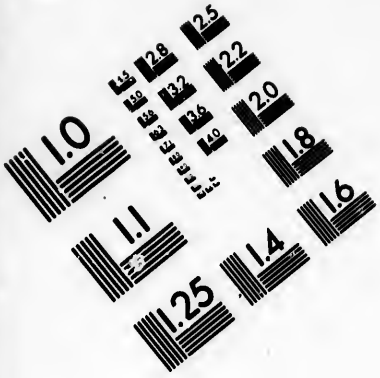

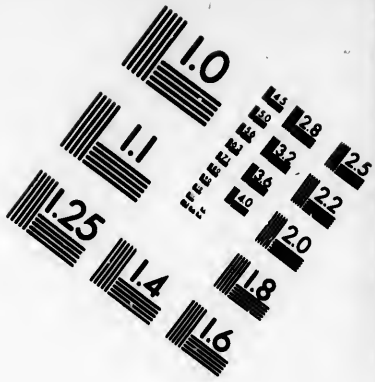

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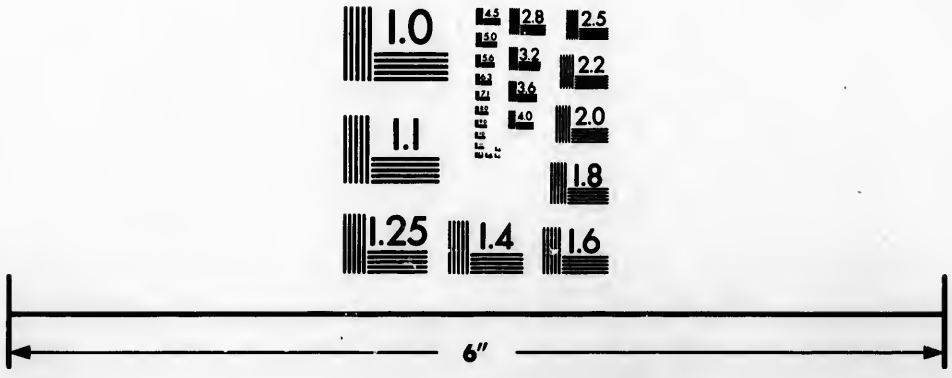

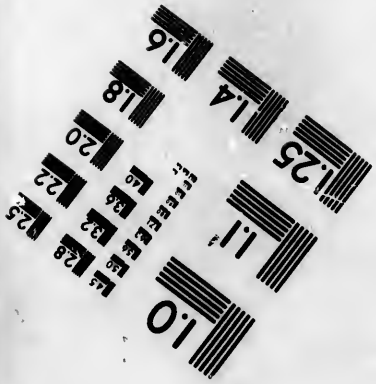

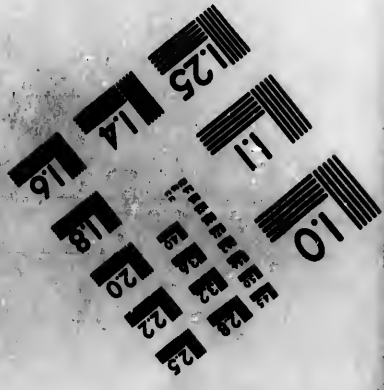

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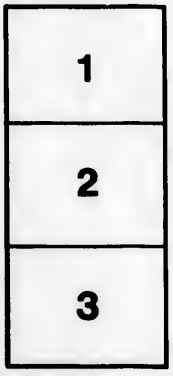

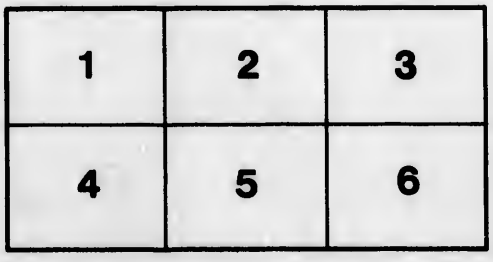

UNDERHILL'S

LAW OF TORTS.

SEVENTH ENGLISH EDITION

AND

FIRST CANADIAN EDITION.

A SUMMARY

OF THE

LAW OF TORTS;

OR,

WRONGS INDEPENDENT OF CONTRACT.

BY

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OF LINCOLN'S INN, ESQUIRE, BARRISTER-AT-LAW,

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SEVENTH EDITION

BY THE AUTHOR;

ASSISTED BY

HUBERT STUART MOORE,

OF THE INNER TEMPLE, ESQUIRE, BARRISTER-AT-LAW.

CANADIAN EDITION

BY

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PREFACE

TO

CANADIAN EDITION.

Mr. Underhill's work on Torts is now so well-known on both sides of the Atlantic, that no apology is needed for the issue of a Canadian Edition.

The method adopted throughout the work has been to amplify the author's system of principle and illustration, by adding, whenever they exist, illustrations from the Canadian reports. The statutory legislation of both the Federal and Provincial Parliaments has been noted, and in this manner the principles of the law of Torts so clearly stated in the text will, it is hoped, be made clearer still to the Canadian practitioner and student. The *dicta* of Canadian Judges has also been added whenever they serve to elucidate the principles in the text. The judgments of such men as Sir John Beverley Robinson, Chief Justice Hagarty, and the present Chief Justice of Canada, contain so many statements of general principles that they might well in themselves form the groundwork of a separate treatise on the subject of Torts. But the basis of Canadian law being the common law of England, a

purely Canadian work is unnecessary—indeed, such a work would be incomplete without numerous references to the leading English cases.

The present Edition of "Underhill on Torts" is therefore issued for the use of the profession in Canada in the hope that it may prove a welcome addition to the legal literature of the Dominion.

A. C. FORSTER BOULTON.

2, Pump Court, Temple, E.C.
September, 1900.

PREFACE

TO

THE SEVENTH EDITION.

MANY of my friends and clients have expressed surprise that an Equity and Conveyancing Counsel should have written a Treatise on the Law of Torts. The answer is, that every lawyer, whatever his speciality may be, ought to know the *principles* of every branch of the law; and, in my student days, my endeavours to fathom the principles of the Law of Torts were surrounded with so much unnecessary difficulty, owing to the absence of any text-book separating *principle* from *illustration*, that I became convinced that a new crop of students would welcome even such a guide as I was capable of furnishing. The result has proved that I was not mistaken.

Indeed, however useful the great treatises then existing were for the practitioner, they were almost useless to the student. In the first place, to his unaccustomed mind they presented a mere chaos of examples, for the most part unexplained, and, in the absence of explanation, seeming very often in direct contradiction. What student without careful explanation would grasp the difference between *Fletcher* v. *Rylands*, and *Nichols* v. *Marsland* for instance?

In the second place, the men are few indeed who can trust their memories to retain the contents of a large treatise with accuracy; and although that is not necessary, yet it *is* essential that they should accurately remember the *principles* of the law.

For these and other reasons, I ventured to write this work, and I still think that if a student will *thoroughly master* it, he will know as much of the *principles* of the Law of Torts as will suffice to make him a competent general practitioner, and to pass him through his examinations so far as that subject is concerned.

I do not assert for one instant that it will enable him to answer every case that comes before him, but I am not acquainted with any man whose mental stock enables him to do this. In the vast majority of cases the practitioner who has any regard for the interests of his clients, or the reputation of himself, will turn to his digests and his reports; for however well he may understand the principles of the law, it is only very long practice indeed, or the intuition of genius, which enable him to apply these principles to particular complicated facts with ease and certainty.

The present Edition contains the latest leading authorities on the subject which have been decided between the issue of the last Edition and the end of January, 1900, together with a few American and Colonial decisions, which seemed to me to be both good law and excellent illustrations of principles.

Lastly, I have to express my thanks to my friends Mr. J. GERALD PEASE, of the Inner Temple and Western

Circuit, Barrister-at-Law, and Mr. HUBERT STUART MOORE, of the Inner Temple, Barrister-at-Law, for their kind assistance in the preparation of this Edition. The former has revised the proof sheets of the whole of Part II, and the latter, in addition to general assistance, has written the articles upon Fisheries and Ferries.

ARTHUR UNDERHILL.

5, NEW SQUARE, LINCOLN'S INN, W.C.
March, 1900.

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INTRODUCTION.

INTRODUCTION

"THE maxims of law," says Justinian, "are these: To live honestly, to hurt no man, and to give every one his due." The practical object of law must necessarily be to enforce the observance of these maxims, which is done by punishing the dishonest, causing wrongdoers to make reparation, and insuring to every member of the community the full enjoyment of his rights and possessions.

Infractions of law are, for the purposes of justice, divided into two great classes: viz., public and private injuries. The former—commonly called crimes—consist of such offences as, aiming at the root of society and order, are considered to be injuries to the community at large; and as no redress can be given to the community, except by the prevention of such acts for the future, they are visited with some deterrent and exemplary punishment.

Private or civil injuries, on the other hand, are such violations or deprivations of the legal rights of another, as are accompanied by either actual or presumptive damage. These, being merely injuries to private individuals, admit of redress. The law, therefore, affords a remedy by forcing the wrongdoer to make reparation.

But as injuries are divided into criminal and civil, so the latter are subdivided into two classes, of injuries

ex contractu and injuries *ex delicto*—the former being such as arise out of the violation of duties undertaken by contract, and the latter (commonly called torts) such as spring from the violation of duties imposed by law, to the performance or observance of which every member of the community is entitled as against the world at large.

Although, however, these divisions are broadly correct, the border line between them is by no means well defined. Indeed, from the very nature of things, each division must to some extent overlap another one. Thus the same set of circumstances may constitute a crime, a tort, and a breach of contract. At the same time, as those circumstances may be regarded from each of the three points of view, no confusion ensues from the fact that they cannot be exclusively placed in any one of the three classes.

In this work an attempt will be made to state the principles which the law applies to those facts which constitute torts.

PART I.

RULES RELATING TO TORTS IN GENERAL.

CHAPTER I.

OF THE NATURE OF A TORT.

ART 1.—*Definition of a Tort.*

A TORT is an act or omission which, independent of contract, is unauthorized by law, and results either in the infringement of some absolute right to which another is entitled, or in the infliction upon him of some substantial loss of money, health, or material comfort beyond that suffered by the rest of the public, and which infringement or infliction of loss is remediable by an action for damages.[1]

No one has yet succeeded in formulating a perfectly satisfactory definition of a Tort; indeed, it may be doubted whether a scientific definition, which would at the same time convey any notion to the mind of the student, is possible.

Canadian Cases.

[1] "There is no case, that I am aware of, that supports the proposition, that a wrongful act committed by a defendant, which causes damage to another, without any default of the person receiving the damage, is not actionable" (*Vars* v. *Grand Trunk R. W. Co.*, 23 *U. C. C. P.* 150—Gwynne, J.).

A tort is described in the Common Law Procedure Act, 1852, as "a wrong independent of contract." If we use the word "wrong," as equivalent to violation of a right recognized and enforced by law by means of an action for damages, the definition is sufficiently accurate, but scarcely very lucid; for it gives no clue as to what constitutes a wrong or violation of a right recognized and enforced by law.[2]

A recently published text book (*a*), by a distinguished American Lawyer, defines a tort as a breach of duty fixed by law, and redressible by a suit for damages; but this definition does not seem to convey much information to the reader, and confessedly requires an elaborate explanatory dissertation.

Perhaps Sir Frederick Pollock, in his work on torts (*b*), gives the most complete definition; but I cannot help thinking that, excellent as it is, the student is more likely to grasp the legal meaning of the word "tort" from the brief definition which I have attempted.

It will be perceived from this, that three distinct factors are necessary to constitute a tort according to our law. First, there must be some act or omission on the part of the person committing the tort (the

(*a*) Bigelow's Elements of the Law of Torts.
(*b*) See Pollock on Torts, p. 19.

Canadian Cases.

[2] The owner of land adjoining a highway has, under R. S. O., c. 187 [now R. S. O., 1897, c. 243, sect. 6], such a special property in the shade and ornamental trees growing on such highway opposite to his land as to entitle him to maintain an action against a wrongdoer to recover damages for the cutting down or destroying such trees, and he is not restricted to the penalty given by section 5 (*Douglas* v. *Fox*, 31 *U. C. C. P.* 140; and see *post*, p. 43).

defendant), unauthorized by law, and not being a breach of some duty undertaken by contract. Secondly, this wrongful act or omission must, in some way, inflict an injury, special, private, and peculiar to the plaintiff, as distinguished from an injury to the public at large; and this may be either by the violation of some right *in rem*, that is to say, some right to which the plaintiff is entitled as against the world at large, or by the infliction on him of some particular and substantial loss of money, health, or material comfort. Thirdly, the wrongful act injurious to the plaintiff must fall within some class of cases for which the recognized legal remedy is an action for damages.

It is desirable that the effect of the absence of any one of these three factors should be examined a little more closely.

One often sees it stated in legal works that a *damnum absque injuriâ* is not actionable, but that an *injuria sine damno* is. This jingle has probably puzzled many generations of students, but it comes to very little when dissected.

By *damnum* is meant damage in the *substantial* sense of money, loss of comfort, service, health, or the like. By *injuria* is meant an unauthorized interference, however trivial, with some general right conferred by law on the plaintiff (*ex. gr.* the right of excluding others from his house or garden). All that the maxims come to, therefore, is this, that no action lies for mere damage (*damnum*), however substantial, caused without breach of law, but that an action does lie for interference with another's legal private rights, even where unaccompanied with damage. *Injuria*, therefore, in the maxim, is not equivalent to breach of law,

but to that limited kind of breach of law which consists in the violation of another's private rights.[3]

Read by the light of these observations, both the maxims in question are correct. For the interruption of a legal right, however temporary and however slight, is considered by the law to be damaging, and a proper subject for reparation; and substantial damages have

Canadian Cases.

[3] An action on the case in the nature of a conspiracy, does not lie against a person for supplanting another in the purchase of goods, which had first been contracted for by the latter party, and in every action on the case in the nature of a conspiracy, the declaration must expressly aver malice on the part of the defendant (*Davis* v. *Minor*, 2 *U. C. R.* 464. But see *Ont. Copper Lightning Rod Co.* v. *Hewitt*, *post*, p. 12, and *Armstrong* v. *Lewin*, 34 *U. C. R.* 629).

Whenever an act done would be evidence against the existence of a right, that is an injury to the right, and the party injured may bring an action in respect of it (*Mitchell* v. *Barry*, 26 *U. C. R.* 416).

"The rule has been firmly established that a railway company authorized by law to use locomotive engines, cannot be held liable for injuries occasioned by sparks escaping from the engine, without proof of negligence. The statutory authority is their warrant, and any loss occasioned by the engine would be *damnum absque injuriâ*" (*Canada Central R. W. Co.* v. *McLaren*, 8 *O. A. R.* 583—Burton, J. A.; and *post*, p. 306).

Where a husband leaves his wife to live in adultery with another woman by her procurement, and lives and continues by such procurement to live in adultery with her, whereby his affections are alienated from his wife and she is deprived of her means and support, an action lies at common law against such a woman (*Quick* v. *Church*, 23 *O. R.* 262).

An action will lie by a husband against his father-in-law when the latter has, without sufficient cause, by a display of force taken the wife away from the house of her husband against his will, she continuing absent, whereby he has lost the comfort and help of her society; and substantial damages may be awarded in such a case (*Metcalf* v. *Roberts et al.*, 23 *O. R.* 130).

more than once (in cases of false imprisonment) been awarded, where the plaintiff's surroundings were very considerably improved during his unlawful detention. But when no private right (*ex. gr.* liberty) has been invaded by a wrongful act, then no action will lie unless the plaintiff has sustained actual loss or damage.

The reason for all this is very clear. In the case of the invasion of a private right, there is a particular damage inflicted on the plaintiff, and that by means of a wrongful act, and therefore the defendant ought to make reparation. But where no private right is infringed, and no particular damage inflicted, but merely an act or omission not authorized by law is committed or made, there the grievance (if grievance it be) is one properly affecting the public and not any private individual in particular; and if every member of the public were allowed to bring actions in respect of it, there would be no limit to the number of actions which might be brought (*Winterbottom* v. *Lord Derby*, *L. R.* 2 *Ex.* 316). The remedy of the public is by indictment, if the unlawful act amounts to so serious a dereliction of duty as to constitute an injury to the public. But if, in addition to the injury to the public, a special, peculiar, and substantial damage is occasioned to an individual, then it is only just that he should have some private redress (see *Lyon* v. *Fishmongers' Co.*, 1 *App. Cas.* 662; and *Fritz* v. *Hobson*, 14 *Ch. D.* 542).[4]

Canadian Cases.

[4] "The cases on the question, whether the party suing has sustained a particular damage, so as to entitle him to sue in a civil action for what constitutes a public nuisance, are numerous. In *Wilkes* v. *The Hungerford Market Co.* (2 *Bing. N. C.* 281) the point was carefully considered; and from the judgment there given as well as from the cases cited in

It will, therefore, be seen, that there must be an unauthorized act or omission causing either an infringement of some general right, or inflicting some

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Canadian Cases.

it, we conclude that it is not enough to entitle a party to sue in such a case, that his land, in common with all the other land situated upon the river, is rendered less valuable by the obstruction of the navigation, though it must be confessed that it is not easy to determine where a line can be drawn" (*Small* v. *Grand Trunk Rail. Co.*, 15 *U. C. R.* 286—Robinson, C. J.).

"There can be no doubt, we think, that the fifth section of the statute 16 Viet. c. 54, does make it incumbent on the defendants to maintain in a proper state of repair the bridge which they were by that Act allowed to make over the eastern extremity of the Des Jardines Canal. But the real question in this case is whether this failure to do so gives any right of action to the plaintiffs. We think it does not. If the defendants did suffer the bridge to be for a time out of repair, so that the public could not safely and conveniently pass over, that no doubt would be a wrong done to the public, who had a right to use the alleged highway between Hamilton and the plaintiff's toll road, of which alleged highway we think we must take the bridge in question to form part. That would in the first place point to a prosecution by the Crown for the public wrong and would not give to each of the many individuals who might be incommoded by the nuisance a right to bring a separate action for his share of the injury. Where the circumstances in any such case have been such as to occasion a special injury to a particular person, then such person has been allowed to maintain an action for his particular damage. This seems to us to be an attempt to push the principle considerably further than was done in *Wilkes* v. *The Hungerford Market Co.* (2 *Bing. N. C.* 281), though undoubtedly the plaintiff's action appears to receive a good deal of support from the language of the judgment given in that case. There was, however, in the case referred to, an actual obstruction of a thoroughfare, upon the very side of which the plaintiff's shop was situated. Here the complaint is, that the plaintiffs received less toll upon their road, because another road which crosses it, or

substantial private damage. But in addition to this, the injury must fall within some class recognized by law, and for which an action for damages is the appropriate remedy. For instance, murder is an act unauthorized by law, and it may inflict most cruel and particular damage on the family of the murdered man; but, nevertheless, that gives them no civil remedy against the murderer. So, if one libels a dead man, his children have no right to redress, although it may cause them to be cut off from all decent society. So

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Canadian Cases.

leads into it, has been suffered to go out of repair. The case cited of *The Streetsville Plank Road Co.* against *The Hamilton and Toronto Railway Co.* (13 *U. C. R.* 600) is very distinguishable from the present, because in that case the plaintiffs' road was rendered almost impassable for loaded trams, by the obstruction which the defendants for their own purposes had placed across it" (*Hamilton and Brock Road Co.* v. *Great Western R. W. Co.*, 17 *U. C. R.* 570 *et seq.*— Robinson, C. J.).

A person throwing noxious matter into Lake Ontario or any other public navigable water is liable *both* to an indictment for committing a public nuisance and to a private action at the suit of any individual *distinctly and peculiarly* injured (*Watson* v. *Toronto Gas Co.*, 4 *U. C. R.* 158).

The right which an individual has to the use of public navigable water in its pure and natural state, is not founded upon the possession of land or of a mill or house adjoining the water, but simply upon the same common law right which any other individual has to use the water in its unadulterated state, whether he possess land, mills or houses, on its banks or not (*Idem*).

In any case in which a party is indictable for a common nuisance any person suffering particularly from the nuisance may have his action on the case. This was decided in the case of *Watson* v. *The Gas Co.*, 4 *U. C. R.* 158, where the plaintiff alleged that the defendants corrupted and injured the water of the Bay of Toronto, whereby his distillery adjoining the defendants' premises was injured; and *post*, pp. 14 and 16.

a breach of trust, although certainly an act unauthorized by law, and usually followed by private and particular loss to the beneficiaries, does not fall within the class of civil injuries remediable by an action for damages, and therefore cannot properly be said to constitute a tort. It would appear that since the abolition of the action of *crim. con.* the same remarks apply to adultery, and consequently that subject is omitted from this work.

Having now explained the nature of the elements which are essential to the constitution of a tort, the attention of the student is invited to a few illustrations.[5]

(1) If one trespass upon another's land without lawful excuse, that is an interference with an absolute legal right (viz., the right of exclusive possession of a man's own land). Moreover, being without excuse, it is an act not authorized by law, and consequently the two elements of an unauthorized act and the consequent infringement of a legal right are present, and an action for tort may be maintained. But if the trespass were committed in self-defence, in order to escape some pressing danger, then no action would lie; for the law authorizes the commission of a trespass for that purpose. Consequently, although in such a case there is an invasion of the right of exclusive

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[5] "If such a statement had been true, and if the defendant could have furnished the same article in the same manner as the plaintiffs did for the price he mentions, we should have been of opinion the plaintiffs had no ground of action; but where the evidence proved and the jury have found that such a statement was untrue, we think the action may be maintained" (*Ontario Copper Lightning Rod Co.* v. *Hewitt*, 30 *U. C. C. P.* 180—Galt, J. See *Davis* v. *Minor*, *ante*, p. 8).

possession, the other element of a tort—viz., an act not authorized by law—is absent, and therefore no tort is committed.

(2) Again, if I own a shop which greatly depends for its custom upon its attractive appearance, and a company erect a gasometer hiding it from the public, I cannot sue them; because, although my trade may be ruined by the obstruction, yet the gas company are only doing an act authorized by law, namely, building upon their own land (*Butt* v. *Imperial Gas Co.*, *L. R.* 2 *Ch. App.* 158). Although, therefore, the element of substantial damage is present, the element of an unauthorized act is not; it is a case of *damnum absque injuriâ*, and no tort is committed (see also *Street* v. *Union Bank, &c.*,[6] 33 *W. R.* 901).

(3) So where a landowner by working his mines

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[6] W. was owner and occupier of a house in Portland situate several feet back from the street with steps in front. The corporation caused the street in front of the house to be cut down, in doing which the steps were removed and the house left some six feet above the road. To get down to the street W. placed two small planks from a platform in front of the house and his wife in going down these planks in the necessary course of her daily avocations slipped and fell, receiving severe injuries. She had used the planks before and knew that it was dangerous to walk up or down them. In an action against the city in consequence of the injuries so received, it was *held*, affirming the judgment of the Supreme Court of New Brunswick, that the corporation, having authority to do the work and it not being shown that it was negligently or improperly done, the city was not liable. *Held* also that the wife of W. was guilty of contributory negligence in using the planks as she did, knowing that such use was dangerous (*Williams* v. *City of Portland*, 19 *S. C. R.* 159. See *The Mayor of St. John* v. *Pattison*, *Cassel's Digest*, 96, and *City of St. John* v. *Christie*, 21 *S. C. R.* 1; and *post*, p. 288).

caused a subsidence of his surface, in consequence of which the rainfall was collected and passed by gravitation and percolation into an adjacent lower coal mine, it was held that the owner of the latter could sustain no action. For the right to work mines is a right of property, which, when duly exercised, begets no responsibility. The damage suffered by the adjacent owner was therefore a *damnum absque injuriâ* (*Wilson* v. *Waddell*, 2 *App. Cas.* 95).

(4) A legally qualified voter duly tenders his vote to the returning officer, who wrongly refuses to register it. The candidate for whom the vote was tendered gains the seat, and no loss whatever, either in money, comfort, or health, is suffered by the rejected voter; yet his absolute right to vote at the election is infringed, and that by an unauthorized act of the returning officer, and hence we have the two elements sufficient to support an action of tort (*Ashby* v. *White*, 1 *Sm. L. C.* 251). This is an instance of *injuria sine damno*.

(5) A man erects an obstruction in a public way. The plaintiff is delayed on several occasions in passing along it, being obliged, in common with everyone else who attempts to use the road, either to pursue his journey by a less direct route, or else to remove the obstruction. He, nevertheless, cannot maintain an action, because, although the element of an unauthorized or unlawful act on the part of the defendant is present, yet there is no invasion of an absolute private right, and no substantial damage peculiar to the plaintiff beyond that suffered by the rest of the public (*Winterbottom* v. *Lord Derby*,[7] *L. R.* 2 *Ex.* 316).

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[7] *Soule* v. *Grand Trunk Railway Co.*, 21 *U. C. C. P.* 308; *Baird* v. *Wilson*, 22 *U. C. C. P.* 491; and *ante*, p. 10.

(6) The defendant leaves an unfenced hole upon premises adjoining a highway. The plaintiff, in passing along the highway at night, falls into the hole, and is injured. Here both elements of a tort are present; for the law does not authorize the leaving of an unfenced hole adjacent to a highway, and likely to be a danger to persons lawfully using it, and the plaintiff clearly suffers a special and substantial damage beyond that suffered by the rest of the public, and accordingly he can recover damages (*Hadley* v. *Taylor*,[s] *L. R.* 1 *C. P.* 53).

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[s] The railway crossed a highway, and in the line of the ditch formerly running at the side of the highway and several feet within the limits of the highway, the railway company constructed an open culvert of square timber about five feet deep and seven feet wide. The plaintiff walking along the road and crossing the railway fell into this culvert and was injured. It was *held* that the company was liable; for their duty was to restore the highway to its former state, or in a sufficient manner not to impair its usefulness; and in substituting this open culvert, which they could readily have covered, for the former ditch, they had unnecessarily made it more dangerous (*Fairbank* v. *G. W. R. Co.*, 35 *U. C. R.* 523).

A city corporation is liable for injuries happening to a person while walking and resulting from the defective condition of a part of a sidewalk constructed by them, extending beyond the true line of the street over adjacent private property so as ostensibly to form a portion of the highway; such defect being caused through the owner of the property having placed on such part of the sidewalk a grating covering an area, and having allowed it, to the knowledge of the municipality, to fall into disrepair so close to the highway as to render travel unsafe (*Badams* v. *City of Toronto*, 24 *O. A. R.* 8).

A municipal corporation is not responsible for damages resulting from a horse taking fright at railway ties piled, without the authority of the corporation, on the untravelled portion of a highway, but the person piling the ties on the highway is responsible (*O'Neil* v. *Windham*, 24 *O. A. R.* 341).

(7) The plaintiff kept a coffee-house in a narrow street. The defendants were auctioneers, carrying on an extensive business in the same neighbourhood, having an outlet at the rear of their premises next adjoining the plaintiff's house, where they were constantly loading and unloading goods into and from their vans. The vans intercepted the light from the plaintiff's coffee-house to such an extent that he was obliged to burn gas nearly all day, and access to his shop was obstructed, and the smell from the horses' manure made the house uncomfortable. Here there was an unauthorized state of facts constituting a public nuisance, but there was also a direct and substantial private and particular damage to the plaintiff, beyond that suffered by the rest of the public, so as to entitle him to maintain an action (*Benjamin* v. *Storr*,[9] *L. R.* 9 *C. P.* 400).

(8) A person is guilty of negligence, or violence, whereby the plaintiff's servant is injured, and incapacitated from performing his usual duties. Here the loss of service is a substantial deprivation of comfort sufficient to give the plaintiff a right of action (*Berringer* v. *G. E. R. Co.*, 4 *C. P. D.* 163). There is, however, a curious exception to this, viz., that where the servant is *killed on the spot*, no action lies by the master (*Osborn* v. *Gillett*, *L. R.* 8 *Ex.* 88).

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[9] The plaintiff was the owner of an inn at the side of a much frequented highway leading to a ferry. The defendant by building across and blocking up the highway committed a public wrong. It was held that by this act the plaintiff has sustained special damage. Per Robinson, C. J., "Whoever suffers more than others by the public wrong may sue for the damage or inconvenience" (*Drew* v. *Baby*, 1 *U. C. R.* 438; and *ante*, p. 10.)

ART. 2.—*Classification of unauthorized Acts or Omissions constituting one element of a Tort.*

Acts unauthorized by law, and which, when coupled with the invasion of a right or the infliction of substantial damage, constitute a tort, may be conveniently divided into the following classes, viz. :—

(a) Malicious acts, or acts so reckless as to imply malice ;

(b) Negligent acts or omissions ;

(c) Acts or omissions in relation to the user of property or otherwise not depending on malice or negligence ;

(d) Acts without legal justification directly infringing another's private rights.

In the words of Pratt, C. J., "torts are infinitely various, for there is not anything in nature that may not be converted into an instrument of mischief" (see *Chapman* v. *Pickersgill*, 2 *Wils.* 146). It is, therefore, hopeless to attempt any definition of what constitutes an unauthorized act or omission, upon which an action for tort may be founded ; but, broadly speaking, the above classification may, perhaps, give the student some standard by which to measure particular cases.

Class (a) covers cases of defamation, malicious prosecution and arrest, maintenance, seduction, fraud, and conspiracy.

Class (b) comprises all cases arising out of the breach of the duty of care.

Class (c) includes all cases coming under the maxim *sic utere tuo ut alienum non lædas : ex. gr.* nuisances.

Class (d) requires some explanation, because it is the one class where, at first sight, the unauthorized act and the consequent injury appear to be inseparable. And no doubt the same *act* does often constitute both elements of a tort, as, for instance, where one beats another, the act of beating is *primâ facie* both an unauthorized act and an invasion of a right. It is not, however, necessarily so, for suppose the beating is administered by the order of a court having jurisdiction to inflict "the cat," there the beating is not an unauthorized act, although it is an interference with the general right of the subject to immunity from battery. Consequently, although the same act may, and often does, of itself combine both elements of a tort, it is divisible, for the purposes of legal analysis, into the two elements which must co-exist if the act is actionable. In all such cases we must ask ourselves the questions: (1) Is the act one which is unauthorized? and (2) Is it an act which if unauthorized violates a legal right? This class embraces all those unauthorized violations of the rights of person and property conferred by law on every member of the community, including assault and battery, false imprisonment, trespass on and dispossession of lands, trespass to and conversion of personal property, infringement of patents and trade marks, and the like.

Generally, the classification above attempted makes no pretence to scientific accuracy. Some of the classes may, and doubtless do, overlap one another. All that is attempted is to give the student a rough idea of the various kinds of unauthorized acts or omissions, which may constitute the first element of a tort, and in the absence of which no amount of loss or damage will suffice to give a right of action.

ART. 3.—*Of Volition and Intention in relation to the unauthorized Act or Omission.*

(1) The unauthorized act or omission must be attributable to active or passive volition on the part of the party to be charged, otherwise it will not constitute an element of a tort.[10]

(2) Nevertheless a want of *knowledge* of its illegality and appreciation of its probable consequences affords no excuse, except in cases in which malice or fraud are of the essence of the unauthorized act or omission. For every person is presumed to intend the probable consequence of any voluntary act or omission of his.

(3) Where an act or omission is done or made under the influence of pressing danger,

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[10] "I have no doubt whatever on the abstract proposition that trespass would lie. It is enough to quote the language of two cases, *McLaughlin* v. *Pryor* (4 *M. & G.* 48) and *Sharrod* v. *The London and North Western Railway Co.* (4 *Ex.* 580). In the former, Tindal, C. J., says: 'The enquiry is, not whether the act was wilful, but whether it was wrongful, and an immediate injury resulted from it; any enquiry into the immediate intention is quite unnecessary.' And in the latter, Parke, B., observes: 'The law is well established that whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass'" (*Anderson* v. *Stiver*, 26 *U. C. R.* 528—Draper, C. J.).

Slander of title, *Ashford* v. *Choate*, 20 *U. C. C. P.* 471; *Cousins* v. *Merrill*, 16 *U. C. C. P.* 114; *Boulton et al.* v. *Shields*, 3 *U. C. R.* 21. And see note [1], *post*, p. 180.

and was *necessary* in order to escape that danger, there is a presumption that it was done or made involuntarily.

The student must carefully distinguish between the voluntary nature of the act or omission and the want of knowledge or appreciation of the fact that it was in fact an act or omission not authorized by law. It would be obviously unjust to charge a man with damage caused by some inevitable accident, over which, or over the causes of which, he had no control. On the other hand, it would be highly dangerous to admit the doctrine, that a man who does an act, or makes an omission voluntarily, should be excused the consequences because of lack of judgment or by reason of ignorance.

The following illustrations will, however, help to accentuate the difference better than pages of explanation:—

(1) A butcher owns a horse which has always stood quietly at the customers' doors while the butcher applied for orders. On one occasion, being frightened by a passing steam-roller, the horse runs away, and knocks down and severely injures the plaintiff. Here the butcher is liable; for he voluntarily left the horse in a public highway unattended.[11] That was the unauthorized omission from which the damage to the plaintiff

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[11] "If the defendants' horses had been carelessly left by the driver standing in the highway, while he was drinking or idling in a tavern (which we have often seen), and the horses had run away, and committed an injury to some one, in such case the right to recover would be clear: but here the question was whether the defendants' driver was driving

arose. No doubt the butcher never intended to hurt the plaintiff, nor did he voluntarily cause the horse to run away; but having once voluntarily omitted to take a precaution which the law required of him, the fact that he did not foresee, and from past experience had no reason to apprehend the result, affords no excuse.

(2) A person has an unguarded shaft or pit on his premises. If another, lawfully coming on to the premises on business, falls down the shaft, and is injured, he may bring his action, although there was no intention to cause him or anyone else any hurt. For the neglect to fence the shaft was an unauthorized omission, and the fall of the plaintiff was the probable consequence of it (*Indermaur* v. *Dames*,[12] *L. R.* 2 *C. P.* 311; *White* v. *France*, 2 *C. P. D.* 308).

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negligently or unskilfully when he upset his sleigh (which really was not charged in the record though it was intended to be), and so from his carelessness his horses got away from him, I told them, if they looked upon it as an accident not fairly imputable to negligence or want of skill, they should find for the defendants" (*Robinson* v. *Blitcher*, 15 *U. C. R.* 160—Robinson, C. J.).

"In a case of collision between two vessels the owner of the vessel not in fault may recover the value of goods on board, not owned by him but in his custody as a carrier" (*Irving* v. *Hagarman*, 22 *U. C. R.* 545).

[12] A person entering upon premises on the express or implied invitation of the occupant is entitled to assume that they will be in reasonably safe condition, but one who visits them for his own purposes and without the knowledge of the occupant, does so at his own peril.

The superintendent of a coal company, before the time arranged for delivery, without the knowledge of the defendants, went to a school house to look at the coal bins in order to decide how he could most conveniently deliver coal

(3) The defendants, a burial board, planted on their own land, and about four feet distant from their boundary railings, a yew tree, *which grew through and beyond the railings, so as to project over plaintiff's meadow.* The plaintiff's horse, feeding in the meadow, ate of that portion of the tree which projected, and died of the poison contained therein. The tree was planted and grown with the knowledge of the defendants:—*Held*, that the defendants were liable (*Crowhurst* v. *Amersham Burial Board*, 4 *Ex. D.* 5; and see *Lax* v. *Corp. of Darlington*,[13] 5 *Ex. D.* 28; but distinguish *Wilson* v. *Newberry*, *L. R.* 7 *Q. B.* 31). Where the tree is wholly

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ordered by the defendants, and was severely hurt by falling into an unguarded hole in the cellar. *Held*, reversing the judgment at the trial, that he could not recover damages (*Rogers* v. *Toronto Public School Board*, 28 *O. A. R.* 597).

"It is clear law that a person going upon business which concerns the defendant, and upon his invitation express or implied, using reasonable care on his own part, for his own safety, is entitled to expect that the occupier of the premises shall on his own part use reasonable care to prevent damage from unusual danger, which he knows, or ought to know, exists. Assuming that the defendants may, for the present argument, be looked upon as the occupiers, how can they be considered as having extended an invitation to the deceased to visit the premises on this occasion" (*Ibid.*—Burton, J. A. 599).

[13] "A person may be on the highway passing along, with the intention of committing a highway robbery a little way off; but if he fell into an excavation which some person or body was liable for leaving in that state, and was injured before he committed the robbery, I imagine there is no doubt he would be entitled to recover damages for the injury he had sustained, although he contemplated committing a felony" (*Denny* v. *Montreal Telegraph Co.*, 42 *U. C. R.* 596, Wilson, J.; *Curry* v. *Canadian Pacific R. W. Co.*, 17 *O. R.* 71).

on the defendant's land, no action will lie (*Ponting* v. *Noakes*, (1894) 2 *Q. B.* 281).

(4) On the other hand, where an ordinarily quiet horse was being driven along a high road by the defendant, and suddenly bolted and injured the plaintiff's horse, it was held that the defendant was not liable; because the injury to the plaintiff's horse was not attributable to any voluntary unauthorized act or omission of his (*Wakeman* v. *Robinson*, 1 *Bing.* 213; *Manzoni* v. *Douglas*,[14] 6 *Q. B. D.* 145; and *Tillett* v. *Ward*, 10 *Q. B. D.* 17).

(5) It has recently been held that, in the absence of negligence, a man who accidentally shoots another is not liable (*Stanley* v. *Powell*, (1891) 1 *Q. B.* 86; 60 *L. J. Q. B.* 52; 63 *L. T.* 809; and see *Holmes* v. *Mather*,[15] *L. R.* 10 *Ex.* 261).

(6) Under the Metropolis Local Management Act (18 & 19 *Vict. c.* 120), a duty is imposed upon the vestry of properly cleansing the sewers vested in them. Under the premises of the plaintiff was an old drain, which was one of the sewers vested in the vestry. This drain having become choked, the soil therefrom flowed into the cellars of the plaintiff, and did damage. In an action against the vestry, the jury found (*inter alia*)

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[14] *Crawford* v. *Upper*, 16 *O. A. R.* 440; and *post*, p. 313.

[15] It is not negligence *per se* for the driver of a horse of a quiet disposition standing in the street to let go the reins while he alights from the vehicle to fasten a head-weight, there being at the time little traffic and no noise or disturbance to frighten the animal; and the owner of the horse is not responsible for damages caused by the horse in running away when frightened by a sudden noise just after the driver has alighted (*Sullivan* v. *McWilliam*, 20 *O. A. R.* 627).

that the obstruction was unknown to the defendants, and could not by the exercise of reasonable care have been known to them. *Held*, that upon this finding the defendants were entitled to the verdict (*Hammond* v. *Vestry of St. Pancras*, *L. R.* 9 *C. P.* 316, and see also *Losee* v. *Buchanan*, 51 *New York Rep.* 476, in relation to the liability of the owner of a steam boiler).

(7) It is a rule of law, that where one brings on to his property for his own purposes, and collects and keeps there, any substance likely to do injury to his neighbour if it escapes, he must, in general, keep it at his peril. Yet where the escape is caused by the act of God, or a third party, he will not be liable, at all events where the substance is not exceptionally dangerous. In *Nichols* v. *Marsland*[16] (*L. R.* 10 *Ex.* 255, and on appeal, 2 *Ex. D.* 1), the facts there were as follows :—On the defendant's land were artificial pools containing large quantities of water. These pools had been formed by damming up, with artificial embankments, a natural stream which rose above the defendant's land, and flowed through it, and which was allowed to escape from the pools by successive weirs into its original course. An *extraordinary* rainfall caused the stream and the water in the pools to swell, so that the artificial embankment

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Canadian Cases.

[16] A millowner having a license from a township to construct his mill-dam in such a way as to flood a part of the highway, constructed it so negligently that it gave way, causing damage to proprietors below. It was *held* that the license to dam water back upon the highway was (except in so far as it might be a public nuisance affecting travellers on the road) a lawful thing, and that the damage being caused by the millowner, the township was not liable (*Ward* v. *Caledon*; *Algri* v. *Caledon*, 19 *O. A. R.* 69).

was carried away by the pressure, and the water in the pools, being suddenly loosed, rushed down the course of the stream and injured the plaintiff's adjoining property. The plaintiff having brought an action against the defendant for damages, the jury found that there was no negligence in the construction or maintenance of the works, and that the rainfall was most excessive, and amounted to a *vis major* or visitation of God. Under these circumstances, it was held that no action was maintainable, because, as Bramwell, B., said, "the defendant had done nothing wrong; he had infringed no right. It was not the defendant who let loose the water and sent it to destroy the bridges. He did, indeed, store it, and stored it in such quantities that if it were let loose it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbour, the occupier would be liable; but that cannot be. Then why is the defendant liable, if some agent over which he has no control lets the water out? The defendant merely brought the water to a place, whence another agent let it loose, *but the act is that of an agent he cannot control*" (see also *Nitro-Phosphate Co.* v. *London and St. Katharine Docks Co.*, 9 *Ch. D.* 503; and *Carstairs* v. *Taylor*, *L. R.* 6 *Ex.* 217).

(8) And so again where the reservoir of the defendant was caused to overflow by a third party sending a great quantity of water down the drain which supplied it, and damage was done to the plaintiff, it was held that the defendant was not liable; Kelly, C. B., saying:—"It seems to me to be immaterial whether this is called a *vis major* or the unlawful act of a stranger; it is

sufficient to say that the defendant had no means of preventing the occurrence" (*Box* v. *Jubb*, 4 *Ex. D.* 76).

(9) The above cases must be carefully distinguished from the well-known leading case of *Rylands* v. *Fletcher*[17] (*L. R.* 3 *H. L.* 330), the facts of which were as follows:—The plaintiff was the lessee of mines. The defendant was the owner of a mill, standing on land

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Canadian Cases.

[17] The leading case in the Ontario Courts on the subject of fires kindled for the purpose of clearing land, or for a purpose necessary in the ordinary use and enjoyment of land, is *Dean* v. *McCarty*, 2 *U. C. R.* 448, *post*, p. 31. (See also *Buchanan* v. *Young*, 23 *U. C. C. P.* 101; and *Gillson* v. *North Grey R. W. Co.*, 33 *U. C. R.* 128, and 35 *U. C. R.* 475; and *post*, p. 30).

Where fire has been properly set out by a person on his land for the necessary purposes of husbandry, at a proper place, time, and season, he is not responsible for damage occasioned by it. But where the defendant, while harvesting in his own field, threw upon the ground a lighted match thinking he had extinguished it, which, however, set fire to combustible material, and the defendant, on afterwards discovering it, though he could easily have put it out, after confining it to one spot, left it, anticipating no danger, and after burning for four or five days, the fire spread to the plaintiff's premises and destroyed his barn, the Court considered that the principle and doctrine established in *Fletcher* v. *Rylands* applied, and that the defendant was liable for the damage sustained by the plaintiff, even in the absence of actual negligence (*Furlong* v. *Carroll*, 7 *O. A. R.* 145).

"In the absence of legislative authority for the use of fire, the common law liability for damage done exists" (*Ibid.*—Patterson, J. A. 165).

The statute 14 Geo. 3, c. 78, s. 86, which exonerates any person in whose house, &c., a fire accidentally begins from all liability, does not apply where the cause of the fire is negligence (*Canada Southern R. W. Co.* v. *Phelps*, 14 *S. C. R.* 132).

Where a person uses fire in his field in a customary way for the purposes of agriculture, or other industrial purposes,

adjoining that under which the mines were worked. The defendant desired to construct a reservoir, and *employed competent persons* to construct it, so that there was no question of negligence. The plaintiff had worked his mines up to a spot where there were certain old passages of disused mines; these passages were connected with vertical shafts, communicating with the land above, which had also been out of use for years, and were apparently filled with marl and earth of the surrounding land. Shortly after the water had been introduced into the reservoir it broke through some of the vertical shafts, flowed thence through the old passages, and finally flooded the plaintiff's mine. It was contended on behalf of the defendant that there was no negligence on his part, and that, if he were held liable, it would make every man responsible for every mischief he occasioned, however involuntarily, or even unconsciously, whereas he contended that knowledge of possible mischief was of the very essence of the liability incurred by occasioning it. The House of Lords, however, held the defendant to be liable on the ground that "a person who, for his own purposes, brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is *primâ facie* responsible for all the damage which is the natural consequence of its escape." It therefore appears that the act which was not authorized by law was *the allowing the water to*

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he is not liable for damages arising from the escape of the fire to other lands, unless the escape is due to his negligence (*Furlong* v. *Carroll*, 7 *Ont. App. Rep.* followed; *Owens* v. *Burgess*, 11 *M. R.* 75; *Booth* v. *Moffatt*, *ibid.* 25; *Chaz* v. *Cisterciens Réformes*, 12 *M. R.* 330; *Beaton* v. *Springer*, 24 *O. A. R.* 297).

escape, and whether this was the result of negligence, or whether it was the *result of a latent and undiscovered defect in the engineering works*, was quite immaterial. The escape of the water was caused by something of which the defendant was *ignorant*, not by something altogether beyond his control or volition, like a visitation of Providence or the act of a third party. As Mellish, L. J., said in *Nichols* v. *Marsland* (2 *Ex. D.* 5), "if, indeed, the damages were caused by the act of the party *without more*—as where a man accumulates water on his own land, but, owing to the peculiar nature or condition of the soil, the water escapes and does damage to his neighbour—the case of *Rylands* v. *Fletcher* establishes that he must be held liable." But where there is *something more*—either the act of God or of a third party—which is the proximate cause of the damage, then *Rylands* v. *Fletcher* has no application. This, of course, however, presupposes that the damage has been *solely* caused by the act of God or of a third party, and that the defendant has not contributed to it by *some distinct breach of duty* (as in *The Nitro-Phosphate Co.* v. *London and St. Katharine Docks Co.*, cited above) (*Harris* v. *Mobbs*, 3 *Ex. D.* 268; *Clark* v. *Chambers*, 3 *Q. B. D.* 327).[18] The case of *Rylands* v.

Canadian Cases.

[18] *Duck et ux.* v. *Corporation of Toronto*, 5 *O. R.* 295.

The principle of liability in case of sparks from passing locomotives setting fire to and injuring adjoining property is stated by Gwynne, J., in *Canada Southern* v. *Phelps*, 14 *S. C. R.* 162.

"The principle upon which the liability of railway companies in such case rests is, in my opinion, this: by the common law, apart from any statute, where a person for his own private purposes brings upon his premises an engine of an extremely dangerous and unruly character, such as a locomotive engine worked by the dangerous element of fire, which if it should escape from the firebox in which for the

Fletcher must also be carefully distinguished from that of *Wilson* v. *Waddell* (2 *App. Cas.* 95, and *supra*, p 14), in which the defendant had not *brought* water on to his land, but had merely so used his land that it collected the rainfall. One was a non-natural user, and the other a natural user in accordance with the ordinary rights of property. (And see *Giles* v. *Walker*, 24 *Q. B. D.* 656 ; and distinguish *Snow* v. *Whitehead*, 27 *C. D.* 588).

The distinction between *Rylands* v. *Fletcher* on the one hand, and *Nichols* v. *Marsland* and *Box* v. *Jubb* on the other, is no doubt subtle and difficult for the lay mind to grasp ; but it shortly comes to this, that a man is not liable for the acts of God or a third party, unless (1) he has committed some distinct breach of duty, or (2) where he has taken upon himself to construct a dangerous work and such work is in fact defective,

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working of the engine it is contained, is calculated to do much mischief, he must keep that fire confined so as to prevent its doing mischief at his peril ; and if he does not do so he will be responsible for all damage which is the natural consequence of, and directly resulting from, its escape, unless he can excuse himself by showing either that the escape was owing to the plaintiff's fault or was the consequence of a *vis major*, or the act of God." And again, at p. 164, "Unless every precaution is taken to prevent injury occurring from the fire in the locomotive engine, the party neglecting to take such precaution cannot claim the protection of the statute which authorizes the use of the engine, but is subject to the same liability as he would have been liable to at common law, apart from the statute" (and *Canada Atlantic* v. *Moxley*, 15 *S. C. R.* 145. The following cases refer to liability for omission to whistle at railway crossings : *Weir* v. *Canadian Pacific R. W. Co.*, 16 *O. A. R.* 100 ; *Peart* v. *Grand Trunk R. W. Co.*, 10 *A. R.* 191 ; *Blake* v. *Canadian Pacific R. W. Co.*, 17 *O. R.* 177 ; *Johnson* v. *Grand Trunk R. W. Co.*, 21 *O. A. R.* 408 ; and see *post*, 48, *Sibbald* v. *Grand Trunk R. W. Co.*, 20 *S. C. R.* 259 ; *Henderson* v. *Canada Atlantic Railway*, 25 *O. A. R.* 437).

whether owing to the constructor's negligence or not; for having taken upon himself to make it, he must be taken to guarantee that it is fit for the purpose for which it is made (see also *Hardman* v. *N. E. R. Co.*, 3 *C. P. D.* 168; *Fletcher* v. *Smith*, 2 *App. Cas.* 781; and *Evans* v. *Manchester, &c. R. Co.*, 57 *L. J. Ch.* 153). It is, however, apprehended that the strictness of the obligation must vary in proportion to the risk. For instance, one who brought a gunpowder magazine on to his land might well be held liable for the consequences of an explosion caused by a thunderstorm following an exceptionally heavy gale, which had blown down his lightning conductors. (*Sed quære.*)[19]

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[19] A person kindling a fire on his own land for the purpose of clearing it, is not liable at all risks for any injurious consequences that may ensue to the property of his neighbours (*Dean* v. *McCarty*, 2 *U. C. R.* 448).

"It is sought here to hold the defendant liable upon a rigorous and indiscriminating application of what is undoubtedly a legal maxim, '*Sic utere tuo ut alienum non lædas*,' but this maxim is rather to be applied to those cases in which a man, not under the pressure of any necessity, deliberately, and in view of the consequences, seeks an advantage to himself at the expense of a certain injury to his neighbours; or, for instance, in the use he makes of a stream of water passing through his land, which he is at liberty to apply for his own purposes, but he must not so use it as to diminish the value of the stream to his neighbour, unless he has a prescriptive right. But when we come to apply the maxim to the acts of parties on other occasions, where accident has part in producing the injury, we must see that a great part of the business of life could not be carried on under risks to which parties would then be exposed. In such cases the question for the jury is one of negligence. In this case the objection taken is the broad one that the defendant must be liable, at all events, a doctrine which cannot be maintained" (*Ibid.*—Robinson, C. J.).

A proprietor setting out fire on his own land in order to

(10) A person wrongfully threw a squib on to a stall, the keeper of which, in self-defence, threw it off again; it then alighted on another stall, was again thrown away, and, finally exploding, blinded the plaintiff. The liability of the persons who threw it away from their stalls in self-defence, was not the question before the court, but a dictum of Chief Justice De Grey is a good illustration of the rule. He said, "It has been urged, that the intervention of a free agent will make a difference: but I do not consider Willis and Ryal (the persons who merely threw away the squib from their respective stalls) as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation" (*Scott* v. *Shepherd*, 2 *W. Bl.* 894). The first illustration to Art. 1 (*supra*) is another example of the rule that a person acting under the influence of pressing danger is not a voluntary agent.[20]

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clear it, is not an insurer that no injury shall happen to his neighbour, but is responsible only for negligence (*Dean* v. *McCarty*, 2 *U. C. R.* 448, followed; *Gillson* v. *North Grey Railway Co.*, 35 *U. C. R.* 475).

Where the necessary and unavoidable consequence of a lawful act done by a person on his own land (such as the erection of a mill-dam) is to produce an injury to his neighbour, an action lies for such injury; but it is otherwise if such an act *per se* would not be necessarily or probably injurious, but becomes so from a cause not under the control of either party. In such case *negligence* must be proved to render a defendant liable (*Peters* v. *Devinney*, 6 *U. C. C. P.* 389; and see *Dean* v. *McCarty*, *ante*, p. 30; *Mills* v. *Dixon*, 4 *U. C. C. P.* 222).

[20] Where a man, acting as a reasonable man would ordinarily do under the circumstances, voluntarily places himself in a position of danger, in the hope of saving his property from probable injury and of preventing probable injury to the life or property of others, and sustains hurt, the person whose negligent act has brought about the

ART. 4.—*Of the connection of the Damage with the unauthorized Act or Omission.*

There will be no tort where the loss or damage is such as would not usually be found to follow from the unauthorized act or omission, unless it can be shown that the defendant knew, or had reasonable means of knowing, that consequences not usually resulting from such an act or omission were, by reason of some existing cause, likely to intervene so as to cause such damage.

(1) The defendant, in breach of the Police Act (2 & 3 *Vict. c.* 47, *s.* 54), washed a van in a public street and

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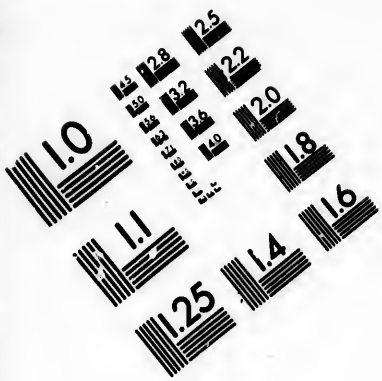
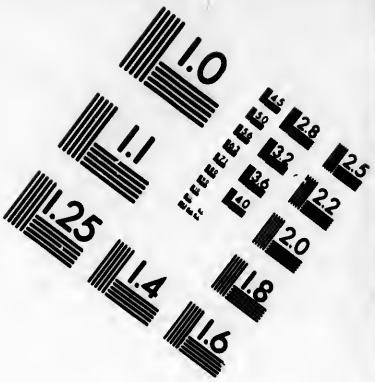
dangerous situation is responsible in damages (*Anderson* v. *Northern R. W. Co.*, 25 *U. C. C. P.* 301, distinguished and questioned; *Town of Prescot* v. *Connell*, 22 *S. C. R.* 147).

C. having driven his horses into a lumber yard adjoining a street on which blasting operations were being carried on, left them in charge of the owner of another team while he interviewed the proprietor of the yard. Shortly after a blast went off, and stones thrown by the explosion fell on the roof of a shed in which C. was standing and frightened the horses, which began to run. C. at once ran out in front of them and endeavoured to stop them but could not, and in trying to get away he was injured. He brought an action against the municipality conducting the blasting operations. *Held*, affirming the decision of the Court of Appeal, that the negligent manner in which the blast was set off was the proximate and direct cause of the injury to C.; that such negligent act immediately produced in him the state of mind which instinctively impelled him to attempt to stop the horses, and that he did no more than any reasonable man would have done under the circumstances (*Idem.*).

allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill-paved and uneven, and there froze. There was no evidence that the defendant knew of the grating being obstructed. The plaintiff's horse, while being led past the spot, slipped upon the ice and broke its leg. In giving judgment in an action brought in respect of this damage, Chief Justice Bovill said: "No doubt one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom;" but "where there is no reason to expect it, and no knowledge in the person doing the wrongful act, that such a state of things exists as to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action. If the drain had not been stopped, and the road had been in a proper state of repair, the water would have passed away without doing any mischief to anyone. Can it then be said to have been the ordinary and probable consequence of the defendant's act that the water should have frozen over so large a portion of the street so as to occasion a dangerous nuisance? I think not. There was no distinct evidence to show the cause of the stoppage of the sink or drain, or that the defendant knew it was stopped. He had a right, then, to expect that the water would flow down the gutter to the sewer in the ordinary course, and, but for the stoppage (for which the defendant is not responsible), no damage would have been done." And accordingly judgment was given





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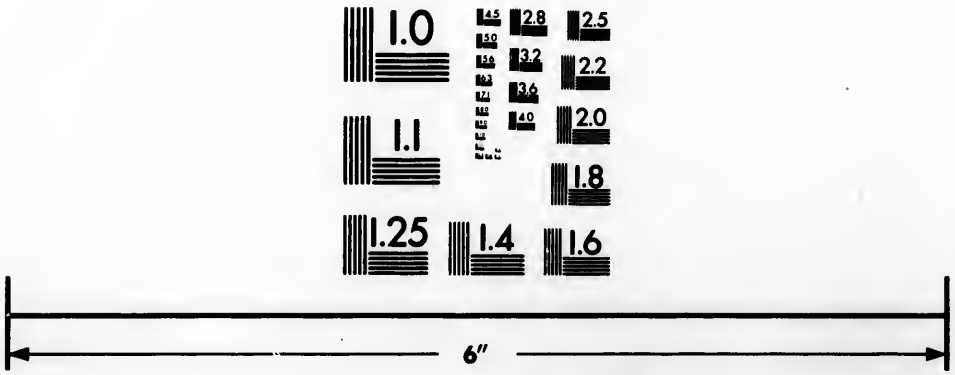

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in favour of the defendant (*Sharp* v. *Powell*,[21] *L. R.* 7 *C. P.* 258).

(2) But where water, which had trickled down from a waste-pipe at a railway station on to the platform, had

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[21] The plaintiff was driving a horse and sleigh along a highway belonging to a city corporation, when the runner of the sleigh came in contact with a large boulder, whereby both horse and sleigh were overturned. In endeavouring to raise his horse the plaintiff sustained a bodily injury, on account of which he sued the corporation for damages. *Held*, that the damages were not too remote (*McKelvin* v. *City of London*, 22 *O. R.* 70).

"I am unable to adopt the view that *Lazarus* v. *The Corporation of Toronto*, 19 *U. C. R.* 9. precluded the Court in the present case from leaving the question of negligence to the jury. There is an element of negligence in this case that there was not in that, that is to say, the notification by the policeman to the defendant to have the snow removed from the roof. This notification under the bye-law was an intimation that the snow was then in a dangerous condition, and assuming the notification was in fact given, which was a question for the jury and not for the Court, the neglect to remove the snow entailed, in my opinion, as much liability on the defendant as there would have been if he had been told that there was a loose stone or brick in the cornice or wall that was likely to fall and endanger those passing below; and it is clear in such case the jury would have to decide whether the defendant had been negligent or not. The language of the judges in giving their opinions in *Lazarus* v. *Corporation of Toronto* does undoubtedly go the length contended for by the defendant, that a liability does not exist at common law for an accident happening by the falling of snow from the roof of a house, without evidence of some construction of the roof that would be likely to cause the precipitation of the snow more dangerously than an ordinary construction would do" (*Landreville* v. *Gouin*, 6 *O. R.* 459—Cameron, C. J., and see *Atkinson* v. *Grand Trunk R. W. Co.*, 17 *O. R.* 220; *Gordon* v. *City of Victoria*, 5 *B. C. Reps.* 553, and *Skelton et ux.* v. *Thompson et al.*, 3 *O. R.* 11).

become frozen, and the plaintiff, a passenger, stepped upon it and fell and was injured, the court held the defendants liable, on the ground, probably, that the non-removal of *a dangerous nuisance*, like ice, from their premises, was the proximate cause of the injury (*Shepherd* v. *Mid. R. Co.*,[22] *cited by plaintiff arguendo*; *Sharp* v. *Powell*, *supra*).

ART. 5.—*Where Damage would have been suffered in the absence of unauthorized Act or Omission.*

Where the elements of a tort are present, the fact that similar damages would have been suffered by the plaintiff, even if the wrongful act or omission had not been done or made by the defendant, does not excuse the latter. It is, however, open to him to show, if he can, that there is a substantial *and ascertainable* portion of the damages fairly to be attributed *solely* to the other circumstances, and in that case he is entitled to a proper deduction in that respect (see *Nitro-Phosphate Co.* v. *London and St. Katharine Docks Co.*, 9 *Ch. D.* 503).

Thus where it was the duty of the defendants to keep a river wall at a height of four feet two inches above Trinity high water mark, and they only kept it at a height of four feet, and an extraordinary tide rose four feet five inches, and flooded the plaintiffs' works; it was

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[22] *Durochie* v. *Town of Cornwall*, 23 *O. R.* 355.

held, that as the defendants had committed a breach of duty in not building their wall to the proper height, and some damage having been suffered in consequence thereof, an action lay against them, although even if the wall had been of the required height, the tide would still have overflowed it. James, L. J., said:—"Suppose that the same damage would have been done by the excess of height of the tide if the wall had been of due height as has been done; yet if the damage has been done by reason of the wall not being of due height, the defendants are liable for that damage arising from that cause, and are not excused because they would not have been liable for similar damage if it had been the result solely of some other cause; and moreover, long before the tide rose even to four feet, it began to flow over towards and into the plaintiffs' works, and of course the defendants cannot escape their liability for the damage so occasioned, because the tide afterwards went on swelling and swelling, even if it could be shown that the same damage would have been occasioned by that additional height of water if the wall of the defendants had been in proper condition. They have been guilty of neglect, and had done damage before the extra height had been reached, and their liability to the plaintiffs was complete when the damage was done. . . . No doubt if the court can see on the whole evidence [as they could not see in that case] that there was a substantial and ascertainable portion of the damage fairly to be attributed *solely to the excess of the tide above the proper height which it was the duty of the defendants to maintain*, occurring after the excess had occurred, and which would have happened if the defendants had done their duty, then there ought to be a proper deduction in that respect" (*Nitro-Phosphate Co.* v. *London and St. Katharine Docks*

Co., 9 *Ch. D.* 526; and see also *Clark* v. *Chambers*, 3 *Q. B. D.* 327, and *Harris* v. *Mobbs*, 3 *Ex. D.* 268).

ART. 6.—*To what Extent Civil Remedy interfered with where the unauthorized Act or Omission constitutes a Felony.*[23]

(1.) Where any unauthorized act or omission is, or gives rise to consequences which make it, a felony, and it also violates a private right, or causes private and peculiar damage to an individual, the latter has a good cause of action.

(2.) But (*semble*) the policy of the law will not allow the person injured to seek civil redress, if *he* has failed in his duty of bringing, or endeavouring to bring, the felon to justice.

(3.) Where the offender has been brought to justice at the instance of some third person injured by a similar offence, or where prosecution is impossible by reason of the death of the offender, or (?) by reason of his escape from the jurisdiction before a prosecution could by reasonable diligence have been commenced, the right of action is not suspended (per Baggallay,

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[23] "No doubt it is a clear principle of law, that whenever in a civil action for seduction, it turns out upon the trial that the act complained of was not merely a trespass but a felony, it is proper to direct an acquittal" (*Brown* v. *Dalby*, 7 *U. C. R.* 162—Robinson, C. J.).

An action for seduction will not lie where the defendant

L. J., *Ex parte Ball, re Shepherd*, 10 *Ch. D.* 673; and see per Cockburn, C. J., *Wells* v. *Abrahams*, *L. R.* 7 *Q. B.* 557).

But although this would seem to be the rule, it is extremely doubtful how it can be enforced. It is no ground for the judge to direct a nonsuit (*Wells* v. *Abrahams*, *sup.*).[24] It cannot be raised by the procedure now substituted for demurrer (*Roope* v. *D'Avigdor*, 10 *Q. B. D.* 412); nor by plea, because the effect of that would be to allow a party to set up his own criminality. But it has been suggested, that if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of the court might be invoked to stay the proceedings, which would involve an undue use, probably an abuse, of the process of the court (per Cockburn, C. J., *Wells* v.

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had connection with the seduced against her will (*Vincent* v. *Sprague*, 3 *U. C. R.* 283).

"It is a clear principle of law that, whenever in a civil action for seduction, it turns out upon the trial that the act complained of was not merely a trespass but a felony, it is proper to direct an acquittal, for the civil injury merges in the higher offence, and the policy of the law is that the party wronged must first bring the offender to justice for the crime before he seeks compensation to himself by a civil action for damages" (*Brown* v. *Dalby*, 7 *U. C. R.* 170—Robinson, C. J.).

[24] To an action for assault and battery defendant pleaded that before action brought the plaintiff laid an information before a magistrate, charging defendant with felony, that the defendant was committed for trial, which trial had not yet taken place. *Held*, that the civil right of action was suspended until the criminal charge was disposed of (*Taylor* v. *M'Cullough*, 8 *O. R.* 309).

Abrahams, *sup.*). And in the same case, Blackburn, J., said, "I do not see how a plaintiff can be prevented from trying his action, unless the court, acting under its summary jurisdiction, interfere." . . . "From the time these cases were decided, there is no reported instance of the court having interfered to stop an action until we come to *Gimson* v. *Woodful*, 2 *C. & P.* 41. That case went to this extent, that where a horse had been stolen by A., and B. afterwards had the horse, the owner could not afterwards bring an action to recover it from B., unless he had prosecuted A. But in *White* v. *Spettigue* (13 *M. & W.* 603) that was expressly overruled. The last case is *Wellock* v. *Constantine*, 32 *L. J. C. P.* 285." . . . "That case, I think, cannot be treated as an authority;" . . . "to say that because it was for the interest of the public, the action should be stayed until the indictment was tried, and for this purpose to nonsuit the plaintiff, or to direct the jury to find a verdict for the defendant upon issues not proved, seems to me to be erroneous."

In *Ex parte Ball, re Shepherd* (10 *Ch. D.* 667), Bramwell, L. J., said: "There is the judgment in *Ex parte Elliott* (3 *Mont. & A.* 110), besides the expressed opinion for centuries, that the felonious origin of a debt is in some way an impediment to its enforcement. But in what way? I can think of only four possible ways:—1. That no cause of action arises at all out of a felony. 2. That it does not arise till prosecution. 3. That it arises on the act, but is suspended till prosecution. 4. That there is neither defence to, nor suspension of the claim by, or at the instance of the felon, but that the court of its own motion, or on the suggestion of the crown, should stay proceedings till public justice is satisfied. It must be admitted that

there are great difficulties in the way of each of these theories.[25] That the first is not true is shown by *Marsh* v. *Keating* (1 *Bing. N. C.* 198), where it was held, that prosecution being impossible, a felony gave rise to a recoverable debt. It is difficult to suppose that the second supposed solution of the problem is correct. That would be to make the cause of action the act of the felon plus a prosecution. The cause of action would not arise till after both. Till then, the statute of limitations would not run. In such a case as the present, or where the felon had died, it would be impossible. And it is to be observed that it is never suggested that the cause of action is the debt *and* the prosecution. The third possible way is attended by difficulties. The suspension of a cause of action is a thing nearly unknown to the law. It exists where a negotiable instrument is given for a debt, and in cases of compositions with creditors, and these were not held till after much doubt and contest. There may be other instances. And what is to happen? Is the statute of limitations to run? Suppose the debtor or his representative sue the creditor, is his set-off suspended? Then how is the defence of impediment to be set up? By plea? That would be contrary to the rule *nemo allegans suam turpitudinem est audiendus*. Besides, it would be absurd to suppose that the debtor himself would ever so plead, and face the consequences. Then is the fourth solution right? Nobody ever heard of such a thing; nobody in any case or book ever

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[25] Where in an action for seduction the evidence shows that a rape was committed it is the duty of the judge in the interests of public justice to stop the case (*Walsh* v. *Nattrass*, 19 *U. C. C. P.* 453; *Williams* v. *Robinson*, 20 *U. C. C. P.* 255).

suggested it till Mr. Justice Blackburn did as a possibility. Is it left to the court to find it out on the pleadings? If it appears on the trial, is the judge to discharge the jury? How is the crown to know of it? There are difficulties, then, in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action. But again, suppose it can be, what is the result? It has been held, that when the felon is executed for another felony the claim may be maintained. What is to happen when he dies a natural death, when he goes beyond the jurisdiction, when there is a prosecution, and an acquittal from collusion or carelessness by some prosecutor other than the party injured? All these cases create great difficulties to my mind in the application of this alleged law, and go a long way to justify Mr. Justice Blackburn's doubt. Still after the continued expression of opinion and the cases of *Ex parte Elliott* and *Wellock* v. *Constantine*, I should hesitate to say that there is no practical law as alleged by the respondent." Unfortunately the point was not necessary for the decision in *Ex parte Ball*, and consequently the law still remains in a very hazy and unsatisfactory state, with regard to which it is impossible to express any opinion with confidence. However, the rule, as above expressed, has received the sanction of nearly three centuries; and although the criticisms of Lord Justice Bramwell throw some doubt upon its accuracy, it must, I think, be taken to be law until it is expressly overruled.

It must be observed that the rule only applies to a plaintiff who has failed in *his duty* of endeavouring to bring the felon to justice, and not to third parties. Where, therefore, in an action for seduction of the plaintiff's daughter, a paragraph of the claim alleged

that the defendant administered noxious drugs to the daughter for the purpose of procuring abortion ; it was held, that the paragraph could not be struck out as disclosing a felony for which the defendant ought to have been prosecuted, inasmuch as the plaintiff was not the person upon whom the felonious act was committed, and had no duty to prosecute (*Appleby* v. *Franklin*, 17 *Q. B. D.* 93 ; and see also *Osborn* v. *Gillett*, *L. R.* 8 *Ex.* 88).

CHAPTER II.

VARIATION IN THE GENERAL PRINCIPLE WHERE THE UNAUTHORIZED ACT OR OMISSION IS ONE FORBIDDEN BY STATUTE.

ART. 7.—*General Rule.*

(1.) When a statute gives *a right,* or *creates a duty,* in favour of an individual or class, then, if no penalty is attached, any infringement of the right or breach of the duty will be a tort remediable in the ordinary way (*Dormont* v. *Furness R. Co.*, 11 *Q. B. D.* 496 ; and see *San. Commrs. of Gibraltar* v. *Orfila*, 15 *App. Cas.* 400 ; and *Mersey Docks* v. *Gibbs, L. R.* 1 *H. L.* 93).[26]

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[26] "It is now well settled that the statutory obligation to fence imposed upon these defendants by that act can only be taken advantage of by the adjoining proprietor or by one who is in occupation of the lands of such proprietor with his licence or consent" (*Daniels* v. *Grand Trunk R. W. Co.*, 11 *O. A. R.* 473—Osler, J. A. See also *M'Lennan* v. *Grand Trunk R. W. Co.*, 8 *U. C. C. P.* 411 ; *McIntosh* v. *Grand Trunk R. W. Co.*, 30 *U. C. R.* 601 ; *Douglass* v. *Grand Trunk R. W. Co.*, 5 *O. A. R.* 585 ; *McAlpine* v. *Grand Trunk R. W. Co.*, 38 *U. C. R.* 446 ; *Conway* v. *Canadian Pacific R. W. Co.*, 12 *O. A. R.* 708, and *McFie* v. *Canadian Pacific R. W. Co.*, *post*, p. 302, and see note 91, *post*, p. 285).

(2.) But where a penalty is attached (whether recoverable by the party aggrieved or not), it then becomes a question of construction whether the legislature intended that the penalty should be the only satisfaction, or whether, in addition, the party injured should be entitled to sue for damages.[26a]

(3.) In the case of a private act imposing an active duty, the penalty will *primâ facie* be taken to be the only remedy given for breach of the duty (*Atkinson* v. *Newcastle Water Co.*, 2 *Ex. D.* (*C. A.*) 441).

(1) By acts of parliament the harbour of B. was vested in the defendants, and its limits were defined. The defendants had however jurisdiction over the harbour of P. and the channel of P. beyond those limits, for the purpose of, *inter alia*, buoying "the said harbour and channel." A moiety of the net light duties to which ships entering or leaving the harbour of P. contributed, was to be paid to the defendants and to be applied by them in, *inter alia*, buoying and lighting the harbour and channel of P. A vessel was wrecked in the channel of P., which under the Wrecks Removal Act, 1877 (40 & 41 Vict. c. 16), s. 4, the defendants had power to, and did partially, remove. The wreck not removed was not buoyed, and the plaintiff's vessel was in consequence wrecked:—*Held*, that the statutes imposed upon the defendants an obligation to remove the wreck from the channel, or to mark its position by buoys,

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[26a] *Douglas* v. *Fox*, *ante*, p. 6.

and that not having done so they were liable in damages to the plaintiff (*Dormont* v. *Furness Railway Co.*, 11 *Q. B. D.* 496 ; and see *Winch* v. *Thames Conservators*, *L. R.* 9 *C. P.* 378).

(2) At one time it was generally considered that, when a statute gave a right or created a duty in favour of an individual or class, then, unless it enforced the duty by a penalty recoverable *by the party aggrieved* (as distinguished from a common informer), any infringement of such right, or breach of such duty, would, if coupled with actual damage, be a tort remediable in the ordinary way. This notion was founded upon the judgment in the case of *Couch* v. *Steel* (3 *El. & B.* 402), but is no longer a correct statement of the law. Thus, water companies are by act of parliament obliged to keep their pipes, to which fire plugs are attached, constantly charged with water at a certain pressure, and are to allow all persons, at all times, to use the same for extinguishing fire without compensation ; and for neglect of this duty a penalty is imposed, recoverable by a common informer. On a demurrer to a declaration by which the plaintiff claimed damages against a water company for not keeping their pipes charged as required, whereby his premises were burnt down, it was held by the Court of Appeal that the action would not lie, Lord Cairns, L. C., saying :—"Apart from authority, I should say without hesitation that it was no part of the scheme of this act to create any duty which was to become the subject of an action at the suit of individuals, to create any right in individuals with a power of enforcing that right by action, but that its scheme was, having laid down certain duties, to provide guarantees for the due fulfilment of them, and where convenient to give the penalties, or some of

them, to the persons injured, but, where not convenient so to do, then simply to impose public penalties, not by way of compensation but as a security for the due performance of the duty. To split up the 43rd section, and to say *that in those cases in which a penalty is to go into the pocket of the individual injured there is to be no right of action, but that where no penalty is so given to the individual there is to be a right of action, is to violate the ordinary rules of construction.*" His Lordship then referred to *Couch* v. *Steel*, and continued, "I must venture, with great respect to the learned judges who decided that case, and particularly to Lord Campbell, to express grave doubts whether the authorities cited by Lord Campbell justify the broad general proposition that appears to have been there laid down, that wherever a statutory duty is created, any person, who can show that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed. I cannot but think that *that must to a great extent depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the act with which the court has to deal is not an act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers, as to the manner in which they will keep up certain public works*" (*Atkinson* v. *Newcastle Water Co.*,[27] 2 *Ex.*

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[27] *Finlay* v. *Miscamble*, 20 *O. R.* 29; and *post*, 102.
The plaintiff, a conductor on the G. T. R., was injured while his train was crossing the track of the defendants' railway on a level by the defendants' train running into it.

D. 441; and see also *Colley* v. *L. & N. W. R. Co.*, 5 *Ex. D.* 277; and *Vallance* v. *Falle*, 13 *Q. B. D.* 109).

(3) On the other hand, where, by 4 & 5 Vict. c. 45, s. 17, a penalty is imposed upon unauthorized persons unlawfully importing books, reprinted abroad, upon which copyright subsists, the remedy by action is not taken away from the authors; for there is *a right* created in their favour, and the penalty is cumulative (*Novello* v. *Sudlow*, 12 *C. B.* 188; and for other instances of the enforcement of statutory rights or duties by action, see *Ross* v. *Rugge-Price*, 1 *Ex. D.* 269; *Geddis* v. *Proprietors of Bann Reservoir*, 3 *App. Cas.* 430; *San. Commrs. of Gibraltar* v. *Orfila*,[28] 15 *ib.* 400; and *J. Lyons & Sons* v. *Wilkins*, (1899) 1 *Ch.* 255).

ART. 8. — *Where the Act or Omission is forbidden to prevent a particular Mischief.*

Where a duty is created by a statute for the purpose of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a

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Canadian Cases.

Held, defendants were liable (*Brown* v. *G. W. R.*, 2 *Tupper's Reps. in App.* 64).

The statute [Consol. Stat. C. c. 66, now sec. 258 Railway Act, Canada, 1888] imposed an absolute duty on the defendants to stop for three minutes, their omission to do so rendered them liable to the plaintiff, unless it was shown to have been caused by the act of God or inevitable necessity, *idem*,

[28] Public corporations to which an obligation to keep public roads and bridges in repair has been transferred are not liable to an action in respect of mere nonfeasance, unless the legislature has shown an intention to impose such liability upon them (*Pictou* v. *Geldert*, (1893) *A. C.* 524).

different kind, is not entitled to maintain an action for damages in respect of such loss (*Gorris* v. *Scott*,[29] *L. R.* 9 *Ex.* 125).

(1) Thus, in the above case, the defendant, a shipowner, undertook to carry the plaintiff's sheep from a foreign port to England. On the voyage, some of the sheep were washed overboard, by reason of the defendant's neglect to take a precaution enjoined by an order of the Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act, 1869. It was, however, held that the object of the statute and order being to prevent the spread of contagious disease among animals, and not to protect them against the perils of the sea, the plaintiff could not recover.

(2) And so, where certain regulations were established by statute for the management of the pilchard fishery, and enforced by the imposition of penalties, it was held, that a fisherman who had lost his proper turn and station, according to the regulations, through the breach of them by another fisherman, could not maintain an action for damages against him for the loss

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Canadian Cases.

[29] "The provisions of the statute which require the railway company to blow the whistle or ring the bell when approaching a highway which it crosses apply only to persons travelling upon the highway so intersected upon the same level, and meeting with injury by actual collision, and not to persons passing over a bridge above the railway or upon the highway at a distance from the intersection, to whom the railway owes no duty" (*Lemay* v. *Canadian Pacific R. W. Co.*, 17 *O. A. R.* 300—Hagarty, C. J. O.).

But the above provision does not release persons approaching and passing over level railway crossings from the exercise of ordinary care (*Miller* v. *Grand Trunk R. W. Co.*, 25 *U. C. C. P.* 389; and see *ante*, 29).

of a valuable capture of fish, which the latter had taken, through being in such wrong place. For the object of the statute was to regulate the fishery, and not to give any individual fisherman a right to any particular place (*Stevens* v. *Jeacocke*, 11 *Q. B.* 741; and see *Municip. of Pictou* v. *Geldert*,[30] (1893) *App. Cas.* 524).

ART. 9.—*The Observance of Statutory Precautions does not restrict Common Law Liability.*

Unless a statute expressly or by necessary implication restricts common law rights, such rights remain unaffected.

Thus, the defendant was possessed of a steam traction-engine, and whilst it was being driven by the defendant's servants along a highway, some sparks, escaping from it, set fire to a stack of hay of the plaintiff's standing on a neighbouring farm. The engine was constructed in conformity with the Locomotive Acts, 1861 and 1865, and there was no negligence in the management of it. It was nevertheless held that the defendant was liable, on the ground that the engine being a dangerous

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Canadian Cases.

[30] *Fairbank* v. *Township of Yarmouth*, 24 *O. A. R.* 273; *Sibbald* v. *Grand Trunk R. W. Co.*, 20 *S. C. R.* 259, *post*, p. 133.

Defendant having been employed by a road company to furnish them with stones, by placing them on the road, accidentally caused the death of plaintiffs' servant and horse. On an application for a nonsuit, it was held that the defendant was personally liable for the damage done under 16 Vict. c. 190, s. 49 [now s. 134, R. S. O., 1897, c. 193] (*Lennox* v. *Harrison*, 7 *U. C. C. P.* 496).

machine (and, therefore, within the doctrine of *Fletcher* v. *Rylands*[31]) an action would have been maintainable at common law, and that the Locomotive Acts did not restrict the common law liability (*Powell* v. *Fall*, 5 *Q. B. D.* 597).

Canadian Cases.

[31] "In my view this case is governed by the principle established in *Fletcher* v. *Rylands* and cases of that description, that principle being that when a man brings or uses a thing of a dangerous character on his own land he must keep it in at his own peril, and is liable to the consequences if it escapes and does injury to his neighbour. That principle applies, I think, when a person uses a thing of a dangerous character on a public highway and causes injury to another. In the present case the defendants, without any statutory authority, ran a steamer called the *Ontario* on the Fenelon river, and it seems to me that it was wholly immaterial to the result that the injury arose from no want of care or skill on the part of the defendants' servants in the management of the vessel or in the method of the construction of its boiler and smokestack. I confess myself unable to distinguish between a liability for an act of this kind between a highway on land and a highway on water; to exempt the parties using a dangerous article of this nature express legislative authority is required" (*Hilliard* v. *Thurston*, 9 *O. A. R.* pp. 523, 526—Burton, J. A.).

