121 Mo. 652, 26 S. W. 661). And, generally, see Ohio & M. R. Co. v. Pearcy, 128 Ind. 197, 27 N. E. 479; Wooden v. Western N. Y. & P. R. Co. (Super. Buff.) 16 N. Y. Supp. 840. Generally, a car inspector is not a fellow servant with the car operators. Macy v. St. Paul & D. R. Co., 35 Minn. 200, 28 N. W. 249. Similarly, the man whose duty it is to inspect telegraph poles is not a fellow servant of a lineman. Kelly v. Erie Telegraph & Telephone Co., 34 Minn. 321, 25 N. W. 706. But see Neutz v. Jackson Hill Coal & Coke Co. (Ind. Sup.) 38 N. E. 324; Bowers v. Connecticut River R. Co., 162 Mass. 312, 38 N. E. 508; Headefin v. Cooper (City Ct. Brook.) 26 N. Y. Supp. 763. Contra, Jarman v. Chicago & G. T. Ry. Co., 98 Mich. 135, 57 N. W. 32.

[207] Ft. Smith Oil Co. v. Slover, 58 Ark. 168, 24 S. W. 106.

[208] Lebbering v. Struthers, Wells & Co., 157 Pa. St. 312, 27 Atl. 720. Cf. Bellows v. Pennsylvania & N. Y. Canal & R. Co., 157 Pa. St. 51, 27 Atl. 685.

[209] Card v. Eddy (Mo. Sup.) 24 S. W. 746. Cf. De Marcho v. Builders' Iron Foundry (R. I.) 28 Atl. 661, and McGuerty v. Hale, 161 Mass. 51, 36 N. E. 682.

Where, however, the general work includes the construction or preparation of the appliances (as where, in erecting a building, the employés construct a scaffold), they are fellow servants in respect to the negligence of one of them in constructing such appliances, as well as in respect to the negligence of such a one in doing other work. Here the master is said not to have undertaken the duty of furnishing or adopting the appliances by which the work is to be performed. This duty is assumed by the workmen themselves, and the master is exempt from responsibility if suitable materials are furnished and suitable workmen are employed by him.[210] But the cases are not in entire harmony.[211] If, however, the master was negligent in furnishing suitable material, and had retained the direction and charge of the staging himself, he would have been liable.[212] An employé may sometimes act as a vice principal, and sometimes as a colaborer,[213] and, on the other hand, a servant per-

[210] Kelley v. Norcross, 121 Mass. 508; O'Keefe v. Brownell, 156 Mass. 131, 30 N. E. 479; Prendible v. Connecticut River Manuf'g Co., 160 Mass. 131, 35 N. E. 675; Marsh v. Herman, 47 Minn. 537, 50 N. W. 611; Colton v. Richards, 123 Mass. 484; Killea v. Faxon, 125 Mass. 485; Noyes v. Wood, 102 Cal. 389, 36 Pac. 766; Peschel v. Chicago, M. & St. P. Ry. Co., 62 Wis. 338, 21 N. W. 269; Filbert v. Delaware & H. Canal Co., 121 N. Y. 207–212, 23 N. E. 1108; Gallagher v. Piper, 16 C. B. (N. S.) 669; Fraser v. Red River Lumber Co., 45 Minn. 235, 47 N. W 785; Nixon v. Selby Smelting & Lead Co., 102 Cal. 458, 36 Pac. 803. Cf. Ryan v. McCully, 123 Mo. 636, 27 S. W. 533; Kalleck v. Deering, 161 Mass. 469, 37 N. E. 450; Loughlin v. State, 105 N. Y. 159, 11 N. E. 371, followed in Connolly v. Maurer (Com. Pl.) 26 N. Y. Supp. 18.

[211] Sims v. American Steel Barge Co., 56 Minn. 68, 57 N. W. 322; Cadden v. American Steel Barge Co., 88 Wis. 409, 60 N. W. 800; McNamara v. MacDonough, 102 Cal. 575, 36 Pac. 941.

[212] Arkerson v. Dennison, 117 Mass. 407.

[213] Lindvall v. Woods, 41 Minn. 212, 42 N. W. 1020 (but see same case, 44 Fed. 855, 47 Fed. 195, 1 C. C. A. 37, and 48 Fed. 62, approved in Northern Pac. R. Co. v. Peterson, 2 C. C. A. 157, 51 Fed. 182–187); Crispin v. Babbitt, 81 N. Y. 516; Loughlin v. State, 105 N. Y. 159, 11 N. E. 371; Quinn v. New Jersey Lighterage Co., 23 Fed. 363; Doughty v. Penobscot L. D. Co., 76 Me. 143; Benson v. Goodwin, 147 Mass. 237, 17 N. E. 517. But see Berea Stone Co. v. Kraft, 31 Ohio St. 287; Gormley v. Vulcan Iron Works, 61 Mo. 492. A foreman in charge of a gang engaged in loading rails, and actually assisting therein, is, as to such work, a fellow servant of the other members of the gang. Louisville, N. A. & C. Ry. Co. v. Isom, 10 Ind. App. 691, 38 N. E. 423. A foreman actually assisting in labor is a fellow servant of the rest of the gang. Texas & P. Ry. Co. v. Rogers, 6 C. C. A. 403, 57 Fed. 378. But see St. Louis,

forming the duties of a vice principal may impose on the master and upon himself the duties and liabilities of the vice principal.[214]

Whether, in a given case, a given servant is a fellow servant or a plaintiff or a vice principal, is a question of law, and not one of fact.[215] In determining the responsibility of the master under such circumstances, the United States courts are governed by their own decisions on the question as a matter of general law, and, in the absence of statutory regulations by the state in which the cause of action arises, they are not required to follow the decisions of the state courts.[216]

The Doctrine of the Supreme Court of the United States.

In the celebrated case of Chicago, M. & St. P. Ry. Co. v. Ross,[217] a conductor, with supreme power and sole direction over his train, caused a collision by gross carelessness. Under the circumstances he was held not to be a fellow servant of the injured engineer. This case was commonly regarded as inconsistent with the general course of authority, holding that neither authority nor control of the servant (i. e. a superior servant), nor his grade in the employment, nor department of services were tests of who are and who are not fellow servants. The court, however, did not hold it to be "universally true that when one servant has control over another they cease to be fellow servants within the rule of the master's exemption from liability, but did hold that an instruction couched in such general language was not erroneous when applied to the case of a

A. & T. Ry. Co. v. Torrey, 58 Ark. 217, 24 S. W. 244. But cf. Shumway v. Walworth & N. Manuf'g Co., 98 Mich. 411, 57 N. W. 251.

[214] Lasky v. Canadian Pac. Ry. Co., 83 Me. 461, 22 Atl. 367.

[215] Johnson v. Boston Towboat Co., 135 Mass. 209; McGinty v. Athol Reservoir Co., 155 Mass. 183, 29 N. E. 510.

[216] Gardner v. Michigan Cent. R. Co., 150 U. S. 349–358, 14 Sup. Ct. 140; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914; Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 13 Sup. Ct. 261; Myrick v. Michigan Cent. R. Co., 107 U. S. 102, 1 Sup. Ct. 425; Hough v. Railway Co., 100 U. S. 213; Railroad Co. v. Lockwood, 17 Wall. 357; Northern Pac. R. Co. v. Peterson, 2 C. C. A. 157, 51 Fed. 182.

[217] 112 U. S. 377, 5 Sup. Ct. 184. And see Northern Pac. R. Co. v. Cavanaugh, 2 C. C. A. 358, 51 Fed. 517, Morgan v. Carbon Hill Coal Co., 6 Wash. 577, 34 Pac. 152, 772; Cowles v. Richmond R. Co., 84 N. C. 309; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Whalen v. Centenary Church, 62 Mo. 326.

conductor having exclusive control of a train in relation to other employés of the company acting under him on the same train. The conductor was, in the language of the opinion, clothed with the control and management of a distinct department. He was 'a superintending officer.' * * * He had 'the superintendence of a department.'" [218] A later opinion of the supreme court held that an engineer and fireman are fellow servants. In this the courts say that the rightful test for determining who are fellow servants is: "There must be some personal wrong on the part of the master; some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility, and that the party who caused the injury should be himself alone responsible. * * * The question turns rather on the character of the act than on the relations of the employés to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor." [219]

This later decision essentially modifies and probably overrules the previous decision of the same court (Chicago, M. & St. P. Ry. Co. v. Ross)—for this court never in terms overrules its previous decisions—in holding that it is not universally true that, when one serv-

[218] Justice Brewer, in Baltimore & O. R. Co. v. Baugh, 149 U. S. 368-382, 13 Sup. Ct. 914.

[219] Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 920, 921. See McGrath v. Rogers, 57 Fed. 378; McGrath v. Texas & P. Ry. Co., 9 C. C. A. 133, 60 Fed. 555; Louisville & N. R. Co. v. Ward, 10 C. C. A. 166, 61 Fed. 927; Harley v. Louisville & N. R. Co., 57 Fed. 144; What Cheer Coal Co. v. Johnson, 6 C. C. A. 148, 56 Fed. 810, distinguished; Finley v. Richmond & D. R. Co., 59 Fed. 419; St. Louis, I. M. & S. Ry. Co. v. Needham, 11 C. C. A. 56, 63 Fed. 107; Canadian Pac. R. Co. v. Johnston, 9 C. C. A. 587, 61 Fed. 738; Martin v. Chicago & A. R. Co., 65 Fed. 384. A railroad employé, who is one of a gang of men employed to remove a wreck, cannot recover from the company for injuries caused by the negligence of the wreck master, who has charge of the wrecking car. Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, followed in McGrath v. Texas & P. R. Co., 9 C. C. A. 133, 60 Fed. 555.

ant has control over another, they cease to be fellow servants.[220] And in Gardner v. Michigan Cent. R. Co.[221] it was distinctly recognized that the rule exempting the master from liability for injuries caused to a servant by a fellow servant is subject to the exception that the master is bound to use due care in furnishing safe instrumentalities for performing the work, and is liable for damages occasioned by a neglect or omission to fulfill this obligation, whether it arises from his own want of care, or that of his agent to whom he intrusts the duty. However, in Northern Pac. R. Co. v. Hambly,[222] Brown, J., selected as the most satisfactory test of liability this: If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow servant should not apply. It would thus seem that the supreme court, having originally accepted the test of superior servant, has finally adopted the test of a vice principal,[223] without excluding common employment as a supplementary test.

[220] 112 U. S. 377, 5 Sup. Ct. 184; 29 Am. Law Rev. 129.

[221] 150 U. S. 349, 360, 14 Sup. Ct. 140. In this case Mr. Justice Fuller says: "We regarded this doctrine as so well settled that in Texas & P. Ry. Co. v. Cox, 145 U. S. 593–607, 12 Sup. Ct. 905, we contented ourselves, without discussion, with a reference to some of the cases in this court upon the subject."

[222] 154 U. S. 349–355, 14 Sup. Ct. 983. This case, specifically, held that a common laborer employed by the company owning and operating a railroad, and working, under direction of a section foreman, on a culvert thereon, is a fellow servant with the engineer and conductor of a passenger train on the road, in such sense as exempts the company from liability for an injury to him through negligence of such conductor and engineer in operating the train. Cf. Union Pac. Ry. Co. v. Erickson, 41 Neb. 1, 59 N. W. 347; Neal v. Northern Pac. R. Co. (Minn.) 59 N. W. 312.

[223] See Brewer, C. J., in Atchison, T. & S. F. R. Co. v. Reesman, 9 C. C. A. 20, 60 Fed. 370.

290. The plaintiff servant does not assume the risk of the negligence of a fellow servant where the master has been negligent in providing an improper fellow servant, unless the plaintiff servant can be held to have assumed such risk upon the principles governing the assumption of ordinary risks, exclusive of the risk of negligence of a fellow servant.

The servant has a right to rely upon the performance of the absolute duties of the master. One of these duties is to furnish proper and sufficiently numerous fellow servants. If, however, the master fails in the performance of these duties, and, notwithstanding such failure, a servant continues to work, for example, with a dangerously incompetent fellow servant,[224] or an insufficient number of them,[225] he assumes the risk of their negligence, subject to exceptions governing the assumption of ordinary risk. But, if the servant be placed at work with which he is unfamiliar and different from and more hazardous than the service for which he is employed, he does not assume the risk of the negligence of a fellow servant.[226]

[224] Richmond & D. R. Co. v. Mitchell, 92 Ga. 77, 18 S. E. 290; Southern Kansas Ry. Co. v. Drake, 53 Kan. 1, 35 Pac. 825; Eddy v. Rogers (Tex. Civ. App.) 27 S. W. 295; St. Louis, A. & T. Ry. Co. v. Lemon, 83 Tex. 143, 18 S. W. 331; Atchison, T. & S. F. R. Co. v. Schroeder, 47 Kan. 315, 27 Pac. 965.

[225] Warmington v. Atchison, T. & S. F. Ry. Co., 46 Mo. App. 159; Latremouille v. Bennington & R. Ry. Co., 63 Vt. 336, 22 Atl. 656; Hatt v. Nay, 144 Mass. 186, 10 N. E. 807; Richmond & D. R. Co. v. Worley, 92 Ga. 84, 18 S. E. 361. Where the servant injured knew of the incompetency of his fellow servant by whose negligence he was injured, and continued to work without complaint, he was guilty of contributory negligence. Consolidated Coal & Min. Co. v. Clay's Adm'r (Ohio Sup.) 38 N. E. 610. So where cars are defective and train force deficient in number. Long v. Coronado R. Co., 96 Cal. 239, 31 Pac. 170. But see Williams v. Missouri Pac. Ry. Co., 109 Mo. 475, 18 S. W. 1098. A master is liable to his servant for injuries resulting from the unsafe condition of his working place, although that condition is brought about by the negligence of fellow servants to the injured person, acting under the master's doing. Northwestern Fuel Co. v. Danielson, 6 C. C. A. 636, 57 Fed. 915.

[226] Here plaintiff (common laborer about depot grounds) was directed by his superintendent to couple cars, although the superintendent knew that he was unskilled in this work. He was injured by the carelessness of an engineer. It was held—First, that the direction by and knowledge of the super-

Nor does he if the master promise to subsequently provide a safe fellow servant.[227] And it has been held that a servant's assumption of risk in working with an inexperienced servant waives the negligence of the company in furnishing such a servant, but that the waiver does not extend to any negligence of which the fellow servant himself may be guilty. "If he fails in any respect to come up to the measure of diligence which under the circumstances he ought to exercise, consent to serve with him would not cut off the right to recover for any injury occasioned by that negligence." [228]

291. The servant assumes the risk of the negligence of his fellow servants, and not that of his master. If the injury of which he complains is caused by the concurrent negligence of both the master and a fellow servant, he is entitled to recovery.

The rule as to the exemption from liability of the master for injury to a servant caused by the negligence of a fellow servant is frequently said to apply only where the master has been negligent

intendent was that of his master; second, that where a person in the employment of another in the performance of a specific line of duty only ordinarily hazardous is commanded by a fellow servant, whom he is bound to obey, to do an act in the same general service, but different from the sphere of employment in which he had engaged to serve, and extra hazardous in its character, in respect to which the servant making the requirement knew that he was unskilled and inexperienced, and in so doing injury results from the negligence of a fellow servant employed in the particular line in which the act is being done, the employer is liable. Lalor v. Chicago, B. & Q. R. Co., 52 Ill. 401. Et vide Campbell & Zell Co. v. Roediger, 78 Md. 601, 28 Atl. 901.

[227] Thus, where a blacksmith's helper is dangerously incompetent, and the master promises a safer one, the blacksmith is not guilty of contributory negligence in continuing to work with his helper. Wust v. Erie City Iron Works, 149 Pa. St. 263, 24 Atl. 291; Laning v. New York Cent. R. Co., 49 N. Y. 521. Et vide doctrine of the case as commented on in Odell v. New York Cent. & H. R. R. Co., 120 N. Y. 323, 24 N. E. 478; Schulz v. Chicago, M. & St. P. Ry. Co. (Minn.) 59 N. W. 192; McGovern v. Central Vt. R. Co., 123 N. Y. 280, 25 N. E. 373; Whittaker v. President, etc., of Delaware & H. Canal Co., 126 N. Y. 544, 27 N. E. 1042.

[228] Applied to injuries done a brakeman by an incompetent fireman operating an engine to plaintiff's knowledge, Richmond & D. R. Co. v. Morley,

in the selection of such careless or otherwise improper fellow servants. This, however, is too narrow a statement of the rule. The true principle would seem to be that this is only one of a class of cases where the wrong both of the master and of a fellow servant combine to do injury, and that, whenever the master has been guilty of a breach of duty to a servant, he cannot defend himself by saying that the negligence of a fellow servant also contributed to the injury.[229] Thus, an employer is liable for an injury to an employé caused by a defective machine, even though the negligence of a coemployé may have contributed to the result.[230] If, however, no

92 Ga. 84, 18 S. E. 361; Francis v. Kansas City, St. J. & C. B. R. Co. (Mo. Sup.) 28 S. W. 842. Cf. Acme Coal Min. Co. v. McIver (Colo. App.) 38 Pac. 596.

[229] Craver v. Christian, 36 Minn. 413, 31 N. W. 457; Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493; Stringham v. Stewart, 100 N. Y. 516, 3 N. E. 575; Elmer v. Locke, 135 Mass. 575; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 N. E. 285; Browning v. Wabash Western Ry. Co., 124 Mo. 55, 27 S. W. 644.