CHAPTER III.

VARIATIONS IN THE GENERAL PRINCIPLE WHERE THE UNAUTHORIZED ACT OR OMISSION ARISES OUT OF THE PERFORMANCE OF A CONTRACT.

ART. 10.—*Cases where Tort and Contract overlap.*

WHENEVER there is a contract, and something to be done in the course of the employment, which is the subject of that contract, if there be a breach of duty in the course of that employment, the plaintiff may recover either in tort or in contract (*Brown* v. *Boorman*,[32] 11 *Cl. & F.* 1).

Canadian Cases.

[32] When a defendant hiring a horse and waggon with seats for two persons places three therein, and the horse on the journey sickens and dies, he will be liable because of the misuser (*Casey* v. *Archibald*, 2 *N. S. R.* 4).

An action will lie against an auctioneer for selling goods at a ruinous sacrifice, if the jury under the circumstances find that he has acted negligently and in disregard of his duty; and it is no misdirection in such a case to tell the jury that the low price for which the goods were sold is evidence to go to them of negligence on the part of the auctioneer (*Cull* v. *Wakefield*, 6 *U. C. R.* (*O. S.*) 178).

"When a factor is employed in the general line of his

Although a tort has been defined as a wrong independent of contract, there is nevertheless a class of injuries which lie on the borderland, as it were, between contract and tort, and for which an action *ex contractu*, or *ex delicto*, may generally be brought at the pleasure of the party injured.

(1) **Negligence of professional men.**—Thus, if an apothecary carelessly or unskilfully administer improper medicines to a patient, whereby such patient is injured, he may sue him either for the breach of his implied contract to use reasonable skill and care, or for tortious negligence, followed by the actual damage (*Seare* v. *Prentice*, 8 *East*, 348).

(2) The plaintiff, who held a mortgage for 4,600*l.* upon lands belonging to one F., agreed to make him a further advance of 400*l.* upon having an additional piece of land, which F. had subsequently acquired, added to the former security. The defendant, who acted as the plaintiff's solicitor in the matter, omitted to ascertain (as the fact was) that a third person had an equitable charge to the extent of 46*l.* upon this additional piece of land, in consequence of which the plaintiff, upon the sale of the property, was unable to convey without paying this 46*l.*:—*Held*, that this was

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Canadian Cases.

trade and in whom, therefore, the public have a right to repose confidence while he transacts his accustomed business according to the common usage, then his disregard of a particular instruction which he may have received in an individual case, will not, as a general rule, make void the transaction as between him and the third person, but his act will be conclusive against his principal" (*Ibid.*—Robinson, C. J. at p. 180).

negligence for which the solicitor was liable (*Whiteman* v. *Hawkins*,[33] 4 *C. P. D.* 13).

(3) **Waste.**—So where a person, having an estate for life or years, commits waste, it is both a breach of the implied contract to deliver up the premises in as good a condition as when he entered upon them, and also an injury to the reversion, which is a violation of the reversioner's right, and therefore a tort.

(4) **Negligence of owners of market.**—The defendants were owners of a cattle market, and in the market-place they had erected a statue, round which they had placed a railing. The plaintiffs attended the market with their cattle and occupied a site for which they paid toll. A cow, belonging to them, in attempting to jump the railing, injured herself, and subsequently died from those injuries. The jury found that the rail was dangerous:—*Held*, that the defendants having *received*

Canadian Cases.

[33] An attorney is not liable to his client for omitting to take advantage of a dishonest defence (*Vail* v. *Duggan*, 7 *U. C. R.* 571). "I should be sorry to find it maintained in a court of justice, that an attorney was guilty of culpable negligence in not putting forward such a defence; he might well decline to do so, and as I think, safely, on the ground that it is not a part of his professional duty to take all dishonest advantages" (*Ibid.*—Robinson, C. J.).

An attorney is liable for negligence and plaintiff is entitled to nominal damages, even if grounds of special damages fail (*McLeod* v. *Boulton*, 3 *U. C. R.* 105).

"There can be no doubt that an attorney is liable for negligence in the discharge of his duty whereby his client has sustained damage, and I think an attorney is bound to bring to the exercise of his profession a reasonable amount of knowledge, skill and care in connection with the business of his client" (*Hett* v. *Pun Pony*, 18 *S. C. R.* 292—Sir W. J. Ritchie, C. J.; *Carrigan* v. *Andrews*, *N. B. R.* 1 *All.* 485).

toll from the plaintiffs, and invited them to come into the market with their cattle, a duty was imposed upon them to keep the market in a safe condition, and therefore an action would lie against the defendants for the loss sustained by the plaintiffs (*Lax* v. *Corp. of Darlington*, 5 *Ex. D.* 28; and see *Hyman* v. *Nye*, 6 *Q. B. D.* 685).

(5) **Negligence of Dock Company.**—A ship entered a dock to load. While entering, a rope got foul of her propeller. On the representation of the dock master that the bottom of the entrance lock was flat, the captain grounded the ship in the lock in order to free the propeller. As a matter of fact the bottom was not flat, but had a sill across its middle, owing to which the ship was seriously strained and injured. Under these circumstances it was held that the dock company were liable to the shipowners (*Owners of Apollo* v. *Port Talbot Co.*, (1891) *App. Cas.* 499; and see *The Rhosina*, 10 *P. D.* 131; *The Moorcock*, 14 *P. D.* 64; *The Calliope*, (1891) *A. C.* 11).

ART. 11.—*Privity necessary where the Tort arises out of the Performance of a Contract.*

Whenever a wrong arises out of the performance of a contract within the meaning of Art. 10, the following principles apply :—

(a) No one, not privy to the contract, can sue *the person who has contracted*, in respect of such wrong (*Tollit* v. *Shenstone*, 5 *M. & W.* 283; *Winterbottom* v. *Wright*, 10 *M. & W.* 109).

(b) But where, altogether separate and apart from the breach of contract, although connected with it, the defendant has undertaken a duty or has by law a duty imposed upon him towards the plaintiff, the latter may sue although not privy to the contract (see *Art.* 12, *infra*).

(c) *A fortiori* if, in addition to the particular breach of duty committed by the contracting party to the contractee, the same circumstances constitute a tort by a third party to a third party, the third party so injured may sue the third party so injuring him (*Berringer* v. *G. E. R. Co.*, 4 *C. P. D.* 163).

Illustrations of paragraph (a).—(1) Thus a master cannot sue a railway company for loss of services, caused by his servant being injured by the company's negligence when being carried by them; for the injury in such a case arises out of the contract between the company and the servant, to which the master is no party (*Alton* v. *Mid. R. Co.*, 34 *L. J. C. P.* 292; *Taylor* v. *Manch., &c. R. Co.*, (1895) 1 *Q. B.* 134, 141).[34]

(2) And so it has been held by the American courts, that where a steam boiler is defectively and negligently constructed by a manufacturer, and sold by him to a

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Canadian Cases.

[34] The plaintiff lent or hired his horse to S., who, while on a journey, put it up at defendant's inn, and it was strangled in the stable there, owing, as the jury found, to the negligence of defendant's servant in tying it up in the stall. It was *held* that the plaintiff might maintain an action therefor (*Walker* v. *Sharpe*, 31 *U. C. R.* 340).

purchaser, and subsequently explodes and injures a third party, the manufacturer is only liable to the purchaser and not to the third party (*Losee* v. *Clute*, 51 *New York Rep.* 494, and *Savings Bank, &c.* v. *Ward*, 100 *U. S. Rep.* 195; and see also *Longmeid* v. *Holliday*, 6 *Ex.* 761; and *Heaven* v. *Pender*, 9 *Q. B. D.* 302).

Illustrations of paragraph (b).—(3) On the other hand, it has been held by the American courts, that a dealer in drugs who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into the market, is liable to *all* persons, whether purchasers or not, who, without fault on their part, are injured by using it as medicine. The liability of the dealer, however, arises in that case not out of any contract, but out of the duty which the law imposes upon him to avoid *acts* in their *very nature* dangerous to the lives of others (*Thomas* v. *Winchester*, 6 *New York Rep.* 397). At first sight this seems difficult to reconcile with the case of the defective boiler, but it is apprehended that the distinction consists in this, that the direct and obvious consequence of labelling poison as medicine is to inflict damage, whereas the fact that a person is killed by the bursting of a steam boiler is only a remote consequence of its defective construction. In short, it is not a *wrongful act* in itself to construct a steam boiler defectively, but it *is* a wrongful act to label poison as medicine.

(4) So in *cases of fraud* (as is hereafter mentioned) a man is responsible for the consequences of a breach of a warranty made by him to another, upon the faith of which a third person acts; provided that such false representation was made with the direct intent that it should be acted upon by such third person. In other words the defendant in such cases has undertaken a duty

towards the plaintiff (*Barry* v. *Croskey*,[35] 2 *Johns. & H.* 21).

(5) And so where a father bought a gun for the use of himself *and his son*, and the defendant sold it to him *for that purpose*, fraudulently representing it as sound, and it exploded and injured the son; it was held that he could maintain an action of tort, although not privy to the warranty (*Langridge* v. *Levy*,[36] 4 *M. & W.* 338).

(6) So where the defendant sold to A. a hair-wash, *to be used* by *A.'s wife*, and professed that it was harmless, but in reality it was very deleterious, and injured A.'s wife, it was held that she had a good cause of action against the defendant (*George* v. *Skivington*, *L. R.* 5 *Ex.* 1). This decision has been dissented from by Field and Cave, JJ., in *Heaven* v. *Pender*[37] (9 *Q. B. D.* 302), but their decision was reversed on appeal (11 *Q. B. D.* 503).

(7) On the other hand, it is now undoubtedly good law that a certificate or a valuation, signed by the maker under circumstances of gross carelessness, does not give any right of action against the maker on the part of a

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Canadian Cases.

[35] *McLean et al.* v. *The Buffalo and Lake Huron Railway Company*, 24 *U. C. R.* 270.

[36] *Smith* v. *Onderdonk*, 25 *O. A. R.* 171.

[37] A physician wrote a prescription for the plaintiff and directed that it should be charged to him by the druggist who compounded it, which was done. His fee, including the charge for making up the prescription, was paid by the plaintiff. The druggist's clerk by mistake put prussic acid in the mixture and the plaintiff in consequence suffered injury. It was *held* that the druggist was liable to the plaintiff for negligence but the physician was not (*Stretton* v. *Holmes*, 19 *O. R.* 286; and see *Howard* v. *Corporation of City of St. Thomas*, 19 *O. R.* 719).

plaintiff who has acted to his loss on the faith of the certificate or valuation being correct, unless (1) there was actual moral fraud (as distinguished from gross negligence); or (2) there was privity of contract between the valuer and the plaintiff. This was laid down in the case of *Le Lievre* v. *Gould*, (1893) 1 *Q. B.* 491, overruling *Cann* v. *Willson* (39 *Ch. Div.* 39), where the law on the subject is most perspicuously stated by Bowen, L. J. In that case, mortgagees lent money by instalments to a builder, on the faith of certificates negligently granted by the defendant, who was a surveyor appointed, not by the mortgagees, but by the builder's vendor. The certificates were inaccurate, and the mortgagees thereby suffered loss, for which they claimed compensation from the defendant:—*Held*, that as there was no contractual relation between them, the defendant owed no duty to the plaintiffs, and the action could not be maintained. It was urged that a certificate carelessly issued was as dangerous as an ill-made gun or a poisonous hair-wash, and that on that ground the defendant was liable; but the court would not admit the analogy. Of course, however, if the certificate had been *fraudulent*, *i.e.*, issued with intent to deceive the plaintiff, then, independent of any contractual relation, the defendant would have been liable (see also *Scholes* v. *Brook*, 63 *L. T.* 837).

(8) So if a surgeon treat a child unskilfully, he will be liable to the child, even though the parent contracted with the surgeon (*Pippin* v. *Sheppard*, 11 *Price*, 400).

(9) So "a stage-coach proprietor who may have contracted with a master to carry his servant, if he is guilty of neglect, and the servant sustain personal injury, is liable to him. For *it is a misfeasance towards him if*,

after taking him as a passenger, the proprietor drives without due care"; and, as will be seen from the next rule, a misfeasance is a distinct tort (*Longmeid* v. *Holliday*,[38] 6 *Ex.* 767, per Parke, B.).

(10) And so, on the same ground, where a servant travelling with his master, who took his ticket and paid for it, lost his portmanteau through the railway company's negligence, he was held entitled to sue the company (*Marshall* v. *York, &c. R. Co.*,[39] 21 *L. J. C. P.* 34; and see *Elliott* v. *Hall*, 15 *Q. B. D.* 315). For the converse case, where the master was held entitled to sue although the contract was with the servant, see *Meux* v. *G. E. R. Co.*, (1895) 2 *Q. B.* 387.

Illustrations of paragraph (c).—(11) Where, on the other hand, a servant took a ticket of the London and Tilbury Railway Company, who thereby impliedly contracted to carry him with care and without negligence, and the servant travelled in a train drawn by an engine of the South Eastern Railway Company, and the latter company also provided the signalman and so on, and owing to their negligence a collision happened, and the

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Canadian Cases.

[38] A husband is not entitled to damages for the personal injury and suffering of the wife as against a medical man who neglects to attend upon her according to contract (*Hunter* v. *Ogden*, 31 *U. C. R.* 132).

[39] The ticket issued to M., a traveller by rail from Boston, Mass., to St. John, N. B., entitled him to cross the St. John Harbour by ferry, and a coupon attached to the ticket was accepted in payment of his fare. The ferry was under the control and management of the corporation of St. John. *Held*, that an action would lie against the corporation for injuries to M. caused by the negligence of the officers of the boat during the passage (*Mayor of St. John* v. *MacDonald*, 14 *S. C. R.* 1).

servant was injured, it was held that the master could sue the South Eastern Railway Company. For although he could not sue the London and Tilbury Company, because, *quâ* them, the wrong was one arising out of contract in respect of which the servant alone could sue, yet the negligence of the South Eastern Railway Company did not arise out of any contract. They were entire strangers to the contract, and their tort was a tort pure and simple, and consequently the master could sue in respect of it (*Berringer* v. *G. E. R. Co.*, 4 *C. P. D.* 163).

ART. 12.—*Duties gratuitously undertaken.*

The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in its performance (*Coggs* v. *Bernard*, 1 *Sm. L. Ca.* 177, 6*th ed.*).

Misfeasance.—There is a class of contracts which are particularly nearly allied to torts. Such are gratuitously undertaken duties. Such duties are not contracts in one sense, namely, that, being without consideration, the contractor is not liable for their nonfeasance, *i.e.*, for omitting to perform them. But, on the other hand, if he once commences to perform them, the contract then becomes choate, as it were, by virtue of the above rule.

(1) Thus, in the above case, the defendant gratuitously promised the plaintiff to remove several hogsheads of brandy from one cellar to another, and, in doing so, one of the casks got stayed through his gross negligence. Upon these facts it was decided that the

defendant was liable; for although his contract could not have been enforced against him, yet, having once entered upon the performance of it, he thence became liable for all misfeasance.

(2) Again, the defendants, the Metropolitan District Railway Company, have running powers over the South Western Railway between Hammersmith and the New Richmond Station of the South Western Company. Above the booking office at the Richmond station are the words "South Western and Metropolitan Booking Office and District Railway." The plaintiff took from the clerk there employed by the South Western Company a return ticket to Hammersmith and back. The ticket was not headed with the name of either Company, but bore on it the words "*viâ* District Railway." On his return journey from Hammersmith the plaintiff travelled with this ticket in a train belonging to the defendants and under the management of their servants. The carriage being unsuited for the New Richmond Station platform, the plaintiff, in alighting, fell and was hurt. He brought an action against the defendants, and the jury found negligence in them:—*Held*, that having invited or permitted the plaintiff to travel in their train, the defendants were bound to make reasonable provision for his safety; and that there was evidence of their liability, *even assuming the ticket not to have been issued by or for them, but for the South Western Company* (*Foulkes* v. *Met. Dis. R. Co.*, 5 *C. P. D.* 157).

(3) So persons performing a public duty gratuitously are responsible for an injury to an individual through the negligence of workmen employed by them (*Clothier* v. *Webster*, 12 *C. B. N. S.* 790; *Mersey* v. *Gibbs*, *L. R.* 1 *H. L.* 93; *Foreman* v. *Mayor*, *L. R.* 6 *Q. B.* 214).

Bailments.—In some works injuries to goods whilst in the keeping of carriers and innkeepers are described as torts; in others as breaches of contract; but however actions in respect of them may be framed, they are in substance *ex contractu*, being for non-performance of the contract of bailment, and not for a tort independent of contract (*Roscoe*, 539; 2 *Bl. Com.* 451; *Legge* v. *Tucker*, 26 *L. J. Ex.* 71). I shall therefore not treat of them in this work. At the same time, for the purpose of ascertaining the scale on which costs will be taxed, such actions may be regarded as actions of tort (*Turner* v. *Stallibras*, (1898) 1 *Q. B.* 56).

CHAPTER IV.

VARIATION IN THE GENERAL PRINCIPLE WHERE THE UNAUTHORIZED ACT OR OMISSION TAKES PLACE OUTSIDE THE JURISDICTION OF OUR COURTS.

ART. 13.—*Torts committed Abroad.*

AN action will lie in the English Courts for a tort committed outside England, provided :—

(a) It is either a tort or a crime according to both English law and the law of the country where it was committed (*Machado* v. *Fontes*, (1877) 9 *Q. B.* 231) ; and

(b) It is a tort which is not of a purely local nature, such as a trespass to, or ouster from land, or a nuisance affecting hereditaments.

(1) Thus, in the leading case of *Mostyn* v. *Fabrigas* (1 *Sm. L. C.* 628), it was held that an action lay in England against the governor of Minorca, for a false imprisonment committed by him in Minorca, the plaintiff being a native Minorquin.

(2) So actions may be brought in this country against foreigners for injuries committed on the high seas (*Submarine Telegraph Co.* v. *Dickson*, 15 *C. B. N. S.* 759).

(3) On the other hand, where there was a collision between two ships in Belgian waters, and the owners of

one of the ships were liable according to Belgian law, notwithstanding that the Belgian law imposed on them compulsory pilotage, it was held that no action could be maintained against them in our courts, which recognise the plea of compulsory pilotage as a good answer to an action for collision (*The Halley*, *L. R.* 2 *P. C.* 193, 204; and see also *The Guy Mannering*, 7 *P. D.* 52, 132, and *The Augusta*, 6 *Asp. M. C.* 58, 161).

(4) Conversely, where the governor of a colony had committed a tort according to our law, but was, by an act of the Colonial Legislature, discharged from responsibility in the colony, it was held that he could not be sued in England (*Phillips* v. *Eyre*, *L. R.* 4 *Q. B.* 225; 6 *ib.* 1; *Machado* v. *Fontes*, (1897) 2 *Q. B.* 231; and see also *Blad's case*, 3 *Swan.* 603).

(5) The English courts have no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad; injuries to proprietary rights in foreign real estate being outside their jurisdiction (see *Brit. South African Co.* v. *The Campanhia de Moçambique*, (1893) *App. Cas.* 602, where all the prior cases are examined).

(6) The case of *Morocco Bound, &c.* v. *Harris* (1895, 1 *Ch.* 534), has given rise in some minds to the idea that torts committed abroad cannot be enforced in English courts. In that case, however, the alleged tort was infringement of copyright *in Germany*. The English law gave the plaintiffs no copyright in Germany, but only in England, and although the German law gave them copyright, the infringement of that was a tort according to German law but not according to English law. The case, therefore, simply falls under para. (a), *supra*.

CHAPTER V.

OF PERSONAL DISABILITY TO SUE AND TO BE SUED FOR TORT.

ART. 14.—*Who may sue.*

(1) EVERY person may maintain an action for tort, except an alien enemy, and a convict during his incarceration (33 & 34 Vict. c. 23, sects. 8, 30).[40] A married woman may sue alone, and damages recovered by her belong to her as her separate property (*Beasley* v.

Canadian Cases.

[40] The executor of a deceased partner in trade is tenant in common with the surviving partners of the partnership property, and the surviving partners cannot sue him in trespass for a wrongful sale and conversion against their will of the whole of the partnership property. *Strathy* v. *Crooks*, 2 *U. C. R.* 51.

Tenants in common cannot maintain trespass against each other (*Wemp* v. *Mormon et al.*, 2 *U. C. R.* 146).

"A man may become the absolute owner of a chattel by purchase without seeing the chattel, and without the performance of any visible act of receiving possession; and it is equally clear that such purchaser, without ever having had actual visible possession of the chattel, may bring trespass against anyone who wrongfully converts it or injures it. It is enough if he has the exclusive property in the chattel and a right to the immediate possession of it" (*Haydon* v. *Crawford*, 3 *U. C. R.* (*O. S.*) 587.—Robinson, C. J.).

A bailee may maintain an action against a wrongdoer (*Sanford* v. *Bowles*, 3 *N. S. R.* 304; *McDougall* v. *McNeil*, 24 *N. S. R.* 322; *post* p. 72).

Roney, (1891) 1 *Q. B.* 509; 60 *L. J. Q. B.* 408).

(2) A husband cannot sue a wife for tort, nor a wife her husband, unless the action be brought by the wife for the security and protection of her separate property (see *Phillips* v. *Barnet*, 1 *Q. B. D.* 436; *Symonds* v. *Hallett*, 24 *C. D.* 346; *Allen* v. *Walker*, *L. R.* 5 *Ex.* 157; *Wood* v. *Wood*, 19 *W. R.* 1049; *Summers* v. *City Bank*, *L. R.* 9 *C. P.* 580, but conf. *Robinson* v. *Robinson*, 13 *T. L. R.* 564, *contra*).

(3) A corporation cannot sue for a tort merely affecting its reputation (*Mayor of Manchester* v. *Williams*, (1891) 1 *Q. B.* 94; 60 *L. J. Q. B.* 23; 63 *L. T.* 805).

(4) A child cannot maintain an action for injuries sustained while *en ventre sa mère* (*Walker* v. *G. N. Rail. Co.*, 28 *L. R. Ir.* 69).

ART. 15.—*Who may be sued for a pure Tort.*[41]

(1) Every person who commits a tort not depending on fraud or malice, and not arising

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Canadian Cases.

[41] "There is no doubt that two or more persons cannot be jointly sued in an action for verbal slander; for in legal consideration it is an act which cannot be committed by several persons, and must be considered the separate *tort* of each person who spoke the words, and for which separate actions only can be brought. In the instance of written slander or libel, the law holds a different course, and permits

out of the performance of a contract, is liable to be sued, notwithstanding infancy, coverture, or unsoundness of mind; except (1) the sovereign, (2) foreign sovereigns, and (3) ambassadors of foreign powers (see *Magdalena Co.* v. *Martin*, 28 *L. J. Q. B.* 310). But they can waive their privilege (*Duke of Brunswick* v. *King of Hanover*, 6 *Bea.* 1).

(2) Every person who commits a tort depending on fraud or malice is liable to be sued, unless from extreme youth or unsoundness of mind he is mentally incapable of contriving fraud or malice (*semble*).

(3) A corporation which commits a tort is as liable to be sued as a private individual would be, if the thing done or omitted is within the purpose for which the corporation exists; but otherwise the corporation is not liable, and its directors, servants, or other persons who authorize or commit the tort can alone be sued (*Edwards* v. *Midland R. Co.*,[42]

Canadian Cases.

the plaintiff to make all who participated, either openly or by secret instigation, in publishing the libel, joint defendants in the action" (*Brown* v. *Hirely*, 5 *U. C. R.* (*O. S.*) 734.—Sherwood, J.; and *post*, p. 189).

[42] *Freeborn* v. *The Singer Sewing Machine Co.*, 2 *Manitoba L. R.* 253; *Wilson* v. *The City of Winnipeg*, 4 *Manitoba L. R.* 193; *Miller* v. *Manitoba Lumber and Fuel Co.*, 6 *M. L. R.* 487.

6 *Q. B. D.* 287 ; *Bank of New South Wales* v. *Owston*,[43] 4 *App. Cas.* 270 ; *Rayson* v. *South Lond. Tramways Co.*, (1893) 2 *Q. B.* 304 ; *Cornford* v. *Carlton Bank*, (1899) 1 *Q. B.* 392).

(1) Thus, where an infant is guilty of negligence, and thereby causes loss to another, the latter may sue him for damages, notwithstanding his infancy (*Burnard* v. *Haggis*, 14 *C. B. N. S.* 45).

(2) So, also, infants and married women are clearly liable for fraud (see *Re Lush*, *L. R.* 4 *Ch. App.* 591, and *Sharpe* v. *Foy*, *ibid.* 35) ; but as fraud depends, not upon acts or omissions simply, but upon acts done or omissions made with *intent to injure another*, it would seem to follow that extreme youth or lunacy *of such a character as would negative the existence of such intention* would probably be held a good defence (see per Lord Esher, M. R., *Emmens* v. *Pottle*, 16 *Q. B. D. at p.* 356). The same principle would, of course, apply to torts which depend on the existence of malice.

(3) With regard to corporations, of course actions of tort can of necessity only arise for acts or omissions of their servants or directors, and the difficulty in such cases is the same as arises in other cases of the responsibility of a principal for the acts of his agent, viz., the difficulty of determining whether or not the act or omission complained of was within the scope of the general authority or duty of such servant or director.

Canadian Cases.

[43] An action for slander will not lie against a corporation (*Marshall* v. *Central Ontario R. W. Co.*, 28 *O. R.* 241).

Thus, in *Edwards* v. *Midland R. Co.* (*supra*), it was held that the employment of policemen by a railway company to protect their property is an act within the scope of the incorporation of the company, and that consequently the company were responsible for a malicious prosecution carried out by one of such policemen. On the other hand, in *Bank of New South Wales* v. *Owston* (*supra*), which was an action for a malicious prosecution against an incorporated banking company, the jury found that the same had been authorized on behalf of the bank by W., the acting manager, and were directed by the judge that it was to be inferred from W.'s position as manager that he had sufficient power under the circumstances for directing a prosecution:—*Held*, on appeal, that the direction to the jury to the effect that it was to be inferred from W.'s position that he had authority to direct the prosecution was on the evidence incorrect. The arrest, and still less the prosecution of offenders, is not within the ordinary routine of banking business, and, therefore, not within the ordinary scope of a bank manager's authority. Evidence accordingly is required to show that such arrest or prosecution is within the scope of the duties and class of acts which such manager is authorized to perform. That authority may be general, or it may be special and derived from the exigency of the particular occasion on which it is exercised. In the former case it is enough to show, commonly, that the agent was acting in what he did on behalf of the principal; but in the latter case, evidence must be given of a state of facts which shows that such exigency is present, or from which it might reasonably be supposed to be present (and see also *Charleston* v. *London Tramways Co.*, 36 *W. R.* 367; *Gilbert* v. *Trinity*

House, 17 *Q. B. D.* 795; and *Mersey Docks* v. *Gibbs*,[44] *L. R.* 1 *H. L.* 93).

(4) Where, however, a *public duty* is imposed by statute on a corporation, it by no means follows that a private injury, caused to an individual by non-feasance, will give him a right of action against the corporation. Of course, if the statute shows an intention to impose such a liability on the corporation, they will be held liable; but the mere imposition of a public duty (*ex. gr.*, to repair roads) does not of itself render the corporation liable to an action for non-performance of the duty. They may be liable to a prosecution, or to a mandamus, but not to an action for damages (*Municipality of Pictou* v. *Geldert*,[45] (1893) *App. Cas.* 524).

Canadian Cases.

[44] *Hesketh* v. *Toronto*, 25 *O. A. R.* 449.

Though municipal corporations are not bound by law to establish and manage a fire department, yet if they do so they are liable for injuries caused by the negligence of the servants employed by them therein while in the performance of their duties (*Hesketh* v. *Toronto*, 25 *O. A. R.* 449).

[45] In the absence of a statute imposing liability for negligence or nonfeasance, a municipal corporation is not liable in damages for injury caused to a citizen by reason of a sidewalk having been raised to a higher level than a private way, or having been allowed to get out of repair (*The City of St. John* v. *Campbell*, 26 *S. C. R.* 1; and see *post*, p. 288).

D. brought an action for damages against the corporation of the town of C. for injuries sustained by falling on a sidewalk where ice had formed and been allowed to remain for a length of time. *Held*, that the corporation was liable, the evidence showing that the sidewalk, either from improper construction or from age and long use, had sunk down so as to allow water to accumulate upon it, whereby the ice causing the accident was formed (*The Corporation of Cornwall* v. *Derochie*, 24 *S. C. R.* 301).

"The case of *Caswell* v. *St. Mary's Road Co.* (28 *U. C. R.* 247) seems to me to be good law; it was there *held*, that if

ART. 16.—*Who may be sued for Torts founded on Contract.*

No person can be sued for a tort arising out of the performance of a contract, who would be incapable of entering into that contract.

(1) Thus, where an infant hired a horse and overworked it, so that it was permanently injured, it was held that he was not liable, because the tort was one arising out of the performance of the contract of hiring (*Jennings* v. *Rundall*, 8 *T. R.* 335).

(2) Of course, however, where the tort is merely connected with, and does not arise out of, the performance of the contract, the case is different; *ex. gr.*, if the infant in the last preceding illustration had shot the horse, or sold it, he would clearly have been liable (see *Burnard* v. *Haggis*, 14 *C. B. N. S.* 45). There is, however, sometimes very considerable difficulty in saying whether a tort arises out of the performance of, or is merely connected with, a contract.

Canadian Cases.

snow collect on a certain spot, and by the thawing or freezing the travel upon it becomes specifically dangerous, and if this special difficulty can be conveniently corrected by removing the snow or ice, or by other reasonable means, there is the duty on the person or body, on whom the care or reparation rests, to make the place fit and safe for travel" (*Ibid.*—Taschereau, J., at p. 303).

Rounds v. *Corporation of Stratford*, 26 *U. C. C. P.* 11; *Roe* v. *Corporation of Lucknow*, 21 *O. A. R.* 1.

CHAPTER VI.

LIABILITY FOR TORTS COMMITTED BY OTHERS.

SECTION I. — LIABILITY OF HUSBAND FOR TORTS OF WIFE.

ART. 17. — *Wife's ante-nuptial and post-nuptial Torts.*

(1) A MARRIED woman may be sued alone in respect of her ante-nuptial torts; but her husband is also liable to the extent of the property which he received with her; and he may be sued either jointly with her or alone (45 & 46 Vict. c. 75, ss. 13, 14, and 15).[46]

Canadian Cases.

[46] A married woman may bring an action of libel in her own name without joining her husband as plaintiff (*Spahr* v. *Bean*, 18 *O. R.* 70).

A bear belonging to one of the defendants escaped from premises, the separate property of Mary, wife of John McCreary, where it had been confined by the latter without objection from his wife, and attacked and injured the plaintiff on a public street. *Held*, that the wife having under R. S. O., 1887, c. 132, sects. 3, 14 [now R. S. O., 1897, c. 163], all the rights of a *feme sole* in respect of her separate property, might have had the bear removed therefrom, and not having done so she was liable (*Shaw* v. *McCreary*, 19 *O. R.* 39).

(2) A married woman may also be sued alone in respect of her post-nuptial torts (45 & 46 Vict. c. 75, s. 1), but her husband is also liable, and may be joined with her as defendant (*Seroka* v. *Kattenburg*, 17 *Q. B. D.* 177).

Prior to the Married Women's Property Act, 1882, a wife could not be sued alone for a tort. Her torts were torts of her husband, and indeed Jessel, M. R., said in one case (*Wainford* v. *Heyl*, *L. R.* 20 *Eq.* 321), that, strictly speaking, a married woman could not commit torts, but could merely create a liability against her husband. By the above-mentioned act, however, this exemption is removed, and a married woman is now as liable to be sued alone for her torts as if she were a *feme sole*. This enactment, however, does not

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Canadian Cases.

Apart from any legislation a married woman may be liable for torts committed by her unless she has been acting under the coercion of her husband (*Ibid.*—Boyd, C.; *Stone* v. *Knapp*, 29 *U. C. C. P.* 609; *Wagner* v. *Jefferson*, 37 *U. C. R.* 551; *Consolidated Bank* v. *Henderson*, 29 *U. C. C. P.* 549).

In an action for a tort committed by a wife during coverture, the husband is not a proper party, but the wife must be sued alone (*Amer* v. *Rogers et ux*, 31 *U. C. C. P.* 195).

"The position of a married woman, as regards liability for her separate contracts and for her torts during coverture, is essentially different. She is bound by her civil torts just as if she was discovert, and whether she has separate property or not. But her contracts, though valid as against her property, cannot be sued upon at law or in equity, either during or after her coverture, so as to bind her person" (*Ibid.*—Osler, J. See, however, *R. S. O.*, 1897, c. 163).

affect the common law liability of a husband for his wife's torts (*Seroka* v. *Kattenburg*, *ubi sup.*); and, consequently, a plaintiff can elect whether he will sue the wife alone, or join her husband as co-defendant with her.

Section II.—Liability of Employer for Torts of Contractor (*a*).

Art. 18.—*General Immunity.*

A person employing a contractor, will be liable for the contractor's wrongful acts in the following cases only :—[47]

(1) If the employer retains his control over the contractor, and personally interferes and makes himself a party to the act which occasions the damage.

(*a*) This section does not apply to the liability of an employer to one of his workmen, for an injury caused by the negligence of a sub-contractor, as to which, see sect. 3, *infra*.

Canadian Cases.

[47] The plaintiff owned a dwelling-house for twenty years, and the defendant, intending to erect a house on his land adjoining, employed an architect, who drew the plans, whereby trenches to lay the foundations in were to be dug adjoining the plaintiff's foundation wall, and the depth of the trenches was shown. This work was let out to a contractor, and through his negligence in digging the trenches, &c., the wall of the plaintiff's house fell. It was *held* that the defendant was liable, for the damage arose, not in a matter collateral to, but in the performance of the very act which the contractor was employed to perform (*Wheelhouse* v. *Darch*, 28 *U. C. C. P.* 269; and see R. S. O., 1897, c. 160, sect. 4; *Kerr* v. *The Atlantic & N. W. R. Co.*, 25 *S. C. R.* 197).

(2) If the thing contracted to be done is itself illegal.

(3) If a legal or statutory duty is incumbent on the employer, and the contractor either omits, or imperfectly performs such duty.

(4) Where the thing contracted to be done, although lawful in itself, is likely, in the ordinary course of events, to damage another or his property unless preventive means are adopted, and the contractor omits to adopt such means (*Hughes* v. *Percival*, 8 *App. Cas.* 443; *Halliday* v. *Nat. Telephone Co.*, (1899) 2 *Q. B.* 392; and *Penny* v. *Wimbledon, &c. District Council*, *ibid.* 72).

Halliday v. L. J. R. 68. 1016

(1) A contractor, employed by navigation commissioners, in the course of executing the works, flooded the plaintiff's land, by improperly, and without authority, introducing water into a drain insufficiently made by himself. Here the contractor, and not the commissioners, was held liable (*Allen* v. *Howard*, 7 *Q. B.* 960; and see also *Jones* v. *Corp. of Liverpool*, 14 *Q. B. D.* 890).

(2) So where a company contracted with A. to construct a railway, and A. sub-contracted with B. to construct a bridge on it, and B. employed C. to erect a scaffold under a special contract between him and C.; a passenger injured by the negligent construction of the scaffold could only sue C., and not A., B., or the company (*Knight* v. *Fox*, 5 *Ex.* 721; and see *Kiddle* v. *Lovett*, 16 *Q. B. D.* 605; and *Membery* v.

G. W. R. Co.,[48] 14 *App. Cas.* 179; 58 *L. J. H. L.* 563).

(3) So where a butcher bought a bullock, and hired a licensed drover to drive it to his shop; and the drover, instead of so doing, employed a boy for the purpose; it was held that the butcher was not liable for the injurious consequences caused by the boy's negligence, as the drover was a contractor and the relation of master and servant did not exist between them or between the butcher and the boy (*Milligan* v. *Wedge*, 12 *A. & E.* 737; *Pickard* v. *Smith*, 10 *C. B. N. S.* 470).

(4) So if the owner of a carriage hire horses from a

Canadian Cases.

[48] L. was walking along the sidewalk of a street in Halifax at night when an electric lamp went out, and in the darkness she fell over a hydrant and was injured. In an action against the city for damage it was shown that there was a space of seven or eight feet between the hydrant and the inner line of the sidewalk, and that L. was aware of the position of the hydrant, and accustomed to walk on this street. The statutes respecting the government of the city do not oblige the council to keep the streets lighted, but authorize them to enter into contracts for that purpose. At the time of the accident the city was lighted by electricity by a company who had contracted with the corporation therefor. Evidence was given to show that it was not possible to prevent a single lamp or a batch of lamps going out at times. *Held*, reversing the judgment of the Supreme Court of Nova Scotia, that the city was not liable; that the corporation being under no statutory duty to light the streets the relation between it and the contractor was not that of master and servant, or principal and agent, but that of employer and independent contractors, and the corporation was not liable for negligence in the performance of the service; that the position of the hydrant was not in itself evidence of negligence in the corporation, and that L. could have avoided the accident by the exercise of reasonable care (*The City of Halifax* v. *Lordly*, 20 *S. C. R.* 505; *McMillan* v. *Walker*, 5 *N. B. R.* 31).

job master, who at the same time provides a driver, the job master is liable for accidents caused by the driver's negligence; for he is the job master's servant, and not that of the owner of the carriage (*Quarman* v. *Burnett*, 6 *M. & W.* 499). And *quâ* the public, a similar principle applies to cab proprietors and cab drivers, where the proprietor finds both cab and horse (*Venables* v. *Smith*, 2 *Q. B. D.* 279; *King* v. *London Cab Co.*, 23 *Q. B. D.* 281; 61 *L. T.* 34; 37 *W. R.* 737); but in the provinces it is otherwise where the driver finds the horse and harness, or merely hires the cab (*King* v. *Spurr*, 8 *Q. B. D.* 104). In London, however, the London Hackney Carriage Act, 1843 (6 & 7 Vict. c. 86), makes the proprietor responsible for the driver while plying for hire, even although the relationship of master and servant does not exist between them (*Keen* v. *Henry*, (1894) 1 *Q. B.* 292).

(5) **Illustrations of exceptions.** — But, where the defendant employed a contractor to make a drain, and he left some of the soil in the highway, in consequence of which an accident happened to the plaintiff, and afterwards the defendant, on complaint being made, promised to remove the rubbish, and paid for carting part of it away, *and it did not appear that the contractor had undertaken to remove it;* it was held that the defendant was liable under exception (1) (*Burgess* v. *Gray*, 1 *C. B.* 578).

(6) A company, not authorized to interfere with the streets of Sheffield, directed their contractor to open trenches therein; the contractor's servants in doing so left a heap of stones, over which the plaintiff fell and was injured. Here the defendant company was held liable, as the interference with the streets was in itself

a wrongful act (*Ellis* v. *Sheffield Gas Consumers Co.*, 23 *L. J. Q. B.* 42).

(7) So where the defendants were authorized, by an act of parliament, to construct an opening bridge over a navigable river, a duty was cast upon them to construct it properly and efficiently; and the plaintiff having suffered loss through a defect in the construction and working of the bridge, it was held that the defendants were liable under exception (3), and could not excuse themselves by throwing the blame on their contractor (see *Hole* v. *Sittingbourne, &c.*, 6 *H. & N.* 488, and *Hardaker* v. *Idle District Council*, (1896) 1 *Q. B.* 335).

(8) Plaintiff and defendant were owners of two adjoining houses, plaintiff being entitled to have his house supported by defendant's soil. Defendant employed a contractor to pull down his house, excavate the foundations, and rebuild the house. The contractor undertook the risk of supporting the plaintiff's house as far as might be necessary during the work, and to make good any damage and satisfy any claims arising therefrom. Plaintiff's house was injured in the progress of the work, owing to the means taken by the contractor to support it being insufficient. Held, on the principle above laid down (paragraph 4), that the defendant was liable (*Bower* v. *Peate*, 1 *Q. B. D.* 321; and see to same effect, *Tarry* v. *Ashton*, *ibid.* 314; *Angus* v. *Dalton*, 6 *App. Cas.* 740; and *Black* v. *Christchurch Finance Co.*, (1894) *A. C.* 48).

SECT. III.—LIABILITY OF EMPLOYER FOR TORTS OF SERVANT AND OTHER AGENTS.

SUB-SECT. 1.—LIABILITY TO THIRD PARTIES.

ART. 19.—*General Principle.*

(1) A person who puts another in his place to do a class of acts in his absence, is answerable for the torts of the latter, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; and whether it be done negligently, wantonly, or even wilfully. Provided that what is done, is done by the agent in the course and within the general scope of his employment (*Bayley* v. *Manchester, Sheff. & Lincoln R. Co.*, *L. R.* 7 *C. P.* 415; *Dyer* v. *Munday*,[49] (1895) 1 *Q. B.* 742).

(2) But if the agent, without regard to his

Canadian Cases.

[49] An action for malicious arrest cannot be maintained against a principal on an arrest made on his agent's apprehension that the debtor would leave the province, the affidavit and arrest being both made without the principal's knowledge, privity or procurement (*Smith* v. *Thompson*, 6 *U. C. R.* (*O. S.*) 327).

"I take it to be clear on general principles that where malice begins the agency ends, for there to serve a wrongful end of his own, the agent is going out of the scope of his authority, and cannot make his principal liable for an act flowing wholly from his own bad motives" (*Ibid.*—Robinson, C. J.); but see *Lyden* v. *McGee*, 16 *O. R.*, *post*, 86.

The Kingston and Bath Road Co. v. *Campbell*, 20 *S. C. R.* 605; *Wishart* v. *City of Brandon*, 4 *Manitoba L. R.* 453.

service or his duty therein, or solely to accomplish some purpose of his own, acts maliciously or wantonly, the employer is not liable (*Mott* v. *Consumers' Ice Co.*, 73 *New York Reps.* 543).

(3) For the purposes of this rule, a person is considered an agent whether he is hired by the employer personally, or by those who are intrusted by the latter with the hiring of servants or other agents (*Laugher* v. *Pointer*, 5 *B. & C.* 547).

(1) **Who are agents.**—This rule springs from the well-known legal maxim, "*qui facit per alium, facit per se*," and is usually considered under the head of master and servant. The word servant, however, in this connection applies not only to domestic servants, but to clerks, managers, agents, and, in short, all whom the master appoints to do any work, and over whom he retains any control or right of control, even though they be not under his immediate superintendence. Thus, "if a man is owner of a ship, he himself appoints the sailing master, and desires him to appoint and select the crew. The crew thus become appointed by the owner, and are his servants for the management of his ship: and if any damage happen through their default, it is the same as if it happened through the immediate default of the owner himself" (*Laugher* v. *Pointer*, *supra*, per Littledale, J.; and see also *Jones* v. *Scullard*, (1898) 2 *Q. B.* 565). In a recent case, however, it was held, that a teacher in a voluntary school was, under the circumstances, not the servant of the committee of management (*Crisp* v. *Thomas*, 63 *L. T.* 756). Nor are the employees of the Admiralty the servants of the

Lords of the Admiralty (*Ralcigh* v. *Goschen*, (1898) 1 *Ch.* 73).

(2) **General illustrations of the rule.**—Thus, if a servant drive his master's carriage over a bystander; or if a gamekeeper employed to kill game, fire at a hare and kill a bystander; or if a workman employed in building, drop a stone from the scaffold, and so hurt a bystander; the person injured may (if the servant's act was negligent or wrongful) claim reparation from the master. For the master is bound to guarantee the public against all damage arising from the wrongful or careless acts of himself, or of his servants when acting within the scope of their employment (*Bartonshill Coal Co.* v. *Reid*,[50] 3 *Macq. H. L. Ca.* 266).

(3) **The tort must be committed in the course of the employment.**—It will be perceived that the liability of the employer depends on two points, viz., (1) the tort must have been committed in the course of the employment, and (2) the act or omission must have been within the general scope of that employment. If either of these factors is absent, the employer is freed from liability. Thus, in *Rayner* v. *Mitchell* (2 *C. P. D.* 357) it was the duty of the carman of the defendant, who was a brewer, to deliver beer to the customers with the defendant's horse and cart, and on his return to collect empty casks, for each of which he received a penny. The carman having,

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Canadian Cases.

[50] *Matthews* v. *Hamilton Powder Co.*, 14 *O. A. R.* 261; *Cram* v. *Ryan*, 25 *O. R.* 524.

The medical health officer of a municipal corporation appointed under R. S. O. c. 205, sect. 47 [now R. S. O., 1897, c. 248, sect. 31], is not a servant of the corporation so as to make them liable for his acts done in pursuance of his statutory duty (*Forsythe* v. *Canniff, Corporation of Toronto*, 20 *O. R.* 478).

without the defendant's permission, taken out the horse and cart *for a purpose entirely of his own*, on his way back collected some empty casks, and while thus returning the plaintiff's cab was injured by the carman's negligent driving. Under these circumstances, it was held that the defendant was not liable; and Lindley, J., said, "The question is, whether, under these circumstances, the servant was acting in the course of his employment. In my judgment he was not. It is certain that the servant did not go out in the course of the employment. Does it alter the case, that whilst coming back he picks up the casks of a customer? I think it does not. He was returning on a purpose of his own, and he did not convert his own private occupation into the employment of his master, simply by picking up the casks of a customer."

(4) So, where a master intrusted his servant with his carriage for a given purpose, and the servant drove it for another purpose of his own in a different direction, and in doing so drove over the plaintiff, the master was held not to be responsible, on the ground that he servant was not acting within the scope of his employment (*Storey* v. *Ashton, L. R.* 4 *Q. B.* 476). But if the servant when going on his master's business had merely taken a somewhat longer road, such a deviation would not have been considered as taking him out of his master's employment (*Mitchell* v. *Crassweller*, 22 *L. J. C. P.* 100; and see *Whiteley* v. *Pepper*,[51] 2 *Q. B. D.* 276).

Canadian Cases.

[51] A tradesman's teamster, sent out to deliver parcels, went to his supper before completing the delivery. He afterwards started to finish his work, and in doing so he ran over and injured a child. It was *held*, affirming the

(5) Thus, in *Rourke* v. *White Moss Coal Co.* (2 *C. P. D.* 205), the defendants had contracted with W. to sink a shaft for them at so much a yard, W. to provide all necessary labour, the defendants providing steam power and machinery, and two engineers, *to be under the control of W.* The plaintiff, one of W.'s workmen, was injured by the negligence of L., one of the defendant's engineers; but it was held that the company were not liable for this injury, on the ground, that although L. was their general servant, yet, at the time of the injury, he was not actually employed in doing their work, and was under the immediate control of W., to whom he had been lent by them, and whose servant, therefore, he must be considered to have been. (See also *Hodkinson* v. *L. & N. W. R. Co.*, 32 *W. R.* 662; and distinguish *Jones* v. *Liverpool Corp.*, 14 *Q. B. D.* 890.)

(6) So where the servant was in the temporary employ of a third party under a contract between the master and such third party, the master was held free from responsibility for an accident caused by the servant's negligence (*Donovan* v. *Laing, &c. Limited*,[52] (1893) 1 *Q. B.* 629).

Canadian Cases.

decision of the Supreme Court of New Brunswick, that from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to the master's store and made a fresh start (*Merritt* v. *Hepenstal*, 25 *S. C. R.* 150; *Miller* v. *Manitoba Lumber Co.*, 6 *M. L. R.* 487).

[52] "The plaintiff was in the employment of Church, a contractor under the defendants. Church was permitted by the defendants, as a matter of convenience to him, to carry the tools used by his workmen on the defendants' trains, so as to enable him to drop them on the line of railway where his workmen might be employed. According to Church's testimony, it was his duty to place the bars in question on the train, to take charge of them while there, and his business to put them off where he wanted them,

(7) **Tort must be within the general scope of employment.**—The plaintiffs occupied offices beneath those of the defendant. In the defendant's office was a lavatory for his own use exclusively, and the use of which was expressly forbidden to his clerks. One of the latter, nevertheless, used it, and left the water running, whereby the plaintiff's offices were flooded. Held, that the act of the clerk was not within the scope of his

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Canadian Cases.

and the person (assuming him to be a baggage master, which is anything but clear) who threw the bar off had nothing to do with him, Church, nor any right to meddle with his tools, nor did he ask him to put them out, or his permission to place them on the car. Now in this case, assuming that it was a servant of the defendants who pitched off the bar, it does not appear from the evidence to have been done in pursuance of his duty or employment. The evidence rather shows that in the act done he was acting as a volunteer, and assisting Church in putting off his tools for the use of his workmen, and he was in effect, although unasked, employed at the time doing Church's work. And supposing that we might infer from the evidence that the defendants lent the services of their baggage master to Church to help him in putting off his tools, he, Church, having, as he swore, the sole superintendence of them, and as to when and where they were to be put off, still it seems to us, in that case, the act would be within the principle laid down by Brett, J., in *Murray* v. *Currie*, in which he says, 'But I apprehend it to be a true principle of law that, if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing not my work, but the work of the independent contractor.' On the whole, it appears to us that the defendants incurred no liability by the act complained of" (*Cunningham* v. *The Grand Trunk Railway Co.*, 31 *U. C. R.* 353 *et seq.*—Morrison, J.; *Saunders* v. *City of Toronto*, 29 *O. R.* 273).

authority, and that the defendant was not liable (*Stevens* v. *Woodward*,[53] 6 *Q. B. D.* 318). But where the clerk was allowed the use of the lavatory, the decision was *contra* (*Ruddiman* v. *Smith*, 60 *L. T.* 708; 37 *W. R.* 528; and see, as to fraud of an agent, *Newlands* v. *Nat. Employers' Acc. Ass. Co.*, 54 *L. J. Q. B.* 428; *British Mutual Bkg. Co.* v. *Charnwood, &c. Co.*, 18 *Q. B. D.* 714; and *Burnett* v. *S. L. Trams*, *ibid.* 815).

(8) On the other hand, in *Limpus* v. *London General Omnibus Co.* (11 *W. R.* 149; 7 *L. T. N. S.* 641), the driver of an omnibus wilfully, and contrary to express orders from his master, pulled across the road, in order to obstruct the progress of the plaintiff's omnibus. In an action of negligence, it was held, that if the act of driving across to obstruct the plaintiff's omnibus, although a reckless driving, was nevertheless an act done in the course of the driver's service, and to do that which he thought best for the interest of his master, the master was responsible. And Willes, J., said, "Of course, one may say that it is no part of the duty of a servant to obstruct another omnibus; and in this case the servant had distinct orders not to obstruct the other omnibus. I beg to say that in my opinion those instructions were perfectly immaterial. If they were disregarded, the law casts upon the master the liability for the *acts of his servants in the course of his employment*; and the law is not so futile as to allow the master, by giving secret instructions to his servant, to set aside his own liability. . . . The proper question for the jury to determine is, whether what was done was in the course of

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[53] *Down* v. *Lee*, 4 *Manitoba L. R.* 177.

the employment, and for the benefit of the master." Blackburn, J., also, quoting and approving the charge of the learned judge who tried the case, said, "If the jury came to the conclusion that he did it, not to further his master's interest, not in the course of his employment as an omnibus driver, but from private spite, with an object to injure his enemy—who may be supposed to be the rival omnibus—that would be out of the course of his employment. That saves all possible objections."

(9) The case of *Poulton* v. *London and South Western R. Co.*[54] (*L. R.* 2 *Q. B.* 534) seems, at first sight, to be inconsistent with the above case. There, a station-master having demanded payment for the carriage of a horse conveyed by the defendants, arrested the plaintiff, and detained him in custody until it was ascertained by telegraph that all was right. *The railway company had no power whatever to arrest a person for non-payment of carriage*, and therefore the station-master, in arresting the plaintiff, did an act that was wholly illegal, not in the mode of doing it, but in the doing of it at all. Under these circumstances, the court held that the railway company were not responsible for the act of their station-master; and Blackburn, J., said: "In *Limpus* v. *General Omnibus Co.*,[55] the act done by the driver was within the scope of

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[54] "From these cases it is clear that a corporation may be liable for false imprisonment under an order by its agent acting within the scope of his authority" (*Lyden* v. *McGee*, 16 *O. R.* 108—Rose, J.; and see *Hesketh* v. *Toronto*, 25 *O. A. R.* 449, *ante*, p. 70; and *Smith* v. *Thompson*, *ante*, p. 79).

[55] "If an illegal act is committed by a servant in furtherance of his own private ends, the employer is not responsible, so also if a servant does an act which is clearly *ultra vires* of the powers vested in the company, and the reason

his authority, though no doubt it was a wrongful and improper act, and, therefore, his masters were responsible for it. In the present case, an act was done by the station-master completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. Having no power themselves, they cannot give the station-master any power to do the act." And Mellor, J., said: "If the station-master had made a mistake in committing an act which he was authorized to do, I think in that case the company would be liable, because it would be supposed to be done by their authority. Where the station-master acts in a manner in which the company themselves would not

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is that such an act cannot be considered as done within the scope of his employment; but if the illegal act is in furtherance of his employer's orders, or in the course of his employment, the employer is responsible, and in the latter case, even if the act was unknown or actually forbidden by the employer" (*Harris* v. *Brunette*, 3 *B. C. Reps.* 174—Drake, J.; *Turner* v. *Isnor*, 25 *N. S. R.* 428).

While defendants' servants were employed in the attempt to replace on the track one of defendants' engines which had run off it, near a highway crossing, but within defendants' grounds, the female plaintiff, with another woman, approached the crossing with a horse and waggon and asked defendants' servants if they might cross, when one of them said "Yes," and then winked at the other and laughed. While she was crossing, she herself holding on to the horse by the head, and the other woman sitting in the waggon and holding the reins, steam was let off through the sides of the engine, and the horse becoming frightened, knocked down the female plaintiff and injured her. It was *held*, that there was an actionable wrong for which the defendants were liable (*Stott et ux* v. *Grand Trunk R. W. Co.*, 24 *U. C. C. P.* 347; *Bell* v. *The W. & A. R. W. Co.*, 24 *N. S. R.* 521).

be authorized to act, and under a mistake or misapprehension of what the law is, then I think the rule is very different, and I think that is the distinction on which the whole matter turns" (see also *Stedman* v. *Baker & Co.*, 12 *T. L. R.* 451).

(10) Again, a tramway company gave to their conductors printed instructions not to give passengers into custody without the authority of an inspector or timekeeper. The conductor of a car detained the plaintiff (a passenger) on a charge of attempting to pass false money. Held, in an action of false imprisonment against the company, that they were not liable, notwithstanding the fact that the fifty-second section of the Tramways Act, 1870, empowers *any* servant or officer of a tramway company to detain a passenger attempting to defraud (*Charleston* v. *Lond. Tramways Co.*, 36 *W. R.* 367; *Knight* v. *Met. Tramways Co.*, 78 *L. T.* 227).

(11) So, again, where a barman wrongfully gave a customer into custody for an alleged attempt to pass bad money, it was held that, in the absence of evidence of authority, the master was not liable (*Abrahams* v. *Deakin*, (1891) 1 *Q. B.* 516; and see also *Owston* v. *Bank of New South Wales*, 4 *App. Cas.* 270).

(12) In *Goff* v. *Great Northern R. Co.*[56] (3 *E. & E.*

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[56] *Lyden* v. *McGee*, 16 *O. R.* 105, *ante*, p. 86.

The plaintiff while travelling between St. M. and L. mislaid his ticket and, having been ejected by the conductor, it was *held*, that the defendants were responsible for the acts of the officer duly authorized and styled under the statute "conductor," when not committed in excess of his authority derived from them, and the court refused to disturb a verdict for plaintiff (*Curtis* v. *Grand Trunk Railway Co.*, 12 *U. C. C. P.* 89; *Thomas* v. *Gildert*, 4 *N. B. R.* 95; and see *Walker* v. *Sharpe*, *ante*, p. 55; and *Beaver* v. *G. T. R. W. Co.*, 22 *S. C. R.* 498).

672), on the other hand, the act was the arresting a man for the benefit of the company where there was authority to arrest a passenger for non-payment of his fare; and the court accordingly held, that the policemen who were employed, and the station-master, must be assumed to be authorized to take people into custody whom they believed to be committing the act, and that if there was a mistake, it was a mistake within the scope of their authority.

(13) So, again, in *Bayley* v. *Manchester, Sheffield and Lincoln. R. Co.*[57] (*L. R.* 7 *C. P.* 415), the plaintiff, a passenger on the defendants' line, sustained injuries in consequence of being pulled violently out of a railway carriage by one of the defendants' porters, who acted under the erroneous impression that the plaintiff was in the wrong carriage. The defendants' bye-laws did not expressly authorize the company's servants to remove any person being in a wrong carriage, or travelling therein without having first paid his fare and taken a ticket, and they even contained certain provisions which implied that the passengers should be treated with consideration; but, nevertheless, the court considered that it was within the probable scope of a porter's authority gently to remove any person in a wrong carriage, and as the porter had exercised his probable authority violently, they held that the company was responsible (see also *Seymour* v. *Greenwood*,[58] 6 *H. & N.* 359; and *Butler* v.

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[57] *Ferguson* v. *Roblin*, 17 *O. R.* 167; *Murphy* v. *Corporation of Ottawa*, 13 *O. R.* 334.

[58] The defendants were *held* not liable where the motorman of one of their electric cars, who had no control over or authority to interfere with passengers or persons on the

Manchester, Sheffield and Lincoln. R. Co., 21 *Q. B. D.* 207).

(14) So where a bye-law of a railway company forbade any persons, except employees, to ride on baggage cars; and enjoined the officials to strictly enforce the rule; and one of the officials, while the train was in motion, ordered a passenger to get off one of the baggage cars; and upon his failure to comply, *kicked him off*, whereby he fell under the wheels, and was greatly injured; it was held by the New York court that the company was liable, on the ground that "it is not necessary to show that the master expressly authorized the particular act. It is sufficient to show that the servant was engaged at the time in doing his master's business, and was acting within the general scope of his authority; and this, although he departed from the private instructions of the master, abused his authority, was reckless in the performance of his duty, and inflicted unnecessary injury" (*Rounds* v. *Delaware, &c. Railroad*, 64 *New York Rep.* 129).

ART. 20.—*Ratification of Tort committed by a Servant.*

A tortious act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the

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cars, pushed off the car, as the jury found, a newsboy who was getting on to sell papers to a passenger (*Coll* v. *Toronto Railway Company*, 25 *O. A. R.* 55; and see *Williamson* v. *G. T. Railway Co.*, 17 *U. C. C. P.* 615, *post*, p. 139; *Adams* v. *The National Electric Tramway Co.*, 3 *B. C.* 199; and *Hall* v. *McFadden*, 5 *N. B. R.* 586).

principal if subsequently ratified by him, and, whether it be for his detriment or his advantage, to the same extent as if the same act had been done by his previous authority (*Wilson* v. *Tumman*, 6 *M. & Gr.* 242).

This rule is generally expressed by the maxim, "*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*," and is equally applicable to torts and to contracts. It should be observed that the act *must* have been done for the use or for the benefit of the principal (4 *Inst.* 317; *Wilson* v. *Barker*, 4 *B. & Ad.* 614; and judgment, Dallas, C. J., *Hull* v. *Pickersgill*, 1 *B. & B.* 286).

ART. 21.—*Unauthorized Delegation by Servant.*

A master is not, in general, liable for the tortious acts of persons to whom his servant has, without authority, delegated his duties, and between whom and the master the relation of master and servant does not exist (*submitted*, and see *Jewell* v. *Grand Trunk Railway*, 55 *N. H.* 84).

(1) Thus it is apprehended that if a master wrote to his groom and ordered him to take the carriage to such a place, and the groom, instead of taking the carriage himself, employed A. to do it for him, without having ever had any authority from the master to intrust A. with the carriage, and A. so carelessly drove the carriage as to injure B., no action would lie against the master. For the master never hired the groom for the purpose

of employing others to do his work; and, therefore, in intrusting the carriage to A., he would be acting beyond the scope of his employment, and beyond his probable authority.

(2) But if, on the other hand, the groom had taken A. with him, and had handed the reins to him, it is submitted that the master would be liable, because the handing of the reins to another whilst he was in the act of performing his duty would be a default in the performance of that duty, and not a complete retirement from its performance (see per Lord Abinger, *Booth* v. *Mister*, 7 *C. & P.* 66; and *Joel* v. *Morison*, 6 *C. & P.* 503; *Englehart* v. *Farrant*, (1897) 1 *Q. B.* 240; and *Gwilliam* v. *Twist*, (1895) 2 *Q. B.* 84).

Such is a brief outline of the law relating to the responsibility of masters to third parties for the torts of their servants; but the learning on the subject is of so technical a character, and the distinctions as to when a servant is, and when not, acting within the scope of his employment, or even whether he be a servant at all, are so very refined, and the authorities are so conflicting, that a legal training is often necessary in order that the difference may be distinguished. I shall therefore content myself with the foregoing general rules (which are believed to be accurate so far as they go), leaving to other and larger works on the law of master and servant the task of quoting the numerous cases on the subject, and commenting upon the very subtle distinctions between them.

Sub-sect. 2. — LIABILITY TO SERVANTS FOR INJURIES CAUSED BY FELLOW-SERVANTS.

In spite of recent legislation, the liability of a master to recompense his servant for an injury resulting from the negligence of a fellow-servant, differs materially from his liability to a third party for a similar injury, by reason of the common law rule that a master is not so liable where the injurer and the injured are engaged in a common employment, and the injury was inflicted in the course of that employment.

This rule, known as the doctrine of common employment, was founded on the idea that the servant takes all the risks incident to his employment as part of the contract of service. With regard to servants generally it still exists, but with regard to certain classes of servants Parliament has of late years made large exceptions to it (1) by the Employers' Liability Act, 1880, and (2) by the Workmen's Compensation Act, 1897 [58a]. The first (which, unless further renewed, will expire at the end of 1900) makes considerable alterations in the common law; but it only applies to a limited class of workmen, and to a limited class of negligent acts. The second applies only to a still more limited class of servants, to whom it gives compensation for accidents, whether arising out of the fault of a fellow-servant or not. In other words, it gives the class of servants to which it applies a right to compensation quite independent of any tort whatever. Its consideration, therefore, does not fall within the scope of this work. The Act of 1880, however, is founded on a tort by a fellow-servant, and therefore the student should first consider the

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[58a] See the various Provincial Statutes, *post*, p. 107 *et seq.*

common law liability of a master towards his servant, and then he may with advantage examine how far these rules are modified by the temporary statute above referred to.

(1.) Common Law Liability.

ART. 22.—*General Immunity.*

(1) A master is not liable to his servant for damage resulting from the negligence or unskilfulness of his fellow-servant in the course of their common employment, unless:—

(a) The master has employed (or, *semble*, has continued the employment of) the latter, knowing him to be incompetent, or without satisfying himself that he was competent for the duties required of him (see *Laning* v. *N. Y. Cent. R. Co.*, 49 *New York Reps.* 521).

(b) The servant injured was not at the time acting in the master's employment.

(2) Common employment does not necessarily imply that both servants should be engaged in the same or even similar acts, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages (*Morgan* v. *Vale of Neath R. Co.*, *L. R.* 1

Q. B. 149 ; *Allen* v. *New Gas Co.*,[59] 1 *Ex. D.* 251).

(3) The rule does not exempt a master from being liable for *personal* negligence causing injury to his servant (*Ormond* v. *Holland*, *E. B. & E.* 102; *Ashworth* v. *Stanwix*, 30 *L. J. Q. B.* 183), unless the servant knew of, and presumably voluntarily acquiesced in, the danger (*a*) (*Griffiths* v. *London & St. Katharine Docks Co.*,[60] 13 *Q. B. D.* 259).

(1) **Illustrations of general principle.**—Thus, where a workman at the top of a building carelessly let fall a heavy substance upon a fellow-workman at the bottom, the master was held not to be responsible, without proof of the incompetency of the workman causing the injury to discharge the duty in which he had been employed (*Wiggett* v. *Fox*, 25 *L. J. Ex.* 188).

(2) So in *Hall* v. *Johnson*[61] (34 *L. J. Ex.* 222), the plaintiff was a miner in defendant's employ, as was also an underlooker whose duty it was to see that, as the

(*a*) This doctrine of acquiescence is generally summed up in the maxim "*volenti non fit injuriâ*," and was, along with the doctrine of common employment, intended to be abolished with regard to servants by the Employers' Liability Bill, 1893.

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[59] The master is not responsible for an accident due to the negligence of a fellow servant (*Matthews* v. *Hamilton Powder Co.*, 14 *O. A. R.* 261).

The question of whether or not there was common employment is one of fact, and is for the jury to decide (*St. John's Gas Light Co.* v. *Hatfield*, 23 *S. C. R.* 164).

[60] *Clegg* v. *Grand Trunk R. W. Co.*, 10 *O. R.* 717 ; *Ryan* v. *Canada Southern R. W. Co.*, 10 *O. R.* 745.

[61] "The defendants could not be liable unless there was reasonable proof that they had intrusted a duty to Ryan

mine was excavated, the roof should be propped up. This the latter neglected to do, whereby a stone fell and injured the plaintiff; but it was held that this imposed no liability on the defendants, as no proof was given that they did not use due care in selecting the underlooker for his post.

(3) **Common employment.**—The driver and guard of a stage-coach; the steersman and rowers of a boat; the man who draws the red-hot iron from the forge, and the man who hammers it into shape; the person who lets down into, or draws up from, a pit the miners working therein, and the miners themselves: all these are fellow-labourers within the meaning of the doctrine (*Bartons-hill Coal Co.* v. *Reid*,[62] 4 *Jur. N. S.* 767); and so are the captain of a ship and the sailors employed under him (*Hedley* v. *Pinkney Co.*, (1892) 2 *Q. B.* 58; and see

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(the deceased's fellow-servant), knowing that he did not possess competent skill for the purpose" (*Deverill* v. *Grand Trunk Railway Co.*, 25 *U. C. R.* 521—Hagarty, J.).

"Servants must be supposed to have the risk of the service in their contemplation where they voluntarily undertake it and agree to accept the stipulated remuneration. If, therefore, one of them suffers from the wrongful act or carelessness of another, the master will not be responsible. This, however, supposes that the master has secured proper servants and proper machinery for the conduct of the works" (*Plant* v. *Grand Trunk Railway Co.*, 27 *U. C. R.* 82—Draper, C. J.; *Campbell* v. *General Mining Association*, 1 *N. S. R.* 415).

[62] "In 1866 the case of *Deverill* v. *Grand Trunk R. W. Co.* (25 *U. C. R.* 517) was decided in this court, and the authorities reviewed. An engineer was killed by a collision caused by the negligence of a switchman. It was *held*, that there could be no recovery, the deceased and the switchman being fellow-servants in a common employment" (*O'Sullivan* v. *Victoria R. W. Co.*, 44 *U. C. R.* 130—Hagarty, C. J.).

also *The Petrel*, 1893, *P.* 320). The real test seems to be, whether they are engaged in the same pursuit.

(4) In *Morgan* v. *Vale of Neath R. Co.*[63] (*L. R.* 1 *Q. B.* 149), the plaintiff was in the employ of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of

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[63] In an action against the owners of a vessel for employing incompetent sailors, whereby an acccident happened to the plaintiff, it appeared that the duty of hiring the sailors had been delegated by the owners to the captain, a competent person for such purpose, and that he had hired the men in question; it was *held* that the defendants were not liable (*Wilson* v. *Hume*, 30 *U. C. C. P.* 542).

"The plaintiff does not in this case seek to controvert the general rule, that a master is not liable to a servant for injuries sustained from the negligence of a fellow-servant in the course of their common employment. What he does contend is that he is in a position to avail himself of the qualification of the rule, namely, that the master is bound to use ordinary care to employ none but competent servants, in other words, that he must not have been guilty of personal negligence. It is urged that this duty of the master is personal and inalienable, and that if carried out by others for his convenience, he is nevertheless responsible for their negligence, as his agents, because they, although in other respects fellow-servants, cannot be so in relation to such duty, which is not one performed in the course of the common employment, and negligence in the performance of which is not one of the ordinary risks contemplated and undertaken by the servant when entering into the employment. In the present case it is not suggested that the captain was not entirely competent to perform the duty of selecting the crew, and any personal negligence on the part of the defendants is out of the question. This being so, the authorities to which we have referred show, in our opinion, that the defendants are not liable" (*Ibid.*, Osler, J., at pp. 546, 550).

railway, and some porters in the service of the company carelessly shifted an engine on a turntable, so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown to the ground and injured. It was held, however, that he could not recover against the company, on the ground, that whenever an employment in the service of a railway company is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to that employment. (See *Lovell* v. *Howell*, 1 *C. P. D.* 161.)

(5) And again, in *Tunney* v. *Mid. R. Co.*[61] (*L. R.* 1 *C. P.* 291), the plaintiff was employed by a railway company as a labourer, to assist in loading what is called a "pick-up train," with materials left by platelayers and others upon the line. One of the terms of his engagement was that he should be carried by the train from Birmingham (where he resided and whence the train started) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham after his day's work was done, the train by which he was travelling came into collision with another train, through the negligence of the guard who had charge of it, and the plaintiff was injured. The plaintiff accordingly sued the company; but the court held, that inasmuch as the plaintiff was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule, which exempts a master from responsibility for an

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[61] *McFarlane* v. *Gilmour et al.*, 5 *O. R.* 310.

injury to a servant through the negligence of a fellow-servant, when both are acting in pursuance of a common employment.

(6) So, again, in *Feltham* v. *England*[65] (L. R. 2 Q. B. 33), the defendant was a maker of locomotive engines, and the plaintiff was in his employ. An engine was being hoisted, for the purpose of being carried away, by a travelling crane moving on a tramway resting on beams of wood, supported by piers of brickwork. The piers had been recently repaired, and the brickwork was fresh. The defendant retained the general control of the establishment, but was not present. His foreman or manager directed the crane to be moved, having, just before, ordered the plaintiff to get on the engine to clean it. The plaintiff having got on to the engine, the piers gave way, the engine fell, and the plaintiff was injured. Here it was held that the fact that the servant who was guilty of negligence was a servant of superior authority, whose lawful directions the other was bound to obey, was immaterial; and that as there was no evidence of personal negligence on the part of the defendant, and nothing to show that he had employed unskilful or incompetent persons to build the piers, he was not liable to the plaintiff.

(7) So, where two railway companies, A. and B., have a joint staff of signalmen, and one of them gets injured

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[65] *Macdonald* v. *Dick*, 34 *U. C. R.* 623.

"It seems clearly established that the superior rank or position of a foreman or manager does not affect his position of a fellow-servant in a common employment with one of far inferior grade" (*Drew* v. *Corporation of East Whitby*, 46 *U. C. R.* 111—Hagarty, C. J.).

through the negligence of the private engine-driver of company A., such company will not be liable. For, although the injured man is the servant of A. and B., and the engine-driver is the servant of A. only, yet they were engaged in a common pursuit so far as company A. was concerned, although the signalman was also engaged in a further and additional pursuit on behalf of B. (see *Swainson* v. *N. E. R. Co.*, 3 *Ex. Dir.* 341). But where one of two companies has the user of the other's station, but not the control of its servants employed on such station, one of whom is injured by the negligence of a servant of the company having such right of user, the rule does not apply (*Warburton* v. *G. W. R. Co.*, *L. R.* 2 *Ex.* 30; and see *Turner* v. *G. E. R. Co.*, 33 *L. T.* 431). And it may be laid down broadly, that the defence of common employment is not available unless the plaintiff was, at the time of the injury, in the defendant's actual employment, and the relationship of master and servant subsisted between them (*Cameron* v. *Nystrom*,[66] (1893) *A. C.* 308).

(8) And so the rule does not apply where one servant is the servant of a contractor, and the other is the servant of the person who employs the contractor; for the servant of the contractor is not the servant of the contractor's employer (*Parry* v. *Smith*, 4 *C. P. D.* 325; *Marrow* v. *Flimby, &c. Co.*, (1898) 2 *Q. B.* 588). It must, however, be borne in mind, that it is sometimes a question of difficulty whether a person holds the position of a contractor, or of a foreman in charge of a gang of workmen; and that in the latter case the rule as to fellow-servants applies (*Charles* v. *Taylor*, 3 *C. P. D.*

Canadian Cases.

[66] *Hurdman* v. *Canada Atlantic R. W. Co.*, 25 *O. R.* 209.

492; and see particularly *Johnson* v. *Lindsay*, (1891) *A. C.* 371).

(9) **Personal negligence of master.**—In all cases (not coming under the Employers' Liability Act) where the servant sues the master for personal negligence, he must prove that the master knew or ought to have known of the danger, and that the servant did not (*Griffiths* v. *London & St. Katharine Docks Co.*,[67] 13 *Q. B. D.* 259). In *Mellors* v. *Shaw* (30 *L. J. Q. B.* 333), the defendants were owners of a coal mine, and the plaintiff was employed by him as a collier in the mine, and, in the course of his employment, it was necessary for him to descend and ascend through a shaft constructed by them. By the defendants' negligence, the shaft was constructed unsafely, and was, by reason of not being sufficiently lined or cased, in a dangerous condition. By reason of this, and also by reason of no sufficient or proper apparatus having been provided by the defendants to protect their miners from the unsafe state of the shaft, a stone fell from the side of the shaft on to the plaintiff's head, and he was dangerously wounded. One of the defendants was manager of the mine, and it was worked under his personal superintendence, and the plaintiff was not aware of the state of the shaft. On this state of facts the defendants were held liable.

(10) So, where a master ordered a servant to take a bag of corn up a ladder which the master knew, and the servant did not know, to be unsafe, and the ladder broke, and the servant was injured, the master was held liable (*Williams* v. *Clough*, 3 *H. & N.* 258; and see *Martin*

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[67] *Rudd* v. *Bell*, 13 *O. R.* 47; *Dean* v. *Ontario Cotton Mills Co.*, 14 *O. R.* 119.

v. *Connah's Quay Co.*, 33 *W. R.* 216; and *Griffiths* v. *London & St. Katharine Docks Co.*, 13 *Q. B. D.* 259).

(11) **Doctrine of volenti non fit injuriâ.**[68]—But where a servant with a full appreciation of the risk which he is running (*Medway* v. *Greenwich, &c. Co.*, 14 *T. L. R.* 290) assents to accept the risk, either expressly or impliedly, he cannot recover; for *volenti non fit injuriâ*. Therefore, where a labourer was killed through the fall of a weight, which he was raising by means of an engine to which he attached it by fastening on a clip, and the clip had slipped off, it was held that there was no case to go to the jury in an action by his representative against the master, although it appeared that another and safer mode of raising the weight was usual, and had been discarded by the master's orders (*Dynen* v. *Leach*,[69] 26 *L. J. Ex.* 221; and see also *Senior* v. *Ward*,[70] 1 *E. & E.* 385; *Thomas* v. *Quartermaine*,[71] 18 *Q. B. D.* 685; *Martin*

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[68] *O'Brien* v. *Sanford*, 22 *O. R.* 136.

The maxim *volenti non fit injuriâ* does not apply where an accident is caused by the breach of a statutory duty (*Rodgers* v. *The Hamilton Cotton Co.*, 23 *O. R.* 425).

[69] *Held*, in an action by a servant against his master for an injury he had sustained, in consequence of the guard being out of place in working a circular saw which he had to attend, that it was not sufficient to show that the master knew the saw was not guarded, but it must also appear that the servant was ignorant of that fact; and as the servant was skilled in the use of the saw, and did not look to see whether the guard was on or off as it was his duty to have done, he could not, therefore, make his master responsible to him for the consequences of his own neglect of duty (*Miller* v. *Reid* 10 *O. R.* 419; see *Webster* v. *Foley*, 21 *S. C. R.* 580, *post*, p. 105).

[70] *Miller* v. *Grand Trunk R. W. Co.*, 25 *U. C. C. P.* 389.

[71] *Headford* v. *M'Clary Mfg. Co.*, 23 *O. R.* 335. This case is like in principle to *Finlay* v. *Miscampble*, 20 *O. R.* 29, *ante*, 46. *Pott* v. *Hewitt*, 23 *O. R.* 619.

v. *Connah's Quay Co.*, 33 *W. R.* 216; and *Membery* v. *G. W. R. Co.*, 14 *A. C.* 179).

(12) Again, a hoarding had been erected by the defendant, a builder, which projected too far into the street, but sufficient room was left for carts to pass. A heavy machine was placed inside the hoarding and close to it. A cart, in passing, struck against the hoarding, and knocked down the machine against the plaintiff, a workman in the defendant's employ. The plaintiff had previously made some complaint of the position of the machine to his master, but voluntarily continued to work though the machine was not moved. It was here held, that there was no evidence to go to the jury of the master's liability (*Assop* v. *Yates*, 2 *H. & N.* 768; *Griffiths* v. *Gidlow*, 3 *H. & N.* 648).

(13) But the defence of *volenti non fit injuriâ* is somewhat difficult of application. Lord Esher, M. R., in the case of *Yarmouth* v. *France*[72] (19 *Q. B. D.* 647), stated the rule in the following words: "It seems to me

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[72] The defendants, an ironworks company, used in their business a pair of shears for cutting up boiler plate and scrap iron, prior to its being placed in the furnace to be melted. It was the duty of the plaintiff and another workman to put the iron into the shears. While a large iron gate was, by the superintendent's orders, being put into the shears to be cut up, by reason of the improper instructions given by the superintendent to the plaintiff, the latter, in the course of his duty, was injured. The plaintiff, though apprehensive of danger, was not aware of the nature and extent of the risk, and obeyed through fear of dismissal. In an action against the defendants under the Workmen's Compensation for Injuries Act it was *held* that defendants were liable (*Madden* v. *Hamilton Iron Forging Company*, 18 *O. R.* 55; *Foley* v. *Webster*, 2 *B. C. Reps.* 137, and *post*, p. 105; and *Scott* v. *B. C. Milling Co.*, 3 *B. C.* 221).

to amount to this, that mere knowledge of the danger will not do ; there must be an assent on the part of the workman to accept the risk with a full appreciation of its extent, to bring the workman within the maxim *Volenti non fit injuriâ*. If so, that is a question of fact." And Lord Justice Lindley added : " A workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it, and complains of it, cannot, in my opinion, be held as a matter of law to have impliedly agreed to incur that danger, or to have voluntarily incurred it, because he does not refuse to face it. . . . If nothing more is proved than that the workman saw the danger, and reported it, but on being told to go on went on as before, in order to avoid dismissal, a jury may, in my opinion, properly find that he had not agreed to take the risk, and had not acted voluntarily in the sense of having taken the risk upon himself. Fear of dismissal, rather than voluntary action, might properly be inferred" (but conf. *Hooper* v. *Holme*, 13 *T. L. R.* 6 ; *Smith* v. *Forbes & Co.*, 34 *Sc. L. R.* 513 ; *Williams* v. *Birmingham, &c. Co.*, (1899) 2 *Q. B.* 338). Moreover, when a workman engaged in an employment not in itself dangerous, is exposed to danger arising from an operation in another department over which he has no control, the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to show that he has voluntarily accepted the risk (*Smith* v. *Baker & Sons*,[73] (1891) 1 *A. C.* 325. And see, also, *Thrussell* v.

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[73] "The law is that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable apart from the provisions of the Employers' Liability Act. The employer may be made liable who is

Handyside,[74] 20 *Q. B. D.* 359; *Church* v. *Appleby*, 58 *L. J. Q. B.* 144; *Brooke* v. *Ramsden*,[75] 63 *L. T.* 287).

ART. 23.—*Volunteer Servants.*

If a stranger invited by a servant to assist him in his work, or who volunteers to assist him in his work, is, while giving such assistance, injured by the negligence of another servant of the same master, he is considered to be a servant *pro tempore*, and no action will lie against

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blameworthy in respect of not having provided proper machinery and appliances for the work, or, as put in *Bartonshill Coal Co.* v. *Reid*, where a master employs his servant in a work of danger, he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition, so as to protect the servant against unnecessary risk" (*Fairweather* v. *Owen Sound Quarry Co.*, 26 *O. R.* 607—Boyd, C.; *Dixon* v. *Winnipeg Electric Street R. W. Co.*, 11 *M. R.* 528; *McInnes* v. *Malaga Mining Co.*, 25 *N. S. R.* 345, and *Whyte* v. *The Sydney & Louisbourg Coal Co.*, 25 *N. S. R.* 384).