[230] Young v. New Jersey & N. Y. Ry. Co., 46 Fed. 160, affirmed 1 C. C. A. 428, 49 Fed. 723; Grand Trunk Ry. Co. v. Cummings, 106 U. S. 700, 1 Sup. Ct. 493; Rogers v. Leyden, 127 Ind. 50–53, 26 N. E. 210, collecting many cases; Richmond & D. R. Co. v. George, 88 Va. 223, 13 S. E. 429; Northwestern Fuel Co. v. Danielson, 6 C. C. A. 636, 57 Fed. 915–919; Browning v. Wabash Western Ry. Co., 124 Mo. 55, 27 S. W. 644; Steinke v. Diamond Match Co., 87 Wis. 477, 58 N. W. 842; Atchison, T. & S. F. R. Co. v. Wilson, 1 C. C. A. 25, 48 Fed. 57. This is consistent with the generally accepted view of concurrent negligence. Post, p. 1053; Franklin v. Winona & St. P. R. Co., 37 Minn. 409, 34 N. W. 898; Ransier v. Minneapolis & St. L. Ry. Co. (1884) 32 Minn. 331, 20 N. W. 332; Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 14 Sup. Ct. 140; Boden v. Demwolf, 56 Fed. 846; Northwestern Fuel Co. v. Danielson, 6 C. C. A. 636, 57 Fed. 915; Louisville, N. A. & C. Ry. Co. v. Berkey, 136 Ind. 181, 35 N. E. 3; Delude v. St. Paul City Ry. Co., 55 Minn. 63, 56 N. W. 461; Morrisey v. Hughes, 65 Vt. 553, 27 Atl. 205; Browning v. Wabash Western Ry. Co. (Mo. Sup.) 24 S. W. 731; Union Pac. R. Co. v. Callaghan, 6 C. C. A. 205, 56 Fed. 988; Clyde v. Richmond & D. R. Co., 59 Fed. 394; Finley v. Richmond & D. R. Co., 59 Fed. 419. If the conductor of a crew allow a fireman to act as engineer, whereby plaintiff was damaged, the company cannot escape liability on the ground that the brakeman and engineer were fellow servants. Norfolk & W. R. Co. v. Thomas' Adm'r (Va.) 17 S. E. 884, and authorities cited page 885; Finley v. Richmond & D. R. Co., 59 Fed. 419. And see note 59 Am. & Eng. R. Cas. 302.

negligence can be really traced to the master, as where a fellow servant selected an improper instrument when he could have had a proper one, the master is not liable.[231] But the concurrent negligence which may entitle a servant to recover notwithstanding the negligence of a fellow servant need not be the negligence of the master in person; it is sufficient if it be the negligence of a vice principal or superior servant who is not a fellow servant.[232]

292. The doctrine of fellow servants has been severely criticised[233] and has been generally altered by statute.

The reaction of the rule against the master and servant appears less distinctly in the decisions of such states as Ohio, Kentucky,

[231] Since the brakeman and the men who make up trains are fellow-servants, a railroad company is not liable for an injury to the former occasioned by the use of too short a pin in coupling cars, when, by the undisputed evidence, a pin of the proper length could have been easily obtained in the yard or from the caboose of the train. Thyng v. Fitchburg R. R., 156 Mass. 13, 30 N. E. 169; Hefferen v. Northern Pac. R. Co., 45 Minn. 471, 48 N. W. 1, 526, followed in Rawley v. Colliau, 90 Mich. 31, 51 N. W. 350. But the cases would not seem to be in harmony as to the general proposition. Thus, it has been held that, conceding that the accident was the result of the joint negligence of decedent's fellow servants and the failure of defendant to furnish a proper caboose, plaintiff could not recover (Freeman, J., dissenting). Lutz v. Atlantic & P. R. Co. (N. M.) 30 Pac. 912; Hefferen v. Northern Pac. R. Co., 45 Minn. 471, 48 N. W. 1, 526, followed in Rawley v. Colliau, 90 Mich. 31, 51 N. W. 350.

[232] Norfolk & W. Ry. v. Phelps (Va.) 19 S. E. 652; Northwestern Fuel Co. v. Danielson, 6 C. C. A. 636, 57 Fed. 915; Cincinnati, N. O. & T. P. R. Co. v. Clark, 6 C. C. A. 281, 57 Fed. 125.

[233] A fair type of such criticism is the celebrated one by Mr. David Gibbons. Note to Gale, Easem. 429, 430. "A very eminent judge has observed that Priestley v. Fowler, 3 Mees & W. 1, introduced a new chapter into the law. Clarke v. Holmes (1861) 7 Hurl. & N. 947. The actions for this cause following Priestley v. Fowler are very numerous, and all brought under circumstances of great discouragement. They have not arisen out of the decision in that case, but in spite of it. There have been cases by the high-pressure speed, with which we run the race after wealth and pleasure. The weaker, the younger, the less skillful workmen fall by the way, and are crushed or torn by the powerful and complicated machinery employed. 'Butchered to

and Tennessee than in its repeal or modification by English [234] and American statutes.[235] In general, these statutes exempt employés of railroad companies from the operation of the rule of fellow servants. The supreme court of the United States has sustained a

make a Roman holiday,' or, what is much the same thing, to make a good dividend for railway shareholders, and enable them to join Cook's personally conducted tours to the Nile and the Holy Land."

How much unfairer and more illiberal the present common-law rule as to the liability of the master to the servant is than the German law will appear from a consideration of the return of the German standard of liability to something corresponding to the absolute liability of the early Saxon. Of the law of June 7, 1871 (Haftpflichtgesetz), concerning the liability of railroads, mines, etc., for employés killed or injured in the operation of railroads, mines, etc., section 1 reads as follows, viz.: "If a man is killed or bodily injured in the operation of a railroad, the operating management is liable for the damage, unless it proves that the accident was caused by the acts of God (vis major—force majeure), or by the own fault of the killed or injured employé." Section 2 is as follows: "Whoever operates a mine, a quarry, a pit, or a factory, is liable for any carelessness or negligence attributable to himself, his manager, representative, agent, or any person employed to superintend the running of the establishment or the hands employed therein, by which the death or bodily injury of a person is caused." By the accident insurance law dated July 6, 1884, it was enacted that (section 1) "all hands employed in mines, salines, sponging, and cleaning establishments, quarries, pits, wharfs, buildings, factories, and furnaces, or other employés, whose wages or salaries do not exceed the amount of M. 2,000 per year, are insured against any accident which may occur in the operation of the same according to the provisions of this law. The same applies, too, for all hands or other employés engaged by any bricklayer, carpenter, roofer, mason, well digger, chimney sweep, in his business. In the same sense are to be considered establishments and plants in which steam boilers or any machinery

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[234] A review of the English cases as to what constitutes a workman engaged in manual labor, within the employer's liability act, will be found in 28 Ir. Law T. Rep. 355.

[235] A partial collection of statutes will be found in 2 Harv. Law Rev. 212. Et vide Law Q. R. (London) April, 1890; 24 Am. Law Rev. 63. The English employer's liability acts (e. g. 1875, 38 & 39 Vict.; 1880, 42 & 43 Vict.) are essentially enforced in Massachusetts and Alabama. McCauley v. Norcross, 155 Mass. 584, 30 N. E. 464; Shinners v. Proprietors of Locks & Canals, 154 Mass. 168, 28 N. E. 10; Downey v. Sawyer, 157 Mass. 418, 32 N. E. 654; Cashman v. Chase, 156 Mass. 342, 31 N. E. 4.

Kansas statute of this character.[236] In some states acts of this kind have been held valid only so far as concerns those employés engaged in the peculiarly hazardous business of railroading.[237] On the other hand it has been held that the statute was not limited to any class of employés.[238] Unless the case at bar is shown to be

is made use of, which for its operation relies on elementary motive power, such as wind, water, steam, gas, hot air, etc., excepting those of agricultural or forestry establishments not already included in clause 1 as secondary plants, as well as such machinery which, being only temporarily used, does not constitute a part of a permanent plant or establishment." Under this system of insurance, the master is stimulated to use and devise safety appliances, and in every way to prevent the occurrence of accidents. In practice the amount recoverable by the workman is not so considerable as to offer any temptation to suffer bodily injury in expectation of large compensation by way of a verdict. The result has been a marked diminution in accidents.

The highly complex, confused, uncertain, and unnatural system in vogue in America has the opposite effect. The expense of elaborate legal departments on the part of the master, the contingent fee which the injured person usually pays to his attorney, are items of expense approximating a large part of the cost of insurance. The possibility of large verdicts is naturally calculated to lead to the employment of illegitimate methods on the part of counsel for the injured person. It is not unnatural that fire should be fought with fire. The result is an elusive, but material, demoralization of the bar. The workingman, smarting under a sense of injustice, secures laws (which in morals, if not in law, are class legislation) against railroad companies. A more vicious system could scarcely be devised.

[236] Missouri Pac. Ry. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161. Et vide Chicago, R. I. & P. Ry. Co. v. Stahley, 11 C. C. A. 88, 62 Fed. 303.

[237] McAwnich v. Mississippi & M. R. Co., 20 Iowa, 338. See Deppe v. Railway Co., 36 Iowa, 52; Pierce v. Railway Co., 73 Iowa, 140, 34 N. W. 783; Smith v. Railway Co., 78 Iowa, 583, 43 N. W. 545; Frandsen v. Railway Co., 36 Iowa, 372; Butler v. Railroad Co., 87 Iowa, 206, 54 N. W. 208; Malone v. Railway Co., 65 Iowa, 417, 21 N. W. 756; Deppe v. Chicago, R. I. & P. R. Co., 36 Iowa, 52; Missouri Pac. Ry. Co. v. Haley, 25 Kan. 35; Union Pac. Ry. Co. v. Harris, 33 Kan. 416, 6 Pac. 571; Herrick v. Minneapolis & St. L. Ry. Co., 31 Minn. 11, 16 N. W. 413; Lavallee v. St. Paul, M. & M. Ry. Co., 40 Minn. 249, 41 N. W. 974; Johnson v. St. Paul & D. R. Co., 43 Minn. 222, 45 N. W. 156; Pearson v. Railway Co., 47 Minn. 9, 49 N. W. 302; Smith v. St. Paul & D. R. Co., 44 Minn. 17, 46 N. W. 149; Steffenson v. Railway Co., 45 Minn. 355, 47 N. W. 1068.

[238] Thompson v. Central Railroad & Banking Co., 54 Ga. 509; Georgia Ry. Co. v. Ivey, 73 Ga. 499; Ditberner v. Chicago, M. & St. P. Ry. Co., 47 Wis. 138, 2 N. W. 69.

within the scope of statutory provision the common-law rule as to fellow servants still prevails.[239]

[239] Gen. St. Kan. 1889, par. 1251, provides that every railroad company, organized or doing business in this state, shall be liable for all damages done to any employé of such company, in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés, to any person sustaining such damages. Held, that a firm composed of private persons, not being a railroad corporation, having a subcontract to construct a part of a railroad, and operating trains on the road in the prosecution of their work, and having servants and employés at work upon the road, and in charge of their trains, are not within the terms of this statute. Sess. Laws 1874 (paragraph 1251, Gen. St. 1889). Beeson v. Busenbark, 44 Kan. 669, 25 Pac. 48. Stevens v. Railroad Co., 100 Cal. 554, 35 Pac. 165; Comp. Laws Dak. Ter. § 3753; Elliot v. Railway Co., 5 Dak. 523, 41 N. W. 758, reviewing many cases. A valuable note, with numerous citations, as to the rule determining the question of who are fellow servants, by Arthur P. Will, 8 C. C. A. 668; Connor v. Chicago, R. I. & P. Ry. Co., 59 Mo. 285. As to Wisconsin act, see Ballou v. Railway Co., 54 Wis. 257, 11 N. W. 539. Et vide Comp. Laws Wyo. p. 512, c. 97, § 1; Rev. St. Mont. 1879, c. 471, § 318; Ashley v. Hart, 147 Mass. 573, 18 N. E. 416. Act April 2, 1890 (87 Ohio Laws, 150), § 3, defining the relation of railroad employés, provides that "every person in the employ of such company having charge or control of employés in any separate branch or department, shall be held to be the superior and not fellow servant of employés in any other branch or department, who have no power to direct or control in the branch or department in which they are employed." Held, that the engineer of one train is not a fellow servant of a brakeman on another train of the same company. Cincinnati, H. & D. R. Co. v. Margrat (Ohio Sup.) 37 N. E. 11. An inspector of cars, having other inspectors under him, by virtue of this act, is not a fellow servant of a brakeman. Columbus, H. V. & T. Ry. Co. v. Erick (Ohio Sup.) 37 N. E. 128. A common laborer working under the direction of a section foreman on a culvert on the line of a railroad and the engineer and conductor of a passenger train on the road are employés engaged "in the same general business," within Comp. Laws Dak. Ter. § 3753, exempting the employer from liability for losses suffered by his employé in consequence of negligence of another employed in the same general business. Northern Pac. R. Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983. Act March 10, 1891, §§ 1, 2, providing that all persons engaged in the service of "any railway corporation" who are intrusted by "such corporation" with authority over any other employé are vice principals of "such corporation," and not fellow servants of such employé; and that all persons engaged in the common service of "such corporations," etc., neither of whom is intrusted with any control over his fellow employé, are fellow servants, etc.,—do not apply to the employés of a receiver of a railway corporation. Campbell v. Cook (Tex. Civ. App.) 24 S. W. 977, reversed, 86 Tex. 630, 26 S. W. 486.

CHAPTER XIV.

COMMON CARRIERS.

WHO ARE COMMON CARRIERS.

293. A common carrier is one who is engaged in transportation for hire as a business.[1]

According to Mr. Schouler, the essentials of the common carrier's relations are that the transportation undertaken must have been for a reward, and in pursuance of some carrying vocation which he exercised.[2] Chief Justice Gibson is authority for a criticised [3] position that, even though the employment be only occasional or incidental, the relationship may be established.[4] As carriers by land, the law recognizes, for example, express companies,[5] stage coaches, or omnibuses as to baggage carried,[6] railways [7] as to bag-

[1] Story, Bailm. (9th Ed.) 495.

[2] Schouler, Bailm. § 343. Wood, J., in The Neaffie, 1 Abb. (U. S.) 465, Fed. Cas. No. 10,063, thinks this is too broad.

[3] Fish v. Chapman, 2 Kelly (Ga.) 355; Schouler, Bailm. § 347; Ang. Carr. 70, 71; Hutch. Carr. § 49. But a carman undertaking casual jobs between uncertain places is not a common carrier. Brind v. Dale, 8 Car. & P. 207.

[4] Gordon v. Hutchinson, 1 Watts & S. 285. Et vide Chevallier v. Straham, 2 Tex. 115; Moses v. Norris, 4 N. H. 304.

[5] Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174; Sweet v. Barney, 23 N. Y. 335; McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343, 4 S. W. 689; Ayres v. Chicago & N. W. Ry. Co., 71 Wis. 372, 37 N. W. 432; Railway Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311.

[6] Story, Bailm. §§ 496–499; Ang. Carr. § 77; Parmelee v. McNulty, 19 Ill. 556; Verner v. Sweitzer, 32 Pa. St. 208.

[7] A railroad company may be liable as a carrier, though a receiver has been appointed for it, where he merely received a portion of the net earnings

gage,[8] freight,[9] and passengers,[10] sleeping-car companies,[11] and street-car companies.[12] As common carriers by water, the law recognizes, for example, boats in general,[13] ferries,[14] rafts or flat boats,[15] steamboats, and merchant ships.[16]

It seems that a person who conveys passengers only is not a common carrier, and that, therefore, as to passengers, a railway company is not a common carrier.[17] It is certainly true that the rule of liability as to passengers differs substantially from that as to

of that and other roads which are managed together, and permits it to be managed by its officers and employés in connection with those of the other roads. Pennsylvania R. Co. v. Jones, 155 U. S. 333, 15 Sup. Ct. 136; Same v. Stewart, Id.

[8] Macrow v. Great Western R. Co., L. R. 6 Q. B. 612, 618. Et vide 2 Redf. R. R. § 171; Hannibal Ry. Co. v. Swift, 12 Wall. 262. But it would seem that a cab proprietor is not a common carrier as to luggage of passengers. Ross v. Hill, 2 C. B. 877; Powles v. Hider, 6 El. & Bl. 207.

[9] As to live stock, McManus v. Lancashire & Y. Ry. Co., 4 Hurl. & N. 327. Et vide post, p. 1073.

[10] Delaware, L. & W. R. Co. v. Ashley, 14 C. C. A. 368, 67 Fed. 209; St. Joseph & G. I. R. Co. v. Hedge (Neb.) 62 N. W. 887; Lewis v. Delaware & H. Canal Co. (N. Y.) 40 N. E. 248.

[11] A sleeping-car company is liable for money stolen from a passenger by the porter of the car on which he is traveling. Pullman Palace-Car Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70. Et vide Pullman Palace-Car Co. v. Martin, 92 Ga. 161, 18 S. E. 364; Kinsley v Lake Shore & M. S. R. Co., 125 Mass. 54; Woodruff Co. v. Deihl, 84 Ind. 474. This, however, is by no means clear. Pullman Palace-Car Co. v. Smith, 73 Ill. 360; Tracy v. Pullman Palace Car Co., 67 How. Prac. 154. A collection of authorities on the liability of sleeping-car companies for loss of valuables by passengers, and also as to their liability for refusing berths, 8 Am. R. & Corp. R. 434.

[12] Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. 270.

[13] Lever Alkali Co. v. Johnson, L. R. 7 Exch. 267, L. R. 9 Exch. 338.

[14] Wyckoff v. Queens County Ferry Co., 52 N. Y. 32. But not a canal company maintaining a water highway, Exchange Ins. Co. v. President of Delaware & H. Canal Co., 10 Bosw. (N. Y.) 180; nor a towbridge, Grigsby v. Chappell, 5 Rich. (S. C.) 443.

[15] Steele v. McTyer, 31 Ala. 667.

[16] 2 Kent, Comm. 599; Harrington v. M'Shane, 2 Watts (Pa.) 443; Benett v. Peninsular & O. Ry. Co., 6 C. B. 775; Crouch v. London & N. W. Ry. Co., 14 C. B. 255.

[17] 1 Smith, Lead. Cas. § 234, citing Aston v. Heaven, 2 Esp. 533; Christie v. Griggs, 2 Camp. 79; Sharpe v. Gray, 9 Bing. 459; Blake v. Great Western R. Co., 7 Hurl. & N. 987, 31 Law J. Exch. 346; Readhead v. Midland Ry. Co., L.

liability for freight or baggage. Slaves, while the institution of slavery left us by our ancestry continued to exist in the United States, came more under the title of live stock than of passengers.[18]

COMMON CARRIERS OF GOODS.

294. Common carriers of freight for hire,[19] not of live stock, are absolutely liable as insurers for goods intrusted to them. The mere happening of an injurious accident to such goods, or their nondelivery to the consignee, raises prima facie a presumption of negligence, from which the carrier may escape by showing—

(a) That the case is within an exemption from liability created by contract and allowed by law, or

(b) That the damage was caused by—

(1) The act of God, or the inherent nature of what is carried.

(2) Public enemies.

(3) The conduct of the shipper.

(4) The act or mandate of public authority.

Liability as an Insurer.

A common carrier has been regarded by the law from the earliest time as an insurer.[20] "And this," said Lord Holt,[21] "is a politic es-

R. 4 Q. B. 379; Wright v. Midland Ry. Co., L. R. 8 Exch. 437, 42 Law J. Exch. 89. But see Bretherton v. Wood, 3 Brod. & B. 54, and Carpue v. London & B. R. Co., 5 Q. B. 747.

[18] American note to Coggs v. Bernard, 1 Smith, Lead. Cas. (8th Ed.) pt. 1, p. 454. Et vide Boyce v. Anderson, 2 Pet. 150.

[19] But the delivery of freight to a carrier, and its acceptance, and transportation thereof according to directions, without payment or promise of reward, make the carrier liable only for damage caused by its gross negligence. Louisville & N. R. Co. v. Gerson (Ala.) 14 South. 873.

[20] Woodlief v. Curtels, 1 Rolle, Abr. 2, E, pl. 5; Coggs v. Bernard, 1 Smith, Lead. Cas. (8th Ed.) 238; Dale v. Hall, 1 Wils. 281; Forward v. Pittard, 1 Term R. 27; Jones, Bailm. 103; Pozzi v. Shipton, 1 Perry & D. 4, 8 Adol. &

[21] Coggs v. Bernard, 2 Ld. Raym. 909, 1 Smith, Lead. Cas. (8th Ed.) pt. 1, § 213.

tablishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc.; and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon that point."

On proof of delivery to a carrier and injury to the goods or their nondelivery to the consignee, a presumption of negligence on the part of the carrier arises.[22]

"As a general rule, and in the absence of fraud and imposition, a common carrier is answerable for the loss of a package of goods, though he is ignorant of its contents, and though its contents are ever so valuable, if he does not make a special acceptance. This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them."[23] The extent to which the carrier may limit this liability by contract has already been considered.[24] The general proposition is also sometimes modified by statutory provisions.[25]

There are certain recognized perils of transportation, and for damage caused by them the carrier is not liable. These excepted perils will be next considered. But if the carrier is negligent, as in exposing the goods to these perils, his negligence, and not the peril, is the juridical cause of the wrong; and it seems that the

El. 963, 1 Willm., W. & H. 624; Condict v. Grand Trunk Ry. Co., 54 N. Y. 500; Story, Bailm. § 489. But special carriers are not insurers. Allis v. Voigt, 90 Mich. 125, 51 N. W. 190.

[22] Buck v. Pennsylvania R. Co., 150 Pa. St. 170, 24 Atl. 678; Duer. Neg. § 122, notes 3, 4. Generally, as to warehouseman, see Claflin v. Meyer, 75 N. Y. 260.

[23] Hart v. Pennsylvania R. Co., 112 U. S. 331–340, 5 Sup. Ct. 151; Railroad Co. v. Fraloff, 100 U. S. 24; Baldwin v. Liverpool & G. W. S. S. Co., 74 N. Y. 125; McCune v. Railroad Co., 52 Iowa, 600, 3 N. W. 615; Stewart v. Ripon, 38 Wis. 384; 3 Suth. Dam. (2d Ed.) § 885.

[24] Ante, p. 298, "Discharge of Torts."

[25] Rev. St. U. S. 1878, § 4281.

burden is on the carrier, not only to bring his case within the excepted peril, but also to show that he was without fault.[26]

Exceptions—Inherent Nature.

Natural decay or deterioration from natural causes have been classed sometimes as apparent exceptions to the liability of the carrier, and sometimes as falling within the category of the act of God. "Men are too apt to hear God in the thunder and storm, and ignore his existence in the still small voice of the calm. But the acts of God are not always cataclysms, and 'natural decay' may as reasonably be classed under this head as 'tempests' or 'lightnings.'" [27] Thus, the carrier cannot be held liable for diminution of liquids by means of evaporations during the journey.[28] But to include too many natural effects in the class "act of God" may easily become irreverent;[29] and it would seem otherwise expedient also to recognize inherent nature as a separate class of exceptions. Thus, it has been held that if stoves shipped are unusually brittle, and likely to break on mere handling, it is error to charge that, if goods were received in good order and delivered injured, a legal presumption of negligence followed, unless it can be shown how the injury happened.[30]

Same—Act of God.

The "act of God" is a phrase concerning which there has been a vast amount of dispute. It seems, however, that it refers, if not necessarily to the violence of nature, at least to the act of nature, and implies the entire exclusion of all human agency, whether of

[26] Duer. Neg. § 110, collecting cases on both sides of this proposition. But see Railroad Co. v. Reeves, 10 Wall. 176; The J. C. Stevenson, 17 Fed. 540; Little Rock Ry. Co. v. Corcoran, 40 Ark. 375. The cases would seem to be not much more than evenly balanced on this point

[27] Wood's Brown, Carr. 184.

[28] Hudson v. Baxendale, 2 Hurl. & N. 575. And see Hunnewell v. Taber, 2 Spr. 1, Fed. Cas. No. 6,880; Farra v. Adams, Bull. N. P. 69; Warden v. Greer, 6 Watts (Pa.) 424; Nelson v. Woodruff, 1 Black, 156; Clark v. Barnwell, 12 How. 272; Tysen v. Moore, 56 Barb. (N. Y.) 442.

[29] The same exception here involved is logically applied to exempt carriers of live stock from liability for inherent vice of live stock. Accordingly, to classify inherent nature under act of God might lead to treating the kick of a mule as having a divine origin.

[30] Buck v. Pennsylvania R. Co., 150 Pa. St. 170, 24 Atl. 678.

carrier or third persons.[31] The civil law employs, as a corresponding term, "vis major."[32] Inevitable accident is by no means synonymous, for an accident due to human force or fraud might be pronounced inevitable, while the act of God, on the contrary, means something which is opposed to the act of man.[33] A gust of wind is the act of God;[34] so is the freezing up of canals and rivers,[35] bad weather[36] generally, or a sudden flood.[37] but a conflagration is not.[38] Perils of the sea, such as lightning and tempest, seem to have a broader meaning than the act of God as commonly defined.[39]

[31] American note to Coggs v. Bernard, 1 Smith, Lead. Cas. (8th Ed.) pt. 1, p. 423; 2 Redf. R. R. p. 151, note 8; Hutch. Carr. § 171, etc.; Story, Bailm. §§ 489, 490, 511; Schouler, Bailm. (2d Ed.) § 410; 2 Kent, Comm. 597; Ang. Carr. §§ 154, 155; Hayes v. Kennedy, 41 Pa. St. 378; per Lowrie, C. J., reviewing cases, McArthur v. Sears, 21 Wend. (N. Y.) 190; Mershon v. Hobensack, 22 N. J. Law, 381; Chevallier v. Straham, 2 Tex. 115–125; Backhouse v. Sneed, 1 Murph. (N. C.) 173; Smyrl v. Niblon, 2 Bailey (S. C.) 421; Falkner v. Wright, Rice (S. C.) 107; Williams v. Grant, 1 Conn. 487 (where a Mohammedan extension of the phrase "act of God" is given); 1 Smith, Lead. Cas. 424. It was here held that a hidden rock in the sea not before known to navigators, and not known to master of vessel, occasioning a wreck, was an act of God.

[32] Whart. Neg. §§ 122, 500.

[33] Schouler, Bailm. § 410, citing Forward v. Pittard, 1 Term R. 27; Trent Nav. Co. v. Wood, 4 Doug. 280. And see Wright, J., in Merritt v. Earle, 29 N. Y. 115.

[34] Amies v. Stevens, 1 Strange, 128. Cf. Colt v. McMechan, 6 Johns. (N. Y.) 160.

[35] Bowman v. Teall, 23 Wend. (N. Y.) 306; Harris v. Rand, 4 N. H. 259; Crosby v. Fitch, 12 Conn. 410.

[36] Nugent v. Smith, 1 C. P. Div. 19, 423; Railroad Co. v. Reeves, 10 Wall. 176; Michaels v. New York Cent. R. Co., 30 N. Y. 564; Morrison v. Davis, 20 Pa. St. 171. As a snow storm, Vail v. Pacific Ry. Co., 63 Mo. 230.

[37] Nashville & C. R. R. Co. v. David, 6 Heisk. (Tenn.) 261; Railroad Co. v. Reeves, 10 Wall. 176; Read v. Spaulding, 30 N. Y. 630; Wallace v. Clayton, 42 Ga. 443.

[38] Forward v. Pittard, 1 Term R. 27; Gatliffe v. Bourne, 4 Bing. N. C. 314; American Transp. Co. v. Moore, 5 Mich. 368; Hebler v. McCartney, 31 Ala. 501; Condict v. Grand Trunk R. Co., 54 N. Y. 500; Lamb v. Camden & A. R. Co., 46 N. Y. 271.

[39] Elliott v. Rossell, 10 Johns. (N. Y.) 1-9; Johnson v. Friar, 4 Yerg. (Tenn.) 48; Gordon v. Buchanan, 5 Yerg. (Tenn.) 71, 78-82; Hays v. Kennedy, 41 Pa.

Losses by fire or explosion are occasioned by causes for which the carrier is responsible, unless except in cases of lightning stroke, or perhaps of spontaneous combustion.[40] If, however, the fault or negligence of the carrier is the cause of the wrong, although the act of God was a condition, the carrier is liable. Thus, if a carrier exposes goods to a dangerous flood, he is responsible for consequent injury.[41] There is much confusion in the cases as to whether the act of God is a cause or a condition when the alleged injury would not have occurred except for the delay of the carrier.[42]

Same—Public Enemies.

Public enemies are those with whom the state is at open war.[43] Thus, pirates on the high seas are the enemies of the state and of mankind.[44] The confederate insurgents of 1861 and the hostile tribes of Indians have been regarded as public enemies in the United States.[45] It was said in Coggs v. Barnard [46] that "though the force be ever so great, as if an irresistible multitude should rob him, nevertheless, he [the carrier] is chargeable." The rule at the present time would seem to be, however, that where a carrier receives

St. 378; dissenting opinion of Thompson, J., in 3 Grant, Cas. (Pa.) 357; Friend v. Wood, 6 Grat. (Va.) 189; Merritt v. Earle, 31 Barb. 47; Fergusson v. Brent, 12 Md. 33. Et vide American note to Coggs v. Bernard, 1 Smith, Lead. Cas. pt. 1, p. 426 et seq.

[40] Schouler, Bailm. § 411.

[41] Charleston & C. S. B. Co. v. Bason, 1 Harp. (S. C.) 262; Campbell v. Morse, Id. 468. So if the vessel be unseaworthy. Bell v. Reed, 4 Bin. (Pa.) 127. And, generally, as to deviation from usual course, see Davis v. Garrett, 6 Bing. 716; Express Co. v. Kountze, 8 Wall. 342; Williams v. Grant, 1 Conn. 487; The Delaware, 14 Wall. 579.

[42] A full discussion of these cases will be found in Hutch. Carr. c. 5.

[43] Story, Bailm. § 526. Et vide Gage v. Tirrell, 9 Allen (Mass.) 299. An article on the liability of carriers for the robbery of railway passengers, with reference to the recent case of Cobb v. Great Western Ry. Co. [1893] 1 Q. B. 459. Justice of the Peace, reprinted in 28 Ir. Law T. 459.

[44] Pickering v. Barclay, 2 Rolle, Abr. 248, Style, 132; Barton v. Wolliford, Comb. 56.

[45] Schouler, Bailm. § 418, citing, inter alia, McCranie v. Wood, 24 La. Ann. 406; Philadelphia R. Co. v. Harper, 29 Md. 330; Holladay v. Kennard, 12 Wall. 254. Et vide Southern Exp. Co. v. Wormack, 1 Heisk. (Tenn.) 256; U. S. v. Palmer, 3 Wheat. 610; Thorington v. Smith, 8 Wall. 1.

[46] 2 Ld. Raym. 909-918.

freight for shipment, and its employés strike, or cease to work for the company, it is still bound to forward the freight within a reasonable time; but if the strike is accompanied by violence and intimidation, so as to render it unsafe to forward the freight, the company is thereby relieved from liability for the delay, especially when the resistance made by the strikers is of such a character as could not be overcome by the company or controlled by the civil authorities when called upon by it.[47] But where trainmen allowed thieves to break open a car containing whisky, and the car was overtaken by the Johnstown flood, the consequent loss did not arise from unavoidable accident or the act of God, nor from insurrection, public enemy, or a mob, and the carrier was accordingly held liable.[48]

Same—Conduct of Shipper.

The plaintiff's own wrong may prevent his recovery against a carrier on essentially the same principle which would disentitle him to recover in any other action of tort. Thus, if damage to the goods be done by bad packing, he cannot recover.[49] But, where improper loading may be negligence on the part of consignor which is attributable to his consignee, it will not bar recovery if such improper loading was apparent to the ordinary observation of the carrier's servants.[50] So, if the shipper of live stock fails to comply with his contract as to feeding and watering, whereby the stock was injured, he cannot recover, though the company delayed transportation.[51]

[47] Haas v. Kansas City, Ft. S. & G. R. Co., 81 Ga. 792, 7 S. E. 629. Et vide Geismer v. Lake Shore & M. S. Ry. Co., 102 N. Y. 563, 7 N. E. 828. Cf. Lake Shore & M. S. R. Co. v. Bennett, 6 Am. & Eng. R. Cas. 391; Schouler, Bailm. § 419.

[48] Lang v. Pennsylvania R. Co., 154 Pa. St. 342, 26 Atl. 370. Et vide Story, Bailm. § 526, and cases cited.

[49] Shriver v. Sioux City, etc., R. Co., 24 Minn. 506; Goodman v. Oregon R. & Nav. Co., 22 Or. 14, 28 Pac. 894. Recital in bill of lading that goods are received in apparent good order is only prima facie evidence of that fact. St. Louis, A. & T. Ry. Co. v. Neel, 56 Ark. 279, 19 S. W. 963. In absence of evidence to contrary, presumption is that goods were received in good order. Henry v. Central Railroad & Banking Co., 89 Ga. 815, 15 S. E. 757. Et vide Goodman v. Oregon R. & Nav. Co., 22 Or. 14, 28 Pac. 894.

[50] McCarthy v. Louisville & N. R. Co (Ala.) 14 South. 370.

[51] Boaz v. Central R. Co., 87 Ga. 463, 13 S. E. 711.

But the law will not allow a carrier to connect a shipper with its own wrong. Express contracts limiting liability are scrutinized with care, especially since "it cannot be said in truth that a voluntary contract was made where the terms are imposed by one and the other has no power to repel them." [52] And what is not allowed to be done expressly cannot be done by implication. Accordingly, if the law does not permit contracts against negligence, it will not allow a carrier to accomplish the same result by giving notice of danger or defect, and escaping because shippers were notified or knew of defects or dangers.[53] And if the freighter must submit to an injurious detention of his property, or to the use of a vehicle having a reasonable defect, from which but slight damage could result during a transit in a reasonable time, his election to use the vehicle is not such negligence as to exonerate the carrier from further damage resulting from an extraordinary detention.[54]

Same—Public Authority.

The common carrier is not liable if goods be taken from his possession by legal proceedings against the owner, or if, without his fault, they become obnoxious to the requirements of the police powers of the state, and are injured or destroyed by its authority; as where they are infected with contagious disease, or where intoxicating liquors intended for use are sold in violation of the laws of the state, which require their seizure and destruction.[55] The principle of the exception is that the carriers are not obliged to violate the law of the jurisdiction to comply with its contract.[56] To protect the carrier in such cases, however, it is necessary that the seiz-

[52] Kimball v. Rutland & Burlington R R., 26 Vt. 247.

[53] Welsh v. Pittsburgh, Ft. W. & C. R. Co., 10 Ohio St. 73 (where the loss of cattle arose from a defective door or fastening on the cars known to plaintiff); Union Pac. R. Co. v. Rainey, 19 Colo. 225, 34 Pac. 986 (it is not negligence for a shipper not to see that slats are so far apart as to allow horses to put feet through them). Et vide Powell v. Mills, 37 Miss. 691.

[54] McDaniel v. Chicago & N. W. Ry. Co., 24 Iowa, 412, 418; Harris v. Northern Indiana R. Co., 20 N. Y. 232.

[55] Atkinson v. Ritchie, 10 East, 530, 534; Williams, J., in Railroad Co. v. O'Donnell, 49 Ohio St. 489–500, 32 N. E. 476. Et vide Wells v. Maine S. S. Co., 4 Cliff. 228, Fed. Cas. No. 17,401; Bliven v. Hudson R. R. Co., 30 N. Y. 403, 407.

[56] Wells v. Maine S. S. Co., 4 Cliff. 228, Fed. Cas. No. 17,401.

ure be made within the procurement or connivance of the carrier, and that the proceeding or process under which it was made appear to be valid, and that the carriers give prompt notice to the owner.[57]

SAME—DUTIES.

295. Common carriers are under a duty to the public for the violation of which an action for tort may be brought—

(a) To receive,

(b) To transport, and

(c) To deliver to the proper consignee the property shipped, or to exercise the care of a warehouseman in preserving it on failure of the consignee to remove after notice.