A master is responsible to his workmen for personal injuries occasioned by a defective system of using machinery as well as for injuries caused by a defect in the machinery itself. At common law a workman was not precluded from obtaining compensation for injuries received by reason of defective machinery, or a defective system of using the same, by reason of his failure to give notice to the employer of such defect (*Webster* v. *Foley*, 21 *S. C. R.* 580).

"The law, as now settled by the judgment of the House of Lords in *Smith* v. *Baker* is that the maxim *volenti non fit injuriâ* has no application in the case of injuries occasioned by the negligent conduct of the defendants" (*The Canada Atlantic Ry. Co.* v. *Hurdman*, 25 *S. C. R.* 219—Gwynne, J.).

[74] *Thompson* v. *Wright*, 22 *O. R.* 127.

[75] *Haight* v. *Wortman and Ward Mfg. Co.*, 24 *O. R.* 618.

the master, unless (perhaps) he were guilty of personal negligence or breach of duty, or the servants were not competent persons.

The reason of this rule is obvious, for the volunteer, by aiding the servant, is simply of his own accord placing himself in the position of a servant, and that without the consent or request of the master. The latter cannot therefore be fairly called upon to recompense him for the result of his officiousness.

Thus, where the servants of a railway company were turning a truck on a turntable, and a person not in the employ of the company volunteered to assist them, and, whilst so engaged, other servants of the company negligently propelled a locomotive against, and so killed, the volunteer, and the servants of the company were of competent skill, and the company did not authorize the negligence, it was held that the company was not liable (*Degg* v. *M. R. Co.*, 1 *H. & N.* 773; *Potter* v. *Faulkner*, 1 *B. & S.* 800).

Exception. Where a person aids the servants of another, with such other's consent or acquiescence, and not as a mere volunteer, but for the purpose of expediting some business of his own, he is not considered to be in the position of a servant *pro tempore* (*Wright* v. *L. & N. W. R. Co.*, 1 *Q. B. D.* 252).

(2.) Under Employers' Liability Act, 1880 (*a*).

ART. 24.—*Epitome of Act.*[76]

(1) In the case of railway servants, labourers, husbandmen, journeymen, artificers, handicraftsmen, miners, and other persons engaged in *manual* labour and *not being domestic or menial*

(*a*) A temporary Act renewed from year to year by the Expiring Laws Continuance Acts.

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[76] *R. S. O.*, 1897, *c.* 160.—An act to secure compensation to workmen in certain cases.

By section 3 it is provided that: "Where personal injury is caused to a workman—

(1) By reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises, connected with, intended for, or used in the business of the employer; or

(2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence; or

(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed; or

(4) By reason of the act, or omission, of any person in the service of the employer done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by the employer, or by any person delegated with the authority of the employer in that behalf; or

(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine, or train upon a railway, tramway, or street railway;

the workman, or, in case the injury results in death, the

servants, an employer cannot set up the defence of common employment in any case where the injury complained of is due to any of the following causes, viz. :—

(a) A defect in or unfitness of ways, works, machinery, or plant, caused, undiscovered, or unremedied by the negligence of the master, or of a fellow-servant, whose duty it was to see to the condition thereof.

(b) The negligence of a fellow-servant whose

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legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work" [The Manitoba Statute, 56 Vict. c. 39, sect. 3, and R. S. B. C., 1897, c. 69, sect. 3, are both identical with the above, and see "An act to make provision for the safety of railway employees and the public" (*R. S. O.*, 1897, *c.* 266)].

The following cases may be consulted as bearing upon the act:—*M'Cloherty* v. *The Gale Mfg. Co.*, 19 *O. A. R.* 117; *Garland* v. *City of Toronto*, 23 *O. A. R.* 238; *Washington* v. *Grand Trunk R. W. Co.*, 24 *O. A. R.* 183; *Toronto Ry. Co.* v. *Bond*, 24 *S. C. R.* 715 (judgment Court of Appeal, Ontario, affirmed); *Hamilton Street Ry. Co.* v. *Moran*, 24 *S. C. R.* 717 (judgment Court of Appeal, Ontario, affirmed); *Hamilton Bridge Co.* v. *O'Connor*, 24 *S. C. R.* 598; *Grand Trunk Ry. Co.* v. *Weegar*, 23 *S. C. R.* 422; *Canada Southern Ry. Co.* v. *Jackson*, 17 *S. C. R.* 316; *Headford* v. *M'Clary*, 21 *O. A. R.* 164; *O'Connor* v. *Hamilton Bridge Co.*, 21 *O. A. R.* 596; *Bond* v. *Toronto R. W. Co.*, 22 *O. A. R.* 78; *Truman* v. *Rudolph*, 22 *O. A. R.* 250; *British Columbia Mills Co.* v. *Scott*, 24 *S. C. R.* 702; *Scott* v. *British Columbia Milling Co.*, 3 *B. C. Reps.* 221.

principal duty was superintendence, while superintending, or the negligence of a fellow-servant in command, in consequence of obeying him.

(c) An act or omission of a fellow-servant consequent on an improper or defective bye-law (not approved by a government department), or consequent on an improper or defective instruction of the master or his delegate.

(d) The negligence of a fellow-servant having the *management* of points, signals, a locomotive, or a train.

(2) The injured servant, or his representatives, must give notice of his claim to the employer within six weeks of the accident, unless, in case of death, the judge thinks there was reasonable excuse for not giving it.

(3) The action must be commenced by the injured servant within six months, or by his personal representatives (if he is killed) within twelve months.[77]

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[77] Section 9 of R. S. O., 1897, ch. 160, provides that subject to the provisions of sections 13 and 14, an action for the recovery, under this act, of compensation for an injury shall not be maintainable against the employer of the workman, unless notice that injury has been sustained is given within twelve weeks, and the action is commenced within six months from the occurrence of the accident causing injury, or in case

(4) The master may rely, by way of defence, on contributory negligence, and on the maxim *volenti non fit injuriâ* (*Thomas* v. *Quartermaine*,[78] 18 *Q. B. D.* 685); and also on any contract by which the workman has contracted himself out of the Act (*Griffiths* v. *Earl of Dudley*,[79] 9 *Q. B. D.* 357).

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of death, within twelve months from the time of death, provided always that in case of death the want of such notice shall be no bar to the maintenance of such action, if the judge shall be of opinion that there was reasonable excuse for such want of notice.

[78] *Lemay* v. *Canadian Pacific R. W. Co.*, 18 *O. R.* 314; *Stride* v. *Diamond Glass Co.*, 26 *O. R.* 270.

[79] Section 10.—No contract or agreement made or entered into by a workman shall be a bar or constitute any defence to an action for the recovery under this act of compensation for any injury—

(1) Unless for such workman entering into or making such contract or agreement there was other consideration than that of his being taken into or continued in the employment of the defendant; nor

(2) Unless such other consideration was in the opinion of the court or judge before whom such action is tried, ample and adequate; nor

(3) Unless in the opinion of the court or judge, such contract or agreement, in view of such other consideration, was not, on the part of the workman, improvident, but was just and reasonable;

and the burden of proof in respect of such other consideration, and of the same being ample and adequate, as aforesaid, and that the contract was just and reasonable and was not improvident as aforesaid, shall in all cases rest upon the defendant. And Manitoba Act, sect. 8, and British Columbia Act, sect. 10.

Section 6 provides that "a workman or his legal representative, or any person entitled in case of his death, shall not be entitled under this act to any right of compensation

(5) The action must be brought in the County Court, but is removable, under very exceptional circumstances, to the High Court (see *Munday* v. *Thames, &c. Co.*, 10 *Q. B. D.* 59).

(6) The damages are limited to three years' average earnings (see *Borlick* v. *Head*, 34 *W. R.* 102).

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or remedy against the employer in any of the following cases, that is to say—

"Sub-section 1.—Under clause 1 of section 3, unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person intrusted by him with the duty of seeing that the condition or arrangement of the ways, works, machinery, plant, buildings, or premises are proper." And Manitoba Act, sect. 5, and R. S. B. C., 1897, c. 69, sect. 7.

(2). — Under clause 4 of section 3, unless the injury resulted from some impropriety, or defect in the rules, by-laws or instructions therein mentioned; provided that where a rule or by-law has been approved, or has been accepted as a proper rule or by-law, either by the Lieutenant-Governor in Council or under and in pursuance to any provision in that behalf of any act of the legislature of Ontario, or of the Parliament of Canada, it shall not be deemed for the purposes of this act to be an improper or defective rule or by-law.

(3). — In any case where the workman knew of the defect or negligence which caused his injury, and failed without reasonable excuse to give or cause to be given within a reasonable time, information thereof to the employer or some person superior to himself in the service of his employer, unless he was aware that the employer or such superior already knew of the said defect or negligence. Provided, however, that such workman shall not, by reason only of his continuing in the employment of the employer with knowledge of the defect, negligence, act or omission, which caused his injury, be deemed to have voluntarily incurred the risk of the injury.

(1) **Class of servants to which the Act applies.**[80]—It will be perceived that this Act applies only to a limited class of employees. Thus, a grocer's assistant, injured while lifting a heavy weight, is not a person engaged in manual labour within the meaning of the Act (*Bound* v. *Lawrence*, (1892) 1 *Q. B.* 206); nor is the driver of a tramcar (*Cook* v. *North Met. Tramways Co.*, 18 *Q. B. D.* 683); nor an omnibus conductor (*Morgan* v. *Lond. Gen. Omnibus Co.*, 13 *Q. B. D.* 832).

(2) **Defect or unfitness in ways, works, &c.**[81]—It will be perceived that the mere fact of a defect in, or unfitness of, plant, does not render the master liable, unless it be *caused, undiscovered, or unremedied* by his negligence or the negligence of a servant whose duty it is to see to the condition thereof. Thus, the mere fact that a machine is dangerous, does not render the master liable for an accident, unless the danger arises from some defect in or unfitness of it for its purpose (*Walsh* v. *Whiteley*,[82] 21 *Q. B. D.* 371). If it were otherwise, trade would be paralysed, and all employments necessitating risk would be stopped. The employer must, however, use all due means to diminish the danger (see *Heske* v. *Samuelson*, 12 *Q. B. D.* 30; *Paley* v. *Garnett*, 16 *ibid.* 52; and *Cripps* v. *Judge*, 13 *ibid.* 583); and if he omits to do so, he will be guilty of negligence which, coupled with the dangerous character of the machine, will be construed to render

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[80] Sub-section 3 of section 2, R. S. O., 1897, c. 160, specifies the class of servants to which the act applies.

[81] See section 6, *ante*, p. 110.

[82] *Black* v. *Ontario Wheel Co.*, 19 *O. R.* 578; *Bridges* v. *Ontario Rolling Mills Co.*, 19 *O. R.* 737.

the latter defective (*Morgan* v. *Hutchins*,[83] 38 *W. R.* 412). As to the meaning of defects in *ways*, see *McGiffen* v. *Palmer's, &c. Co.* (10 *Q. B. D.* 5). "Works" means works already completed, and not works in process of construction (*Howe* v. *Finch*, 17 *Q. B. D.* 187).

(3) It may be mentioned that the word "plant" includes live stock, such as a vicious horse (*Yarmouth* v. *France*, 19 *Q. B. D.* 647); and a ship (*Carter* v. *Clarke*, 78 *L. T.* 76).

(4) **Negligence of superintendents.**[84]—Where the plaintiff relies on the negligence being that of a person entrusted with superintendence, the latter must be a genuine superintendent, and not a mere fellow-worker whose part in the joint labour necessitates his giving directions when to start or stop machinery (*Shaffers* v. *Gen. Steam Nav. Co.*, 10 *Q. B. D.* 356; and *Kellard* v. *Rooke*, 21 *ibid.* 367); nor one who is a mere mouthpiece to carry the orders of the master himself to the other workers (*Snowden* v. *Baynes*, 25 *Q. B. D.* 193). But, on the other hand, where a genuine superintendent voluntarily assists in manual labour, that fact renders the master none the less liable for his negligence (*Osborne* v. *Jackson*, 11 *Q. B. D.* 619). A boy going about as mate to a carman may sue in respect of the latter's carelessness, as, *primâ facie*, he is under his orders (*Millward* v. *Mid. Ry. Co.*, 14 *Q. B. D.* 68).

Canadian Cases.

[83] *Hamilton* v. *Groesbeck*, 19 *O. R.* 76; and 18 *O. A. R.* 437, *post*, 115.

[84] Sect. 2, sub-sect. (1). "Superintendence" shall be construed as meaning such general superintendence over workmen as is exercised by a foreman, or person in a like position to a foreman, whether the person exercising superintendence is or is not ordinarily engaged in manual labour, [identical with (*a*) sect. 2, Manitoba Act, and (1) sect. 2, R. S. B. C., 1897, c. 69.]

To succeed under the latter part of this sub-section, the plaintiff must prove that there was negligence of a person in the employ of the defendant, to whose orders the plaintiff was bound to conform; and that his injuries resulted from his having in fact conformed to those orders (*Wild* v. *Waygood*, (1892) 1 *Q. B.* 783, dissenting from part of Lord Coleridge's judgment in *Howard* v. *Bennett*, 58 *L. J. Q. B.* 129; and see also *Moore* v. *Gimson*, *ibid.* 169).

(5) **Defective bye-law.**—As to what does or does not constitute a defective bye-law, the reader is referred to *Whatley* v. *Holloway* (62 *L. T.* 639).

(6) **Negligence of railway servants having management of points, signals, locomotives, and trains.**[85]—A person employed to shunt trucks by means of an hydraulic capstan, of which he had the management, may be a person having control of a train on a railway within the meaning of the Act, so as to render the railway company liable for his negligence (*Cox* v. *G. W. R. Co.*, 9 *Q. B. D.* 106; and see *McCord* v. *Cammell*, (1896) *A. C.* 57). But, on the other hand, a person whose duty it is to oil, clean, and adjust points, and signal wires, and apparatus, is not a person who has the *management* of points and signals within the meaning of the Act (*Gibbs* v. *G. W. R. Co.*, 12 *Q. B. D.* 208). The word railway is not confined to the railways of regular railway companies, but extends to temporary railways laid down by a contractor for the purpose of constructing works (*Doughty* v. *Firbank*, 10 *Q. B. D.* 358).

(7) **Notice of claim.**—The contents and form of this notice are matters rather of procedure than of law; but

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[85] Section 5, *R. S. O.*, 1897, *c.* 160.

for the convenience of the practitioner, it may be stated, that it should be in writing (*Moyle* v. *Jenkins*, 8 *Q. B. D.* 118), and should state on the face of it the name and address of the injured servant, and the date and cause of the injury (*Keen* v. *Millwall Docks*, 8 *Q. B. D.* 482). It should be served by delivering it at, or sending it in a registered letter to, the place of business or residence of the employer. It need not, however, be technically accurate (*Stone* v. *Hyde*,[86] 9 *Q. B. D.* 76; and see also *Previdi* v. *Gatti*,[87] 36 *W. R.* 670).

Section IV.—Liability of Partners for Each Other's Torts.

The liability of partners for each other's torts rests on precisely the same principles as the liability of a principal for the act of his agent, inasmuch as each partner is the agent of his co-partners in relation to the conduct of the partnership business. With regard to partnership, however, the law has now been codified by the 10th and 11th sections of the Partnerships Act, 1890, in the following words:—

Art. 25.—*Statutory Rule.*

(1) "Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or

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[86] *Cox* v. *Hamilton Sewer Pipe Co.*, 14 *O. R.* 300.

[87] See also *Factories Act, R. S. O.*, 1897, *c.* 256; and *Hamilton* v. *Groesbeck*, 18 *Ont. App. Reps.* 437; and *Railway Act, Canada*, 1888, *c.* 29.

any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting, or omitting to act" (section 10).

(2) "In the following cases, viz.:—

"(a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

"(b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm;

"the firm is liable to make good the loss" (section 11).

(1) **Liability for torts other than fraudulent misappropriations.**—It will be perceived that section 10 relates to ordinary torts, and section 11 to specific torts in the nature of fraudulent misappropriations of property. With regard to the torts referred to in section 10, in order to render a firm liable, the tort must be a wrongful act or omission of a partner committed or made either (1) with the authority of his co-partners, or (2) in the ordinary course of the firm's business. If, therefore, it be committed or made without the actual authority of the co-partners, and outside the scope of the partner's ostensible authority, the firm will not be liable any more than it would be for a contract entered into under similar circumstances. Thus a firm of solicitors would be liable for the professional negligence and

unskilfulness of one of the partners (*Blyth* v. *Fladgate*, (1891) 1 *Ch.* 337; *Marsh* v. *Joseph*, (1897) 1 *Ch.* 213). Similarly, a firm of surgeons would be liable for the unskilful treatment of a patient by a member of the firm. So, a firm of engineers would be liable for the negligence of a partner in the design or construction of works. On the other hand, where a partner wrongfully commences a malicious prosecution for an alleged theft of the partnership property, the firm will not be liable unless it expressly authorized the tort; for such a prosecution is outside the ostensible authority of a partner, as it has nothing to do with carrying on the business of the firm in the ordinary way (*Arbuckle* v. *Taylor*, 2 *Dav. P. C.* 160). Indeed, it is difficult to imagine a case in which (without express authority, or, what is the same thing, subsequent ratification) a firm would be liable for the violent acts of a member against the person or liberty of a third party.

(2) Partners in certain firms may, however, be liable for torts to the reputation committed by a partner who has no actual authority. Thus, a firm of newspaper proprietors would be liable for a libel inserted by an editor partner. So, a firm of company promoters would be liable for a fraudulent prospectus issued in the course of business by an individual partner. In all these cases the inquiry is simply whether the wrongful act or omission was done or made in the course of the partner's duty as such, or outside it.

(3) **Fraudulent guarantees.**—There is one tort from which the firm is specially exempted from liability by statute (viz., 9 Geo. 4, c. 14, s. 6), by which it is enacted that the firm is not to be liable for false and fraudulent representation as to the character or solvency of any

person, unless the representation is in writing signed by all the partners. The signature of the firm's name is insufficient even although all the partners were privy to the misrepresentation (*Swift* v. *Jewsbury*, *L. R.* 9 *Q. B.* 301).

(4) **Liability for fraudulent misappropriations.**—With regard to the special torts referred to in section 11 of the Partnership Act, viz., the misapplication of money or property by a member of the firm, the liability arises in two cases, viz., (1) where a partner acting within the scope of his apparent authority receives the money and misapplies it; and (2) where the firm receives the money in the course of its business and one or more of the partners misapplies it. Questions under the first part of section 11 mostly occur in the case of solicitors and bankers, and the question almost always resolves itself into this: Was the acceptance of the money or property by the defaulting partner within the scope of his apparent authority or not? It is obviously impossible to give any general rule by which such a question can be solved, and most of the reported cases really turn on evidence of partnership usage tending to prove actual as distinguished from ostensible authority, and therefore decide no general principle of law at all (conf. *Cleather* v. *Twisden*, 28 *C. D.* 340, and *Rhodes* v. *Moules*, (1895) 1 *Ch.* 236). It has, however, been held that the receipt of money by one member of a firm of solicitors, professedly on behalf of the firm, for the general purpose of investing it as soon as a good security can be found, is not an act within the scope of the ordinary business of a solicitor, and that therefore, in the absence of actual authority, the other partners are not liable for its misappropriation (*Harman* v. *Johnson*, 2 *E. & B.* 61). But, on the other hand, the receipt of money by a solicitor

to be invested on a specified mortgage, or to be applied in the settlement of the affairs of the client, is within the scope of his ostensible authority so as to render his partners liable if he misapplies it (*Earl of Dundonald* v. *Masterman*, 7 *Eq.* 504).

(5) With regard to the second part of section 11, viz., the case where a firm (and not merely an individual partner) receives money or property, and it is afterwards misapplied by one or more of the partners, no question of partnership authority to *receive* the property can arise. In such cases the only question is whether it has been misapplied by a partner *while it remains in the custody of the firm*. Thus, where a firm of solicitors accepts money from a client to be invested on a specific mortgage, *and it is so invested*, the subsequent fraud of one of the partners, who induces the mortgagor to repay the money to him and then absconds with it, will not render the firm liable; for the misapplication is not made while the money is in the custody of the firm (*Sims* v. *Brutton*, 5 *Ex.* 802; 20 *L. J. Ex.* 41).

(6) **Liability joint and several.**—With regard to torts, partners are liable both jointly and severally. (Partnership Act, 1890, sect. 12.)

CHAPTER VII.

OF THE LIMITATION OF ACTIONS FOR TORT.

Reason for Limitation.—I have so far treated of the wrongs independent, or quasi independent, of contract, of which the law takes cognizance; and I have shown how the law gives a remedy whenever it holds any act to be wrongful, in accordance with the maxim "*ubi jus ibi remedium est.*"

But although there is always a remedy, yet, for the sake of the peace of the kingdom, a man is not allowed to enforce his remedy at his own leisure, and after a long interval, in the course of which evidence may have been entirely swept away which, if produced, might prove the defendant's innocence.

For this and other reasons, various statutes have been from time to time passed, which confine the right of action within certain periods after its commencement—periods which, as they differ in different actions, will be more particularly mentioned in the course of the second part of this work. At this stage, I propose to examine only such rules as apply to the limitation of all actions of tort.

ART. 26.—*Commencement of Period.*[88]

(1) When a statute limits the period within which an action is to be brought for a tort, then, if the cause of action is the infringement

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Canadian Cases.

[88] The period for bringing an action against a clerk of a municipality for omitting names from the collectors' roll is not limited to two years under R. S. O., 1877, c. 61, sect. 1 [now R. S. O., 1897, c. 72, sect. 1] (*Town of Peterborough* v. *Edwards*, 31 *U. C. C. P.* 231).

An action against a commissioner of Indian affairs for seizing and selling timber cut on Indian lands must be brought within six months from the seizure, not from the sale (*Jones* v. *Bain*, 12 *U. C. R.* 550).

An action for malpractice against a registered member of the "College of Physicians and Surgeons of Ontario," was brought within one year from the time when the alleged ill-effects of the treatment developed, but more than a year from the date when the professional services terminated. *Held*, that the action was barred under "The Ontario Medical Act," R. S. O., 1887, c. 148, sect. 40 [now R. S. O., 1897, c. 176, sect. 41]. *Held*, also, that infancy does not prevent the running of the statute (*Miller* v. *Ryerson*, 22 *O. R.* 369).

The defendants, a road company, incorporated under the General Road Companies' Act, R. S. O., 1887, c. 159, sect. 99 [now R. S. O., 1897, c. 193, sect. 139], and which requires them to keep their road in repair, constructed a culvert across it with a post and rail guard at the mouth thereof in such an improper manner that the wheel of the plaintiff's carriage striking the post he was thrown out of it into the open ditch at the end of the culvert and injured. *Held*, that the construction of the culvert and the guard was a thing "done in pursuance of the act" within the meaning of section 145; and that therefore the time for bringing the action was limited to within six months after the date of the accident (*Webb* v. *The Barton Stoney Creek Consolidated Road Co.*, 26 *O. R.* 343).

The Municipal Act, sect. 337 [now R. S. O., 1897, c. 223, sect. 606] provides that actions against a municipal

of a right, the action must be brought within the prescribed period after the actual doing of the thing complained of.

(2) But if the cause of action is not the

Canadian Cases.

corporation for not repairing highways must be brought "within three months after the damages have been sustained." The plaintiff's mare fell through a bridge and died four months after from the injuries received. *Held*, that the statute began to run from the occurrence of the accident, not from the death (*Miller* v. *The Corporation of the Township of North Fredericksburgh*, 25 *U. C. R.* 31).

In case of fraudulent misrepresentation, the statute begins to run from the time of misrepresentation, not from its discovery by the plaintiff, nor from the time that damage accrued (*Dickson* v. *Jarvis*, 5 *U. C. R.* (*O. S.*) 694 ; *Irwin* v. *Freeman*, 13 *Grant's Chy. Reps.* 465).

To a declaration charging negligence in the construction and maintenance of drains, in order to drain the streets of a town whereby the drains were choked and the sewage matter overflowed into plaintiff's premises, defendants pleaded that the cause of action did not accrue within three months. *Held* bad, as section 491 of the Municipal Act, R. S. O., 1877, c. 174 [now R. S. O., 1897, c. 223, sect. 606], did not apply (*Sullivan* v. *Town of Barrie*, 45 *U. C. R.* 12).

"The only section of the Municipal Act, R. S. O., 1877, c. 174 [now R. S. O., 1897, c. 223, sect. 606], which imposes any limitation as to the time of commencement of an action against a municipal corporation is the 491st," which enacts that "every public road, street, bridge, and highway shall be kept in repair by the corporation, and in default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained." This section is not applicable to all actions against a corporation, but only to those arising out of non-repair of, or by reason of neglect to repair public streets, highways, &c. (*Ibid.*—Osler, J.).

infringement of a right, but merely damage resulting from a wrongful act or omission, the period of limitation is to be computed from the time when the party sustained the damage (*Backhouse* v. *Bonomi*, 9 *H. L. C.* 503; *Mitchell* v. *Darley Main Co.*, 11 *App. Cas.* 127).

(3) And where a tort is fraudulently concealed, and the plaintiff has no reasonable means of discovering it, the statute only runs from the date of the discovery (*Gibbs* v. *Guild*, 9 *Q. B. D.* 59; *Bulli Coal Mining Co.* v. *Osborne*, (1899) *A. C.* 351).

The meaning of this rule is, that where the tort is the wrongful infringement of a right, then as that constitutes *per se* a tort, so the period of limitation commences to run immediately from the date of the infringement. But, on the other hand, where the tort consists in the violation of a duty coupled with actual resulting damage, then, as the breach of duty is not of itself a tort, so the period of limitation does not commence to run until it becomes a tort by reason of the actual damage resulting from it.

(1) **Taking away lateral support.**—Thus, where A. owned houses built upon land contiguous to land of B., C. and D.; and E., being the owner of the mines under the land of all these persons, so worked them that the lands of B. sank, and after more than six years' interval (the period of limitation in actions for causing subsidence), their sinking caused an injury to A.'s houses: Held, that A.'s right of action was not barred, as the tort to him was the damage caused by the working

of the mines, and not the working itself (*Backhouse* v. *Bonomi, supra; Mitchell* v. *Darley Main Co., supra*).

(2) **Abstracting coal.**—But where a trespasser wrongfully worked *the plaintiff's coal*, in consequence of which the surface of the plaintiff's land subsided, it was held that the statute commenced to run from the working and taking away of the plaintiff's coal, and not from the subsidence; on the ground that the working of the coal was a complete tort, and that the subsidence was only a consequence of it (*Spoor* v. *Green, L. R.* 9 *Ex.* 99).

(3) **Trover.**—In an action for wrongful conversion of goods (which is an injury to a right), the facts were as follows:—A.'s furniture was seized under an execution by the sheriff, and eventually it was bought by A.'s friends, and left in his possession. A. enjoyed the use of it for more than six years, and died. Upon A.'s death it was claimed by these friends, and adversely by the widow, on the ground that the Statute of Limitations barred them from claiming it after they had allowed A. to keep it for six years: it was, however, held that the statute did not begin to run until the friends had claimed the furniture, for the tort was the wrongful conversion of the goods, which had only taken place when the widow refused to give them up (*Edwards* v. *Clay*, 28 *Beav.* 145).

(4) A lease, belonging to the plaintiff, was fraudulently taken from him by his son, and deposited with B. to secure a loan made by B. to the plaintiff's son. The plaintiff was ignorant of this transaction. Subsequently, B. became bankrupt, and his trustee in bankruptcy assigned the leasehold premises for good consideration to the defendant. B. and the defendant

were both ignorant of the fraud. The plaintiff then commenced an action against the defendant for conversion of the lease; to which the defendant pleaded that the fraudulent deposit with B. was made more than six years before action brought, and that, consequently, the action was barred by the Statute of Limitations. The Court of Appeal, however, held that the statute only began to run when the plaintiff had a complete cause of action against the defendant, *i.e.*, when he demanded the deed and was refused it, and not from the receipt of the deed by B. In giving judgment, Lord Esher, M.R., said, "I am of opinion that, in the present case, the Statute of Limitations does not apply; it applies only to an action brought against the defendant in respect of a wrongful act done *by the defendant* himself. The property in chattels, which are the subject-matter of this action, is not changed by the Statute of Limitations, though more than six years may elapse, and if the rightful owner recovers them, the other man cannot maintain an action against him in respect of them" (*Miller* v. *Dell*, (1891) 1 *Q. B.* 468; and see also *Spackman* v. *Foster*, 11 *Q. B. D.* 99).

(5) **Actions for recovery of land.**[89]—There is a great distinction between actions for the recovery of chattels,

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Canadian Cases.

[89] *McClure* v. *Black*, 20 *O. R.* 70; *Kent* v. *Kent*, 19 *O. A. R.* 352; *Hill* v. *Ashbridge*, 20 *O. A. R.* 44; *Grant* v. *O'Hare*, 46 *U. C. R.* 277; *Adamson* v. *Adamson*, 12 *S. C. R.* 563; *Hopkins* v. *Hopkins*, 3 *O. R.* 223; *Smith* v. *Midland R. W. Co.*, 4 *O. R.* 494; *Cameron* v. *Walker*, 19 *O. R.* 212; and see *Dickson* v. *Jarvis*, *post*, p. 273.

In an action against O. to recover possession of land it was shown that O. had been in possession for over twenty years; that he was originally in as caretaker for one of the owners;

and actions for the recovery of land. For the Statutes of Limitation *do not bar the right* to chattels after the prescribed period, but only *bar the plaintiff's remedy* against the wrongdoer; whereas, the Real Property Limitation Acts bar and extinguish *not merely the remedy but also the right* (see 3 & 4 Will. 4, c. 27, s. 34, and 37 & 38 Vict. c. 57, s. 9). Consequently, if a plaintiff has allowed another to remain in possession of land, without acknowledgment, for twelve years, he will be barred, although he may never have demanded

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Canadian Cases.

that afterwards the property was severed by judicial decree, and such owner was ordered to convey certain portions to the others; that after the severance O. performed acts showing that he was still acting for the owners; and that he also exercised acts of ownership by inclosing the land with a fence and in other ways. *Held*, that the severance of the property did not alter the relation between the owners and O.; that no act was done by O. at any time declaring that he would not continue to act as caretaker; and that his possession, therefore, continued to be that of caretaker, and he had acquired no title by possession (*Ryan* v. *Ryan*, 5 *S. C. R.* 387, followed; *Heward* v. *O'Donohoe*, 19 *S. C. R.* 341; and see *Harris* v. *Mudie*, 7 *O. A. R.* 414).

"The Supreme Court in *McConaghy* v. *Denmark*, 4 *S. C. R.* at p. 632, points out that 'by a long unbroken chain of decisions extending over a period of upwards of forty years, it has been held by the courts in Upper Canada that the possession which will be necessary to bar the title of the true owner must be an actual, constant, visible occupation by some person or persons . . . to the exclusion of the true owner for the full period of twenty years.' The period is now reduced, but the tendency since *McConaghy* v. *Denmark* has been more than ever in the direction of requiring satisfactory proof of a possession answering in all respects the conditions above indicated" (*Coffin* v. *N. A. Land Co. et al.*, 21 *O. R.* 87—Street, J.; and see *Harris* v. *Mudie*, 7 *O. A. R.* 414; and *Griffith* v. *Brown*, 5 *O. A. R.* 303).

delivery up of possession (see *Scott* v. *Nixon*, 3 *Dru. & War.* 388; *Lethbridge* v. *Kirkman*, 25 *L. J. Q. B.* 89; and *Moulton* v. *Edmonds*, 1 *De G. F. & J.* 250). Where, however, an intruder goes out of possession of land before acquiring a statutory title, the statute ceases to run, and the title of the true owner remains unaffected, even although he does not himself retake possession until after the expiration of the statutory period (*Trustees, &c. Co.* v. *Short*,[90] 13 *A. C.* 793; 59 *L. T.* 677).

ART. 27.—*Continuing Torts.*

Where the tort is continuing, or recurs, a fresh right of action arises on each occasion (*Whitehouse* v. *Fellowes*,[91] 30 *L. J. C. P.* 305).

(1) Thus, where an action is brought against a person for false imprisonment, every continuance of the

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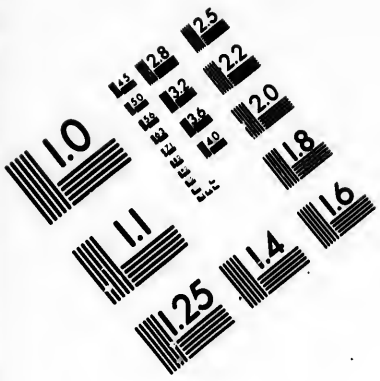
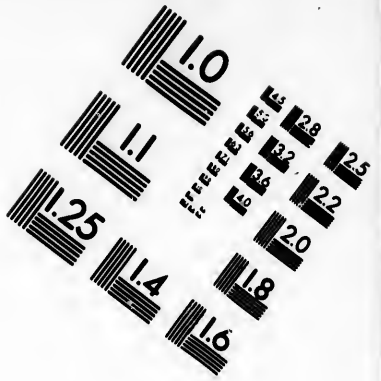
Canadian Cases.

[90] "During the summer months and during the months when he was sowing the land and reaping his crop, his possession was clearly sufficient beyond question, but during the rest of the year his possession was not actual, nor constant, nor visible. . . . The right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken in the spring again by the plaintiff" (*Coffin* v. *N. A. Land Co. et al.*, 21 *O. R.* 87, 88—Street, J.).

The payment of taxes is not a payment of rent within the meaning of the Real Property Limitation Act (*Ibid.*; and *Finch* v. *Gilray*, 16 *O. A. R.* 484).

[91] An action on the case will not lie for the continuance of trespass, as every continuance of the injury is a new trespass (*Wallace* v. *Milliken* (*N. B. Reps.*), Trin., T., 1833).





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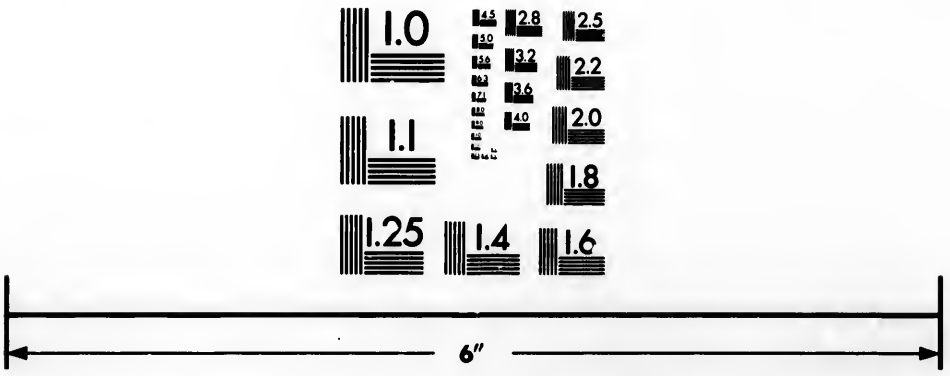

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imprisonment *de die in diem* is a new imprisonment; and therefore the period of limitation commences to run from the last, and not the first day of the imprisonment (*Hardy* v. *Ryle*, 9 *B. & C.* 608).

(2) But where A. enters upon the land of B. and digs a ditch thereon, there is a direct invasion of B.'s rights, a completed trespass, and the cause of action for all injuries resulting therefrom commences to run at the time of the trespass. The fact that A. does not re-enter B.'s land and fill up the ditch does not make him a continuous wrongdoer and liable to repeated actions as long as the ditch remains unfilled, even though there afterwards arises new and unforeseen damage from the existence of the ditch (*Kansas Pac. Ry.* v. *Mihlman*, 17 *Kansas Rep.* 224).

(3) But where the defendants worked their mines too close to the plaintiff's land, and, in consequence, some cottages of the plaintiff were injured in 1868, and by reason of the *same excavation*, some more cottages were injured in 1882, it was held that the plaintiff was entitled to sue for the injuries suffered in 1882. For the tort did not consist in making the excavation, but in causing the plaintiff's land to subside; and as often as it subsided a new cause of action arose. The *causa causans* was, no doubt, the excavation, but the cause of action was the damage (*Mitchell* v. *Darley Main Co.*, 11 *App. Cas.* 127).

ART. 28.—*Disability.*[92]

Where a person is under disability, the statute only runs from the cesser of the disability (21 Jac. 1, c. 16, s. 7; 3 & 4 Will. 4, c. 27, s. 16). But whenever the statute once begins to run, it continues to do so notwithstanding subsequent disability (*Rhodes* v. *Smethurst*, 4 *M. & W.* 42; *Lafond* v. *Ruddock*, 13 *C. B.* 819). But no action to recover land or rent can be brought after thirty years, notwithstanding disability (37 & 38 Vict. c. 57, s. 5).

By disability is meant infancy,[93] lunacy, or idiocy, and formerly coverture; but since the Married Women's Property Act, 1882, was passed, the latter is no longer disability, and where a tort was suffered by a married woman before that Act, it has been held, that for the purposes of limitation, her right to sue first accrued on the passing of the Act (*Weldon* v. *Neal*, 32 *W. R.* 828).

Canadian Cases.

[92] Where the Statute of Limitations has once begun to run against a person no subsequent disability in any one claiming under him will stop it, thus where A. discontinued possession in 1820, and died in 1826, leaving a son under age. It was *held*, that if the statute began to run against A., his son had not ten years after coming of age in which to bring ejectment (*Doe* dem. *Thompson* v. *Marks*, *N. B. R.*, 3 *Kerr*, 659).

[93] Where a person enters upon the lands of infants, not being a father or guardian, or standing in any fiduciary relation to the owner, and remains in possession for the statutable period, the rights of the infant will be barred (*In re Taylor*, 28 *Grant's Chy. Reps.* 640. See *Hughes* v. *Hughes*, 6 *O. A. R.* 373; *Faulds* v. *Harper*, 11 *S. C. R.* 639; and *Clarke* v. *McDonnell*, 20 *O. R.* 564).

CHAPTER VIII.

OF DAMAGES IN ACTIONS FOR TORT.

The principles which govern the measure of damages in actions of tort are very loose; and, indeed, as Mr. Mayne, in his excellent treatise, has pointed out, there are many cases of tort in which no measure can be given. It will be at once apparent, however, that, putting aside circumstances of aggravation or mitigation, the compensation to be awarded in respect of an injury to property is capable of being far more accurately calculated than in respect of injury to person or reputation; and therefore, to some extent, the principles of law are different in these two classes of cases, as will be seen from the following rules.

ART. 29.—*Damages for Personal Injury.*

There is no fixed rule for estimating damages in cases of injury to the person, reputation, or feelings, and the finding of the jury will only be disturbed—

(a) Where the damages awarded are outrageously excessive (*Huckle* v. *Money*,

2 *Wils.* 205; *Praed* v. *Graham*,[94] 24 *Q. B. D.* 53; 59 *L. J. Q. B.* 230);

(b) Where it appears that the jury acted under mistake or ill-feeling;

(c) Where they have given more than the plaintiff was, on his own showing, entitled to;

(d) Where the smallness of the award shows that they have either failed to take into consideration some essential element (*Phillips* v. *L. & S. W. R. Co.*, 4 *Q. B. D.* 406), or have compromised the question (*Britton* v. *S. Wales R.*

Canadian Cases

[94] *Fraser* v. *London St. R. W. Co.*, 29 *O. R.* 411; *Steadman* v. *Venning*, 6 *N. B. S. C. R.* 639; *Sornberger* v. *Canadian Pacific R. W. Co.*, 24 *O. A. R.* 263; *Laughlin* v. *Harvey*, 24 *O. A. R.* 438.

In actions for torts the court will not set aside a verdict for excessive damages except upon very clear and manifestly strong grounds.

"As regards the amount of damages and the merits generally, it is never without reluctance and hesitation that the court sets aside a verdict in any action of this nature (wrongful imprisonment) on the ground of excessive damages, because there is no rule approaching to certainty by which they can be estimated, and it is peculiarly within the province of a jury to assess them. In doing this, juries are supposed to give due consideration, not merely to the facts of the case, but to the feelings and motives of the parties, weighing also, as they cannot fail to do in some degree, their characters and stations of life" (*McDonald* v. *Cameron*, 4 *U. C. R.* 1.—Robinson, C. J.; and see *post*, p. 134).

Co., 27 *L. J. Ex.* 355; *Falvey* v. *Stanford*,[95] *L. R.* 10 *Q. B.* 54).

In the words of an American court, "In actions sounding in damages, where the law furnishes no rule of measurement save the discretion of the jury upon the evidence before them, courts will not disturb a verdict upon the ground of excessive damages unless it be so flagrantly improper as to evince passion, prejudice, partiality, or corruption. Upon a mere matter of damages, where different minds might, and probably would, arrive at different results, and nothing inconsistent with an honest exercise of judgment appears, the verdict should be left as the jury found it" (*Miss. Cent. R. R.* v. *Caruth*, 51 *Miss. Rep.* 77).

(1) **False Imprisonment.**—Thus, where some working men were unlawfully imprisoned for six hours only, being in the meantime well fed and cared for, and the jury nevertheless awarded 300*l.* to each of them, the court refused to set the verdict aside; on the ground that it seemed to them probable that the jury considered the importance of the right of personal liberty rather than the position of the plaintiffs (*Huckle* v. *Money*, 2 *Wils.* 587).

(2) **Seduction.**[96]—And so in actions for seduction, "although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact that it is an action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the

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Canadian Cases.

[95] *Dobbyn* v. *Dicow*, 25 *U. C. C. P.* 18.
[96] *Ford* v. *Gourlay*, 42 *U. C. R.* 552.

nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example" (*per* Ld. Eldon, *Bedford* v. *M'Kowl*, 3 *Esp.* 120).

(3) **Assault.**—So in actions for assault and battery, the court will seldom interfere; and the jury may take the circumstances into consideration, and aggravate or mitigate the damages accordingly.

Thus, to beat a man publicly, is a greater insult and injury than to do so in private, and is accordingly ground for aggravation of damages (*Tullidge* v. *Wade*, 8 *Wils.* 18).

(4) **Defamation.**—So, for defamation, the damages are almost wholly in the discretion of the jury (*Kelly* v. *Sherlock*, *L. R.* 1 *Q. B.* 686), and the court will not interfere with their verdict, unless, having regard to all the circumstances, the damages awarded are so large that no twelve reasonable men could have given them (*Praed* v. *Graham*,[97] *supra*).

ART. 30.—*Damages for Injury to Property.*

(1) The damages in respect of injuries to property are to be estimated upon the basis of being compensatory for the deterioration in value caused by the wrongful act of the defendant, and for all natural and necessary expenses

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Canadian Cases.

[97] *Sibbald* v. *Grand Trunk R. W. Co.*, 19 *O. R.* 164; and *ante*, p. 49.

incurred by reason of such act (see *Rust* v. *Victoria Dock Co.*, 56 *L. T.* 216; and *Pneumatic Tyre, &c., Co.* v. *Puncture Proof, &c., Co.*, 15 *R. P. C.* 405.[98]

(2) Where the plaintiff is merely the possessory and not the real owner, he may, as against the defendant, recover the entire value; but as against the real owner, only the value of his limited interest (*Heydon and Smith's Case*, 13 *Co.* 68).

(1) **Injury to Horse.**—Thus, in the case of injury to a horse through the defendant's negligence, it has been held that the measure of damages is the keep of the horse at the farrier's, the amount of the farrier's bill, and the difference between the prior and subsequent value of the horse (*Jones* v. *Boyce*, 1 *Stark.* 493), and

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Canadian Cases.

[98] "It is not an inflexible rule that the jury can give no more in damages than the value of the goods at the time of the conversion, though that is the estimate by which they should be governed as a general principle where there is nothing special or unusual in the case" (*Morton and McGhee* v. *McDowell*, 7 *U. C. R.* 339—Robinson, C. J.).

"It is true that in actions of trespass the courts are reluctant to interfere on account of excessive damages, but this applies rather to trespasses to the person, or such as involve injury to the feelings or character, and in which there can be scarcely said to be any rule for computation. But here the injury was to a right of possession, certainly not wanton or insulting—the damages, if any, might have been estimated, and the jury should not have disregarded all computation" (per Robinson, C. J.; *Jeffers* v. *Markland*, 5 *U. C. R. O. S.* 677. *Godard* v. *Fredericton Boom Co.*, *N. B. R.*, 1 *Han.* 536; *Rankin* v. *Mitchell*, *N. B. R.*, 1 *Han.* 495; *Rose* v. *Belyea*, *N. B. R.*, 1 *Han.* 109; *Allenach* v. *Desbrisay*, *N. B. R.*, *East. T.* 1865).

damages for the loss of the use of the horse (*The Greta Holme*, (1897) *A. C.* 596); and see *Wilson* v. *Newport Co.*, *L. R.* 1 *Ex.* 187).

(2) **Conversion.**—So, for the conversion of chattels, the full market value of the chattel at the date of the conversion, is, *in the absence of special damage*, the true measure.[99] Thus, where the plaintiff purchased

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Canadian Cases.

[99] The jury, however, are not limited to the actual value (*Rose* v. *Belyea*, *N. B. R.*, 1 *Han.* 109; *Allenach* v. *Desbrisay*, *N. B. R.*, *East. T.* 1865).

"The question is, whether the jury were properly directed when they were told that the measure of damages was the sum paid to get back the property, together with any reasonable amount to compensate the plaintiff for the trouble and expense he would be at in asserting his rights, the defendant having been expressly warned not to persist in selling the frame. The jury certainly are not confined to the value of the goods at the time of the seizure by the wrongdoer; for by statute 7 Will. 4, c. 3, sect. 21 [now R. S. O., 1897, c. 51, sect. 115], they may give interest in the nature of damages over and above the value of the goods. But so far as this affords any indication, it tends to show that the measure of damages was treated as the value of the goods at the time of the wrongful act, and the conclusion would be adverse to allowing other considerations to enhance the amount of the damages in actions of this description. The court do not, we apprehend, set themselves to work to ascertain whether, in estimating the value of the goods, the jury may have put a high price on them—may not perhaps have looked rather to what they may be considered to have been worth to the plaintiff than their market value; and, in directing a jury, I have not thought myself overstepping the proper line in saying that they are not bound down to a rigid estimate of the saleable value of articles taken wrongfully from a plaintiff, whether the action be trespass or trover. But that, if correct, does not introduce any other element than a valuation of the goods themselves as forming the true measure of damages" (*Maxwell* v. *Crann*, 13 *U. C. R.* 254 *et seq.*—Draper, J.; and *post*, p. 143).

champagne, lying at the defendant's wharf, at fourteen shillings per dozen, and resold it at twenty-four shillings to the captain of a ship about to leave England, and the defendants wrongfully refused to deliver up the wine, and converted it to their own use, it was held, in an action of trover, that although the defendants had no knowledge of the sale, or of the purposes for which the plaintiff required delivery of the champagne, yet the plaintiff was entitled as damages to the price at which he had sold it (*France* v. *Gaudet*, *L. R.* 6 *Q. B.* 199).

(3) **Trespass.**—So, where coal has been taken, by working into the mine of an adjoining owner, the trespasser will be treated as the purchaser at the pit's mouth, and must pay the market value of the coal at the pit's mouth, less the actual disbursements (not including any profit or trade allowances) for severing and bringing it to bank, so as to place the owner in the same position as if he had himself severed and raised the coal (*In re United Merthyr Coll. Co.*, *L. R.* 15 *Eq.* 46).

(4) **Collision at Sea.**—So, in case of collisions between ships, the actual cost of repairs must be recouped, no allowance being made in respect of new materials replacing old ones (*The Munster*, 12 *T. L. R.* 264).

Art. 31.—*Consequential Damages.*

Where any special damages have *naturally*, and in sequence, resulted from the tort, they may be recovered; but not otherwise.

The difficulty in cases under this rule, is to determine what damages are the *natural* result, and what are too remote.

(1) **Loss of Business by reason of bodily incapacity occasioned by tort.**—If, through a person's wilful or negligent conduct, corporal injury is inflicted on another, whereby he is partially or totally prevented from attending to his business, the pecuniary loss suffered in consequence may be recovered, for it is the natural result of the *injuria* (*Phillips* v. *S. W. Ry. Co.*, 4 *Q. B. D.* 406). Whether mere mental shock due to fright, and not arising from corporal injury, is too remote to afford a ground for damages, is by no means free from doubt. In one case (*Victorian Ry. Comms.* v. *Coultas*,[100] 13 *App. Cas.* 222; 57 *L. J. P. C.* 69) it was held by the Privy Council that such damage was not the natural result of negligence, and was, therefore, too remote; but this case has been dissented from by the Irish Court of Appeal in *Bell* v. *G. N. R. Co.*,[101] 26 *L. R. Ir.* 428, and the point was treated as still

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Canadian Cases.

[100] In an action for damages for being wrongfully ejected from a street car, illness resulting from exposure to cold in consequence of such ejectment is not too remote a cause for damages; and where the evidence was that the person ejected was properly clothed for protection against the severity of the weather, but was in a state of perspiration from an altercation with the conductor when he left the car, and so liable to take cold, it was *held* that the jury was justified in finding that an attack of rheumatism and bronchitis which ensued was the natural and probable result of the ejectment, and in awarding damages therefor (*Toronto Ry. Co.* v. *Grinsted*, 21 *O. A. R.* 578; 24 *S. C. R.* 570; *Henderson* v. *Canada Atlantic R. W. Co.*, 25 *O. A. R.* 487).

[101] *Grand Trunk Ry. Co.* v. *Sibbald*, 20 *S. C. R.* 259.

open to question in *Pugh* v. *L. B. & S. C. Ry. Co.*, (1896) 2 *Q. B.* 248. Moreover, where the mental shock arose from a cruel practical joke (the defendant telling the plaintiff that her husband had had both legs smashed in an accident), Wright, J., held that the damage *was* the natural result of the *injuria* (*Wilkinson* v. *Downton*, (1897) 2 *Q. B.* 57). Money received by the plaintiff from an accidental insurance company cannot be taken into account (*Bradburn* v. *G. W. Ry. Co.*, *L. R.* 10 *Ex.* 1). As to loss of freight caused by collision, see *The Argentino* (13 *P. D.* 191; 58 *L. J. P. & D.* 1).

(2) **Medical Expenses.**—So, the medical expenses incurred may be recovered if they form a legal debt owing from the plaintiff to the physician, but not otherwise (*Dixon* v. *Bell*, 1 *Stark.* 289; and see *Spark* v. *Heslop*, 28 *L. J. Q. B.* 197). Seeing, however, that counsel's fees are allowed as part of the costs of a successful litigant, this distinction seems untenable.

(3) **Loss of Property.**—The plaintiff was travelling with other passengers in the carriage of a railway company, and, on the tickets being collected, there was found to be a ticket short. The plaintiff was wrongly charged by the collector with being the defaulter, and, on his refusing to pay, was removed by the officers of the company, but without unnecessary violence. In an action for assault, it was held, that the loss of a pair of race-glasses, which the plaintiff had left behind him in the carriage when he was removed, and which were not proved to have come into the possession of any of the company's servants, was not such a natural consequence of the assault as to be recoverable (*Glover* v.

L. & S. W. R. Co.,[102] *L. R.* 3 *Q. B.* 25; and see as to remoteness, *Sanders* v. *Stuart*, 1 *C. P. D.* 326).

(4) **Lord Campbell's Act.**—The damages awarded under Lord Campbell's Act to the relatives of persons killed through the default of the defendant, should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life of the deceased (*Franklin* v. *S. E. R. Co.*,[103] 3 *H. & N.* 211). But the jury cannot, in such cases, take into consideration the grief, mourning, and funeral expenses to which the survivors were put. And this seems reasonable; for, in the ordinary course of nature, the deceased would have died sooner or later, and the grief, mourning, and funeral expenses would have had to be borne then, if not at the time they were borne (*Blake* v. *Mid. R. Co.*, 21 *L. J. Q. B.* 233; *Dalton* v. *S. E. R. Co.*, 27 *L. J. C. P.* 227).

(5) And, on the same principle, where a deceased had made provision for his wife, by insuring his life in her favour, then, inasmuch as she is benefited by *the accelerated receipt* of the amount of the policy, the jury ought, in estimating the widow's loss, to deduct from

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Canadian Cases.

[102] Where the conductor of a railway company forcibly, and without excuse for so doing, removes from a train a passenger who has paid his fare, he is liable for the assault, and the doctrine of *respondeat superior* applies to the company. But where, in the course of such removal, and while in the act of leaving the car, plaintiff slipped and was injured, the defendants were *held* not liable for such injury, as the removal was not the proximate, but the remote cause of the accident (*Williamson* v. *Grand Trunk Railway Co.*, 17 *U. C. C. P.* 615).

[103] *Lett* v. *The St. Lawrence and Ottawa R. W. Co.*, 1 *O. R.* 545, and R. S. O. 1897, c. 166.

the future earnings of the deceased, not the amount of the policy moneys, but the premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy (*Grand Trunk R. Co.* v. *Jennings*,[104] 13 *App. Cas.* 800).

(6) **Injury to Trade.**—So, in estimating the damages in an action for libelling a tradesman, the jury should take into consideration the prospective injury which will probably happen to his trade in consequence of the defamation (*Gregory* v. *Williams*, 1 *C. & K.* 568).

(7) **Hiring Substitute.** — In cases of injury to a chattel, if the owner of the chattel has been obliged to hire another in its place, the expense to which he has been put is recoverable (*The Greta Holme*,[105] (1897) *A. C.* 596). And even if he has a spare one, he is entitled to compensation for the temporary deprivation of the injured chattel (*The Comet*, not yet reported, but will be in (1900) *A. C.*).

(8) **Trespass.**—Where the defendant was in charge of the plaintiff's house, and having one day lost the key, he effected an entrance through the window by means of a ladder, and showed some strangers through the house, and some short time afterwards the house was entered through the same window by thieves following his example, and many things stolen, it was held to be the consequence of the defendant's wrongful entry, and that he was liable for the loss of the things stolen (*Ancaster* v. *Milling*, 2 *D. & R.* 714). The present

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Canadian Cases.

[104] *Beckett* v. *Grand Trunk R. W. Co.*, 13 *O. A. R.* 174; *Grand Trunk* v. *Beckett*, 16 *S. C. R.* 713.

[105] *Stephens* v. *Township of Moore*, 25 *O. A. R.* 42.

writer, however, entertains little doubt that this decision would not be followed in the present day.

(9) **Infection.**—A cattle-dealer sold to the plaintiff a cow, fraudulently representing that it was free from infectious disease, when he knew that it was not; and the plaintiff having placed the cow with five others, they caught the disease and died. It was held that the plaintiff was entitled to recover as damages the value of all the cows, as their death was the natural consequence of his acting on the faith of the defendant's representation (*Mullet* v. *Mason*, *L. R.* 1 *C. P.* 559).

(10) **Collision.**[106]—In collision cases, the loss of earnings from a second voyage for which the ship was let, is not too remote (*The Argentino*, 14 *App. Cas.* 519; 61 *L. T.* 706). Nor is the loss of profit which might have been earned by a dredger which was run into and damaged (*The Greta Holme*, (1897) *A. C.* 596). And it makes no difference that the plaintiff has a spare vessel, kept for such emergencies (*The Comet*, *supra*).

(11) So, where a steamer (wholly to blame) collided with a sailing vessel, and destroyed its instruments of navigation, and in consequence of that loss, the sailing ship ran ashore, and was lost while making for port, it was held that the loss of the ship was the natural result

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Canadian Cases.

[106] In an action for injury to plaintiff's vessel, caused by collision with defendant's steamboat, it was *held* that the plaintiff was entitled to recover the costs of repairing his vessel, and for the permanent injury done to her, and the wages of his crew necessarily kept over during the repairs, but not for the sum expended in the hire of another vessel, to take her place, or for the profits which he would have earned by her employment (*Brown* v. *Beatty et al.*, 35 *U. C. R.* 328).

of the collision, and that the steamer was liable (*The City of Lincoln*, 15 *P. D.* 15; 59 *L. J. P. & D.* 1).

(12) **Floodwater.**—In *Collins* v. *The Middle Level Commissioners* (*L. R.* 4 *C. P.* 279), the facts were as follows: By a drainage act, the commissioners were to construct a cut, with proper walls, gates and sluices to keep out the waters of a tidal river, and also a culvert under the cut to carry the drainage from the lands on the east to the west of the cut, *and to keep the same at all times open*. In consequence of the negligent construction of the gates and sluices, the waters of the river flowed into the cut, and, bursting its western bank, flooded the adjoining lands. The plaintiff and other owners of lands on the east side of the cut, closed the lower end of the culvert, which prevented the waters overflowing their lands to any considerable extent; but the occupiers of the lands on the west side, believing that the stoppage of the culvert would be injurious to their lands, re-opened it, and so let the waters through on to the plaintiff's lands to a much greater extent. It was held, that the commissioners were liable for the whole of the damage, as the natural result of their negligence.

(13) **Having been obliged to pay Damages to a Third Party.**—So, again, a landlord, upon his tenant giving notice to quit, entered into a contract with a new tenant. Upon the expiration of the notice, the first tenant refused to quit, and the new tenant not being able to enter in consequence, brought an action against the landlord for breach of contract. It was held, that the landlord might recover, in an action against the tenant, the costs and damages to which he had been put in the action against himself; for they were the natural and ordinary result

of the defendant's wrong (*Bramley* v. *Chesterton*, 2 *C. B. N. S.* 605; and see *Tindale* v. *Bell*, 11 *M. & W.* 228; and *Mowbray* v. *Merryweather*, (1895) 2 *Q. B.* 640).

ART. 32.—*Prospective Damages.*[107]

(1) The damages awarded must include the probable future injury which will result to the plaintiff from the defendant's tort.

(2) But where an act of the defendant is merely the *causa causans*, and the actual cause of action (*i.e.*, the tort) is injury to the plaintiff's property, then each such injury constitutes a fresh cause of action.

Canadian Cases.

[107] "The substantial question is that of damages. I agree in the view taken by the learned Chief Justice that the plaintiff is not entitled to be compensated as for the loss of his time and labour, from the time the loom was taken to pieces and injured, up to the time of trial or up to the commencement of the action. If the loom had been wholly destroyed the value of it would have been the measure of damage—not the value strictly as on a sale, but the value of it to the owner when the trespass was committed, and the court would not feel disposed to interfere because such value in the case of wanton trespass was liberally estimated. But this, with interest on that value, would, I think constitute the measure of damages where no special damage is stated in the declaration. The language of the 7th Will. 4, c. 3, sect. 21 [now R. S. O., 1897, c. 51, sect. 115], supports this opinion in authorizing the jury, if they think fit, to give interest in the nature of damages over and above the value of the goods at the time of the conversion or of seizure in all actions of trover or trespass *de bonis asportatis*" (*Benson* v. *Connor*, 6 *U. C. C. P.* 359—Draper, C. J.; *Scott* v. *McAlpine*, 6 *U. C. C. P.* 302; and *ante*, p. 135).

(1) In *Richardson* v. *Mellish* (2 *Bing.* 240), Best, C. J., said:—

"When the cause of action is complete, when the whole thing has but one neck, and that neck has been cut off by one act of the defendant, it would be mischievous to say—it would be increasing litigation to say—'You shall not have all you are entitled to in your first action, but you shall be driven to a second, third, or fourth for the recovery of your damages.'" A corollary to this rule is, that several actions cannot be brought in respect of the same injury. Therefore, where a bodily injury at first appeared slight, and small damages were awarded, but subsequently it became a very serious injury, it was held that another action would not lie; for the action having been once brought, all damages arising out of the wrong were satisfied by the award in the action (*Fetter* v. *Beal*,[108] 1 *Ld. Raym.* 339—692).

(2) But if the tort be a continuing tort, the principle

Canadian Cases.

[108] In an action for trespass to land, the defendant, who was a contractor, having driven over the plaintiff's fields where crops were growing, and thereby injured the grass, grain, &c., it was *held* that the plaintiff might recover to the extent of the ultimate injury resulting to the crop from the act complained of, as ascertained at the time of harvest (*Throop* v. *Fowler*, 15 *U. C. R.* 365).

The owner of a house of which he is not in the actual occupation, may recover from a person who has placed an offensive nuisance on adjoining premises, damages for the injury sustained in not being able to let the house advantageously in consequence of the nuisance. An owner is liable if he let a building which required particular care to prevent the occupation from being a nuisance, and the nuisance occurs from the want of such care on the part of the tenant (*Smith* v. *Humbert*, *N. B. R.*, 2 *Kerr*, 602).

does not apply; for in that case a fresh cause of action arises *de die in diem*. Thus, in a continuing trespass or nuisance, if the defendant does not cease to commit the trespass or nuisance after the first action, he may be sued until he does. Whether, however, there *is* a continuing *tort*, or merely a continuing *damage*, is often a matter of difficulty to determine.

(3) In the recent case of *Mitchell* v. *Darley Main Co.* (11 *App. Cas.* 127), the defendant worked his mines too close to the plaintiff's property, and in consequence some cottages of the plaintiff were injured in 1868, and were repaired by the defendant. In 1882, in consequence *of the same workings which caused the damage of* 1868, a further subsidence took place, and the plaintiff's cottages were again injured. The case turned on the question of whether the plaintiff was barred by the Statute of Limitations, but incidentally it was decided that the tort was not the excavation, but the causing the plaintiff's land to subside. The excavation was no doubt the *remote* cause of the tort (the *causa causans*), but the tort itself was the infringement of the plaintiff's right of support, and consequently each separate subsidence was a distinct and separate cause of action.

(4) So, also, where the same wrongful act causes damage to goods, and also damage to the person, it has been held that there were two distinct causes of action, for which separate proceedings might be prosecuted (*Brunsden* v. *Humphrey*, 14 *Q. B. D.* 141, Coleridge, C. J., *dissentiente*).

ART. 33.—*Aggravation and Mitigation.*

The jury may look into all the circumstances, and at the conduct of both parties, and see where the blame is, and what ought to be the compensation according to the way the parties have conducted themselves (*Davis* v. *L. & N. W. R. Co.*,[109] 7 *W. R.* 105).

(1) **Seduction under Guise of Courtship.**—In seduction, if the defendant have committed the offence under the guise of honourable courtship, that is ground for aggravating the damages; not, however, on account of the breach of contract, for that is a separate offence, and against a different person. "The jury did right in a case where it was proved that the seducer had made his advances under the guise of matrimony, in giving liberal damages; and if the party seduced brings an action for breach of promise of marriage, so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he

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Canadian Cases.

[109] The action was brought for libels published in the defendant's paper. The first publication appeared on the 29th October, 1862; the second on 5th November. The action was commenced on the 15th December, and the declaration was dated the 24th December, 1862. On the same day an apology was published in the paper. It was *held* that the question of the apology within a reasonable time was properly left to the jury, and further that the publication of the apology "at the earliest opportunity" is to be construed as meaning within a reasonable time, the circumstances of the case and the opportunities of the defendant to publish it being considered (*Cotton* v. *Beaty*, 13 *U. C. C. P.* 243; and *post*, p. 220).

had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (Wilmot, C. J., in *Tullidge* v. *Wade*, 3 *Wils.* 18).

(2) On the other hand, the previous loose or immoral character of the party seduced is ground for mitigation. The using of immodest language, for instance, or submitting herself to the defendant under circumstances of extreme indelicacy.

(3) **Plea of Truth in Defamation.**—In actions for defamation, a plea of truth is matter of aggravation unless proved, and may be taken into consideration by the jury in estimating the damages (*Warwick* v. *Foulkes*,[110] 12 *M. & W.* 508).

(4) **Plaintiff's bad Character in Defamation.**[111]—Evidence of the plaintiff's *general bad character* is allowed

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Canadian Cases.

[110] Pleading justification in an action of slander, where no attempt is made to prove the plea, is not in itself evidence of malice, entitling the plaintiff to have the case submitted to the jury, the words in question having been spoken on a privileged occasion (*Corridan* v. *Wilkinson*, 20 *O. A. R.* 184).

[111] In an action of slander a defendant may give facts and circumstances in evidence in mitigation of damages (*Johnson* v. *Eastman*, *Taylor's K. B. Reps.* 243).

"The case of *Bracegirdle* v. *Bailey* (1 *F. & F.* 536) lays down the rule that evidence of the plaintiff's bad character is inadmissible. . . . We have consulted the judges of the other court, and find that their practice has been in accordance with the case of *Bracegirdle* v. *Bailey*" (*Myers* v. *Currie*, 22 *U. C. R.* 470—Hagarty, J.).

"Clearly evidence of general bad character is inadmissible, though as to whether a reputation for the particular offence charged may be proved there have been different opinions expressed, more especially in text-writers" (*Ibid.*—Adam Wilson, J.; and see *Edgar* v. *Newell*, 24 *U. C. R.* 215,

in mitigation of damages in cases of defamation; for, as is observed in Mr. Starkie's book on "Evidence," "To deny this, would be to decide that a man of the worst character is entitled to the same measure of damages with one of unsullied and unblemished reputation. A reputed thief would be placed on the same footing with the most honourable merchant; a virtuous woman with the most abandoned prostitute." Such evidence cannot, however, be given, unless the facts on which the defendant relies to support his contention are expressly pleaded, so as to enable the plaintiff to meet them if he can (see Judgment of Cave, J., in *Scott* v. *Sampson*,[112] 8 *Q. B. D.* 491, and cases there cited). But although

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where it was *held* that evidence of general bad character was properly rejected).

In an action of slander for charging the plaintiff with stealing, evidence of the general bad character of the plaintiff is not admissible in mitigation of damages (*Williston* v. *Smith*, *N. B. R.*, 3 *Kerr*, 443).

[112] It is not permissible to a defendant to plead justification to a libel, and under that defence to offer evidence of the plaintiff's bad character in mitigation of damages. A plea in mitigation of damages must in its nature be an admission that the plaintiff is entitled to recover some compensation; but it amounts to a contention that the amount of the plaintiff's recovery shall be limited to the value of the plaintiff's character, which value is affected by the facts pleaded. Such a plea, based upon the plaintiff's bad character, must either show that the plaintiff is a man of bad *general reputation or character*, or that the plaintiff has a bad character with regard to some specific act which relates to the charge in the libel complained of (*Wilson* v. *Woods*, 9 *O. R.* 687, disapproved of, and *post*, p. 180; *Moore* v. *Mitchell*, 11 *O. R.* 21; and see *Livingston* v. *Trout*, 9 *O. R.* 488.

In an action for damages for indecent assault evidence of the general reputation for unchastity of the plaintiff is admissible, but evidence of specific acts of impropriety is not (*Gross* v. *Brodrecht*, 24 *O. A. R.* 687).

evidence of general bad character is admissible if pleaded, evidence of rumours and suspicions to the same effect as the defamatory matter is not admissible, as they only indirectly tend to affect the plaintiff's reputation (*ibid.*).

(5) **Plaintiff's irritating Conduct in Defamation.**—In *Kelly* v. *Sherlock* (*L. R.* 1 *Q. B.* 686), the action was brought in respect of a series of gross and offensive libels contained in the defendant's newspaper. It appeared, however, that the first libel was written because the plaintiff preached, and published in the local papers, two sermons reflecting on the magistrates for having appointed a Roman Catholic chaplain to the borough gaol, and on the town council for having elected a Jew as their mayor. The plaintiff had, also, soon after the libels had commenced, alluded to the defendant's paper, in a letter to another paper, as "the dregs of provincial journalism," and he had delivered from the pulpit, and published, a statement to the effect, that some of his opponents had been guilty of subornation of perjury in relation to a charge of assault of which the plaintiff had been convicted. The jury having returned a verdict for a farthing damages, the court refused to interfere with the verdict on the ground of its inadequacy, intimating that, although, on account of the grossness and repetition of the libels, the verdict might well have been for larger damages, yet it was a question for the jury, taking the plaintiff's own conduct into consideration, what amount of damages he was entitled to, and that the court ought not to interfere. As to how far the circulation of the newspaper may aggravate damages, see *Whittaker* v. *Scarborough, &c. Co.*, 1896, 2 *Q. B.* 148.

(6) **Imprisonment on False Charge of Felony.**—In false imprisonment and assault, if the imprisonment has been upon a false charge of felony, where no felony has been committed, or no reasonable ground for suspecting the plaintiff, this will be matter of aggravation.

(7) **Battery in consequence of Insult.**—But if an assault and battery have taken place in consequence of insulting language on the part of the plaintiff, this will be ground for mitigating the damages (*Thomas* v. *Powell*, 7 *C. & P.* 807).

(8) **Insolent Trespass.**—Where a person trespassed upon the plaintiff's land, and defied him, and was otherwise very insolent, and the jury returned a verdict for 500*l.* damages, the court refused to interfere, Chief Justice Gibbs saying, "Suppose a gentleman has a paved walk before his window, and a man intrudes, and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done'? Would that be a compensation?" (*Merest* v. *Harvey*, 5 *Taunt.* 441; *Reeves* v. *Penrose*, 26 *L. R. Ir.* 142.)

(9) **Wrongful Seizure.**—And so where the defendant wrongfully seizes another's chattels, and exercises dominion over them, substantial damages will be awarded for the invasion of the right of ownership (*Bayliss* v. *Fisher*, 7 *Bing.* 153).

(10) **Causing Suspicion of Insolvency.**—And where the defendant took the plaintiff's goods under a false claim, whereby certain persons concluded that the plaintiff was insolvent, and that the goods had been seized under an

execution, it was held that exemplary damages might be given (*Brewer* v. *Dew*, 11 *M. & W.* 629).

ART. 34.—*Presumption of Damage against a Wrong-doer.*

If a person who has wrongfully converted property, refuses to produce it, it will be presumed as against him to be of the best description (*Armory* v. *Delamirie*, 1 *Sm. L. Ca.* 315).

(1) Thus, in the above case, where a jeweller who had wrongfully converted a jewel which had been shown to him, and had returned the socket only, refused to produce it in order that its value might be ascertained, the jury were directed to assess the damages on the presumption that the jewel was of the finest water, and of a size to fit the socket; for *Omnia præsumuntur contra spoliatorem.*

(2) So, where a diamond necklace was taken away, and part of it traced to the defendant, it was held that the jury might infer that the whole thing had come into his hands (*Mortimer* v. *Cradock*, 12 *L. J. C. P.* 166).

ART. 35.—*Damages in Actions of Tort founded on Contract.*

The damages in actions of tort founded upon contract must be estimated in the same way as they are estimated in breach of contract; for a

man cannot, by merely changing the form of his action, put himself in a better position (see *Chinery* v. *Viall*, 5 *H. & N.* 295; *Johnson* v. *Stear*, 33 *L. J. C. P.* 130).

Therefore, since in breaches of contract the damages are limited to injuries which may reasonably be presumed to have been foreseen by both parties at the time of contracting, a man cannot sue for extraordinary, though consequential, damages, unless those damages were within the contemplation of both parties at the time of making the contract, either by express intimation (*Hadley* v. *Baxendale*, 9 *Ex.* 354; *Sanders* v. *Stuart*, 1 *C. P. D.* 326), or by implication from the surrounding circumstances (*Simpson* v. *L. & N. W. R. Co.*, 1 *Q. B. D.* 274; *Jameson* v. *Mid. Ry. Co.*, 50 *L. T.* 426; *Schulze* v. *G. E. Ry. Co.*, 19 *Q. B. D.* 30; and *Waddell* v. *Blockey*, 4 *Q. B. D.* 678).

ART. 36.—*Joint Tort-feasors.*[113]

(1) Persons who jointly commit a tort may be sued jointly or severally, but not both jointly and severally (*Sadler* v. *G. W. R. Co.*, (1896) *A. C.* 688); and if jointly, the damages may be

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Canadian Cases.

[113] "In joint trespasses the question is not which trespasser of several has acted best or worst, which is most, which least guilty, but what is the damage occasioned by the joint trespass to the plaintiff. Each defendant is liable with his fellow-trespassers for that sum" (*Grantham* v. *Severs*, 25 *U. C. R.* 468).

"There is no doubt the general rule is, that in actions of trespass against two or more persons for a joint trespass,

levied from both or either (*Hume* v. *Oldacre*, 1 *St.* 252; *Blair* v. *Deakin*, 57 *L. T.* 522).

(2) A judgment against one of several tort-feasors is a bar to an action against the others, even although the judgment may remain unsatisfied (*Brinsmead* v. *Harrison*,[113a] *L. R.* 7 *C. P.* 547).

Canadian Cases.

where a joint trespass is proven, the damages should be assessed against all the defendants; but when there appears to be a different course of conduct pursued by each defendant, and their motives seem different, an assessment of damages might do great injustice to one and be perfectly right as to the other" (*Clissold* v. *Machell and Moseley*, 26 *U. C. R.* 423—Richards, C. J.).

Where a debt is due to A. and B., and A. makes an affidavit to arrest the debtor, B. is not liable to an action for a malicious arrest, unless it can be shown that he participated in the malicious act either by instructing or authorizing A. to do it, or by having some knowledge that it was done, or intended, or by having afterwards adopted it by giving his assent thereto. If a writ of *capias* be set aside for irregularity, an action on the case will lie against the parties *suing out the same* maliciously. Trespass will be the proper form of action against the party *making the arrest* (*Cameron* v. *Playter*, 3 *U. C. R.* 138).

In trespass and trover against five defendants, for taking and converting a steam boiler, it appeared that one defendant P. had nothing to do with the original taking, but that it had been placed in his yard by the others, or by some of them, not acting in concert with him, and that he had afterwards refused to give it up to the plaintiff. At the trial the plaintiff's counsel declined to elect, but went to the jury against all the defendants, claiming exemplary damages, and a general verdict was rendered. A new trial was ordered without costs, the court refusing to allow the verdict to stand against P. (*Menton* v. *Lee et al.*, 30 *U. C. R.* 281).

[113a] A recovery of a verdict in an action for libel against

(3) A release of one of several tort-feasors is a bar to an action against the others; but a mere covenant not to sue one of them is not (see *Duck* v. *Mayeu*, (1892) 2 *Q. B.* 511; and see *per* Vaughan Williams, L. J., *Price* v. *Reed*, (1900) 1 *Q. B.* at p. 67).

(4) If damages are levied upon one only, then (a) where the tort consists of an act or omission, the illegality of which he must be presumed to have known, he will have no right to call upon the others to contribute (*Merryweather* v. *Nixon*, 8 *T. R.* 186). But (b) where the tort consists of an act not obviously unlawful in itself (*e.g.*, trover by a person from whom the same goods are claimed by adverse claimants), he may claim contribution or indemnity against the party really responsible for the tort; and this right is not confined to cases where he is the agent or servant of the other tort-feasor (*Dugdale* v. *Lovering*, *L. R.* 10 *C. P.* 196; *Adamson* v. *Jervis*, 4 *Bing.* 72; *Betts* v. *Gibbins*, 2 *A. & E.* 57; *Dixon* v. *Fawcus*, 30 *L. J. Q. B.* 137).

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some of several parties concerned in the libel, and payment of the amount of verdict and all costs without judgment being entered, is a bar to an action against others for the same libel (*Willcocks* v. *Howell*, 8 *O. R.* 576; *McMillan* v. *Fairly*, *N. B. R.*, *Han.* 325).

CHAPTER IX.

OF INJUNCTIONS TO PREVENT THE CONTINUANCE OF TORTS.

Definition.—An injunction is an order of the Court of Appeal, or the High Court of Justice, or any division or judge of either of them, or of a county court (*a*), restraining the commission or continuance of some act of the defendant.

Interlocutory or Perpetual.—Injunctions are either interlocutory or perpetual. An interlocutory injunction is a temporary injunction, granted summarily on motion founded on an affidavit, and before the facts in issue have been formally tried and determined. A perpetual injunction is one which is granted after the facts in issue have been tried and determined, and is given by way of final relief.

(*a*) A county court has now, in actions within its jurisdiction, power to grant an injunction against a nuisance, and to commit to prison for disobedience thereof (*Ex parte Martin*, 4 *Q. B. D.* 212; *Martin* v. *Bannister*, *ib.* 491).

ART. 37.—*Injuries Remediable by Injunction.*[114]

(1) Wherever a legal right, whether in regard to property or person, exists, a violation of that right will be prohibited in all cases where the injury is such as is not susceptible of being adequately compensated by damages, or at least not without the necessity of a multiplicity of actions for that purpose (*Aslatt* v. *Corporation of Southampton*, 16 *Ch. D.* 143).

(2) An injunction will not be granted where the injury is trivial in amount, or where the court, in its discretion, considers that damages should alone be given (*b*) (*Kino* v. *Rudkin*, 6 *Ch. D.* 160; *Fritz* v. *Hobson*, 14 *Ch. D.* 542;

(*b*) This jurisdiction was first conferred on the Court of Chancery by Lord Cairns' Act (21 & 22 Vict. c. 27). That Act was, however, repealed by the Statute Law Revision Act, 1883; but sect. 5, sub-s. (b), seems to have preserved the jurisdiction, although it was apparently unnecessary, having regard to the powers given by the Judicature Acts to grant either an injunction or damages (see *per* Baggallay, L. J., *Sayers* v. *Collyer*, 28 *Ch. D.* 108, and *Serrao* v. *Noel*, 15 *Q. B. D.* 549).

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[114] *R. S. O.* 1897, c. 51, s. 58, ss. 9, 10, and Consolidated Rules of Practice and Procedure (Ontario) 1897. "In this case the plaintiffs, a municipal corporation, claim an injunction restraining the defendant from continuing to obstruct an alleged public highway. There does not appear to be any objection to their maintaining a civil action for this purpose instead of proceeding by indictment, though the latter is the more usual course (*St. Vincent* v. *Greenfield*, 15 *O. A. R.* 568—Osler, J.; and see *Fenelon Falls* v. *Victoria*, 29 *Grant, Chy. Reps.* 4, and *Wray* v. *Morrison*, 9 *O. R.* 180).

and *Warwick, &c. Canal* v. *Burman*,[115] 63 *L. T.* 670; *Shelfer* v. *City of London Elec. Lighting Co.*, (1895) 1 *Ch.* 287).

(3) To entitle a plaintiff to an interlocutory injunction, the court must be satisfied that there is a serious question to be tried at the hearing, and that, on the facts before it, there is a probability that the plaintiff is entitled to relief (*per* Cotton, L. J., *Preston* v. *Luck*,[116] 27 *Ch. D.* p. 506). An interlocutory injunction to restrain a libel will only be granted in the clearest cases (*Bonnard* v. *Perryman*,[117] (1891) 2 *Ch.* 269), but is not confined to libels affecting a business (*Monson* v. *Tussaud*,[118] (1894) 1 *Q. B.* 671).

(1) Thus, where substantial damages would be, or

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[115] In *Wright* v. *Turner*, 10 *Grant*, 67, it was *held* that the small amount of damage occasioned was not a sufficient reason for withholding the aid of the court, and that the plaintiff, having established a clear right, was entitled to a perpetual injunction to stay further trespass.

[116] There are many cases in which the court will interfere by injunction to maintain things in *statu quo pendente lite*, not only where plaintiff's title to relief is unquestioned, but even where it is doubtful, provided there is a substantial question to be settled (*Atty.-Gen.* v. *M'Laughlin*, 1 *Grant*, 34).

[117] *Wolfenden* v. *Giles*, 2 *B. C. Reps.* 279.