Acceptance.

The carrier's liability commences with the complete delivery of the goods to be shipped to him.[58] When the property actually reaches his control, no question can well arise; but it seems that the delivery may be actual or constructive, to him or to his authorized agents.[59] The delivery is properly made when it accords with the carrier's rules,[60] or the known and established usages of the particular trade involved.[61] "We know of no general rule of law which governs the delivery of a bill of goods under a bill of lading when such delivery is not expressly according to the terms of the bill of

[57] Railroad Co. v. O'Donnell, supra; Gibons v. Farwell, 63 Mich. 344, 29 N. W. 855; Kiff v. Old Colony Ry. Co., 117 Mass. 591; Ohio & M. Ry. Co. v. Yohe, 51 Ind. 181.

[58] Missouri Pac. Ry. Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990.

[59] Thus, signing a bill of lading by the agent of cotton yard where the goods are stored is good delivery. Bennitt v. The Guiding Star, 53 Fed. 936; Capehart v. Granite Mills, 97 Ala. 353, 12 South. 44. As to delivery of supplies entitling to maritime lien, see The Vigilancia, 58 Fed. 698; Merriam v. Hartford & N. H. R. Co., 20 Conn. 354; White v. Winnisimet Co., 7 Cush. 125; Armistead Lumber Co. v. Louisville, N. O. & T. R. Co. (Miss.) 11 South. 472.

[60] Louisville & N. R. Co. v. Echols, 97 Ala. 556, 12 South. 304.

[61] Deming v. Merchants' Cotton-Press & Storage Co., 90 Tenn. 306, 17 S. W. 89; New England Manuf'g Co. v. Starn, 60 Conn. 369, 22 Atl. 953; Michigan v. Ward, 2 Mich. 543; Evansville & C. Ry. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296.

lading, except that it must be a delivery according to the practice and custom usually observed in the particular place of delivery." [62]

At common law, an action may lie for an unjustifiable refusal or delay in accepting shipments tendered.[63] The liability of a common carrier for the refusal to receive and convey is subject to these qualifications, viz.: (1) That the party owning the chattel should offer for hire; (2) that the common carrier's means of safe conveyance should be adequate; (3) that such carriage should be in the line of his vocation.[64] Such liability is often determined or altered by specific contract.[65] Where delay in the shipment of freight, delivered for immediate shipment, is due to the failure of the company to furnish cars, the company is liable on its destruction by fire, though the shipping contract requires the shippers to load the freight.[66] It has also been materially and almost universally altered by statute. Thus, under the interstate commerce act, reasonably proper and equal facilities for the interchange of traffic are commanded, but without requiring the carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.[67] The violation of this portion of the act gives rise to an action as for a tort.[68]

[62] Gatliffe v. Bourne, 4 Bing. N. C. 314–329 (Tindal, C. J.); Constable v. National S. S. Co., 154 U. S. 51, 63, 14 Sup. Ct. 1062.

[63] Union Pac. Ry. Co. v. Goodridge, 149 U. S. 680, 13 Sup. Ct. 970; Crouch v. London & N. W. Ry. Co., 14 C. B. 255; Freeman v. Louisville & N. R. Co., 32 Fla. 420, 13 South. 892, and authorities, page 425, 32 Fla., and page 892, 13 South.; New Jersey Steam Nav. Co. v. Merchant's Bank, 6 How. (U. S.) 344; Cole v. Goodwin, 19 Wend. (N. Y.) 261.

[64] Schouler, Bailm. c. 3, § 372, discussing these qualifications at length. Et vide Wood's Brown, Carr. §§ 71–74; 1 Smith, Lead. Cas. 237.

[65] Gulf, C. & S. F. Ry. Co. v. Wright, 1 Tex. Civ. App. 402, 21 S. W. 80; Pittsburgh, C., C. & St. L. Ry. Co. v. Racer, 5 Ind. App. 209, 31 N. E. 853. A collection of authorities on the rights and remedies of shippers for unjust discrimination as to freight, 9 Am. R. & Corp. R. 619. An extensive note, with numerous citations, as to some phases of unjust discrimination and undue preference or prejudice under the common law and the statutes, Id. 273.

[66] London & L. Fire Ins. Co. v. Rome, W. & O. R. Co., 68 Hun, 598, 23 N. Y. Supp. 231, affirmed 144 N. Y. 200, 39 N. E. 79.

[67] Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co., 56 Fed. 925; Oregon Short Line & U. N. Ry. Co. v. Northern Pac. R. Co., 51 Fed. 465.

[68] Osborn v. Chicago & N. W. R. Co., 48 Fed. 49. As to state regulation,

Transportation.

In carrying the goods to their destination, the common carrier and his servants are bound to transport safely, with reasonable dispatch, by the prescribed or customary route.[69]

The carrier is held to the liability of an insurer for the goods while they are being carried.[70] His duty applies alike to proper loading, adequate propelling force, and safe and suitable vehicles.[71] If no time be stipulated, he is bound to carry within a reasonable time.[72] He is liable in damage for delay;[73] and neither unusual pressure of business,[74] disobedience of employés,[75] nor avoidable

see Littlefield v. Fitchburg R. Co., 158 Mass. 1, 32 N. E. 859; Galveston, H. & S. A. Ry. Co. v. Schmidt (Tex. Civ. App.) 25 S. W. 452; Norfolk & W. R. Co. v. Adams (Va.) 18 S. E. 673.

[69] Schouler, Bailm. § 403.

[70] See cases collected in 13 Lawy. Rep. Ann. 33. The reason for this severe rule of policy will be found discussed in Schouler, Bailm. §§ 406–408.

[71] Sharp v. Grey, 9 Bing. 457; Lyon v. Mells, 5 East, 428; Hoosier Stone Co. v. Louisville, N. A. & C. Ry. Co., 131 Ind. 575, 31 N. E. 365; The Northern Belle, 9 Wall. 526; Tucker v. Pennsylvania R. Co., 10 Misc. Rep. 35, 30 N. Y. Supp. 811; Branch v. Wilmington & W. Ry. Co., 77 N. C. 347; Hunt v. Nutt (Tex. Civ. App.) 27 S. W. 1031; Schouler, Bailm. § 402. A water carrier warrants by implication, not that he has honestly endeavored to make his vessel fit and safe for the particular freight he is to carry, but that she is in fact reasonably fit. Lyon v. Mells, 5 East, 428; Kopitoff v. Wilson, 1 Q. B. Div. 377; Steel v. State Line S. S. Co., 3 App. 72; Stanton v. Richardson, L. R. 9 C. P. 390; The Northern Belle, 9 Wall. 526.

[72] Taylor v. Great Northern Ry. Co., L. R. 1 C. P. 385; Raphael v. Pickford, 5 Man. & G. 551; Johnson v. East Tennessee, V. & G. Ry. Co., 90 Ga. 810, 17 S. E. 121; Beckwith v. Frisbie, 32 Vt. 559; Lowe v. East Tennessee, V. & G. Ry. Co., 90 Ga. 85, 15 S. E. 692; Thomas v. Wabash, St. L. & P. Ry. Co., 63 Fed. 200; Hackett v. B. C. & M. R. R., 35 N. H. 390; Hawkins v. Hoffman, 6 Hill, 586; Black v. Baxendale, 1 Exch. 410; Hamlin v. Great Northern Ry. Co., 1 Hurl. & N. 408. As to what is reasonable time in view of all the circumstances, see Hughes v. Great Western Ry. Co., 14 C. B. 637; Nudd v. Wells, 11 Wis. 407; Hand v. Baynes, 4 Whart. 204.

[73] Davis v. Jacksonville S. E. Line (Mo. Sup.) 23 S. W. 965.

[74] Louisville & N. R. Co. v. Touart, 97 Ala. 514, 11 South. 756; Gulf, C. & S. F. R. Co. v. M'Aulay (Tex. Civ. App.) 26 S. W. 475; Great Western R. Co. v. Hawkins, 18 Mich. 427; Empire Tea Co. v. Wamsutta Oil Co., 63 Pa. St. 14; Toledo, W. & W. R. Co. v. Lockhart, 71 Ill. 627; Gulf, C. & S. F. Ry. Co. v. Hume (Tex. Sup.) 27 S. W. 110.

[75] Not amounting to a strike, Central Railroad & Banking Co. v. Georgia Fruit & Vegetable Exchange, 91 Ga. 389, 17 S. E. 904.

accident [76] will justify delay whereby the goods are damaged.[77] Indeed, the cases have gone so far as to hold that inevitable accident is no excuse for failure to carry within time agreed upon.[78] Where delays arise, however, preference should be given to perishable goods already received.[79]

Delivery to Consignee.

The carrier is not liable for misdelivery if in making such delivery he has followed the usual course of business.[80] The liability, after it has attached, does not cease until there has been a delivery of goods according to contract, statute, or usage of business.[81] On arrival at the destination, the carrier, as a warehouseman, is bound to keep the goods with ordinary care, and to deliver them on demand, within a reasonable time, and on payment of reasonable charges, and to have an agent ready to deliver them at reasonable time. If, through breach of any of these duties, as of that of the agent, the property is destroyed by fire, the carrier is liable. Under such circumstances, the carrier is held, not to the liability of an insurer,

[76] Receivers of Missouri, K. & T. Ry. Co. v. Olive (Tex. Civ. App.) 23 S. W. 526.

[77] Thus, a railroad company is liable for venison spoiled, Cantwell v. Pacific Exp. Co., 58 Ark. 487, 25 S. W. 503; for damage done to grapes by delay, Grinnell v. Wisconsin Cent. Co., 47 Minn. 569, 50 N. W. 891; Gulf, C. & S. F. Ry. Co. v. Hume (Tex. Civ. App.) 24 S. W. 915; Missouri Pac. Ry. Co. v. Russell (Tex. Sup.) 18 S. W. 594.

[78] Harmony v. Bingham, 12 N. Y. 99. Et vide Hutch. Carr. § 319, note 1.

[79] Peet v. Chicago & N. W. Ry. Co., 20 Wis. 624; Great Western Ry. Co. v. Burns, 60 Ill. 284. In Michigan Cent. Ry. Co. v. Burrows, 33 Mich. 6, preference to goods for the relief of Chicago fire sufferers was justified. Et vide Marshall v. New York Cent. Ry. Co., 45 Barb. (N. Y.) 502.

[80] Farmers' & Mechanics' Bank v. Champlain Transp. Co., 23 Vt. 186; Richmond v. Steamboat Co., 87 N. Y. 240; Gibson v. Culver, 17 Wend. 305; The Boston, 1 Low. 464, Fed. Cas. No. 1,671; The Sultana v. Chapman, 5 Wis. 454; Dixon v. Dunham, 14 Ill. 324; Salmon Falls Co. v. The Tangier, 1 Cliff. 396, Fed. Cas. No. 13,743; Gates v. Chicago, B. & Q. R. Co., 42 Neb. 379, 60 N. W. 583. Cf. Savannah, F. & W. Ry. Co. v. Sloat, 93 Ga. 803, 20 S. E. 219; ante, p. 734, "Trover and Conversion and Ministerial Duties."

[81] Kirk v. Chicago, St. P., M. & O. Ry. Co. (Minn.) 60 N. W. 1084; Farmers' & Mechanics' Bank v. Champlain Transp. Co., 18 Vt. 131–140; Richardson v. Goddard, 23 How. 39; Chicago & R. I. R. Co. v. Warren, 16 Ill. 505; Constable v. National S. S. Co., 154 U. S. 51, 14 Sup. Ct. 1062.

as a common carrier, but to such care as a warehouseman would take of his own property.[82] If the consignee is present on arrival of goods, he must take them away at a reasonable time; if not present, he or his agent living at the place of destination should be notified.[83] If the goods are not then removed within a reasonable time, their loss falls on the consignee, provided the carrier has exercised the care of a warehouseman.[84] Thus, if the consignee is dead or cannot be found, the carrier should store them at the owner's risk and expenses.[85] Failure of the carrier to deliver to the proper consignee, after reasonable opportunity to determine his legal rights, creates a liability for damage sustained by consignee.[86]

Damages.

Where property delivered to a common carrier for shipment is destroyed while in transit, the measure of damages is the market

[82] E. O. Stanard Milling Co. v. White Line Cent. Transit Co. (Mo. Sup.) 26 S. W. 704; St. Louis & S. F. Ry. Co. v. Dodd (Ark.) 27 S. W. 227 (under contract); East Tennessee, V. & G. Ry. Co. v. Kelly, 91 Tenn. 699–708, 20 S. W. 312, 314; Derosia v. Winona & St. P. R. Co., 18 Minn. 133 (Gil. 119); Arthur v. St. Paul & D. R. Co., 38 Minn. 95, 35 N. W. 718 (under contract).

[83] As to statutory requirements of notice, see Wilson v. California Cent. Ry. Co., 94 Cal. 166, 29 Pac. 861. If, after arrival, in violation of general and uniform custom, the carrier fails to give notice of arrival of goods, and they are injured by the act of God, as a freshet, the carrier is liable for negligence. Richmond & D. R. Co. v. White, 88 Ga. 805, 15 S. E. 802.

[84] Basnight v. Railroad Co., 111 N. C. 592, 16 S. E. 323; Hasse v. American Exp. Co., 94 Mich. 133, 53 N. W. 918; Wald v. Railroad Co. (Ky.) 18 S. W. 850; Moses v. Boston & M. R. Co., 32 N. H. 523; Gregg v. Illinois Cent. R. Co., 147 Ill. 550, 35 N. E. 343; E. O. Stanard Milling Co. v. White Line Cent. Transit Co. (Mo. Sup.) 26 S. W. 704. And see Constable v. National S. S. Co., 154 U. S. 51, 14 Sup. Ct. 1062, discussing contractual limitations on liability after unloading, discharge at other than usual place, and notice to consignee.

[85] Fisk v. Newton, 1 Denio, 45; Rowland v. Miln, 2 Hilt. (N. Y.) 150, 153; Crawford v. Clark, 15 Ill. 561; Young v. Leary, 135 N. Y. 569, 32 N. E. 607. Leaving a car of wheat on a side track threatened by rising water was held to be a failure to exercise ordinary care, and the owner of the wheat recovered. Baltimore & O. Ry. Co. v. Keedy, 75 Md. 320, 23 Atl. 643. Cf. Charlotte, C. & A. R. Co. v. Wooten, 87 Ga. 203, 13 S. E. 509.

[86] But in such an action mere brusqueness on the part of the agent, not amounting to insult, is not a ground for punitive damages. Illinois Cent. R. Co. v. Brookhaven Mach. Co., 71 Miss. 663, 16 South. 252.

value of the property at its place of destination, at the time it should have been delivered there.[87]

Same—Connecting Lines.

Where property is shipped over connecting railroads, express or freight lines, and is injured in transit, the question arises to to the responsibility of the carrier who originally undertook to transport from one point to another, the intermediate carrier, independent car company, and others. Here the proper parties defendant are often determined by construction of the contract entered into in each case.[88] They may be joint tort feasors.[89] If the contract provides expressly or impliedly, by bill of lading or receipt, for a through transportation, the original carrier is clearly liable.[90] There is, however, much difference of opinion whether, in the absence of any express contract, the carrier who originally received the goods is liable for any negligence outside of his own immediate line. In Muschamp v. Lancaster & P. J. Ry. Co.[91] it was determined that, where goods are delivered to be carried by a railway company from one terminus to another, the jury may find that this company is answerable for the entire transportation, although intermediate carriers carried the goods part of the distance. In this case, there was no contract apart from the ordinary booking, and no proof of partnership between the original and the connecting company. The English rule in accordance with this case would seem to be that, in the absence of contract modification, a carrier who undertakes to

[87] Atchison, T. & S. F. R. Co. v. Lawler, 40 Neb. 356, 58 N. W. 968; Alabama & V. Ry. Co. v. Searles, 71 Miss. 744, 16 South. 255.

[88] Galveston, H. & S. A. Ry. Co. v. Short, 25 S. W. 142–147.

[89] Atlantic & P. R. Co. v. Laird, 7 C. C. A. 489, 58 Fed. 760. As to carrying passengers, vide Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9, 31 N. E. 412. As to lessees, vide Baxter v. Railway Co. (Tex. Civ. App.) 22 S. W. 1002; Wabash R. Co. v. Williamson, 3 Ind. App. 190, 29 N. E. 455. Joint and through tariff rates do not make carriers liable as joint tort feasors. Wehmann v. Minneapolis, St. P. & S. S. M. Ry. Co. (Minn.) 59 N. W. 546.

[90] Candee v. Pennsylvania R. Co., 21 Wis. 582; Davis v. Jacksonville S. E. Line (Mo. Sup.) 28 S. W. 965; Railroad Co. v. Androscoggin Mills, 22 Wall. 594; Central Railroad & Banking Co. v. Georgia Fruit & Vegetable Exchange Co., 91 Ga. 389, 17 S. E. 904; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438, 28 N. E. 394.

[91] 8 Mees. & W. 421.

transport from one point to another is liable for the negligence of the intermediate carrier.[92] It has been followed [93] and denied [94] by many American cases. The intermediate carrier who is liable for his own negligence is relieved by delivery to the succeeding carrier,[95] or giving the next carrier notice of arrival of goods and a reasonable time for it to receive them. It is not liable thereafter for the latter's inability to receive.[96] Where property transported by successive carriers has been injured in transit, in the absence of evidence to the contrary, the injury is presumed to have been caused through the fault of the last carrier. He is presumed to have received goods in good order.[97] The right of the owner of the goods

[92] Bristol & E. Ry. Co. v. Collins, 7 H. L. Cas. 194. As to passengers, see Great Western Ry. Co. v. Blake, 7 Hurl. & N. 987.

[93] Nashua Lock Co. v. Worcester & N. Ry. Co., 48 N. H. 339; Illinois Cent. Ry. Co. v. Frankenberg, 54 Ill. 88; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174; Central R. Co. v. Combs, 70 Ga. 533. Et vide cases collected sections 147 and 148, Hutch. Carr.; Jennings v. Grand Trunk Ry. Co., 127 N. Y. 438, 28 N. E. 394. And see Tolman v. Abbot, 78 Wis. 192, 47 N. W. 264; Illinois Cent. R. Co. v. Kerr, 68 Miss. 14, 8 South. 330.

[94] Nutting v. Connecticut Ry., 1 Gray (Mass.) 502; Burroughs v. Norwich & W. R. Co., 100 Mass. 26; Railroad Co. v. Forsyth, 61 Pa. St. 81; Irish v. Milwaukee & St. P. Ry. Co., 19 Minn. 376 (Gil. 323); Railroad Co. v. Manufacturing Co., 16 Wall. 318.

[95] Pratt v. Railway Co., 95 U. S. 43; Church v. Atchison, T. & S. F. R. Co., 1 Okl. 44, 29 Pac. 530; Wehmann v. Railway Co. (Minn.) 59 N. W. 546. As to what is apparently improper loading of a car delivered by one carrier to a connecting carrier, see McCarthy v. Louisville & N. R. Co. (Ala.) 14 South. 370. As to liability of consolidated roads, see State v. Baltimore & L. R. Co., 77 Md. 489, 26 Atl. 865; Atchison, T. & S. F. R. Co. v. Richardson, 53 Kan. 157, 35 Pac. 1114; Zealy v. Electric Co., 99 Ala. 579, 13 South. 118; Cleveland, C., C. & St. L. Ry. Co. v. Prewitt, 134 Ind. 557, 33 N. E. 367.

[96] Palmer v. Atchison, T. & S. F. R. Co., 101 Cal. 187, 35 Pac. 630.

[97] Texas & P. Ry. Co. v. Barnhart, 5 Tex. Civ. App. 601, 23 S. W. 801, and 24 S. W. 331. And see Missouri Pac. Ry. Co. v. Breeding (Tex. App.) 16 S. W. 184; Western Ry. Co. v. Harwell, 97 Ala. 341, 11 South. 781; Central Railroad & Banking Co. v. Bayer, 91 Ga. 115, 16 S. E. 953; Leo v. St. Paul, M. & M. Ry. Co., 30 Minn. 438, 15 N. W. 872; Louisville & N. R. Co. v. Jones, 100 Ala. 263, 14 South. 114; Forrester v. Railroad Co., 92 Ga. 699, 19 S. E. 811; Joseph v. Railroad Co., 88 Ga. 426, 14 S. E. 591 (by statute); Falson v. Alabama & V. Ry. Co., 69 Miss. 569, 13 South. 37. Liability of first carrier as to goods delivered to connecting carrier, Miller v. South Carolina R. Co., 33 S. C. 359, 11 S. E. 1093.

to sue either the original carrier or the intermediate carrier by whose fault the damage was caused is generally recognized.[98]

CARRIERS OF LIVE STOCK.

296. A carrier of live stock is liable for the performance of duties whenever a carrier of other freight would be. His liability is especially contingent upon the inherent vice, disease, or condition of the animals shipped.

It has been insisted that "the carriage of live stock is not, 'under the custom of the realm,' the proper subject of a common carrier at all. Live stock can in no proper sense be called goods or produce in the carriage of which the office of the common carrier is defined to consist."[99] It seems, however, to be now settled that the carriers of live animals incur the responsibility of common carriers as to such freight; but due regard is had to the nature of the thing transported. Common carriers of live stock, it is universally recognized, are not responsible for damages to live stock where the damage may have arisen from the nature or condition of the animals themselves, which diligent care could not have prevented. "The carrier of animals by a mode of conveyance opposed to their habits and instincts has no such means of securing absolute safety. They may die of fright, or by refusing to eat; or they may, notwithstanding every precaution, destroy themselves in attempting to break away, * * * or they may kill each other. * * * Where, however, the cause of the damage * * * is in connection with the condition or propensity of animals undertaken to be carried, the ordinary responsibilities of the carrier should attach."[100] There is,

[98] Barter v. Wheeler, 49 N. H. 9; Anchor Line v. Dater, 68 Ill. 369; Southern Exp. Co. v. Hess, 53 Ala. 19; Mosher v. Southern Exp. Co., 38 Ga. 37; Missouri Pac. Ry. Co. v. Twiss, 35 Neb. 267, 53 N. W. 76. Et vide St. Louis, I. M. & S. Ry. Co. v. Henderson, 57 Ark. 402, 21 S. W. 878; Johnson v. East Tennessee, V. & G. Ry. Co., 90 Ga. 810, 17 S. E. 121.

[99] American note to Coggs v. Bernard, 1 Smith, Lead. Cas. pt. 1, p. 451. The English cases which incline to this view will be found collected, and together with some leading American cases considered, in 3 Am. & Eng. Enc. Law, pp. 1–3, etc. Et vide Hutch. Carr. § 221.

[100] Clark v. Rochester & S. R. Co., 14 N. Y. 571, 573; Harris v. Northern Ind.

of course, no liability on part of carrier where the damage complained of was caused by the wrong of the shipper.[101] Where, however, the carrier's negligence has caused damage, he is responsible. The carrier is bound to provide safe cars and appliances with reference to the ordinary character and condition of the animals.[102] It is no defense that the car alleged to be defective belongs to a connecting carrier,[103] or to an independent company,[104] or even to the owner of the stock shipped.[105] While the duty of loading and unloading cattle is commonly determined by contract,[106] circumstances may

R. Co., 20 N. Y. 232; Michigan Cent. Ry. Co. v. Myrick, 1 Sup. Ct. 425; Illinois Cent. R. Co. v. Scruggs, 69 Miss. 418, 13 South. 698; Lindsley v. Chicago, M. & St. P. Ry. Co., 36 Minn. 539, 33 N. W. 7; Evans v. Fitchburg R. Co., 111 Mass. 142; Hance v. Pacific Exp. Co., 48 Mo. App. 179; Moulton v. St. Paul, M. & M. Ry. Co., 31 Minn. 85, 16 N. W. 497; McCoy v. Keokuk & D. M. R. Co., 44 Iowa, 424; Morrison v. Philips, 44 Wis. 405. Et vide cases collected by states, 3 Am. & Eng. Enc. Law, 7, 8. As to burden of proof, see Boehl v. Chicago, M. & St. P. Ry. Co., 44 Minn. 191, 46 N. W. 333. Where a carrier seeks to escape liability for injury to an animal delivered to it for transportation on the ground that the injury arose from the viciousness, unruliness, or restiveness of the animal, it must also be shown that the carrier was not guilty of negligence. Giblin v. National Steamship Co. (Super. N. Y.) 28 N. Y. Supp. 69.

[101] Thus, the burden on a common carrier is rebutted by showing that the owner left a window open, whereby animal was injured. Huchinson v. Chicago, St. P., M. & O. Ry. Co., 37 Minn. 524, 35 N. W. 433.

[102] A car furnished by a railroad company for the transportation of horses and mules, which is liable to be broken from slight kicks by the animals, is not reasonably safe, and the shipper may recover for injuries to the animals caused by the car being so broken. Betts v. Chicago, R. I. & P. Ry. Co. (Iowa) 60 N. W. 623; Selby v. Wilmington & W. R. Co., 113 N. C. 588, 18 S. E. 88; Railroad Co. v. Pratt, 22 Wall. 123; Pratt v. Ogdensburg & L. C. Ry. Co., 102 Mass. 557; McDaniel v. Chicago & N. W. Ry. Co., 24 Iowa, 412; Harris v. Northern Ind. R. Co., 20 N. Y. 232. The question of construction and condition of cars may be for the jury. Armstrong v. United States Exp. Co., 159 Pa. St. 640, 28 Atl. 448. Et vide Louisville & N. R. Co. v. Grant, 99 Ala. 325, 13 South. 599; Searles v. Alabama & V. Ry. Co., 69 Miss. 186, 13 South. 815.

[103] Wallingford v. Columbia & G. R. Co., 26 S. C. 258, 2 S. E. 19; McAllister v. Chicago, R. I. & P. Ry. Co., 74 Mo. 351.

[104] Louisville & N. R. Co. v. Dies, 91 Tenn. 177, 18 S.W. 266.

[105] Fordyce v. McFlynn, 56 Ark. 424, 19 S. W. 961.

[106] Squire v. New York Cent. R. Co., 98 Mass. 239; Bills v. New York Cent. R. Co., 84 N. Y. 5; Benson v. Gray, 154 Mass. 391, 28 N. E. 275.

impose on the carrier the duty of unloading and setting out from the car exhausted and frightened animals, if this can be reasonably done.[107] This is an application of the larger duty on the part of the carrier to take care of stock while in his possession, with due reference to their propensities, necessities, and surrounding circumstances.[108]

It may be actionable negligence on the part of the carrier to refuse to allow the owner of cattle to take them out of the cars and to water them.[109] The general duty as to providing food, water, and exercise is commonly determined by contract[110] or statute.[111] The time within which the stock is to be delivered and the responsibility for delay are governed by the ordinary principles determining liability for delay of common carriers.[112]

The liability of a carrier for loss of market to his shipper would seem to have been determined in some cases, as to measure of dam-

[107] Coupland v. Housatonic R. Co., 61 Conn. 531, 23 Atl. 870; Johnson v. Alabama & V. Ry. Co., 69 Miss. 191, 11 South. 104; Illinois Cent. Ry. Co. v. Peterson, 68 Miss. 454, 10 South. 43.

[108] The tendency of animals to escape: Indianapolis, P. & C. R. Co. v. Allen, 31 Ind. 394; Stuart v. Crawley, 2 Starkie, 323; Richardson v. Northeastern R. Co., L. R. 7 C. P. 75. As to duty to prevent burning hay or straw in cattle car, see McFadden v. Missouri Pac. Ry. Co., 92 Mo. 343, 4 S. W. 689; Powell v. Pennsylvania R. Co., 32 Pa. St. 414; Holsapple v. Rome, W. & O. R. Co., 86 N. Y. 275.

[109] Gulf, C. & S. F. Ry. Co. v. Gann (Tex. Civ. App.) 28 S. W. 349 (contract); Harris v. Northern Ind. R. Co., 20 N. Y. 232. If the shipper is to feed and water cattle, delay in transportation of carrier is wrongful if denial of opportunity to feed is wrongful in view of delay. Smith v. Michigan Cent. Ry. Co., 100 Mich. 148, 58 N. W. 657.

[110] Cf. Illinois Cent. R. Co. v. Adams, 42 Ill. 474, with South & N. Ala. R. Co. v. Henlein, 52 Ala. 606. And see Ft. Worth & D. C. Ry. Co. v. Daggett (Tex. Civ. App.) 27 S. W. 186.

[111] Thus, interstate carriers are forbidden to confine animals for more than 28 hours without unloading. Rev. St. U. S. §§ 4386–4388. See Newport News & M. V. Co. v. United States, 9 C. C. A. 579, 61 Fed. 488; Hale v. Missouri Pac. R. Co., 36 Neb. 266, 54 N. W. 517. The care of confined horse on a plank floor after arrival at destination is a question of fact to be determined by a jury. Moses v. Port Townsend S. R. Co., 5 Wash. 595, 32 Pac. 488.

[112] While it has been held that delay will make a carrier liable for shrinkage of cattle in weight or for their becoming stale (Douglas v. Hannibal & St. J. R. Co., 53 Mo. App. 473), the cases are not agreed on the point (Ohio

ages, rather by the law of contract than of tort.[113] But the true measure of damages is the difference between the market value of the cattle in the condition in which they would have arrived but for the negligence of defendant and their market value in the condition in which by reason of such negligence they did arrive.[114]

CARRIERS OF BAGGAGE.

297. A common carrier is liable as such for baggage only to the extent of ordinary personal effects as distinguished—

(a) From merchandise, and

(b) From property of exceptional value.

The common carrier is liable as such for the personal baggage of passengers delivered to and received by it solely for transportation, and not for storage, although, for the convenience of the carrier, the passenger consents to some delay in transportation.[115] But it is liable for personal baggage only, and is not bound to ask if the bag-

& M. R. Co. v. Dunbar, 20 Ill. 624). Et vide Frazer v. Kansas City, St. J. & C. B. R. Co., 48 Iowa, 571. As to what is reasonable time, see Illinois Cent. R. Co. v. Haynes, 64 Miss. 604, 1 South. 765; Alabama & V. Ry. Co. v. Sparks, 71 Miss. 757, 16 So. 263; International & G. N. R. Co. v. Wentworth (Tex. Civ. App.) 28 S. W. 277; Atchison, T. & S. F. R. Co. v. Bryan (Tex. Civ. App.) 28 S. W. 98; Louisville, N. A. & C. R. Co. v. Brinley (Ky.) 29 S. W. 305.

[113] Philadelphia, W. & B. Co. v. Lehman, 56 Md. 209; Horne v. Midland R. Co., L. R. 8 C. P. 131; Leonard v. Fitchburg R. R., 143 Mass. 307, 9 N. E. 667.

[114] New York, L. E. & W. R. Co. v. Estill, 147 U. S. 591–617, 13 Sup. Ct. 444, citing Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 556; Smith v. Griffith, 3 Hill (N. Y.) 333; Sturges v. Bissell, 46 N. Y. 462; Cutting v. Grand Trunk Ry. Co., 13 Allen (Mass.) 381; Gulf, C. & S. F. Ry. Co. v. Wilm (Tex. Civ. App.) 28 S. W. 925; M'Cune v. Railway Co., 52 Iowa, 600, 3 N. W. 615; Missouri Pac. Ry. Co. v. Fagan, 72 Tex. 127, 9 S. W. 749; Missouri Pac. Ry. Co. v. Edwards, 78 Tex. 307, 14 S. W. 607; Gulf, C. & S. F. Ry. Co. v. Simmons (Tex. Civ. App.) 28 S. W. 825; Hutch. Carr. (2d Ed.) §§ 221, 770a; Hudson v. Northern Pac. R. Co. (Iowa) 60 N. W. 608.

[115] Shaw v. Northern Pac. R. Co., 40 Minn. 144, 41 N. W. 548. Where a common carrier claims exemption from liability for loss of a passenger's baggage on the ground that it resulted from the act of God, the burden is on it to show that the loss was caused by such act. Toledo, St. L. & K. C. R. Co. v. Tapp, 6 Ind. App. 304, 33 N. E. 462. Where a passenger purchased a

gage is anything else. Hence, if a valise contain merchandise, and not articles of "necessity and convenience intended and designed for personal use, instruction, amusement, and protection," and the company have no notice thereof, the owner cannot recover for the loss without proof of gross negligence.[116] In Humphreys v. Perry[117] a traveling salesman for a jewelry firm paid a charge for overweight on a trunk of the kind which, from the practice of sending out agents with trunks filled with jewelry, had come to be known as a "jeweler's trunk," which trunk contained jewelry and personal baggage. He was held not entitled to recover for the loss of the contents of the trunk. The carrier had no knowledge of its contents, actual or constructive, and was not bound to inquire with reference thereto. It would seem that a common carrier is not responsible for money included in the baggage of a passenger beyond the amount which a prudent person would deem proper and necessary for traveling expenses and personal use, or intended for other persons, unless the loss was the result of the carrier's gross negligence.[118] On arrival at destination, the carrier becomes a bailee for hire, and is

ticket for a certain train, and had his trunk checked 20 minutes before train time, it was the duty of the railroad company to carry the trunk on the same train with its owner, and a failure to do so was negligence. Id.

[116] Stimpson v. Connecticut River R. Co., 98 Mass. 83; Collins v. Boston & M. R. Co., 10 Cush. (Mass.) 506; Haines v. Chicago, St. P., M. & O. R. Co., 29 Minn. 160, 12 N. W. 447; Oakes v. Northern Pac. Ry. Co., 20 Or. 392, 26 Pac. 230. As to dogs, see Kansas City, M. & B. R. Co. v. Higdon, 94 Ala. 286, 10 South. 282. Jewelry is part of ladies' luggage, McGill v. Rowand, 3 Pa. St. 451; so a watch in a trunk, Jones v. Voorhees, 10 Ohio, 145; a pistol, Davis v. Michigan, S. & N. I. R. Co., 22 Ill. 281. Contra, Giles v. Faunteroy, 13 Md. 126. And, as to action by employer of drummer for loss of sample trunk, see Ft. Worth & R. G. Ry. Co. v. I. B. Rosenthal Millinery Co. (Tex. Civ. App.) 29 S. W. 196.

[117] 148 U. S. 627, 13 Sup. Ct. 711; Southern Kansas Ry. Co. v. Clark, 52 Kan. 398, 34 Pac. 1054; Parmelee v. McNulty, 19 Ill. 556; Davis v. Michigan, S. & N. I. R. Co., 22 Ill. 281. As to bond required before shipment of jewelry cases, see Weber Co. v. Chicago, St. P., M. & O. Ry. Co. (Iowa) 60 N. W. 637.

[118] Jordan v. Fall River R. Co., 5 Cush. (Mass.) 69; Johnson v. Stone, 11 Humph. (Tenn.) 420; Illinois Cent. R. Co. v. Copeland, 24 Ill. 336; Weed v. Saratoga & S. Ry. Co., 19 Wend. (N. Y.) 534; Camden & A. R. Co. v. Baldauf, 16 Pa. St. 68, 79; Doyle v. Kiser, 6 Ind. 247.

liable for want of reasonable care of baggage;[119] and if it fail to provide reasonable facilities for the removal of baggage, in consequence of which the baggage is damaged or burned, the jury may find the carrier liable for negligence.[120] The baggage check is in the nature of a receipt, and is evidence of delivery, ownership, and identity of baggage in good order.[121] On its surrender, the liability of the carrier as such ceases.[122]

CARRIERS OF PASSENGERS—LIABILITIES.