[118] Defendant erected in the city of Kingston a planing machine and circular saw, driven by steam, and was in the habit of burning the pine shavings and other refuse, using no means to consume or prevent the smoke. He was ordered to desist from using his steam engine so as to occasion annoyance to the plaintiff from the smoke (*Cartwright* v. *Gray*, 12 *Grant*, 399; *Arnold* v. *White*, 5 *Grant*, 371; *Radenhurst* v. *Coate*, 6 *Grant*, 139; *Heenan* v. *Dewar*,

have been, recovered for injury done to land, or the herbage thereon, by smoke or noxious fumes, an injunction will be granted to prevent the continuance of the nuisance; for otherwise the plaintiff would have to bring continual actions (*Tipping* v. *St. Helens Smelting Co.*, *L. R.* 1 *Ch.* 66).

(2) And so where a railway company, for the purpose of constructing their works, erected a mortar mill on part of their land close to the plaintiff's place of business, so as to cause great injury and annoyance to him by the noise and vibration, it was held that he was entitled to an injunction to restrain the company from continuing the annoyance (*Fenwick* v. *East London R. Co.*, *L. R.* 20 *Eq.* 544; but see *Harrison* v. *Southwark, &c. Water Co.*, (1891) 2 *Ch.* 409, in which the former case was distinguished).

(3) As the atmosphere cannot rightfully be infected with noxious smells or exhalations, so it should not be caused to vibrate in a way that will wound the sense of hearing. Noise caused by the ringing of church bells, if sufficient to annoy and disturb residents in the neighbourhood in their homes or occupations, is a nuisance, and will be prohibited (*Soltau* v. *De Held*,

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18 *Grant*, 438; *Swan* v. *Adams*, 23 *Grant*, 220; *Hathaway* v. *Doig*, 6 *O. A. R.* 264).

Where the defendant raised the height of a party wall beyond that of the building of plaintiff, the adjoining owner, without the latter's consent, and subsequently opened a window through the wall so as to overlook the plaintiff's premises, it was *held* that defendant had distinctly given notice that he had ceased to regard the wall as a party wall, that it was an unauthorized user of the party wall, and plaintiff was entitled to an injunction to restrain the further continuance of such window (*Sproule* v. *Stratford*, 1 *O. R.* 335).

2 *Sim. N. S.* 133; *Harrison* v. *St. Mark's Church*, 15 *Albany Law J.* 248; and see also *Bartlett* v. *Marshall*, 60 *J. P.* 104); and as to playing of an organ, *Spruzen* v. *Dossett*, 12 *T. L. R.* 264.

(4) So, where one has gained a right to the free access of light to his house, and buildings are erected which cause a substantial privation of light sufficient to render the occupation of the house uncomfortable, *or* to prevent the plaintiff from carrying on his accustomed business on the premises, an injunction will be granted *if the deprivation of light is such as would support a claim for substantial damages.* For, as was said by Sir W. Page Wood, V.-C., in *Dent* v. *Auction Mart Co.* (*L. R.* 2 *Eq.* 246), "Having arrived at this conclusion with regard to the remedy which would exist at law, we are met with the further difficulty, that in equity we must not always give relief (it was so laid down by Lord Eldon and Lord Westbury) where there would be relief given at law. Having considered it in every possible way, I cannot myself arrive at any other conclusion than this, that where substantial damages would be given at law, as distinguished from some small sum of 5*l.*, 10*l.*, or 20*l.*, this court will interpose, and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour, have a right to purchase him out, without an act of parliament for that purpose." Sir G. Jessel, M. R., commenting upon the above passage in *Aynsley* v. *Glover* (*L. R.* 18 *Eq.* 552), says: "It seems to me that that gives a reasonable rule, whatever the law may have been in former times. As I understand it, the rule now is—and I shall so decide in future, unless in the meantime the Appeal Court shall decide differently,—that

wherever an action can be maintained at law, and really substantial damages, or perhaps I should say considerable damages (for some people may say that 20*l.* is substantial damages), can be recovered at law, there the injunction ought to follow in equity; generally, not universally, because I have something to add upon that subject." His Lordship then, commenting upon the power given to him of awarding damages in substitution for an injunction, proceeded as follows: "It must be for the court to decide, upon consideration, to what cases the enactment (21 & 22 Vict. c. 27) should be held to apply. In the case of *The Curriers' Company* v. *Corbett* (2 *D. & Sm.* 355), we have an instance in which a judge has said that the act ought to apply in some cases. I had one before me, in which, there being comparatively a very trifling injury, although sufficient perhaps to maintain an injunction, comparing that with the injury inflicted upon the defendant, I thought, under the special circumstances, damages should be given instead of an injunction. I am not now going, and I do not suppose that any judge will ever do so, to lay down a rule which, so to say, will tie the hands of the court. The discretion being a reasonable discretion, should, I think, be reasonably exercised, and it must depend upon the special circumstances of each case whether it ought to be exercised. The power has been conferred, no doubt usefully, to avoid the oppression which is sometimes practised in these suits by a plaintiff who is enabled—I do not like to use the word 'extort,' but—to obtain a very large sum of money from a defendant, merely because the plaintiff has a legal right to an injunction. I think the enactment was meant, in some sense or another, to prevent that course being successfully

adopted. But there may be some other special cases to which the act may be safely applied, and I do not intend to lay down any rule upon the subject. If I had found by the evidence, that there was in this case a clear instance of very slight damage to the plaintiffs —that is, some 20*l.*, or 30*l.*, or 40*l.*, but still very slight—I should be disposed to hold that that was a case in which this court would decline to interfere by injunction, having regard to the new power conferred upon me by Lord Cairns' Act to substitute damages for it" (and see also *Smith* v. *Smith*, *L. R.* 20 *Eq.* 505; *Nat. Provincial Plate Glass Co.* v. *Prudential Ass. Co.*, 6 *Ch. D.* 757; *Kino* v. *Rudkin*, *ibid.* 160; and *Holland* v. *Worley*,[119] 26 *Ch. D.* 578; *Martin* v. *Price*, (1894) 1 *Ch.* 276).

(5) And so it has been laid down in an American court, that injunctions are to prevent irreparable mischief, and stay consequences that cannot be adequately compensated; their allowance is discretionary and not of right, calls for good faith in the plaintiff, and may be withheld if likely to inflict greater injury than the grievance complained of. It is an irreparable injury to create intolerable smells near the homestead of a

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[119] The plaintiff, who claimed the exclusive user of certain streams flowing through his land, which right the defendants denied, had obtained an interlocutory injunction restraining the defendants from using his improvements thereon for floating down their logs, upon the usual undertaking to pay any damage sustained thereby. *Held*, that the plaintiff was not entitled to an interlocutory injunction, as it was not shown that irremediable damage would result from refusing it, or that the balance of inconvenience was in his favour (*McLaren* v. *Caldwell*, 5 *O. A. R.* 363; *Wright* v. *Turner*, 10 *Grant*, 67; *Beamish* v. *Barrell*, 16 *Grant*, 318).

neighbour, or to undermine his house by excavations; to cut him off from the street by buildings or ditches, or otherwise destroy the comfortable, peaceful and quiet occupation of his homestead; also to break up his business, destroy its goodwill, and inflict damages that cannot be measured, because the elements of reasonable certainty are wanting in computing them (*Edwards* v. *Allouez, &c.*, 38 *Michigan Rep.* 46).

(6) Formerly (1) if the plaintiff was out of possession, an injunction against a trespasser was refused, except in cases of fraud, collusion, or destruction of the estate; and it was necessary that an action to try the right should be pending. (2) If the plaintiff was in possession, the right to an injunction depended upon the fact of the trespass being by a stranger, or under a claim of title (*Stanford* v. *Hurlstone*, 9 *Ch. App.* 116). All such distinctions, are, however, abolished by sect. 25, sub-sect. 8 of the Judicature Act, 1873[120a] (*Anglo-Italian Bank* v. *Davies*, 9 *Ch. D.* 286; and see *Harrison* v. *Duke of Rutland*, (1893) 1 *Q. B.* 154; and *Micklethwaite* v. *Vincent*,[120] 67 *L. T.* 225).

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[120a] *R. S. O.*, 1897, *c.* 51, *sect.* 58, *sub-sect.* 9.

[120] An interlocutory injunction having been granted to restrain defendants, who were carrying on business in partnership as an electric light company, from running their lines in such a way as to interfere with the safe and efficient working of the business of the plaintiffs, an incorporated telephone company, it was *held* that, although the circumstance that the plaintiffs were in possession of the ground, and had their poles erected about two years before the defendants put up their poles, did not give them the exclusive possession or right to use the sides of the road on which they had placed their poles, yet, their possession being earlier than that of the defendants, the defendants had not the right to do any act interfering with

(7) Where the sewage of a town was carried from a brook which, passing through a man's land, fed a lake also on such land, and the sewage thus discharged had for several years fouled the water of the lake, so that from being pure drinking water it gradually became quite unfit for drinking, an injunction was granted (*Goldsmid* v. *Tunbridge Wells Improvement Coms.*, *L. R.* 1 *Eq.* 161). But as to present practice in these cases, see *Att.-Gen.* v. *Preston Corporation*, 13 *T. L. R.* 14.

(8) Again, deprivation of lateral or subjacent support, in cases where a jury would give considerable damages, is sufficient ground for an injunction. So also a mandatory injunction will be granted for the removal of an obstruction to a householder's access to a public highway (*Ramuz* v. *Southend Local Board*, 67 *L. T.* 169).

(9) So infringements of trade marks, copyright, and patent right, are peculiarly remediable by injunction; for not only are they continuing wrongs to proprietary rights, but damages never could properly compensate the persons whose rights are invaded (see *Magnolia, &c. Co.* v. *Atlas Metal Co.*, 14 *R. P. C.* 389).

(10) It was formerly held that an injunction could not be granted to restrain the publication of a personal libel, even where it injuriously affected property (*Gee* v. *Pritchard*, 2 *Swan.* 402; *Clark* v. *Freeman*, 11 *Beav.* 112; *Prudential Assurance Co.* v. *Knott*, 10 *Ch. App.* 142). However, since the Judicature Act, 1873, the court has power to grant an injunction wherever it may appear to be just or convenient (sect. 25 (8)).

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or to the injury of the plaintiffs' rights (*Bell Telephone Co.* v. *Belleville Electric Light Co.*, 12 *O. R.* 571).

For some time the court was inclined to restrict this power to cases where a libel prejudicially affected property (*Thorley's Cattle Food Co.* v. *Massam*, 6 *Ch. D.* 582; 14 *ibid.* 763); but, in *Aslatt* v. *Corporation of Southampton* (16 *Ch. D.* 148), the late Sir George Jessel, M. R., said:—"I do not think that the interference of the court is absolutely confined to that now; there may be cases in which the court would interfere even where personal *status* is the only thing in question." That view has since been confirmed, and it may now be considered settled that the court *has jurisdiction* to grant injunctions to restrain the publication of all libels (see *per* Lord Coleridge, C. J., in *Bonnard* v. *Perryman*, (1891) 2 *Ch. at p.* 283; *Quartz Hill, &c. Co.* v. *Beall*, 20 *Ch. D.* 501; *Liverpool, &c. Association* v. *Smith*, 37 *Ch. D.* 170); or even oral slanders (*Hermann Loog* v. *Bean*, 26 *Ch. D.* 306). Thus, injunctions have been granted to restrain libels denying the validity of an alderman's election (*Aslatt* v. *Corporation of Southampton*, *supra*), or imputing "sweating" to a manufacturer (*Collard* v. *Marshall*, (1892) 1 *Ch.* 571; and see also *Pink* v. *Federation of Trades Unions*, 67 *L. T.* 258; and *Lee* v. *Gibbings*,[121] *ibid.* 263). However, the

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[121] Where there are conflicting claimants to the position of president of a company and one takes forcible possession of the company's premises, the other claimant, at all events, when he is at the time the acting president, can bring an action to restrain him in the name of the company, although it be uncertain who is the rightful president (*Toronto Brewing and Malting Co.* v. *Blake*, 2 *O. R.* 175).

The plaintiffs individually were members of the Master Plasterers' Association, and the defendants individually were members of the Operative Plasterers' Association. Some of the defendants by threats, intimidation and violence, prevented one man who had contracted to work for one of the

court is extremely chary of granting *interlocutory* injunctions in cases of libel. As Lord Coleridge said in *Bonnard* v. *Perryman* (*supra*): "The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. . . . We entirely approve of, and desire to adopt as our own, the language of Lord Esher, M. R., in *Coulson* v. *Coulson* (3 *Times L. R.* 846): 'To justify the court in granting an interim injunction, it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of a delicate nature. *It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find, the court would set aside the verdict as unreasonable*'" (see also *Salomons* v. *Knight*, (1891) 2 *Ch.* 294; *Monson* v. *Tussaud*, (1894) 1 *Q. B.* 671; and *Newton* v. *Amalgamated Musicians Union*, 12 *T. L. R.* 622).

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plaintiffs, from fulfilling his contract, and induced him to leave Toronto, where he had been hired to work, whereby his master suffered injury to his business. *Held*, that this entitled the master to an injunction restraining these defendants from so interfering with his servants (*Hynes* v. *Fisher*, 4 *O. R.* 60).

"Any publication false in fact, injurious to property or trade, will be restrained; and any act done, or threatened to be done, injurious to trade or property, will be restrained" (*Ibid.*—Wilson, C. J., 73).

(11) The court has held that the writer of private letters has such a qualified property in them as will entitle him to an injunction to restrain their publication by the party written to, or his assignees (Drew. Inj. 208; *Pope* v. *Curl*, 2 *At.* 341). And the party written to has such a qualified right of property in them as will entitle him, or his personal representatives, to restrain their publication by a stranger, unless such right is displaced by some personal equity, or by grounds of public policy (Drew. Inj. 309; *Granard* v. *Dunkin*, 1 *Ball & B.* 207; *Perceval* v. *Phipps*, 2 *V. & B.* 19). However, it does not now seem necessary to assume any such right of property in order to give the court jurisdiction, as an injunction may be granted to prevent a wrong arising out of mere breach of confidence, *e.g.*, publication by a photographer of a customer's portrait (*Pollard* v. *Photo. Co.*, 40 *Ch. D. at p.* 354).

ART. 38.—*Threatened Injury.*

The court will not in general interfere until an actual tort has been committed; but it may, by virtue of its jurisdiction to restrain acts which when completed will result in a ground of action, interfere before any actual tort has been committed, where it is satisfied that the act complained of will inevitably result in a nuisance or trespass (Kerr, Inj. 339).

So where a man threatens, or begins to do, or insists upon his right to do, certain acts, the court will interfere before any actual damage or infringement of any right has actually taken place, if the circumstances are such

as to enable it to form an opinion as to the legality of the acts complained of and the irreparable injury which will ensue (*Palmer* v. *Paul*,[122] 2 *L. J. Ch.* 514; *Elliott* v. *N. E. R. Co.*, 10 *H. L. Cas.* 333; *Phillips* v. *Thomas*, 62 *L. T.* 793). An injunction will not, however, be granted in a *quia timet* action unless the plaintiff makes out a strong case of probability that the apprehended mischief will in fact arise (*Attorney-General* v. *Mayor of Manchester*, (1893) 2 *Ch.* 87). Thus, where a proposed smallpox hospital was 250 yards from the nearest house and 200 yards from the nearest road and the medical evidence was conflicting, it was held that in the absence of strong medical evidence that the proposed hospital would be a nuisance, no injunction could be granted (*ibid.*; and see *Fletcher* v. *Bealey*,

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[122] "I think the plaintiff was entitled to bring his action as he did, and there having been the threats made he was not obliged to wait to see how much mischief the defendants might do before bringing his suit. It might then be quite too late for the purpose of an injunction. I also think that the injury reasonably apprehended would be an injury to the plaintiff's reversion, and that he is in a position to sustain this suit notwithstanding the fact of the house being at present let to a tenant who is in occupation of it" (*Wray* v. *Morrison*, 9 *O. R.* 184—Ferguson, J.; and see *Donnelly* v. *Donnelly*, 9 *O. R.* 673).

An injunction will be granted to restrain the corporation of one municipality from establishing a smallpox hospital within the limits of another (*Township of Elizabeth* v. *Town of Brockville*, 10 *O. R.* 372; and see *Smith* v. *Petersville*, 28 *Grant*, 599; *McGarvey* v. *Strathroy*, 10 *O. A. R.* 631; *Clouse* v. *Canada Southern R. W. Co.*, 4 *O. R.* 28; *Fenelon Falls* v. *Victoria R. W. Co.*, 29 *Grant*, 4; and *Montreal* v. *Drummond*, 1 *App. Cas.* 384).

An injunction may be obtained by a municipality to restrain the obstruction of a highway (*St. Vincent* v. *Greenfield*, 15 *O. A. R.* 567).

28 *Ch. D.* 688; and see also *Savory* v. *Lond. Elect., &c. Association*, 8 *Times Rep.* 192; *McMurray* v. *Caldwell*, 6 *ibid.* 76; and *Dicker* v. *Popham & Co.*, 63 *L. T.* 379; and *Phillips* v. *Thomas*, 62 *ibid.* 793).

ART. 39.—*Public Convenience does not justify the continuance of a Tort.*

It is no ground for refusing an injunction that it will, if granted, do an injury to the public. Even where parliament has authorized a public body to carry out a public work, that does not authorize the body to carry it out in such manner or place as will cause a nuisance, *if it can be carried out otherwise* (see *Truman* v. *L. B. & S. C. R. Co.*, 11 *App. Cas.* 45).

Thus, in the case of *The Attorney-General* v. *Birmingham Corporation* (4 *K. & J.* 528), where the defendants had poured their sewage into a river, and so rendered its water unfit for drinking and incapable of supporting fish, it was held that the legislature not having given them express powers to send their sewage into the river, their claim to do so, on the ground that the population of Birmingham would be injured if they were restrained from carrying on their operations, was untenable (see also *Spokes* v. *The Banbury Board of Health*, *L. R.* 1 *Eq.* 42; *Goldsmid* v. *Tunbridge Wells Improvement Coms.*, *supra*; and *Hill* v. *Met. Asylums Board*, 6 *App. Cas.* 193). The same rule is observed in the United States (*Weir's Appeal*, 74 *Penn. St. Rep.* 230, and *Meigs* v. *Lester*, 23 *New*

Jersey Eq. 199). But where parliament has authorized works which cannot be carried out without the creation of a nuisance, the parliamentary authority is a good answer to an action (see *Truman* v. *L. B. & S. C. R. Co.*, *ubi sup.*; and *Harrison* v. *Southwark, &c. Water Co.*, (1891) 2 *Ch.* 409).

ART. 40.—*Mandatory Injunctions.*[123]

Where an injunction is asked, not merely prohibiting an act, but ordering some act to be done, it in general requires a stronger case to be made out than where a mere prohibition is asked for (*Deere* v. *Guest*, 1 *Myl. & C.* 516; *Durrell* v. *Pritchard, L. R.* 1 *Ch.* 250; *Clarke* v. *Clark, L. R.* 1 *Ch.* 16). The court has power to grant it on an interlocutory application, but will not do so unless the matter is very urgent (*Bonner* v. *G. W. R. Co.*, 24 *Ch. D.* 10), or unless the defendant has evaded service of the writ (*Von Joel* v. *Hornsey*, (1895) 2 *Ch.* 774; *Daniel* v. *Ferguson*, (1891) 2 *Ch.* 27).

(1) Thus, where a man has actually built a house which interferes with his neighbour's ancient lights,

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[123] "I think there is no doubt of the general proposition that the court has the right to interfere by mandatory injunction on an interlocutory application. But where that is done the right must be very clear indeed" (*Toronto Brewing and Malting Co.* v. *Blake*, 2 *O. R.* 183—Proudfoot, J.).

the court will not order him to take it down, except in cases in which extreme, or at all events, very serious, damage would ensue if its interference were withheld. For, in such case, the injury to the defendant by the removal of his building would generally be out of all comparison to the injury to the plaintiff, and that is a consideration which ought to have great weight (see *Nat. Prov. Plate Glass Co.* v. *Prudential Ass. Co.*, 6 *Ch. D.* 761).

(2) And so where an injunction was asked, ordering the defendants to pull down some new buildings, on two grounds, namely, 1st, that a right of way was obstructed by the new buildings; and, 2ndly, that the new buildings obstructed the light and air; it was held that no injunction ought to be granted, because, as was said by the Lord Justice Turner, "as to none of these grounds does it seem to me that there is any such extreme or serious damage as could justify the mandatory injunction which is asked. As to the first ground, the right of way is not wholly stopped. The question is one merely of the comparative convenience of the right of way as it formerly existed, and as it now exists. As to the second ground, I think that the diminution of light and air to the plaintiff's houses is not such as would warrant us in granting the relief which is asked" (*Durrell* v. *Pritchard*, *supra*). But where, in a light and air case, the defendant, after receiving notice of motion for an injunction, put on a number of men who worked night and day, and ran up his building to a height of nearly forty feet before he received notice that the injunction had been granted, it was held by the Court of Appeal that he ought to be ordered to restore the *status quo ante* by pulling down the building at once, without reference to the

questions to be decided at the trial (*Daniel* v. *Ferguson*, *supra;* and see *Lawrence* v. *Horton*, 38 *W. R.* 555; and *Von Joel* v. *Hornsey*, *supra*).

As to the modern *form* of a mandatory injunction see *Jackson* v. *Normandy Brick Co.*, (1899) 1 *Ch.* 438.

ART. 41.—*Delay in Seeking Relief.*[124]

A person who has not shown due diligence in applying to the court for relief, will, in general, be debarred from obtaining an interlocutory injunction; but he will not be thereby debarred from obtaining an injunction at the hearing of the cause, unless his delay has been of such long duration as wholly to have deprived him of the right which he originally had (*per* Lord Langdale, in *Gordon* v. *Cheltenham R. Co.*, 5 *B.* 233; and see as to infringement of patents, *Dunlop, &c. Co.* v. *Stone*, 14 *R. P. C.* 263).

Canadian Cases.

[124] *Sanson* v. *Northern R. W. Co.*, 29 *Grant*, 459; *Davies* v. *Toronto*, 15 *O. R.* 33.

CHAPTER X.

THE EFFECT OF THE DEATH OR BANKRUPTCY OF EITHER PARTY.

ART. 42.—*Death generally destroys the Right of Action.*

(1) As a general rule, the right to sue, and the liability to be sued, for torts, ceases with the life of either party.

(2) This rule does not apply where the tort consists of:—

(a) The appropriation by the defendant of property, or the proceeds or value of property, belonging to the plaintiff (*Phillips* v. *Homfray*, 24 *Ch. D.* 439); or

(b) An injury to real or personal property committed *by the deceased* within six calendar months of his death (3 & 4 Will. 4, c. 42, s. 2; see *Kirk* v. *Todd*, 21 *Ch. D.* 484)(*a*); or

(c) An injury to *real* property *of the deceased*,

(*a*) Must be brought within six months of constitution of a personal representative.

committed within six calendar months of his death (*Ib.*) (*b*); or

(d) An injury to goods and chattels (including choses in action) *of the deceased* (4 Edw. 3, c. 7; 25 Edw. 3, c. 5); or

(e) An injury causing the death of the deceased, if he or she leaves a wife, husband, parent, or child (9 & 10 Vict. c. 93, s. 1) (*c*).

(1) The rule is usually expressed in the form of a Latin maxim, "*actio personalis moritur cum personâ.*" Thus, if one is assaulted or libelled, or assaults or libels another, and dies; in the one case the assaulter or libeller is acquitted, and in the other the assaulted or libelled party is left without any remedy, however severely he may have been injured.

(2) The case of *Hatchard* v. *Mège* (18 *Q. B. D.* 771) is an excellent example of the rule under consideration. There it was held that a claim for falsely and maliciously publishing a statement, calculated to injure the plaintiff's right of property in a trade mark, was put an end to by the death of the plaintiff after the commencement of the action *only so far as it was a claim for libel;* but so far as the alleged tort was in the nature of slander of title, the action survived, and could be continued by his personal representative, who would be entitled to recover

(*b*) Must be brought within twelve months of death.

(*c*) As to this Act, commonly called Lord Campbell's Act, *vide infra*, under the Chapter on Negligence. Strictly, such actions are not survivals of a cause of action belonging to the deceased, but are remedies for a statutory tort of a very special nature.

on proof of special damage (and see also *Daly* v. *Dublin, &c. Ry. Co.*, 30 *L. R. Ir.* 514).

It may be observed that, under paragraph (b), where an action is actually pending, if the defendant dies *pendente lite*, the action dies with him, unless the tort was committed within the six months immediately preceding his death (*Kirk* v. *Todd, ubi supra*).[125]

ART. 43.—*Effect of Bankruptcy.*

(1) The right of action belonging to one who becomes bankrupt, is not affected by his bankruptcy, unless it causes actual loss to his estate, in which case the right passes to his trustee (see *Wright* v. *Fairfield*, 2 *B. & Ad.* 727; *Beckham* v. *Drake*, 2 *H. L. C.* 579; *Brewer* v. *Dew*, 11 *M. & W.* 625; *Hodgson* v. *Sidney*, *L. R.* 1 *Ex.* 313; *Ex parte Vine*, 8 *Ch. D.* 364).

(2) A right of action for tort against one who becomes bankrupt, is not destroyed by the bankruptcy, nor can the plaintiff prove in the bankruptcy for compensation (46 & 47 Vict. c. 52, s. 30, sub-s. 2, and s. 37; *Watson* v. *Holliday*, 20 *Ch. D.* 780; 52 *L. J. Ch.* 543; *Ex parte Stone*, 37 *W. R.* 767).

(1) Thus a bankrupt may, even during the continuance of the bankruptcy, sue another for libel or assault, or for seduction (*Beckham* v. *Drake, supra*); and may, it is

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Canadian Cases.

[125] The right of action for seduction does not survive to the administrator of the original plaintiff (*Ball* v. *Goodman*,

conceived, keep any damages which he may recover for his own use and benefit (*Ex parte Vine*, *supra*).

(2) And so where the tort, although one in respect of property, does not cause any actual damage to it, but merely interferes with the plaintiff's abstract right, the right of action remains in him and does not pass to the trustee (*Brewer* v. *Dew*, *supra*).

(3) But where a tort in respect of property causes actual damage, so as to inflict loss on the bankrupt's creditors, the right of action passes to the trustee, and the bankrupt loses the right of suing for the abstract tort to his right (*Brewer* v. *Dew*, *supra*; and *Hodgson* v. *Sidney*, *supra*), unless there were two distinct causes of action (*Ib.*).

Canadian Cases.

10 *U. C. C. P.* 174; nor does it survive to the mother where the action has been commenced in the father's lifetime (*Healey* v. *Crummer*, 11 *U. C. C. P.* 527).

This is no longer law in Ontario, the legislature having passed the following statute:—

The executors or administrators of any deceased person may maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased, except in cases of libel and slander, in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but such action shall be brought within one year after his decease (*R. S. O.*, 1897, *c.* 129, *sect.* 10).

In case any deceased person committed a wrong to another in respect to his person, or of his real or personal property, the person so wronged may maintain an action against the executors or administrators of the person who committed the wrong. The action shall be brought, at latest, within one year after the decease. This section shall not apply to libel or slander (*R. S. O.*, 1897, *c.* 129, *sect.* 11; and see *R. S. M.*, 1891, *c.* 146, *sect.* 48).

PART II.

RULES RELATING TO PARTICULAR TORTS.

CHAPTER I.

TORTS FOUNDED ON MALICE (*a*).

Sect. I.—Of Libel and Slander.

Art. 44.—*Definitions of Libel and Slander.*[1]

(1) Libel is a false, defamatory and malicious writing, picture, or the like, tending to injure the reputation of another.

(2) Slander is a false, defamatory and malicious verbal statement tending to injure the reputation of another.

(3) A libel is of itself an infringement of a right, and no actual damage need be proved in order to sustain an action. Slander, on the other hand, is not of itself an infringement of a right, unless damage ensues, either actually or presumptively.

(4) A corporation or a firm are equally entitled with individuals to protection against

(*a*) Malice is the conscious violation of law to the prejudice of another.

Canadian Cases.

[1] For definition of defamatory libel, see the Criminal Code, 1892, s. 285.

defamation calculated to affect its business, but not against personal defamation (*South Hetton Coal Company* v. *N. E. News Association*,[1a] (1894) 1 *Q. B.* 133; *Manchester (Mayor, &c.)* v. *Williams*, (1897) 1 *Q. B.* 94).

Analysis of libel and slander.—It will be perceived that in order to found an action, whether for libel or slander, four distinct factors must be present. (1) The imputation conveyed by the writing, picture or words must be false, for truth (*b*) is a good defence to an

(*b*) It must be observed, however, that if truth be pleaded, it must be strictly proved; for general evidence of reputation, showing that the plaintiff was credited by the public with misconduct such as that charged in the libel, is of no avail (see *Wood* v. *Earl of Durham*,[2] 21 *Q. B. D.* 501; 57 *L. J. Q. B.* 547; 59 *L. T.* 142.

Canadian Cases.

[1a] Although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or proving special damage (*Journal Printing Co. of Ottawa* v. *Maclean*, 25 *O. R.* 509; *Journal Printing Co.* v. *MacLean*, 23 *O. A. R.* 324; and see cases on Slander of Title, *ante*, p. 19; *Acme Silver Co.* v. *Stacey*, *post*, p. 216; and *Hamilton* v. *Walters*, *post*, pp. 216, 217).

[2] "In the present case the plea of justification was persisted in, and was not abandoned until after the defendant and witnesses called by him were examined and failed to prove it. We therefore think, on the authority of the cases referred to, that the plaintiff was entitled to have had the jury told that they might consider the defendant's conduct in putting the plea of justification on the record and endeavouring to prove it, as some evidence of malice and aggravation of the injury" (*Faucitt* v. *Booth*, 31 *U.C.R.* 267—Morrison, J.; and see *ante*, p. 148).

Where in case for slander, the words laid in the declaration were "He (meaning the plaintiff) burnt my barn," and the words proved were "There is the man that burnt my

action, or, in technical language, is a justification (*Watkin* v. *Hall*, *L. R.* 3 *Q. B.* 396; *Gourley* v. *Plimsoll*, *L. R.* 8 *C. P.* 362; *Leyman* v. *Latimer*, 3 *Ex. D.* 352). (2) The imputation must be defamatory (*Allen* v. *Flood*, (1898) *A. C.* 1). (3) The imputation must have been published. (4) The imputation must have been either expressly *or impliedly* malicious. And in the case of *slander*, but not of libel, a fifth factor must exist, viz., actual damage must be proved, unless it can be implied from the nature of the defamatory words. In the succeeding articles, questions which occur as to the nature of defamatory imputations, publication, and malice, and, in the case of slander, the nature of the resulting damage, will be more fully elucidated. It suffices, at this point, to say that if any one of the first four factors above enumerated in case of libel, or of the whole five in case of slander, is absent, no tort has been committed. As to injunctions to restrain libels, the reader is referred to p. 155, *supra*, and to the case of *Monson* v. *Tussaud*, (1894) 1 *Q. B.* 671.

Canadian Cases.

barn, if he was not guilty of it he would not carry pistol," it was *held* that the words proved did not support the declaration (*Vankeuren* v. *Griffis*, 2 *U. C. R.* 423; *McNaught* v. *Allen*, 8 *U. C. R.* 304; *Smiley* v. *McDougall*, 10 *U. C. R.* 113; *Miller* v. *Houghton*, 10 *U. C. R.* 348; *Manley* v. *Corry*, 3 *U. C. R.* 380).

The editor of a public newspaper must respect the sacredness of a man's home, and if he resorts to such means of attack, he cannot complain if he is accused of having a bad depraved heart, and that his course is one of deliberate determined wickedness (*Stewart* v. *Rowlands*, 14 *U. C. C. P.* 485).

Where an action is brought for a libel, to make a good plea to the whole charge, the defendant must justify everything that the libel contains which is injurious to the plaintiff (*Davis* v. *Stewart et al.*, 18 *U. C. C. P.* 482; *Archibald* v. *Cummings*, 25 *N. S. R.* 555).

ART. 45.—*What is defamatory.*

(1) Defamatory words or pictures or effigies are such as impute conduct or qualities tending to disparage or degrade the plaintiff (*Digby* v. *Thompson*, 4 *B. & Ad.* 821); or to expose him to contempt, ridicule, or public hatred; or to prejudice his private character or credit (*Fray* v. *Fray*, 34 *L. J. C. P.* 45); or to cause him to be feared or avoided (*l'Anson* v. *Stuart*, 1 *T. R.* 748; *Walker* v. *Brogden*,[3] 19 *C. B. N. S.* 65).

(2) A statement disparaging in intention,

Canadian Cases.

[3] "It is true that we do not recognize the criminal law of foreign countries, and therefore it is argued that we cannot be certain that by the law of the United States a man who has stolen a cow (which is what this plaintiff has been charged with) would be liable to any corporal punishment. The same might be said of words imputing murder, forgery, or arson. But surely we may infer that in any civilized community which has laws and property to protect, to steal must be an offence of a very grave character. I think the good sense of the rule as now maintained is that the charging a man with committing abroad such a crime as would subject him to the punishment of felony here by the common law fixes with equal certainty the character of the imputation, and places the man in fully as degraded a position in society" (*Smith* v. *Collins*, 3 *U. C. R.* 3—Robinson, C. J.).

Where slanderous words were spoken under such circumstances as that the person to whom they were spoken did not know to which of a class of two persons they were intended to be applied, it was *held* that either of the two members of the class were entitled to sue, but it was necessary for plaintiff to prove that the words were untrue of, and could not apply to, the other member, otherwise she could not recover (*Albrecht* v. *Burkholder*, 18 *O. R.* 287; *Silver et al.* v. *Dominion Telegraph Co.*, 2 *N. S.* (*Russell & Geldert*), 17; and see the Criminal Code, 1892, s. 285, s.s. 2).

and so reasonably understood by the person to whom it was published, is none the less actionable because, if taken literally, it would not be defamatory (*Capital & Counties Bank* v. *Henty*, 5 *C. P. D.* 515; 7 *A. C.* 741, but see *Nevill* v. *Fine Arts, &c., Co.*, (1897) *A. C.* 69; *Williams* v. *Smith*, 22 *Q. B. D.* 134, and *Searles* v. *Scarlett*,[4] (1892) 2 *Q. B.* 56).

(1) **Illustrations of directly defamatory words.**—Thus, describing another as an infernal villain is a disparaging statement sufficient to sustain an action (*Bell* v. *Stone*, 1 *B. & P.* 331); and so is an imputation of insanity (*Morgan* v. *Lingen*, 8 *L. T. N. S.* 800); or insolvency, or impecuniousness (*Met. Saloon Omnibus Co.* v. *Hawkins*,[5] 28 *L. J. Ex.* 201); *Eaton* v. *Johns*, 1 *Dowl. N. S.* 602); or even of past impecuniousness

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Canadian Cases.

[4] The declaration charged on a libel the following words: "You have stolen goods in your house, and you know it," and imputed as the meaning that he (the defendant) knew the goods in his house were stolen. It was *held* that this was not actionable though spoken of and to an innkeeper (*Paterson* v. *Collins*, 11 *U. C. R.* 63; *Green* v. *Minnes*, 22 *O. R.* 177).

[5] An action for libel will lie against a corporation (*McLay* v. *The Corporation of Bruce*, 14 *O. R.* 398; *Owen Sound Building and Savings Society* v. *Meir*, 24 *O. R.* 109), but no action will lie for slander (*Marshall* v. *Central Ontario Ry. Co.*, *ante*, p. 68).

Where a declaration charged that the defendant had accused the plaintiff of having taken a false oath, meaning thereby that he was guilty of wilful and corrupt perjury, it was *held* sufficient on motion in arrest of judgment, and that no allegation of the oath having been made in a judicial proceeding was necessary (*McDonald* v. *Moore*, 26 *U. C. C. P.* 52).

The epithet "blackleg" is libellous (*Hugo* v. *Todd*, 1 *B. C. Reps.* 369; and see *Hunter* v. *Hunter*, *post*, p. 200).

(*Cox* v. *Lee*, *L. R.* 4 *Ex.* 284); or of gross misconduct (*Clement* v. *Chivis*, 9 *B. & C.* 172); or of cheating at dice (*Greville* v. *Chapman*, 5 *Q. B.* 744); or of ingratitude (*Cox* v. *Lee*, *supra*).

(2) So, reflections on the professional and commercial conduct of another are defamatory; as, for instance, to say of a physician that he is a quack; and even to advertise pills as prepared by him (contrary to the fact) would probably be a libel (*Clark* v. *Freeman*, 11 *Beav.* 117; but conf. *Dockerell* v. *Dougall*, 78 *L. T.* 840). So, also, calling a newspaper proprietor "a libellous journalist" is defamatory (*Wakley* v. *Cooke*, 4 *Ex.* 518), although it would appear that applying the word "Ananias" to a newspaper does not necessarily impute wilful and deliberate falsehood to its manager and proprietor (*Australian Newspaper Co.* v. *Bennett*,[6] (1894) *A. C.* 284).

(3) So, again, it is libellous to call even an ex-convict a felon, as one who has endured the punishment for felony is, by 9 Geo. 4, c. 32, s. 3, no longer a felon in point of law (*Leyman* v. *Latimer*, 3 *Ex. D.* 352).

(4) **Illustrations of indirectly defamatory words.**—A statement may be none the less defamatory because it is in the form of an ironical compliment. Thus, if one said of another that he was so valuable a citizen that the government had sent him to Australia for

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Canadian Cases.

[6] An action cannot be maintained for words spoken imputing the crime of arson to the plaintiff, where, from the evidence, it appeared that the burning of the building of which the plaintiff was accused would not have constituted such crime (*McNab* v. *McGrath*, 5 *U. C. R.* (*O. S.*) 516).

a considerable period, at the public expense, meaning thereby, and being understood to mean, that he had been transported, that would clearly be defamatory.[7]

(5) So, inserting the plaintiffs' names under the head of "first meetings under the Bankruptcy Act" is libellous, the innuendo being that the plaintiffs had become bankrupt, or taken proceedings in liquidation (*Shepheard* v. *Whitaker*, *L. R.* 10 *C. P.* 502).

(6) So, again, there may be facts known to the person publishing the libel or slander, and the person to whom it is published, which make an apparently innocent statement bear a secondary, and decidedly defamatory, construction. For instance, a statement that the speaker saw the plaintiff at Portland some years since, is primarily innocent enough; but if the surrounding circumstances were such as to convey to the person to whom the words were addressed the insinuation that the speaker had seen the plaintiff working at Portland as a convict, the mere absence of a direct statement to that effect would not be sufficient to excuse the speaker. It must, however, be borne in mind that where a secondary meaning is to be imputed,

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Canadian Cases.

[7] The use of the innuendo is to explain the evil meaning of the defendant, where the words are apparently innocent and inoffensive or ambiguous, and the doctrine of taking words in the mildest sense is applied only where the words in their natural import are doubtful, and equally to be understood in one sense as in the other. It is for the court to say whether the innuendo is capable of bearing the meaning assigned by it, and for the jury to say whether that meaning was intended and proved (*Anonymous*, 29 *U. C. R.* 462—Wilson, J.; *Brown* v. *Beatty*, 12 *U. C. C. P.* 107; *Black* v. *Alcock*, 12 *U. C. C. P.* 19; *Lemay* v. *Chamberlain*, 10 *O. R.* 638).

it is necessary that the facts should be known both to the person who makes the statement and to the persons to whom it is published; because, if facts are known to the latter from which they might reasonably suppose that the document is defamatory, but those facts are not known to the person who wrote it, if he were held liable he would be made liable for doing that which he could have no reason to suppose would injure anybody, the language used being such as in its ordinary sense would not be defamatory of any one. Again, if there are facts known to the person who makes the statement, which, if known to the persons to whom it is made, might reasonably lead them to suppose that it was used in an ironical sense, yet, if those facts are not known to the persons to whom it is made, that which is stated, although stated inadvertently or maliciously, could produce no effect upon their minds. Though the act might be negligent or wrongful on the part of the person making the statement, the person who received it would have no reasonable ground for understanding it in any evil sense (*Capital & Counties Bank* v. *Henty*, 5 *C. P. D.* 515).[8]

Canadian Cases.

[8] The very words complained of by the plaintiff must be set out in his statement of claim. It is not permitted to a plaintiff to give by way of narration the effect of the words instead of the language used (*Phillips* v. *Odell*, 5 *U. C. R.* (*O. S.*) 483; *McBean* v. *Williams*, 5 *U. C. R.* (*O. S.*) 689).

The sense in which the words are spoken and the truth of the innuendo are for the jury to determine, unless the words cannot possibly have a slanderous meaning (*Jackson* v. *McDonald*, 1 *U. C. R.* 20; *Taylor* v. *Massey*, 20 *O. R.* 429).

"It is always a question for the judge, or for the court upon reading the *innuendo*, and after having heard the evidence upon it, to say whether the words are reasonably

(7) So, where a trade journal published a list headed "County Court Judgments," in which appeared a judgment against the plaintiff, which had, in point of fact, been discharged, although it remained on the county court register, it was held that, although it was true that there was such a judgment, yet there was evidence from which the jury might infer an innuendo that it remained undischarged, and that consequently the plaintiff was a person in bad credit (*Williams* v. *Smith*, 22 *Q. B. D.* 134; but conf. *Searles* v. *Scarlett*,[9] (1892) 2 *Q. B.* 56).

(8) The exhibition of the waxen effigy of a person who has been tried for a murder and acquitted, in company with the effigies of notorious criminals, may be defamatory (*Monson* v. *Tussaud*, (1894) 1 *Q. B.* 672).

(9) On the other hand, however malicious a statement may be, and however ruinous its result, it is not actionable unless it is defamatory. Thus where the defendant as the delegate of a trades union gave notice to the plaintiff's employers that unless the plaintiff were discharged all their union workmen would be called out "on strike," it was held that no action lay (*Allen* v. *Flood*, (1898) *A. C.* 1).

(10) It would seem that a false statement disparaging a tradesman's goods does not fall within the law of libel at all, as it has been held that it is not actionable

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Canadian Cases.

capable of bearing the meaning attributed to them" (*Huber* v. *Crookall*, 10 *O. R.* 481—Wilson, C. J.; *Anderson* v. *Stewart*, 8 *U. C. R.* 243).

Higgins v. *Walkern*, 17 *S.C.R.* 225; *The Manitoba Free Press* v. *Martin*, 21 *S.C.R.* 518; *Milner* v. *Gilbert*, 3 *Kerr, N.B.R.* 617.

[9] *Grant* v. *Simpson*, 3 *N. S.* (*Russell & Chesney*), 141; *Bowers* v. *Hutchison*, *N. S. Reps.* (*Oldwright*), 679; *Ferguson* v. *Inman*, 2 *N. S.* (*Geldert & Oxley*), 135.

(although in writing) without proof of special damage (*White* v. *Mellin*, (1895) *A. C.* 154). And the mere statement by one tradesman that his goods are superior to those of another, even if untrue, and even if causing loss, is not actionable (*Hubbuck & Co.* v. *Wilkinson & Co.*,[10] (1899) 1 *Q. B.* 86).

ART. 46.—*Publication.*[10a]

The making known, knowingly or negligently, of a libel or slander to any person *other than the object of it*, is publication in its legal sense.

(1) "Though, in common parlance, that word [publication] may be confined to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual is indisputably, in law, a publishing" (*Rex* v. *Burdett*, 4 *B. & Ald.* 143). Publication, therefore, being a question of law, it is for the jury to find whether the facts by which it is endeavoured to prove publication are true; but for the court to decide whether those facts constitute a publication in point of law (*Street* v. *Licensed Victuallers' Society*, 22 *W. R.* 553; *Hart* v. *Wall*, 2 *C. P. D.* 146).

(2) **Telegrams and post cards.**—If the libel be contained in a telegram, or be written on a post card, that is publication, even though they be addressed to the party libelled; because the telegram must be read by

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Canadian Cases.

[10] See cases under note 46, *post*, pp. 216 and 217; see Volition and Intention, *ante*, p. 19, and note 1, p. 180.

[10a] For definition of publication see the Criminal Code, 1892, s. 286.

the transmitting and receiving officials, and the post card will in all probability be read by some person in the course of transmission (*Robinson* v. *Jones*, 4 *L. R. Ir.* 391; *Williamson* v. *Freer*,[11] *L. R.* 9 *C. P.* 393).

(3) **Dictating libel.**—So, dictating a libellous letter to a typewriter, and giving it to an office boy to make a press copy, is publication (*Pullman* v. *Hill & Co.*, (1891) 1 *Q. B.* 524). But where a solicitor acting for a client dictated a defamatory letter addressed to the plaintiff, it was held that the decision was privileged, publication to clerks being necessary and usual in the discharge of his duty as a solicitor (*Boxius* v. *Goblet Frères*, (1894) 1 *Q. B.* 842).

(4) **Newsvendors.**—But the vendor of a newspaper in

Canadian Cases.

[11] A libel may be published by transmission through the electric telegraph (*Dominion Telegraph Co.* v. *Silver*, 10 *S. C. R.* 238).

"I am at a loss to understand how a newspaper proprietor can be liable for the publication of a libel and the party who prepares the libel and delivers it at the office of the newspaper for publication, and without whose acts no publication of the libellous matter could take place, can escape an equal liability with the printer or publisher of the paper: they are all engaged in one and the same transaction, viz., collecting, transmitting and publishing matter collected, the aid and participation of all being necessary to the publication" (*Ibid.*—Ritchie, C. J., 259).

An action for oral slander will not lie against several defendants jointly (*Carrier* v. *Garrant et al.*, 23 *U. C. C. P.* 276; *ante*, p. 66).

Jackson v. *Staley*, 9 *O. R.* 334; *Carroll* v. *Penberthy Injector Co.*, 16 *O. A. R.* 446; *Ashdown* v. *The Free Press*, 6 *M. L. R.* 578; *Handspiker* v. *Adams*, 21 *N. S. R.* 147; *Wright* v. *Morning Herald Co.*, 2 *N. S.* (*Russell & Geldert*), 398; *Crosskill* v. *The Morning Herald Co.*, 4 *N. S.* *Russell & Geldert*), 200.

the ordinary course, though he is *primâ facie* liable for a libel contained in it, is excused if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his own part; and that he had no ground for supposing that the newspaper was likely to contain libellous matter (*Emmens* v. *Pottle*, 16 *Q. B. D.* 354).

(5) **Husband and wife.**—There is, also, an exception to the rule, in the case of a husband communicating a libel or slander to his wife. Such a communication is not a "publication" of the defamatory statement, because, in the eye of the law, husband and wife are one person (*Wennhak* v. *Morgan*, 20 *Q. B. D.* 635). The converse does not, however, hold good, and if a defamatory statement be made to the wife of *the plaintiff*, that is a sufficient publication to sustain an action (*Wenman* v. *Ash*, 13 *C. B.* 836).

ART. 47.—*Malice and Privileged Communications.*[12]

(1) Where the words or picture are defamatory, malice is generally implied; and the existence of express malice, that is to say, a conscious violation of the law to the prejudice

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[12] *Shepherd* v. *White*, 2 *N. S. Reps.* (*Russell & Chesney*), 31; *Kerr* v. *Davison*, 3 *N. S.* (*Geldert & Oxley*), 354; *Lowther* v. *Baxter*, 22 *N. S. R.* 372; *Des Barre* v. *Tremain*, 4 *N.S.* (*Russell & Geldert*), 215; *Ray* v. *Corbett*, 4 *N. S. R.* 407; *Brown* v. *McCarthy*, 21 *N. S. R.* 201; *Waterbury* v. *Dewe*, 3 *Pug. N. B. R.* 673, and *post*, p. 194; *Carvill* v. *McLeod*, *N. B. R.*, 4 *All.* 332; *Cormick* v. *Wilson*, 2 *Kerr*, *N. B. R.* 496; *Bolger* v. *Crossman*, 25 *N. B. R.* 556; *Hanna* v. *De Blacquier*, 11 *U. C. R.* 310.

of another (*per* Campbell, C. J., *Ferguson* v. *Earl of Kinnoull*, 9 *Cl. & F.* 321), is only a matter for inquiry, when the words complained of were spoken on a justifiable occasion (*Watkin* v. *Hall*,[13] *L. R.* 3 *Q. B.* 396; *Spill* v. *Maule*, *L. R.* 4 *Ex.* 232), or where the defamation

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[13] "In the infinite number of cases in which the question of privileged communication has been discussed, we do find the law again and again laid down in such a manner that we might well understand the learned judges to mean, that however clear might be the fact that the alleged libel was, under the circumstances, a privileged communication, yet if the defendant acted maliciously in making it, he should be convicted of libel. Now, the evidence might show in any such case a strong feeling of ill-will against the plaintiff, such as the jury might well call a malicious feeling, if they were considering it apart from the cause which produced it; and not a little malicious even when considered in connection with the cause which did produce it; but yet we conceive that would not signify so long as the jury were convinced from the evidence that there was really good ground for making the complaint; and this good ground, we must always bear in mind, consists not exclusively in the complaint being literally or substantially true, but may consist also in the fact that the defendant was warranted in believing it to be true. We take the true principle intended to be stated to be this, that where there is a fair occasion for making the statement complained of, it is not to be taken to be malicious, though it may turn out to be unfounded; in other words, that the inference of malice cannot be raised upon the face of the libel itself, as in other cases it might be, but that there must be proof given by the plaintiff of actual express malice, independently of the evidence of such a feeling which the paper itself would seem to supply. And we conceive that the plaintiff, even in such a case, cannot sustain his action upon this proof of malice alone, but that he must also show the statement to be false as well

consisted in falsely impeaching a man's right to property,—a form of defamation commonly known as "slander of title" (*Wren* v. *Weild*, *L. R.* 4 *Q. B.* 730).

(2) Where a communication is made upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, either public or private, legal, moral, or social, such communication, if made to a person having a corresponding interest or duty, rebuts the inference of malice (in some cases absolutely, and in others only *primâ facie*), and is privileged (*Laughton* v. *Bishop of Sodor and Man*, *L. R.* 4 *P. C.* 495; *Dawkins* v. *Lord Paulet*, *L. R.* 5 *Q. B.* 94; *Hunt* v. *G. N. Rail. Co.*,[14] (1891) 2 *Q. B.* 189).

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as malicious; and where he has done this, the defendant may yet make out a good defence, if he can prove that he had good ground for believing the statement to be true, and acted honestly under that persuasion" (*McIntyre* v. *McBean*, 13 *U. C. R.* 541 *et seq.*—Robinson, C. J.).

Strachan v. *Barton*, 34 *U. C. R.* 374; *Colvin* v. *McKay*, 17 *O. R.* 218.

[14] *Ross* v. *Bucke*, 21 *O. R.* 692; *Wells* v. *Lindop*, 14 *O. R.* 275; *Lemay* v. *Chamberlain*, 10 *O. R.* 638; *Todd* v. *Dun Wiman & Co. and Chapman*, 12 *O. R.* 791.

"The meaning in law of a privileged communication is a communication made on such an occasion as rebuts the *primâ facie* inference of malice arising from the publication of matter prejudicial to the character or credit of the plaintiff, and throws on the latter the onus of proving malice in fact, *i.e.*, that the defendant was actuated by motives of personal spite or ill-will, or some other indirect

(3) Where the occasion is only *primâ facie*, and not absolutely, privileged, the plaintiff may rebut the inference of privilege by proving a malicious motive, such as anger or indifference to the truth, but the onus of proof lies on the plaintiff (*Jenoure* v. *Delmege*,[15] (1891) *App. Ca.* 73). But if the defendant made the statements believing them to be true, he will not lose the protection arising from the privileged occasion, although he had no reasonable ground for his belief (*Clark* v. *Molyneux*,[16] 3 *Q. B. D.* 237).

(4) The question whether a communication

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or improper motive independent of the occasion on which the communication was made" (*Todd* v. *Dun Wiman & Co.*, 15 *O. A. R.* 91, 92—Burton, J. A.; and *Robinson* v. *Dun*, *infra*).

Holliday v. *The Ontario Farmers' Mutual Ins. Co.*, 1 *Tupper's Reps. in Appeal*, 483.

[15] In case for slander, the defendant may, under the general issue, show that the words were used in a privileged communication, and where the words imputed slanderous are spoken on an occasion when, either from public duty, private interest, or the relation of the parties to each other, the character of the party complaining may be freely discussed, the jury must find express malice upon evidence sufficient to warrant their finding before the defendant can be pronounced guilty (*Richards* v. *Boulton* 4 *U. C. R.* (*O. S.*) 95).

[16] *Roberts* v. *Climie*, 46 *U. C. R.* 264; *Wilcocks* v. *Howell*, 5 *O. R.* 360; *Colvin* v. *McKay*, 17 *O. R.* 212; *Blagden* v. *Bennett*, 9 *O. R.* 593; *Stewart* v. *Sculthorp*, 25 *O. R.* 544; *Wells* v. *Lindop*, 15 *O. A. R.* 695; *Robinson* v. *Dun*, 24 *O. A. R.* 287.

"I think the law is very clear on this subject. It is for the judge to rule whether the occasion creates privilege. It is clear that defendant was *de facto*, and, I think, *de jure*, in

is privileged is for the judge, and that of express malice for the jury (*Cook* v. *Wildes*,[17] 5 *E. & B.* 328).

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the discharge of a public duty, and the words were spoken while in the discharge of that duty, and in reference thereto, to a subordinate officer having a corresponding duty, and therefore were privileged; that being so, it is equally clear that the burden of proof was on the plaintiff to show actual malice. There was no evidence in this case whatever that the defendant was actuated by motives of personal spite or ill-will; and the occasion and surrounding circumstances repel the presumption of malice. Therefore, I think the evidence in this case clearly establishes that the occasion created the privilege, and that the occasion was used *bonâ fide* and without malice. The plaintiff having given no evidence of malice, it was the duty of the judge to say that there was no question for the jury, and to direct a nonsuit or a verdict for the defendant" (*Dewe* v. *Waterbury*, 6 *S. C. R.* 154, 155—Ritchie, C. J. [appeal from Supreme Court of New Brunswick allowed]).

"All questions of fact are within the exclusive province of the jury, but questions of fraud and malice may be said to be more peculiarly so than any other; and the court in those cases does not, I think, where the defendant is acquitted of the fraud or malice, ever exercise the right of sending the case to a second jury in the same manner as in other questions of fact which appear to the court to be found against the evidence, or as in cases where those issues are, in the judgment of the court, found wrongly against the defendant" (*Miller* v. *Ball*, 19 *U. C. C. P.* 452—Gwynne, J.).

A mercantile agency is not liable in damages for false information as to a trader given in good faith to a subscriber making inquiries, the information having been obtained from a person apparently well qualified to give it, and there being nothing to make them in any way doubt its correctness (*Robinson* v. *Dun*, 24 *O. A. R.* 287; and *Cossette* v. *Dun*, 18 *S. C. R.* 222).

[17] *McCullough* v. *McIntee*, 13 *U. C. C. P.* 441; and see *Shaver* v. *Linton*, 22 *U. C. R.* 177.

In actions for slander or libel it is the province of the

(1) **Parliamentary proceedings.**—Speeches in Parliament are absolutely and irrebuttably privileged (*Stockdale* v. *Hansard*, 9 *A. & E.* 1; *Dillon* v. *Balfour*, 20 *L. R. Ir.* 601); and a faithful report in a public newspaper, of a debate of either House of Parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question (*Wason* v. *Walter*, *L. R.* 4 *Q. B.* 73. See also 51 & 52 Vict. c. 64, s. 4). Statements of witnesses before Parliamentary Committees are also privileged (*Goffin* v. *Donnelly*, 6 *Q. B. D.* 307).[17a]

(2) **Judicial proceedings and matters of State.**—Statements of a judge acting judicially, whether relevant or not, are absolutely privileged (*Scott* v. *Stansfield*, *L. R.* 3 *Ex.* 220); and so are those of counsel, however irrelevant and however malicious (*Munster* v. *Lamb*, 11 *Q. B. D.* 588). Solicitors acting as advocates have a like privilege (*ib.*, and *Mackay* v. *Ford*, 29 *L. J. Ex.* 404). Statements of witnesses can never be the subject of an action (*Seaman* v. *Netherclift*,[18] 2 *C. P. D.* 53; and *Lilley* v. *Roney*, 61 *L. J. Q. B.* 727); and a military man giving evidence before a military court of inquiry which has not power to administer an oath, is entitled to the same

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judge to determine whether the occasion of uttering the slanderous words, or writing the libellous matter complained of, was or was not privileged, and, if privileged, that, in the absence of evidence of malice, there is nothing to be left to the jury as to *bona fides*, or otherwise (*McIntee* v. *McCullough*, 2 *Error & App. U. C. R.* 390).

[17a] The Criminal Code, 1892, s. 290.

[18] *Cowan* v. *Landell*, 13 *O. R.* 13; and the Criminal Code, 1892, s. 290.

protection as that enjoyed by a witness under examination in a court of justice (*Dawkins* v. *Rokeby*, *L. R.* 7 *H. L.* 744; 23 *W. R.* 931). So also is a person who fills in a form required for obtaining a lunacy order (*Hodson* v. *Pare*, (1899) 1 *Q. B.* 455). Communications relating to affairs of State made by one officer of State to another in the course of duty are also absolutely privileged (*Chatterton* v. *Secretary of State for India*, (1895) 2 *Q. B.* 189).

(3) **Letters and notices of solicitors.**—Defamatory letters or notices sent by solicitors acting in the course of their professional duty are privileged to the same extent as if written by the client (*Baker* v. *Carrick*, (1894) 1 *Q. B.* 838).

(4) **Speeches at County Councils, &c.**—In speeches before District Boards, County Councils, and the like, although the occasion is privileged, the privilege is not (as in the case of Parliament) absolute, and the speaker is only protected in the absence of express malice. (*Royal Aquarium Co.* v. *Parkinson*,[19] (1892) 1 *Q. B.* 431; and *Pittard* v. *Oliver*, (1891) 1 *Q. B.* 474).

(5) **Reports of legal proceedings.**—Fair and accurate reports of trials (unless obscene or demoralizing) published in a newspaper contemporaneously with the proceedings are privileged (51 & 52 Vict. c. 64, s. 3);[20] and the same rule applies to a report of an *ex parte* application for a summons, made to a magistrate in open court (*Kimber* v. *Press Association*, (1893) 1 *Q. B.* 65). And a report of a trial published by a private person

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[19] *Hanes* v. *Burnham*, 26 *O. R.* 528.

[20] *R. S. O.*, 1897, *c.* 68, *sect.* 9.

is probably *primâ facie* privileged in the absence of express malice. But, on the other hand, *dicta* of Lord Halsbury and Lord Bramwell in the case of *Macdougall* v. *Knight* (14 *App. Cas.* 194) lay it down that a report of the judge's summing up, or judgment only, is not a fair report of a trial, and is only privileged if, in point of fact, the summing up or judgment gave reasonable opportunity to the reader to form a correct conclusion. It has also been held, that a true report of proceedings in a court of justice, sent to a newspaper by a person who was not a reporter on the staff, was not absolutely privileged, and that if it was sent for a malicious motive an action would lie (*Stevens* v. *Sampson*, 5 *Ex. D.* 53). On the other hand, the publication, by the order of magistrates, of the report made to them by the chief constable as to the conduct of publicans is privileged, in the absence of actual malice (*Andrews* v. *Nott-Bower*, (1895) 1 *Q. B.* 858).

(6) **Reports of quasi judicial proceedings.**—Reports of their proceedings published by *quasi* judicial bodies, *bonâ fide* and without any sinister motive, are privileged. For instance, where the General Council of Medical Education and Registration (who are empowered by statute to strike the names of persons off the register of qualified medical practitioners) struck off the plaintiff's name, and, in their annual published report, stated the circumstances which induced them to do so, it was held that in the absence of express malice the publication was privileged (*Allbutt* v. *General Council, &c.*, 37 *W. R.* 771). The Court of Appeal intimated that the same principle would apply to reports of the proceedings of all bodies entrusted by Parliament with duties in which the public are interested, *e.g.*, county councils and the like. If, however, the statement is published maliciously, the

privilege is gone, as there is no *absolute* privilege in such cases (*Royal Aquarium Co.* v. *Parkinson*, (1892) 1 *Q. B.* 431).

(7) **Newspaper reports of meetings, and publication of public notices, &c.**[21]—By section 4 of "The Law of Libel Amendment Act, 1888," it was enacted that a fair and accurate report published in *any newspaper*[22] of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority, or any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication *at the request* of any government office or department, officer of state, commissioner of police or chief constable, of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously. But the protection intended to be afforded by that section is not available if the defendant has refused to insert in the newspaper in which the matter complained of appeared, a reasonable explanation or contradiction by, or on behalf of, the plaintiff. Nor is

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[21] *R. S. O.*, 1897, *c.* 68, *sect.* 8; and the Criminal Code, 1892, s. 291.

[22] Under a defence of "fair comment" in a libel action, evidence of the existence of a certain state of facts on which it was alleged the comment was fairly made is admissible, but not evidence of the truth of the statement complained of as a libel (*Brown* v. *Moyer*, 20 *O. A. R.* 509).

it available to protect fair and accurate reports of statements made to the editors of newspapers by private persons as to the conduct of a public officer (*Davis* v. *Shepstone*,[23] 11 *App. Cas.* 187).

(8) **Bonâ fide complaints.**—A complaint addressed to an authority having power to dismiss the party complained of, is *primâ facie* privileged (*i.e.*, the occasion is privileged). But if the complaint is made maliciously the privilege is taken away (*Procter* v. *Webster*, 16 *Q. B. D.* 112; *Stuart* v. *Bell*,[24] (1891) 2 *Q. B.* 341).

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[23] *Martin* v. *Manitoba Free Press*, 8 *M. L. R.* 50.

[24] A petition to the Lieutenant-Governor complaining of the conduct of commissioners of the Court of Requests, and charging them with partiality, corruption and connivance at extortion, signed by a number of persons, and praying for redress, is an absolutely privileged communication in its nature, and no action for libel will lie upon it, though the defendant had circulated it, and been the means of obtaining signatures to it of individuals who knew nothing of the facts stated in such petition, and some of whom supposed it to be a matter of a totally different description (*Stanton* v. *Andrews*, 5 *U. C. R.* (*O. S.*) 211).

"The declaration in the celebrated Bill of Rights has been relied on by the defendant. That declaration—'That it is the right of the subject to petition the King, and that all commitments and prosecutions for such petitions are illegal;' and it is relied upon not without reason as a solemn recognition by the highest authority of a principle of the law which certainly applies to the case before us" (*Ibid.*—Robinson, C. J., at p. 219).

S., the general manager of the defendants' railway, without special instructions of the directors, dismissed the plaintiff, a conductor, for alleged dishonesty; and by his directions placards describing the offence, and stating the plaintiff's dismissal, were posted up in the company's private offices (in some of which they were seen by strangers), and in circular books of the conductors, for the information and warning of the company's employees, 2,000 in number. It was *held*

(9) **Confidential advice.**—So advice given, in confidence, at the request of another, and for his protection, is privileged; and it seems that the presence of a third

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that the communication to the employees was privileged, as made by a person having a duty or interest to persons having a corresponding duty or interest (*Tench* v. *Great Western Railway Co.*, 33 *U. C. R.* 8).

"But I have heard no argument, nor have I found any authority, which shows that a notification, written or printed, to all the employees, that one of them was dismissed, assigning the cause truly, would enable the party dismissed, even though he were charged with fraud towards his employers, to maintain an action; for I think it is clear such a communication is privileged" (*Ibid.*—Draper, C. J., at p. 16; *Hanes* v. *Burnham*, 23 *O. A. R.* 90).

An action for a libel contained in communications made to the executive Government with a view to obtaining redress, cannot be sustained, unless it can be proved that the party making them acted maliciously, and without probable cause (*Rogers* v. *Spalding*, 1 *U. C. R.* 258; *Corbett* v. *Jackson*, 1 *U. C. R.* 128).

Defendant, a Government detective, knowing that M. was in partnership with the plaintiff, informed him that the plaintiff was connected with a gang of burglars, which defendant had been the means of breaking up, and put him upon his guard. It was *held* that the communication was privileged, and, there being no evidence of malice, that the plaintiff was properly nonsuited (*Smith* v. *Armstrong*, 26 *U. C. R.* 57).

Where the words used may be reasonably understood to impute that the person addressed had previously stolen similar articles they are actionable (*Hunter* v. *Hunter*, 25 *U. C. R.* 145).

A complaint addressed to a public body, or to Government, respecting the conduct of an officer, whose conduct the Government or such public body may have the power of controlling, is not necessarily a privileged communication. That depends on the motives with which such communication is made (*Corbett* v. *Jackson*, 1 *U. C. R.* 128).

party makes no difference (*Taylor* v. *Hawkins*, 16 *Q. B.* 308; *Clark* v. *Molyneux*,[25] *sup.*; *Manby* v. *Witt*,[26] 25 *L. J. C. P.* 294; 18 *C. B.* 544; *Lawless* v. *Anglo-Egyptian Co.*, *L. R.* 4 *Q. B.* 262; *Jones* v. *Thomas*, 34 *W. R.* 104). But it seems doubtful whether a voluntary statement is equally privileged (see *Coxhead* v. *Richards*,[27] 15 *L. J. C. P.* 278; and *Fryer* v. *Kinnersley*,[28] 33 *L. J. C. P.* 96; but see *Davies* v. *Snead*, *L. R.* 5 *Q. B.* 608).

Thus the character of a servant given to a person requesting it, is privileged (*Gardener* v. *Slade*, 18 *L. J. Q. B.* 334); and so, also, is the character of a person who states that she is a fit recipient of charity, given to, and at the request of a person willing to bestow such charity, by the secretary of the Charity Organization Society (*Waller* v. *Loch*,[29] 7 *Q. B. D.* 619).

The character of a candidate for an office, given to one of his canvassers, was held to be privileged (*Cowles* v.

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[25] *Cossette* v. *Dun*, 18 *S. C. R.* 222.

Where the words complained of were spoken by a person interested to another, also interested, the occasion is privileged, and in the absence of proof of express malice, no action will lie (*Blagden* v. *Bennett*, 9 *O. R.* 593).

[26] *Miller* v. *Johnston*, 23 *U. C. C. P.* 580.

[27] *Ross* v. *Burke*, 21 *O. R.* 692.

[28] *Graham* v. *Crozier*, 44 *U. C. R.* 378; *Hargreaves* v. *Sinclair*, 1 *O. R.* 260.

[29] Any conversation between the sheriff and the clerk of the peace respecting a medical examination of lunatics in gaol was in its nature privileged (*Shaver* v. *Linton*, 22 *U. C. R.* 182—Hagarty, J.; *Howarth* v. *Kilgour*, 19 *O. R.* 640).

Potts, 34 *L. J. Q. B.* 247). And it has been held by the Supreme Court of New Zealand that defamatory words *bonâ fide* spoken of a mayor at a town's meeting convened for the purpose of considering municipal business, but at which there were other persons present besides ratepayers, were privileged (*Hodges* v. *Glass*, 1 *Ollivier Bell & Fitzgeralds'* (*New Zealand*) *S. C. Reps.* 66.)

(10) **Statements made by one having an interest to one having a corresponding interest.**—A privileged occasion arises, if the communication is of such a nature that it can be fairly said that he who makes it has an interest in making it, and that those to whom it is made have a corresponding interest in having the communication made to them. Thus, where the defendants (a railway company) dismissed the plaintiff (one of their guards), on the ground that he had been guilty of gross neglect of duty, and published his name in a monthly circular addressed to their servants, stating the fact of, and the reason for, his dismissal, it was held that the statement was made on a privileged occasion, and that the defendants were not liable. For, as Lord Esher, M. R., said, "Can any one doubt that a railway company, if they are of opinion that some of their servants have been doing things which, if they were done by their other servants, would seriously damage their business, have an interest in stating this to their servants? And how can it be said that the servants to whom that statement is made have no interest in hearing that certain things are being treated by the company as misconduct, and that if any of them should be guilty of such misconduct, the consequence would be dismissal from the company's service?" (*Hunt* v. *G. N. R.*

Co., (1891) 2 *Q. B.* 189; and see *Hamon* v. *Falle*, 4 *App. Cas.* 247).[29a]

(11) **Imputations made to persons not having a corresponding interest.**—However, imputations which, if made to persons having a corresponding interest, would be privileged in the absence of express malice, cease to be so if spread broadcast. Thus, imputations circulated freely against another in order to injure him in his calling, however *bonâ fide* made, are not privileged. For instance, a clergyman is not privileged in slandering a schoolmaster about to start a school in his parish (*Gilpin* v. *Fowler*,[30] 9 *Ex.* 615).

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[29a] *Tench* v. *G. W. R.*, *ante*, p. 200.

[30] Where defendant, a clerk in the Receiver-General's office, told his principal that the plaintiff, another clerk, had robbed him (the R.-G.) of money; there being no proof that any money had been stolen, or that the Receiver-General had ever suspected it, it was *held* that such communication was not privileged.

Per Sherwood, J.: "When a master gives a character of his servant, whether he is requested to do so or not, malice will not be presumed, but must be expressly proved to sustain an action. The superintending authority of a master and the subordinate situation of a servant necessarily imply a right in the master to express an opinion of the conduct and moral principles of a servant. The interests of society sanction this right, and the policy of the law supports it, but it seems to me no good arguments can be found in favour of a right in the servant to impeach the character of a third person to his master whenever he may feel disposed, without any apparent cause for his assertions. I am inclined to think the communications of a servant to his master stand on the same footing as other communications made from one individual to another in society, and may be confidential, and consequently privileged, or not, according to the facts and circumstances which attend them and the occasion on which they are made. When the words are spoken in the discharge of any duty, the performance of

So, the unnecessary transmission by a post office telegram of libellous matter, which would have been privileged if sent by letter, avoids the privilege (*Williamson* v. *Freer*,[31] *L. R.* 9 *C. P.* 393). And where by the defendant's negligence that which would be a privileged communication if made to A., is in fact placed in an envelope directed to B., whereby the defamatory matter is published to B., the defendant will be liable (*Hebditch* v. *MacIlwaine*, (1894) 2 *Q. B.* 54, overruling *Tompson* v. *Dashwood*,[32] 11 *Q. B. D.* 43).

(12) **Criticism.**—It was at one time considered, that criticisms on matters of public interest, such as books, works of art, plays, the acts of public men, and the like, were privileged communications, and that proof of actual malice was necessary in order to give rise to an action by the person criticised. This is, however, no longer the law. The true rule, as laid down by the Court of Appeal in *Merivale* v. *Carson* (20 *Q. B. D.* 275), is, that where an action of libel is brought in respect of comment on a matter of public interest, the case is not one of privilege properly so called, and it is not necessary in order to give a cause of action, that actual malice should be proved. The question is one for the jury,

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which is required by the ordinary exigencies of society, although the party was under no absolute and legal obligation to perform it, the occasion operates in the nature of evidence, and supplies a *primâ facie* justification" (*Prentice* v. *Hamilton*, 1 *Draper*, *K. B. Reps.* 410; *Nolan* v. *Tipping*, 7 *U. C. C. P.* 524).

[31] *Holliday* v. *Ontario Farmers' Mutual Ins. Co.*, 38 *U. C. R.* 76.

[32] *Bourgard* v. *Barthelmes*, 24 *O. A. R.* 431; *Gorst* v. *Barr*, 13 *O. R.* 644.

whether the disparaging statements go beyond the limits of fair criticism. In other words, "is the article, in the opinion of the jury, beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men, with ordinary judgment, must say whether any *fair* man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case. . . . Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit" (*per* Lord Esher, M. R., in *Merivale* v. *Carson*, *sup.*, overruling *Henwood* v. *Harrison*, *L. R.* 7 *C. P.* 606, and following *Campbell* v. *Spottiswoode*,[33] 3 *B. & S.* 769).

Lord Tenterden, in a passage in his judgment in *Macleod* v. *Wakley* (3 *C. & P.* 313), quoted with approval by Lord Justice Bowen in the above case, said: "Whatever is fair, and can be reasonably said of the works of authors or *of themselves as connected with their works*, is not actionable unless it appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author."

Canadian Cases.

[33] *Graham* v. *McKim*, 19 *O. R.* 475.

Under these principles, not only books and works of art, but even tradesmen's advertisements may be fairly criticised (*Paris* v. *Levy*,[34] 30 *L. J. C. P.* 11).

So, too, fair criticism is allowed upon the public life of public men, or men filling public offices; such as the conduct of public worship by clergymen (*Kelly* v. *Tinling*, *L. R.* 1 *Q. B.* 699): provided such criticism does not touch upon their private lives (*Gathercole* v. *Miall*, 15 *M. & W.* 319; *Odger* v. *Mortimer*,[35] 28 *L. T.* 472). And the same rule applies to fair criticism of the past exploits of one who is endeavouring to push a scheme of national importance (*Henwood* v. *Harrison*, *L. R.* 7 *C. P.* 606). But although the acknowledged or proved public acts of public men may be lawfully criticised, that gives no right to publish false and defamatory statements *of facts*, unless, of course, they are published in the course of parliamentary or judicial proceedings (*Davis* v. *Shepstone*,[36] 11 *App. Cas.* 187).

And in the United States it has been laid down, that while a citizen has the right to criticise the official conduct of a public man with satire and ridicule, he cannot in such criticism attack his private character (*Hamilton* v. *Eno*, 10 *N. Y. Weekly Dig.* 403).

So fair criticism is allowed on the conduct of persons at a public meeting (*Davis* v. *Duncan*, *L. R.* 9 *C. P.* 396).

Canadian Cases.

[34] *Macdonell* v. *Robinson*, 12 *O. A. R.* 270; *Farmer* v. *The Hamilton Tribune Co.*, 3 *O. R.* 538, distinguished.

[35] *Regina* v. *Wilkinson*, 41 *U. C. R.* 1; *Macdonell* v. *Robinson*, 8 *O. R.* 53; *Farmer* v. *Hamilton Tribune Printing and Publishing Co.*, 3 *O. R.* 538.

[36] *Mills* v. *Carman*, 17 *O. R.* 223; *Douglas* v. *Stephenson*, 29 *O. R.* 616; *The Manitoba Free Press* v. *Martin*, 21 *S. C. R.* 518; and the Criminal Code, 1892, s. 293.

ART. 48.—*Actual Damage essential to Action for Slander.*

(1) Actual damage being essential to an action for oral defamation, it is generally necessary to prove it; and in that case the loss complained of must be such as might fairly and reasonably have been anticipated from the slander (*Lynch* v. *Knight*,[37] 9 *H. L. C.* 577).

(2) But damage will be presumed where the slander imputes a criminal offence punishable by imprisonment (*Webb* v. *Beavan*,[38] 11 *Q. B. D.* 609), unfitness for society (*Bloodworth* v. *Gray*, 7 *M. & G.* 334), or unfitness, or want of some necessary qualification for the plaintiff's

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Canadian Cases.

[37] *Campbell* v. *Campbell*, 25 *U. C. C. P.* 368.

It is not libellous to write of a man that his outward appearance is more like an assassin than an honest man (*Lang* v. *Gilbert*, *N. B. R.*, 4 *All.* 445).

The term "rebel" is not actionable unless it is used in a treasonable sense, which must appear on the record (*Beadsley* v. *Dibble*, *N. B. R.*, 1 *Kerr*, 246; and see also *Hea* v. *McBeath*, *N. B. R.*, 2 *Kerr*, 301; *Paint* v. *McLean*, 3 *N. S.* (*Geldert & Oxley*), 316).

[38] Any defamatory charge referable to wrong doing under sect. 26 or sect. 58 *R. S. C.*, *c.* 168 [now the Criminal Code, 1892], is actionable, without proof of special damage; for the punishment of imprisonment, and not merely the infliction of a fine, is imposed in the case of such offences, but it is otherwise in the case of a defamatory charge referable to offences punishable by fine only (*Routley* v. *Harris*, 18 *O. R.* 405).

McCann v. *Kearney*, 4 *N. B. S. C. R.* 84; *Lang* v. *Gilbert*, *N. B. R.* 4 *All.* 445; *Johnston* v. *Ewart*, 24 *O. R.* 116.

profession or trade or office of profit (*Foulger* v. *Newcomb*, *L. R.* 2 *Ex.* 327), or some conduct which might cause him to be deprived of an office, whether of profit or not (*Alexander* v. *Jenkins*,[39] (1892) 1 *Q. B.* 797); or some distinct misconduct or dishonesty in his office, whether of profit or not (*Booth* v. *Arnold*, (1895) 1 *Q. B.* 571).

(1) **Damage must be natural, but not necessarily legal,**

Canadian Cases.

[39] Words imputing the crime of incest to a paid preacher or lay exhorter of the Methodist Church are of themselves actionable, without showing a special damage arising from the slander, on the ground that the tendency of the slander is to occasion the loss of plaintiff's employment or office, nor is it any objection to such action that the slander was not spoken with reference to the office (*Starr* v. *Gardner*, 6 *U. C. R.* (*O. S.*) 512).

The offence need not be specified with legal precision, indeed it need not be specified at all, if the words impute felony generally. But if particulars are given they must be legally consistent with the offence imputed (*Ferris* v. *Irwin*, 10 *U. C. C. P.* 116; *Porter* v. *McMahon*, 25 *N. B. R.* 211).

A writing which tends to vilify and degrade a person is actionable, although no crime be imputed (*Cormick* v. *Wilson*, *N. B. R.* 2 *Kerr*, 617; *Martindale et ux* v. *Murphy*, *N. B. R.*, *Ber.* 85).

Where the words used charge the plaintiff with having committed a misdemeanour they are actionable (*Decow* v. *Tait*, 25 *U. C. R.* 188).

In *Young* v. *Sloan* (2 *U. C. C. P.* 284), it was *held*, on motion in arrest of judgment on the ground that plaintiff, being the bailee, could not be guilty of larceny [the Criminal Code, 1892, alters this], that the use of words imputing an indictable offence is actionable or not according to the sense in which they may be fairly understood by bystanders not acquainted with the matter to which they relate.

consequence of slander.—It was at one time considered that the special damage must be the legal and natural consequence of the words spoken, and consequently, that it was not sufficient to sustain an action of slander to prove a mere wrongful act of a third party induced by the slander; *ex. gr.* that a third party had dismissed the plaintiff from his employment before the end of the term for which they had contracted (*Vicars* v. *Wilcocks*, 2 *Sm. L. C.* 534). However, that view of the law can no longer be considered accurate, having been dissented from in several cases, particularly in *Lumley* v. *Gye* (2 *E. & B.* 216), and *Lynch* v. *Knight* (*supra*). In the latter case Lord Wensleydale said:—"To make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, as we might think ought to follow. . . . In the case of *Vicars* v. *Wilcocks*,[40] I must say that the rules laid down by Lord Ellenborough are too restrictive. I cannot agree that the special damage must be the natural *and legal* consequence of the words, if true. Lord Ellenborough puts an absurd case, that a plaintiff could recover damages for being thrown into a horse-pond as a consequence of words spoken; but, I own, I can conceive that, when the public mind was greatly excited on the subject of some base and disgraceful crime, an accusation of it to an assembled mob might, under particular circumstances, very

Canadian Cases.

[40] *Ashford* v. *Choate*, 20 *U. C. C. P.* 471.

naturally produce that result, and compensation might be given for an act occurring as a consequence of an accusation of that crime."

(2) **Damage caused by plaintiff himself.**—If the damage be immediately caused by the plaintiff himself, he cannot sue. For instance, where the plaintiff (a young woman) told the slander to her betrothed, who consequently refused to marry her, it was held that no action would lie against the slanderer (*Speight* v. *Gosnay*, 60 *L. J. Q. B.* 231).

(3) **Imputation of unchastity.**—Formerly, words imputing unchastity to a woman were not actionable without proof of special damage except in the City of London. Thus where, by reason thereof, a girl was excluded from a private society and congregation of a sect of Protestant Dissenters, of which she had been a member, and was prevented from obtaining a certificate, without which she could not become a member of any other society of the same nature, such a result was not such special damage as would render the words actionable (*Roberts* v. *Roberts*,[41] 33 *L. J. Q. B.* 249; and see *Chamberlain* v. *Boyd*, 11 *Q. B. D.* 407; and *Allsop* v. *Allsop*, 5 *H. & N.* 534). However, by the Slander of Women Act, 1891 (54 & 55 Vict. c. 51), this scandalous state of the law has been altered, and it is enacted that words spoken and published after the passing of that Act which impute unchastity or adultery to any woman or girl, shall not require special damage to render them actionable: provided that the plaintiff

Canadian Cases.