298. A carrier of passengers is not an insurer; but proof of damage to a passenger by the carrier raises a presumption of actionable negligence on the part of the carrier, which may be rebutted—

(a) By bringing the case within exceptions similar to those recognized by law as to liability of common carriers of freight, or

(b) By showing the absence of negligence on carrier's part.

Who are Passengers.[123]

Where a consideration is paid, the permission to ride is not necessarily a ticket;[124] a special contract is sufficient.[125] If a railroad

[119] Kahn v. Atlantic & N. C. R. Co. (N. C.) 20 S. E. 169; Nealand v. Boston & M. R. R., 161 Pa. St. 67, 36 N. E. 592. A short note on the liability of sleeping-car companies for loss of passenger's baggage, 58 Am. & Eng. Ry. Cas. 584.

[120] Geo. F. Dittman Boot & Shoe Co. v. Keokuk & N. W. Ry. Co. (Iowa) 59 N. W. 257.

[121] St. Louis, A. & T. H. Ry. Co. v. Hawkins, 39 Ill. App. 406. Union Depot Company is agent of connecting roads for baggage checking. See Ahlbeck v. St. Paul, M. & M. Ry. Co., 39 Minn. 424, 40 N. W. 364; Hyman v. Central Vt. R. Co., 66 Hun, 202, 21 N. Y. Supp. 119.

[122] Mortland v. Philadelphia & R. Ry. Co., 81 Hun, 473, 30 N. Y. Supp. 1021.

[123] A collection of recent decisions as to who are passengers, 58 Am. & Eng. Ry. Cas. 12, 18.

[124] See an article on the rights of a passenger traveling on a railway without a ticket, 98 Law T. 515, 538.

[125] Applied to circus employés, Robertson v. Old Colony R. Co., 156 Mass. 525, 31 N. E. 650.

company, as part consideration of a deed, agreed to carry grantor and family, but issue no pass, one of the children ejected can recover damages.[126] Where, however, a ticket is purchased, it is the contract; and its terms, within the limits allowed by law as to limitations on liability[127] for negligence, so far as they extend, determine the rights of the parties.[128] There is no distinction between

[126] Grimes v. Minneapolis, L. & M. Ry. Co., 37 Minn. 66, 33 N. W. 33.

[127] Ante, p. 298. Et vide Doyle v. Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770; Meuer v. Chicago, M. & St. P. Ry. Co. (S. D.) 59 N. W. 945; Potter v. The Majestic, 9 C. C. A. 161, 60 Fed. 624; O'Regan v. Cunard S. S. Co., 160 Mass. 356, 35 N. E. 1070. As to excursion tickets, see Bowers v. Pittsburgh, Ft. W. & C. R. R., 158 Pa. St. 302, 27 Atl. 893; Pittsburgh, C., C. & St. L. R. Co. v. Russ, 6 C. C. A. 597, 57 Fed. 822; Randall v. New Orleans & N. E. R. Co., 45 La. Ann. 778, 13 South. 166; Central Railroad & Banking Co. v. Roberts, 91 Ga. 513, 18 S. E. 315; Pennsylvania R. Co. v. Parry, 55 N. J. Law, 402, 27 Atl. 914. A few citations on the effect of conditions in railroad ticket, 58 Am. & Eng. R. Cas. 60, 64, 68.

[128] Lechowitzer v. Hamburg American Packet Co., 8 Misc. Rep. 213, 28 N. Y. Supp. 577. Hence, if mileage book prohibit riding on freight, no subsequent advertisement allowing such privilege will prevent proper ejectment. Dunlap v. Northern Pac. Ry. Co., 35 Minn. 203, 28 N. W. 240. Cf. Boggess v. Chesapeake & O. Ry. Co., 37 W. Va. 297, 16 S. E. 525. Signing, stamping, and identification of holder of return coupon are legal and proper conditions if no deception is used in sale. Abram v. Gulf, C. & S. F. Ry. Co. 83 Tex. 61, 18 S. W. 321; Wyman v. Northern Pac. Ry. Co., 34 Minn. 210, 25 N. W. 349; Gulf, C. & S. F. Ry. Co. v. Henry, 84 Tex. 678, 19 S. W. 870. And yet the general doctrine is that the company is liable for mistake of conductor or ticket agent. New York, L. E. & W. R. Co. v. Winter's Adm'r, 143 U. S. 60, 12 Sup. Ct. 356; Kansas City, B. & M. R. Co. v. Riley, 68 Miss. 765, 9 South. 443. A purchaser of a second-class ticket is bound by its terms, whether he has read them or not; and, if trains do not connect, a railroad company is not bound to transport on the next train,—a limited express. New York, L. E. & W. Ry. Co. v. Bennett, 6 U. S. App. 95, 1 C. C. A. 544, and 50 Fed. 496. Et vide Humphries v. Illinois Cent. R. Co., 70 Miss. 453, 12 South. 155. But ordinary ticket does not entitle to seat in chair car. St. Louis, A. & T. Ry. Co. v. Hardy, 55 Ark. 134, 17 S. W. 711. Transfer check is good only for lines punched. Pine v. St. Paul City Ry. Co., 50 Minn. 144, 52 N. W. 392; Louisville, N. O. & T. Ry. Co. v. Patterson, 69 Miss. 421, 13 South. 697. As to tickets issued by connecting lines, see Rouser v. North Park St. Ry. Co., 97 Mich. 565, 56 N. W. 937; Humphries v. Illinois Cent. R. Co., 70 Miss. 453, 12 South. 155; Nichols v. Southern Pac. Co., 23 Or. 123, 31 Pac. 296; Matthews v. Charleston & S. Ry. Co., 38 S. C. 429, 17 S. E. 225; Gulf, C. & S. F. Ry. Co. v. Looney, 85 Tex. 158, 19 S. W. 1039. A

passengers of various classes on passenger trains so far as protection against personal injury is concerned, whatever the difference as to rights to seats may be.[129] Shippers accompanying live stock,[130] postal clerks,[131] express messengers,[132] porters on palace cars,[133] have the rights of passengers.[134]

review of recent decisions as to interchangeable mileage tickets, 9 Am. R. & Corp. R. 592.

[129] Whart. Neg. § 641, citing Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Indianapolis, B. & W. Ry. Co. v. Beaver, 41 Ind. 493. But see criticism in Flint & P. M. Ry. Co. v. Weir (1877) 37 Mich. 111. If a passenger is permitted at his own request to travel on a freight train, he assumes only the naturally additional risks, not including condition of track. Ohio Val. Ry. Co. v. Watson's Adm'r, 93 Ky. 654, 21 S. W. 244. The ticket entitles to a seat, and, if one is on a train which moves before inability to get a seat is known, one is not a trespasser, and can be put out only at a regular station, if he refuses to surrender ticket. Hardenbergh v. St. Paul, M. & M. Ry. Co., 39 Minn. 3, 38 N. W. 625. From a passenger who rides in a chair car the railway company may demand extra compensation, where the train is supplied with cars furnished with the usual appliances for the accommodation of passengers entitled to first-class passage. St. Louis, A. & T. Ry. Co. v. Hardy, 55 Ark. 134, 17 S. W. 711. A collection of authorities as to discrimination in transporting white and colored passengers, 58 Am. & Eng. R. Cas. 557.

[130] New Orleans & N. E. R. Co. v. Thomas, 9 C. C. A. 29, 60 Fed. 379; Receivers of International & G. N. Ry. Co. v. Armstrong, 4 Tex. Civ. App. 146, 23 S. W. 236; Richmond & D. R. Co. v. Burnsed, 70 Miss. 437, 12 South. 958. Cf. Meuer v. Chicago, M. & St. P. Ry. Co. (S. D.) 59 N. W. 945; Orcutt v. Northern Pac. R. Co., 45 Minn. 368, 47 N. W. 1068; Olson v. St. Paul & D. R. Co., 45 Minn. 536, 48 N. W. 445; Pitcher v. Lake Shore & M. S. R. Co., 61 Hun, 623, 16 N. Y. Supp. 62; Miller v. Cornwall R. R., 154 Pa. St. 473, 26 Atl. 779; Chicago, B. & Q. R. Co. v. Dickson, 143 Ill. 368, 32 N. E. 380 (42 Ill. App. 363, affirmed); Gulf, C. & S. F. Ry. Co. v. Cole (Tex. Civ. App.) 28 S. W. 391.

[131] Mellor v. Missouri Pac. Ry. Co. (Mo. Sup.) 14 S. W. 758; Id., 105 Mo. 455, 16 S. W. 849; Arrowsmith v. Nashville & D. R. Co., 57 Fed. 165; Gulf, C. & S. F. Ry. Co. v. Meson, 79 Tex. 371, 15 S. W. 280; Cleveland, C., C. & St. L. Ry. Co. v. Ketcham, 133 Ind. 346, 33 N. E. 116.

[132] San Antonio & A. P. Ry. Co. v. Adams, 6 Tex. Civ. App. 102, 24 S. W. 839; Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597; Florida South. Ry. Co. v. Hirst, 30 Fla. 1, 11 South. 506. Et vide Blair v. Erie Ry. Co., 66 N. Y. 313; Hammond v. North Eastern Ry. Co., 6 Rich. (S. C.) 130.

[133] Jones v. St. Louis S. W. Ry. Co. (Mo. Sup.) 28 S. W. 883.

[134] A laborer entitled to ride is not a trespasser. Gradin v. St. Paul & D.

Where, however, no consideration is paid, although the passenger may be actually aboard the train by the invitation or acquiescence of the carrier's employés, the carrier does not owe him the duties owed to a passenger for the violation of which an action in tort as for negligence will lie.[135] A passenger about to board a car, and partially on it, is a passenger who can recover damages for the negligence of the carrier;[136] but a person attempting to board a moving car, signaled by him to stop, may be entitled to only such

R. Co., 30 Minn. 217, 14 N. W. 881. Cf. McVeety v. St. Paul, M. & M. Ry. Co., 45 Minn. 268, 47 N. W. 809. Plaintiff got on wrong train, and followed conductor's directions in retracing steps. He fell into cattle guards, was injured, but could not recover because a trespasser. Finnegan v. Chicago, St. P., M. & O. Ry. Co., 48 Minn. 378, 51 N. W. 122. Compare Jones v. Chicago, M. & St. P. Ry. Co., 42 Minn. 183, 43 N. W. 1114. Generally, as to rights of passengers, see Hall v. Memphis & C. R. Co., 15 Fed. 69, note by S. D. Thompson.

[135] Woolsey v. Chicago, B. & Q. R. Co., 39 Neb. 798, 58 N. W. 444; Gardner v. Waycross Air-Line R. Co. (Ga.) 19 S. E. 557; Texas & P. Ry. Co. v. Black, 87 Tex. 160, 27 S. W. 118; Wynn v. City & Suburban Ry. Co., 91 Ga. 344, 17 S. E. 649; Evansville & R. R. Co. v. Barnes, 136 Ind. 306, 36 N. E. 1092; Atlanta & F. R. Co. v. Fuller, 92 Ga. 482, 17 S. E. 643, 644; Everett v. Oregon S. L. & U. N. Ry. Co., 9 Utah, 340, 34 Pac. 289. Compare Doyle v. Fitchburg R. Co., 162 Mass. 66, 37 N. E. 770; Galveston, H. & S. A. R. Co. v. Snead, 4 Tex. Civ. App. 31, 23 S. W. 277; Farber v. Missouri Pac. Ry. Co., 116 Mo. 81, 22 S. W. 631; Atchison, T. & S. F. R. Co. v. Headland, 18 Colo. 477, 33 Pac. 185. But see Bryant v. Chicago, St. P., M. & O. Ry. Co., 4 C. C. A. 146, 53 Fed. 997. As to riding on a freight train, see Texas & P. Ry. Co. v. Black, 87 Tex. 60, 27 S. W. 118; Illinois Cent. Ry. Co. v. Axley, 47 Ill. App. 307; Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860. But see Smith v. Louisville, E. & St. L. R. Co., 124 Ind. 394, 24 N. E. 753. A newsboy not a passenger on an elevator. See Springer v. Byram, 137 Ind. 15, 36 N. E. 361.

[136] As where such damage is caused from pushing from behind. Smith v. St. Paul City Ry. Co., 32 Minn. 1, 18 N. W. 827. Similarly, if car start suddenly and throw him. Sahlgaard v. St. Paul City Ry. Co., 48 Minn. 232, 51 N. W. 111. And see Cohen v. West Chicago St. Ry. Co., 9 C. C. A. 223, 60 Fed. 698; Louisville & N. R. Co. v. Popp (Ky.) 27 S. W. 992; Walters v. Philadelphia Traction Co., 161 Pa. St. 36, 28 Atl. 941; Pennsylvania R. Co. v. Reed, 9 C. C. A. 219, 60 Fed. 694; Yarnell v. Kansas City, Ft. S. & M. Ry. Co., 113 Mo. 570, 21 S. W. 1; Mellquist v. The Wasco, 53 Fed. 546; Cogswell v. West St. & N. E. El. Ry. Co., 5 Wash. 46, 31 Pac. 411. Proximity of telegraph pole, North Chicago St. Ry. v. Williams, 140 Ill. 275, 29 N. E. 672.

care on the part of the trainmen as is due to any person in the street.[137] Persons escorting passengers [138] or persons bringing meals on cars [139] are not entitled to the performance of duties due to passengers, but may recover for damage caused by negligence under circumstances, especially where there is willful and wanton wrong. But mere trespassers, as a boy attempting to board a car [140] without notice to employés, or a person stealing a ride on a freight train,[141] are not passengers, and the carrier owes none of the peculiar duties of a common carrier to such persons. And an employé, knowing the risks of travel, assumes them, and cannot recover because of damage produced by the danger which he knew or ought to have known.[142] In the absence of any contrary agreement, a person who travels on a pass is entitled to the same protection as to life or limb as a passenger; but the authorities would seem to be in hopeless confusion as to the effect of a contract limiting or removing the liability of the carrier. While, perhaps, the general rule has been said to be that no agreement that a free passenger shall take the risk of all injury can exonerate the carrier for negligence,[143] the

[137] Baltimore Traction Co. v. State, 78 Md. 409, 28 Atl. 397. Cf. Joliet St. Ry. Co. v. Duggan, 45 Ill. App. 450. Even a ticket holder crossing tracks outside of station, apparently to catch a starting train, who is killed by another train, is not a passenger. Webster v. Fitchburg R. Co., 161 Mass. 298, 37 N. E. 165. A review of decisions on the question as to the time when a person who has started to take passage on a train becomes a passenger, 24 Lawy. Rep. Ann. 521.

[138] Houston v. Gate City St. R. Co., 89 Ga. 272, 15 S. E. 323; Gillis v. Railroad Co., 59 Pa. St. 143; Lawton v. Little Rock & Ft. S. Ry. Co., 55 Ark. 428, 18 S. W. 543. Et vide Doss v. Missouri, K. & T. R. Co., 59 Mo. 27; Dowd v. Chicago, M. & St. P. Ry. Co., 84 Wis. 105, 54 N. W. 24; Yarnell v. Kansas City, Ft. S. & M. R. Co., 113 Mo. 570, 21 S. W. 1; Gautret v. Egerton, L. R. 2 C. P. 371; Holmes v. North Eastern R. R., L. R. 4 Exch. 254; Watkins v. Great Western R. Co., 37 Law T. (N. S.) 193; Missouri, K. & T. Ry. Co. v. Miller (Tex. Civ. App.) 27 S. W. 905.

[139] But if a conductor threatens to knock off from a train in motion a waiter who brought him his dinner, and the waiter jumps and is injured, the company is liable. Savannah, F. & W. Ry. Co. v. Watson, 89 Ga. 110, 14 S. E. 890.

[140] Pitcher v. People's St. Ry., 154 Pa. St. 560, 26 Atl. 559.

[141] Planz v. Boston & A. R. Co., 157 Mass. 377, 32 N. E. 356.

[142] Whart. Neg. §§ 200–202, 605, 640.

[143] Philadelphia & R. R. Co. v. Derby, 14 How. (U. S.) 468; Railroad Co.

latest opinion holds that one who accepts and uses a free pass as a pure gratuity on condition that he will assume all risk of personal injury must be deemed to have accepted and to be bound by it, whether he reads it or not.[144]

Degree of Care and Burden of Proof.

A carrier of passengers is not an insurer.[145] Not only does the intelligence and volition of the person carried create a difference in the degree of care which it is proper to demand of the carrier, corresponding to the allowance for the inherent vice or disease of live stock, but the courts also recognize that one result of making carriers of passengers insurers would have been either the refusal of the carrier to undertake passenger traffic or their refusal of it except upon special contract affecting any individual case.[146] A carrier is not necessarily guilty of negligence, although it may have been possible to have prevented the damage;[147] but he is bound to exercise, at least, such diligence as a good specialist in such business is accustomed to use, and this must rise in proportion to the risk.[148] In-

v. Lockwood, 17 Wall. 357; Railway Co. v. Stephens, 95 U. S. 695; Jacobus v. St. Paul & C. R. Co., 20 Minn. 125 (Gil. 110). Et vide cases collected Whart. Neg. §§ 355, 641, and 641a.

[144] Rogers v. Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069; 12 N. Y. Law J. 80, reviewing authorities at length; Muldoon v. Seattle City Ry. Co. (Wash.) 38 Pac. 995. A collection of conflicting authorities on the right of a common carrier to exempt himself by contract from the consequences of his own negligence in the case of strictly free passengers, by Albert B. Davidson, 3 N. W. Law Rev. 191.

[145] White v. Boulton, Peake, 113 (this is the first case on the subject); Hubbard, J., in Ingalls v. Bills, 9 Metc. (Mass.) 1. Et vide Crofts v. Waterhouse, 11 Moore, 133; Bennett v. Dutton, 10 N. H. 481; Readhead v. Midland Ry. Co., L. R. 2 Q. B. 412, L. R. 4 Q. B. 379.

[146] Schouler, Bailm. § 652. A note, with numerous citations, as to the degree of care required towards passengers, 58 Am. & Eng. R. Cas. 73, 90, 110, 133, 194.