[41] *Palmer* v. *Solmes*, 45 *U. C. R.* 15; and see *R. S. O.*, 1897, *c.* 68, *sect.* 5. Consolidated Ordinances of the North-West Territories, 1898, *c.* 30. *R. S. B. C.* 1897, *c.* 120, *sect.* 5.

shall not recover more costs than damages, unless the judge certifies that there was reasonable cause for bringing the action.

(4) But, on the other hand, an action brought by a trader, alleging that defendant falsely and maliciously spoke and published of his wife, who assisted him in his business, certain words accusing her of having committed adultery upon the premises where he resided and carried on his business, whereby *he was injured in his business*, and certain specified and other persons who had previously dealt with him ceased to do so, was maintainable on the ground that the injury to his business was special damage, the natural consequence of the words. Held, also, that the special damage might be proved by general evidence of the falling off of his business, without showing who the persons were who had ceased to deal with him, or that they were the persons to whom the statements were made (*Riding* v. *Smith*,[42] 1 *Ex. Div.* 91; 24 *W. R.* 487).

(5) **Examples of damage implied from imputation of crime.**—The words, "You are a rogue, and I will prove you a rogue, for you forged my name," are actionable *per se* (*Jones* v. *Herne*, 2 *Wils.* 87). And it is immaterial that the charge was made at a time when it could not cause any criminal proceedings to be instituted. Thus the words "You are guilty" [innuendo of the murder of D.] are, after the verdict of not guilty, a sufficient charge of murder to support an

Canadian Cases.

[42] By sect. 11 of the Libel Act, Manitoba (50 Vict. c. 22), actual malice or culpable negligence must be proved in an action for libel against a newspaper unless special damages are claimed (*Ashdown* v. *The Manitoba Free Press*, 20 *S. C. R.* 43).

action (*Peake* v. *Oldham*, *W. Bl.* 960). But if words charging a crime are accompanied by an express allusion to a transaction which merely amounts to a civil injury, as breach of trust or contract, they are not actionable (*per* Ellenborough in *Thompson* v. *Barnard*, 1 *Camp.* 48; and *per* Kenyon, *Christie* v. *Cowell*,[43] *Peake*, 4). Nor are words imputing an impossible crime, as "Thou hast killed my wife," who, to the knowledge of all parties, was alive at the time (*Snag* v. *Gee*, 4 *Rep.* 16; *Heming* v. *Power*, 10 *M. & W.* 569).

(6) The allegation, too, must be a direct charge of punishable crime (*Lemon* v. *Simmons*, 57 *L. J. Q. B.* 260). Thus, saying of another that he had forsworn himself is not actionable *per se*, without showing that the words had reference to some judicial inquiry (*Holt* v. *Scholefield*, 6 *T. R.* 691). So where the plaintiff's pleadings alleged that the defendant called the plaintiff a "welcher (meaning a person who dishonestly appro-

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Canadian Cases.

[43] Words imputing to the plaintiff having taken a false oath, but not in any judicial proceeding, or on any occasion when it would be an offence in law, are not actionable (*Hogle* v. *Hogle*, 16 *U. C. R.* 518).

"The words charged in the declaration impute the crime of incest, a crime not cognizable in our courts, and therefore not actionable without proof of special damage" (*Palmer* v. *Solmes*, 30 *U. C. C. P.* 482—Osler, J.).

No action will lie for words spoken where they only refer prospectively to some act which if committed would be a crime (*Conkey* v. *Thompson*, 6 *U. C. C. P.* 238; *Hall* v. *Carty*, *N. S. Reps.* (*James*), 379).

A general charge of forswearing is sufficient to maintain an action of libel, but where the charge is to be found by implication from one or more writings the case is different (*Oakes* v. *Keating et al.*, 4 *N. S.* (*Russell & Geldert*), 554).

priates and embezzles money deposited with him)"; and the evidence showed that a "welcher" is a person who receives money which has been deposited to abide the event of a race, and who has a predetermined intention to keep the money for himself, it was held that, as the word did not necessarily impute the offence of embezzlement, it did not imply a criminal offence, and so was not actionable without special damage (*Blackman* v. *Bryant*, 27 *L. T.* 491, *Ex.*).

(7) So words imputing mere suspicion of a crime are not actionable without proof of special damage (*Simmons* v. *Mitchell*,[44] 6 *App. Cas.* 156).

(8) **Examples of damage implied from imputation of unfitness for society.**—Again, to allege the *present* possession of an infectious, or even a venereal, disease is actionable, but a charge of past infection is not; for

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Canadian Cases.

[44] Saying of the plaintiff, a Methodist preacher, that he kept company with a prostitute, and defendant could prove it, was *held* not to be actionable, at all events, without special damage (*Breeze* v. *Sails*, 23 *U. C. R.* 94).

Plaintiff and defendant were tailors, the latter also selling dry goods. Plaintiff went into defendant's shop to buy cloth to make up a pair of trousers for one A., who was with him, when defendant said to A., "Don't you have anything to do with that man: that man will rob you; he is a rogue." He also asked A. to let him make the trousers. The jury were directed that the words were actionable if spoken of the plaintiff in the way of his trade, and a verdict found for the plaintiff was *held* to be supported by the evidence (*Sloman* v. *Chisholm*, 22 *U. C. R.* 20).

"The words in the declaration are merely, 'He will get drunk; I have seen him drunk!' Now these words are applicable as well to a person not a clergyman as to a clergyman, and cannot be actionable as referable to the plaintiff's profession, and they are not actionable in themselves" (*Tighe* v. *Wicks*, 33 *U. C. R.* 482—Morrison, J.).

it shows no present unfitness for society (see *Carslake* v. *Mappledoram*, 2 *T. R.* 473; *Bloodworth* v. *Gray*, 7 *M. & G.* 334).

(9) **Examples of damage implied from imputation of unfitness for business or office of profit.**—It is quite clear that, as regards a man's business, or profession, or office, *if it be an office of profit*, the mere imputation of want of ability to discharge the duties of that office, is sufficient to support an action. It is not necessary that there should be imputation of immoral or disgraceful conduct; the probability of pecuniary loss from such imputation obviates the necessity of proving special damage. But the mere disparagement of a tradesman's goods is not sufficient. The disparagement must be of his unfitness for business (see *White* v. *Mellin*,[45] (1895) *A. C.* 154), or some allegation which must necessarily injure his business (see *Royal Baking Powder Co.* v. *Wright*,

Canadian Cases.

[45] Where in an action for defamation brought by a person describing himself in the declaration as a druggist, vendor of medicine, and apothecary, the witnesses proved that several persons practising physic had purchased medicine from him; this evidence upon a motion for nonsuit was considered sufficient to support the verdict (*Terry* v. *Starkweather*, *Taylor's K. B. Reps.* 57).

Words imputing the crime of incest to a paid preacher or an exhorter of the Methodist Church are of themselves actionable, without showing a special damage arising from the slander, on the ground that the tendency of the slander is to occasion the loss of plaintiff's employment or office; nor is it any objection to such action that the slander was not spoken with reference to the office; *Starr* v. *Gardner*, 6 *U. C. R.* (*O. S.*). 512).

"Where the libel is on a member of a firm in respect of his trade or business the partner libelled can recover without proof of special damage, but the partners must sue jointly for any special damage sustained by the

Crossley & Co., 15 *Rep. Pat. Cas.* 677). Thus, words imputing drunkenness to a master mariner whilst in command of a ship at sea are actionable *per se* (*Irwin* v. *Brandwood*, 2 *H. & C.* 960; 33 *L. J. Ex.* 257). And similarly where a clergyman is beneficed or holds some ecclesiastical office, a charge of incontinence is actionable; but it is not so if he holds no ecclesiastical office (*Gallwey* v. *Marshall*, 23 *L. J. Ex.* 78). With regard to offices that are not offices of profit, the loss of which would therefore not necessarily involve a pecuniary loss, the law is different, and the mere imputation of *want of ability or capacity* is not actionable; and the imputation to be actionable must be one which, if true, would show that the plaintiff ought to be, and could be, deprived of his office by reason of the incapacity charged against him. The implied damage, in fact, is the risk of deprivation of the office of honour or credit

Canadian Cases.

copartnership" (*Bricker* v. *Campbell*, 21 *O. R.* 211—MacMahon, J.).

"It is true no special damage was alleged or proved. It need not be if the words are spoken of a tradesman in the conduct of his business. . . . The plaintiff avers he is a corn merchant carrying on extensive business in buying wheat on commission and otherwise; the defendant says that he sold wheat to the plaintiff, who cheated him out of two bushels; and the residue of the words spoken plainly imply that the cheating was effected by the false use of true scales and weights, or the use of false scales and weights, and the jury have found that the words were so spoken. The two cases of *Griffiths* v. *Lewis* (one in 7 *Q. B.* 64, and the other in 8 *Q. B.* 841), are, we think, conclusive in the plaintiff's favour. We look upon this case as rather stronger, for it alleges directly that defendant was cheated by the plaintiff in selling wheat to him, and attributes the plaintiff's cheating to the management of his scale in some manner or other to effect the fraud" (*Marsden* v. *Henderson*, 22 *U. C. R.* 591—Draper, C. J.).

which he holds (see *per* Lord Herschell, L. C., in *Alexander* v. *Jenkins*, (1892) 1 *Q. B.* 797).

So to say of a surgeon "he is a bad character; none of the men here will meet him," is actionable (*Southee* v. *Denny*, 17 *L. J. Ex.* 151; 1 *Ex.* 196). Or of an attorney that "he deserves to be struck off the roll" (*Phillips* v. *Jansen*, 2 *Esp.* 624). But it is not ground for an action to say "he has defrauded his creditors, and been horsewhipped off the course at Doncaster," because this has no reference to his profession (see also *Jenner* v. *A'Beckett*, *L. R.* 7 *Q. B.* 11; 41 *L. J. Q. B.* 14; and *Miller* v. *David*,[46] *L. R.* 9 *C. P.* 118). But this seems a curious refinement. A similarly absurd distinction has been taken between

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Canadian Cases.

[46] Where a man falsely and maliciously makes a statement disparaging an article which another manufactures or vends, although in so doing he casts no imputation on his personal or professional character, and thereby causes an injury, and special damage is proved, an action may be maintained (*Acme Silver Co.* v. *Stacey*, 21 *O. R.* 261); and see cases under note [1], *ante*, p. 180.

"It is not necessary that the words should disparage the plaintiff as to his unfitness for business, want of capacity, or unskilful conduct therein. It is sufficient to maintain an action to impute insolvency, or anything calculated to impugn his financial credit or standing. Special damage is not necessary to be proved" (*Lott* v. *Drury*, 1 *O. R.* 582—Hagarty, C. J.).

To maintain an action for slander of title, the words must be followed as a natural and legal consequence by a pecuniary damage to the plaintiff, which must be specially alleged and proved, and mere words of caution are not enough (*Gordon* v. *McGibbon*, *N. B. Reps.*, 3 *Pug.* 49).

I can see no difference between the slander of a steamboat and the slander of an inn or any other medium of business by which profit is made. The same principle governs all. No words that can be used respecting the

saying of a barrister "He hath as much law as a jackanapes" (which is actionable *per se*) and "He hath no more wit than a jackanapes" (which is not actionable). The point being that law is, but wit is not, essential in the profession of a counsellor (see *per* Pollock *arguendo*, 2 *Ad. & Ell.* 4).

With regard to slander upon persons holding mere offices of honour, it has been held that an imputation of drunkenness against a town councillor is not actionable without proof of special damage. For such conduct, however objectionable, is not such as would enable him to be removed from, or deprived of that office, nor is it a charge of malversation in his office (*Alexander* v. *Jenkins*, *supra*). But a charge of dishonesty in his office, against one who holds a merely honorary office, is actionable without special damage, even although there be no power to remove him (*Booth* v. *Arnold*, (1895) 1 *Q. B.* 571). The American Courts have held that to say of a magistrate (apparently an unpaid one), that "He is a damned fool of a justice," is actionable *per se* (*Spiering* v. *Andrea*, 30 *Am. Law Rep.* 744). It seems somewhat curious that the point has never arisen here, where a similar form of defamation is far from unusual.

ART. 49.—*Repeating Libel or Slander.*

(1) Whenever an action will lie for slander or libel, it is of no consequence that the

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Canadian Cases.

vessel or the inn can be actionable *per se*, like slanderous words uttered respecting the person. The words must be shown to have occasioned damage, and then a cause of action arises" (Per Robinson, C. J., in *Hamilton* v. *Walters*, 4 *U. C. R.* (*O. S.*) 27); and see cases under note [10], *ante*, p. 188.

defendant was not the originator, but merely a repeater, or printer and publisher of it.[47]

(2) If the damage arise simply from the repetition, the originator will not be liable (*Parkins* v. *Scott*, 1 *Hurl. & Colt.* 153; *Watkin* v. *Hall*, *L. R.* 3 *Q. B.* 396); except (a) where the originator has authorized the repetition (*Kendillon* v. *Maltby*, *Car. & M.* 402); or (b) where the words are spoken to a person who is under a moral obligation to communicate them to a third person (*Derry* v. *Handley*, 16 *L. T. N. S.* 263).

(1) In the case last cited, Cockburn, C. J., observed, "Where an actual duty is cast upon the person to whom the slander is uttered to communicate what he has heard to some third person (as when a communication is made to a husband, such as, if true, would render the person the subject of it unfit to associate with his wife and daughters), the slanderer cannot excuse himself by saying, 'True, I told the husband, but I never intended that he should carry the matter to his wife.' In such case the communication is privileged, and an exception to the rule to which I have referred; and the originator of the slander, and not the bearer of it, is responsible for the consequences."

Canadian Cases.

[47] In an action for slander it is not a justification to plead simply that the defendant was told what he has said he was told, but he must in his plea mention who told him what he ventured to repeat, so as to have a right of action against his informant; and, moreover, it must appear that he spoke the words not maliciously or wantonly, but on some lawful occasion (*Muma* v. *Harmer*, 17 *U. C. R.* 293).

(2) But where A. slandered B. in C.'s hearing, and C., without authority, repeated the slander to D., *per quod* D. refused to trust B.: it was held that no action lay against A., the original utterer, as the damage was the result of C.'s unauthorized repetition and not of the original statement (*Ward* v. *Weeks*, 4 *Moo. & P.* 808).

(3) **Printing slander.**—So the printing and publishing by a third party of oral slander (not *per se* actionable) renders the person who prints, or writes and publishes the slander, and all aiding or assisting him, liable to an action, although the originator, who merely *spoke* the slander, will not be liable (*M'Gregor* v. *Thwaites*, 3 *B. & C.* 35).

(4) Upon this principle the publisher, as well as the author of a libel, is liable; and the former cannot exonerate himself by naming the latter. For "of what use is it to send the name of the author with a libel that is to pass into a part of the country where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character whether he is a person entitled to credit for veracity or not" (*per* Best, J., *De Crespigny* v. *Wellesley*, 5 *Bing.* 403).

ART. 50.—*Libels by Newspaper Proprietors.*[48]

(1) In an action for libel against the proprietor or editor of any newspaper or other

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Canadian Cases.

[48] *Farmer* v. *Hamilton Tribune Printing and Publishing Co.*, 3 *O. R.* 538.

In an action brought against a newspaper company for

periodical, the defendant, in addition to pleading the privileges conferred on newspaper proprietors and editors by the 3rd and 4th sections of the Statute 51 & 52 *Vict.* c. 64 (*supra*, pp. 145 and 146), may plead that the libel was inserted without malice and without gross negligence; and that at the earliest subsequent opportunity he inserted in such newspaper or other periodical a full apology; or, if such publication was published at intervals exceeding a month, that he offered to publish such apology in any paper the plaintiff might name. And upon filing such plea, the defendant may pay a sum into court by way of amends (6 & 7 *Vict.* c. 96, *s.* 2). See *Hawkesley* v. *Bradshawe*,[49] 5 *Q. B. D.* 22, 302.

(2) In any such action as aforesaid, the

Canadian Cases.

alleged libellous articles published in the company's newspaper, the notice complaining of the publication given in pursuance of R. S. O., 1887, c. 57, sect. 5, sub-sect. 2 [now R. S. O., 1897, c. 68, sect. 6] was addressed to the editor of the paper and was served on the city editor at the company's office, and a similar notice was served on the chairman of the board of directors at the said office. *Held*, that this was a notice merely to the editor and not to the defendants, and therefore was not sufficient under the statute (*Burwell* v. *London Free Press Printing Co.*, 27 *O. R.* 6).

[49] In an action for libel contained in a newspaper the defendant may plead that the libel was inserted in the newspaper without actual malice and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in the

defendant shall be at liberty to give in evidence in mitigation of damages, that the plaintiff has already recovered or brought actions for damages, or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect (44 & 45 *Vict. c.* 60, *s.* 6) (*a*).

ART. 51.—*Limitation of Actions for Defamation.*

An action for slander must generally be commenced within two years next after the cause of action arose, and an action for libel within six years (21 *Jac.* 1, *c.* 16, *s.* 3).[50]

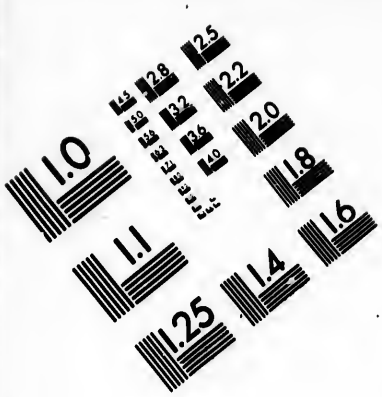
(*a*) The Act gives very exhaustive definitions of "Newspaper" [51] and "Proprietor." As to the consolidation of several actions brought against different persons for the same libel, see 51 & 52 *Vict. c.* 64, *s.* 5.

Canadian Cases.

newspaper a full apology for the libel (*R. S. O.*, 1897, *c.* 68, *sect.* 6).

[50] Every action for libel contained in a newspaper shall be commenced within three months after the publication complained of has come to the notice or knowledge of the person defamed (*R. S. O.*, 1897, *c.* 68, *sect.* 13).

[51] Sect. 1, *ib.*, and see *R. S. O.*, 1897, *c.* 72.



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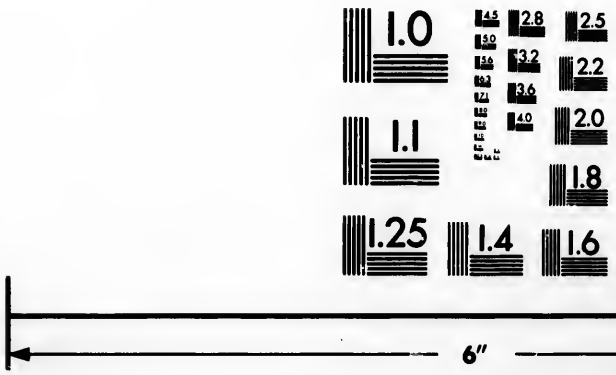

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Section II.—Of Malicious Prosecution.

Art. 52.—*Definition.*

(1) Malicious prosecution consists of the malicious institution against another of unsuccessful criminal, or bankruptcy, or liquidation proceedings, without reasonable or probable cause (see *Churchill* v. *Siggers*, 3 *Ell. & Bl.* 937; *Johnson* v. *Emerson*, *L. R.* 6 *Ex.* 329; and *Quartz Hill, &c. Co.* v. *Eyre*,[52] 11 *Q. B. D.* 674).

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[52] In *Sherwood* v. *O'Reilly* (3 *U. C. R.* 4), it was *held* that in an action for a malicious arrest without any probable cause of action, it is not sufficient to establish a *primâ facie* case, that the plaintiff puts in at the trial the exemplification of the judgment in the former case, by which it appears that a verdict was rendered for the defendant in that action.

"I was inclined to think upon the argument that the record of acquittal, while wholly unexplained, might, in an action for malicious arrest, be held to supply *primâ facie* want of probable cause and malice so as to call upon the defendant to show ground for the arrest. Upon examining into the question I have now no doubt that actions for malicious prosecutions, and for malicious arrests, stand on the same footing, as regards the onus of proof of want of probable cause and malice, and that the weight of authority is against the position that a mere acquittal by the jury with nothing more shown, supplies any proof of want of probable cause; something besides that must be shown tending to lead to a conclusion that the plaintiff was not proceeding in good faith and with a sincere conviction that he had a legal cause of action, though very slight evidence might be received, for the purpose of putting the other party on his defence." *Ibid.* Robinson, C. J. See also *McDonald* v. *Cameron*, 4 *U. C. R.* 1.

"Actions for malicious prosecution are founded on the idea of bad faith on the part of the defendant. When he

(2) Malicious prosecution causing actual damage to the party prosecuted is a tort, for which he may maintain an action.

It will be seen from the above article, that in order to sustain an action for malicious prosecution, five factors

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acts honestly and without malice, under a mistaken impression of facts, he will not be liable in this form of action, still less will he be liable for the mistake of the justice in acting upon his information" (*Lucy* v. *Smith*, 8 *U. C. R.* 520—Robinson, C. J.).

"We have considered the evidence in this case and the objections taken at the trial. It was not necessary, in our opinion, to prove that the defendant made an information on oath. It was enough to show that he set the magistrate in motion. It is not alleged in the declaration that the defendant did make any information on oath; that fact, therefore, is not brought in issue, and the action may be sustained without showing it. As to the second objection, that the prosecution is not shown to have been terminated—that is, legally and officially—we find several cases in which the allegation was merely, as in this case, that the person prosecuted was discharged by the magistrate, as in *Gregory* v. *Derley* (8 *C. & P.* 749); and it is not indispensable to an action for malicious prosecution that the party charged should have been arrested or imprisoned. On the contrary, it is laid down that the damage which will sustain the action may be either to the plaintiff's person by imprisonment; to his reputation by scandal; or to his property by expense" (*Sinclair* v. *Haynes*, 16 *U. C. R.* 251—Robinson, C. J.).

In an action for maliciously making a charge against the plaintiff, before a magistrate, upon which he was arrested, and afterwards discharged, it was *held* necessary to produce the information or lay a foundation for secondary evidence, and that the plaintiff having done neither was properly nonsuited (*Nourse* v. *Foster*, 21 *U. C. R.*, 47).

Webber v. *McLeod*, 16 *O. R.* 609; *Colbert* v. *Hicks*, 5 *Tupper's Reps. in App.* 571.

No action will lie for improperly putting the law in

must co-exist, viz.:—(1) a prosecution of the plaintiff by the defendant; (2) want of reasonable and probable cause for that prosecution; (3) malice, express or implied; (4) the determination of the prosecution in favour of the party prosecuted; and (5) loss or damage caused to that party by the prosecution. If any one of these five factors are absent, no action will lie. It is, therefore, desirable to examine each one of these elements in detail.[53]

ART. 53.—*Prosecution by the Defendant.*

The prosecution must have been instituted by the defendant against the plaintiff, and not merely by the authorities on facts furnished by the defendant.

Thus, if a person *bonâ fide* lays before a magistrate a state of facts, without making a specific charge of crime, and the magistrate erroneously treats the matter as a felony, when it is in reality only a civil injury, and issues his warrant for the apprehension of the plaintiff, the defendant who has complained to the magistrate is not responsible for the mistake. For *he* has not instituted the prosecution, but the magistrate (*Wyatt* v. *White*, 29 *L. J. Ex.* 193; *Cooper* v. *Booth*, 3 *Esp.* 144). And the same rule applies where one lays an information

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motion in the name of a third party, unless it is alleged and proved that it is done maliciously and without reasonable and probable cause (*Mitchell* v. *McMurrich*, 22 *O. R.* 712).

[53] "The declaration appears to be very loosely framed: it does not allege that the defendant made any false representation to the judge, by which he procured the order to arrest the plaintiff; it is not alleged that what the defendant

before a justice under the Criminal Law Amendment Act, 1885, s. 10 (*Lea* v. *Charrington*, 23 *Q. B. D.* 272; and *Hope* v. *Evered*,[54] 17 *ib.* 338).

ART. 54.—*Want of Reasonable and Probable Cause.*

(1) The onus of proving the absence of reasonable and probable cause for the prosecution rests on the plaintiff (*Lister* v. *Perryman*,

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did was done *falsely* and maliciously; yet the very gist of the action consists in the falsity of the representations; for, however maliciously the defendant made true representations to the judge, which were sufficient to warrant the arrest, it would seem that no action lies since the passing of the statute 22 Vict. c. 24 (Consol. Statutes, Upper Canada)" [now R. S. O., 1897, c. 80] (*Baker* v. *Jones*, 19 *U.C.C.P.* 369—Gwynne, J.).

[54] "If a private person, suspecting a felony to have been committed, state facts to a constable, and the latter on his own responsibility makes an arrest without a warrant, no action will lie for the arrest against the private person. But if the private person do more than simply put the law in motion; if he direct or command the arrest, he may be sued in trespass. There is a distinction between a private individual and a constable in the case of an arrest for suspicion of felony. In order to justify a private person in causing the arrest of another, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed by somebody; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities" (*Patterson* v. *Scott*, 38 *U. C. R.* 644—Harrison, C. J.).

In laying an information against the plaintiff, the defendant only intended to charge him with having unlawfully carried away a saw, and stated facts to the magistrate which merely amounted to a charge of trespass, but in

L. R. 4 *H. L.* 521; *Abrath* v. *N. E. R. Co.*, 11 *App. Cas.* 247).

(2) The jury find the facts on which the question of reasonable and probable cause depends; but the judge determines whether those facts do constitute reasonable and probable cause (*Hilliar* v. *Dade*,[55] 14 *T. L. R.* 534).

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drawing the information the magistrate of his own accord used the word "feloniously," which word the defendant did not know the meaning of. *Held*, that under these circumstances an action for malicious prosecution would not lie (*Rogers* v. *Hassard*, 2 *Tupper's Reps. in App.* 507).

A complainant who in good faith lays an information for an offence unknown to the law before a magistrate, who thereupon without jurisdiction convicts and commits the accused to gaol, is not liable to an action for malicious prosecution, the essential ground for such an action being the carrying on maliciously and without probable cause of a legal prosecution (*Grimes* v. *Miller*, 23 *O. A. R.* 764).

[55] "It is well settled that whether the circumstances alleged to show the existence or non-existence of probable cause existed is a matter of fact, and whether, supposing them to be true, they amount to probable cause, is a question of law" (*Riddell* v. *Brown*, 24 *U. C. R.* 95—Draper, C. J.; *Joint* v. *Thompson*, 26 *U. C. R.* 519; *Thorne* v. *Mason*, 8 *U. C. R.* 236).

"It is only upon the ground that the prosecution of the plaintiff was instituted without probable cause that the fourth count could be sustained. The allegation of the want of it is a matter of substance, and must be proved; it is not to be implied. Slight evidence may be sufficient, for it is in truth the proof of a negative, but, as Lord Ellenborough ruled in *Purcell* v. *McNamara* (1 *Campbell*, 199), there must be some proof" (*Barbour* v. *Gittings*, 26 *U. C. R.* 547—Draper, C. J.).

"The learned judge could not have told the jury that, taking the case to be exactly as proved by the plaintiff's evidence, it afforded proof that the defendant, without probable cause, made the information in the terms in which he did make it; and wherever that is the case a nonsuit

(3) No definite rule can be laid down for the exercise of the judge's judgment (*Lister* v. *Perryman, L. R.* 4 *H. L.* 521); but the defendants will be deemed to have had reasonable and probable cause for a prosecution where (a) they took reasonable care to inform themselves of the true facts; (b) they honestly, although erroneously, believed in their informa-

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should follow of course; for actions of malicious prosecution are founded on the idea of bad faith on the part of the defendant. When he acts honestly and without malice, under a mistaken impression of facts, he will not be liable in this form of action, still less will he be liable for any mistake of the justice in acting upon his information" (*Lucy* v. *Smith*, 8 *U. C. R.* 520—Robinson, C. J.).

"The case quoted from Salkeld [*Savil* v. *Roberts*, 1 *Salk.* 13] is an express authority that in this case, when the plaintiff was imprisoned, the ignoring of the bill by the grand jury was some evidence of want of reasonable and probable cause. The *dicta* of the judges which I have quoted are in accordance with the general sentiment of the profession, that the ignoring of the bill by the grand jury, on a charge of felony, when the defendant himself was the prosecutor and went before the jury, was evidence of want of reasonable and probable cause in an action for a malicious arrest and prosecution" (*McCreary* v. *Bettis*, 14 *U. C. C. P.* 97—Richards, C. J.).

Scougall v. *Stapleton*, 12 *O. R.* 206; *Malcolm* v. *Perth Mutual Fire Ins. Co.*, 29 *O. R.* 717; *Milner* v. *Sanford*, 25 *N. S. R.* 227, and *Grant* v. *Booth*, 25 *N. S. R.* 266.

In an action for malicious prosecution the existence or non-existence of reasonable and probable cause must be determined by the court. The jury may be asked to find on the facts from which reasonable and probable cause may be inferred, but the inference must be drawn by the judge (*Archibald* v. *McLaren*, 21 *S. C. R.* 588).

The question of reasonable and probable cause is for the judge and not for the jury (*Rice* v. *Saunders*, 26

tion; and (c) that information, if true, would have afforded a *primâ facie* case for the prosecution complained of (see *Abrath* v. *N. E. R. Co.*,[56] *ubi supra*).

(1) In the case of *Lister* v. *Perryman* (*ubi supra*), Lord Chelmsford said: "There can be no doubt since the case of *Panton* v. *Williams* (2 *Q. B.* 169), in which the question was solemnly decided in the Exchequer Chamber, that what is reasonable and probable cause in an action for malicious prosecution, or for false imprisonment, is to be determined by the judge. In what other sense it is properly called a question of law, I am at a loss to understand. No definite rule can be laid down for the exercise of the judge's judgment. Each case must depend on its own circumstances, and the result is a conclusion drawn by each judge for himself, whether the facts found by the jury, in his opinion, constitute a defence to the action. The verdict in cases of this description, therefore, is only nominally the verdict of a jury."

(2) In *Broad* v. *Ham* (5 *Bing. N. C.* 725), Tindal, C. J., said: "There must be a reasonable cause, such

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U. C. C. P. 27; *Joint* v. *Thompson*, 26 *U. C. R.* 519, followed; *Wilson* v. *City of Winnipeg*, 4 *Manitoba L. R.* 193; *Wishart* v. *City of Brandon*, *ibid.* 453; *Miller* v. *Manitoba Lumber and Fuel Co.*, 6 *M. L. R.* 487; *Anderson* v. *Bell*, 24 *N. S. R.* 100; *Raymond* v. *Bider*, 24 *N. S. R.* 363).

"No doubt, although the existence of probable cause is a question of law, generally speaking, yet where there is a conflict of evidence, or where a proper foundation is laid by evidence for inquiring into the motives with which a party acted, the question may become a mixed question of law and fact" (*Smith* v. *McKay*, 10 *U. C. R.* 414—Robinson, J.).

[56] Where in the opinion of the trial judge want of reasonable and probable cause had not been shown by the

as would operate on the mind of a discreet man;[57] there must be also a probable cause, such as would operate on the mind of a reasonable man; at all events, such as would operate on the mind of the party making the charge, otherwise there is no probable cause for him."

(3) A man who makes a criminal charge against another, cannot absolve himself from considering whether the charge is reasonable and probable, by delegating that question to an agent, even although that agent be presumably more capable of judging. Thus, the opinion of counsel as to the propriety of instituting a prosecution, will not excuse the defendant if the charge was in fact

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evidence, the charge to the jury should be peremptory to find for the defendant (*Tyler* v. *Babington*, 4 *U. C. R.* 202).

[57] "Reasonable and probable cause is the existence of such facts and circumstances as would excite in the mind of a reasonable man a belief of guilt: see *Patterson* v. *Scott* (38 *U. C. R.* 639), recently before me. Good faith merely in making a criminal charge is not sufficient. Mere suspicion cannot in any case amount to reasonable and probable cause. There must be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant the belief that the party is guilty of the crime of which he is accused. A belief that a given state of facts would constitute a crime, when they do not, is not sufficient to create reasonable and probable cause" (*Munroe* v. *Abbott*, 39 *U. C. R.* 82 *et seq.*—Harrison, C. J.).

"Where the allegation is that there was no reasonable or probable cause for believing any debt due, or a debt for so large an amount was not due, the reason why an action for malicious arrest as to those allegations cannot be maintained until the suit in which the arrest took place is ended, is, because it may appear by the result of that suit that the debt and the amount of it were really due, and the court will not permit two actions to go on at the same time to ascertain that matter, nor allow it to be alleged of a pending suit that it is unjust; this can only be decided by

unreasonable and improbable. For as Heath, J., said in *Hewlett* v. *Cruchley* (5 *Taunt.* 283), "it would be a most pernicious practice if we were to introduce the principle that a man, by obtaining the opinion of counsel, by applying to a weak man or an ignorant man, might shelter his malice in bringing an unfounded prosecution."[58]

(4) With regard to the amount of care which a prosecutor is bound to exercise before instituting a prosecution, it would seem that although he must not act upon mere tittle-tattle or rumour, or even upon what one man has told his immediate informant, without himself interviewing the first-mentioned man, yet where his immediate informant is himself cognizant of other facts, which, if true, strongly confirm the hearsay evidence, that will be sufficient to justify the prosecutor in acting, without first going to the source of the

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a judicial determination of it finally" (*Eakins* v. *Christopher*, 18 *U. C. C. P.* 536—Richards, C. J.).

[58] "The law certainly is that if a party lays all the facts of his case fairly before counsel, and acts *bonâ fide* on the opinion given by that counsel, however erroneous the opinion, he is not liable to this action" (*Fellowes* v. *Hutchison*, 12 *U. C. R.* 634—Draper, J.).

"In actions for malicious prosecution, or for maliciously arresting another, it is always the rule that the defendant has exculpated himself if he has fairly and fully stated all the facts to the magistrate, or to his professional adviser, or to some other competent person to act and advise in such a case, and he has been governed by their direction or advice" (*Jackson* v. *Hide*, 28 *U. C. R.* 296—Adam Wilson, J.; but see *Scougall* v. *Stapleton*, *ante*, p. 227, and *St. Denis* v. *Shoultz*, *infra*).

Nourse v. *Calcutt*, 6 *U. C. C. P.* 15.

"The law certainly seems to be now settled that if a party lays all the facts of his case fairly before counsel, and

hearsay (*Lister* v. *Perryman*,[59] *L. R.* 4 *H. L.* 521). But as circumstances are infinite in variety, it is quite impossible to lay down any guiding principle as to what steps a person ought reasonably to take for informing himself of the truth before instituting a prosecution.

ART. 55.—*Malice.*

(1) In an action of malicious prosecution, malice is generally implied, upon proof of absence of reasonable and probable cause for instituting the prosecution complained of (*Johnstone* v. *Sutton*,[60] 1 *T. R.* 544). But this inference may be negatived (*Brown* v. *Hawkes*, (1891) 2 *Q. B.* 718).

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acts *bonâ fide* upon the opinion given by that counsel, he is not liable to an action" (*Rex* v. *Stewart*, *M. L. R.* 264—Taylor, C. J.).

[59] *Hagarty* v. *Great Western Railway Co.*, 44 *U. C. R.* 319; *Hamilton* v. *Cousineau*, 19 *O. A. R.* 203; *Cox* v. *Gunn*, 2 *N. S. Reps.* (*Russell & Chesney*), 528; see *St. Denis* v. *Shoultz*, 25 *O. A. R.* 131, *post*, p. 233).

[60] "An action of this kind lies for the scandal, vexation, and expense the plaintiff has been exposed to, and has suffered, and not for the danger of conviction he has been subjected to" (*Macdonald* v. *Henwood*, 32 *U. C. C. P.* 440—Wilson, C. J.; and see *Campbell* v. *McDonell*, 27 *U. C. R.* 343; *McNellis* v. *Gartshore*, 2 *U. C. C. P.* 464; *Wilson* v. *Tennant*, 25 *O. R.* 339).

"The defendant had no legal ground of charge against the plaintiff, but I am inclined to think if he honestly believed he had, and believed also that the case was one of false pretences, he would be justified in prosecuting for it. That would, of course, be a matter to be submitted to the jury" (*Reid* v. *Maybee*, 31 *U. C. C. P.* 391—Wilson, C. J.).

(2) A prosecution, though in the outset unmalicious, may become malicious, if the prosecutor, having acquired positive knowledge of the innocence of the accused, proceeds *malo animo* in the prosecution (*per* Cockburn, C. J., *Fitzjohn* v. *Mackinder*, 30 *L. J. C. P.* 257).

(3) And where a person has not instituted, but only adopts and continues proceedings, the same principle applies (*Weston* v. *Beeman*,[61] 27 *L. J. Ex.* 57).

(1) Thus, where the defendant, at the time of the prosecution of the plaintiff, showed that he had a consciousness of the innocence of the accused, it was held evidence of malice (see *Shrosbery* v. *Osmaston*,[62] 37 *L. T.* 792).

(2) So, too, where one is assaulted justifiably, and institutes criminal proceedings for the assault; if in the opinion of the jury he commenced such proceedings, knowing that he was wrong and had no just cause of complaint, malice may be presumed (*Hinton* v. *Heather*,[63] 14 *M. & W.* 131).

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[61] *Crandall* v. *Crandall*, 30 *U. C. C. P.* 497.

[62] *Watt* v. *Clark*, 18 *O. R.* 602.

[63] Where a man has been prosecuted for an assault, and brings an action for malicious prosecution, the finding that there was in fact an assault is not decisive of the question whether there was a reasonable and probable cause for the prosecution. The plaintiff is entitled to have the circumstances relied on as a justification for the assault submitted to the jury, and to have their finding as to whether

(3) So, too, it may be presumed, if it be shown that the defendant *knew* that the plaintiff against whom he had charged a theft, took the goods under an erroneous belief that he had a legal right to do so (*Huntley* v. *Simson*, 27 *L. J. Ex.* 134).

(4) So, where the prosecutor of another says that he is prosecuting him in order to stop his mouth, it is evidence that he knew him to be innocent, and therefore that the prosecution was malicious (*Heslop* v. *Chapman*, *per* Maule, J., 23 *L. J. Q. B.* 49).

(5) But where the defendant has honestly and *bonâ fide* instituted the prosecution, he is not liable, although owing to a defective memory he has wrongly accused the plaintiff (*Hicks* v. *Faulkner*,[64] 8 *Q. B. D.* 167).

(6) Whether malice may be implied in a corporation, having regard to its want of individuality was, until recently, not free from doubt. In *Edwards* v. *Mid. R. Co.* (6 *Q. B. D.* 287), it was held by Fry, J., that a corporation was capable of malice. On the other hand, in *Abrath* v. *N. E. R. Co.*[65] (11 *App. Cas.* 247), Lord

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the defendant was conscious when he laid the information that he had been in the wrong (*Sutton* v. *Johnstone*, 1 *T. R.* 493, distinguished; *Routhier* v. *McLaurin*, 18 *O. R.* 112).

[64] That the prosecution in question was instituted on the advice of counsel is not sufficient to protect the prosecutor if he does not exercise reasonable care to ascertain and lay before counsel the facts in reference to the alleged offence. Absence of reasonable and probable cause for the prosecution is not by itself sufficient to impose liability; malice must exist, and the question of malice must be left to the jury (*St. Denis* v. *Shoultz*, 25 *O. A. R.* 131).

Winfield v. *Kean*, 1 *O. R.* 193; *Young* v. *Nichol*, 9 *O. R.* 347; *McGill* v. *Walton*, 15 *O. R.* 389.

[65] *Young* v. *Nichol*, 9 *O. R.* 347.

Bramwell strongly supported the opposite view, but this was only a dictum, and not necessary to the determination of the case; and if a virtuous master is liable for the malice of his servant (as to which, see Part I., Chapter VI., Sect. III., *supra*), it is difficult to see why an impersonal corporation should not be. And this view was adopted by the late Lord Esher in *Rayson* v. *S. Lond. Tram. Co.* (1893, 2 *Q. B.* 304), and followed in *Cornford* v. *Carlton Bank*, (1899, 1 *Q. B.* 392, [1900] 1 *Q. B.* 22).

(7) Where, through the defendant's perjury, the judge of the county court, believing the *plaintiff* to have perjured himself, committed him for trial, and bound over the defendant to prosecute him, which he did, but unsuccessfully; it was held, that the plaintiff had a good cause of action against the defendant; because, although the defendant had not initiated the proceedings, yet he might have discharged his recognizance by appearing and telling the truth (*Fitzjohn* v. *Mackinder*, 30 *L. J. C. P.* 257).

Art. 56.—*Failure of the Prosecution.*

It is necessary to show that the proceeding alleged to have been instituted maliciously, and without reasonable or probable cause, has terminated in favour of the plaintiff, if, from its nature, it be capable of such a termination (*Basèbè* v. *Matthews*, *L. R.* 2 *C. P.* 684; and as to bankruptcy proceedings, *Met. Bank* v. *Pooley*, 10 *App. Cas.* 210).

This rule, which at first sight appears somewhat harsh, is founded on good sense, and applies even where the result of the prosecution cannot be appealed (*Basèbè* v. *Matthews, ubi supra*). As Crompton, J., said, in *Castrique* v. *Behrens* (30 *L. J. Q. B.* 168), "there is no doubt on principle and on the authorities, that an action lies for maliciously, and without reasonable and probable cause, setting the law of this country in motion, to the damage of the plaintiff. . . . But in such an action it is essential to show that the proceeding alleged to be instituted maliciously, and without probable cause, has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be that, if in the proceeding complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause."

Art. 57.—*Damage.*

In order to support an action for malicious prosecution, it is necessary to show some damage resulting to the plaintiff from the prosecution complained of (*Byne* v. *Moore*, 5 *Taunt.* 187).

The damage need not necessarily be pecuniary. "It may be either the damage to a man's fame, as if the matter he is accused of be scandalous, or where he has been put in danger to lose his life, or limb, or liberty; or damage to his property, as where he is

obliged to spend money in necessary charges to acquit himself of the crime of which he is accused" (*Mayne's Treatise on Damages, p.* 345).

In this case, as in slander, the damages must be the reasonable and probable result of the malicious prosecution, and not too remote.

N.B.—There are certain torts analogous to malicious prosecution which occur too rarely to require notice in an elementary work of this kind. One of these is malicious arrest, which consists in wilfully putting the law in motion to effect the arrest of another *under civil process* without cause. Arrest under civil process is, however, now so rarely possible that this form of tort may be almost deemed obsolete. Another wrong of the same nature is causing injury to another by an abuse of legal procedure (see *Grainger* v. *Hill*,[66] 4 *Bing. N. C.* 212). This, again, is rarely brought before the courts, and the student who desires information regarding it is referred to larger works.

Section III.—Of Maintenance.

Art. 58.—*Definition.*

(1) Maintenance is a malicious assistance, by money or otherwise, proffered by a third person to either party to a civil suit, to enable him to prosecute or defend it.

(2) Malice is implied on proof of officious

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[66] *Erickson* v. *Brand*, 14 *O. A. R.* 614.

The Statute of Limitations commences to run from the date of acquittal, not from date of arrest (*Crandall* v. *Crandall*, *ante*, p. 232).

assistance; but it may be rebutted by showing (a) that the maintainer had a common interest in the action with the party maintained; or (b) that the maintainer was actuated by motives of charity, *bonâ fide* believing that the person maintained was a poor man oppressed by a rich one.[67]

(1) Thus, in the well-known case of *Bradlaugh* v.

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[67] "In my opinion the agreement before us comes within the principles laid down in the cases and authorities referred to. It contains all the ingredients which are obnoxious to public policy, and which constitute maintenance and champerty. It contains an undertaking to remove an impediment in the way of proceeding with the suit in question by paying into court the money required as security for the defendant's costs. It further provides for the payment of all costs then incurred, and for all future costs in that suit, or in any other suit necessary to be brought or defended respecting the subject-matter, and also that the defendant shall attend to the prosecution of the suit; and it further provides for a division of the property in the event of the suit being favourable, viz., that the plaintiff shall be entitled to receive one-tenth part and the defendants and their associates nine-tenths. During the arguments it was said that in modern times the law relating to maintenance has been relaxed in its application. No doubt the former strict rule of law in some instances is, perhaps, inapplicable to the present state of society, but upon examination of the latest decisions the early law and principles are still recognized and adhered to. It seems to me that if we were to hold that the agreement under discussion was not one tainted with maintenance and champerty, we would virtually ignore all the principles upon which the previous decisions proceeded. I see no ground upon which the purchase of a disputed right upon such terms as this agreement and the allegations in the plea disclose should be sanctioned" (*Carr et al.* v. *Tannahill et al.*, 30 *U. C. R.* 226—Morrison, J., and 31 *U. C. R.* 201).

Newdegate (11 *Q. B. D.* 1), the plaintiff, having sat and voted as a member of Parliament without having made and subscribed the oath, the defendant, who was also a member of Parliament, procured C. to sue the plaintiff for the penalty imposed for so sitting and voting. C. was a person of insufficient means to pay the costs in the event of the action being unsuccessful: Held, that the defendant and C. had no common interest in the result of the action for the penalty, and that the conduct of the defendant in respect of such action amounted to maintenance, for which he was liable to be sued by the plaintiff.

(2) So, advancing money to a man to enable him to maintain a suit, on the terms that, if the suit be successful, the maintainer shall not only have a return of the money advanced with interest, but also a bonus of 250*l.*, is illegal, and (it is conceived) would give the defendant in the action a right to sue the maintainer (see *James* v. *Kerr*, 40 *Ch. D.* 449; *Hutley* v. *Hutley*, *L. R.* 8 *Q. B.* 112; *Hilton* v. *Woods*, 4 *Eq.* 432).

(3) But, on the other hand, as a general rule, there is no doubt, that where there is a common interest believed on reasonable grounds to exist, maintenance, under those circumstances, would be justifiable. The oldest authorities all lay down this qualification, and, by the instances they give, show the sort of interest which is intended. A master for a servant, or a servant for a master, an heir, a brother, a son-in-law, a brother-in-law, a fellow commoner defending rights of common, or a landlord defending his tenant in a suit for tithes (*per* Lord Coleridge, C. J., in *Bradlaugh* v. *Newdegate*, 11 *Q. B. D.* 11).

(4) So, where, during the pendency of an action, the plaintiffs became bankrupt, and the trustee in bankruptcy assigned the right of action to F., with power to continue it, on the terms that if F. was successful he should take three-fourths of the net result, and that the remaining one-fourth should be paid to the trustee in bankruptcy, and it further appeared that F. was in reality trustee for himself and certain other creditors of the bankrupt, it was held that the transaction was lawful. For F. and the trustee in bankruptcy had a common interest in the subject-matter of the action, and so had the other creditors for whom F. was trustee (*Guy* v. *Churchill*, 40 *Ch. D.* 481; 58 *L. J. Ch.* 345; 37 *W. R.* 504; and see *Seear* v. *Lawson*, 15 *Ch. D.* 426).

(5) And, again, in *Plating Company* v. *Farquharson* (17 *Ch. D.* 49), it was held, that all persons engaged in the trade of plating had such a common interest in impugning the validity of a patent granted to a person for nickel plating, that they were entitled to subscribe a fund for enabling the defendant, in an action brought by the patentee for infringement of his patent, to appeal against an adverse judgment.

(6) And so where a rich man in the *bonâ fide*, but erroneous, belief that a poor man was being oppressed, advanced money to him for the purpose of maintaining an action against the oppressor, it was held that he was justified, notwithstanding that if he had made full inquiry, he would have ascertained that there was no reasonable or probable ground for the proceedings which he assisted (*Harris* v. *Brisco*, 17 *Q. B. D.* 504). It is on the authority of this case that this form of tort is classed under torts founded on malice (see also *Findon* v. *Parker*, 11 *M. & W.* 675; *Hutley* v. *Hutley*, *L. R.*

8 *Q. B.* 112; and *Met. Bank* v. *Pooley*, 10 *App. Cas.* 210).

(7) The law of maintenance has no application to the prosecution or defence of criminal proceedings (*Grant* v. *Thompson*, 72 *L. T.* 264).

Section IV.—Of Seduction.

Art. 59.—*General Liability.*

Every person is liable to an action who wilfully:—

(1) Procures a servant or employé to depart from the master's service during the stipulated period of service, or a child to depart from that service while it exists.

(2) Harbours a servant, after wrongfully quitting the master.

(3) Debauches such servant or child so as to incapacitate them from rendering such service (*Lumley* v. *Gye*,[63] 2 *Ell. & Bl.* 224; *Blake* v. *Lanyon*, 6 *T. R.* 221).

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[63] Ontario Seduction Act (R. S. O., 1897, c. 69); Manitoba Seduction Act (55 Vict. c. 43). The plaintiff declared in trespass complaining of breaking and entering his close and debauching his daughter, and the defendant pleaded the leave and license of the daughter. Plea *held* bad on demurrer.

"The defendant has cited no authority in support of his plea. If the debauching the plaintiff's servant is an injury to the plaintiff, the servant cannot give license to the

(1) Thus, if I employed (against the will of his master) an apprentice or servant before the expiration of his term of service, I should be liable; for by so

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defendant to commit that injury. If this defence could be sustained there could be no action for seduction, for when the connection was against the will of the female it would be felonious"—(Robinson, C. J.; *Ross* v. *Merritt*, 2 *U. C. R.* 421, and 3 *U. C. R.* 60).

To sustain an action for seduction, the plaintiff must prove the defendant to have been the father of the child—mere proof of seduction by the defendant will not be sufficient (*Kimball* v. *Smith*, 5 *U. C. R.* 32).

Plaintiff sued defendants for enticing and procuring certain of his servants to desert his service, and the evidence at the trial established that the parties were in plaintiff's service, and were, with the exception of one of them, induced by the defendants' manager to leave. *Held*, that plaintiff was entitled to recover, and that the measure of damages was not confined to the loss of service, but that the jury were justified in giving ample compensation for all damages resulting from the wrongful act (*Hewitt* v. *The Ontario Copper Lightning Rod Co.*, 44 *U. C. R.* 287).

In an action for enticing away and having carnal knowledge of the plaintiff's daughter, the plaintiff was allowed at the close of the case to amend by setting up, as an alternative cause of action, the enticing away of the daughter and having connection with her by force and against her will, and consequent loss of service. *Held*, that the amendment was properly allowed, and that the fact of the defendant having been previously acquitted on an indictment for rape was not a bar to the action (*Cole* v. *Hubble*, 26 *O. R.* 279).

"It was denied on the trial, and the point has been strenuously argued on this rule that any action can lie for seduction before the birth of the child. Few things, perhaps, could be less desirable, than that parties could be encouraged to suppose that an action for seduction could be maintained upon the mere proof of criminal intercourse, not followed by the birth of a child, nor even by pregnancy. It would seem a most unreasonable and unwise principle

doing I should be affording him the means of keeping out of his master's service (*De Francesco* v. *Barnum*, 63 *L. T.* 514).

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which should prevent the action lying before the birth of the child, which is no part of the seduction, but a consequence only, and, it may be, not the most afflicting consequence that might follow. It might happen that the child might never be born; the mother might die of disease, induced by pregnancy, and before delivery, and then all the injury to feelings would be suffered, embittered by the death of the daughter, and probably a much greater expense, occasioned by her illness, to the father than would generally attend the birth of a child; while in such a case the same loss of labour might also have occurred in reality, which is in contemplation of law the foundation of the action. I infer from these considerations that the injury must, with a view to a remedy for actual loss of service, be complete when pregnancy follows, and interruption of service is occasioned by it, which may well be the case before the child is born, and consequently I take it, that by the law of England, it cannot be an indispensable condition to the maintenance of the action that there must be a child born. I should bring myself very reluctantly to any other conclusion; because in England in effect, and in this country I may say in terms, since our statute 7 Will. 4, c. 8 [now R. S. O., 1897, c. 69], the grievance which the law regards and desires to afford redress for, is the injury to feelings, the mortification, the domestic unhappiness, the blighted hopes which follow the seduction—and this must all be suffered before the birth when the pregnancy is known. . . . The only difference created by our statute is, that it dispenses with evidence to prove what the legislature says shall be presumed—namely, the performance of acts of service by the daughter for the father; and it provides further, that whether the daughter be living at home or abroad at the time of being seduced, her parent may equally sustain an action for the wrong" (*L'Esperance* v. *Duchene*, 7 *U. C. R.* 147 *et seq.*—Robinson, C. J.; and see *Kimball* v. *Smith*, 5 *U. C. R.* 33; *McLeod* v. *McLeod*, 9 *U. C. R.* 331, which follows *L'Esperance* v. *Duchene*).

(2) So, in *Bowen* v. *Hall* (6 *Q. B. D.* 333), it was held by the Court of Appeal (Coleridge, C. J., *dissentiente*), that an action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer, although the relation of master and servant may not strictly exist. Where, in such an action, the employed was also a defendant, but, as against him, the plaintiff claimed only an injunction, and not damages, it was held, that damages might, in the discretion of the Court, be given, either in addition to or substitution for the injunction. However, actions for seduction mostly come before the Court under the circumstances referred to in paragraph 3 of the above article, viz., where an action is brought (generally by an aggrieved parent) to recover damages from one who has seduced a daughter or female servant from the paths of virtue, and consequently this section will be devoted to a consideration of that particular class of wrong.

ART. 60.—*Relation of Master and Servant essential.*[69]

(1) The relation of master and servant must exist at the time of the seduction (*Davies* v. *Williams*, 10 *Q. B.* 725); and it would appear

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[69] The mother of an illegitimate daughter may maintain an action for her seduction (*Muckleroy* v. *Burnham*, 1 *U. C. R.* 351. See, however, *Hicks* v. *Ross*, 25 *U. C. R.* 52, *post*, p. 245).

"We are of opinion that this verdict should be allowed to stand. It rests on the common law principles on which such

also that the confinement, or illness, of the girl must have happened while she was in the plaintiff's service.

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actions are sustained independent of our statute 7 Will. 4, c. 8. It is sufficiently established that a person standing *in loco parentis* may bring this action and recover compensation for injury to wounded feelings in the same manner as a parent may; the claim, in such case, not being necessarily restricted to the actual damage resulting from loss of service and expenses attending the illness of the female seduced" (*Muckleroy* v. *Burnham*, 1 *U. C. R.* 352—Robinson, C. J.).

"When a daughter above the age of twenty-one is absent from her father's house (with the *animus revertendi*) with his consent and is seduced, the action lies; but most clearly so when the daughter is under age; but where there is no *animus revertendi* the action does not lie" (*Ibid.*—Jones, J.).

The father of an illegitimate daughter cannot under Provincial Statute (7 Will. 4, c. 8) bring an action for her seduction, merely on the footing of being her father (*Biggs* v. *Burnham*, 1 *U. C. R.* 106).

"I think the intention of the statute is clearly this, that when the father is dead the mother shall be entitled to the action, wherever the daughter may be living at the time of being seduced, provided she is living in the province, and has not abandoned her daughter or refused to receive her as an inmate. And the statute reserves to the father or the mother this privilege of suing, in preference to any person not a parent for six months, after which period, if the parent has not sued, the master may" (*Whitfield* v. *Todd*, 1 *U. C. R.* 223—Robinson, C. J.).

"Illicit connection, not followed by pregnancy or any disabling ailment, has never been held sufficient to maintain this action" (*Ryan and wife* v. *Miller*, 22 *U. C. R.* 91—Hagarty, J.).

"We take the effect of this enactment (*C. S. U. C.*, *c.* 77, *sect.* 3), [now *R. S. O.*, 1897, *c.* 69], to be, at least to postpone the right of the master, who might otherwise sue at common law, for six months in favour of the father, or, in the event of his death, the mother of the female seduced; and if the father or mother bring a suit for the seduction within the six months, either

(2) But a contract of service may be *implied* from the relation between the plaintiff and the alleged servant; and where a daughter is

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the master is wholly deprived of his remedy or the seducer is liable to two actions.

"In the present case, however, the mother was resident in the province at the time of the seduction and of the birth of the child, and this action was commenced within six months from the latter event, and hence, according to the apparent meaning of the statute, as an action at common law, it is brought too soon" (*M'Intosh* v. *Tyhurst*, 23 *U. C. R.* 568—Draper, C. J.).

"The intention which I assume the legislature to have entertained—namely, to secure a prior right of action to the father or mother of the female seduced, and to postpone to it the common law right of action of a third party with whom such female resided as a servant when she was seduced, can hardly, I think, be held to extend to a case where the mother, to whom the statutory right of action is only given after the death of the father, marries a second time" (*M'Intosh* v. *Tyhurst*, 24 *U. C. R.* 445—Draper, C. J.; see also *Green* v. *Wright*, 24 *U. C. R.* 245, and *Smith et ux.* v. *Crooker*, 23 *U. C. R.* 84). The Statute *R. S. O.* 1897, *c.* 69, *sect.* 1, includes a mother who re-marries.

The headnote to the case of *Muckleroy* v. *Burnham* (1 *U. C. R.* 361) is, though literally correct, very likely to lead to a false impression, that the mother of an illegitimate daughter may maintain such an action *under the statute* (*C. S. U. C. c.* 77) against the seducer, whereas, on reading the judgment, the decision is obviously this, that the mother in such a case can only maintain the action upon the principles of the common law, but that she so far is to be considered as *in loco parentis* that the damages may go beyond the mere loss of service, and include compensation for wounded feelings (*Hicks* v. *Ross*, 25 *U. C. R.* 52—Draper, C. J.).

In *Hogan and wife* v. *Ackman*, 30 *U. C. R.* 14, it was held that an action would lie by husband and wife for the seduction of K. after the death of the father of K., K. being the daughter and servant of the wife, notwithstanding

seduced, very slight services will suffice to raise this implication.

(1) Thus, the plaintiff's daughter was in service as

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that at the time of the seduction K. was residing with the defendant.

"Whatever differences of opinion may exist on the construction of this Act, it seems to be conceded on all hands that the principal object the legislature had in view, was to give the right of action to parents for the seduction of their daughter when residing away from home. And the most revolting features of the law as it formerly stood was, and still is in England, that the master with whom the female might be residing at the time of her seduction was often himself the seducer, and yet no action could be maintained against him. I do not find any decided cases in our own courts that an action will not lie against a defendant who seduces a girl residing with him, whose father is dead and whose mother has married again" (*Ibid.* —Richards, C. J., at pp. 19 and 20).

"Both in that case (*M'Intosh* v. *Tyhurst*) and this, the seduction of the young woman happened after the marriage of the mother with her second husband. I think the decision is one which must be followed, because this is not a case in which the mother can maintain an action for the seduction of her daughter while dwelling under the protection of herself and her stepfather." (*Waters et ux.* v. *Powers*, 29 *U. C. R.* 339). Since the passing of the Married Women's Property Act, *R. S. O.* 1897, *c.* 163, and the inclusion of the mother of an unmarried female who has married again by *R. S. O.*, 1897, *c.* 69, the cases of *M'Intosh* v. *Tyhurst* and *Waters* v. *Powers* are not law.

"It is clear that this is not an action falling within the scope of our statute, for the female for whose seduction this action is brought is not unmarried; she is a widow, the mother of four children. The plaintiff's case must therefore be supported as it would require to be supported in England" (*Anderson* v. *Rannie*, 12 *U. C. C. P.* 537—Draper, C. J.; and see *Kirk* v. *Long*, *post*, p. 248).

The plaintiff, a widow, sued the defendant for the seduction of her daughter, and loss of service thereby caused. It

a governess, and was seduced by the defendant whilst on a three-days' visit, with her employer's permission, to the plaintiff, her widowed mother. During her visit

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was proved on the trial that the seduction took place in October, 1861, during the lifetime of the plaintiff's husband, father of the plaintiff's daughter. On the 15th June, 1862, the father died, and on the 16th July, 1862, a child was born by plaintiff's daughter. It was held that the action was not maintainable without proof of actual service to support it, and as the plaintiff, neither at the time the seduction occurred, nor subsequently, when the daughter being pregnant and the right of action became complete, was entitled to her services, she could not be said to have lost those services by the misconduct of the defendant (*Smart* v. *Hay*, 12 *U. C. C. P.* 529).

The plaintiff's unmarried daughter was seduced by the defendant while at service in his family. There was no pregnancy, and only very slight physical disturbance. *Held*, that under the Seduction Act (*R. S. O.*, 1887, *c.* 58) [now *R. S. O.*, 1897, *c.* 69], an action lies by the parent, although the daughter may not have been living with him at the time of the seduction or subsequent illness. That while mere illicit intercourse affords no ground of action, proof of illness or physical disturbance sufficient to have caused loss of service to the parent, if the girl had been living with the parent, is all that is necessary, and that in this case the evidence fell short of that (*Harrison* v. *Prentice*, 24 *O. A. R.* 677).

"While there is under the act, in an action by the parent, an irrebuttable presumption of service, there is no presumption of loss of service to the parent, which must still be proved" (*Ibid.*—Burton, C. J.).

In an action for the seduction of the daughter of the plaintiff, the action may be maintained before the birth of the child; and the statute (7 *Will.* 4, *c.* 8, *Con. Stat. U. C.*) [now *R. S. O.*, 1897, *c.* 69], does not dispense with evidence of a pecuniary loss or damage such as was required before the act. But the requirements of the statute are satisfied on showing any service rendered, the presumption being that service to whomsoever rendered in law is considered service to the parent (*Westacott* v. *Powell*, 2 *U. C. Error and Appeal*, 525).

In an action after the death of the father by the mother

she gave some assistance in household duties. At the time of her confinement she was in the service of another employer, and afterwards returned home to her mother: Held, that there was no evidence of service at the time of the seduction. And also, by Kelly, C. B., and Martin and Bramwell, BB., that the action must also fail on the ground that *the confinement* did not take place whilst the daughter was in the plaintiff's service (*Hedges* v. *Tagg*,[70] *L. R.* 7 *Ex.* 283; and see also *Gladney* v. *Murphy*, 26 *L. R. Ir.* 651).

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for the seduction of her daughter in the lifetime of the father, who was an invalid supported by the mother and daughter, it was held as no evidence of the actual relationship of mistress and servant was given that the action would not lie (*Entner* v. *Benneweis*, 24 *O. R.* 401; and *Smart* v. *Hay*, *supra*).

A parent may maintain an action for the seduction of his daughter, though resident abroad at the birth of the child (*Cromie* v. *Skene*, 19 *U. C. C. P.* 328).

"If I was asked what cases the statute (7 Will. 4, c. 8, now c. 77 of the Con. Stat. Upper Canada) [now *R. S. O.*, 1897, *c.* 69] was intended to provide for, I should instance the present as one of the most, if not the most prominent, as being a case wholly remediless, unless the parent, in the position of the present plaintiff, is entitled to avail himself of the provisions of the statute to maintain this action" (*Ibid.*—Gwynne, J., at p. 336; *James* v. *Hawkins*, 25 *U. C. C. P.* 346).

A widow is not within the meaning of the term "unmarried female" as used in the statute (7 Will. 4, c. 8), and her father cannot maintain an action for her seduction when she was not living in his service, but in that of her seducer (*Kirk* v. *Long*, 7 *U. C. C. P.* 363; and *ante*, p. 246).

Mere abandonment does not divest the mother of the right of action when the father is dead (*Hebb* v. *Lawrence*, 7 *M. L. R.* 222; *James* v. *Hawkins*, 25 *U. C. C. P.* 346).

[70] "The act respecting seduction (*R. S. O.*, 1877, *c.* 57) does not give any new right of action for the seduction of an unmarried woman to any one except the father or the mother of such female, and a person standing *in loco parentis*

(2) In *Long* v. *Keightley*, however (11 *Ir. Rep. C. L.* 221, *C. P.*), there was held to be a sufficient loss of service under the following circumstances. The plaintiff's daughter, aged twenty-four years, was seduced in the house and service of the plaintiff. The day after, she left Ireland for America, pursuant to a prior arrangement. Finding herself pregnant while in service there, she returned to her native country, and went to stay at her sister's house, where she was confined. Afterwards she returned to the house of her mother (the plaintiff). On the authority of *Hedges* v. *Tagg*, it was argued, that inasmuch as the confinement did not take place while the daughter was in the service of her mother, the action must fail. But the court distinguished the two cases on the ground, that in *Hedges* v. *Tagg* the girl's confinement happened when she was in the service of *another;* while in the case in discussion she was *constructively* in the service of the

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to an unmarried woman can maintain an action for her seduction only where the father, if living, could have maintained it without the aid of the act; in other words, only where the relationship of master and servant at the time of the seduction does not exist between such unmarried female and some person other than the father or person standing *in loco parentis*" (*McKersie* v. *McLean*, 6 *O. R.* 432—Cameron, C. J.).

The mother of the girl seduced, suing as her mistress, has a sufficient common law right to bring the action in the absence from the province of the girl's father (*Gould* v. *Erskine*, 20 *O. R.* 347; *Tweedie* v. *Bogie*, 27 *U. C. C. P.* 561; and *Abernethy* v. *McPherson*, 26 *U. C. C. P.* 516).

"If the father is dead, the mother of an unmarried female can maintain an action for the seduction of her daughter, though the daughter be serving or residing with another person at the time of the seduction. This is the plain intention of the statute, and it ought not to be defeated by the accident of the mother marrying again" (*Meyer* v. *Bell*, 13 *O. R.* 37—Boyd, C.; *Evans* v. *Watt*, 2 *O. R.* 167).

plaintiff directly she returned to Ireland (and see *Terry* v. *Hutchinson*, *infra*).

(3) In *Evans* v. *Walton* (*L. R.* 2 *C. P.* 615), the daughter of the plaintiff (a publican), who lived with him and acted as his barmaid, but without any express contract or wages, was induced by the defendant to leave her father's house: it was held, that the relation of master and servant might be implied from these circumstances, and that it mattered not whether the service was at will or for a fixed period.

(4) So, such small services as milking, or even making tea, have been held sufficient (*Bennett* v. *Allcott*, 2 *T. R.* 166; *Carr* v. *Clarke*, 2 *Chit. R.* 261).

(5) Where the daughter lived at, and assisted in the duties of the house, from six in the evening until seven in the morning, and the rest of the day was employed elsewhere, it was held sufficient evidence of service (*Rist* v. *Faux*,[71] 32 *L. J. Q. B.* 387). And where the daughter is a *minor*, living with her father, service will be presumed (*Harris* v. *Butler*, 2 *M. & W.* 542).

(6) But where the daughter at the time of the seduction is acting as housekeeper to another person, the action will not lie (*Dean* v. *Peel*, 5 *East*, 45); not

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[71] Case for seduction will lie to recover damages, arising from subsequent connection, though the evidence strongly tends to show that the defendant had, in the first instance, committed a rape on the girl (*Hayle* v. *Hayle*, 3 *U. C. R.* (*O. S.*) 295).

"Unless the loss of service clearly sprang from the very act supposed to be felonious, the civil remedy should not be defeated or suspended" (*Ibid.*—Robinson, C. J.).

Straughan v. *Smith*, 19 *O. R.* 558.

even when she partly supports her father (*Manley* v. *Field*, 29 *L. J. C. P.* 79).

(7) The plaintiff's daughter, being under age, left his house and went into service. After nearly a month, the master dismissed her at a day's notice, and the next day, on her way home, the defendant seduced her. It was held, that as soon as the real service was put an end to by the master, whether rightfully or wrongfully, the girl intending to return home, the right of her father to her services revived, and there was, therefore, sufficient evidence of service to maintain an action for the seduction (*Terry* v. *Hutchinson*, *L. R.* 3 *Q. B.* 599).

(8) When the child is only absent from her father's house on a temporary visit, there is no termination of her services, providing she still continues, in point of fact, one of his own household (*Griffiths* v. *Teetgen*, 15 *C. B.* 344).

Art. 61.—*Misconduct of Parent.*[72]

If a parent has introduced his daughter to, or has encouraged, profligate or improper persons, or has otherwise courted his own injury, he has no ground of action if she be seduced.

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[72] Gross neglect on the part of the parents is held a ground for a new trial in an action of seduction (*Hogle* v. *Ham*, *Taylor's K. B. Reps.* (*U. C.*) 248.

"It is an established maxim with me that no man has a right to sue for compensation in damages for any loss or inconvenience which has arisen from his own fault or criminal neglect of duty" (*Ibid.*—Campbell, J.; *Beadstead* v. *Wyllie*, *Taylor's K. B. Reps.* 60).

Thus, where the defendant was received as the daughter's suitor, and it was afterwards discovered by the plaintiff that he was a married man, notwithstanding which he allowed the defendant to continue to pay his addresses to his daughter on the assurance that his wife was dying, and the defendant seduced the daughter: it was held, that the plaintiff had brought about his own injury, and had no ground of action (*Reddie* v. *Scoolt*, 1 *Peake*, 316).

ART. 62.—*Damages.*

(1) In cases of seduction, in addition to the actual damage sustained, and any expenses incurred through a servant's or daughter's illness, damages may be given for the loss which the plaintiff has sustained of the society and comfort of a child who has been seduced, and for the dishonour he has received and the anxiety and distress which he has suffered (*Bedford* v. *McKowl*, 3 *Esp.* 120; *Terry* v. *Hutchinson*, *L. R.* 3 *Q. B.* 599).

(2). Where more than ordinarily base methods have been employed by the seducer, the damages may be aggravated. On the other hand, the defendant may show the loose character of the daughter in mitigation of damages.

(1) Thus, as was observed by Lord Eldon, in *Bedford* v. *McKowl* (3 *Esp.* 120), "although in point of form the action only purports to give a recompense for loss of service, we cannot shut our eyes to the fact that it is an

action brought by a parent for an injury to her child, and the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation; and as the parent of other children whose morals may be corrupted by her example." Damages given by a jury for this kind of tort will, therefore, rarely be reduced by the Court on the ground that they are excessive.

(2) *À fortiori* will this be the case, where the seducer has made his advances under the guise of matrimony. As was said by Wilmot, C. J., in a case of that character: "If the party seduced brings an action for breach of promise of marriage (*a*), so much the better. If much greater damages had been given, we should not have been dissatisfied therewith, the plaintiff having received this insult in his own house, where he had civilly treated the defendant, and permitted him to pay his addresses to his daughter" (*Tullidge* v. *Wade*, 3 *Wils.* 18).

(3) On the other hand, the defendant may, in mitigation of damages, call witnesses to prove that they have had sexual intercourse with the girl previously to the seduction (*Eager* v. *Grimwood*, 16 *L. J. Ex.* 236; *Verry* v. *Watkins*, 7 *C. & P.* 308). And, generally, the previous loose or immoral character of the party seduced is ground for mitigation. The using of immodest language, for instance, or submitting herself to the defendant under circumstances of extreme indelicacy.

(*a*) The loss caused to the plaintiff by *breach* of a *promise* to marry, however, is not to be taken into consideration, for that is a civil injury to *her* and not to the father.

Art. 63.—*Limitation.*[73]

An action for seduction must be commenced within six years (see 21 *Jac.* 1, *c.* 16, *s.* 3).

Section V.—Of Deceit or Fraud.

Art. 64.—*Definition of Fraud.*[74]

Fraud consists of:—

(1) A false statement made with intent to

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[73] "We take it to be undeniable that the Statute of Limitations began to run from the time of the seduction, for the plaintiff could have then brought his action, and need not have waited till the child was born. And upon the other point, the principles of the common law which regulate this action are not interfered with by this statute (7 Will. 4, c. 8), except where the action is brought by the father or mother of the girl. Where, as in this case, it is brought, as it may be under certain circumstances, by a person other than a parent, upon the ground that at the time of the seduction the girl was living in his family and was his servant, he must give evidence, as in England, that the alleged relation of master and servant existed at the time of the seduction; and the evidence that this was not the case in the present instance is clear" (*McKay* v. *Burley*, 18 *U. C. R.* 252—Robinson, C. J.).

Where the mother of the person seduced brought an action within six months from the birth of the child, it was *held* that by the statute [*Consol. Stat. U. C. c.* 77, *sect.* 3] the master's right of action was taken away, notwithstanding that the suit brought by the mother had abated, owing to her death after verdict in her favour had been set aside, and before a new trial granted had taken place (*Cross* v. *Goodman*, 20 *U. C. R.* 242).

[74] *McKay* v. *Campbell*, 2 *N. S.* (*Geldert & Oxley*),

induce another to act upon it, and either known to be false to the party making it, or made without belief in its truth, or recklessly without caring whether it be true or false; or

(2) An industrious concealment of a material fact with intent to induce another to act to his detriment; or

(3) Silence as to a material fact where the essence of a transaction is a confidence that all material facts will be disclosed.

Moral delinquency necessary.—After considerable diversity of opinion, it is now well settled, that in order to make a person liable for damages in a common law action of deceit, moral delinquency is necessary. As Mr. Justice (now Lord Justice) A. L. Smith said, in *Joliffe* v. *Baker* (11 *Q. B. D.* 274), "an action for damages for deceit cannot be maintained, unless the plaintiff establishes that the defendant has made a statement false in fact and *fraudulent in intent*. A statement false in fact, with regard to the truth or falsity of which the defendant *knows himself* to be entirely ignorant, and which he makes for the purpose of receiving some advantage to himself or causing some loss to the plaintiff, is fraudulent in intent; for he thereby lies about

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475). As to what is sufficient to sustain the action of deceit, see *Thomas* v. *Crooks*, 11 *U. C. R.* 579; and *Barr* v. *Doan*, 45 *U. C. R.* 491.

his state of knowledge" (and see also Bramwell, L. J., in *Weir* v. *Bell*, 3 *Ex. D.* 243; Maule, J., in *Evans* v. *Edmunds*, 13 *C. B.* 786; and Parke, B., in *Taylor* v. *Ashton*, 11 *M. & W.* 401). Much difference of opinion, however, has arisen of late years, as to whether this view of the law is correct, or whether a person making a false statement with intent to induce another to act upon it is not liable even where there was no intent to deceive; and many judges of great eminence have answered the question in the affirmative. For instance, the late Sir Geo. Jessel laid it down, in *Smith* v. *Chadwick*[75] (20 *Ch. D.* 44), in a passage quoted with approval by Sir J. Hannen, in *Peek* v. *Derry*[76] (37 *Ch. D.*

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[75] "The law upon the subject is well settled that it is not necessary in order to set aside a contract obtained by material false representations to prove that the party who obtains it knew at the time that the representation was made, that it was false, because a man is not allowed to get a benefit from a statement which he now admits to be false, if the other contracting party has done nothing to disentitle him to rescind and is in a position to place the party he contracted with in *statu quo*. But a misrepresentation to be material should be in respect of an ascertainable fa as distinguished from a mere matter of opinion, or as to the legal effect of a document, for the law in general is equally within the knowledge of all, and therefore a representation or statement of mere matter of law, although erroneous, will not in general be a sufficient ground for imputing fraud" (*McKenzie* v. *Dwight*, 11 *O. A. R.* 382—Burton, J. A.).

See also *Petrie* v. *Guelph*, *ibid.* 341; *Garland* v. *Thompson*, 9 *O. R.* 376; *Beatty* v. *Neelon et al.*, 9 *O. R.* 385; *Moffat* v. *Merchants' Bank*, 11 *S. C. R.* 46.

[76] An action for deceit will lie against a corporation (*Moore* v. *Ontario Investment Association*, 16 *O. R.* 269; *Budd* v. *McLaughlin*, 10 *M. L. R.* 75).

"That decision [*Derry* v. *Peek*], which commends itself

582), that "A man may issue a prospectus, or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and *which he ought to have known were not true, and if he does so, he is liable in an action for deceit;* he cannot be allowed to escape merely because he had good intentions, and did not intend to defraud." A similar view was expressed by Sir James (afterwards Lord) Hannen, in the case of *Peek* v. *Derry*, where his Lordship said: "No doubt the word 'fraud' is, in common parlance, reserved for actions of great turpitude, but the law applies it to lesser breaches of moral duty; and it appears to me the making of any statement upon which others are intended to act, *without reasonable ground for making it, without reasonable ground for believing it to be true*, is a breach of moral duty, although it may not be one of such dark complexion as to blast the character of the man for ever who does it. It is not necessary that

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fully to my sense of justice, puts an end to the difference of opinion as to whether an action for *negligent* misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained, and I think very properly holds that it cannot, and that there must be proof of fraud, and that nothing short of that will suffice" (*White* v. *Sage*, 19 *O. A. R.* 136—Burton, J. A.). *Aliter*, when action on contract only, *McKenzie* v. *Dwight*, *supra*.

"An action for deceit is not maintainable unless there is actual moral fraud" (*Bell* v. *Macklin*, 15 *S. C. R.* 581—Strong, J.).

Petrie v. *Guelph Lumber Co.*, 11 *S. C. R.* 450, judgment of Court of Appeal, Ont., affirmed; *Young* v. *Vickers*, 32 *U. C. R.* 385; *Ontario Copper Lightning Rod Co.* v. *Hewitt*, 29 *U. C. C. P.* 491; *Tupper* v. *Crowe*, 3 *N. S.* (*Russell & Geldert*), 261).

there should be that amount of wrong in order to give a lega remedy."

However, this view of the law has now been expressly overruled by the House of Lords, in the leading case of *Peek* v. *Derry* (14 *App. Cas.* 337), where it was laid down that, in an action of deceit, the plaintiff must prove actual fraud; he may prove it by shewing that the false representation was made knowingly, or without belief in its truth, or recklessly, not caring whether it was true or false. But a false statement made through carelessness, and *without reasonable ground for believing it to be true*, although it may be some evidence of fraud, does not necessarily amount to fraud; and if the Court comes to the conclusion that it was made in the honest belief that it was true, the defendant will not be liable, however unreasonable his belief may have been (see also *Glasier* v. *Rolls*, 62 *L. T.* 133; *Angus* v. *Clifford*, (1891) 2 *Ch.* 449; and *Le Lievre* v. *Gould*, (1893) 1 *Q. B.* 493). *Peek* v. *Derry* does not, however, apply to cases where there is a legal obligation to give correct information, as, for instance, where the law of warranties or estoppel is applicable (*Low* v. *Bouverie*, (1891) 3 *Ch.* 82).

This view of the law was considered to be so dangerous in the case of company promoters and directors, that it led to the passing of the Directors' Liability Act, 1890, by which it was enacted that where, after the passing of that Act a prospectus or notice invites persons to subscribe for shares in, or debentures or debenture stock of a company, every person who is a director of the company at that time, or has authorized his name to be mentioned as a director, or has agreed to become a director, and every promoter of such company, and every person who has authorized the issue of such

prospectus or notice, shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock, on the faith of such prospectus or notice, for loss or damage sustained by any untrue statement in the same, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein, or issued therewith, *unless it be proved*—

(1) With respect to such untrue statement, not purporting to be made on the authority of an expert or of a public official document or statement that the defendant had *reasonable ground to believe*, and did believe, that it was true; or

(2) With respect to every such expert report, that it fairly represented the statement of such expert, or was a correct copy of or extract from such report; and even then the defendant will be liable, if he had no reasonable ground for believing in the competency of the expert; or

(3) With respect to any such public or official document, that it was a correct and fair representation of such document; or

(4) That, having consented to become a director, the defendant withdrew his consent before the issue of the prospectus, which was issued without his authority; or

(5) That the prospectus or notice was issued without his knowledge or consent, and that, on becoming aware of it, he forthwith gave reasonable public notice that it was so issued; or

(6) That after issue of the prospectus, and before allotment, on finding out the untrue statements, he withdrew his consent, and gave reasonable

public notice of his withdrawal, and of the reason thereof.

It will be perceived that this statute really creates a new statutory duty, the breach of which is a tort, and that consequently it makes no alteration in the law relating to fraud. In short, it makes directors and promoters liable for carelessness as well as for fraud.