[147] Gilbert v. West End St. Ry. Co., 160 Mass. 403, 36 N. E. 60. But see Jackson v. Tollett, 2 Starkie, 37; Mayhew v. Boyce, 1 Starkie, 423; Card v. New York & H. R. Co., 50 Barb. (N. Y.) 39; Crofts v. Waterhouse, 3 Bing. 319.

[148] Whart. Neg. §§ 627-637. This standard is, however, severely criticised. Carrico v. West Virginia Cent. & P. Ry. Co., 35 W. Va. 389, 14 S. E. 12; Hutch. Carr. p. 403, note 1.

deed, the cases generally recognize that the carrier must exercise the utmost care under the circumstances, short of a warranty of the safety of the passenger.[149]

An injury to a passenger while on a carrier's vehicle is prima facie negligence, whether caused by defects of appliances, errors in operation, or by conduct of servants, according to the general,[150] but not

[149] Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Chicago & A. R. Co. v. Byrum, 153 Ill. 131, 38 N. E. 578; Chicago P. & St. L. Ry. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960; Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. 270; Gulf, C. & S. F. Ry. Co. v. Higby (Tex. Civ. App.) 26 S. W. 737; Douglas v. Sioux City St. Ry. Co. (Iowa) 58 N. W. 1070; Bischoff v. People's Ry. Co. (Mo. Sup.) 25 S. W. 908; Wilson v. Northern Pac. Ry. Co., 26 Minn. 278, 3 N. W. 333; International & G. N. R. Co. v. Welch, 86 Tex. 203, 24 S. W. 391; Taylor v. Pennsylvania Co., 50 Fed. 755; Jackson v. Grand Ave. Ry. Co., 118 Mo. 199, 24 S. W. 192; Gulf, C. & S. F. Ry. Co. v. Stricklin (Tex. Civ. App.) 27 S. W. 1093; Christie v. Griggs, 2 Camp. 79; Dunn v. Grand Trunk Ry. Co., 58 Me. 187; The New World v. King, 16 How. 469; Hutch. Carr. § 500 et seq. As to operation of horse-car lines, Noble v. St. Joseph & B. H. St. Ry. Co., 98 Mich. 249, 57 N. W. 126; Watson v. St. Paul City St. Ry. Co., 42 Minn. 46, 43 N. W. 904. An instruction that a carrier of passengers is bound to run and operate its cars "with the highest degree of care of a very prudent person, in view of all the facts and circumstances at the time of the alleged injury," does not require too high a degree of care. O'Connell v. St. Louis Cable & W. Ry. Co., 106 Mo. 482, 17 S. W. 494. And, generally, as to requirement of highest measure of care in conduct of business by common carriers, see Willock v. Railroad Co., 166 Pa. St. 184, 30 Atl. 948; Greenh. Pub. Pol. 513. Cable lines, Watson v. St. Paul City Ry. Co. 42 Minn. 46, 43 N. W. 904. Electric lines, Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269. To prevent electric shock from defective insulation, Burt v. Douglas Co. St. Ry. Co., 83 Wis. 229, 53 N. W. 447. Elevators, Mitchell v. Marker, 10 C. C. A. 306, 62 Fed. 139. A ferry, McLean v. Burbank, 11 Minn. 277 (Gil. 189), 12 Minn. 530 (Gil. 438).

[150] Stokes v. Saltonstall, 13 Pet. 181; 58 Am. & Eng. R. Cas. 294, collecting cases. New Jersey R. Co. v. Pollard, 22 Wall. 341; Kentucky & I. Bridge Co. v. Quinkert, 2 Ind. App. 244, 28 N. E. 338; Chicago, B. & Q. Ry. Co. v. Landauer, 39 Neb. 803, 58 N. W. 434; St. Louis & S. F. Ry. Co. v. Mitchell, 57 Ark. 418, 21 S. W. 883; Union Pac. Ry. Co. v. Porter, 38 Neb 226, 56 N. W. 808 (under statute); Bush v. Barnett, 96 Cal. 202, 31 Pac. 2; Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. 270; Skinner v. London, B. & S. C. Ry. Co., 5 Exch. 787; Sullivan v. Philadelphia & R. R. Co., 30 Pa. St. 234; New Orleans, J. & G. N. R. Co. v. Allbritton, 38 Miss. 242. Cf. Carpue v. London & B. Ry. Co., 5 Q. B. 747; Cornman v. Eastern Counties Ry. Co., 4 Hurl. & N. 781. As to statutory provisions, Omaha & R. V. Ry. Co. v.

universal,[151] opinion. Thus, the presumption of negligence arises from damage produced by a collision,[152] or derailment,[153] or an accident caused by a train coming in contact with a land slide.[154] If,

Cholette, 41 Neb. 578, 59 N. W. 921; Vail v. Broadway R. Co., 6 Misc. Rep. 20, 26 N. Y. Supp. 59. But see Herstine v. Lehigh Val. R. Co., 151 Pa. St. 244, 25 Atl. 104. To leave a switch out of place is per se negligence. State v. O'Brien, 32 N. J. Law, 169; Reg. v. Pargeter, 3 Cox, Cr. Cas. 191.

[151] Railroad Co. v. Mitchell, 11 Heisk. (Tenn.) 400; Texas & P. Ry. Co. v. Buckelew, 3 Tex. Civ. App. 272, 22 S. W. 994; Georgia R. Co. v. Anderson, 33 Ga. 110; Mitchell v. Western & A. R. Co., 30 Ga. 22; Illinois Cent. R. Co. v. Cragin, 71 Ill. 177; Deyo v. New York Cent. R. Co., 34 N. Y. 9; Holbrook v. Utica & S. R. Co., 12 N. Y. 236; Curtis v. Rochester & S. R. Co., 18 N. Y. 534. That plaintiff (passenger) must show freedom from contributory negligence, see Chamberlain v. Milwaukee & M. R. Co., 11 Wis. 238; Bonce v. Dubuque St. Ry. Co., 53 Iowa, 278, 5 N. W. 177; Aurora R. Co. v. Grimes, 13 Ill. 585.

[152] West Chicago St. Ry. Co. v. Martin, 47 Ill. App. 610; Kansas City, F. S. & M. R. Co. v. Stoner, 1 C. C. A. 231, 49 Fed. 209; North Baltimore Pass. Ry. Co. v. Kas Kell, 78 Md. 517, 28 Atl. 410; Little Rock & M. R. Co. v. Harrell, 58 Ark. 454, 25 S. W. 117; Fordyce v. Jackson, 56 Ark. 594, 20 S. W. 528, 597; Louisville & N. R. Co. v. Long, 94 Ky. 410, 22 S. W. 747. Collisions of vessels, The Woodrop Sims, 2 Dod. 83, and cases collected in great number in note 2, § 577, Wood's Browne, Car. p. 582. From the bursting of a boiler, Robinson v. New York Cent. & H. R. R. Co., 20 Blatchf. 338, 9 Fed. 877; Rose v. Stephens & C. Transp. Co., 20 Blatchf. 411, 11 Fed. 438; Illinois Cent. Ry. Co. v. Phillips, 49 Ill. 234, 55 Ill. 194; Caldwell v. New Jersey Steamboat Co., 56 Barb. (N. Y.) 425; or of a lamp, Wilkie v. Bolster, 3 E. D. Smith (N. Y.) 327.

[153] Mexican Cent. Ry. Co. v. Lauricella, 87 Tex. 277, 28 S. W. 277; Spellman v. Lincoln Rapid Transit Co., 36 Neb. 890, 55 N. W. 270. And see George v. St. Louis, I. M. & S. Ry. Co., 34 Ark. 613; Pittsburgh, C. & St. L. R. Co. v. Williams, 74 Ind. 462. Horses, Christie v. Griggs, 2 Camp. 79; Budd v. United Carriage Co., 25 Or. 314, 35 Pac. 660; Gardner v. Detroit St. Ry. Co., 99 Mich. 182, 58 N. W. 49; Israel v. Clark, 4 Esp. 259; cable-car company, Clow v. Pittsburgh Traction Co., 158 Pa. St. 410, 27 Atl. 1004; overturning of a car, Denver, S. P. & P. Ry. v. Woodward, 4 Colo. 1; or of a stage, Boyce v. California Stage Co., 25 Cal. 460; Payne v. Halstead, 44 Ill. App. 97; Lemon v. Chanslor, 68 Mo. 340; Ware v. Gay, 11 Pick. (Mass.) 106.

[154] Gleeson v. Virginia M. R. Co., 140 U. S. 435, 11 Sup. Ct. 859, overruling 5 Mackey, 356. So, washing away an embankment, Philadelphia & R. R. Co. v. Anderson, 94 Pa. St. 351; or of a road, Brehm v. Great Western R. Co., 34 Barb. (N. Y.) 256; giving way of bridge, Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442. Generally, an obstruction on a track. Sullivan v. Philadelphia & R. R. Co., 30 Pa. St. 34.

however, the injury was not in some way connected with the appliances and operation of the carrier, but was occasioned, for example, by the act of God, the injured person cannot recover. Therefore, where the accident was caused by the fall of a rock from a point more than 300 feet from the top of the cut of a railroad track, there was no presumption of negligence.[155] A fortiori, one cannot recover when he himself has been negligent, and his negligence is shown to have been the proximate cause of the wrong.[156]

Rules and Regulations.

A person may become a passenger before the transportation has actually commenced.[157] The duty of the carrier commences with the approach, and ends with the departure, of the passenger. The proposed passenger is bound to obey the reasonable rules of the company,[158] including the rules requiring the purchase of a ticket as evidence of right of passage.[159] Therefore, he may, under the company rules, be refused admittance to the trainway, unless he shows

[155] Fleming v. Pittsburgh, C., C. & St. L. Ry. Co., 158 Pa. St. 130, 27 Atl. 858. And see Andrews v. Chicago, M. & St. P. Ry. Co., 86 Iowa, 677, 53 N. W. 399; Gleeson v. Virginia M. R. Co., 140 U. S. 435, 11 Sup. Ct. 859.

[156] Chicago, B. & L. R. Co. v. Landauer, 39 Neb. 803, 58 N. W. 434; Illinois Cent. R. Co. v. Davidson, 12 C. C. A. 118, 64 Fed. 301. A collection of authorities on contributory negligence by passengers, 58 Am. & Eng. R. Cas. 326, 336, 358, 375, 393, 410.

[157] Rogers v. Kennebec Steamboat Co., 86 Me. 261, 29 Atl. 1069; Norfolk & W. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935. But a person, in possession of a ticket, who, while running from the street, across the company's tracks, outside the passenger station, apparently to catch a train about to start, is struck and killed by another train, has not become a passenger. Webster v. Fitchburg R. Co., 161 Mass. 298, 37 N. E. 165.

[158] Central Railroad & Banking Co. v. Strickland, 90 Ga. 562, 16 S. E. 352; Bancroft v. Boston & W. R. Co., 97 Mass. 275; Gonzales v. New York & H. R. Co., 38 N. Y. 440; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318. As to stopping of street cars, Jackson v. Grand Ave. Ry. Co., 118 Mo. 199, 24 S. W. 192. But passengers may ride on platforms notwithstanding contrary rule if the car is crowded and there is not sufficient room for passengers inside, and the care to be exercised by the carrier has reference to this principle. Matz v. St. Paul City Ry. Co., 52 Minn. 159, 53 N. W. 1071; Morris v. Eighth Ave. R. Co., 68 Hun, 39, 22 N. Y. Supp. 666; Holland v. West End St. Ry. Co., 155 Mass. 387, 29 N. E. 622; Highland Ave. & B. R. Co. v. Donovan, 94 Ala. 299, 10 South. 139.

[159] Van Dusan v. Grand Trunk Ry. Co., 97 Mich. 439, 56 N. W. 848; Pouilin

ticket; and, if he passes through without doing so, the gateman may return him, using no unnecessary force.[160] It is the duty of the intending passenger to inform himself as to regulations of the carrier, as to when, where, and how he can stop; and he boards the wrong train at his peril.[161] However, where a rule to go to the right required passengers, in leaving the cars, to go down steps, and cross what had become a stream of water, and then go under a bridge on an ungraded street, and the railroad company knew of the habit of passengers in disregarding such rule or notice, and crossing the tracks, as did the plaintiff, whereby he was killed, it was held that there was no obligation on the part of the plaintiff to cross the track by the underground public street, and that he was not guilty of negligence in law in turning to the left on leaving the car.[162] Nor need a passenger take notice of a rule of a railroad company which contravenes a statute.[163]

Before Entrance to Car.

The carrier is bound to exercise care in keeping approaches to his stations or wharf in a safe and suitable condition for passengers or licensees.[164] If, when one is about to purchase a ticket, he contracts a contagious disease from the ticket seller, knowledge of the fact of

v. Canadian Pac. Ry. Co., 3 C. C. A. 23, 52 Fed. 197. As to rule of time of paying fare, see Nye v. Railroad Co., 97 Cal. 461, 32 Pac. 530.

[160] Dickerman v. St. Paul Union Depot Co., 44 Minn. 433, 46 N. W. 907; Northern Cent. Ry. Co. v. O'Conner, 76 Md. 207, 24 Atl. 449.

[161] Beauchamp v. International & G. N. Ry. Co., 56 Tex. 239; Texas & P. Ry. Co. v. Ludlam, 6 C. C. A. 454, 57 Fed. 481. Et vide Ohio & M. Ry. Co. v. Brown, 46 Ill. App. 137; International & G. N. R. Co. v. Flores (Tex. Civ. App.) 26 S. W. 899. Damages can be recovered by error in representation by ticket seller as to the train being through train, without change, etc. Announcement of change in schedule must be brought home to plaintiff. Dye v. Virginia Ry., 19 Wash. Law Rep. 369.

[162] Chicago, M. & St. P. R. Co. v. Lowell, 151 U. S. 209, 14 Sup. Ct. 281. Et vide Dublin, W. & W. Ry. Co. v. Slattery, 3 App. Cas. 1155.

[163] Robinson v. Southern Pac. Co., 105 Cal. 526, 38 Pac. 94.

[164] Gilmore v. Philadelphia & R. R. Co., 154 Pa. St. 375, 25 Atl. 774; Johns v. Charlotte, C. & A. R. Co., 39 S. C. 162, 17 S. E. 698. Thus, the platform should be properly lighted, Buenemann v. St. Paul, M. & M. Ry. Co., 32 Minn. 390, 20 N. W. 379; Galveston, H. & S. A. R. Co. v. Thornsberry (Tex. Sup.) 17 S. W. 521; and properly prepared for alighting by passengers, Falls v. San Francisco & N. P. R. Co., 97 Cal. 114, 31 Pac. 901; Fullerton v. For-

disease by the company makes it liable.[165] The carrier is liable for the violence of his servants; as, for example, a baggage clerk.[166] Refusal to carry may be a ground of action;[167] but the duty to stop and afford a safe place for taking on passengers applies only to customary stopping places.[168]

In Transit.

The duty of diligence applies not only as to safe stations, wharves, and approaches, but also to providing, maintaining, and inspecting

dyce, 121 Mo. 1, 25 S. W. 587; Johnson v. Winona & St. P. R. Co., 11 Minn. 296 (Gil. 204); Keller v. Sioux City & St. P. Ry. Co., 27 Minn. 178, 6 N. W. 486. Cf. Bernhardt v. Western Pennsylvania R. Co., 159 Pa. St. 360, 28 Atl. 140 (where a passenger stepped on a bung from a keg), and Poole v. Consolidated St. Ry. Co., 100 Mich. 379, 59 N. W. 390 (where a steep bank was allowed to remain at a place for alighting from cars); Fullerton v. Fordyce, 25 S. W. 587 (where a broken plank in platform was allowed to be unrepaired for four days). As to duty to warn passenger of danger of alighting from rear platform, see McDonald v. Illinois Cent. R. Co., 88 Iowa, 345, 55 N. W. 102; York v. Canada Atlantic Steamship Co., 22 Can. Sup. Ct. R. 167; Mullen v. Oregon, S. L. & U. N. Ry. Co., 22 Or. 430, 30 Pac. 222. But cf. Seddon v. Bickley, 153 Pa. St. 271, 25 Atl. 1104; an inadequate gate for cheap excursions may prove an expensive luxury. Taylor v. Pennsylvania Co., 50 Fed. 755; Falk v. New York & S. W. R. Co., 56 N. J. Law, 380, 29 Atl. 157; Cazneau v. Fitchburg R. Co., 161 Mass. 355, 37 N. E. 311; Race v. Union Ferry Co., 138 N. Y. 644, 34 N. E. 280; East Tennessee, V. & G. Ry. Co. v. Watson, 94 Ala. 634, 10 South. 228. A collection of authorities as to the duties and obligations of railroad companies to passengers at station, 38 Am. & Eng. R. Cas. 182, 190.

[165] Long v. Chicago, K. & W. R. Co., 48 Kan. 28, 28 Pac. 977.

[166] Dean v. St. Paul Union Depot Co., 41 Minn. 360, 43 N. W. 54.

[167] Hamlin v. Great Northern Ry. Co., 1 Har. & N. 408, 26 Law J. Exch. 20; Buckmaster v. Great Eastern Ry. Co., 23 Law. T. (N. S.) 471. If the ticket holder is drunk, he may properly be kept off a train in motion, but not when he has so far boarded the train that it will be less dangerous to leave him alone. Harrold v. Winona & St. P. R. Co., 47 Minn. 17, 49 N. W. 389; Louisville & N. Ry. Co. v. Johnson, 92 Ala. 204, 9 South. 269. And, further, as to refusal of admission to cars, see Galveston, H. & S. A. R. Co. v. McMonigal (Tex. Civ. App.) 25 S. W. 341.