To return to the subject of the present section, the elements of legal fraud are: (1) intentional deceit; (2) practised with intent to induce another to act upon it. For if it were otherwise, a man might sue his neighbour for any mode of communicating erroneous information; such, for example, as having a conspicuous clock too slow, since the plaintiff might thereby be prevented from attending to some duty, or acquiring some benefit (*Barley* v. *Walford*, 9 *Q. B.* 197, 208).

It will be perceived, from the definition, that fraud may be either positive or negative; in other words, it may consist of a positive statement, or an equally deceptive suppression. It is desirable to treat these two classes separately.

ART. 65.—*When an Action will lie for fraudulent Statements.*[77]

(1) An action will lie, where, by reason of a fraudulent representation made by the defendant:—

(a) The person to whom it was made has

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[77] "It is averred that the defendant *wrongfully* and falsely made a statement in regard to the credit of the

been induced to act to his loss (*Pasley* v. *Freeman*,[78] 2 *Sm. L. C.* 71); or has otherwise suffered loss which is the natural consequence of the fraudulent representation; or

(b A third person has been so induced, if

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Lewines, and the amount in which they were indebted *to himself and his partners* and to Moss, which *he knew* at the time to be false. To make wrongfully and knowingly a false statement of the amount of a party's indebtedness to the very person of whom the inquiry is made, is in itself a fraud. We mean the allegation includes it so clearly as to make it unnecessary to apply the epithet. The distinction, as we take it, is between cases in which the party may be supposed to be expressing his opinion or conviction merely, and not to be stating a fact necessarily known to himself" (*Fowler* v. *Benjamin*, 16 *U. C. R.* 177—Robinson, C. J.).

"I understand the cases, although not very plainly expressed, to decide that a false affirmation by a person, which he knows to be untrue, or which he has no knowledge of at all, made with intent to induce another to act upon it to his damage, and such person does act upon it, describes a good cause of action; but, that if the affirmation be falsely and fraudulently made, and it is averred it is false in fact, it is not necessary to allege in pleading that the defendant knew it to be false" (*Young* v. *Vickers*, 32 *U. C. R.* 389—Wilson, J.).

[78] "Having gone over the authorities referred to by the plaintiff, we think they will sustain the general doctrine that a party who makes a false statement knowing it to be such, to be acted upon by another, may be held in law liable for the injury caused by its being so acted on" (*Sparkes* v. *Joseph*, 7 *U. C. C. P.* 73—Richards, J.).

By a covenant in a lease of a farm from defendant to plaintiff, it was provided that upon receiving six months' notice from lessor that he had sold the farm, and upon receiving compensation for all labour up to the date of the

the representation was made with the direct intention that he should so act (*Langridge* v. *Levy*, 2 *M. & W.* 519).

(2) Provided that where the fraudulent statement consists of a false representation as to the conduct, credit, ability or dealings of another, with intent to procure for him credit, money or goods, no action will lie unless the representation is in writing signed by the defendant (*a*) (9 *Geo.* 4, *c.* 14, *s.* 6).

Elements of an action of deceit.[79]—As Lord Selborne said, in *Smith* v. *Chadwick* (9 *App. Cas.* 190): "I conceive that in an action of deceit it is the duty of the

(*a*) It will be observed that the signature must be that of the defendant himself, and not of an agent or partner (*Swift* v. *Jewsbury*, *L. R.* 9 *Q. B.* 301; *Mason* v. *Williams*, 28 *L. T. N. S.* 232).

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notice, from which he had derived no return, the lessee would deliver up possession at the end of six months, the compensation being duly paid. Defendant served the plaintiff with a notice that he had sold the farm, in consequence of which the plaintiff desisted from putting in crops and other work for which he had made preparation, and rented another farm. Upon ascertaining that the notice was untrue, the plaintiff refused to give up possession, and sued the defendant for false representation. *Held*, that the plaintiff was entitled to recover the damage sustained by him in consequence of the notice (*Cowling* v. *Dickson*, 5 *Tupper's Reps. in App.* 549; *Silverthorne* v. *Hunter*, *ibid.* 163; *Brennan* v. *Brennan*, 19 *O. R.* 327; *McKay* v. *The Commercial Bank*, *N. B. R.* 1 *Pug.* 1, and *L. R.* 5 *P. C. Appeals*, 394).

[79] In order that a representation may be actionable it must be fraudulently made. Where, therefore, in an action to recover damages for falsely representing that a forged

plaintiff to establish two things; first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts; and secondly, he must establish that this fraud was an inducing cause to the contract; for which

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cheque was genuine, the jury answered in the negative the question, "Did the defendant falsely, fraudulently, and deceitfully represent the signature to the cheque to be genuine, when in truth and in fact it was a forgery?" The action was *held* not maintainable, though in answer to other questions they found that the defendant made the representation without knowing whether it was true or false, without a reasonable belief in its truth, and without making proper inquiries (*White* v. *Sage*, 19 *O. A. R.* 135).

To sustain an action for deceit actual fraud must be proved, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law fully imputes to produce those consequences which are the natural result of his acts; and it must also be established that such fraud was the inducing cause to the contract, and must have produced in the mind of the person alleged to be defrauded an erroneous belief influencing his conduct (*Garland* v. *Thompson*, 9 *O. R.* 376).

Fraud is necessary to the existence of an estoppel by conduct. The person must have been deceived. The party to whom the representation is made must have been ignorant of the truth of the matter, and the representation must have been made with the knowledge of the facts, and it (the representation) must be plain and not a matter of mere inference of opinion (*McGee* v. *Kane*, 14 *O. R.* 226; and see *Newman* v. *Kissock*, 8 *U. C. C. P.* 41; and *Fowler* v. *Benjamin*, 16 *U. C. R.* 174).

purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct." In short, as was said by Buller, J., in *Pasley* v. *Freeman* (*ubi sup.*): "Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies."

(1) **Illustrations of fraud followed by damage.**—Thus, where one fraudulently misrepresents the amount of his business, and the person to whom such representation is made, acting on the faith thereof, purchases it and is damnified, an action of deceit will lie against the vendor (*Dobell* v. *Stevens*, 3 *B. & C.* 623; *Smith* v. *Chadwick*, *ubi sup.*). But a mere careless statement as to the percentage of profits on capital, made honestly, but untrue in point of fact by reason of the defendant having omitted to include trade buildings in his computation of capital, has been held to give no right of action (*Glasier* v. *Rolls*,[80] 62 *L. T.* 133).

(2) Similarly, where a gunmaker sold a gun to B., for the use of C., fraudulently warranting it to be sound, and the gun burst while C. was using it, and he was thereby injured: held, that C. might maintain an action for false representation against the gunmaker (*Langridge* v. *Levy*, *ubi sup.*). But actual fraud must be proved in such a case, and mere negligence, however gross, is insufficient (see *Le Lievre* v. *Gould*, (1893) 1 *Q. B.* 491).

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[80] An action will not lie by a married woman against the father, mother, and brother of her husband for damages for false representations made to her before marriage as to the character and financial standing of her husband, and for entering into a fraudulent conspiracy to induce the plaintiff to enter into the marriage contract (*Brennan* v. *Brennan*, 19 *O. R.* 327).

(3) Previously to the Directors' Liability Act, 1890, the directors of a company circulated a prospectus, which offered the issue of 7 per cent. preference shares to the amount of 50,000*l.*, and represented that "guaranteed dividends at the minimum rate of 7 per cent. per annum, or 3*l.* 10*s.* each half-year's dividend," were payable half-yearly on these shares until a specified date, and that this dividend was "secured by a deposit with trustees, of a sufficient amount of government securities and first-class bank and insurance stock to cover same." There was, in fact, no such guarantee for the payment of the dividends, nor were the dividends secured by deposit of any government securities or first-class bank or insurance stock. The plaintiff, on the faith of this prospectus, applied for, and was allotted, shares which proved worthless, and she therefore sued the directors for fraud. On these facts, and on the evidence, it was held, that the statements in question were false to the knowledge of the directors who made them; that they were made for the purpose of inducing persons to take shares, and were calculated to mislead; and that consequently it was impossible to say that an action for deceit would not lie (*Knox* v. *Hayman*, 67 *L. T.* 137).

(4) On the other hand, in *Angus* v. *Clifford* ((1891) 2 *Ch.* 449), where directors (also prior to the Directors' Liability Act, 1890) carelessly, but honestly and without any intention to deceive, stated, in a prospectus, that reports of certain engineers were "prepared for the directors," the fact being that they were prepared for the vendors who sold to the company, it was held, that the directors were not liable. As Lindley, L. J., said, "speaking of *Peek* v. *Derry* broadly, I take it that it has settled once for all the controversy which was well

known to have given rise to very considerable differences of opinion, as to whether an action for negligent misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained. There was considerable authority to the effect that it could, and there was considerable authority to the effect that it could not; and as I understand *Peek* v. *Derry*, it settles that question in this way, that an action for a negligent, as distinguished from a fraudulent, misrepresentation, cannot be supported." Of course, however, since the Directors' Liability Act a similar case would be decided the other way.

(5) Where a coal merchant conspires with the agent of a purchaser to charge the purchaser a higher price than he (the coal merchant) was willing to sell at, the difference being paid to the agent by way of a bribe, it was held by the Court of Appeal that an action for fraud lay against the coal merchant. At first sight it seems a little difficult to see where the fraudulent misstatement comes in, but the judgment of Lord Esher, M. R., brings it out with his customary lucidity. His Lordship said: "The fraud was this, that the defendant allowed and assisted the agent of the corporation to put down a false figure as the price of the coals, in order to cheat the corporation out of a shilling a ton, which was to be paid to their own agent" (*Salford* (*Mayor of*) v. *Lever*, (1891) 1 *Q. B.* 168; 60 *L. J. Q. B.* 39; 63 *L. T.* 658).

(6) The false statement need not be made with intent to benefit the defendant. It is sufficient that it was made maliciously and was followed by loss which a reasonable man might have contemplated. Thus, where a foolish practical joker told the plaintiff that her

husband had had both his legs smashed in a railway accident and that she was to go to him at some distance immediately with appliances for bringing him home, he was held liable for the nervous shock and subsequent ill-health of the plaintiff (*Wilkinson* v. *Downton*, (1897) 2 *Q. B.* 57).

(7) So where a person is induced by the deceitful representations of another to commit an act (*ex. gr.* invade the territories of a friendly state), which is in fact a crime, but which he believed to be lawful, he can sue the person who made the representation for any damages which he may have sustained (*Burrows* v. *Rhodes*, (1899) 1 *Q. B.* 816).

(8) **Frauds by agents.**— Although, as above stated, it is now settled that the defendant, in actions of deceit, must have been guilty of moral delinquency, it has also been held, after much conflict of opinion, that (except as to cases coming under paragraph (2) of the present article) the fraud of the agent, acting within the scope of his employment, is, in law, the fraud of the principal. Thus, a plaintiff, having for some time, on a guarantee of the defendants, supplied J. D., a customer of theirs, with oats, on credit, for carrying out a government contract, refused to continue to do so unless he had a better guarantee. The defendants' manager thereupon gave him a written guarantee, to the effect that the customer's cheque on the bank in plaintiff's favour, in payment of the oats supplied, should be paid on receipt of the government money in priority to any other payment "except to this bank." J. D. was then indebted to the bank to the amount of 12,000*l.*, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff,

thereupon, supplied the oats to the value of 1,227*l.* The government money, amounting to 2,676*l.*, was received by J. D. and paid into the bank; but J. D.'s cheque for the price of oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to detain the whole sum of 2,676*l.* in payment of J. D.'s debt to them. The plaintiff having brought an action for false representation: Held, first, that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing, and fraudulently concealed from the plaintiff the fact which would make it so; and secondly, that the defendants would be liable for such fraud (*Barwick* v. *English Joint-Stock Bank*,[81] *L. R.* 2 *Ex.* 259).

(9) An officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A., which, by omitting a material fact, misled A., and induced him to accept a bill in which the bank was interested, and A. was compelled to pay the bill: Held, that A. could recover from the bank the amount so paid. In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated, for the purposes of pleading, as that of the principal (*Mackay* v. *Commercial Bank of New Brunswick*, *L. R.* 5 *P. C.* 394. See, also, *Addie* v. *Western Bank of Scotland*, *L. R.* 1 *H. L.* 145, and the more recent case of *Houldsworth* v. *City of Glasgow Bank and Liquidators*, 5 *App. Cas.* 317). A principal agent is not, however, responsible for the

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[81] *Gilpin* v. *Royal Canadian Bank*, 26 *U. C. R.* 445.

false representation of a sub-agent made on behalf of his principal. For instance, *the directors* of a limited company are not personally responsible for the fraudulent representation of an agent of the company, unless such representation was made by their inducement or authority (*Bear* v. *Stevenson*, 30 *L. T.* 177).

(10) Of course where an agent makes a fraudulent statement outside the general scope of his employment, the principal will not be liable. For instance, where the secretary of a company by false statements induced persons to take shares, it was held that the company was not liable; for it is no part of the duty of a secretary of a company to make representations to persons to induce them to become shareholders (*Newlands* v. *Nat. Employers' Acc. Ass. Co.*, 54 *L. J. Q. B.* 428). And *à fortiori* will this be the case where a secretary makes the fraudulent statements for his own benefit (*British, &c. Banking Co.* v. *Charnwood, &c. Ry. Co.*, 18 *Q. B. D.* 714; *Barnett* v. *S. London Tramways Co.*, *ib.* 815; and *Thorne* v. *Heard*, (1895) *A. C.* 495).

ART. 66.—*When an Action will lie for fraudulent Silence.*

The general rule, both of law and equity, is, that mere silence with regard to a material fact will not give a right of action,

(a) unless active artificial means have been taken to prevent the other party from discovering the fact for himself; or

(b) unless the essence of the transaction

implied confidence reposed in the party concealing, to divulge all material facts.

(1) Thus, in the case of a sale, although a vendor is bound to employ no artifice or disguise for the purpose of concealing defects in the article sold (since that would amount to a positive fraud on the vendee), yet, under the general doctrine of *caveat emptor*, he is not ordinarily bound to disclose every defect of which he may be cognisant, although his silence may operate virtually to deceive the vendee (see *Story on Contracts*, p. 511, cited with approval in *Ward* v. *Hobbs*, 4 *App. Cas.*, p. 26; see also *Fletcher* v. *Krell*, 42 *L. J. Q. B.* 55).

(2) Again, the defendant sent for sale, to a public market, pigs which he knew to be infected with a contagious disease. They were exposed for sale subject to a condition that no warranty would be given and no compensation would be made in respect of any fault. No verbal representation was made by or on behalf of the defendant as to the condition of the pigs. The plaintiff having bought the pigs, put them with other pigs which became infected. Some of the pigs bought from the defendant, and also some of those with which they were put, died of the contagious disease: Held, that the defendant was not liable for the loss sustained by the plaintiff, for that his conduct in exposing the pigs for sale in the market did not amount to a representation that they were free from disease (*Ward* v. *Hobbs*, *sup.*). "The mere fact," said Brett, L. J., when that case was before the Court of Appeal (3 *Q. B. D.* 162), "of offering a defective chattel for sale, where nothing is said about quality and condition, and nothing is done to conceal the defect, gives no cause of action, though the seller knows of the defect, and he knows

that if the purchaser even suspected him of the knowledge he would not buy."

(3) So, also, in *Peek* v. *Gurney* (*L. R.* 6 *H. L.* 403), Lord Cairns remarks: "I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would, in my opinion, form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misrepresentation of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."

(4) "Even if the vendor was aware," observes Lord Blackburn, "that the purchaser thought the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him; and a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit. For, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor" (*Smith* v. *Hughes*, *L. R.* 6 *Q. B.* 579).

(5) On the other hand, where the vendor of a house, knowing of a defect in one of the walls, plastered it up and papered it over, in consequence whereof the vendee

was deceived as to its true condition, and was damnified: it was held, that the purchaser could maintain an action of deceit (*Pickering* v. *Dowson*, 4 *Taunt.* 785).

(6) Again, where a ship was to be taken "with all faults," and the vendor knew of a latent defect in her, and, in order to escape its detection, *concealed it* and made a fraudulent representation of her condition: Held, that an action of deceit would lie (*Schneider* v. *Heath*, 3 *Camp.* 506). For the expression "all faults" is not equivalent to "all frauds," and there is a vast difference between leaving a man to form his own judgment, and laboriously perverting the facts on which alone a correct judgment can be founded, by taking active means to prevent him learning of their existence. The active concealment of a defect is, in fact, equivalent to a *statement* that it does not exist. A statement is merely a communication from one mind to another, and such a communication may be made as readily and as positively by acts leading to the inference intended to be communicated, as by words uttered or reduced into writing.

(7) There are, however, some exceptional cases, in which even silence is a breach of duty, without any active concealment of fact. For instance, where a person is desirous of effecting an insurance on his life, the law casts upon him the duty of divulging everything which he knows about his health and habits which would affect the judgment of the directors of the office in determining whether they will accept or reject the risk. The very essence of such a transaction is confidence reposed by the directors in the candidate for insurance, and it is a gross breach of that confidence, amounting to fraud, if he omits to communicate facts to

them which he knows would influence their judgment, and which they cannot find out by reasonable diligence for themselves.

(8) It is apprehended that the same principle would apply to the case where one gives "a character" in reply to an application from an intending employer, where the suppression of a material fact (*e.g.*, drunkenness or immorality) might make a material difference to the decision of the party seeking the character.

ART. 67.—*Limitation.*[82]

An action for deceit must be brought within six years, unless the existence of the fraud was fraudulently concealed by the defendant, in which case the action must be brought within six years after the plaintiff discovers, or might by reasonable diligence have discovered, the fraud (*Gibbs* v. *Guild*, 9 *Q. B. D.* 59; and see *Bulli Coal Mining Co.* v. *Osborne*, (1899) *A. C.* 351.)

Canadian Cases.

[82] In an action on the case for fraudulent misrepresentation, the Statute of Limitations begins to run from the time of the misrepresentation, not from the time of its discovery by the plaintiff, nor from the time that damages accrued (*Dickson* v. *Jarvis*, 5 *U. C. R. O. S.* 694).

Section VI.—Of Illegal Coercion.

Art. 68.—*General Liability.*[82a]

(1) Every person is guilty of a tort who, with a view to compel another to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, without legal authority :—

(*a*) uses violence to or intimidates such other person or his wife or children or injures his property ; or

(*b*) persistently follows him about from place to place ; or

(*c*) hides his tools, clothes, or other property ; or deprives him of or hinders him in the use thereof ; or

(*d*) watches or besets the house or other place where he resides or works or carries on business or happens to be, or the approach to such house or place ; or

(*e*) follows him with two or more other persons in a disorderly manner in or through any street or road ; or (*semble*) commits any other unlawful act.

(2) Provided that watching or besetting does not include attending at or near any such house or place, in order merely to obtain or

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Canadian Cases.

[82a] See *Hynes* v. *Fisher*, 4 *O. R.* 60, *ante*, pp. 164, 165.

communicate information (see 38 & 39 Vict. c. 86, s. 7).

(3) Provided also that an act lawful in itself which inflicts loss is not converted by a malicious or bad motive into an unlawful act, so as to make the doer liable to an action for tort.

(1) **Besetting by strike pickets.**—In *J. Lyons & Sons* v. *Wilkins*, (1899) 1 *Ch.* 255, the facts were as follows:—A strike was in progress at the plaintiffs' works, in the course of which the works were "picketed" by persons employed by the Trades Union of which the defendant was an executive officer. It was admitted that the pickets used no violence, intimidation, or threats; but, in the opinion of the court, the evidence showed that the picketing, or the acts done by the pickets, were done with the view to compel the plaintiffs to change their mode of conducting their business, and constituted watching and besetting, as distinguished from "attending merely to obtain or communicate information," and accordingly an injunction was granted. Lindley, M.R., in giving judgment, said: "The truth is, that to watch or beset a man's house with a view to compel him to do or not to do what is lawful for him not to do or to do, is wrongful and without lawful authority, unless some reasonable justification for it is consistent with the evidence. Such conduct seriously interferes with the ordinary comfort of human existence and the ordinary enjoyment of the house beset, and such conduct would support an action for a nuisance at Common law. Proof that the nuisance was 'peaceably to persuade other people' would afford no defence to such an action. Persons *may be peaceably persuaded, provided the method employed is not a nuisance to other people.*"

(2) **Persuading a master to dismiss non-union workmen.**—In accordance with the last sentence it has been held that no action lay in the following case, although the motives of the defendant were malicious and bad, and the consequences to their victims were disastrous. The plaintiffs were shipwrights employed "for the job" on the repairs to the woodwork of a ship, but were liable to be discharged at any time. Some ironworkers who were employed on the ironwork of the ship objected to the plaintiffs being employed, on the ground that they had previously worked at ironwork on a ship for another firm, the practice of shipwrights working on iron being resisted by the trade union of which the ironworkers were members. The defendant, who was a delegate of the union, was sent for by the ironworkers, and informed that they intended to leave off working. The defendant informed the employers that, unless the plaintiffs were discharged, all the ironworkers would "be called out" on strike, that the employers had no option, that the iron men were doing their best to put an end to the practice in question, and that wherever the shipwrights were employed the iron men would cease work. There was evidence that this was done to punish the plaintiffs. The employers, giving way to this coercion, discharged the plaintiffs, who thereupon sued the defendant, and the jury found that he had maliciously induced the employers to discharge the plaintiffs, and gave damages. The House of Lords, however, by a majority, dismissed the action, on the ground that the defendant had violated no legal right of the plaintiffs, done no unlawful act, and used no unlawful means in procuring the plaintiffs' dismissal; and that therefore his conduct, however malicious or bad his motive might be, was not actionable (*Allen* v.

Flood, (1898) *A. C.* 1, where the whole law on the subject is elaborately discussed).

(3) **Trade combination to injure rivals.**—A similar result was arrived at in *Mogul Steamship Co., Limited* v. *McGregor and others*, (1892) *A. C.* 25. There owners of ships, in order to secure a carrying trade exclusively for themselves and at profitable rates, formed an association, and agreed that the number of ships to be sent by members of the association to the loading port, the division of cargoes and the freights to be demanded should be the subject of regulations; that a rebate of 5 per cent. on the freights should be allowed to all shippers who shipped only with members; and that agents of members should be prohibited, on pain of dismissal, from acting in the interest of competing shipowners, any member to be at liberty to withdraw on giving certain notices. The plaintiffs, who were shipowners excluded from the association, sent ships to the loading port to endeavour to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid the plaintiffs, and reduced freights so low that the plaintiffs were obliged to carry at unremunerative rates. They also threatened to dismiss certain agents if they loaded the plaintiffs' ships, and circulated a notice that the rebate of 5 per cent. would not be allowed to any person who shipped cargoes on the plaintiffs' vessels. The plaintiffs having brought an action for damages against the associated owners alleging a conspiracy to injure the plaintiffs: Held, affirming the decision of the Court of Appeal (23 *Q. B. D.* 598), that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not employed any unlawful means, the plaintiffs had no cause of action.

CHAPTER II.

OF TORTS FOUNDED ON NEGLIGENCE (*a*).

ART. 69.—*Definition.*

112. (1) Negligence consists in the omission to do something which a reasonable man would do, or the doing something which a reasonable man would not do (*Blyth* v. *Birm. Water Co.*,[83] 25 *L. J. Ex.* 212).

(2) Negligence is wrongful whenever, as between the plaintiff and the defendant, there

(*a*) Most actions for negligence against railway companies are not founded on tort, but upon the breach of the implied contract to carry the passenger with all due care, and therefore they are not touched upon in this work.

Canadian Cases.

[83] A toll house extended to the edge of the highway and in front of it was a short board walk. The gate was attached to a post on the opposite side of the road, and was fastened at night by a chain, which was usually carried across the board walk and held by a large stone against the house. The board walk was generally used by foot passengers, and C. walking on it at night tripped over the chain and fell, sustaining the injuries for which the action was brought. *Held*, that C. had a right to use the board walk as part of the public highway, and was moreover, invited by the company to use it, and there was, therefore, no contributory negligence (*The Kingston and Bath Road Co.* v. *Campbell*, 20 *S. C. R.* 605).

Negligence is a relative term (*McDougall* v. *McDonald*, 3 *N. S. R.* 219; *Neal* v. *Allan et al.* 6 *N. S. R.* 449).

is a duty cast upon the latter to be careful; and any breach of this duty which results in damage to the plaintiff which ought reasonably to have been foreseen, is a tort (see per Ld. Herschell, *Cal. Ry. Co.* v. *Mulholland*, (1898) *A. C.* 225).

General illustrations.[84]—(1) Thus, where the plaintiff was in the occupation of certain farm buildings, and of

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Canadian Cases.

[84] It is the duty of a motorman in charge of an electric car on a street railway to take special care to have the car sufficiently under control, to enable him to avoid collision with aged and infirm persons on foot whose infirmities are plainly evident, and who may be crossing the line of railway at a street crossing (*Haight* v. *The Hamilton Street Railway Co.*, 29 *O. R.* 279; *Cornish* v. *Toronto St. R. W. Co.*, 23 *U. C. C. P.* 355).

Defendant's horses and carriage, driven by his servant westerly along S. road, met opposite the gate of defendant's stable yard, situated on the northern side of the road, a horse and truck coming in the opposite direction, and instead of passing on the south side, attempted to pass on the side nearest the stable yard (the intention of the driver being to proceed to a house a few yards west of the stables), when the horses suddenly turned in towards the yard, knocking down and injuring the plaintiff, who was coming along the sidewalk near the gate. *Held*, that the accident resulted from the careless and negligent driving of the defendant's servant, and verdict for plaintiff upheld (*Lownd* v. *Robinson*, 2 *N. S. Reps.* (*Russell & Chesney*), 364; *Courser* v. *Kirkbride*, 23 *N. B. R.* 404; *Black* v. *Municipality of St. John*, 23 *N. B. R.* 249).

Where plaintiff was injured by an explosion of gas in defendant company's mine, occasioned by an erroneous plan of the workings, but it was not proved that the company had employed incompetent men to superintend the mining and plaintiff was not employed under any special agreement. *Held*, that he could not maintain an action against the company for the injury (*Smith* v. *Inter-Colonial Coal Mining Company*, 2 *N. S. Reps.* (*Russell & Chesney*), 556).

corn standing in a field adjoining the field of the defendant, and the defendant stacked his hay on the latter, knowing that it was in a highly dangerous state and likely to catch fire, and it subsequently did ignite and set fire to the plaintiff's property, it was held, that the defendant was liable (*Vaughan* v. *Menlove*,[85] 3 *Bing. N. C.* 468; see also *Cox* v. *Vestry of Paddington*, 64 *L. T.* 566).

(2) So, where the defendant entrusted a loaded gun to an inexperienced servant girl, with directions to take the priming out, and she pointed and fired it at the plaintiff's son, wounding and injuring him, it was held that the defendant was liable. For entrusting a loaded gun to such a person was an act which a reasonable man would not have committed (*Dixon* v. *Bell*,[86] 5 *M. & S.* 198).

(3) In the case of *Heaven* v. *Pender*[87] (11 *Q. B. D.* 503), the defendant, a dock owner, had erected a staging round a ship, under a contract with the ship-owner. The plaintiff was a workman in the employ of

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Canadian Cases.

[85] Although a railway company is not responsible for the emission of sparks, &c., from its engine, when all known and reasonable precautions are taken to prevent it, yet it must keep the track reasonably clear from combustible matter, &c., likely to be thus set on fire. But it was *held*, under the circumstances of the case—the railway having recently been built through the forest, and the plaintiff's land being in a state of nature—that there was not sufficient evidence of negligence on the defendants' part (*Jaffrey* v. *Toronto, Grey and Bruce R. W. Co.*, 23 *U. C. C. P.* 553; and 24 *U. C. C. P.* 271; *Peers* v. *Elliott*, 21 *S. C. R.* 19; *McLaren* v. *Canada Central R. Way Co.*, *ante*, p. 8, and *post*, p. 309; *The North Shore R. W. Co.* v. *McWillie*, 17 *S. C. R.* 511; *Holmes* v. *Midland*, *post*, p. 299; *New Brunswick R. W. Co.* v. *Robinson*, *post*, p. 305; and *Rainville* v. *G. T. Rway. Co.*, *post*, p. 306; and *ante*, p. 28).

[86] *Carroll* v. *Freeman*, 23 *O. R.* 283.

[87] *Caldwell* v. *Mills*, 24 *O. R.* 462.

a painter who had contracted with the shipowner for the painting of the ship. In order to do this the plaintiff had to use the staging. Owing to the defendant's negligence the staging fell, and the plaintiff was injured: Held, reversing the court below, that the plaintiff being engaged on work in the performance of which the defendant as dock owner was interested, the defendant was under an obligation to him to take reasonable care that the staging was safe, and that for neglect of that duty the defendant was liable. As Lord Esher, M.R., said: "Whenever one person is by circumstances placed in such a position with regard to another, that everyone of common sense, who did think, would at once recognize that if he did not use ordinary care and skill in his conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger" (see also *Elliott* v. *Hall*, 15 *Q. B. D.* 315; *Hyman* v. *Nye*, 6 *Q. B. D.* 685; and distinguish *Cal. Ry. Co.* v. *Mulholland*,[87a] (1898) *A. C.* 216).

(4) Where a dock-master or wharfinger invites a vessel to a particular place to unload, and, owing to an inequality in the bottom of the dock, the vessel is injured, the dock company or wharfinger is liable. For the dock-master or wharfinger either knew, or ought to have known, of the danger; and in either view was negligent (see *Owners of Apollo* v. *Port Talbot Co.*, (1891) *App. Cas.* 499; *The Moorcock*, 14 *P. D.* 64; but see *The Calliope*,[88] (1891) *App. Cas.* 11; *Engley* v. *McIlreith*, 3 *N. S. R.* 511).

Canadian Cases.

[87] *Martin* v. *Taylor*, 3 *N. S. R.* 94.

[88] "The evidence seems to have established very clearly that the wharf or pier in question was carelessly suffered

(5) On the other hand, a water company whose apparatus was constructed with reasonable care, and to withstand ordinary frosts, was held not to be liable for the bursting of the pipes by an extraordinarily severe frost (*Blythe* v. *B. W. W. Co.*, *sup.*).

(6) And so, where the defendants' line was misplaced by an extraordinary flood, and by such misplacement injury was done to the plaintiff, it was held that no action could be maintained against the defendants (*Withers* v. *The North Kent R. Co.* 27 *L. J. Ex.* 417).

(7) Again, a valuable greyhound was delivered by his owner to the servants of a railway company, who were not common carriers of dogs, to be carried; and the fare was demanded and paid. At the time of delivery the greyhound had on a leather collar, with a strap attached thereto. In the course of the journey, it being necessary to remove the greyhound from one train to another which had not then come up, it was fastened by means of the strap and collar to an iron spout on the open

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Canadian Cases.

to be for a long time out of repair on that part on which the plaintiff received the injury, while nothing more seems to have been necessary than the substituting a sound plank for one that had become rotten. The defect was apparent; others had fallen into the hole; it was considered dangerous; and it was suffered to be in that state, though it was on that part of the wharf at which vessels generally lie while they are taking in or discharging their cargo. The plaintiff was a deck hand on board of one of their vessels. He stepped from the vessel on the wharf after dark, got his leg into this hole, and broke it. The principles of the common law sustain this action, if it be true, as the jury found it was, that the pier in question was in the possession of the defendants, and used and enjoyed by them, and under their control" (*Johnson* v. *The Port Dover Harbour Co.*, 17 *U. C. R.* 155, 156—Robinson, C. J.).

platform of a station, and, while so fastened, it slipped its head, ran on the line, and was killed: Held, that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence (*Richardson* v. *N. E. R. Co.*,[89] *L. R.* 7 *C. P.* 78; and see also *Cobb* v. *G. W. R. Co.*, (1894) *A. C.* 419).

(8) Moreover, in order to give rise to an action for negligence founded on tort, it must be proved that the injury suffered ought reasonably to have been anticipated by the defendant as the result of his negligence. If he could not reasonably have foreseen it, he will not be liable. Thus, where a contractor was engaged in making an excavation with a steam crane, and a person came and looked on idly, and, in consequence of a defect in the crane, he was killed, it was held that there was no evidence to sustain an action by his widow. As Lord Esher, M.R., put it: "There was no evidence to show that the defendant's workmen had reason to expect the deceased to be at the spot where he met with his death. There was no contract between the defendant and the deceased; the defendant did not undertake with the deceased that his servants should not be guilty of negligence; no duty was cast upon the defendant to take care that the deceased should not go to a dangerous place" (*Batchelor* v. *Fortescue*, 11 *Q. B. D.* 474; and see also to same effect, *Tolhausen* v. *Davies*, 58 *L. J. Q. B.* 98). It must be, however, borne in mind that, in both these cases, the injury was suffered on the defendant's premises, where a man may do things freely which

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Canadian Cases.

[89] *Hurd* v. *Grand Trunk R. W. Co.*, 15 *O. A. R.* 58; *Howe* v. *Hamilton and N. W. R. Way Co.*, 3 *Tupper's Reps.* 336.

he would not be able to do with impunity on or adjacent to a public highway, or another person's property.

(9) **Dangerous animals.**—So, if a man *knowingly* keeps dangerous animals, he is answerable for any injury they may commit, and that, too, though he has done his best to secure their safe keeping. In other words, he who keeps an animal of the above description (*May* v. *Burdett*, 9 *Q. B.* 101), knowing it to be so, does that which, in the eyes of the court, a reasonable man would not do (*Cox* v. *Burbidge*,[90] 13 *Com. B. N. S.* 430). If the animal is by nature dangerous, no actual knowledge of its previous disposition is necessary, for in that case a man must absolutely guarantee that his precautions are adequate, and he would only be excused if the animal escaped by the malice of a third party or by the act of God (see *Filburn* v. *People's Palace Co.*, the case of a tame elephant, 25 *Q. B. D.* 258; 38 *W. R.* 706). But if the animal is naturally domestic, then actual knowledge (technically called "scienter") of his fierceness must be proved (*R.* v. *Huggins*, 2 *Ld. Raym.* 1583). It is not necessary, in order to sustain an action against a person for negligently keeping a ferocious dog, to show that the animal has actually bitten another person before it bit the plaintiff: it is enough to show that it has, to the knowledge of its owner, evinced a savage disposition, by attempting to bite another person (*Worth* v. *Gilling*, *L. R.* 2 *C. P.* 1; and see also *Simson* v. *General Omnibus Co.*, *L. R.* 8 *C. P.* 390, a case of a kicking horse). The previous tendency to bite must,

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Canadian Cases.

[90] *Shaw* v. *McCreary*, 19 *O. R.* 39; *Vaughan* v. *Wood*, 18 *S. C. R.* 703, affirming the Supreme Court of New Brunswick; *McKenzie* v. *Blackmore*, 19 *N. S. R.* 203; *Arnold* v. *Diggdon*, 20 *N. S. R.* 303.

however, have been to bite human beings, and not merely other animals (*Osborne* v. *Choqueel*, (1896) 2 *Q. B.* 109). It has been held that, if the owner of a dog appoints a servant *to keep it*, the servant's knowledge of the animal's disposition is the knowledge of the master, for it is knowledge acquired by him in relation to a matter within the scope of his employment (*Baldwin* v. *Casella*, *L. R.* 7 *Ex.* 325). But where the complaint is made to a servant, who has no control over the defendant's business, nor of his yard where his dog was kept, nor of the dog itself, the knowledge of the servant would not necessarily be that of the master (*Stiles* v. *The Cardiff Steam Navigation Co.*, 33 *L. J. Q. B.* 310; and see *Applebee* v. *Percy*, *L. R.* 9 *C. P.* 647).

Exception.—By 28 & 29 Vict. c. 60, s. 1, scienter of a dog's disposition, which has injured sheep or cattle, need not be proved. It has been held that horses are to be included under the term *cattle* (*Wright* v. *Pearson*, *L. R.* 4 *Q. B.* 582). Nor is it necessary to show a scienter where the action is founded on the breach of a contract to use reasonable care, and not upon any breach of duty as the owner of a mischievous animal (*Smith* v. *Cook*, 1 *Q. B. D.* 79).

(10) For further examples of negligence[91] the reader is referred to *Holmes* v. *Mather*, *L. R.* 10 *Ex.* 261;

Canadian Cases.

Railway Cases.

[91] The fulfilment of the requirements of the statute (Con. Stat. Can., 1859, c. 66, sects. 103, 104) [now sects. 244 and 256 of the Railway Act (Canada), 1888], by the railway company as to the ringing of the bell or sounding the whistle at or approaching crossings does not of itself free the company from the responsibility of accidents or damages arising from any neglect or breach of duty by which any damage may arise (*Ham* v. *The Grand Trunk Railway Co.*, 11 *U. C. C. P.* 86).

All persons rightfully upon the railway track, as well as

Firth v. *Bowling Iron Co.*, 3 *C. P. D.* 254; *Harris* v. *Mobbs*, 3 *Ex. D.* 268; *Clark* v. *Chambers*, 3 *Q. B. D.*

Canadian Cases.

upon the highway crossing next to the coming train, are entitled to the benefit of the provisions of sect. 256 of the "Railway Act" (Canada), 1888, requiring warning by bell or whistle on approaching a highway. But where a passenger could not be said to have been impliedly invited on to the defendants' track and was killed, it was *held* that his representative could not claim the protection which the statute would otherwise have given him (*Anderson* v. *Grand Trunk R. W. Co.*, 27 *O. R.* 441; *Levoy* v. *Midland R. W. Co.*, 3 *O. R.* 623; *Grand Trunk R. W. Co.* v. *Anderson et al.*, 28 *S. C. R.* 541; *Can. Pac. Ry. Co.* v. *Fleming*, 22 *S. C. R.* 33; *Winckler* v. *G. W. R. Way Co.*, 18 *U. C. C. P.* 260; *Tyson* v. *The Grand Trunk R. Way Co.*, 20 *U. C. R.* 256, *post*, p. 303).

Consolidated Statutes of Canada, c. 66, sect. 104 [now Railway Act, Canada (51 Vict. c. 29, sect. 256)], must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by the statute, whether such damage arises from actual collision or, as in this case, by a horse being brought over near the crossing and taking fright at the appearance or noise of the train (*Grand Trunk R. W. Co.* v. *Rosenberger*, 9 *S. C. R.* 311; and see *Peart* v. *Grand Trunk R. Way Co.*, *post*, p. 314; and *N. B. Ry. Co.* v. *Van Wart*, *post*, p. 315).

A railway company has no authority to build its road so that part of its road bed shall be some distance below the level of the highway, unless upon the express condition that the highway shall be restored so as not to impair its usefulness, and the company so constructing its road, and any other company operating it, is liable for injuries resulting from the dangerous condition of the highway to persons lawfully using it. A company which has not complied with the statutory conditions of ringing a bell when approaching a crossing is liable for injuries resulting from a horse taking fright at the approach of a train and throwing the occupants of a carriage over the dangerous part of the highway on to the track, though there was no contact between the engine

327; *Parry* v. *Smith*, 4 *C. P. D.* 325; *White* v. *France*, 2 *C. P. D.* 308; *Manzoni* v. *Douglas*, 6

Canadian Cases.

and the carriage (*Grand Trunk Ry. Co.* v. *Rosenberger* followed; *Grand Trunk Ry. Co.* v. *Sibbald*, 20 *S. C. R.* 259; *Grand Trunk R. W. Co.* v. *Beckett*, 16 *S. C. R.* 713; *Moggy* v. *Can. Pacific R. W. Co.*, 3 *M. L. R.* 209; *Thompson* v. *G. W. R. Co.*, 24 *U. C. C. P.* 429; *Dunsford* v. *Michigan Central R. W. Co.* 20 *O. A. R.* 577; and *McMichael* v. *G. T. R. W. Co.*, 12 *O. R.* 547; and see *ante*, p. 280).

In *Brown* v. *Great Western Railway Company*, 3 *S. C. R.* 159, the Supreme Court *held* that the company were guilty of negligence in not applying the air-brakes at a sufficient distance from another railway crossing to enable the train to be stopped by hand-brakes in case of the air-brakes giving way.

Street Railways.

Persons crossing a street railway are entitled to assume that the cars running over them will be driven moderately and prudently, and if an accident happens through a car going at an excessive rate of speed the street railway company is responsible. The driver of a cart struck by a car in crossing a track is not guilty of contributory negligence because he did not look to see if a car was approaching, if in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross (*The Toronto Ry. Co.* v. *Gosnell*, 24 *S. C. R.* 582, and 21 *O. A. R.* 553).

"We have to say here whether the fact of a horse in the street of a city being seen running away, upsetting the cutter and throwing out the driver and then running into the sidewalk and injuring a passenger thereon, does not show a *primâ facie* case. I am inclined to think that it does" (*Ibid.*—Hagarty, C. J. O. 444).

Although a street railway company may be permitted by its charter to run its cars on the public streets at high rates of speed, it is not, therefore, relieved from the duty of exercising proper care to prevent accidents (*Lines* v. *Winnipeg Electric Street Ry. Company*, 11 *M. R.* 77; and see *Coll* v. *Toronto R. Way Co.*, 25 *O. A. R.*, *ante*, p. 89; *Haight* v. *Hamilton Street R. Way Co.*; and *Cornish* v. *Toronto St. R. Way Co.*, *ante*, p. 279, and R. S. O., 1897, c. 209, sect. 40).

Q. B. D. 145. As to the manner of estimating damages in cases of injuries arising from railway

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Negligence of Municipal Corporations. Neglect to remove ice or snow, and see post.

The Municipal Act, R. S. O., 1897, c. 223, sect. 606, makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks. A byelaw of the city of Kingston required frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings, which therefore became higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being severely injured, brought an action of damages against the city and obtained a verdict. It was *held*, affirming the decision of the Court of Appeal that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair ; *Cornwall* v. *Derochie* (24 *S. C. R.* 301, *ante*, p. 70), followed ; that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the byelaw ; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the act ; that "gross negligence" in the act means very great negligence, of which the jury found the corporation guilty (*The Corporation of the City of Kingston* v. *Drennan*, 27 *S. C. R.* 46, and see *Walker* v. *City of Halifax*, 16 *N. S. Reps.* 371).

An action does not lie against a municipal corporation for damages in respect of mere nonfeasance unless there has been a breach of some duty imposed by law upon the corporation (*Pictou* v. *Geldert*, (1893) *A. C.* 524, and *The Municipal Council of Sydney* v. *Bourke*, (1895) *A. C.* 433, followed ; *Montreal* v. *Mulcair et al.*, 28 *S. C. R.* 458 ; and see *Williams* v. *City of Portland*, *ante*, p. 13 ; *Badams* v. *City of Toronto*, *ante*, p. 15 ; and *The City of St. John* v. *Campbell*, 26 *S. C. R.* 1, *ante*, p. 70).

The plaintiff while proceeding along a sidewalk attempted to cross from one side of such walk to the other over an accumulation of hard beaten snow where there was a slight

accidents, see the case of *Phillips* v. *L. & S. W. R. Co.*, 5 *C. P. D.* 280.

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declivity in the sidewalk, and in doing so slipped and fell, thereby injuring herself. *Held* [reversing the judgment of the *Q. B. D.*, 7 *O. R.* 261], that there was no proof of such accumulation of snow as indicated negligence on the part of the defendants, and there being no evidence of negligence in the construction of the sidewalk, the corporation was not liable (*Bleakley* v. *Corporation of Prescott*, 12 *O. A. R.* 637; and see *Boyle* v. *Corporation of Dundas*, 25 *U. C. C. P.* 424).

The plaintiff while walking along one of the sidewalks in the city of Toronto, on a frosty day in the middle of winter, stepped on a piece of ice about three feet wide, slipped and fell, and received a severe injury. It was *held* not sufficient to render the corporation liable as for neglect to keep the sidewalk in repair, for the mere existence of the piece of ice was no evidence of actionable negligence, and a nonsuit directed at the trial was upheld (*England* v. *The Corporation of the City of Toronto*, 23 *U. C. C. P.* 95).

A state of repair such as would exempt the corporation from liability on an indictment will also exempt them from liability to a civil action (*Ibid.*; and see *Ray* v. *Corporation of Petrolia*, 24 *U. C. C. P.* 73, and *Campbell* v. *Hill*, 23 *U. C. C. P.* 473).

By reason of ice on the sidewalk on Yonge Street, in the city of Toronto, the plaintiff, who was walking along that street about six o'clock in the afternoon, slipped and fell, sustaining damage. The place in question was in front of a lane which ran between two stores, the walls of the stores forming the sides of the lane, which sloped towards the sidewalk; the ice being caused by the water from rain and melting snow running down the lane on to the sidewalk and then freezing. There was ice on the sidewalk at the time of the accident, but there was no evidence of its having accumulated there, nor did it appear how long it had been there. *Held*, that there was no evidence of negligence on the part of the defendants (*Forward* v. *The Corporation of the City of Toronto*, 22 *O. R.* 351).

The mere allowance of the formation and continuance of obstructions or dangerous spots in the highways due to accumulation of snow or ice may amount to non-repair,

From the above rule and illustrations, it will be seen that the term negligence is quite a relative expres-

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for which the corporation would be liable, but in every such case the question to be determined is whether, taking all the circumstances into consideration, it is reasonable to hold that the municipality should have removed the danger (*City of Kingston* v. *Drennan*, 27 *S. C. R.* 46, followed; *Taylor* v. *City of Winnipeg*, 12 *M. R.* 479; *Atcheson* v. *Portage La Prairie*, 10 *M. L. R.* 39; and see *note* [110], *post*, p. 326. For cases bearing upon the liability of a householder to remove snow or ice from the roofs and sidewalks see *Atkinson* v. *G. T. R. W. Co.*, *ante*, p. 34; *Lazarus* v. *The Corporation of Toronto*, *post*, p. 333; and The Municipal Act, *R. S. O.*, 1897, *c.* 223, *sect.* 559.

Defective Highways.

The liability of road companies is regulated by *R. S. O.*, 1897, *c.* 193, *sects.* 79—116.

Where plaintiff's horse was injured by falling into a deep uncovered drain by the side of a road in the suburbs of the city, it was *held* that the drain being proved to be well constructed and of a kind (uncovered) usual in the suburbs, the city was not liable (*Mackinlay* v. *City of Halifax*, 2 *N. S. Reps.* (*Russell & Chesney*), 305).

Plaintiff while crossing on horseback a bridge within the municipality received injuries found to have resulted from the negligence of the corporation and its officers. *Held*, that the corporation was liable (*McQuarrie* v. *The Municipality of St. Mary's*, 5 *N. S.* (*Russell & Geldert*), 493; *Grant* v. *Town of New Glasgow*, 6 *N. S.* (*Russell & Geldert*), 87; *Watson* v. *Municipality of Colchester*, *ib.* 549).

On one side of a travelled road which the defendants were bound to keep in repair was a declivity, down which a pile of wood had been thrown by a person living near the highway. Some of the wood was upon the bed of the road, but a portion estimated at from 21 to 26 feet was free from obstruction, and the road itself was not defective. The plaintiff's horse in passing shied at the wood, threw him off and injured him. *Held*, that the defendants were not guilty of a breach of the statutory duty imposed upon them by *R. S. O.*, 1877, *c.* 174, *sect.* 491 [now *R. S. O.*,

sion (*a*), and that in deciding whether a given act is, or is not, negligent, the circumstances attending each

(*a*) The student must also distinguish carefully between negligence giving rise to pure torts, and negligence arising out of the performance of contracts. In the latter class of cases, very often a person is taken to warrant the safety of what he has to do under the contract.

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1897, *c.* 223, *sect.* 606] to "keep in repair," and they were therefore not liable (*Maxwell* v. *The Corporation of Clarke*, 4 *Tupper's Reps. in App.* 460; and see *Lucas* v. *Moore*, and *Walton* v. *York*, *post*, p. 292).

The obligation expressed by the words "keep in repair" [now R. S. O., 1897, c. 223, sect. 606], is satisfied by keeping the road in such a state of repair as is reasonably safe and sufficient for the requirements of the particular locality (*Lucas* v. *Corporation of Moore*, 3 *Tupper's Reps. in App.* 602).

A municipal corporation is not responsible in damages to a person who is injured in endeavouring to cross in daylight a plainly visible shallow trench, lawfully and necessarily in the street at the time, the person injured being, moreover, familiar with the locality and knowing that there is close at hand a safe passage way across the trench (*Keachie* v. *The City of Toronto*, 22 *O. A. R.* 371).

A municipal corporation is under no obligation to construct a street crossing on the same level as the sidewalk, and that a sidewalk is at an elevation of four inches above the level of the crossing is not such evidence of negligence in the construction of the crossing as to make the corporation liable in damages for injury to a foot passenger sustained by striking her foot against the curbing while attempting to cross the street (*The Corporation of London* v. *Goldsmith*, 16 *S. C. R.* 231).

The plaintiff fell while attempting to cross a railway track which was lawfully, and without negligence or undue delay, being built across a street in a city. It was *held* that neither the railway company nor the city was responsible in damages (*Aitken* v. *City of Hamilton*, 24 *O. A. R.* 389).

Ward et ux. v. *City of Halifax*, 3 *N. S. Reps.* (*Geldert & Oxley*), 264; *Walker* v. *The City of Halifax*, 4 *N. S.* (*Russell & Geldert*), 371; *King* v. *The Municipality of Kings*, 19 *N. S. R.* 68; *Diamond* v. *Municipality of East*

particular case must be fully considered. "A man," it has been said, "who traverses a crowded thoroughfare

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Hants, 20 *N. S. R.* 9; *Gilbert* v. *Municipality of Yarmouth*, 23 *N. S. R.* 93; *Geldert* v. *Pictou*, *ib.* 484; *Lordly* v. *City of Halifax*, 24 *N. S. R.* 100; and 20 *S. C. R.* 505.

A municipality is not by the common law answerable in damages occasioned by defective highways or bridges (*Wallis* v. *Municipality of Assiniboia*, 4 *Manitoba L. R.* 89; *Achesson* v. *Portage La Prairie*, 9 *M. L. R.* 192).

Corporations undertaking to manage highways are not insurers against latent defects, they are only bound to take reasonable care. No action could be maintained at common law for an injury arising from the non-repair of a highway, but a duty may be cast by statute upon a corporation to repair, and if that is clearly done, it will be answerable in an action of negligence (*Lindell* v. *Corporation of Victoria*, 3 *B. C. Reps.* 400).

The existence of a broken down waggon with a bright red board sticking up in it, on the side of a highway and partly in the ditch, where it had been hauled by the owner some eight or ten feet from the travelled part, leaving plenty of room to pass and remaining thus for two days, does not constitute evidence of actionable negligence on the part of the corporation (*Rounds* v. *Corporation of Stratford*, 26 *U. C. C. P.* 11; and see *Maxwell* v. *The Corporation of Clarke*, *ante*, p. 291; and *Macdonald* v. *The Hamilton and Port Dover Road Co.*, 3 *U. C. C. P.* 402).

The liability to keep a road in repair extends to overhanging trees liable to fall upon the road and cause damage to passers-by (*Gilchrist* v. *Corporation of Carden*, 26 *U. C. C. P.* 1).

"We cannot lay it down as matter of law that a person walking along a street loses all remedy for injuries if she or he happen to be looking away at the moment" (*Boyle* v. *Corporation of Dundas*, 27 *U. C. C. P.* 133—Hagarty, C. J.).

"The liability of a corporation, whether to answer in damages or to be convicted of a misdemeanour, for suffering a highway to be in an impassable or dangerous condition, arises not merely because the road is impassable or dangerous, for that state of things may exist without blame to the corporation, but because there has been neglect of the duty to keep the road in such a state of repair as is reasonably safe and sufficient for the ordinary travel of the locality"

with edged tools, or bars of iron, must take especial care that he does not cut or bruise others with the

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Lucas v. *Moore*, 3 *Tupper in App.* 608 (Patterson, J. A.); *Walton* v. *Corporation of York*, 6 *Tupper's Reps. in App.* 181).

In an action against defendants for damage sustained by the plaintiff through the breaking down of a bridge some six feet wide, built on three sleepers over a culvert, on a road in defendants' township, over which the plaintiff was attempting to drive with a buggy and a pair of horses, it appeared from an examination after the accident, that the centre sleeper to two-thirds of its diameter and on the outside was quite rotten, and that its condition was not either ascertained by the persons whose duty it was to repair the bridge, or, if ascertained, it was not repaired, and that the bridge broke down in consequence of this centre sleeper giving way by the mere entry of the plaintiff's horses, without the buggy, on the side of the bridge. The jury having found for the plaintiff, their verdict was upheld (*Macdonald* v. *The Corporation of the Township of S. Dorchester*, 29 *U. C. C. P.* 249).

"It is obvious that in cases of this kind the question of neglect or no neglect upon the part of the defendants is one which must always be considered relatively to the particular subject in respect of which the neglect is charged, to the purpose which it has to discharge, and to the gravity of the consequences probably attendant upon the neglect charged. For example, a greater degree of care and inspection is necessary in attending to the condition and state of repair of a bridge than of a plank sidewalk, and in proportion as the defect may be more likely to take place in a hidden part than in a place exposed to view, so that it is more necessary that particular inspection of the hidden part should be made from time to time in the manner best calculated to ascertain any defect not openly apparent, and by so much as a loose or defective plank, timber, or sleeper in a bridge is calculated to be attended with more serious consequences than a loose or defective plank or sleeper in a sidewalk, by just so much are greater care and attention necessary to be displayed in looking after the condition and state of repair of a bridge than of a sidewalk" (*Ibid.*—Gwynne, J., 254).

things he carries. Such person would be bound to keep a better look out than the man who merely carried

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"The other inquiry, and the important one is, whether there was neglect on the part of the defendants to keep the road in repair, by having and maintaining a ditch of the kind and at the part of the road before described, without guard or railing, or without slanting the roadway to the bottom of the ditch. The canon of municipal law, I take to be, that the road shall be reasonably safe and fit for public use and travel. That reasonable safety and fitness must depend on circumstances. It is plain that a ditch of this kind would not do in a city or town in its thoroughfare, where people have constantly to drive up to the sidewalks. And yet such a ditch may well answer in a township where it is for drainage only, and where people have no occasion to drive to it. And my opinion is, so far as the court is to determine the question, that the defendants were not and are not guilty of neglect in not fencing the ditch complained of from the travelled road. In other words, the highway was not out of repair by reason of there being such a ditch as the one in question, running alongside such a roadway" (*Walton* v. *Corporation of York*, 30 *U. C. C. P.* 222—Wilson, C. J.).

It is always a question of fact for the jury whether, having regard to all the circumstances, the road or bridge was in a state reasonably fit for ordinary travel (*Steinhoff* v. *Corporation of Kent*, 14 *O. A. R.* 12; *Toms* v. *Corporation of Whitby*, 37 *U. C. R.* 104; *Sherwood* v. *City of Hamilton*, 37 *U. C. R.* 410; *Walton* v. *Corporation of York*, 6 *O. A. R.* 181).

Kennedy v. *Portage La Prairie*, 12 *M. R.* 634; *Caswell* v. *St. Mary's Road Co.*, 28 *U. C. R.* 247, followed.

Adair v. *Corporation of Kingston*, 27 *U. C. C. P.* 126; *The Township of Ellice* v. *Hills*, 23 *S. C. R.* 429; *Ayre* v. *Corporation of Toronto*, 30 *U. C. C. P.* 225; *Copeland* v. *The Corporation of the Village of Blenheim*, 9 *O. R.* 19; *Bliss* v. *Boeckh*, 8 *O. R.* 451; *Howard* v. *Corporation of St. Thomas*, 19 *O. R.* 719; *Goldsmith* v. *The City of London*, 11 *O. R.* 26; *Rice* v. *Town of Whitby*, 25 *O. A. R.* 191; *Boyle* v. *Corporation of Dundas*, 25 *U. C. C. P.* 420; *Drennan* v. *Kingston*, 23 *O. A. R.* 406; *Township of*

an umbrella; and the person who carried an umbrella would be bound to take more care in walking with it than a person who had nothing at all in his hands."

ART. 70.—*Contributory Negligence.*[92]

(1) Though negligence, whereby actual damage is caused, is actionable, yet if the damage would not have happened had the

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Sombra v. *Township of Moore*, 19 *O. A. R.* 144; *Bleakley* v. *Town of Prescott*, 7 *O. R.* 261; *Victs* v. *Wood*, 1 *N. S. R.* 159, and cases under "Nuisance."

[92] "The general rule of law respecting negligence is, that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he is entitled to recover" (*Campbell* v. *Great Western Railway Co.*, 15 *U. C. R.* 505 (McLean, J.); *Robertson* v. *Halifax Coal Co.*, 22 *N. S. R.* 84).

Cattle Straying upon a Railway.

If the horse was lawfully on the road at the point of intersection, and had strayed from there upon the railway because the cattle guard was defective, his owner would have been in as favourable a position as he would have been if his horse had escaped from his own field upon the railway track for want of a fence between such field and the railway, which it was the duty of the company to keep up; but being in the road and unattended at the point of intersection, in direct violation of an act of parliament, and straying from thence upon the railway over the insufficient cattle guard, his owner is in no more favourable position than he would have been if the horse had broken into his neighbour's farm, and had wandered from thence upon the railway by reason of there being no fence kept up by the company between their track and that neighbour's farm.

"For all that appears the railway was well inclosed from

plaintiff himself used ordinary care, the plaintiff cannot recover from the defendant.

(2) But where the plaintiff's own negligence is only remotely connected with, and not a

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the adjacent lands. It is clear that the horse strayed on the track from the highway, where he had no right to be, and he could not have been on the track at all if he had not been first on the highway contrary to the act of parliament. We are of opinion, therefore, that the plaintiff has no right of action, not because the express words of the 16th clause [now sect. 103, R. S. O., 1897, c. 207, and sect. 271, Railway Act, Canada, 1888, c. 29] extend to this case, where it says that the owner of an animal killed at the point of intersection shall not under such circumstances have an action, but because upon the principles of the common law that consequence follows, on account of the horse having got upon the railway from a place where he had no right to be, and had therefore no excuse for being upon the railway at any point, and was as wrongfully there on one side of the cattle guard as he would have been upon the other" (*Simpson* v. *The Great Western Railway Co.*, 17 *U. C. R.* 64, 65—Robinson, C. J.).

Ferrin v. *C. P. R. W. Co.*, 9 *M. L. R.* 501; *Douglas* v. *Grand Trunk R. W. Co.*, 5 *Tupper's Reps.* 585; *Murphy* v. *G. T. R. W. Co.*, 1 *O. R.* 619; *Gillie* v. *G. W. R. Co.*, 12 *U. C. R.* 427; *Connors* v. *G. W. R. W. Co.*, 13 *U. C. R.* 401; *Chisholm* v. *G. W. R. W. Co.*, 10 *U. C. C. P.* 324; *Clayton* v. *G. W. R. W. Co.*, 23 *U. C. C. P.* 137; *Whitman* v. *The W. and A. R. W. Co.*, 6 *N. S. R.* 271; *Philips* v. *C. P. R. W. Co.*, 1 *M. L. R.* 110, and *McFie* v. *C. P. R.*, *post*, p. 302.

Contributory Negligence.

"If the plaintiffs contributed to the occurrence of the injury they sustained through their own default or neglect, or through the reckless management of their steamboat brought her into collision with the defendant's vessel, and so caused the damage complained of, no action would lie. The bare infringement of the regulations as set out in the count would not of itself give any cause of action to the plaintiff" (*Jacques et al.* v. *Nicholl*, 25 *U. C. R.* 405—Morrison, J.).

The principle now defined by the Supreme Court of

necessary factor of the accident, and the defendant might by the exercise of ordinary care have avoided the accident, the plaintiff will be entitled to recover.

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Massachusetts is that illegal conduct of the plaintiff which contributed directly and proximately to the injury suffered by plaintiff is equivalent to contributory negligence (see, in this connection, *McLeod* v. *Bell*, 3 *U. C. R.* 61 ; *Jones* v. *Ross*, 328 ; *Beamer* v. *Darling*, 4 *U. C. R.* 211 ; *Eberts* v. *Smythe*, 3 *U. C. R.* 189).

Where a waggon is left standing in the highway the owner cannot exempt himself from liability by showing that the person injured thereby was drunk at the time of the accident (*Ridley* v. *Lamb*, 10 *U. C. R.* 354).

"It cannot be permitted to a person to place any obstruction that he pleases in the highway and to consider himself responsible for no injury that may happen from it, except to persons who are sober and vigilant in looking out for nuisances that they had no right to expect to find there. A man might as well dig a ditch across the highway and leave it open and hold himself free from all liability for the consequences, if the person injured by it happened at the time to be talking to a friend and not looking straight before him. The principle that the accident must have happened from no fault of the plaintiff cannot, in our opinion, be carried so far" (*Ibid.*—Robinson, C. J.).

"The general rule is that where a nuisance is created by a stranger on the land of another the owner of the land is not responsible for its continuance, unless he in some manner adopts the act of the wrongdoer" (*Castor* v. *Corporation of Uxbridge*, 39 *U. C. R.* 118—Harrison, C. J.).

"It is, however, the duty of everyone travelling along a highway to use caution and prudence adapted to the circumstances in which he is placed. The driver knew that the telegraph poles were placed on and along the highway at short distances from each other. Having used proper care he passed many of them in perfect safety. And yet knowing of their existence he all at once ceases to pay any attention whatever to the highway, and while in this careless state he, in broad daylight, at eight o'clock in the morning, drove

General illustrations.—(1) This rule is well illustrated by two cases, in each of which the damnum was the same. In *Fordham* v. *L. B. & S. C. R. Co.* (*L. R.* 4 *C. P.* 619), the facts were these: The guard of one of

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against a particular pole, which caused the sulky to upset. Had he been using *any* care at the time the accident could not have occurred" (*Ibid.*—Harrison, C. J., 129).

The jury were directed that if they were satisfied the accident would not have happened if the defendants had erected proper fences, they should find for the plaintiff. This was *held* to be a misdirection, for if the driver by his negligence contributed to the accident, so that but for his want of reasonable care it would not have happened, the plaintiff could not succeed (*Rastrick* v. *The Great Western Railway Co.*, 27 *U. C. R.* 396; and see *City of Halifax* v. *Lordly*, 20 *S. C. R.* 505, *ante*, p. 76).

"There is a duty incumbent on all persons driving or walking on a road crossed by a railway, and it is dictated by common sense and prudence, that on approaching a railway crossing they should do so with care and caution, both with a view to their own safety as well as the safety of passengers travelling by rail" (*Nicholls* v. *The Great Western Railway Co.*, 27 *U. C. R.* 382—Morrison, J. And see *Hutton* v. *Corporation of Windsor*, 34 *U. C. R.* 487; *Vicary* v. *Keith*, 34 *U. C. R.* 212).

It is the duty of a person driving across a railway track to use care and precaution to see whether a train is approaching, and the omission to do so is contributory negligence (*Johnston* v. *Northern Railway Co.*, 34 *U. C. R.* 432).

The plaintiff, on a dark night, intending to go to the railway station, walked along the highway until he came to the railway crossing, and then turned to the left, intending to go along the track to the station, when he fell into the cattle guard, which was within the limits of the highway, and was injured. *Held*, that he could not recover, for assuming that the encroachment on the highway by the cattle guard was illegal, it was in no way the cause of the accident, which resulted from the plaintiff leaving the highway to walk along the track, and would have happened without such encroachment (*Thompson* v. *The Grand Trunk R. W. Co.*, 37 *U. C. R.* 40; and see *Craig* v. *G. W. R.*, 24

the defendants' trains forcibly closed the door of one of the carriages without giving any warning, whereby the hand of the plaintiff, *who was entering* the carriage, was crushed. It was held, that the jury were justified in

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U. C. R. 504 ; *Briggs* v. *G. T. R. Co.*, *ib.* 510 ; *Fairbanks* v. *G. W. R. Co.*, 35 *U. C. R.* 523).

In an action against the railway company for negligently allowing their land adjoining the track to remain covered with brushwood, &c., whereby cinders from the locomotive fell thereon and caused a fire, which extended to the plaintiff's, it was shown that the railway fence, in which the fire originated, was a bush fence, the line having recently been built through a new country. The plaintiff had been employed by the defendants to cut down the trees on his own land within 100 feet of the centre of the track, under C. S. C. c. 66, sect. 4, and he had felled them lengthwise with the track and left them there. The jury having found for the plaintiff, the court refused to interfere, and *held* that under the circumstances the plaintiff was not guilty of contributory negligence in having left the trees felled by him on his own land, and that the statute 14 Geo. 3, c. 78, afforded no defence (*Holmes* v. *Midland R. W. Co.*, 35 *U. C. R.* 253 ; and see *note* [85], *ante*, p. 280).

A fire arising from negligence, and communicating from one part of the house to another part was *held* to be an accidental fire within the meaning of 14 Geo. 3, c. 78 (*Gaston* v. *Wald*, 19 *U. C. R.* 586).

Defendants' railway crossed the track of another railway on the level, and both were bound by statute to stop at least a minute before crossing, but neither did so. Defendants' line was signalled as clear, and their train, in which the plaintiff was a passenger, went on without stopping. The other line was signalled as not clear, but the train on it ran on, disregarding this signal, and struck the defendants' train at the crossing, whereby the plaintiff was injured. If either train had pulled up about two seconds sooner the collision would have been avoided. It was *held* that the defendants were liable to the plaintiff, for that their negligence to stop the required time was, so far as the plaintiff was concerned, a part of the cause of his injury,

finding that the guard was guilty of negligence, and that there was no contributory negligence on the part of the plaintiff.

(2) Where, however, the plaintiff, on entering a railway

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and sufficiently proximate (*Graham* v. *The Great Western Railway Co.*, 41 *U. C. R.* 324).

"I do not think it reasonable that a company, which has without cause violated its clear duty, should be acquitted of accountability to their passengers, whose limbs and lives are in their keeping, for damages done to them, because some other company or person was just two seconds too late in doing something which would have cured all their neglect. If it had been an obvious case of misconduct by the other company, in which the neglect of the defendants could not fairly be said to have led to the accident, the defendants would, in my opinion, be excused from liability to the plaintiff. But I am not able entirely to remove from my mind the impression that the neglect of the defendants to stop for the required time before crossing the track was, so far as the plaintiff is concerned, part of the cause of his injury, and it is sufficiently proximate to form an actionable ground for damages" (*Ibid.*—Wilson, J., pp. 330, 331).

"This is one of a class of cases which it is not very easy satisfactorily to deal with. It is certain the defendants were guilty of serious negligence by having an open unguarded trap in the floor of their public office, to which customers were invited, and in the situation in which it was, about four feet from the west counter or wicket to which all persons doing business there must go, and so very close to the north end of the east counter. That the trap was a dangerous one cannot be doubted; accidents had upon two or three occasions nearly happened there before, and on this occasion Denny lost his life by falling into it. . . . It is not, therefore, the least evidence of negligence against Denny that he did not happen to see it too. It was undoubtedly his misfortune, but I cannot say it was his fault. He had no more reason to look for a hole in the floor than to look for a load of bricks over his head. In such a case I should require strong evidence to relieve the defendants from their very great neglect, and to cast the whole of the blame upon

carriage, *left his hand on the edge* of the door half a minute after so entering, and the guard gave due warning before shutting the door, it was held that the act was attributable to the plaintiff's contributory

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the deceased, or so much of it as would make him contributory to his own death. That the learned judge 'could hardly conceive how anyone could walk into the hole' while there was so much light in the office at the time of the accident, and when the trap was so plainly seen when the office was entered, does not convince me that the deceased was guilty of contributory negligence because he did not see the trap. The answer is, this man did walk into the hole, and he did not mean to do it, and he did not know he was doing it, and he did not see it; and why? Because he believed, and he was led to believe by the defendants, he was in a place of security, and that he need not look out for traps or anything dangerous to life; and he therefore did not look out for them, and was not obliged to do it" (*Denny* v. *Montreal Telegraph Co.*, 42 *U. C. R.* 586 *et seq.*—Wilson, J.; and see *M'Adam* v. *Ross*, 22 *N. S. R.* 264; *Drake* v. *Town of Dartmouth*, 25 *N. S. R.* 177).

Headford v. *The McClary Manufacturing Company*, 24 *S. C. R.* 291.

The plaintiff was going from I. to M. by train in charge of cattle. At T. the train on which he had come from I. was partly broken up to be re-made with some cars which were standing on another track. While there the plaintiff, unknown to the defendants, went into the caboose at the end of the cars which were to be added to the cars from I., and when the connection was about to be made, deliberately stood up and was washing his hands, when the shock of the connection caused the injury, for damages for which this action was brought. *Held*, affirming the decision of Rose, J., that there was no evidence of negligence on the defendants' part, and the mere fact of the accident happening to the plaintiff was not in itself sufficient evidence of negligence. *Held*, also, that there was evidence of contributory negligence, in that the plaintiff knew that he was in a freight train, where there would not be so much care shown, and yet stood up, instead of sitting down, as he might have done,

negligence, in leaving his hand carelessly upon a door which he must have known would be immediately shut. But for that fact no accident would have happened (*Richardson* v. *Metropolitan R. Co.*, *L. R.* 3 *C. P.* 374 n., and see *Batchelor* v. *Fortescue*, 11 *Q. B. D.* 474).

(3) And so, in cases of collision between carriages, the question is, whether the disaster was occasioned wholly by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the disaster, by his own negligence, or want of common and ordinary care, that, but for his default in this respect, the disaster would not have happened. In the former case he recovers, in the latter not (*Tuff* v. *Warman*, 27 *L. J. C. P.* 322); and for further illustrations of the rule, see *Skelton* v. *L. & N. W. R. Co.*, *L. R.* 2 *C. P.* 631; *Stubley* v. *L. & N. W. R. Co.*, *L. R.* 1 *Ex.* 13; *Stapley* v. *L. B. & S. C. R. Co.*, *L. R.* 1 *Ex.* 21; *Cliff* v. *Mid. R. Co.*, *L. R.* 5 *Q. B.* 258; *Ellis* v. *G. W. R. Co.*, *L. R.* 9 *C. P.* 551; *Armstrong* v. *Lanc. & York R. Co.*, *L. R.* 10 *Ex.* 47; and *Davey* v. *L. & S. W. R. Co.*, 12 *Q. B. D.* 70.

(4) **Illustrations where negligence of plaintiff no**

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while the connection was being made, especially as he entered the caboose before the train was made up, and had no reason to think the defendants knew he was there (*Hutchinson* v. *The Canadian Pacific R. W. Co.*, 17 *O. R.* 347; *McGinney* v. *Canadian Pacific Ry. Co.*, 7 *M. L. R.* 151; *Bedford* v. *City of Halifax*, 25 *N. S. R.* 90).

Where the land adjoining the railway is unoccupied, the company is not bound to fence at that part of their line (*McFie* v. *Canadian Pacific Ry. Co.*, 2 *Manitoba L. R.* 10).

"A plaintiff's own negligence, which contributed to the injury, does not defeat his right of action, if the defendants might or could, by exercise of ordinary care, have avoided it" (*Ibid.*—Ardagh, J.).

excuse.[93]—If, however, although the plaintiff has been guilty of some want of care, it does not appear that the accident would not have happened if he had used ordinary care, he will be entitled to recover (*Radley* v. *L. & N. W. R. Co.*, 1 *App. Cas.* 754; see also

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[93] Where a railway train in approaching a crossing neglects to give the proper signals, the company will not be relieved from liability because the person whose cattle were run over did not take the best means to avoid the accident, or because his horses were unmanageable (*Tyson* v. *G. T. Ry. Co.*, 20 *U. C. R.* 256).

"The cause of damage, the proximate and only intelligible cause, is the admitted neglect of defendants' servants in allowing another of their trains to strike against that on which the plaintiff was. Could the plaintiff by ordinary care have avoided being injured by defendants' neglect? Even if he knew a collision was inevitable, it would be the idlest speculation as to which part of the train would receive the most violent shock. As it happened, he would probably have escaped injury had he remained in the passenger car. It might, with equal probability, have happened that those in the passenger car might have suffered most seriously. Therefore, irrespective of any legislative enactment, or any special contract limiting the defendants' liability, can it be truly said that where a negligent collision causes the injury, the mere fact that the plaintiff happened to be in a compartment to which the passengers were constantly permitted access, and in which his presence was unobjected to by the conductor in charge, in any way contributed to the injury?" (*Watson* v. *The Northern Railway Co.*, 24 *U. C. R.* 104—Hagarty, J.).

"We do not feel satisfied they were right in holding the plaintiff free from some blame, but however that may be, he would not be disqualified from recovering if, notwithstanding any failure upon his part, the defendants could, by the exercise of reasonable care upon their part, have avoided doing the injury which is complained of" (*Bender* v. *The Canada Southern R. W. Co.*, 37 *U. C. R.* 39—Wilson, J.).

"The plaintiff and his fellow-workmen choose for their own convenience, and in no way as a part of any bargain,

Dublin, Wicklow, and Wexford R. Co. v. *Slattery*, 3 *App. Cas.* 1155; *Watkins* v. *G. W. R. Co.*, 46 *L. J. C. P.* 817). The law on this point was thus summarized by Willes, J.: "If both parties were

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express or implied with the defendants, to sit or stand on an open platform carriage, on a railway. The risk thus taken by them, standing on an open unprotected surface, was far greater than it would have been had they been in any passenger carriage in the case of a sudden check or collision. The fact that the defendants' engine driver or conductor allowed them to get on the platform does not, in my view, alter the case. I cannot distinguish it from the case of a cart sent by its owner under his servant's care to haul bricks or lumber to a house he is building. A workman either with the driver's assent, or without any objection from him, gets upon the cart. It breaks down, or by careless driving runs against another vehicle, or a lamp post, and the workman is injured. I cannot understand by what process of reasoning the owner can in such a case be held to incur any liability to the person injured. Nor, in my opinion, would the fact that the owner was aware that the driver of his cart often let a friend, or a person doing work at his house, drive in the cart, make any difference. If the owner in such a case be liable, the step would be very short to making the owner of a vehicle liable to any street boy who, even with the driver's knowledge, should be holding on behind. The law ought to stand on some intelligible footing in these cases, and men should not be held liable except on some clear principle" (*Graham* v. *Toronto G. & B. R. W. Co.*, 23 *U. C. C. P.* 552—Hagarty, C. J.).

A mere licence, given by the owner, to enter and use premises which the licensee has full opportunity of inspecting, which contain no concealed cause of mischief, and in which any existing source of danger is apparent, makes no obligation on the owner to guard the licensee against danger (*Spence* v. *Grand Trunk R. W. Co.*, 27 *O. R.* 303).

R. owned a barn situated about 200 feet from the New Brunswick Railway Company's line, and the barn was destroyed by fire caused, as was alleged, by sparks from the defendant's engine. An action was brought to recover damages for the loss of said barn and its contents. On the

equally to blame, and the accident *the result* of their joint negligence, the plaintiff could not be entitled to recover. If the negligence and default of the plaintiff was in any degree the *proximate cause of* the damage,

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trial it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found that the defendants did not use reasonable care in running the engine. *Held*, reversing the decision of the Supreme Court of New Brunswick, that the company were under no obligation to use coal for fuel, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that there should be a new trial (*New Brunswick R. W. Co.* v. *Robinson*, 11 *S. C. R.* 688).

"No doubt plaintiff has the right to use his barn as he pleases, but knowing that the legislature has permitted the running of locomotives on the railway passing his barn, if he chooses to place in his barn combustible materials, and to leave it in such a condition that such combustible materials are exposed to sparks from the engine, though provided with all the usual and requisite appliances for preventing the escape of sparks and the prevention of accidents, and an accidental spark should ignite such combustible material and cause the destruction of the barn and its contents, the owner must submit to the risk, as a consequence of the legislature having permitted the use of a dangerous agent, and the question is: Have the defendants used all reasonable precautions and appliances to prevent accidents? It cannot be supposed that the best appliances will absolutely avoid all danger from the emission of sparks, and therefore it behoves parties through whose premises the railway runs, to understand the risk to which the sanction of the legislature, in the public and general interests of the country, to the running of locomotives, has subjected them. And, if they choose to have their property unnecessarily exposed, as in this case, it is their own imprudence, and they must bear the loss" (*Ibid.*—Sir W. J. Ritchie, C.J., 689, 690).

he could not recover, however great may have been the negligence of the defendant. But if the negligence of the plaintiff was only remotely connected with the accident, then the question is, whether the defendant might not, by the exercise of ordinary care, have avoided it" (*Tuff* v. *Warman*, 27 *L. J. C. P.* 322). Therefore, where the plaintiff left his ass with its legs tied in a public road, and the defendant drove over it, and killed it, he was held to be liable; for he was bound to drive carefully, and circumspectly, and had he done so he might readily have avoided driving over the ass (*Davies* v. *Mann*,[94] 10 *M. & W.* 549).

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A railway company is responsible for damages caused by fire, which is started by sparks from one of their engines, in dead grass and shrubs allowed by them to accumulate in the usual course of nature from year to year on their land adjoining the railway track. It is the company's duty in such a case to remove the dangerous accumulation (*Rainville* v. *Grand Trunk R. W. Co.*, 25 *O. A. R.* 242; *Peers* v. *Elliott*, 23 *N. S. R.* 276).

Derlin v. *Bain*, 11 *U. C. C. P.* 523; *Hollings* v. *Canadian Pacific R. W. Co.*, 21 *O. R.* 705; *Winckler* v. *Great Western Railway Co.*, 18 *U. C. C. P.* 263; *Edgar et ux.* v. *Northern R. W. Co.*, 4 *O. R.* 201; *Wilton* v. *Northern R. W. Co.*, 5 *O. R.* 490; *Beckett* v. *Grand Trunk R. W. Co.*, 8 *O. R.* 601; *Miller* v. *Grand Trunk R. W. Co.*, 25 *U. C. C. P.* 389; *Anderson* v. *Northern R. W. Co.*, 25 *U. C. C. P.* 301; *Casey* v. *Canadian Pacific R. W. Co.*, 15 *O. R.* 574; *Keith* v. *Intercolonial Coal Mining Co.*, 6 *N. S.* (*Russell & Geldert*), 226; *Curwin* v. *The W. & A. Railway Co.*, 3 *N. S.* (*Geldert & Oxley*), 493; *Conlon* v. *Connolly*, 1 *N. S. Reps.* (*Russell & Chesney*), 95; and see *Canada Central R. W. Co.* v. *McLaren*, 8 *O. A. R.*, *ante*, p. 8; *Jaffrey* v. *Toronto G. and B. R. W. Co.*, *ante*, p. 280; *Ramie* v. *Walker*, 6 *N. S. R.* 175; *West* v. *Boutilier*, 6 *N. S. R.* 297; and *Bundy* v. *Carter*, 21 *N. S. R.* 296.

[94] The evidence certainly left the case, putting it most favourably for the plaintiff, in that condition in which it was as consistent with the absence as with the existence of

(5) The plaintiff, a passenger on board a steam vessel, was injured by the falling of an anchor, caused by the defendant's steam vessel striking the steam vessel in which the plaintiff was a passenger. It was no defence

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negligence in the defendant, upon which it is held the plaintiff has failed; and this rule is said to be of the first importance and to be fully established in all the courts" (*Jackson* v. *Hyde*, 28 *U. C. R.* 296.—Adam Wilson, J.).

One who contributes to his own injury must, however, be presumed to be disqualified from recovering; for contribution is that degree of participation which supposes that but for the participation referred to, the accident would not have happened" (*Bradley* v. *Brown*, 32 *U. C. R.* 479—Wilson, J.; and see *Miller* v. *Reid*, 10 *O. R.* 419, *ante*, p. 102).

"The plaintiffs say the proximate cause of injury was the want of a fence. The defendants say it was the ungovernable conduct of the horse, no matter how it was produced, whether by accident, misfortune, or otherwise. The following cases show that a cause which is not the next preceding event to the loss, damage, or effect, has been considered to be the proximate cause. [After referring to the cases, the learned judge proceeds:] On a consideration of these cases I come to the conclusion that the proximate cause of damage as against the defendants was the defective state of the highway. If the result had been brought about by the misconduct or negligence of the driver, the proximate cause in my opinion would still have been the defective state of the road. I cannot see how its position can be affected by any antecedent events whatever; but the plaintiff could not have recovered, because it would have been the driver's own mismanagement which contributed and led to the accident" (*Toms et ux.* v. *Corporation of Whitby*, 35 *U. C. R.* 214 *et seq.*—Wilson, J.).

The decision in this case, reported in 35 *U. C. R.* 195, was affirmed, and the defendants *held* liable for the want of a railing protection along the sides of an embankment leading to a bridge, in consequence of which the plaintiff's horse, being frightened, backed the waggon over it (*Toms et ux.* v. *The Township of Whitby*, 37 *U. C. R.* 100).

"A plaintiff, in order to recover in an action of this kind,

to say that the accident arose in part from the negligent stowage of the anchor, or that the plaintiff was in a part of the vessel where he ought not to have been (*Greenland* v. *Chaplin*, 5 *Ex.* 243).

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must, however, not only establish the default of the corporation, but that such default was the cause of the injury in respect of which he sues. If it be shown that there was contributory negligence on the plaintiff's part, directly, not remotely, contributing to the injury of which he complains, he cannot of course recover. But if it be shown that, without fault or negligence on his part, his horses escaped from his control, and ran away or became unmanageable, so that no care could be exercised by him in respect to them, and this condition of things is not produced by a defect in the highway, the question is whether the plaintiff can recover. In the State of New Hampshire, under a statute also like ours, the contrary is held. It is there held that where two causes combined to produce the injury, both of which were in their nature proximate, the one being the defect in the highway, and the other some occurrence for which neither party is responsible, that the corporation is liable, provided the injury would not have been sustained but for the defect in the highway. I must say, contrary to the opinion which I held when counsel in *Toms et ux.* v. *Whitby*, 35 *U. C. R.* 195, that the weight of authority now appears to be in favour of the law as propounded in the New Hampshire courts; and as this is in accordance with the opinions expressed by the majority of the judges of this court as constituted when *Toms et ux.* v. *Whitby* was decided—opinions not in any manner dissented from by the judges of the Court of Appeal, I have the less hesitation in coming to the conclusion that in this case the rule must be made absolute to set aside the nonsuit and for a new trial" (*Sherwood* v. *The Corporation of Hamilton*, 37 *U. C. R.* 416 *et seq.*—Harrison, C. J.).

"The proximate and immediate cause of the injuries was the voluntary act of the plaintiff in returning into the burning carriage from a place of safety. The injuries he received were not owing to the negligence of the defendants, and, that being the case, he was disentitled from recovering any damages. It is not without some doubt that I have arrived at a conclusion unfavourable to the plaintiff, but I

(6) For many years it was thought, that where a person voluntarily engaged another person to carry him, he so identified himself with the carrier as to be precluded from suing a third party for negligence in

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have done so after much consideration, and because I think there are insuperable reasons against a different conclusion. I have not overlooked the rule that the want of ordinary caution is a question of degree, and where that point is contested and arises it is one for the jury; and as *held* in *Tuff* v. *Warman* (5 *C. B. N. S.* 573), that mere want of ordinary care and caution will not disentitle a plaintiff to recover unless it was such that but for the want of ordinary care and caution, the misfortune would not have happened. Here, as I have said, the immediate and proximate cause of the misfortune was the returning of the plaintiff into the burning carriage, and to that voluntary act of his are attributable the injuries he has received" (*Hay* v. *Great Western R. W. Co.*, 37 *U. C. R.* 466 *et seq.*—Morrison, J.).

In an action for negligence against the owner of a steamboat for injuries sustained by the plaintiff in consequence of one of the fenders having broken loose from the steamboat while in the act of leaving a wharf, and striking and injuring the plaintiff who was standing on the wharf, and it appearing that the plaintiff had received warning to stand clear of the fenders, and that a person with ordinary care might have escaped, the court set aside a verdict for plaintiff and granted a new trial (*Grieve* v. *The Ontario and St. Lawrence Steamboat Co.*, 4 *U. C. C. P.* 387; and see *Herritt* v. *Ontario, Simcoe, and Huron Railway Union Co.*, 11 *U. C. R.* 605; and *Thatcher* v. *The Great Western R. W. Co.*, 4 *U. C. C. P.* 543).

"It cannot be asserted that a man is not at liberty to use his own land to its utmost limit, in such way and manner as he pleases, and he is not bound to take more care of his property or to alter it by reason of its proximity to a railway. Contributory negligence exists where a person injured has wrongfully done or omitted to do an act which it was his duty to do or not to do, by reason of which the culpable conduct of another, which has caused the injury, would not have occasioned it but for the concurring wrongful act or omission of the person injured" (*McLaren* v. *Canada Central*

cases where the carrier was guilty of contributory negligence (*Thorogood* v. *Bryan*, 8 *C. B.* 115). However, this doctrine was overruled by the House of Lords, in the case of *The Bernina*[95] (13 *App. Cas.* 1), and there is no longer any inference of law that the driver of an omnibus, or coach, or cab, or the engineer of a train, or the master of a vessel, and their respective passengers, are so far identified as to affect the latter with any liability for the former's contributory negligence (*Matthews* v. *Lond. Tr. Co.*, 58 *L. J. Q. B.* 12).

(7) **Contributory negligence in infants.**—It was decided many years ago that, where the plaintiff was a child of tender years, it was not necessarily a good defence to an action of negligence to prove that he himself had contributed to his injury (*Lynch* v. *Nurdin*,[96] 1 *Q. B.* 29). And,

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R. W. Co., 32 *U. C. C. P.* 342 and 344—Wilson, C. J.; and see *N. B. Railway Co.* v. *Robinson*, *ante*, pp. 304, 305).

A fire alarm wire belonging to a municipality broke and fell upon an electric wire belonging to a private corporation, and thereby sent a fatal current into plaintiff's horse. *Held*, that the municipality was liable (*Earle* v. *Corporation of Victoria*, 2 *B. C. Reps.* 156).

Brace v. *Union Forwarding Co.*, 32 *U. C. R.* 43; *Boggs* v. *Great Western R. W. Co.*, 23 *U. C. C. P.* 573; *Shields* v. *Grand Trunk Railway Co.*, 7 *U. C. C. P.* 115; *Anderson* v. *Grand Trunk R. W. Co.*, 24 *O. A. R.* 672; *York* v. *The Canada Atlantic S. S. Co.*, 22 *S. C. R.* 167).

[95] The doctrine that the occupant of a carriage is not identified as to negligence with the driver applies only where the occupant is a mere passenger having no control over the management of the carriage. Where, therefore, the hirer of a carriage allows one of his friends to drive and an accident results from the latter's negligence the former cannot recover (*Flood* v. *Village of London West*, 23 *O. A. R.* 530).

Atkinson v. *City of Chatham*, 29 *O. R.* 518; *Sherwood* v. *City of Hamilton*, 37 *U. C. R.* 410, followed.

[96] The doctrine of contributory negligence does not

notwithstanding several cases to the contrary, this seems to be still the law. Thus, in the recent case of *Harrold* v. *Watney*, ((1898) 2 *Q. B.* 320), it was held by the Court of Appeal that the owner of a rotten fence adjoining a highway was liable to a boy who, in attempting to climb it (which he had no right to do), was crushed and otherwise injured. On the one hand, where the defendant exposed in a public place for sale, unfenced and without superintendence, a machine which might be set in motion by any passer-by, and which was dangerous when in motion; and the plaintiff, a boy four years of age, by the direction of his brother, seven years old, placed his finger within the machine, whilst another boy was turning the handle, which moved it, and his fingers were crushed: it was held, that the plaintiff could not maintain any action for the injury (*Mangan* v. *Atterton*, *L. R.* 1 *Ex.* 239). But this case appears to be irreconcileable on principle with *Harrold* v. *Watney* (*sup.*). Anyhow, it appears that what would amount to contributory negligence in a grown-up person, may not be so in a child of tender years (per Kelly, C.B., *Lay* v. *M. R. Co.*,[97] 34 *L. T.* 30).

(8) It would seem that where an infant is incapable of taking care of himself, he cannot recover if the person in whose charge he was, was guilty of contributory negligence (*Waite* v. *N. E. R. Co.*, *El. B. & E.* 719).

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apply to an infant of tender age (*Merritt* v. *Hepenstal*, 25 *S. C. R.* 150).

Eaton v. *Sangster*, 24 *S. C. R.* 708, judgment of Court of Appeal for Ontario affirmed; *McIntyre* v. *Buchanan*, 14 *U. C. R.* 581; *Vars* v. *Grand Trunk R. W. Co.*, 23 *U. C. C. P.* 143.

[97] *Sangster* v. *T. Eaton Co.*, 25 *O. R.* 78.

ART. 71.—*Onus of Proof.*

(1) In general, the onus of proving negligence is on the plaintiff (*Hammack* v. *White*,[98] 11 *C. B. N. S.* 588; *Toomey* v. *L. & B. R. Co.*, 3 *ibid.* 146); and of proving contributory negligence on the defendant (*Dublin, Wicklow, &c., R. Co.* v. *Slattery*,[99] 3 *App. Cas.* 1169; *Wakelin*

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[98] In an action against the town of Portland for damages arising from an injury caused by a defective sidewalk, the evidence of the plaintiff showed that the accident whereby she was injured happened while she was engaged in washing the window of her dwelling from the outside of her house, and that in taking a step backward her foot went into a hole in the sidewalk and she was thrown down and hurt. She admitted that she knew the hole was there. There was no evidence of the nature or extent of the hole, nor was affirmative evidence given of negligence on the part of any officer of the corporation. The jury having found a verdict for the plaintiff, it was *held* that there was no evidence of negligence to justify the verdict, and a new trial was ordered (*The Town of Portland* v. *Griffith*, 9 *S. C. R.* 333).

"The gist of this species of action is negligence upon the part of the defendants in committing such a breach of a duty which they owed to the public as subjected them to conviction on an indictment as for a public nuisance, from which breach of duty the plaintiff suffered the peculiar private damage complained of, without any negligence on her own part contributing to the happening of the injury. Now, in this case, the mere happening of the accident not being even *primâ facie* evidence of negligence, nor indeed of the alleged defect being of that nature and magnitude to constitute a public nuisance, it was necessary for the plaintiff to have given affirmative evidence upon both of these particulars. This she did not attempt to do" —(*Ibid.*—Gwynne, J., at pp. 341 and 344).

McMillan v. *Western Dredging Co.*, 4 *B. C. Reps.* 122.

[99] *Green* v. *Toronto R. W. Co.*, 26 *O. R.* 319; *Bennett* v. *Grand Trunk R. W. Co.*, 7 *O. A. R.* 470; *Maw* v.

v. *L. & S. W. R. Co.*,[100] 12 *App. Cas.* 41; *Smith* v. *South Eastern Ry. Co.*, (1896) 1 *Q. B.* 178).

(2) But where a thing is solely under the management of the defendant or his servants, and the accident is such as, in the ordinary course of events, does not happen to those having the management of such things, and using proper care, it affords *primâ facie* evidence of negligence (*Scott* v. *London, &c., Dock Co.*, 34 *L. J. Ex.* 220; *Byrne* v. *Boadle*, 2 *Hurl. & C.* 722).

(1) **Runaway horse.**[100a]—Thus, where a horse of the defendant suddenly bolted without any explainable cause, and, swerving on to the footpath, collided with and injured the plaintiff, it was held that the plaintiff had not produced any evidence of negligence sufficient to entitle him to recover. For it is no negligence to drive a horse along a public street, and horses will occasionally run away without any negligence of the driver (*Manzoni* v. *Douglas*, 6 *Q. B. D.* 145).

(2) **Accident capable of two explanations.**—So where the dead body of a man was found on the defendants' railway near to a level crossing, the man having been killed by a train which bore the usual head-lights, but

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Townships of King and Albion, 8 *O. A. R.* 248; *Jones* v. *Grand Trunk R. W. Co.*, 16 *O. A. R.* 37.

[100] Where the manner in which the accident happened is mere conjecture, the action is not maintainable (*Lydia Farmer* v. *Grand Trunk R. W. Co.*, 21 *O. R.* 299).

Finlay v. *Miscampble*, 20 *O. R.* 29; *Follet* v. *Toronto Street R. W. Co.*, 15 *O. A. R.* 346.

[100a] *Crawford* v. *Upper*, 16 *O. A. R.* 440.

did not whistle, it was held that, in an action by the widow, there was no evidence of negligence on the defendants' part. For, as Lord Halsbury said, "One may surmise, and it is but surmise and not evidence, that the unfortunate man was knocked down by a passing train while on the level crossing; but assuming in the plaintiff's favour that fact to be established, is there anything to show that the train ran over the man rather than that the man ran against the train?" (*Wakelin* v. *L. & S. W. R. Co.*, 12 *App. Cas.* 41; and see also *Davey* v. *L. & S. W. R. Co.*,[101] 12 *Q. B. D.* 70).

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[101] The deceased, who was well acquainted with the locality, while driving along a road running in the same direction as and crossing the railway, was killed at the crossing by a locomotive, not a regular train. The jury found that the engine was going unusually fast; that the whistle was sounded at another crossing three-fifths of a mile off but was not continued; and that deceased was not guilty of contributory negligence. The Common Pleas Division refused to disturb this verdict, which was affirmed in the Court of Appeal, and on appeal to the Privy Council the appeal was dismissed (*Peart* v. *The Grand Trunk R. W. Co.*, 10 *O. A. R.* 191, and *Wheeler's Privy Council Law*, 1876—1891, 308).

"If the law laid down in *Davey* v. *London and South Western R. W. Co.* went the length, to which I do not understand it to go, of casting on a plaintiff who sues for an injury caused by the negligence of the defendant, the burden of affirmatively proving that he took all precautions to avoid the accident, or in other words of negativing contributory negligence, as a part of his case, it would not necessarily govern us in this country. In England there is no such statutory provision as that of our law, which requires a warning to be given when approaching a level crossing, by ringing the bell or sounding the whistle. If that precaution is neglected, there is no escape for the railway company from the imputation of negligence. If no warning is given and a person crossing the track is struck by the train, there is evidence enough in the proof of those facts

(3) **Accident primâ facie due to negligence.**[102]—On the other hand, where a person was walking in a public

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to convince a jury, if nothing else is shown, that the accident was caused by the neglect to give warning. To hold that the plaintiff must show affirmatively that he looked up and down the track or took other precautions which might have averted the danger arising from the defendants' negligence, would be to practically relieve the company and its servants from the duty cast upon them by the statute" (*Ibid.*—Patterson, J. A., 199, 200).

A traveller on approaching a railway crossing is bound to use such faculties of sight and hearing as he may be possessed of, and when he knows he is approaching a crossing and the line is in view, and there is nothing to prevent him from seeing and hearing a train if he looks for it, he ought not to cross the track in front of it without looking, merely because the warning required by law has not been given (*Weir* v. *The Canadian Pacific R. W. Co.*, 16 *O. A. R.* 100).

At a place which was not a station nor a highway crossing the N. B. Ry. Co. had a siding for loading lumber delivered from a saw mill and piled upon a platform. The deceased was at the platform with a team for the purpose of taking away some lumber, when a train coming out of a cutting frightened the horses, which dragged the deceased to the main track, where he was killed by the train. *Held*, that there was no duty upon the company to ring the bell or sound the whistle or to take special precautions in approaching or passing the siding (*The N. B. Ry. Co.* v. *Vanwart*, 17 *S. C. R.* 35).

Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident is insufficient to support a verdict for damages where there is no direct fault or negligence proved against the defendant and the actual cause of the accident is purely a matter of speculation or conjecture (*The Canada Paint Co.* v. *Trainor*, 28 *S. C. R.* 352).

Forwood v. *The City of Toronto*, 22 *O. R.* 351; *Shoebrink* v. *The Canada Atlantic R. W. Co.*, 16 *O. R.* 515; *Kerwin* v. *The Canadian Coloured Cotton Co.*, 28 *O. R.* 73; *Gilmour* v. *Bay of Quinté Bridge Co.*, 20 *O. A. R.* 281; *Shannahan* v. *Ryan*, 20 *N. S. R.* 142.

[102] *Jones* v. *The Grand Trunk R. Co.*, 18 *S. C. R.* 696.

IMAGE EVALUATION
TEST TARGET (MT-3)

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street and a barrel of flour fell upon him from a window of the defendant's house, it was held sufficient *primâ facie* evidence of negligence to cast on the defendant the onus of proving that the accident was not attributable to his want of care. For barrels do not usually fall out of windows in the absence of want of care (*Byrne* v. *Boadle*, 33 *L. J. Ex.* 13; *Scott* v. *London, &c. Dock Co.*, *sup.*). But where the defendant was gratuitously driving the plaintiff, and the kingbolt of the carriage broke and the horses consequently bolted, and the plaintiff was injured, it was held that there was not sufficient evidence of negligence to render the defendant liable. For, as Lord Chelmsford, referring to cases such as that last cited, said: "This case is very different. There is nothing more usual than for accidents to happen in driving without any want of care or skill on the part of the driver" (*Moffatt* v. *Bateman*,[103] *L. R.* 3 *P. C.* 115). In short, the question must always depend on the nature of the accident. In general, where an accident may be equally susceptible of two explanations, one involving negligence, and the other not, the plaintiff must give some evidence of want of care. But where the probability is that the accident could only have had a negligent origin, the presumption will be the other way.

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[103] "I think the result of the authorities undoubtedly is, that if the deceased was a mere licensee, who entered the car not as a passenger, but for the purpose of plying his trade there, and whose presence was simply tolerated, the plaintiff has no right to complain because the safety of the car was not improved by the addition of a step" (*Blackmore* v. *Toronto Street Railway Co.*, 38 *U. C. R.* 216—Moss, J.).

ART. 72.—*Duties of Judge and Jury.*

Whether there is *reasonable* evidence, to be left to the jury, of negligence occasioning the injury complained of, is a question for the judge. It is for the jury to say whether, and how far, the evidence is to be believed (*Met. R. Co.* v. *Jackson*,[104] 3 *App. Cas.* 193).

That is to say, the judge should not leave the case to the jury merely because there is a *scintilla* of evidence, but should rather decide whether there is *reasonable* evidence of negligence, and then leave it to the jury to find whether the facts which afford that reasonable evidence are true. The law is thus summarised in the above important case. "The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence *may* be reasonably inferred: the jurors have to say whether from those facts, when submitted to them, negligence *ought* to be inferred. It is, in my opinion, of the greatest importance, in the administration of justice, that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if,

Canadian Cases.

[104] Where the evidence is as consistent with the existence or non-existence of negligence, the question is for the jury (*Henderson* v. *Barnes*, 32 *U. C. R.* 176; see also *Jackson* v. *Hyde*, 28 *U. C. R.* 294).

Jones v. *Grand Trunk R. W. Co.*, 45 *U. C. R.* 193; *Fields* v. *Rutherford*, 29 *U. C. C. P.* 113; *McGibbon* v. *Northern & N. W. R. Co.*, 11 *O. R.* 307; *Barrett* v. *Suttis*, 5 *N. S.* (*Russell & Geldert*), 262.

in a case where there are facts from which negligence may reasonably be inferred, the judge were to withdraw the case from the jury, upon the ground that in his opinion negligence ought not to be inferred. And it would place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies: a company might be unpopular, unpunctual and irregular in its service, badly equipped as to its staff, unaccommodating to the public, notorious, perhaps, for accidents occurring on the line, and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where the company was really blameless. It may be said that this would be set right by an application to the court in banco, on the ground that the verdict was against evidence; but it is to be observed that such an application, even if successful, would only result in a new trial. And on a second trial, and even on subsequent trials, the same thing might happen again." See also *Lee* v. *Nixey*, 63 *L. T.* 285.

Art. 73.—*Limitation.*

An action for damage incurred by another's negligence must be commenced within six years.

ART. 74.—*Actions by Personal Representatives of Persons killed by Torts* (*a*).[105]

(1) Whenever the death of a person is caused by a wrongful act, neglect or default of another which would (if death had not ensued) have

(*a*) It will be observed that the Act applies not only to deaths caused by *negligence*, but to deaths however tortiously caused. As, however, cases under the Act usually arise out of negligence, it has been thought most convenient to treat of the Act under the present section.

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[105] "This is an action on the case founded upon the provincial statute 10 & 11 Vict. c. 6 [now R. S. O., 1897, c. 166], which enacts that whensoever the death of a person shall be caused by wrongful act, neglect or default, such as would (had death not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then the persons who would have been liable shall be liable to an action at the suit of the administrator or executor of the person deceased, wherefore the test is whether the intestate could have sustained an action had he only sustained a bodily injury not mortal" (*Kinney* v. *Morley*, 2 *U. C. C. P.* 231—Macaulay, C. J.).

The act respecting compensation to families of persons killed by accident, R. S. M. c. 26, supersedes Lord Campbell's Act in Manitoba, and must be read along with the Workmen's Compensation for Injuries Act, 1893; and any action under it must be brought by the executor or administrator of the deceased person (*Pearson* v. *Canadian Pacific Ry. Company*, 12 *M. R.* 112).

Zimmer v. *Grand Trunk R. W. Co.*, 19 *O. A. R.* 693; *McLeod* v. *W. & A. Railway Co.*, 23 *N. S. R.* 69.

P. brought an action against a conductor of the Intercolonial Railway for injuries received in attempting to board a train, and alleged to be caused by the negligence of the conductor in not bringing the train to a standstill. Between the verdict and a judgment ordering a new trial P. died. *Held*, that under Lord Campbell's Act or the equivalent

entitled the party injured to maintain an action in respect thereof, then the wrongdoer is liable to an action, even although the circumstances amount in law to a felony (9 & 10 Vict. c. 92, s. 1).

(2) Every such action must be for the benefit of the wife, husband, parent and child of the deceased, and must be brought by and in the name of the executor or administrator of the deceased person; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death, to the parties respectively for whom and for whose benefit such action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, is divided amongst the before-mentioned parties in such shares as the jury by their verdict may direct (sect. 2).

(3) Not more than one action lies for the same cause of complaint, and every such action must be commenced within one year after the death of the deceased (sect. 4).

(4) Where there is no executor or administrator, or (if there is) no action is brought by

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statute in New Brunswick (C. S. N. B. c. 86), an entirely new cause of action arose on the death of P., and the original action was entirely gone and could not be revived (*White* v. *Parker*, 16 *S. C. R.* 699).

"No civil action can be maintained at common law for

him within six months, the action may be brought in the name or names of all or any of the persons for whose benefit the personal representative could have sued (27 & 28 Vict. c. 95, s. 1, and see *Holleran* v. *Bagnell*,[105] 4 *L. R. Ir.* 740).

In respect to actions brought under the provisions of this statute (commonly known as Lord Campbell's Act), which establishes a statutory exception to the common law maxim "*actio personalis moritur cum personâ*," the following points must be remembered—

(1) The personal representatives (or should they not

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an injury which results in death. The death of a human being, though clearly involving pecuniary loss, is not at common law the ground of an action for damages, and therefore until the passing of Lord Campbell's Act (9 & 10 Vict. c. 93) there was in *England* no right of action for the recovery of damages in respect of an injury causing death, nor until R. S. O. 1877, c. 128 [now R. S. O., 1897, c. 166], in Ontario" (*Monaghan* v. *Horn*, 7 *S. C. R.* 420—Ritchie, C. J.).

Canadian Pacific R. W. Co. v. *Robinson*, 19 *S. C. R.* 292.

[106] In an action under the Workmen's Compensation for Injuries Act, 1886 (R. S. O. 141) [now R. S. O. 1897], c. 160, *ante*, p. 107], as well as under the provisions of the statute known as Lord Campbell's Act contained in R. S. O. 1887, c. 135 [now R. S. O. 1897, c. 166], it is necessary to show that the plaintiff had a reasonable expectation of pecuniary or material benefit from the life of the person killed (*Mason* v. *Bertram*, 18 *O. R.* 1).

An action for damages by reason of the death of a person can be maintained under R. S. O. c. 135, sect. 7 [now R. S. O. 1897, c. 166, s. 8], by the person beneficially entitled, though brought within six calendar months from the death, unless there be at the time an executor or administrator of the deceased (*Lampman* v. *Corporation of Gainsborough*, 17 *O. R.* 193).

"The 7th sect. of the R. S. O. c. 135 [now sect. 8 R. S. O.

sue, the parties mentioned in the last clause of the rule) can only maintain the action in those cases in which, had the deceased lived, he himself could have done. So that, if the deceased were guilty of such contributory negligence as would have barred him from succeeding, those claiming as his representatives can stand in no better position (*Pym* v. *G. N. R. Co.*,[107] 4 *B. & S.* 396).

(2) Every such action must be brought for the benefit of the wife, husband, parent and child of the deceased. *Parent* includes a grand-parent and a step-parent. The word *child*, a grand-child and a step-child, and a child *en ventre sa mère* (*The George and Richard*, *L. R.* 3 *Adm.* 466; 24 *L. T.* 717 (*a*)), but not a bastard (*Dickinson* v. *N. E. R. Co.*,[108] 2 *H. & C.* 735). The jury apportion the damages amongst these persons in such shares as they may think proper.

(3) The persons for whose benefit the action is

(*a*) The reader must not be misled by this case into concluding that an action *in rem* against a ship may be maintained under the Act (see *Seward* v. *The Vera Cruz*, 10 *App. Cas.* 59).

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1897, c. 166], follows the Imperial Act, 27 & 28 Vict. c. 95, sect. 1, which forms an amendment to Lord Campbell's Act" (Rose, J., *ibid.*).

[107] Although on the death of a wife caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife, which would have to be replaced by hired services, is a substantial loss, for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother (*The St. Lawrence and Ottawa R. W. Co.* v. *Lett*, 11 *S. C. R.* 422. Leave to appeal to the Judicial Committee was refused; see also *Canadian Pacific R. W. Co.* v. *Robinson*, 14 *S. C. R.* 105).

[108] *Gibson* v. *Midland R. W. Co.*, 2 *O. R.* 658.

brought must have suffered some pecuniary loss by the death of the deceased (*Franklin* v. *S. E. R. Co.*, 3 *Hurl. & N.* 211). "*Pecuniary* loss" means "some substantial detriment in a worldy point of view." Thus, loss of reasonably anticipated pecuniary benefits, loss of education or support is sufficient (*Pym* v. *G. N. R. Co.*, *sup.*; *Franklin* v. *S. E. R. Co.*, *sup.*); as where the plaintiff was old and infirm and had been partly supported by his son, the deceased (*Hetherington* v. *N. E. R. Co.*, 9 *Q. B. D.* 160). Even loss of mere gratuitous liberality (*Dalton* v. *S. E. R. Co.*, 27 *L. J. C. P.* 227), or loss to the personal property of the deceased by medical expenses is sufficient (*Bradshaw* v. *Lanc. and York. R. Co. L. R.*, 10 *C. P.* 189; but see *Leggott* v. *G. N. R. Co.*, 1 *Q. B. D.* 599). Grief, mourning, and funeral expenses, however, cannot be taken into account (per Bramwell, *Osborn* v. *Gillett*, *L. R.* 8 *Ex.* 88); nor can a person recover compensation where the pecuniary advantage he has lost arose from a contract between himself and the deceased, and not from his relationship to him (*Sykes* v. *N. E. R. Co.*, 44 *L. J. C. P.* 191).

(4) If the deceased obtained compensation during his lifetime, no further right of action accrues to his representatives on his decease (*Read* v. *G. E. R. Co.*, *L. R.* 3 *Q. B.* 555. But see *Daly* v. *Dublin, &c., Ry. Co.*, 30 *L. R. Ir.* 514, where the Irish Courts decided *contra*).

(5) The death must be actually caused by the wrongful act for which compensation is sought.

(6) The action must be brought within twelve calendar months after the death of the deceased.

(7) Where a deceased has made provision for his wife, by insuring his life in her favour, then, inasmuch as she is benefited by *the accelerated receipt* of the

amount of the policy, the jury ought, in estimating the widow's loss, to deduct from the future earnings of the deceased not the amount of the policy moneys, but the premiums which, if he had lived, he would have had to pay out of his earnings for the maintenance of the policy. (*Grand Trunk R. Co.* v. *Jennings*, 13 *App. Cas.* 800.) It is apprehended that the same result would follow in cases where compensation is awarded under the Workmen's Compensation Act.

CHAPTER III.

TORTS FOUNDED ON MISUSE OR ABUSE OF PROPERTY PUBLIC OR PRIVATE.

ART. 75.—*Definition of Nuisance.*

A NUISANCE is a misuse or abuse of a man's own property or proprietary rights, or an unauthorized use of public property, causing either danger to the public (in which case it is called a public nuisance), or merely damage to a private citizen (in which case it is called a private nuisance), and not necessarily depending for its wrongful character on malice or negligence, and not amounting to trespass.[109]

(1) Thus the storing of water on a man's own land in large quantities, and allowing it, either with or without negligence, to escape on to the land of his neighbour, is a private nuisance.

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[109] Though a livery stable is constructed with all modern improvements for drainage and ventilation, if offensive odours therefrom and the noise made by the horses are a source of annoyance and inconvenience to the neighbouring residents the proprietor is liable in damages for the injury caused thereby (*Drysdale* v. *Dugas*, 26 *S. C. R.* 20).

"The doctrine seems well established that where a man

(2) So setting up a noisy or a noisome factory in a residential neighbourhood may be a public or private nuisance according to the number of people annoyed.

(3) Again, to dig a hole in a highway is an unauthorized interference with the property of the public which constitutes a public nuisance, and so it is to allow rubbish or filth to be deposited on your land so as to be a public nuisance (*Att.-Gen.* v. *Hartley*, (1897) 1 Ch. 560.)

The law with regard to nuisances mainly depends upon the maxim *sic utere tuo ut alienum non lædas*.[110] Not that that maxim can receive a literal translation, for a man may do many acts which may injure others (*ex. gr.*, build a house which may shut out a fine view theretofore enjoyed by a neighbour); but such acts are necessarily incidental to the ownership of property. The acts referred to in the maxim are acts which go beyond the recognized legal rights of a proprietor; acts, so to speak, *ultra vires*, which are an abuse of the legal rights enjoyed by a proprietor.

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suffers a particular injury by a nuisance he may maintain an action, the injury being direct and not consequential" (*Fairbanks* v. *G. W. Rail. Co.*, 35 *U. C. R.* 531—Richards, C. J.). *Fuller* v. *Pearson*, 23 *N.S.R.* 263; *Park* v. *White*, 23 *O.R.* 611.

[110] Letting snow lie on a macadamized road does not, as a general rule, come under the notion of suffering the road to go out of repair (*Stewart* v. *The Woodstock, &c. Road Co*, 15 *U. C. R.* 427; *Caswell* v. *St. Mary's, &c. Road Co.*, 28 *U. C. R.* 247, *ante*, p. 288).

In the case of *Burns et ux.* v. *The Corporation of Toronto* (42 *U. C. R.* 560), the authorities are reviewed as to liability for accidents caused by snow or ice.

Section 609 of the Municipal Act, R. S. O. 1897, c. 223, gives a remedy over in case of damages for injuries caused by parties other than the corporation sued.

Torts arising out of nuisances may be conveniently divided into:—(1) those in which the damnum consists of some bodily injury; and (2) those in which it consists of some injury to property; and each of these will be separately treated in the two following sections.

Section I.—Of Bodily Injuries caused by Nuisances.

Art. 76.—*When actionable.*

A person who commits a nuisance either public or private, whereby bodily injury is caused to a fellow citizen, is liable to an action for damages.

(1) **Excavations.** — Thus, where a man makes an excavation adjoining a highway, and keeps it unfenced, he will be liable for any injury occasioned to a person falling into it (*Barnes* v. *Ward*,[111] 9 *C. B.* 392; *Bishop* v. *Trustees of Bedford Char.*, 28 *L. J. Q. B.* 215).

(2) **Noxious fumes.**—And to keep anything injurious to the health of persons living near, such as a foul cesspool, or to carry on any noisome or noxious employment, is a nuisance. For cases on "Noxious Fumes," see *Tipping* v. *St. Helens Smelting Co.*, *L. R.* 1 *Ch.* 66; *Crump* v. *Lambert*, *L. R.* 3 *Eq.* 409; *Salvin* v. *N. Brancepeth Coal Co.*, *L. R.* 9 *Ch.* 705; *Malton Board of Health* v. *Malton Manure Co.*, 4 *Ex. D.* 302.

(3) **Statutory Nuisances.**—Certain acts have been declared nuisances by statute, and private damage caused by them is of course actionable. Thus by

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[111] *Howarth* v. *McGregan*, 23 *O. R.* 396.

24 & 25 Vict. c. 100, s. 31 (re-enacting 7 & 8 Geo. 4, c. 18), the setting of spring-guns, man-traps, or other engines calculated to kill or do grievous bodily harm to a trespasser is made a misdemeanor, and even a trespasser hurt thereby may recover; for although it would be partly owing to his own misconduct, yet if the defendant might, by acting rightly, have avoided doing the injury, the plaintiff's contributory misconduct is no excuse. But this Act does not apply to the setting of traps or guns in the night in dwelling-houses for the protection thereof.

So by the General Highway Act, 5 & 6 Will. 4, c. 50, s. 70, it is made illegal for any person to sink any pit, or erect any steam or other like engine, gin, or machinery attached thereto, within twenty-five yards from any part of a carriage or cart way, unless concealed within some building, or behind some fence, so as to guard against danger to passengers, horses, or cattle. It also prohibits the erection of windmills within fifty yards, and fires for burning ironstone, limestone, or making bricks or coke, within fifteen yards of a carriage or cart way.

Sect. 72 prohibits the letting-off of fireworks or firearms within fifty feet of the centre of the way, as also the laying of things upon it or obstructing it in any way.

By virtue of this Act any corporal injury caused to an individual by the non-observance of duties thereby created, is actionable, even though the person injured were trespassing at the time (within twenty-five yards of the way).

Thus, where the defendants were owners of waste land bounded by two highways, and worked a quarry

outside the prohibited distance in such land, and the plaintiff walking over the waste, fell into the quarry and broke his leg, it was held that no action lay, the plaintiff being a mere trespasser (*Hounsell* v. *Smyth*, 29 *L. J. C. P.* 203; and see *Binks* v. *S. Y. R. Co.*, 32 *L. J. Q. B.* 26; *Hardcastle* v. *S. Y. R. Co.*, 28 *L. J. Ex.* 139).

But children appear to be "licensed libertines" in this respect. Thus, where a boy attempted wrongfully to climb a rotten fence adjoining a highway, and the fence fell upon, and injured him, he was held to be entitled to recover, because the fence was a nuisance, and he only did what might have been expected of a boy (*Harrold* v. *Watney*, (1898) 2 *Q. B.* 390).

(4) **Ruinous premises.**—To permit premises adjoining a highway, or the land of another, to fall into a ruinous condition is a public nuisance entitling a person injured thereby to damages (*Todd* v. *Flight*, 30 *L. J. C. P.* 21; see also *Gwinnell* v. *Eamer*, *L. R.* 10 *C. P.* 658; *Nelson* v. *Liverpool Brewery Co.*, 2 *C. P. D.* 311; *Tarry* v. *Ashton*, 1 *Q. B. D.* 314).

ART. 77.—*Nuisances created by Ruinous Premises.*

(1) As between landlord and tenant, or the customers or guests of a tenant (*Lane* v. *Cox*, (1897) 1 *Q. B.* 415), there is no implied obligation on the part of the former that the property let is in a safe condition (*Keates* v. *Cadogan*, 20 *L. J. C. P.* 76; *Hart* v. *Windsor*, 12 *M. & W.* 68; *Erskine* v. *Adeane*, 42 *L. J. Ch.* 835; *L. R.*

8 *Ch.* 756; but conf. *Broggi* v. *Robins*,[112] 14 *T. L. R.* 439).

(2) With regard to third parties, the tenant is the person responsible for any injury resulting from the premises let being out of repair, and the landlord will also be responsible to persons using an adjacent highway, or to persons occupying adjacent premises (*Lane* v. *Cox*, *sup.*), if he has done any act authorizing the continuance of the dangerous state of the house (per Bovill, C. J., *Pretty* v. *Bickmore*,[113] *L. R.*, 8 *C. P.* 404; *Broder* v. *Saillard*, 2 *Ch. D.* 692; *Humphries* v. *Cousins*, 2 *C. P. D.* 239;

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[112] An agent merely to let or receive rents is not liable for a nuisance upon the premises let by him. If a nuisance existed at the time of letting, both tenant and owner are liable. If it arises after the tenancy is created the tenant only is responsible (*The Queen* v. *Osler*, 32 *U. C. R.* 324).

[113] "It is clear that by English law the lessee or vendee continuing previously existing nuisances is liable, though the original creator may also be liable" (*Sibbald* v. *Grand Trunk R. W. Co.*, 18 *O. A. R.* 194—Hagarty C. J. O.).

Both the landlord and tenant are liable for damages arising from a nuisance erected by the landlord of a house, and continued to be used by the tenant in occupation (*McCallum* v. *Hutchison and another*, 7 *U. C. C. P.* 508).

"But if the premises are let to a tenant, unless they are let with a nuisance upon them, the landlord is not liable for anything done by the tenant unless expressly authorized, or in the nature of a nuisance which he permitted. But in no case can the landlord be made liable for the negligence of his tenant, and the principle must be the same in the case of a person in possession under a licence" (*Ward* v. *Caledon*, 19 *O. A. R.* 76—Burton, J. A.); and see *Smith* v. *Humbert*, *N. B. R.*, 2 *Kerr* 602, *ante*, p. 144, and *Castor* v. *Uxbridge*, *ante*, p. 297.

Firth v. *Bowling Iron Works Co.*, 3 *C. P. D.* 254); Where there is a weekly tenancy, the law does not imply a re-letting at the end of each week, so as to make the landlord liable for dangerous nuisances arising since the original letting (*Bower* v. *Anderson*, (1894) 1 *Q. B.* 164, overruling *Sandford* v. *Clarke*, 21 *Q. B. D.* 398).

(3) These rules, however, only apply to the property *actually let*; and, where the landlord retains control of the approaches (*ex. gr.*, a staircase common to a lot of flats), he, and not the tenant, is responsible both to tenants and strangers for injuries caused by want of repair (*Miller* v. *Hancock*, (1893) 2 *Q. B.* 177).

(1) **Falling chimneys.**—Thus, if, in consequence of disrepair, a chimney falls and injures the tenant's family, yet he has no remedy, unless the landlord has contracted to keep the house in repair, or unless there was fraud on his part in industriously concealing the defect from the tenant (*Gott* v. *Gandy*, 23 *L. J. Q. B.* 1; *Keates* v. *Cadogan*, 20 *L. J. C. P.* 76).

(2) **Dangerous coal-cellar plate.**—The defendant let premises to a tenant who covenanted to keep them in repair. Attached to the house was a coal-cellar under the footway, with an aperture covered by an iron plate, which was, *at the time of the demise*, out of repair and dangerous. A passer-by, in consequence, fell into the aperture, and was injured: Held, that the obligation to repair, being, by the lease, cast upon the tenant, the landlord was not liable for this accident. And Keating, J., said, "In order to render the landlord liable in a case of

this sort, there must be some evidence that he authorized the continuance of this coal shoot in an insecure state; for instance, that he retained the obligation to repair the premises: that might be a circumstance to show that he authorized the continuance of the nuisance. There was no such obligation here. The landlord had parted with the possession of the premises to a tenant, who had entered into a covenant to repair" (see also *Gwinnell* v. *Eamer*, *L. R.* 10 *C. P.* 658, and *Rich* v. *Basterfield*, 16 *L. J. C. P.* 273; and comp. *Roswell* v. *Prior*,[114] 12 *Mood.* 639).

(3) And in *Todd* v. *Flight* (30 *L. J. C. P.* 21; 9 *C. B. N. S.* 377), where the declaration contained an allegation that the defendant let the houses when the chimneys were known by him to be ruinous and in danger of falling, that he *kept and maintained them in that state, and that the tenant was under no obligation to repair*, and the case was tried on demurrer, and the allegation was therefore assumed to be true, it was held that the landlord was liable.[115]

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[114] An employee of a company which had contracted to deliver coal at a school building went voluntarily to inspect the place where the coal was to be put on the evening preceding the day upon which arrangements had been made for the delivery, and was accidentally injured by falling into a furnace pit in the basement on his way to the coal bins. He did not apply to the School Board or the caretaker in charge of the premises before making his visit. *Held*, that in thus voluntarily visiting the premises for his own purpose, and without notice to the occupants, he assumed all risks of danger from the condition of the premises (*Rogers* v. *The Toronto Public School Board*, 27 *S. C. R.* 448; *Ross* v. *Hunter*, 7 *S. C. R.*; *Corbett* v. *Wilson*, 24 *N. S. R.* 25).

[115] There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for

(4) In *Nelson* v. *The Liverpool Brewery Co.* (25 *W. R.* 877), Lopes, J., laid it down, that the owner of premises demised to a tenant is not liable for an injury sustained by a stranger, owing to the premises being out of repair, unless he has either contracted to do the repairs, *or has let the premises in a ruinous and improper condition*. It seems, however, to be clear that the last alternative is not accurate, except where the tenant has not undertaken the repairs (see remarks of Brett, L. J.,

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accidents caused by its falling (*Lazarus* v. *The Corporation of Toronto*, 19 *U. C. R.* 1, and *ante*, p. 290).

"The first count in this declaration charges the defendants with neglecting to remove the snow from the building in question; but as owners of the land merely they had no such duty incumbent on them, and they are not charged on that ground, but because they occupied the upper part of the house. No case has been cited for the position that a tenant of part of a house has the duty cast upon him of taking care that the building generally is not the cause of injury to others. If any one would be liable to this action by reason of occupation, it must be, I think, the lessee of the whole building. The defendants have no particular charge of the roof because they occupy the room next below it" (*Ibid.*—Robinson, C. J.).

"The defendant's counsel objected that he was not liable on this indictment, being only servant or agent for the owner of the property on which the dam was erected and maintained. He cannot justify or excuse his own acts by the relation of agent or servant to another, if those acts were unlawful; whether he did keep up and maintain this dam was as much a fact to be proved against him as that it was a common and public nuisance" (*The Queen* v. *Brewster*, 8 *U. C. C. P.* 211—Draper, C. J.).

A corporation is liable for damages caused by a dangerous nuisance created by it on a highway within the limits of its control, and the misconduct will be treated as a misfeasance and not mere nonfeasance, if the injury arises from a combination of acts and omissions on the part of the corporation (*Patterson* v. *City of Victoria*, 5 *B. C. Reps.* 628).

in *Gwinnell* v. *Eamer, sup.*, and *Lane* v. *Cox, sup.*); and the dictum is not a complete summary of the law, inasmuch as there may be possible cases where the landlord may *prevent* the tenant from repairing a nuisance, by threatening an action for waste.

Art. 78.—*Nuisances on Roads.*

When a person expressly or impliedly permits others to come on to roads on his land, he is liable for any injury caused to them by a nuisance thereon or near to the same, but not if they stray from such paths and trespass on the adjoining ground.

(1) **Private roads.**—Thus, a person permitting the use of a pathway to his house, holds out an invitation to all having occasion for coming to the house, to use his footpath, and he is responsible for neglecting to fence dangerous places. And so, also, a shopkeeper, who leaves a trap-door open without any protection, is liable to a person lawfully coming there, who suffers injury by falling through such trap-door (Tindal, C. J., *Lancaster Canal Co.* v. *Parnaby*, 11 *A. & E.* 243; *Barnes* v. *Ward*, 9 *C. B.* 420; 19 *L. J. C. P.* 200; *Gautret* v. *Egerton*,[116] *L. R.* 2 *C. P.* 371; *Chapman* v. *Rothwell*, 27 *L. J. Q. B.* 315; *Lax* v. *Mayor of Darlington*, 5 *Ex. D.* 28).

But where a person, straying from the ordinary approaches to a house, trespasses where there is no

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[116] *Rounds* v. *Corporation of Stratford*, 25 *U. C. C. P.* 123.

path, and falls into an unguarded pit, he has no remedy for any injury suffered thereby, as the hurt is in such case caused by his own carelessness and misconduct, and accordingly the principle of contributory negligence applies (Wilde, B., *Bolch* v. *Smith*,[117] 31 *L. J. Ex.* 203).

(2) **Railways.**—Railway companies are responsible for the state of their works, and are liable to any person who, being lawfully on or under the same, is injured by the faulty construction or want of repair, of their bridges, embankments, &c. (*Grote* v. *Chester and Holyhead R. Co.*, 2 *Ex.* 251; *Kearney* v. *L. B. & S. Coast R. Co.*, *L. R.* 6 *Q. B.* 759; *Lay* v. *Mid. Rail. Co.*, 34 *L. T.* 30; and as to tramways, see *Sadler* v. *South Staffordshire, &c. Tramways Co.*, 23 *Q. B. Div.* 17). But if the ruinous state has been caused by a *vis major* or act of God (as where a railway gives way through an extraordinary flood), the company is not liable, provided their line is constructed so firmly as to be capable of resisting the foreseen, though more than ordinary, attacks of the weather (*Withers* v. *North Kent R. Co.*, 27 *L. J. Ex.* 417; *G. W. R. Co. of Canada* v. *Fawcett*, 1 *Moore, P. C. C., N. S.* 120; *Murray* v. *Met. R. Co.*, 27 *L. T.* 762).

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[117] A person who, with the knowledge of, and without objection by a municipal corporation, constructs across a ditch between the sidewalk and the crown of the highway an approach therefrom to enable vehicles to pass to and from his property, adjacent to the highway, is liable for injuries sustained through want of repair of the approach, by a person using it to cross the highway (*Hopkins* v. *The Corporation of the Town of Owen Sound et al.*, 27 *O. R.* 43).

Hasson v. *Wood*, 22 *O. R.* 67; *Ryan* v. *Canada Southern R. W. Co.*, 10 *O. R.* 745; *Noverre* v. *City of Toronto*, 27 *O. R.* 651.

(3) **Canals.**—So, too, canal companies are bound to take reasonable care to make their canal as safe as possible to those using it (*Lanc. Canal Co.* v. *Parnaby*, 11 *A. & E.* 243).

(4) **Public Roads.**—So, too, for nuisances on a highway caused by a private person, or by the misfeasance of a public authority, any person who can show special damage may sue. *Fenna* v. *Clark & Co.*, (1895) 1 *Q. B.* 199; *Harrold* v. *Watney*, (1898) 2 *Q. B.* 320; *Foreman* v. *Mayor of Canterbury*, *L. R.* 6 *Q. B.* 214. But for a nuisance caused by mere non-feasance a public authority is not liable civilly to a person who suffers special damage (*Thompson* v. *Brighton Corporation*, (1894) 1 *Q. B.* 332; *Saunders* v. *Holborn Board*, (1895) 1 *Q. B.* 64; *Sidney* v. *Bourke*, (1895) *A. C.* 433; *Cowley* v. *Newmarket Local Board*,[118] (1892) *A. C.* 345).

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[118] Anything which exists or is allowed to remain above a highway, interfering with its ordinary and reasonable use, constitutes want of repair and a breach of duty on the part of the municipality having jurisdiction over the highway. A branch of a tree growing by the side of a highway, to the knowledge of the defendants, extended over the line of travel at a height of about eleven feet. The plaintiff in endeavouring to pass under the branch on the top of a load of hay was brushed off by it and injured. It was *held* that defendants were liable (*Ferguson* v. *Township of Southwold*, 27 *O. R.* 66).

Where an object is left overnight on the highway unlighted and unguarded (in this case a building in process of removal), which is calculated to frighten horses, and by which a horse is frightened, and an accident results, and where the municipality, though having notice have taken no precaution to warn travellers, the municipality is liable, in the absence of contributory negligence, but is entitled to be indemnified by the person who placed the obstruction

ART. 79.—*Nuisances causing Injuries to Guests.*

Mere guests, licensees and volunteers are considered as temporary members of the host's family, and can therefore only recover for injuries caused to them by hidden dangers which they did not know of, but of which the host knew or ought to have known. But visitors on business which concerns the occupier of premises, may maintain an action for any injury caused by the unsafe state of the premises (see *Ivay* v. *Hedges*, 9 *Q. B. D.* 80).

(1) **Guests.**—In *Southcote* v. *Stanley* (1 *H. & N.* 247), the plaintiff was a guest of the defendant's, and when leaving the house a loose pane of glass fell from the door as he was pushing it open and cut him. It was held that the plaintiff being a guest, was for the time being one of the family and could not recover for an accident, the liability to suffer which he shared in common with the rest of the family.

(2) **Persons coming on business.**—But where, on the

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on the highway (*Rice* v. *Corporation of Whitby*, 28 *O. R.* 598). See R. S. O. 1897, c. 223, s. 609, and *ante*, p. 326. *McMullin* v. *Archibald*, 22 *N. S. R.* 146; *Shannahan* v. *Ryan*, 20 *N. S. R.* 142; *Robertson* v. *Halifax Coal Co.*, 20 *N. S. R.* 517; *York et al.* v. *Canada Atlantic S.S. Co.*, 24 *N. S. R.* 436.

The word "repair" as used in the municipal act with reference to a highway is a relative term, and if the particular road is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied (*Foley* v. *Township of East Flamborough*, 29 *O. R.* 139; *Ewing* v. *City of Toronto*, *ibid.* 197; *Macdonald* v.

contrary, a workman came *on business* to the defendant's manufactory, and there fell down an unguarded shaft, the defendant was held to be liable; although it would have been otherwise had the plaintiff been one of his own servants, for it was not a hidden danger (*Indermaur* v. *Dames*, *L. R.* 1 *C. P.* 274; 2 *ib.* 311).

(3) The plaintiff, a licensed waterman, having complained to the person in charge that a barge of the defendants' was being navigated unlawfully, was referred to the defendants' foreman. While seeking the foreman, he was injured by the falling of a bale of goods so placed as to be dangerous, and yet to give no warning of danger: Held, that the defendants were liable (*White* v. *France*, 2 *C. P. D.* 308).

(4) **Nuisances on railway stations.**—So, in the case of railway companies, the company must take great care to ensure the safety of persons coming to their station, and if through want of light or proper directions any such person is injured, he may maintain an action against the company. Thus, where the plaintiff, having a return ticket, arrived at the wrong side of the station, and there being no proper crossing and no directions, crossed the line in order to get to his train, and in doing so, on account of the ill-lighted condition of the station, fell over a switch and was injured, it was held that an action lay against the company (*Martin* v. *G. N. R. Co.*, 24 *L. J. C. P.* 209; *Shepperd* v. *Mid. R. Co.*,[119] 20 *W. R.* 705).

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Corporation of the Township of Yarmouth, *ibid.* 259; *Atkinson* v. *City of Chatham*, *ibid.* 525).

[119] Where, after calling out the name of the next station, a railway train was slowed up on approaching and passing it, but was not brought to a full stop, and the plaintiff, who had purchased a ticket for that station, received injuries on

ART. 80.—*Limitation.*

Actions for injuries to the person caused by nuisances must be brought within the period of six years next after the cause of action arose.

Exception.—Where the injury has caused death, any action brought by the personal representative, under Lord Campbell's Act, must be commenced within twelve calendar months from the death (see *supra*, p. 323).

SECT. II.—OF INJURIES TO PROPERTY CAUSED BY NUISANCES.

SUB.-SECT. 1.—NUISANCES TO CORPOREAL HEREDITAMENTS.

ART. 81.—*General Liability.*[119a]

Any nuisance, public or private, whereby sensible injury is caused to the property of another, or, whereby the ordinary physical

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alighting there, it was *held*, that there was evidence of an invitation to alight, and the jury having found in favour of the plaintiff the verdict was upheld (*Edgar et ux.* v. *The Northern R. W. Co.*, 11 *O. A. R.* 452).

"In an action of this nature the judge must say whether, upon the whole facts in evidence, negligence can legitimately be inferred; the jury have to say, in case the judge rules that there is evidence from which it may be so inferred, whether it ought to be inferred" (*Ibid.*—Burton, J.A., at p. 453).

McGibbon v. *Northern R. W. Co.* 14 *O. A. R.* 91.

[119a] The Municipal Act, R. S. O. 1897, c. 223, s. 586, empowers the councils of municipalities to pass by-laws for the purpose of preventing and abating public nuisances.

comfort of human existence in such property is *materially* interfered with, is actionable.

(1) **Fumes.**—Thus, in the case of *Tipping* v. *St. Helens Smelting Co.* (*L. R.* 1 *Ch.* 66), the fact that the fumes from the company's works killed the plaintiff's shrubs, was held sufficient to support the action; for the killing of the shrubs was an injury to the property.

(2) **Noisy Trade.**—So, too, it was said, in *Crump* v. *Lambert* (*L. R.* 3 *Eq.* 409), that smoke unaccompanied with noise, or with noxious vapour, noise alone, and offensive vapours alone, although not injurious to health, may severally constitute a nuisance; and that the material question in all such cases is, whether the annoyance produced is such as materially to interfere with the ordinary comfort of human existence.

(3) And so, again, in *Walter* v. *Selfe*[120] (4 *D. G. & Sm.* 322), Vice-Chancellor Knight Bruce said: "Both on principle and authority, the important point next for decision may properly, I conceive, be put thus: Ought this inconvenience to be considered in fact as more

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[120] The plaintiff claimed damages in an action against the defendants for injuries caused to his land and crops by the negligence and wrongful construction of a ditch by the corporation, in consequence of which water diverted from its natural course and collected in the ditch overflowed upon plaintiff's land. This work had been done under a by-law simply authorizing the expenditure of money upon the ditch, which was dug wholly upon land under defendants' control. *Held*, that such a by-law could not make lawful an act causing damage by flooding private lands (*Rayleigh* v. *Williams* distinguished; *Foster* v. *Municipality of Lansdown*, 12 *M. R.* 416).

Church of St. Margaret v. *Stephens*, 29 *O. R.* 185.

Barlow v. *Kinnear*, *N. B. R.* 2 *Kerr*, 94.

than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among English people?" (and see *Soltau* v. *De Held*, 2 *Sim. N. S.* 133; and *Inchbald* v. *Robinson*, *L. R.* 4 *Ch.* 388; and see *Robinson* v. *Kilvert*, 41 *Ch. D.* 88; 58 *L. J. Q. B.* 392; 61 *L. T.* 58).

(4) **Noisy Entertainments.**—So, too, the collection of a crowd of noisy and disorderly people, to the annoyance of the neighbourhood, outside grounds in which entertainments with music and fireworks are being given for profit, is a nuisance, even though the entertainer has excluded all improper characters, and the amusements have been conducted in an orderly way (*Walker* v. *Brewster*, *L. R.* 5 *Eq.* 25; and see also *Inchbald* v. *Robinson*, *L. R.* 4 *Ch.* 388).

(5) A proprietary club was established for pugilistic encounters, which caused the collection of large and noisy crowds outside the club. The club was kept open until three o'clock a.m., and, as the members left, great noise was caused by cabs being whistled for, and by such cabs driving up to and away from the club. In an action against the club proprietor for an injunction, brought by the owners, lessees, and occupiers of an adjoining house: Held, that the nuisance thus caused, was the reasonable and probable consequence of the defendant's acts, and that the injunction must be granted (*Bellamy* v. *Wells*, 60 *L. J. Ch.* 156; 63 *L. T.* 635; and see also *Barber* v. *Penley*, (1893) 2 *Ch.* 447; and *Jenkins* v. *Jackson*, 40 *Ch. D.* 71).

(6) So the letting-off of rockets, and the establishment

of a powerful band of music playing twice a week for several hours within one hundred yards of a dwelling-house, are nuisances (*Ib.*).

(7) On the other hand, the piano appears, like the dog, to be a licensed nuisance according to English law. Thus, the giving of numerous music lessons by the defendant in a house separated from the plaintiff's house by a thin party wall, varied by practising and singing, and evening musical entertainments, was held not to be a nuisance for which an injunction would be granted; and moreover, the Court restrained the plaintiff from making noises by way of reprisal (*Christie* v. *Davey*, (1893) 1 *Ch.* 316).

(8) **Dangerous substances.**—So, if a person allows substances which he has brought on his land to escape into his neighbour's, an action lies without proof of negligence. Thus, as we have seen (*supra*, p. 27), one who brings or collects water upon his land, does so at his peril, for if it escape and injure his neighbour, he is liable, however careful he may have been (*Fletcher* v. *Rylands*,[121] *L. R.* 3 *H. L.* 330; *Fletcher* v. *Smith*, 2 *App.*

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[121] O. and S. were adjoining proprietors of land in the village of Frankfort, Ont., that of O. being situate on a higher level than the other. In 1875 improvements were made to a drain discharging upon the premises of S., and a culvert was made connecting with it. In 1887 S. erected a building on his land and cut off the wall of the culvert which projected over the line of the street, which resulted in the flow of water through it being stopped and backed upon the land of O., who brought an action against S. for the damage caused thereby. *Held*, that S., having a right to cut off the part of the culvert which projected over his land, was not liable to O. for the damage so caused, the remedy of the latter, if he had any, being against the municipality for

Cas. 781; *Buckley* v. *B.*, (1898) 2 *Q. B.* 608), unless the escape was caused by something quite beyond the possibility of his control, as the act of God or malice of a third party (*Nichols* v. *Marsland*, 2 *Ex. Div.* 1; *Box* v. *Jubb*, 4 *Ex. Div.* 77); but where the water is naturally upon the land, the owner is only liable for negligence in keeping it. Nor is a mine owner liable because, by reason of his operations, water naturally percolates into the mines of his neighbours (*Wilson* v. *Waddell*, 2 *App. Cas.* 95). On the same ground, a landowner is not liable because the seed of thistles, permitted to grow on his land, is blown by the wind on to the land of his neighbour (*Giles* v. *Walker*,[122] 24 *Q. B. D.* 656). And so, also, where water is brought upon land, or into a house, by the defendant, but for the joint use of himself and the plaintiff, the latter cannot complain of any damage (not attributable to the defendant's negligence) which its escape may cause to him (*Anderson* v. *Oppenheimer*, 5 *Q. B. D.* 602).

(9) It has even been held in a recent case (*Whalley* v. *L. & Y. R. Co.*, 13 *Q. B. D.* 131) that even if a person has not brought the dangerous substance on to his land,

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not properly maintaining the drain (*Ostrom* v. *Sills et al.*, 28 *S. C. R.* 485, and *post*, p. 378).

"A charge of negligence in the construction of highways, producing injury by flooding someone's land, is not by any means a novelty with us. We find the right of action sustained by a series of decisions reaching back for over thirty years" (*Derinzy* v. *Corporation of Ottawa*, 15 *O. A. R.* 720—Hagarty, C. J. O.).

Ward v. *Caledon*, 19 *O. A. R.* 69; *The Chandler Electric Co.* v. *Fuller*, 21 *S. C. R.* 337; *Shaw* v. *McCreary*, 19 *O. R.* 39.

[122] *Osborne* v. *The Corporation of Kingston*, 23 *O. R.* 382.

he is yet liable if he takes *active means* to shift the danger from himself to his neighbour. In that case, by reason of an unprecedented rainfall, a quantity of water accumulated against one of the sides of the defendants' embankment so as to endanger its stability. To prevent this the defendants cut trenches in the embankment, and so let the water flow on to the plaintiff's land, and injured it. It was held that although the defendants had not brought the water on to their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff. They would have been entitled, no doubt, to *prevent* the water getting against their embankment, but they had no right, when once it was there, to transfer it to their neighbour, any more than the owner of a natural lake could drain it on to his neighbour's lands.

(10) **Other examples.**—Other examples of nuisance to corporeal hereditaments, are overhanging eaves from which the water flows on to another's property (*Bathis-hill* v. *Reed*, 25 *L. J. C. P.* 290); or overhanging trees (*Lemmon* v. *Webb*, (1895) *A. C.* 1); or pigstys creating a stench, erected near to another's house. And it would seem that noisy dogs, preventing the plaintiff's family from sleeping, are nuisances, if the jury find that such discomfort is caused; although, where the jury find that no serious discomfort has arisen, the court will not interfere (*Street* v. *Gugwell*, *Selwyn's N. P.*, 13*th ed.* 1090). So, also, a small-pox hospital, so conducted as to spread infection to adjoining lands, is a nuisance (*Hill* v. *Metropolitan Asylums Board*, 6 *App. Ca.* 193).

ART. 82.—*Reasonableness of Place.*

Where an act is proved to interfere with the comfort of an individual, so as to come within Art. 81, it cannot be justified by the fact that it was done in a reasonable place (*Banford* v. *Turnley*, 31 *L. J. Q. B.* 286; *Hill* v. *Metropolitan Asylums Board*, *supra*). But what would be a nuisance in one locality may not be one in another (*St. Helens Smelting Co.* v. *Tipping*, 11 *H. L. C.* 650).

(1) The spot selected may be very convenient for the defendant, or for the public at large, but very inconvenient to a particular individual who chances to occupy the adjoining land; and proof of the benefit to the public, from the exercise of a particular trade in a particular locality, can be no ground for depriving an individual of his right to compensation in respect of the particular injury he has sustained from it. Thus, where the defendants put up a stove in their hotel, the heat of which rendered the cellar of the adjoining house unfit for storing wine, it was held that it was a proper case for an injunction, although the defendants were acting reasonably in the use of their premises (*Reinhardt* v. *Mentasti*, 42 *Ch. Div.* 685, where the cases are discussed).

(2) In *St. Helens Smelting Co.* v. *Tipping* (*supra*), Lord Westbury said: "In matters of this description, it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action

brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter—namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves—whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in the immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town, and the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him which is carried on in a fair and reasonable way, he has no ground of complaint because, to himself individually, there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade or occupation or business is a material injury *to property*, then unquestionably arises a very different consideration. I think that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property." And Lord Cranworth said (referring to a case which he had tried when a Baron of the Exchequer): "It was proved

incontestably that smoke did come, and in some degree interfere with a certain person; but I said, 'You must look at it, not with a view to the question whether abstractedly that quantity of smoke was a nuisance, *but whether it was a nuisance to a person living in the town of Shields.*'"

ART. 83.—*Plaintiff coming to the Nuisance.*[123]

It is no answer to an action for nuisance, that the plaintiff knew that there was a nuisance, and yet went and lived near it (*Hole* v. *Barlow*, 27 *L. J. C. P.* 208).

Or in the words of Mr. Justice Byles in the above case, "It used to be thought that if a man knew that there was a nuisance and went and lived near it, he could not recover, because it was said it is he that goes to the nuisance, and not the nuisance to him. That, however, is not law now." The justice of this is obvious from the consideration, that if it were otherwise, a man might be wholly prevented from building upon his land if a nuisance was set up in its locality, because the nuisance might be harmless to a mere field, and therefore not actionable, and yet unendurable to the inhabitants of a dwelling-house.

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[123] The doctrine of coming to a nuisance is referred to in *R.* v. *Brewster*, 8 *U. C. C. P.* 212.

Art. 84.—*How far Right to commit a nuisance can be acquired.*

The right to carry on a noisome trade in derogation of the rights of another may be gained by statute, custom, grant, or prescription, but the right to carry on a trade which creates a public nuisance can only be acquired by clear statutory authority (see *Elliotson* v. *Feetham*, 2 *Bing. N. C.* 134; and see *Flight* v. *Thomas*, 10 *A. & E.* 590).

(1) Thus, a railway company were by their Act authorized, among other things, to carry cattle, and also to purchase by agreement any lands not exceeding in the whole fifty acres, *in such places as* should be deemed eligible, for the purpose of providing additional stations, yards, and other conveniences, for receiving, loading, or keeping any cattle, goods, or things, conveyed, or intended to be conveyed, by the railway. Under this power, the railway company bought land adjoining one of their stations, and used it as a yard for their cattle traffic. The noise of the cattle and drovers was a nuisance to the owners of houses near to the station, which, but for the Act, would clearly have entitled them to maintain an action. It was, however, held, that the purpose for which the land was acquired, being expressly authorized by the Act, and *being incidental and necessary* to the authorized use of the railway for the cattle traffic, the company were entitled to do what they did, and were not bound to choose a site more convenient to other persons. In giving judgment Lord Halsbury said: "It cannot now be doubted, that a railway company constituted for the purpose of carrying passengers, or goods, or cattle,

are protected in the use of the functions with which Parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at common law." His Lordship, on the construction of the particular Act, came to the conclusion that the powers of the Act did necessarily involve the creation of a nuisance by the company somewhere along their line, and gave to the company the absolute discretion as to the locality, and accordingly held that the parties injured had no remedy (*L. & B. R. Co.* v. *Truman*, 11 *App. Cas.* 45. And see also *Harrison* v. *Southwark, &c. Water Co.*, (1891) 2 *Ch.* 409; 64 *L. T.* 864). The same principle has been applied in the case of an Electric Tramway Co. whose electricity caused disturbance in adjacent telephone wires (*National Telephone Co.* v. *Baker*, (1893) 2 *Ch.* 186).

(2) The last-mentioned cases must, however, be carefully distinguished from that of *Met. Asylum District Board* v. *Hill* (6 *App. Cas.* 193 (*a*)). There it appeared, that by their Act the Metropolitan Asylum District Board were authorized to purchase lands and erect buildings, to be used as hospitals. But it did not by direct or imperative provision order these things to be done. The Board erected a small-pox hospital, which was, in point of fact, a nuisance to owners of neighbouring lands. On these facts it was held, that the Board could not set up the statute as a defence. Lord Blackburn, in the course of his judgment, laid it down, that on those who seek to establish that the

(*a*) As to the evidence necessary to sustain a *quia timet* action for an injunction to prohibit a proposed small-pox hospital, see *Att.-Gen.* v. *Mayor of Manchester*, (1893) 2 *Ch.* 87; 62 *L. J. Ch.* 453, 68 *L. T.* 603.

legislature intended to take away the private rights of individuals lies the burden of showing that such an intention appears by express words or *necessary implication*. And Lord Watson affirmed that 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 thereby conferred, should be exercised in strict conformity with private rights. It is somewhat difficult to reconcile this last dictum with the decision in the *L. & B. R. Co.* v. *Truman*, and possibly it requires to be diluted. The distinction, however, between the *two cases* was pointed out by Lord Selborne (11 *App. Cas.* 57) as follows:—"In that case (*Met. Asylum District Board* v. *Hill*), the establishment of a small-pox hospital within certain local limits was not specially authorized, as the construction of the London and Brighton Railway for the purpose (among other things) of the loading, carriage, and unloading of cattle, and other animals was here. If it had been, I do not think that this House would have considered the case of any adjacent land in a situation not defined, which the Board might have been authorized to purchase by agreement for the enlargement, as they might think desirable, of the hospital premises, different from that of the hospital itself. In that case, no use of any land which must *necessarily* be a nuisance at common law was authorized; it was not shown to be impossible that lands might be acquired in such a situation, and of such extent, as to enable a small-pox hospital to be erected upon them without being a nuisance to adjoining land. Here there can be no question that the legislature has authorized acts to be done for the necessary and ordinary purposes of the railway traffic (*e.g.*, those complained of in *Rex* v.

Pease,[124] 4 *B. & Ad.* 30) which would be nuisances at common law, but which being so authorized are not actionable." His Lordship then came to the conclusion, that the powers for making cattle yards were *ejusdem generis* with the other ordinary powers of the company, and that as the exercise of the ordinary powers necessarily created nuisances (*e.g.*, smoke, noise, and so on) which were not actionable, so the exercise of the power in question necessarily created nuisances which were therefore not actionable.

(3) It has since been laid down broadly, that the liability of a corporation created by statute is governed by the statute. Its powers, if exercised at all, must be exercised with care. In the absence of contrary intention, its duties and liabilities are the same as those imposed upon a private person doing the same thing (*Sanitary Commrs. of Gibraltar* v. *Orfila*,[125] 15 *App. Cas.* 400; and see also *Rapier* v. *Lond. Tramways Co.*, 68 *L. T.* 645; *Heron* v. *Rathmines Commrs.*,[126] (1892) *App. Cas.* 498; and *Jordeson* v. *Sutton, &c. Gas Co.*, (1899) 2 *Ch.* 217).

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[124] *Auger* v. *Ontario Simcoe and Huron Railway Co.*, 9 *U. C. C. P.* 164.

[125] *Pictou* v. *Geldert*, (1893) *A. C.* 524.

[126] The charter of a street railway company required the road between, and for two feet outside of, the rails to be kept constantly in good repair and level with the rails. A horse crossing the track stepped on a grooved rail and the caulk of his shoe caught in the groove, whereby he was injured. In an action by the owner against the company it appeared that the rail at the place where the accident occurred was above the level of the roadway. *Held*, affirming the judgment of the Supreme Court of Nova Scotia, that as the rail was above the road level, contrary to the requirements of

Sub.-sect. 2.—NUISANCES TO INCORPOREAL HEREDITAMENTS.

Introductory.—A servitude is a duty or service which one piece of land is bound to render, either to another piece of land, or to some person other than its owner. Property to which such a right is attached is called the dominant tenement, that over which the right is exercised being denominated the servient tenement.

Where the right is annexed to a dominant tenement it is said to be appurtenant if it arises by prescription or grant, and appendant if it arises by manorial custom. Where it is annexed merely to a person it is said to be a right in gross.

Servitudes are either natural or conventional. Natural servitudes are such as are necessary and natural adjuncts to the properties to which they are attached (such as the right of support to land in its natural state), and they apply universally throughout the kingdom. Conventional servitudes, on the other hand, are not universal, but must always arise either by custom, prescription, or express or implied grant. The right to the enjoyment of a conventional servitude is called an *easement* or a *profit à prendre in alieno solo*, according as the right is merely a right of user or a right to enter another's land and take something from it, as game, fish, minerals, gravel, turf, or the like.[127]

Canadian Cases.

the charter, it was a street obstruction unauthorized by statute and, therefore, a nuisance, and the company was liable for the injury to the horse caused thereby (*The Halifax Street Ry. Co.* v. *Joyce*, 22 *S. C. R.* 258).

[127] The owner of a servient tenement who takes water by an artificial stream from the dominant tenement, created by the owner of the latter for his own convenience for the

The easements known to our law are numerous. Mr. Gale, in his excellent treatise on Easements, gives a list of no less than twenty-five "amongst other" instances. In an elementary work such as this, however, it is only possible to treat of those torts which most often occur in practice. I shall therefore confine myself to torts affecting—(1) rights of support for land, (2) rights of

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purpose of discharging surplus water upon the servient tenement, acquires no right to insist upon the continuance of the flow, which may be terminated by the owner of the dominant tenement, and the fact that the burthen has been imposed for over forty years does not alter the character of the easement and convert the dominant into a servient tenement.

The owner of a servient tenement taking water under such circumstances is not "a person claiming right thereto" within R. S. O., 1887, c. 111, sect. 35 [now R. S. O., 1897, c. 133, sect. 35] (*Olliver* v. *Lockie*, 26 *O. R.* 28).

The owner of a house subdivided it, and let the north part to one G. This consisted of two rooms, a front and back room, the front room having a chimney but not the latter. G. had a stove in the back room, and the only way he could use it was by passing a stove pipe through a hole in the partition between his and the south part and thence into the chimney in that part. The owner subsequently leased the south part to the defendant, who at the time he became tenant was aware of the existence of the stove pipe. G. afterwards assigned to the plaintiff, and on leaving took down the pipe. The plaintiff on coming in put up a pipe of his own, with the consent of, or, at least, without any objection by, defendant. The defendant having afterwards taken down the pipe and stopped up the hole, it was *held* that he was a wrongdoer in doing so, as he only held the south part subject to the user or easement of the plaintiff of the stove pipe and hole (*Culverwell* v. *Lockington*, 24 *U. C. C. P.* 611).

The nature of the enjoyment of an easement at the time of the grant is the proper measure of enjoyment during the continuance of the grant (*Howard* v. *Jackson*, 21 *Grant*, 263).

support for buildings, (3) rights to the free access of light, and possibly air, (4) rights to the use of water, and (5) rights of way. With regard to *profits à prendre*, I propose only to notice disturbances—(1) of rights of common, and (2) of fisheries. I shall also shortly refer to disturbance of the peculiar incorporeal right, called a Ferry.

ART. 85.—*Disturbance of Right of Support for Land without Buildings.*

(1) Every person commits a tort, who so uses his own land as to deprive his neighbour of the subjacent or adjacent support of mineral matter necessary to retain such neighbour's land in its natural and unencumbered state (*Backhouse* v. *Bonomi*, 9 *H. L. C.* 503; *Birm. Corp.* v. *Allen*,[128] 6 *Ch. D.* 284). But (*semble*) there is no right to the support afforded by subterranean water provided that it is not loaded with mineral matter (*Popplewell* v. *Hodkinson*, *L. R.* 4 *Ex.* 248, as explained in *Jordeson* v. *Sutton, &c. Co.*, (1899) 2 *Ch.* 217).

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[128] The plaintiff was entitled to the lateral support of the defendants' land, in which they made excavations for the purposes of a rink, whereby the plaintiff's land was damaged. *Held*, that in substituting artificial support for the natural support of the soil which had been removed, the defendants might construct it of any material, provided it was a sufficient support for the purpose and that they continued to maintain the plaintiff's land in its proper position (*Snarr* v. *Granite Curling and Skating Company*, 1 *O. R.* 102, and *post*, p. 363).

(2) In order to maintain an action for disturbance of this right, some appreciable subsidence must be shown (*Smith* v. *Thackerah*, *L. R.* 1 *C. P.* 564, as explained in *Att.-Gen.* v. *Conduit Colliery Co.*, (1895) 1 *Q. B.* at pp. 311, 313), or, where an injunction is claimed, some irreparable damage must be threatened (*Birm. Corp.* v. *Allen*, *supra*).

(3) The right of support may be destroyed or prevented from arising by covenant, grant or reservation, but the language of the instrument must be clear and unambiguous (*Rowbotham* v. *Wilson*, 8 *H. L. C.* 348; *Aspden* v. *Seddon*, *L. R.* 10 *Ch. App.* 394, and cases there cited).

(1) **The right arises ex jure naturæ.**—In *Humphries* v. *Brogden* (12 *Q. B.* 739; 20 *L. J. Q. B.* 10), Lord Campbell (in delivering the judgment of the court) said: "The right to *lateral* support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant, but it is a right of property passing with the soil. If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years or any longer period. *Pari ratione*, where there are separate freeholds, from the surface of the land and the mines belong to different owners, we are of opinion that the owner of the surface, while unencumbered by buildings *and in its natural state*, is entitled to have it supported by the subjacent mineral strata. Those strata

may, of course, be removed by the owner of them, so that a sufficient support is left; but if the surface subsides and is injured by the removal of these strata, although the operation may not have been conducted negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which he is entitled from the adjoining surface close, it cannot be securely enjoyed as property, and under certain circumstances (as where the mineral strata approach the surface and are of great thickness) it might be entirely destroyed. We likewise think, that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation or covenant, must be laid down generally, without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals."

(2) **The servitude not extended to remote owners by reason of adjacent owner weakening the support.**—But a servitude cannot be created by the act of a third party in cases where, but for that act, no servitude would have existed. Between the land of the plaintiffs and that of the defendants, who were the owners of a colliery, there was an intermediate piece of land, the coal under which had been worked out some years before by a third party. The effect of the cavity was, that when the defendants worked their coal, subsidence was caused in the surface of the plaintiff's land. It was admitted that if the intermediate land had been in its natural state no injury would have been caused to the plaintiffs by the defendants' workings. Held, that the plaintiffs had no

right of action against the defendants. And Sir G. Jessel, M. R., said:—"It appears to me that it would be really a most extraordinary result that the man upon whom no responsibility whatever originally rested, who was under no liability whatever to support the plaintiffs' land, should have that liability thrown upon him, without any default of his own" (*Corporation of Birmingham* v. *Allen*, 6 *Ch. D.* 290; *Greenwell* v. *Low Beechburn Coal Co.*, (1897) 2 *Q. B.* 165).

(3) **Subterranean Water.**—But although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining that soil, if for any reason it becomes necessary or convenient for him so to do. Therefore it has been held that he is not liable if the result of his drainage operations is to cause a subsidence of his neighbour's land (*Popplewell* v. *Hodgkinson*, *L. R.* 4 *Ex.* 248; *sed quære* per Lindley, M. R., (1899) 2 *Ch. at p.* 239). But whatever may be true of percolating waters themselves, if a man withdraws, along with that water, quicksand or other mineral matter, and in consequence thereof his neighbour's land settles and cracks, he will be liable. And the same remark applies *à fortiori* to the withdrawal of pitch or other liquid mineral, and (it is submitted) to mineral oil (*Jordeson* v. *Sutton, &c. Gas Co.*, (1899) 2 *Ch.* 217; *Trinidad Asphalt Co.* v. *Ambard*, *ib.* 260; and (1899) *A. C.* 594).

(4) **Pecuniary loss not essential.**—At one time it was thought, on the authority of *Smith* v. *Thackerah* (*L. R.* 1 *C. P.* 564), that actual *loss* must have been suffered in order to give rise to an action for withdrawal of support. However, in *Att.-Gen.* v. *Conduit Colliery Co.*

((1895) 1 *Q. B. at p.* 311), Collins, J., made the following observations:—"I have no doubt whatever that such an action would lie without proof of pecuniary loss. I think the principle at the root of the matter is, that the owner is entitled to have his land 'remain in its natural state unaffected by any act done in the neighbouring land;' and see, per Willes, J., delivering the judgment of the Exchequer Chamber in *Bonomi* v. *Backhouse* (*E. B. & E.* 622, *at p.* 657); and that as soon as the condition of the plaintiff's land has been in fact changed to a substantial extent by the withdrawal of the lateral support, the plaintiff has sustained an *injuria* for which he may maintain an action without proof of pecuniary loss."

Exception.—Companies governed by the Railway Clauses Consolidation Act, 1845, do not acquire any such right to subjacent support, by purchasing the surface; and the owners of the mines may, after having given notice to the company, so as to give them the opportunity of purchasing the mines, work them with impunity in the ordinary way (*G. W. R. Co.* v. *Bennett*, *L. R.* 2 *H. L.* 29; *Ruabon Brick Co.* v. *G. W. R. Co.*, (1893) 1 *Ch.* 427). But neither will an action lie against the company for any damage suffered by the mine owner, although perhaps he may demand compensation under the Act (see *Dunn* v. *Birm. Canal Co.*, *L. R.* 8 *Q. B.* 42).

ART. 86.—*Disturbance of Support of Buildings.*

(1) A tort is not committed by one, who so deals with his own property, as to take away the support necessary to uphold his neighbour's *buildings*, unless a right to such support has

been gained by grant, express or implied (*Partridge* v. *Scott*, 3 *M. & W.* 220; *Brown* v. *Robins*, 4 *H. & N.* 186; *N. E. R. Co.* v. *Elliott*, 29 *L. J. Ch.* 808); or by twenty years' uninterrupted user, peaceable, open, and without deception (*Dalton* v. *Angus*,[129] 6 *App. Cas.* 740).

Canadian Cases.

[129] The plaintiff owned a dwelling-house for twenty years, and the defendant intending to erect a house on her land adjoining, employed an architect, who drew the plans, whereby trenches to lay the foundation were to be dug adjoining the plaintiff's foundation wall, and the depth of the trenches was shown. The work was let out to a contractor, and through his negligence in digging the trenches, &c., the wall of the plaintiff's house fell. It was *held*, that the plaintiff by twenty years' user, his house having been built for that time, had acquired, if that were necessary to maintain the action, the right to support for his house from defendant's adjacent soil. *Held* also, that the defendant was liable, for the damage arose, not in a matter collateral to but in the performance of the very act which the contractor was employed to perform (*Wheelhouse* v. *Darch*, 28 *U. C. C. P.* 269).