[168] The fact that after plaintiff had entered the train the conductor treated him as a passenger, by collecting his fare from the next station, does not affect his relation to the company at the time of the injury. Georgia Pac. Ry. Co. v. Robinson, 68 Miss. 643, 10 South. 60. Cf. Evans v. Interstate Rapid-Transit Ry. Co., 106 Mo. 594, 17 S. W. 489.

proper roadways, rolling stock, engines, cars, and other vehicles, and, generally, places, appliances, and instrumentalities used in the carriage of passengers.[169]

The rule as to use of improvements and devices to prevent injury corresponds to the duty of the master to provide suitable appliances and machinery for the servant.[170] The carrier is bound to exercise

[169] The Northern Belle v. Robson, 9 Wall. 526 (inspection of barge). Et vide Eldridge v. Minneapolis & St. L. R. Co., 32 Minn. 253, 20 N. W. 151; Simmons v. New Bedford, V. & N. S. S. Co., 97 Mass. 361; Meir v. Pennsylvania R. Co., 64 Pa. St. 225; Caveny v. Neely (S. C.) 20 S. E. 806. As to defective bridge, not owned by defendant, Burningham v. Rochester City & B. R. Co., 137 N. Y. 13, 32 N. E. 995. Cf. Grote v. Chester & H. R. Co., 2 Exch. 254. As to roadbed, Gulf, C. & S. F. Ry. Co. v. Killebrew (Tex. Civ. App.) 20 S. W. 1005, reversing 20 S. W. 182 (Tex. Sup.). A railroad track must be laid and maintained in safe running order with reference to the strain to which it is subjected. 2 Redf. R. R. § 192; Withers v. North Kent R. Co., 2 Hurl. & N. 969; Read v. Spaulding, 5 Bosw. (N. Y.) 395, 30 N. Y. 630; O'Donnell v. Allegheny R. Co., 50 Pa. St. 490, 59 Pa. St. 239; Tyrrell v. Eastern R. Co., 111 Mass. 546. As to defects in doors and windows of cars in absence of guards, see New Orleans & C. R. Co. v. Schneider, 8 C. C. A. 571, 60 Fed. 210. A carrier cannot be deemed negligent because the door of a passenger car was not all glass above the middle, so that persons could see each other coming to the door. Graeff v. Philadelphia & R. R. Co., 161 Pa. St. 230, 28 Atl. 1107. Steps on platforms, Matz v. St. Paul City Ry. Co., 52 Minn. 159, 53 N. W. 1071. As to failure to close gates of street cars, Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406. Derailment caused by rotten ties is prima facie evidence of negligence. Louisville, N. A. & C. Ry. Co. v. Miller (Ind. Sup.) 37 N. E. 343. As to broken rail, see Canadian Pac. R. Co. v. Challfoux, 22 Can. Sup. Ct. R. 721. Stanchion on ferryboat, Louisville & J. Ferry Co. v. Nolan, 34 N. E. 710. Failure to provide safe horses, see Knight v. Pacific Coast Stage Co. (Cal.) 34 Pac. 868. But full 20 minutes for dinner is not part of its equipment, Texas Trunk Ry. Co. v. Mullins (Tex. App.) 18 S. W. 790; nor is an alarm clock in form of a conductor or a bell to waken passengers at destination, Nichols v. Chicago & W. M. Ry. Co., 90 Mich. 203, 51 N. W. 364; Gulf, C. & S. F. Ry. Co. v. Ryan (Tex. App.) 18 S. W. 866; Texas & P. Ry. Co. v. White (Tex. App.) 17 S. W. 419–421; Samuels v. Richmond & D. R. Co., 35 S. C. 493, 14 S. E. 943.

[170] Jackson v. Metropolitan R. Co., 2 C. P. Div. 125; Caldwell v. New Jersey S. S. Co., 47 N. Y. 282; Baltimore & O. R. Co. v. State, 29 Md. 252; Taylor v. Grand Trunk R. Co., 48 N. H. 304; Steinweg v. Erie R. Co., 43 N. Y. 123; Toledo, P. & W. R. Co. v. Conroy, 68 Ill. 560. It is for the jury to determine whether reasonable diligence requires that a street-railroad com-

commensurate care, in view of all the circumstances, to prevent damage to its passengers by the operation of its means of conveyances, and in avoiding sudden starts and stops,[171] danger from curves,[172] or a dangerous rate of speed.[173] It is negligence not to announce, or to wrongly announce, stations,[174] but not to neglect to

pany should place guards in front of the car windows in order to prevent passengers from exposing their arms. New Orleans & C. R. Co. v. Schneider, S C. C. A. 571, 60 Fed. 210. Whether it is negligence not to have a chain across the space between the railings on the rear platform of a passenger car in a mixed train is a question for the jury. Newton v. Central Vermont R. Co. (Sup.) 30 N. Y. Supp. 488.

171 Starts and stops, Holmes v. Allegheny Traction Co., 153 Pa. St. 152, 25 Atl. 640; Yarnell v. Kansas City, Ft. S. & M. R. Co., 113 Mo. 570, 21 S. W. 1; North Chicago St. R. Co. v. Cook, 145 Ill. 551, 33 N. E. 958; Bowdle v. Railway Co. (Mich.) 61 N. W. 529; Poole v. Georgia Railroad & Banking Co., 89 Ga. 320, 15 S. E. 321; Cassidy v. Atlantic Ave. R. Co., 9 Misc. Rep. 275, 29 N. Y. Supp. 724; Hill v. West End St. Ry. Co., 158 Mass. 458, 33 N. E. 582; Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204. As to street cars where passengers are alighting, Cawfield v. Asheville St. Ry. Co., 111 N. C. 597, 16 S. E. 703; Chicago, B. & Q. Ry. Co. v. Landauer, 36 Neb. 642, 54 N. W. 976; Robinson v. Northampton St. Ry. Co., 157 Mass. 224, 32 N. E. 1; Conway v. Railroad Co., 46 La. Ann. 1429, 16 South. 362; Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 13 Sup. Ct. 557.

172 Lynn v. Southern Pac. Co., 103 Cal. 7, 36 Pac. 1018; Francisco v. Troy & L. R. Co., 78 Hun, 13, 29 N. Y. Supp. 247; Brusch v. St. Paul City Ry. Co., 52 Minn. 512, 55 N. W. 57. Et vide Seymour v. Citizens' Ry. Co., 114 Mo. 266, 21 S. W. 739; Highland Ave. & B. R. Co. v. Donovan, 94 Ala. 299, 10 South. 139.

173 Andrews v. Chicago, M. & St. P. Ry. Co., 86 Iowa, 677, 53 N. W. 399; Chicago, P. & St. L. Ry. Co. v. Lewis, 145 Ill. 67, 33 N. E. 960; Pennsylvania Co. v. Newmeyer, 129 Ind. 401, 28 N. E. 860; Willmot v. Corrigan Consol. St. Ry. Co., 106 Mo. 535, 17 S. W. 490; Mexican Cent. Ry. Co. v. Lauricella, 87 Tex. 277, 28 S. W. 277. As to effect of municipal ordinance, Cogswell v. West St. & N. E. Electric Ry. Co., 5 Wash. 46, 31 Pac. 411.

174 Pennsylvania Co. v. Hoagland, 78 Ind. 203. Cf. Railroad Co. v. Aspelle, 23 Pa. St. 147. Recovery has been allowed for failure of sleeping-car company to awaken passenger at destination. Pullman Palace-Car Co. v. Trimble (Tex. Civ. App.) 28 S. W. 96. Where a train stops between stations on account of a wreck, and the passengers leave the train without objection from the conductor, it is negligence to start the train without first giving the passengers timely warning to return. Gulf, C. & S. F. Ry. Co. v. Roundtree (Tex. Civ. App.) 25 S. W. 989.

state that the train will stop at a railroad crossing before it reaches the next station.[175]

While a railroad company may not be bound to accept as a passenger a person unable to take care of himself, it is liable for negligence in exercising proper care and furnishing sufficient assistance to such person after it has voluntarily received him as a passenger. This is a logical application of the general principle that care has reference to the passenger's physical and mental condition.[176] This care extends even to a person manifestly intoxicated.[177]

The carrier is liable for the torts of his servants, including their negligence, as well as willful or wanton wrongs.[178] A carrier is not

[175] Minock v. Detroit, G. H. & M. Ry. Co., 97 Mich. 425, 56 N. W. 780.

[176] Weightman v. Louisville, N. O. & T. Ry. Co., 70 Miss. 563, 12 South. 586, distinguishing Sevier v. Vicksburg & M. R. Co., 61 Miss. 8; Meyer v. St. Louis, I. M. & S. Ry. Co., 4 C. C. A. 221, 54 Fed. 116; Sawyer v. Dulany, 30 Tex. 479; Sheridan v. Brooklyn, C. & N. R. Co., 36 N. Y. 39; Philadelphia C. P. Ry. Co. v. Hassard, 75 Pa. St. 367; Allison v. C. & N. W. R. Co., 42 Iowa, 274; Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568–584; Indianapolis, P. & C. R. Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, and 10 N. E. 70; Croom v. Chicago, M. & St. P. Ry. Co., 52 Minn. 296, 53 N. W. 1128.

[177] Fisher v. West Virginia & P. R. Co. (W. Va.) 19 S. E. 578.

[178] If a conductor advise a passenger to leave a train in motion, and he does so, to his injury, the company is liable. Jones v. Chicago, M. & St. P. Ry. Co., 42 Minn. 183, 43 N. W. 1114. Et vide Irish v. Northern Pac. R. Co., 4 Wash. 48, 29 Pac. 845; Prothero v. Citizens' St. Ry. Co., 134 Ind. 431, 33 N. E. 765; Galloway v. Chicago, R. I. & P. R. Co., 87 Iowa, 458, 54 N. W. 447; Thomas v. Charlotte, C. & A. R. Co., 38 S. C. 485, 17 S. E. 226; Leggett v. Western New York & P. R. Co., 143 Pa. St. 39, 21 Atl. 996. Cf. Wilburn v. St. Louis, I. M. & S. R. Co., 48 Mo. App. 224. So, if an incompetent engineer bursts a boiler, the company is liable. Fay v. Davidson, 13 Minn. 523 (Gil. 491); or where a grip man lost control of a cable car, Bishop v. St. Paul City Ry. Co., 48 Minn. 26, 50 N. W. 927; Spohn v. Missouri Pac. Ry. Co., 116 Mo. 617, 22 S. W. 690; Citizens' St. R. Co. v. Willoeby, 134 Ind. 563, 33 N. E. 627; Indianapolis Union Ry. Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219; East Tennessee, V. & G. R. Co. v. Fleetwood, 90 Ga. 23, 15 S. E. 778. Under allegations that plaintiff was knocked and kicked from defendant's railway train by its conductor, he may recover on proof that the conductor alarmed him to such an extent that he jumped off the train. Texas & P. Ry. Co. v. Williams, 10 C. C. A. 463, 62 Fed. 440. A carrier is not liable in damages for an injury caused to a passenger by its servant under circumstances which free the servant from all criminal or civil responsibility. New Or-

necessarily liable for the torts of one passenger committed on another; but if the servants of the carrier have knowledge that there is an occasion for interference, for example, to afford protection against drunken and violent men, the company will be liable in damages for failure to exercise the power with which such employé is clothed by law.[179]

Termination of Liability.

A carrier owes to passengers the duty of allowing a reasonable time in which to alight, and providing a safe place therefor.[180] This duty may extend to assistance to a passenger in alighting because of

leans & N. E. R. Co. v. Jopes, 142 U. S. 18, 12 Sup. Ct. 109. A short note as to what constitutes wrongful expulsion of passengers from a train, 58 Am. & Eng. R. Cas. 467, 477, 491, 537, 544.

[179] Richmond & D. R. Co. v. Jefferson, 89 Ga. 554, 16 S. E. 69; Graeff v. Philadelphia & R. R. R., 161 Pa. St. 230, 28 Atl. 1107; Wright v. Chicago, B. & Q. R. Co., 4 Colo. App. 102, 35 Pac. 196; Thompson v. Manhattan Ry. Co., 75 Hun, 548, 27 N. Y. Supp. 608; Evansville & I. R. Co. v. Darting, 6 Ind. App. 375, 33 N. E. 636; Sira v. Wabash R. Co., 115 Mo. 127, 21 S. W. 905; Meyer v. St. Louis, I. M. & S. R. Co., 10 U. S. App. 677, 4 C. C. A. 221, and 54 Fed. 116; Ellinger v. Philadelphia, W. & B. R. Co., 153 Pa. St. 213, 25 Atl. 1132; Pounder v. North Eastern Ry. Co. [1892] 1 Q. B. 385. As to injury by insane fellow passenger, see Meyer v. St. Louis, I. M. & S. R. Co., 4 C. C. A. 221, 54 Fed. 116. Plaintiff, a boy 14 years old, was a passenger on one of defendant's street cars. The car was crowded, and he was standing on the front platform, leaning against the dasher. He either fell off, or, as he claimed, was pushed off by passengers getting off, and was run over. *Held*, that there was no error in charging that defendant was not liable for the conduct of the passengers unless it was unusual and disorderly, and could have been prevented by the persons who had charge of the car at the time. Randall v. Frankford & S. P. C. P. R. Co., 139 Pa. St. 464, 22 Atl. 639. And see Gulf, C. & S. F. Ry. Co. v. Shields (Tex. Civ. App.) 28 S. W. 709, to the effect that whether railroad employés were negligent in not going to the assistance of a passenger whose clothes caught fire from alcohol spilled by a fellow passenger is a question for the jury. And see Pittsburgh & C. R. Co. v. Pillow, 76 Pa. St. 510.

[180] McSloop v. Richmond & D. R. Co., 59 Fed. 431; Richmond & D. R. Co. v. Smith, 92 Ala. 237, 9 South. 223; Jackson v. Grand Ave. Ry. Co., 118 Mo. 199, 24 S. W. 192. Et vide authorities collected in 58 Am. & Eng. R. Cas. 238, 244, 257. And as to liability of street-car company to passengers boarding and alighting from moving cars, see 58 Am. & Eng. R. Cas. 198, 208, 222-229. But the duty does not extend to furnishing a passenger a safe path

physical condition [181] or other circumstances.[182] But it does not require protection from the rush of alighting passengers, unless there be reasonable danger to the passenger, or he is in some measure unable to take care of himself.[183] The duty to stop a train at its destination, and to afford reasonable opportunity to alight, follows naturally; [184] and if one, while about to alight at such place, is injured by a premature starting of the train, he may recover.[185] If, however, the stopping point be not the customary one, it will depend upon circum-

for further progress after he has left the train at a place where there is not a regular station. Buckley v. Old Colony R. Co., 161 Mass. 26, 36 N. E. 583. Passengers are presumed to know manifestly obvious dangers in places where they alight. Bigelow v. West End St. R. Co., 161 Mass. 393, 37 N. E. 367. But see Ohio & M. Ry. Co. v. Stansberry, 132 Ind. 533, 32 N. E. 218.

[181] Madden v. Port Royal & W. C. Ry. Co. (S. C.) 19 S. E. 951.

[182] Toledo, St. L. & K. C. R. Co. v. Wingate (Ind. Sup.) 37 N. E. 274; Campbell v. Alston (Tex. Civ. App.) 23 S. W. 33; Croom v. Chicago, M. & St. P. R. Co., 52 Minn. 296, 53 N. W. 1128 (a man 80 years old).

[183] Jarmy v. Duluth St. R. Co., 55 Minn. 271, 56 N. W. 813.

[184] Caldwell v. Richmond & D. R. Co., 89 Ga. 550, 15 S. E. 678; Thomas v. Charlotte, C. & A. R. Co., 38 S. C. 485, 17 S. E. 226; Sira v. Wabash R. Co., 115 Mo. 127, 21 S. W. 905; Louisville & N. R. Co. v. Dancy, 97 Ala. 338, 11 South. 796; Louisville & N. R. Co. v. Lewis (Ky.) 21 S. W. 341; East Tennessee, V. & G. Ry. v. Hyde, 89 Ga. 721, 15 S. E. 621.

[185] Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 13 Sup. Ct. 557; Robinson v. Northampton St. Ry. Co., 157 Mass. 224, 22 N. E. 1; Chicago, B. & Q. R. Co. v. Landauer, 36 Neb. 642, 54 N. W. 976; Carr v. Railroad Co., 98 Cal. 366, 33 Pac. 213; Hill v. West End St. Ry. Co., 158 Mass. 458, 33 N. E. 582; Chicago & A. R. Co. v. Arnol, 144 Ill. 261, 33 N. E. 204 (46 Ill. App. 157, affirmed); Gilbert v. West End St. Ry. Co., 160 Mass. 403, 36 N. E. 60; Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406; Onderdonk v. New York & S. B. Ry. Co., 74 Hun, 42, 26 N. Y. Supp. 310; Bernstein v. Dry Dock, E. B. & B. R. Co., 72 Hun, 46, 25 N. Y. Supp. 669; Tobin v. Omnibus Cable Co. (Cal.) 34 Pac. 124; Texas & P. Ry. Co. v. Bryant (Tex. Civ. App.) 26 S. W. 167; Texas & P. Ry. Co. v. Mitchell, Id. 154; Illinois Cent. R. Co. v. Taylor, 46 Ill. App. 141; Chicago & A. Ry. Co. v. Byrum, 48 Ill. App. 41; Warbowisky v. Ft. Wayne & E. Ry. Co., 86 Mich. 236, 48 N. W. 1097. In an action against a railroad company for injuries to a passenger in alighting from a train, it was proper to show that a brakeman on the train remarked at the time of the accident that "it beats hell; they cannot stop long enough to let people get off." Omaha & R. V. Ry. Co. v. Chollette, 41 Neb. 578, 59 N. W. 921.

stance whether or not such person assumed the risk of alighting from the car while in motion.[186]

[186] Cf. Bowie v. Greenville St. Ry. Co., 69 Miss. 196, 10 South. 574, where plaintiff was not guilty of contributory negligence, with Barnett v. East Tennessee, V. & G. Ry. Co., 87 Ga. 766, 13 S. E. 904. Et vide Robinson v. Northampton St. Ry. Co., 157 Mass. 224, 32 N. E. 1.

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