The plaintiff, tenant for years of the defendant S., sued for loss of use of a tenement, in consequence of the fall of the wall thereof, which was caused by the excavation of the adjoining lot for a cellar by the defendant H., who owned it. H. had excavated his land in some places to within a few inches of the dividing line, close to which the house in question stood. This house had been built by S. in 1854, when he had a lease of the lot for ten years, which gave him the right to remove it at the expiration of the term upon oak planks laid about one foot under the ground. In 1856, however, he acquired the fee, and in 1870 he also became owner of the lot now owned by H., and held it for a year, when he conveyed it to E. H., from whom H. derived title. There was no evidence to show that H. knew that the house was receiving more support from his land than it would have required if it had been constructed in

(2) But the owner of land may maintain an action for a disturbance of the natural right to support for the surface, notwithstanding buildings have been erected upon it, provided the weight of the buildings did not cause the injury (*Brown* v. *Robins*, 4 *H. & N.* 186; *Stroyan* v. *Knowles*, 6 *ib.* 454).

(1) **Right not ex jure naturæ.**—Thus, in *Partridge* v. *Scott* (*ubi sup.*), it was said that "rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds a house at the extremity of his land, he does not thereby acquire any easement of support or otherwise over the land of his neighbour. He has no right to load his own soil, so as to make it require the support of his neighbour's, unless he has some grant to that effect." So again, as between adjoining houses, there is no obligation towards a neighbour, cast by law on the owner of a house, merely as such, to keep it standing and in repair; his only duty being to prevent it from being a nuisance, and from falling on to his neighbour's property (*Chandler* v. *Robinson*, 4 *Ex.* 163).

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the ordinary way. It was *held*, that owing to the unity of seizin of S., there had not been twenty years' continuous enjoyment of the support as an easement, and that even if there had been, no such acquiescence in the use of the servient tenement had been shown as to justify the presumption that an easement had been acquired by grant. *Held* also, that when S. sold H.'s lot there was no implied reservation of the right of support for the house (*Backus* v. *Smith*, 5 *O. A. R.* 341; and see also *Walker* v. *McMillan*, 6 *S. C. R.* 241, and *Ross* v. *Hunter*, 7 *S. C. R.* 289, reversing decision of *S. C., N. S.*).

(2) **Implied grant.**—But where, on the other hand, houses are built by the same owner, adjoining one another, and depending upon one another for support, and are afterwards conveyed to different owners, there exists, by a presumed grant and reservation, a right of support to each house from the adjoining ones (*Richards* v. *Rose*, 9 *Ex.* 218). And it is apprehended that the same rule would apply where the owner of a detached house sold it, while retaining the adjacent land.[130]

(3) **Right acquired by twenty years' user.**—So again, a grant of a right of support for buildings is gained by uninterrupted user for twenty years, if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the plaintiff's building (*Dalton* v. *Angus*,[131] 6 *App. Cas.* 740). This case, which was twice argued before the House of Lords sitting with the judges as assessors, is the leading authority on the question of support to houses, and the student should carefully study the various judgments. Whether, however, the

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Canadian Cases.

[130] Upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass (*Culverwell* v. *Lockington*, 24 *U. C. C. P.* 611; *Wray* v. *Morrison*, 9 *O. R.* 183).

[131] "It was secondly urged that the dam had been erected upwards of twenty years. For the purpose of establishing an easement affecting the private property of others, this would be sufficient, generally speaking, but it is not so, where the consequences of this act are *ad commune nocumentum*" (*R.* v. *Brewster*, 8 *U. C. C. P.* 212—Draper, C. J.).

right rests upon the doctrine of a lost grant (*a*), or upon prescription at common law, or upon the provisions of the Prescription Act, is a question upon which the learned judges and law lords differed; but the law lords all agreed that, even if the right is founded on the presumption of a lost grant, the presumption is absolute, and cannot be rebutted by showing that no grant has in fact been made.

(4) The right established in *Dalton* v. *Angus* to a right of support for an ancient building by the adjacent land, equally applies to support enjoyed from an adjacent building, even although both buildings were erected by different owners (*Lemaitre* v. *Davis*, 19 *Ch. Div.* 281, where Hall, V.-C., considered that the right arose under the Prescription Act).

(5) **Where natural right to support of site infringed, the consequent damage to a modern house may be recoverable.**—Even although no right of support for a building has been gained, yet if the act of the defendant would have caused the site of the building to subside even if the building had not been there, the defendant will be

(*a*) As to the theory of "lost grant," which is a presumption of law that an easement or profit enjoyed for a long period must have had a lawful origin, or else it would have been stopped by the owner of the servient tenement, the reader is referred to the opinion of Bowen, J., in *Dalton* v. *Angus*, 6 *App. Cas. at p.* 777. At one time the doctrine was restricted to cases in which a grant (in the strict technical sense) would have been possible, but of late years the Courts have extended the doctrine to all cases in which the right might have lawfully arisen, either at law *or in equity*, *ex. gr.*, under a condition, or even under a lost charitable trust in favour of a fluctuating body such as the inhabitants of a town (see *Phillips* v. *Halliday*, (1891) *A. C.* 231; *Goodman* v. *Mayor of Saltash*, 7 *A. C.* 633; *Att.-Gen.* v. *Wright*, (1897) 2 *Q. B.* 318; *Simpson* v. *Mayor of Godmanchester*, (1896) 1 *Ch.* 214).

liable, not merely for the damage done to the land, but also for the injury caused to the building. For he will have committed a wrongful act (viz., an act causing the subsidence of his neighbour's land), and will consequently be liable for all damages which might reasonably have been anticipated as the consequence of that act (*Stroyan* v. *Knowles*, 6 *H. & N.* 454; and see *Hunt* v. *Peake*,[132] 29 *L. J. Ch.* 785).

ART. 87.—*Disturbance of Right to Light and Air.*[133]

(1) There is no right, *ex jure naturæ*, to the free passage of light to a house or building, but such a right may be acquired by (1) express or implied

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Canadian Cases.

[132] An action may be maintained by the tenant of a building against the proprietor of adjoining land for damage done to the building by the removal of the lateral support afforded by such adjoining land (*McCann* v. *Chisholm*, 2 *O. R.* 506). *Ante*, p. 354.

[133] The plaintiff and defendant were owners of contiguous houses. The defendant's house was built some time prior to 1853 for B., who in April of that year sold it to S., who afterwards sold it to H., from whom the plaintiff purchased under a registered deed. In the summer of 1853, whilst the defendant's house was in the occupation of a Mrs. Ranney, a tenant of S., the house owned by the plaintiff was built for A., from whom the plaintiff derived his title. In the autumn of 1853, whilst the plaintiff's house was in course of erection, two windows were placed in the gable end of it to afford light and air to the bedrooms in the attic. These windows overlooked the house which B. had erected. A. began to live in the house about December, 1854. The windows remained where they were placed and unobstructed until August, 1874, when the defendant by raising his house

grant from the contiguous proprietors; (2) by reservation (express or implied) on the sale of the servient tenement; or (3) by actual enjoyment of such light for the full period of twenty years without interruption submitted to or acquiesced in for one year after the owner of the dominant tenement shall have had notice thereof, and of the person making or authorizing such interruption (2 & 3 Will. 4, c. 71, ss. 3 and 4).

(2) Whether a right to the free access of air to land or buildings at large can be gained, except by

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Canadian Cases.

and putting a mansard roof upon it, caused the obstruction complained of by closing up the lower half of the windows. There was no evidence of an express grant, the plaintiff relying upon the fact of twenty years' uninterrupted enjoyment. The learned Chief Justice of New Brunswick, before whom the case was tried, directed the jury that "if S., the owner of the land, did not occupy the land himself, but it was occupied by his tenants, then he would not be bound by the user, unless he knew of the windows being there; if he knew and did not obstruct them within twenty years, he would be bound, and the tenancy had nothing to do with the question. On appeal to the Supreme Court of Canada it was *held*, reversing the decision of the Court below, that the duration of Mrs. Ranney's tenancy was a proper question for the jury, and it should have been left to them without the qualification that it made no difference if S. had knowledge of the existence of the windows; for if the tenancy continued subsequently to August, 1854, there was manifestly no user for twenty years with the consent or acquiescence of the defendant and those through whom he claimed, for S., the then owner of the fee, would have had no right to enter upon the possession of his tenant for the purpose of obstructing the lights" (*Pugsley* v. *Ring*, *Cassell's Supreme Court Digest*, 139, and 2 *Pugs. & Burb.* (*N. B. R.*), 503).

express grant seems doubtful (*Bryant* v. *Lefever*, 4 *C. P. Div.* 172; *Chastey* v. *Ackland*, (1895) 2 *Ch.* 389, see *S. C.*, (1897) *A. C.* 155). But (*semble*) a right to the free access of air through a particular defined channel, or through a particular aperture, may be acquired by implied lost grant, or by immemorial user (*Bass* v. *Gregory*, 25 *Q. B. Div.* 481; *Hall* v. *Lichfield Brewery Co.*, 49 *L. J. Ch.* 655; *Dent* v. *Auction Mart Co.*, *L. R.* 2 *Eq.* 238; *Chastey* v. *Ackland*, *supra*; but see *contra* per Cotton, L. J., in *Bryant* v. *Lefever*, *supra*).

(3) Where a right to light has been acquired, no person will be allowed to interrupt it, unless he can show that, for whatever purpose the plaintiff might wish to employ the light, there would be no *material* interference with it by the alleged obstruction (*Yates* v. *Jack*, *L. R.* 1 *Ch.* 295; and see per Best, C. J., in *Back* v. *Stacey*, 2 *C. & P.* 465, and *Dent* v. *Auction Mart Co.*, *L. R.* 2 *Eq.* 245; *Robson* v. *Whittingham*, *L. R.* 1 *Ch.* 442; and *Theed* v. *Debenham*, 2 *Ch. D.* 165).

(4) The question whether there has been a material obstruction depends on the facts of each case (*Parker* v. *First Avenue Hotel Co.*, 24 *Ch. D.* 282).

(5) Where a new building has been erected on the site of one in respect of which a right to

the access of light had been gained, then, in order to entitle the owner of the new building to access of light, it must be shown that some defined part of an ancient window admitted access of light through the space occupied by a defined part of an existing window (*Pendarves* v. *Munro*, (1892) 1 *Ch.* 611 ; *Scott* v. *Pape*, 53 *L. T.* 598).

(1) **Implied grants of right.**—Implied grants of easements are generally founded on the maxim, "A man cannot derogate from his own grant." In other words, the grantor of land which is to be used for a particular purpose is under an obligation to abstain from doing anything on adjoining property belonging to him which would prevent the land granted from being used for the purpose for which the grant was made (*Aldin* v. *Latimer, Clark & Co.*, (1894) 2 *Ch.* 437). Therefore, if one grants a house to A., and keeps the land adjoining the house in his own hands, he cannot build upon that land so as to darken the windows of the house, unless he has expressly reserved the right to do so (*Haynes* v. *King*, (1893) 3 *Ch.* 439 ; *Broomfield* v. *Williams*, (1897) 1 *Ch.* 602). And if he have sold the house to one and the land to another, the latter stands in the grantor's place as regards the house (*Wilson* v. *Queen's Club*, (1891) 3 *Ch.* 522 ; *Myers* v. *Catterson*, 43 *C. D.* 470 ; *Bailey* v. *Icke*, 64 *L. T.* 789 ; and *Corbett* v. *Jones*, (1892) 3 *Ch.* 137).

(2) And so, where two separate purchasers buy two unfinished houses from the same vendor, and, at the time of the purchase, the windows are marked out, this is a sufficient indication of the rights of each, and

implies a grant (*Compton* v. *Richards*, 1 *Pr.* 27; *Glave* v. *Harding*, 27 *L. J. Ex.* 286; *Russell* v. *Watts*, 10 *App. Cas.* 590). And the same rule appears to apply where two devisees take under the will of the same testator (*Phillips* v. *Low*, (1892) 1 *Ch.* 47; and see *Tawes* v. *Knowles*, (1891) 2 *Q. B.* 564).

(3) Similarly, where two lessees claim under the same lessor, it is said that they cannot, in general, encroach on one another's access to light and air (*Coutts* v. *Gorham*, *Moo. & Mal.* 396; *Jacomb* v. *Knight*, 32 *L. J. Ch.* 601). But it would seem that this statement of the law is too wide, as it is difficult to see what right the second lessee can have against the first, for no act of his can be a derogation from the second demise. And, indeed, it has been distinctly held, that where the grantor sells the land but retains the house, there is no duty upon the grantee of the land to abstain from building upon it, and the grantor cannot prevent him; for to do so would be, as much as in the preceding case, a derogation from his own grant (*White* v. *Bass*, 31 *L. J. Ex.* 283; *Wheeldon* v. *Burrows*, 12 *Ch. D.* 31).

(4) Again, if the owner of the dominant tenement authorizes the owner of the servient tenement, either verbally or otherwise, to do an act of notoriety upon his land, which, when done, will affect or put an end to the enjoyment of the easement, and such act is done, the licensor cannot retract. Thus, where A. had a right to light and air across the area of B., and gave B. leave to put a skylight over the area, which B. did: it was held that A. could not retract his licence, although it was found that the skylight obstructed the light and air. For it would be very unreasonable, that after a party has been led to incur expense in consequence of having

obtained a licence from another to do an act, that other should be permitted to recall his licence (*Winter* v. *Brockwell*, 8 *East*, 309; *Webb* v. *Paternoster*, *Palmer*, 71).

(5) **Reservation of light seldom implied.**—But although by the grant of a part of a tenement there will pass to the *grantee* all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted, and have been hitherto used therewith; yet as a general rule there is no corresponding implication in favour of the *grantor*, though there are certain exceptions to this, as in the case of ways of necessity.[134] A workshop and an adjacent piece of land belonging to the same owner were put up for sale by auction. The workshop was not then sold, but the piece of land was. A month after the conveyance the vendor agreed to sell the workshop to another person. The workshop had windows overlooking and receiving their light from the piece of land first sold. The purchaser of the piece of land proposed to build thereon so as to obstruct the light of the workshop windows. On an action being brought to restrain him, it was held that as the common vendor had not, when he conveyed the piece of land, expressly reserved the access of light to his windows, the purchaser thereof could build so as to obstruct them, and

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Canadian Cases.

[134] Where the owner of two adjoining lots of land conveys one of them he impliedly grants all those continuous and apparent easements, including rights of drainage and aqueduct over the other lot which are necessary for the reasonable use of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted (*Israel* v. *Leith*, 20 *O. R.* 361).

that whatever might have been the case had both lots been sold at one auction, there was under the circumstances no implied reservation of light over the piece of land first sold (*Wheeldon* v. *Burrows*,[135] *ubi sup.*).

(6) On the other hand, although there may be no reservation of the right to light in express terms, yet, if looking at the whole transaction, the nature of the property, and so on, a reservation of the right to light appears to be reasonably implied, the Court will give effect to it. (See and consider circumstances in *Russell* v. *Watts*, 10 *App. Cas.* 590.)

(7) **Right gained by prescription.**—To gain a right by prescription under the statute 2 & 3 Will. 4, c. 71,

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Canadian Cases.

[135] P., the owner of lots 8 and 9, by his will devised the same to trustees in trust to sell. In 1869 the plaintiff purchased from the trustees lot 8, on which there was a house with windows overlooking lot 9, immediately adjoining it, the said lot 9 being then open, and not built upon. In 1873, the trustees sold lot 9 to P., who sold it to T., who erected a house thereon. T. sold to G., under whom defendant claimed. At the time P. acquired lot 9 he did so subject to a mortgage thereon, and the trustees sold to P. subject to such mortgage, which was subsequently discharged by G., who obtained the usual statutory discharge, which was duly registered by him. The plaintiff claimed that he was entitled by implied grant to the right of both light and air to the said windows, and that the same had been infringed upon by the erection of T.'s house. In an action therefor the jury found that the right to light had been infringed, but not injuriously. *Held*, that by payment of the mortgage and registration of the discharge, G. did not acquire a new estate such as would have the effect of enabling him to derogate from the grant of light, if any, made to the plaintiff by their common grantors. *Held* also, that the finding of the jury was too uncertain to support a judgment for the defendant (*Carter* v. *Grasett*, 11 *O. R.* 331, 14 *O. A. R.* 685).

s. 3, there must be an uninterrupted user for twenty years without the written consent of the owner of the servient tenement from the time when window spaces are complete or the building occupied (*Collis* v. *Laugher*, (1894) 3 *Ch.* 659). As, however, by sect. 4, nothing is to be deemed an interruption unless submitted to for a year after notice, it has been held that enjoyment for nineteen years and 330 days, followed by an interruption of thirty-five days just before the action was commenced, was sufficient to establish the right (*Flight* v. *Thomas*,[136] 11 *A. & E.* 688). However, for the purposes of commencing an action an inchoate title of nineteen years and a fraction is not sufficient, and no injunction will be granted until the twenty years have expired (*Lord Battersea* v. *Commissioners of Sewers*, (1895) 2 *Ch.* 708).

(8) The interruption, to defeat the right, must be the interruption of the defendant, and not a voluntary deprivation by the plaintiff himself of the access of light. Thus, the owner of a building having windows with moveable shutters, which are opened at his pleasure for the admission of light, acquires a prescriptive right to light, under sect. 3 of the Prescription Act, at the end of twenty years, if he opens the shutters at any time he pleases for the admission of light during those twenty years, and if also there is no such interruption of the access of light over the neighbouring land as is contemplated by sect. 4 (*Cooper* v. *Straker*, 40 *Ch. Div.* 21). And, similarly, the fitting of windows with stained glass does not deprive the owner of the right to the free access of light (*Att.-Gen.* v. *Queen Anne's Mansions Co.*, 60 *L. T.* 759; 37 *W. R.* 572).

Canadian Cases.

[136] *Burnham* v. *Garvey*, 27 *Grant*, 80.

(9) If the interruption of the defendant during the twenty years was in its nature permanent (*ex. gr.*, a stone wall), the onus is on the plaintiff of proving that such interruption did not in fact continue with his acquiescence for a year; but if the interruption is in its nature fluctuating (*ex. gr.*, boxes piled one upon another), the onus of proving that it in fact continued, and was acquiesced in for a year by the plaintiff, lies on the defendant (*Presland* v. *Bingham*, 41 *Ch. Div.* 268).

(10) The acquisition of a right to light under the Act by twenty years' user is absolute, and binds even remaindermen and reversioners. But as sects. 3 and 4 of the Prescription Act do not expressly mention the Crown, no prescriptive right to light against the Crown or its tenants can be gained under the Act (*Wheaton* v. *Maple & Co.*, (1893) 3 *Ch.* 48; *Perry* v. *Eames*, (1891) 1 *Ch.* 658).

(11) **Right to access of air.**[137]—Cases to prevent, or to claim damages for, interference with ancient lights, are

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Canadian Cases.

[137] In an action for damages by trespass by McI. on M.'s land, and by closing ancient lights, defendant claimed title in himself, and pleaded that a conventional line between his lot and the plaintiff's had been agreed to by a predecessor of the plaintiff in title. On the trial the parties agreed to strike out the pleadings in reference to lights and drains and try the question of boundary only. *Held*, affirming the judgment of the court below (19 *N. S. Reps.* 419), that independently of the conventional boundary claimed by the defendant, the weight of evidence was in favour of establishing a title to the land in question in the defendant and the plaintiff could not recover, and that by the agreement at the trial the plaintiff could not claim to recover by virtue of a user of the land for over twenty years (*Mooney* v. *McIntosh*, 14 *S. C. R.* 740).

Defendant in 1855 or 1856 built a house on his lot

frequently spoken of as cases of light and air, and the right relied on, as a right to the access of "light and air." But this is inaccurate. The cases, as a rule, relate solely to the interference with the access of light, and it has been said that a right to the access of air over the general unlimited surface of the land of a neighbour cannot be acquired by mere enjoyment (per Cotton, L. J., *Bryant* v. *Lefever*, 4 *C. P. Div.* 172). Thus, in *Webb* v. *Bird* (13 *C. B. N. S.* 841), it was held that the owner of an ancient windmill could not, under the Prescription Act, prevent the owner of adjoining land from building so as to interrupt the passage of air to the mill. A similar decision was given in *Bryant* v. *Lefever* (*sup.*), where it was sought to restrain the defendant from building so as to obstruct the access of air to the plaintiff's chimneys. However, having regard to the observations of the Lords of Appeal in *Chastey* v. *Ackland*, (1897) *A. C.* 155), in which the appeal was withdrawn on terms, before judgment, the question must be considered to be eminently doubtful. Anyhow, it seems that a right to the

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Canadian Cases.

adjoining the plaintiff's, having three windows looking out upon the plaintiff's land. In 1864 the defendant raised his house more than three feet, and none of the windows being more than three feet high, the position of each of them was thus entirely changed. It was *held*, that he had acquired no right under the statute C. S. U. C., c. 88, sect. 38 [the right to access and use of light by prescription is now abolished by R. S. O., 1897, c. 133, sect. 36], for that he had not enjoyed the access or use of the light at the same place for the statutory period (*Hall* v. *Evans*, 42 *U. C. R.* 190).

No person shall acquire a right by prescription to the access and use of light to or for any dwelling-house, workshop or other building, but this section shall not apply to any such right which has been acquired by twenty years' use before the 5th day of March, 1880 (*R. S. O.*, 1897, *c.* 133, *sect.* 36).

uninterrupted passage of air along a defined channel (*ex. gr.*, a ventilating shaft) may be gained under sect. 2 of the Prescription Act by twenty years' uninterrupted enjoyment (*Bass* v. *Gregory*, 25 *Q. B. Div.* 481), or possibly a right to the free flow of air through a defined opening (*ex. gr.*, a window); at all events, if the diminution complained of involved danger to health (*City of London Brewery Co.* v. *Tennant*, 9 *Ch. App. at p.* 212).

(12) **Degree of diminution giving rise to an action.**—As above stated, the plaintiff is entitled to enjoy the access of light without regard to his particular employment. Thus in *Yates* v. *Jack* (1 *Ch. App.* 295), where it was contended that the plaintiff was not entitled to relief, because, for the purposes of his then present trade, he was obliged to shade and subdue the light, and that consequently he suffered no actual damage, Lord Cranworth said: "This is not the question. It is comparatively an easy thing to shade off a too powerful glare of sunshine, but no adequate substitute can be found for a deficient supply of daylight. I desire, however, not to be understood as saying that the plaintiffs would have no right to an injunction unless the obstruction of light were such as to be injurious to them in the trade in which they are now engaged. The right conferred, or recognized, by the statute 2 & 3 Will. 4, c. 71, is an absolute and indefeasible right to the enjoyment of the light, without reference to the purposes for which it has been used. Therefore, I should not think the defendant had established his defence, unless he had shown that, for whatever purpose the plaintiffs might wish to employ the light, there would be no material interference with it" (and see *Aynsley* v. *Glover*, *L. R.* 18 *Eq.* 544, and

10 *Ch.* 283; *Lazarus* v. *Artistic Photo Co.*, (1897) 2 *Ch.* 214).

(13) And so, where ancient lights are obstructed, the fact that the owner of the building to which the ancient rights belong has himself contributed to the diminution of the light, will not of itself preclude him from obtaining an injunction or damages (*Tapling* v. *Jones*, 11 *H. L. C.* 290; *Arcedeckne* v. *Kelk*, 2 *Giff.* 683, *Straight* v. *Burn*, 5 *Ch. App.* 163; and see also illustration 8, *sup.*).

(14) **Enlargement of ancient lights.**—Nor will an enlargement of an ancient light (although it will not enlarge the right, *Cooper* v. *Hubbuck*, 31 *L. J. Ch.* 123) diminish or extinguish it. And therefore, where the owner of a building having ancient lights enlarges or adds to the number of windows, he does not preclude himself from obtaining an injunction to restrain an obstruction of the ancient lights (*Aynsley* v. *Glover*, *sup.*).

(15) **Right to light exclusively confined to buildings.**—The dominant tenement must be a building; and, therefore, a person who grants a lease of a house and garden is not precluded (under the doctrine of not derogating from his own grant) from building on open ground retained by him adjacent to the house and garden, though, by so doing, the enjoyment of the garden, as pleasure ground, is interfered with, there being no obstruction of light and air to the house (*Potts* v. *Smith*, *L. R.* 6 *Eq.* 311). It has, however, been recently held by Kekewich, J., that a greenhouse is a building, and capable of gaining a right to light (*Clifford* v. *Holt*, (1899) 1 *Ch.* 698).

ART. 88.—*Disturbance of Water Rights.*

(1) The right to the use of the water of a natural surface stream, whether for irrigation, navigation, or otherwise, and whether the stream be tidal or not (*North Shore Co.* v. *Pion*, 14 *App. Cas.* 612), belongs, *jure naturæ* and of right, to the owners of the adjoining lands, every one of whom has an equal right to use the water which flows in the stream; and consequently, no proprietor can have the right to use the water to the prejudice of any other proprietors (*Chasemore* v. *Richards*, 7 *H. L. Ca.* 349; *Wright* v. *Howard*, 1 *S. & S.* 203; *Dickinson* v. *Gr. Junc. Canal Co.*, 7 *Ex.* 299; *Booth* v. *Ratté*,[138] 15 *App. Cas.* 188).

Canadian Cases.

[138] An act for protecting the public interest in rivers, streams, and creeks, R. S. O., 1897, c. 142. Where both parties have equal rights in a navigable river, it must be shown in order to maintain an action that one party has exercised his rights in such a manner as to unreasonably impede or delay the other (*Crandell* v. *Mooney*, 23 *U. C. C. P.* 212; *Rolston* v. *Red River Bridge Co.*, 1 *Manitoba L. R.* 235; *North West Navigation Co.* v. *Walker*, 3 *Manitoba L. R.* 25, and 4 *Manitoba L. R.* 406).

Without legislative power there can be no power to obstruct or prevent the user of navigable tidal waters, or where the tide ebbs and flows in harbours (*Wood* v. *Esson*, 9 *S. C. R.* 239; *McEwan* v. *Anderson*, 1 *B. C. Reps.* 308; *Rowe* v. *Titus*, *N. B. R.* 1 *All.* 326; *Wallace* v. *G. T. Rway. Co.*, 16 *U. C. R.* 551; *Vanhorn* v. *The G. T. Rway. Co.*, 18 *U. C. R.* 356).

"The erection which the plaintiffs allege the defendant interfered with, and which is the alleged trespass for which they seek damages, consisted of piles driven with a view to the construction of a wharf below low-water mark, in the

(2) There is, however, no right to the continued flow of water which runs through natural undefined channels underground, but it must not be made the vehicle of a nuisance (*Chasemore* v.

Canadian Cases.

navigable waters of the harbour of Halifax, and which obstructed and prevented the defendant's vessels and steamers from navigating in that part of the said harbour, and from getting to the south side of his wharf, as he had been accustomed to do, and which piles or obstructions he pulled up and removed so that his steamers could get to his wharf. There can be no doubt that all her Majesty's liege subjects have a right to use the navigable waters of the Halifax harbour, and no person has any legal right to place in said harbour, below low-water mark, any obstruction or impediment so as to prevent the free and full enjoyment of such right of navigation, and defendant having been deprived of that right by the obstruction so placed by plaintiffs and specially damnified thereby, had a legal right to remove the said obstruction to enable him to navigate the said waters with his vessels and steamers and bring them to his wharf" (*Wood* v. *Esson*, 9 *S. C. R.* 242—Ritchie, C. J. [appeal from S. C., Nova Scotia, allowed]. See also *Martley* v. *Carson*, 20 *S. C. R.* 634 [appeal from S. C., B. C., dismissed]).

W. was the lessee, under lease from the city of Toronto, of certain water lots held by the said city under patent from the Crown, granted in 1840, the lease to W. being given by authority of the said patent, and of certain public statutes respecting the construction of the esplanade which formed the boundary of the said water lots. It was *held*, affirming the judgment of the Court of Appeal (12 *O. A. R.* 327), that such lease gave W. a right to build as he chose upon the said lots, subject to any regulations which the city had power to impose, and in doing so to interfere with the right of the public to navigate the water. It was *held* also, that the said waters being navigable parts of Toronto Bay, no private easement by prescription could be acquired therein while they remained open for navigation (*London and Canadian Loan and Agency Company, Limited* v. *Warin*, 14 *S. C. R.* 232).

Richards, sup.; *Ballard* v. *Tomlinson*, 29 *Ch. Div.* 115).

(3) An artificial watercourse may have been originally made under such circumstances, and have been so used as to give to the owners on each side all the rights which a riparian proprietor would have had if it had been a natural stream (*Sutcliffe* v. *Booth*, 32 *L. J. Q. B.* 136).

(1) **Rights of riparian owners.**—Every riparian owner may reasonably use the stream for drinking, watering his cattle, or turning his mill, and other purposes, provided he does not thereby seriously diminish the stream (see *Embrey* v. *Owen*, 6 *Ex.* 353).

(2) **Disturbance of riparian rights.**—If the rights of a riparian proprietor are interfered with, as by diverting the stream or abstracting or fouling the water, or by cutting him off from a navigable tidal river, by embanking the foreshore (*North Shore Co.* v. *Pion, sup.*), he may maintain an action against the wrongdoer, even though he may not be able to prove that he has suffered any actual loss (*Wood* v. *Waud*, 3 *Ex.* 748; *Embrey* v. *Owen*, 6 *Ex.* 369; *Crossley* v. *Lightowler*, 2 *Ch. App.* 478). So if one erects a weir which affects the flow of water to riparian owners lower down the river, an injunction will be granted (*Belfast Ropeworks* v. *Boyd*, 21 *L. R., Ir.* 560).

(3) **Damage essential to action.**—Nevertheless, where a non-riparian owner, *with the licence of a riparian owner*, takes water from a river, and after using it for cooling certain apparatus returns it undiminished in quantity and unpolluted in quality, a lower riparian owner has no right of action. For his right is to have the water undiminished in quantity and undefiled in quality, and

that right is not infringed (*Kensit* v. *G. E. R. Co.*,[139] 27 *Ch. D.* 122).

(4) **Abstracting underground water.**—The owner of land containing underground water, which percolates by undefined channels and flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it. And his right is the same whatever his motive may be, whether *bonâ fide* to improve his own land, or maliciously to injure his neighbour, or to induce his neighbour to buy him out (*Mayor of Bradford* v. *Pickles*, (1895) *A. C.* 587).

Canadian Cases.

[139] A watercourse consists of bed, banks, and water, and, while the flow of the water need not be continuous or constant, the bed and banks must be defined and distinct enough to form a channel or course that can be seen as a permanent landmark on the ground (*Wilton* v. *Murray*, 12 *M. R.* 35).

An occupant or owner of land has no right to drain into his neighbour's lands the surface water from his own land not flowing in a defined channel, and the rule of the civil law, that the lower of two adjoining estates owes a servitude to the upper to receive the natural drainage does not apply in Manitoba (*Ibid.* ; *Bur* v. *Stroud*, 19 *O. R.* 10, and *Bunting* v. *Hicks*, 7 *R.* 53).

"As regards mere surface water precipitated from the clouds in the form of rain or snow, it has been determined that no right of drainage exists *jure naturæ*, and that as long as surface water is not found flowing in a defined channel, with visible edges or banks approaching one another and confining the water therein, the lower proprietor owes no servitude to the upper to receive the natural drainage" (*Ostrom* v. *Sills*, 24 *Ont. App. Reps.* 526—Moss, J. A.; 28 *S. C. R.* 485, and *ante*, p. 342).

Where damages are claimed for an obstruction to a watercourse, to entitle the plaintiff to recover he must show that the whole damage resulted from the act of the defendant (*Foster* v. *Fowler*, 2 *N. S. Reps.* 425).

(5) **Fouling underground water.**—But although there can be no *property* in water running through underground undefined channels, yet no one is entitled to pollute water flowing beneath another's land. Thus, in *Ballard* v. *Tomlinson* (29 *Ch. D.* 115), where neighbours each possessed a well, and one of them turned sewage into his well, in consequence whereof the well of the other became polluted, it was held by Pearson, J., that no action lay; on the ground that, it being settled law that a landowner is entitled so to deal with underground water on his own land as to deprive his neighbour of it entirely, it follows that he is equally entitled to render such water unfit for use by polluting it. This decision was, however, reversed on appeal. For (as was pointed out in a previous edition of this work, issued while the appeal was pending) there is a considerable difference between intercepting water in which no property exists, on the one hand, and sending a new, foreign and deleterious substance on to another's property, on the other hand. The immediate *damnum* (viz., the pollution of the water) might possibly be no legal *damnum;* but allowing sewage to escape into another's property (for *cujus est solum, ejus est usque ad inferos*) is of itself an *injuria* which needs no *damnum*.

(6) **Drawing off underground water sometimes actionable.**—Although there is no property in underground water flowing in undefined channels, yet a landowner will be restrained from drawing off underground water from his neighbour's land, if, in doing so, he necessarily abstracts water which has once flowed in a defined surface channel (see *Gr. Junc. Canal Co.* v. *Shugar*, 6 *Ch. App.* 488).

(7) **Riparian proprietor causing floods.**—On the ground of injury to a *corporeal* hereditament, a riparian owner

commits a tort if, by means of impediments placed in or across a stream, he causes the water to flood the *lands* of a proprietor higher up the stream. And it seems that he will be liable, not only for damages resulting therefrom, but for nominal damages, even if no actual injury has been sustained (*M'Glone* v. *Smith*, 22 *L. R., Ir.* 559). And similarly, if a higher proprietor collects water and pours it into the watercourse in a body, and so floods the lands of a proprietor lower down the stream, he will be liable for damage resulting therefrom (*Chasemore* v. *Richards*, 7 *H. L. C.* 349; *Sharpe* v. *Hancock*, 8 *Sco. N. R.* 46).

(8) **Exception. Prescriptive rights.**—Rights in derogation of those of the other riparian proprietors may be gained by grant or prescription (*Acton* v. *Blundell*, 12 *M. & W.* 353; *Carlyon* v. *Lovering*,[140] 1 *H. & N.* 784; 26 *L. J. Ex.* 251).

(9) **Riparian rights in artificial watercourses.**—Where a loop had been made in a stream, which loop passed through a field A., it was held that the grantee of A. became a riparian proprietor in respect of the loop (*Nuttall* v. *Bracewell*, *L. R.* 2 *Ex.* 1).

Canadian Cases.

[140] Whenever a right to interfere with the natural course of a stream is attempted to be set up by prescription, the exercise of such right to the full extent claimed must be shown throughout the period for which the right is claimed, and not that the right had accrued within the time allowed by the act, but had not been exercised till of late (*Hunt et al.* v. *Hespiler*, 6 *U. C. C. P.* 269; *McNab* v. *Adamson*, 6 *U. C. R.* 100; *Eastwood* v. *Helliwell*, 3 *U. C. R.* (*O. S.*) 49; *Applegarth* v. *Rhymal*, *Taylor's K.B. Reps.* 427; *McLaren* v. *Cook*, 3 *U. C. R.* 299; *McGillivray* v. *Miller*, 27 *U. C. R.* 62; *Crewson* v. *The G. T. R. Co.*, 27 *U. C. R.* 68; *Wadsworth* v. *McDougall*, 30 *U. C. R.* 369; *Rowe* v. *The Corporation of ochester*, and *Beathour* v. *Bolster*, 23 *U. C. R.* 317).

(10) A natural stream was divided immemorially, but by artificial means, into two branches; one branch ran down to the river Irwell, and the other passed into a farmyard, where it supplied a watering trough, and the overflow from the trough was formerly diffused over the surface and discharged itself by percolation. In 1847, W., the owner of the land on which the watering trough stood, and thence down to the Irwell, connected the watering trough with reservoirs, which he constructed adjacent to, and for the use of, a mill on the Irwell. In 1865, W. became owner of all the rest of the land through which this branch flowed. In 1867, he conveyed the mill, with all water rights, to the plaintiff. In an action brought by the plaintiff against a riparian owner on the stream above the point of division, for obstructing the flow of water, it was held that the plaintiff was entitled to maintain the action (*Holker* v. *Porrit*, *L. R.* 10 *Ex.* (*Ex. Ch.*) 59).

(11) But where the watercourse is merely put in for a temporary purpose, as for drainage of a farm or the carrying off of water pumped from a mine, a neighbouring landlord, benefited by the flow from the drain or stream, cannot sue the farmer or mine owner for draining off the water, even after fifty years' enjoyment (*Greatrex* v. *Hayward*, 8 *Ex.* 291).

ART. 89.—*Disturbance of Private Rights of Way.*

(1) A right of way over the land of another can only arise by grant, express or implied, or by prescription, of which 20 years' uninterrupted user is proof. It is usually appurtenant to and passes along with some corporeal here-

ditament; but a right of way "in gross" may be granted to a particular person apart from the ownership of any land.[141]

(2) A person commits a tort who disturbs the enjoyment of a right of way by blocking it up permanently or temporarily, or by otherwise preventing the free user of it.

(1) **Right restricted by the terms of the grant or the extent of the user.**—Rights of way are susceptible of

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Canadian Cases.

[141] The time for acquisition of an easement by prescription does not run while the dominant and servient tenements are in the occupation of the same person, even though the occupation of the servient tenement be wrongful and without the privity of the true owner (*Innes et al.* v. *Ferguson*, 21 *O. A. R.* 323; 24 *S. C. R.* 703).

One piece of land cannot be said to be burdened by an easement in favour of another piece when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do; and if the title to different parcels comes to be vested in the same owner, there is an extinction of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, cease to be so; and become mere easements in fact, or *quasi* easements. If the *quasi* servient easement is subsequently first conveyed without expressly providing for the continuance of the easements, there is no implied reservation for the benefit of the land retained by the grantor, except of easements of necessity, and no distinction is to be made for this purpose between easements which are apparent and those which are non-apparent.

If the dominant tenement is first granted all *quasi* easements which have been enjoyed as appendant to it over a *quasi* servient tenement retained by the grantor pass by implication (*Attrill* v. *Platt*, 10 *S. C. R.* 425; judgment of Court of Appeal, Ontario, reversed).

almost infinite variety. Thus there may be a right of way to church, which can only be lawfully used for going to and from the church (*Gale on Easements, 6th ed.* 305); or the right may be limited by the grant (or if it depends on prescription, may be limited by the nature of the user) to a footway, a horseway, or carriageway, and the like. Indeed, grants are somewhat strictly construed, and a grant of a right of carriageway will not authorize the grantee to drive cattle over the way (see judgments in *Ballard* v. *Dyson*, 1 *Taunt.* 279). So again proof of user for farming purposes does not necessarily prove a right of way for the purpose of conveying coal from a mine (*Cowling* v. *Higginson*, 4 *M. & W.* 245); nor does the finding by a jury of a right of way for carting timber prove a right for all carts, carriages, horses, or on foot, or for any of such rights (*Higham* v. *Rabett*, 5 *Bing. N. C.* 622; and see also *Wimbledon Conservators* v. *Dixon*, 1 *Ch. Div.* 362; and *Bradburn* v. *Morris*, 3 *ib.* 812).

(2) **Rights of way of necessity.**—Where one grants land to another, and there is no access to the land sold except through other land of the grantor, or no access to the land retained except through the land sold, the law implies a grant or reservation (as the case may be) of a private right of way limited to such purposes as will enable the owner of the dominant tenement to enjoy it in the condition it was in at the time when the severance took place; *ex. gr.*, if it was then farm land the right of way will be limited to farming purposes, and so on (*Corp. of London* v. *Riggs*, 13 *Ch. Div.* 798). In ways of necessity, however, the owner of the dominant tenement cannot range across the servient tenement between the points most convenient for himself, but is obliged to pursue the track selected by the owner of the servient tenement (*Bolton* v. *Bolton*, 11 *Ch. Div.*

968). It must also be pointed out that when the necessity ceases (for instance, if the owner of the dominant tenement buys a field intervening between it and the highway), the right ceases also; but, on the other hand, it appears to revive again when the necessity revives (*Holmes* v. *Goring*, 2 *Bing.* 76; *Pearson* v. *Spencer*, 1 *B. & S.* 584). In a recent case, Kekewich, J., laid down that where a man buys a piece of land which is surrounded on three sides by land of the vendor, and on the fourth by land of a stranger, there is no implied grant of a right of way of necessity; but this decision seems open to doubt (*Titchmarsh* v. *Royston Water Co.*, (1899) *W. N.* 256).

(3) **Implied grant of particular way.**—Rights of way of necessity must, however, be carefully distinguished from a right of using a particular made road, which is sometimes implied in a conveyance. Thus, where a lessee of two adjacent plots builds a house on each, and makes a passage partly on plot A. and partly on plot B., forming a back road to the gardens of each, and then assigns plot A. to X., and plot B. to Z., without mentioning any right of way, both X. and Z. will have the right of using the road not as a way of necessity (although it may be the only method of getting into their respective gardens except through their houses), but by implied grant as being in the nature of a continuous and apparent easement (see *Brown* v. *Alabaster*, 37 *Ch. Div.* 490, where the doctrine of continuous or apparent easements is discussed).

(4) **Prescriptive rights of way.**[142]—Under sect. 2 of

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[142] The owner of land on a sea shore, or on a navigable river, is entitled to free ingress and egress (*Collins* v. *Barrs*, 2 *N. S. Reps.* 281).

In an action for obstructing a right of way, the plaintiff

the Prescription Act (2 & 3 Will. 4, c. 71), a prescriptive right of way is gained by twenty years' uninterrupted user as of right. It seems, however, that this section only applies where the user is practically a continuous one. Thus, where the right claimed was a right of way for removing timber as it was cut, and it appeared that

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claimed the use of such right both by prescription and agreement, and also claimed that by the agreement the way was wholly over defendant's land. The evidence on the trial showed that plaintiff had acquired the land from his father, who retained the adjoining land, which was eventually conveyed to defendant, and that, after so acquiring it, the plaintiff continued to use a track or trail over the adjoining land, and mostly through bush land, to reach the concession line, and his claim to the use of the way by prescription depended on whether or not his user was of a well-defined road, or merely of an irregular track and by license and courtesy of the adjoining owner. Finally an agreement was entered into between the plaintiff and his brother, who had acquired the adjoining lot, which he afterwards conveyed to defendant, by which, in consideration of certain privileges granted to him, the brother covenanted to permit plaintiff to have a right of way along a lane to which the way formerly used led, and extending forty rods east from the centre of the lot, so as to allow plaintiff free communication from defendant's lot along the lane to the concession line. The issue raised on the construction of this agreement was, whether the right of way granted thereby should be wholly or in part on plaintiff's land, or wholly on that of defendant. It was *held*, reversing the judgment of the Court of Appeal (16 *O. A. R.* 3), that plaintiff had no title to the right of way by prescription, the evidence clearly showing that the user was not of a well-defined road, but only of a path through bush land, and that he only enjoyed it by license from his father, the adjoining owner, which license was revoked by his father's death; but, affirming the judgment of the court below, that under the agreement the right of way granted to the plaintiff was wholly over defendant's land, the agreement, not being explicit as to the direction of such

the right had only been exercised at intervals of several years, it was held that the Act did not apply to so discontinuous an easement, and that no prescriptive right was gained by the fact that more than twenty years had elapsed since the first user of the alleged way (*Hollins* v. *Verney*,[143] 13 *Q. B. Div.* 304).

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right of way, requiring a construction in favour of the plaintiff and against the grantor (*Rogers* v. *Duncan*, 18 *S. C. R.* 710).

E. and B. owned adjoining lots, each deriving his title from S. E. brought an action of trespass against B. for disturbing his enjoyment of a right of way between said lots. The fee in this right of way was in S., but E. founded his claim to an user of the way by himself and his predecessors in title for upwards of forty years. The evidence on the trial showed that it had been used in common by the successive owners of the two lots. It was *held*, affirming the judgment of the Supreme Court of Nova Scotia (19 *N. S. R.* 222), that as E. had no grant or conveyance of the right of way, and had not proved an exclusive user, he could not maintain his action (*Ells* v. *Black*, 14 *S. C. R.* 740).

[143] K. owned lands in the county of Lunenberg, N.S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood-lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There was not any formed road across the lands, but merely a track upon the snow during the winter months, and the way was not used at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain

(5) **Obstruction of rights of way.**—It does not require a permanent obstruction to give rise to a right of action. Thus the padlocking of a gate is sufficient (*Kidgill* v. *Moor*, 9 *C. B.* 364); and so permitting carts or waggons to remain stationary on the road in the course of loading and unloading, in such a way as to obstruct

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undisturbed and caused a cessation of the actual enjoyment of the way, during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff.

The statute R. S. N. S. (5 series), c. 112, s. 27, which in terms follows the provisions of the English act, 2 & 3 Will. 4, c. 71, provides a limitation of twenty years for the acquisition of easements, and declares that no act shall be deemed an interruption of actual enjoyment unless submitted to or acquiesced in for one year after notice thereof, and of the person making the same. It was *held*, that notwithstanding the customary use of the way as a winter road only, the cessation of user, for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute. It was also *held*, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would without special grant pass by implication upon the severance of the tenements (*Knock* v. *Knock*, 27 *S. C. R.* 664).

After a right of way had been enjoyed for more than the period necessary to obtain title thereto by prescription, the tenant of the dominant tenement, without the knowledge of the owner, gave to the tenant of the servient tenement two pairs of shoes as consideration for the exercise of the right. *Held*, that even if an act of this kind could in any event affect the right that had been acquired, the owner of the dominant tenement was not bound by what the tenant did without his authority (*Ker* v. *Little*, 25 *O. A. R.* 387).

The abandonment of an easement may be shown not only from acts done by the owner of the dominant tenement

the passage over the road, will give rise to an action (*Thorpe* v. *Brumfitt*, 8 *Ch. App.* 650).

The above is necessarily only a mere sketch of the law relating to private ways, which is a subject on which a volume might be easily written. For further information as to this class of easements, the reader is referred to Mr. Gale's or Mr. Goddard's excellent treatises on Easements.

ART. 90.—*Disturbance of Rights of Common.*

(1) A right of common is a right which one person has of taking some part of the produce of land, the whole property in which is vested in another (*Goodeve's R. P.*, 3*rd ed.* 335). It may be appendant to other land (that is, may owe its origin to a general privilege supposed to have been conferred by lords upon tenants to whom they granted arable land), or

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indicating an intention to abandon, but also from acquiescence in acts done by the owner of the servient tenement. Where, therefore, the owner of the property over which a right of way existed built, with the knowledge of the owner of the property, for the benefit of which a right of way had been reserved, an ice-house upon the portion reserved, and after some years pulled down the ice-house, and with the same knowledge built a stable on the same site, and a row of shops over another part of the right of way, it was *held* that the owner of the dominant tenement could not then have the right of way opened (*Bell* v. *Golding*, 23 *O. A. R.* 485; and see *Mykel* v. *Doyle*, 45 *U. C. R.* 65, and *McKay* v. *Bruce*, 20 *O. R.* 709).

appurtenant to other land (in which case it must have arisen by grant or prescription), or in gross (which must arise in the same way). Common appendant is restricted to horses, oxen, cows, and sheep (which are called commonable beasts); but common appurtenant or in gross is not necessarily so restricted.

(2) A person commits a tort against a commoner, who, having no right of common, puts beasts on the land; or, having such a right, puts uncommonable ones on it; or surcharges, by putting more beasts on it than he is entitled to put; or (whether lord or stranger) encloses any part of the common without leaving sufficient land for the full enjoyment of the commoners' rights, and without having obtained the leave of the Board of Agriculture (56 & 57 *Vict. c.* 57).

(1) **Turning uncommonable cattle on to the common.**— The lord may by *prescription* put a stranger's cattle into the common, and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common; but unless such prescription exists, the cattle of a stranger, or the uncommonable cattle of a commoner, may be driven off, or distrained damage feasant, or their owner may be sued either by the lord or a commoner.

(2) **Surcharging.**— Surcharging generally happens where the right of common is appendant, that is to say, where the common is limited to beasts that serve the plough or manure the land, and are levant and couchant

on the estate; or where it is appurtenant, that is to say, where there is a right of depasturing a limited number of beasts upon the common, which number is taken to be the number which the land, in respect of which the common is appurtenant, is capable of supporting through the winter if cultivated for that purpose (*Carr* v. *Lambert*, *L. R.* 1 *Ex.* 168). A common in gross can only arise from grant to a particular person and his heirs, or by prescriptive personal enjoyment by a man and his ancestors, and, having no connection with his land, the number of commonable beasts is usually expressly limited by the grant or prescription. Common appendant and appurtenant being limitable by law, a commoner surcharging the common commits a tort for which the lord may distrain the beasts surcharged, or bring an action; and any commoner may also bring an action, whether the surcharger be the lord or a fellow commoner (*Steph. Comm.*, *Bk. V.*, *Ch.* 8).

(3) **Approvement.**—The common being free and open to all having commonable rights over it, it follows that when the owner of the land (or some other person) so encloses or obstructs it that the commoner is precluded from enjoying the benefit to which he is by law entitled, the commoner may maintain an action (*City Commrs. of Sewers* v. *Glasse*, *L. R.* 19 *Eq.* 134). Thus, if the owner ploughs it up, or drives off the commoner's beasts, or stocks it with rabbits to such an extent that all the herbage is eaten by them, he commits a tort. The owner may, however, make a warren, so long as the rabbits be kept under so as not to occasion injury to the commoners (*Bullew* v. *Langdon*, *Cro. Eliz.* 876). However, most modern actions respecting commons have arisen out of what is called approvement by the owners of the soil, that is to say, the enclosure of part

of the common. Before 1894 this was legal, under the provisions of the Statute of Merton, so long as the owner left sufficient common for the full enjoyment of the commoners' rights, although the onus of proving this lay on the owner, and not on the commoners (*Betts* v. *Thompson*, 6 *Ch. App.* 732; *Robinson* v. *Duleep Singh*, 11 *Ch. Div.* 798). If, however, the approvement diminished the common to such an extent as to obstruct the rights of the commoners, then an action would lie against the owner of the soil. Thus, in an action brought on behalf of all the tenants of a manor to prevent the lord from enclosing parts of the waste, and from digging or removing any part of the soil of the waste so as to interfere with their right of common, it was shown that the tenants had rights of common of pasturage appendant over the waste for sheep, and that certain landowners, not tenants of the manor, had rights of common appurtenant over it for sheep, and that such rights appendant and appurtenant entitled the commoners to turn out a greater number of sheep than the waste would carry. It was, however, proved that, having regard to the average number of sheep that had actually been turned out for many years past, it was highly improbable that nearly as many sheep as the waste could carry would ever be turned out again. It was, nevertheless, held that this made no difference, and that the question of sufficiency of common must be determined according to the theoretical number of sheep which the commoners were *entitled* to turn out, and consequently the lord was restrained from doing any acts which would diminish the amount of pasturage (*Robertson* v. *Hartopp*, 43 *Ch. Div.* 484).

(4) **Law of Commons Amendment Act, 1893.**—However, the old law has been greatly modified by the

statute 56 & 57 Vict. c. 57, by which, in future, the consent of the Board of Agriculture is made a condition precedent to inclosures and approvements of common. With regard to inclosures of commons, the reader is also referred to the Metropolitan Commons Acts, 1866 and 1869, and the Commons Act, 1876. It is conceived that the Act of 1893 does not, however, alter the lord's right of digging for gravel, mould, loam, and subsoil in the waste, so long as he does not infringe on the rights of the commoners, as such acts stand on a different basis to approvements (see *Hall* v. *Byron*, 4 *Ch. Div.* 667).

ART. 91.—*Disturbance of Rights of Fishery.*[144]

(1) A right of fishery may be exclusive or in common. An exclusive right of fishery (called a several fishery) may arise from the exclusive

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[144] "According to the common law of England, which applies in all the provinces constituting the Dominion, except the province of Quebec, riparian proprietors undoubtedly have an exclusive right of fishing in non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown. This is a proprietary right, the fishery in such a case being denominated a territorial fishery; in other words, it is an incident of the property in the soil" (*In re Provincial Fisheries*, 26 *S. C. R.* 517—The Chief Justice of Canada; and see *The Queen* v. *Robertson*, 6 *S. C. R.* 52; *Venning* v. *Steadman*, 9 *S. C. R.* 206).

Ownership of land or water, though not enclosed, gives to the proprietor, under the common law, the sole and exclusive right to fish, fowl, hunt, or shoot within the precincts of that private property, subject to game laws, if any; and this exclusive right is not diminished by the fact that the land may be covered by navigable water. In such cases the public can use the water solely for *bonâ fide*

ownership of the bed of a non-tidal river, lake, or pond; or from a grant, express or implied; or from the party claiming the right being a riparian owner on a non-tidal river; or (in tidal waters) by grant from the Crown. A common of fishery, or common of free fishery, as it is sometimes called, is a right to fish in common with the owner of the fishery, or with others, and always depends on grant, either express, or implied by long user.

(2) A person commits a tort when he fishes in another's fishery, whether he takes fish or not; or when he disturbs, or drives away, or destroys the fish in a fishery; or diverts the water to an unreasonable extent.

(1) **Origin of exclusive piscatorial rights.**—The person who is the owner of the bed of the non-tidal river, pond, or lake in which a fishery is situate, has, *primâ facie*, the exclusive right to fish therein. Such a right is called a "several territorial fishery," and the right of fishing arises from the ownership of the soil entitling

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purposes of navigation and must not unnecessarily disturb or interfere with the private rights of fishing or shooting. Where such waters have become navigable owing to artificial public works the private right must be exercised concurrently with the public servitude for passage (*Beatty* v. *Davis*, 20 *O. R.* 373).

The Crown cannot grant an exclusive right of fishery on navigable waters (*Moffatt* v. *Roddy*, *M. T.* 2 *Vict.*; and see *Parker et ux.* v. *Elliott*, 1 *U. C. C. P.* 470; *Gage* v. *Bates*, 7 *U. C. C. P.* 116; *Duragh* v. *Dunn*, 7 *L. J.* 273; *Arnott* v. *Bradley*, 23 *U. C. C. P.* 1).

the owner to the profits arising within it (*Lord Fitzwalter's Case*, 1 *Mod.* 105; *Gibbs* v. *Woolliscott*, 3 *Salkeld*, 290; *Cooper* v. *Phibbs*, *L. R.* 2 *H. L.* 165). A manorial fishery is generally of this character when the river is non-tidal. The river and the fishery in it form a separate close parcel of the manor (*Duke of Devonshire* v. *Pattinson*, 20 *Q. B. D.* 265).

(2) But a person may be the owner of a fishery although he is not owner of the soil, in which case his title must have originally been derived by grant from the owner of the soil, and is sometimes, although inaccurately, described as a "free fishery"; such a fishery is an incorporeal hereditament (*Duke of Somerset* v. *Fogwell*, 5 *B. & C.* 875).

(3) A person may also be owner of a fishery by reason of his being owner of the riparian land abutting on a non-tidal river, and, in the absence of evidence to the contrary, is presumed to be such owner (*Partheriche* v. *Mason*, 2 *Chitty*, 658). But this presumption may be rebutted by showing that when the riparian land was granted, the fishery in the water was in the possession of another person (*Duke of Devonshire* v. *Pattinson*, 20 *Q. B. D.* 265; *Bloomfield* v. *Johnston*, 8 *Ir. R. C. L.* 97, 104), or by showing user of the fishery by another, and absence of user by the riparian owner.

(4) **Common of piscary.**—A person may have a right to fish from his land although he is not owner of the fishery. This is a "common of fishery" or a "common of free fishery," and arises by grant from the owner of the fishery of a right to fish in common with the owner, or in common with the owner and other grantees.

(5) A person may also have a right to fish in common with others throughout a fishery, irrespective of any

ownership of the soil of the river or of the riparian land. This is also "common of fishery" arising by grant from the owner of the fishery (*Bracton, Lib. iv. c.* 28, *sect.* 4).

(6) **Piscatorial rights of the public.**—The public have no right to fish in a non-tidal river (*Pearce* v. *Scotcher*, 9 *Q. B. D.* 162; *Blount* v. *Layard*, (1891) 2 *Ch.* 681 (note), and *Smith* v. *Andrews*, (1891) 2 *Ch.* 678, and cases there cited). But they have a *primâ facie* right to fish in tidal water. This claim may, however, be rebutted by showing evidence of the ownership of a several fishery in another of such antiquity as to presume a legal origin (*Malcomson* v. *O'Dea*, 10 *H. of L. Cas.* 593). And if this be once proved, the exercise of fishing by the public, even for a long period, will not take the several right away, or confer any right on the public. For the public cannot, in law, prescribe for a *profit à prendre in alieno solo*, nor acquire any right adversely to the owner under any statute of limitations; and an incorporeal hereditament, such as a several fishery, which can only pass by deed, cannot be abandoned (*Neill* v. *Duke of Devonshire*, 8 *App. Cas.* 135). The existence of a several fishery in tidal waters rebuts the *primâ facie* claim of the Crown to the soil of the foreshore (*Att.-Gen.* v. *Emerson*, *L. R.*, (1891) *App. Cas.* 649).

(7) **Meanings of "free fishery" and "several fishery."**—There is much confusion in books with regard to the meaning of the expressions "several fishery" and "free fishery," and it has been attempted to draw a distinction between them, viz., that a fishery is said to be "several" when accompanied by ownership of the soil, and said to be "free" when existing apart from the soil; but this

is not accurate. The words "several" and "free" are only alternative expressions for the same thing (*Gipps* v. *Woollicott*, *Holt*, 323; *Stuart-Moore on Foreshore*, *p.* 740; *Holford* v. *Bailey*, 13 *Q. B.* 426). The confusion has arisen from a misprint in the text of *Co. Lit.* 122*a*.

(8) **Several fisheries in tidal waters.**—A several fishery in tidal waters may exist as an incorporeal right arising from a grant by the Crown apart from the ownership of the soil. Thus, where the free inhabitants of ancient tenements in a borough had, from time immemorial, exercised the exclusive privilege of dredging for oysters in tidal waters, it was held that a lawful origin for the usage ought to be presumed if reasonably possible; and that the presumption which ought to be drawn as reasonable in law and probable in fact was, that there was a grant to the corporation of the borough, subject to a trust or condition in favour of the free inhabitants of ancient tenements in the borough (*Goodman* v. *Mayor of Saltash*, 7 *App. Cas.* 633). However, a several right of fishery in tidal waters usually arises from the ownership of the soil of the foreshore, which again depends on express grant from the Crown, or grant implied from long user (see *Neill* v. *Duke of Devonshire*, 8 *App. Cas.* 135; *Att.-Gen.* v. *Emerson*, *supra*; and *Moore on Foreshore*, *pp.* 658 *and* 734). It should be observed that a several fishery in a tidal river, the waters of which have permanently receded from one channel, and flow in another, cannot be followed from the old to the new channel (*Mayor of Carlisle* v. *Graham*, *L. R.* 4 *Ex.* 361).

(9) **Copyhold fisheries.**—A fishery, and also a right of common of fishery, may be held of copy of court roll

within a manor (*Att.-Gen.* v. *Emerson, supra*; *Tilbury* v. *Silva*, 45 *Ch. Div.* 98).

(10) **Disturbance of fishery.**—A fishery is disturbed if a person prevents fish from approaching it from the lower reaches of the river (*Barker* v. *Faulkener*, (1898) *W. N.* 69), or drives them away by pouring sewage or other noxious matter into the stream (*Fitzgerald* v. *Firbank*, (1897) 2 *Ch.* 96), as much as if he actually caught or attempted to catch the fish; for the effect is the same in each case, namely, to deprive the owner of the fishery of his full enjoyment of it.

ART. 92.—*Disturbance of Ferries.*[145]

(1) A ferry is the exclusive right of carrying passengers in boats across a river or arm of the

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[145] Disturbance of ferry (*Higgins* v. *Hogan*, 7 *U. C. R.* 401).

The Government of this country has power to grant a right of ferry on rivers which form the division line between Canada and the United States, and a person to whom such a right is granted may maintain an action against any one who disturbs his ferry, on the water over which the British Government has jurisdiction (*Kerby* v. *Lewis*, 6 *U. C. R.* (*O. S.*) 207).

In an action on the case for disturbance of the plaintiff's ferry, it is not necessary to prove that the defendant either received or claimed any hire or payment (*Burford* v. *Oliver*, 1 *Draper's K. B. Reps.* 8).

The provincial act, 9 Vict. c. 9 (now R. S. O., 1897, c. 139, s. 10), as well as the common law, authorizes a person to use his own boat within the limits of a ferry, in the pursuit of his business or pleasure, freely, and without any necessity

sea. It can only arise by royal franchise, which may, however, be presumed from immemorial or even long user (see *Trotter* v. *Harris*, 2 *Y. & J.* 285).

(2) A person commits a tort who disturbs a legal ferry, either by refusing to pay a reasonable toll, or by setting up a new ferry or passage to the diminution of the custom of the legal ferry.

(1) **Owner of ferry must keep sufficient boats.**—Since the granting of ferries is a royal franchise and is in derogation of the common law, it is incumbent on the owner of a ferry to keep sufficient boats and men to carry over the public and their goods at all times, and to charge no more than a reasonable toll for so doing. The demand, therefore, of an unreasonable toll would justify the passenger in refusing to pay. But it would seem that the neglect to keep sufficient boats is no answer to an action for disturbance of the ferry (*Peter* v. *Kensal*, 6 *B. & C.* 703).

(2) **What amounts to disturbance of ferry.**—A ferry is the connecting link between two highways or two towns, and the carrying of passengers in boats belonging to other people to and from places so near these highways or towns as to allow the passengers to rejoin these highways almost immediately, will be a disturbance of the ferry, and the persons so conveying over will be committing

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of showing the particular motives or occasions he may have for allowing any individual to pass in his boat, provided that such person be not a traveller and provided nothing be charged for carrying (*Ives* v. *Calvin*, 3 *U. C. R.* 464).

a tort (*Blissett* v. *Hart, Willes*, 508). On the other hand, the ferrying over of persons to places near these highways or towns will not be construed as an interference with the ferry, provided it is shown that it is not done fraudulently, or as a pretence for avoiding the regular ferry (*Tripp* v. *Frank*, 4 *Durn. & E.* 666). The plea that the legal ferry is not sufficient for the public convenience owing to the altered condition of the neighbourhood will not avail (*Newton* v. *Cubitt*,[146] 5 *C. B. N. S.* 627).

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[146] The plaintiffs were authorized to build and maintain a toll bridge, and if the bridge should be destroyed by accident to maintain a ferry until it was replaced. The bridge was accidentally destroyed and during its reconstruction plaintiff maintained a ferry. Defendant built a temporary bridge within the limits of the plaintiff's franchise. It was *held* that the exclusive statutory privilege extended to the ferry and while maintained by the plaintiffs the defendant had no right to build the temporary bridge (*Galarneau* v. *Guilbault*, 16 *S. C. R.* 579).

A club or partnership styled "The Edmonton Ferry Company," was formed for the purpose of building, establishing and operating a ferry within the limits assigned in the license by the municipality granting exclusive rights to ferry across the river in question, the conditions being that any person could become a member of the club by signing the list of membership and taking at least one share of $5 therein, which share entitled the signer to 100 tickets that were to be received in payment of ferry service according to a prescribed tariff, and when expended could be renewed by further subscriptions for shares *ad infinitum*. The club supplied their ferryman with a list of membership, and established and operated their ferry, without any license, within a short distance of one of the licensed ferries, thereby, as was claimed, disturbing the licensee in his exclusive rights. *Held*, that the establishment of the club ferry and the use thereof by members and others under their club regulations was an infringement of the rights under the license, and that

(3) **Building of a bridge.**—With regard to the interference with a ferry by the building of a bridge, it is laid down in *Hopkins* v. *G. N. R. Co.* (2 *Q. B. D.* 224, *at p.* 233), where a railway bridge with a footpath had been erected about half a mile above the legal ferry, that

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Canadian Cases.

the licensee could recover damages by reason of such infringement (*Dinner* v. *Humberstone*, 26 *S. C. R.* 252, affirming the decision of the Supreme Court of the N. W. Territories).

The Crown granted a license to the town of Belleville giving the right to ferry "between the town of Belleville to Ameliasburg." This was *held* to be a sufficient grant of a right of ferry to and from the two places named. Under the authority of this license the town of Belleville executed a lease to the plaintiff, granting the franchise "to ferry to and from the town of Belleville to Ameliasburg," a township having a water frontage of about ten or twelve miles, directly opposite to Belleville, such lease providing for only one landing place on each side, and a ferry was established within the limits of the town of Belleville on the one side to a point across the Bay of Quinté, in the township of Ameliasburg, within an extension of the east and west limits of Belleville. The defendants established another ferry across another part of the Bay of Quinté, between the township of Ameliasburg and a place in the township of Sidney, which adjoins Belleville, the termini being on the one side two miles from the western limits of Belleville, and on the Ameliasburg shore about two miles west from the landing place of the plaintiff's ferry. It was *held* that the establishment and use of the plaintiff's ferry within the limits aforesaid for many years had fixed the termini of the said ferry, and that the defendants' ferry was no infringement of the plaintiff's rights (*Anderson* v. *Tillet*, 9 *S. C. R.* 1). And see *Kerby* v. *Lewis*, 6 *U. C. R.* (*O. S.*) 207; *Regina* v. *Davenport*, 16 *U. C. R.* 411; *Jones* v. *Fraser*, 6 *U. C. R.* (*O. S.*) 426; *Higgins* v. *Hogan*, 7 *U. C. R.* 401; *Smith* v. *Ratlé*, 15 *Grant*, 473; *Ives* v. *Calvin*, 3 *U. C. R.* 464; *R.* v. *Tinning*, 11 *U. C. R.* 636; and *Hickley* v. *Gildersleeve*, 10 *U. C. C. P.* 460.

although the erection of a bridge in the line of the ferry so as to take the traffic of the highways between which the ferry plies would be an infringement, yet when a bridge is made to provide for a new traffic, and in no way takes the traffic directly from the two termini of the ferry, the owner of the ferry cannot claim compensation from the railway company for interference with the ferry. It was also questioned whether the exclusive right of an owner of a ferry extended beyond the carriage of passengers by boat.

Other disturbances.—There are several other kinds of disturbance of incorporeal rights which it is impossible to treat of in an elementary work of this character, and for which I must refer the reader to larger works.[147]

ART. 93.—*Remedy for Nuisances by Abatement.*[148]

(1) The law gives a peculiar remedy for nuisances by which a man may right himself without legal proceedings. This remedy is

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Canadian Cases.

[147] All persons have an equal right to navigate a navigable river with logs or steamboats, which right must be exercised in such a manner as not unreasonably to impede or delay another in the exercise of the same right (*Crandell* v. *Mooney*, 23 *U. C. C. P.* 212).

[148] A defendant who takes upon himself to abate a nuisance, viz., a mill dam which caused water to overflow a neighbouring road, may be called upon to pay damages for any injury done to the plaintiff's property beyond what was necessary for the purpose of removing the public inconvenience (*Truesdale* v. *McDonald, Taylor's King's Bench Reps.* (*U. C.*) 121). And see The Municipal Act, R. S. O., 1897, c. 223, s. 586.

called abatement, and consists in the removal of the nuisance.

(2) A nuisance may be abated by the party aggrieved thereby, so that he commits no riot in the doing of it, nor occasions, in the case of a private nuisance, any damage beyond what the removal of the inconvenience necessarily requires (*Steph. Comm., bk. v. ch. i.*); but a man cannot enter a neighbour's land to prevent an apprehended nuisance (*a*).

(1) Thus, if my neighbour build a wall and obstruct my ancient lights, I may after notice and request to him to remove it, enter and pull it down (*R.* v. *Rosewell*,[149] 2 *Salk.* 459); but this notice should always be given (*Davies* v. *Williams*, 16 *Q. B.* 556).

(2) But where the plaintiff had erected scaffolding in order to build, which building when erected would have been a nuisance, and the defendant entered and threw down the scaffolding, such entry was held wholly unjustifiable (*Norris* v. *Baker*, 1 *Roll. Rep.* 393, *fol.* 15).

(3) Obstructions to watercourses, whether by diminution or flooding, may be abated by the party injured (*Roberts* v. *Rose*, *L. R.* 1 *Ex.* 82).

(4) A commoner may abate an encroachment on his

(*a*) It is generally very imprudent to attempt to abate a nuisance. It is far better to apply for an injunction.

Canadian Cases.

[149] "That a party injured thereby may abate a private nuisance as well as a public one, though in the soil of another, seems a well-settled rule" (*Little* v. *Ince*, 3 *U. C. C. P.* 545 —Macaulay, C. J.).

common by pulling down a house, even although it be inhabited, after first giving notice and requesting the occupier to remove it (*Davies* v. *Williams, supra; Lane* v. *Capsey*, (1891) 3 *Ch.* 411); or a fence obstructing his right (*Mason* v. *Cæsar*, 2 *Mod.* 66); but he cannot abate a warren, however great a nuisance, but must appeal to a court of justice (*Cooper* v. *Marshall*, 1 *Burr.* 259).

(5) Whether where a person has failed to obtain a mandatory injunction to remove a nuisance he can himself abate it, seems to be a moot point (see per Chitty, J., *Lane* v. *Capsey, sup.*).

(6) A private individual may not, however, abate a nuisance on a highway unless it does him a special injury; and even then only so far as may be necessary to enable him to pass along the highway (*Davies* v. *Petley*, 15 *Q. B.* 276; *Arnold* v. *Holbrook*, *L. R.* 8 *Q. B.* 96; *Denny* v. *Thwaites*,[150] 2 *Ex. Div.* 21).

Art. 94.—*Remedy of Reversioners for Nuisances.*

Whenever any wrongful act is necessarily injurious to the reversion to land, or has actually

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Canadian Cases.

[150] Where a defendant undertook to abate a nuisance but in doing so did more than was necessary he is liable (*Adamson* v. *McNab*, 6 *U. C. R.* 113).

"The defendants would not be justified in destroying or injuring the boom, merely because it was in the river, if they could by reasonable care on their part have avoided doing so. In abating a nuisance of that description a private person can interfere with it only to the extent to which it is an injury to him and obstructing his passage" (*Brace* v. *Union Forwarding Co.*, 32 *U. C. R.* 53—Wilson, J.).

been injurious to the reversionary interest, the reversioner may sue the wrongdoer (*Bedingfield* v. *Onslow*, 1 *Saund.* 322).

(1) Thus, opening a new door in a house may be an injury to the reversion, even though the house is none the worse for the alteration; for the mere alteration of property may be an injury (*Young* v. *Spencer*, 10 *B. & C.* 145, 152).

(2) So if a trespass be accompanied with an obvious denial of title, as by a public notice, that would probably be actionable (see judgment, *Dobson* v. *Blackmore*, 9 *Q. B.* 991).

(3) So, the obstruction of an incorporeal right, as of way, air, light, water, &c., may be an injury to the reversion (*Kidgill* v. *Moor*, 9 *C. B.* 364; *Met. Ass. Co.* v. *Petch*, 27 *L. J. C. P.* 330; *Greenslade* v. *Halliday*, 6 *Bing.* 379).

(4) But an action will not lie for a trespass or nuisance of a mere transient and temporary character (*Baxter* v. *Taylor*, 4 *B. & Ad.* 72). Thus, a nuisance arising from noise or smoke will not support an action by the reversioner (*Mumford* v. *O. W. & W. R. Co.*, 25 *L. J. Ex.* 265; *Simpson* v. *Savage*, 26 *L. J. C. P.* 50). Some injury to the reversion must always be proved, for the law will not assume it from any acts of the defendant (*Kidgill* v. *Moor*, *sup.*).

CHAPTER IV.

OF TORTS FOUNDED ON THE DIRECT INFRINGEMENT OF PRIVATE RIGHTS.

Introductory.—Hitherto we have been considering torts in which there was a wrongful act distinct from the damage to the plaintiff, and which might, if it had not been followed by damage, have given no right of action. Such wrongful acts depend, as we have seen, upon (1) a state of mind from which the law infers malice, that is, a conscious, or intentional violation of law to another's prejudice; or (2) a course of conduct from which the law infers negligence, or reckless indifference to the rights of others; or (3) an usurpation of powers, or an abstention from duties in relation to property of the defendant or the public, which may or may not cause private damage.

The class of torts about to be considered, however, differs from all the foregoing, by reason of the wrongful act and the damage resulting from it being practically indivisible. These are what are spoken of in many text books as *injuriæ*. They require no proof of intention to commit a wrong, and no proof of damage resulting from it. The mere fact that a private right has been infringed *without lawful excuse*, constitutes of itself both wrongful act and damage, and gives the party affronted a right of action, even although his actual surroundings may have been improved rather than depreciated.

Such torts usually consist of infringements of the rights of liberty, of immunity from physical violence, or of the enjoyment of real or personal property, including in the latter term incorporeal property consisting of monopolies or rights of exclusive user in relation to patented inventions, trade marks, designs, and literary productions.

Section I.—Of False Imprisonment.

Art. 95.—*Definition.*

False imprisonment consists in the imposition of a total restraint for some period, however short, upon the liberty of another, without sufficient legal authority (*Bird* v. *Jones*, 7 *Q. B.* 743). The restraint may be either physical or by a mere show of authority.[151]

Moral restraint.—Imprisonment does not imply incarceration, but any restraint by force or show of authority. For instance, where a bailiff tells a person that he has a writ against him, and thereupon such person peaceably accompanies him, that constitutes an imprisonment (*Grainger* v. *Hill*, 4 *Bing. N. C.* 212; see *Harvey* v. *Mayne*, 6 *Ir. R. C. L.* 417). But some total restraint there *must* be, for a partial restraint of locomotion in a

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Canadian Cases.

[151] In an action for a malicious arrest, the arrest is not proved by showing that the bailiff to whom the warrant was directed went to the plaintiff's house, and told him at the door that he had a writ against him, but did not enter the house or touch him, and afterwards left him, on his promise to put in bail next day, which he did (*Perrin* v. *Joyce*, 6 *U. C. R.* (*O. S.*) 300).

particular direction (as by preventing the plaintiff from exercising his right of way over a bridge) is no imprisonment; for no restraint is thereby put upon his liberty (*Bird* v. *Jones*, *sup.*).

Legal warrant.—To constitute false imprisonment the defendant must have acted without due legal authority. Where, therefore, a gaoler acts upon a writ or order of a competent court, which is *primâ facie* valid, he is not liable if it subsequently turns out that the order was wrong (*Greaves* v. *Keene*, 4 *Ex. Div.* 73; and *Henderson* v. *Preston*, 21 *Q. B. D.* 362). But, on the other hand, where the order shows on the face of it that the prisoner was committed under a statute which expressly *casts on the gaoler the duty* of releasing the prisoner after a specified time unless the party on whose motion the prisoner was committed brings the prisoner to the bar of the court, then the gaoler will be liable unless he so releases the prisoner (*Moone* v. *Rose*, *L. R.* 4 *Q. B.* 486).

The rules which apply to imprisonments by private persons, and those which apply to imprisonments by judges and other magistrates, are necessarily different. It will be therefore more convenient to consider them separately.[152]

Canadian Cases.

[152] The evidence in this case showed that the defendant, having obtained the issue of the warrant, interfered personally in the arrest, telling the constable to have the plaintiff taken away, or right away. This was *held* sufficient to support a verdict on the second count, in trespass (*Stephens* v. *Stephens*, 24 *U. C. C. P.* 424; *Hubley* v. *Boak*, 4 *N. S. R.* 82; *Martyr* v. *Pryor*, 4 *N. S. R.* 498; *Lutts* v. *Nott*, 4 *N. S. R.* 129; *Oakes* v. *Blois*, 22 *N. S. R.* 167; and *Bank of Upper Canada* v. *Lewis*, 3 *U. C. R.* 325; and *Acland* v. *Adams*, 7 *U. C. R.* 139).

Sub-sect. 1.—OF IMPRISONMENTS BY PRIVATE PERSONS AND CONSTABLES.

Art. 96.—*General Immunity from Imprisonment.*

(1) A person who arrests or imprisons another without a legal, and legally executed, warrant, commits a tort, except in certain exceptional cases.

(2) Where an arrest can only lawfully be made by warrant, the person arresting must have it with him at the time, ready to be produced if demanded (*Gilliard* v. *Laxton*, 31 *L. J. M. C.* 123).

Thus, for either a constable or a private person to arrest a person who is suspected of a mere misdemeanour, or a person who has committed a past assault, or the like, without the warrant of a magistrate, is a false imprisonment, for which the party making the arrest will be liable, even although the party arrested might have been properly arrested, had a warrant been obtained.[153]

Canadian Cases.

[153] Where the judge at *nisi prius* left it to the jury to say whether a constable who had arrested a man without a warrant, acted under a fair and reasonable supposition that he was performing a public duty, telling them at the same time his own impressions as to the evidence, and the jury found in accordance with his views as expressed, it was *held* that the case was properly left to the jury, and the verdict was sustained (*Cottrell* v. *Hueston*, 7 *U. C. C. P.* 277; *Menervey* v. *Wallace*, 1 *N. S. R.* 34; *Barkstrom* v. *Beck*, 5 *N. S. R.* 538; *Kingston* v. *Wallace*, 25 *N. B. R.* 573; *Murphy* v. *Ellis*, *N. B. R. East Liner*, 1871).

"We take the law respecting the right of a private person to make an arrest in such cases to be at this day, as it is

Exceptional cases justifying arrests by private persons.—In the following cases, a private citizen may arrest another with impunity, viz.:—

(1) **Bail.**—A person who is bail for another may always arrest and render him up in his own discharge (*Ex parte Lyne*, 3 *Stark.* 132).

(2) **Felons.**—A treason or felony having *been actually committed*, a private person may arrest one *reasonably*, although erroneously, suspected by him; but the suspicion must not be mere surmise (*Beckwith* v. *Philby*,[154] 6 *B. & C.* 635). So a person may arrest another in order to prevent him from committing a felony.

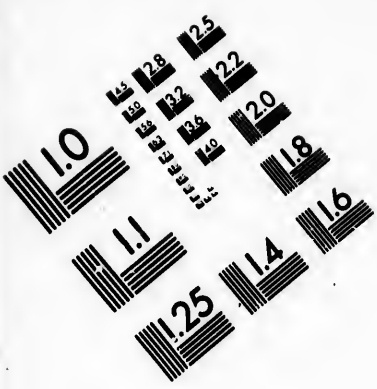
In an action for false imprisonment, where the

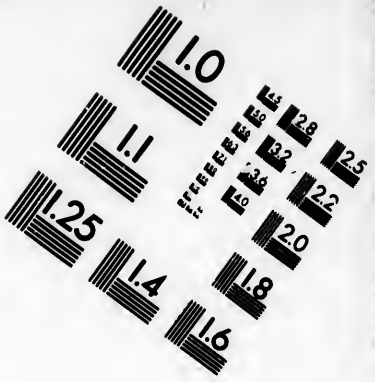
Canadian Cases.

clearly stated to be in *Hale's Pleas of the Crown*, 2*nd vol.* 76, namely, that where a private person—that is, a person not by office a keeper of the peace, or a justice, or a constable—takes upon himself to arrest another without a warrant for a supposed offence, he must be prepared to prove, and therefore must in his plea affirm, that a felony has been committed, for in that respect he acts at his own peril. That point in his defence must be clear; mere suspicion that there has been a felony committed by someone will not do; though if he is prepared to show that there really has been a felony committed by someone, then he may justify arresting a particular person, upon reasonable grounds of suspicion that he was the offender; and mistake upon that point when he acts sincerely upon strong grounds of suspicion will not be fatal to his defence" (*McKenzie* v. *Gibson*, 8 *U. C. R.* 101—Robinson, C. J.). And see *ante*, p. 225.

A private individual cannot arrest on suspicion of felony: he must show a felony committed. What constitutes a probable cause for suspecting the plaintiff of the commission of a felony is often a question of fact for the jury (*Ashley* v. *Dundas*, 5 *U. C. R.* (*O. S.*) 749).

[154] *Lyden* v. *McGee*, 16 *O. R.* 105; *Patterson* v. *Scott*, 38 *U. C. R.* 642; *Ellis* v. *Power*, 4 *N. B. R.* 41.





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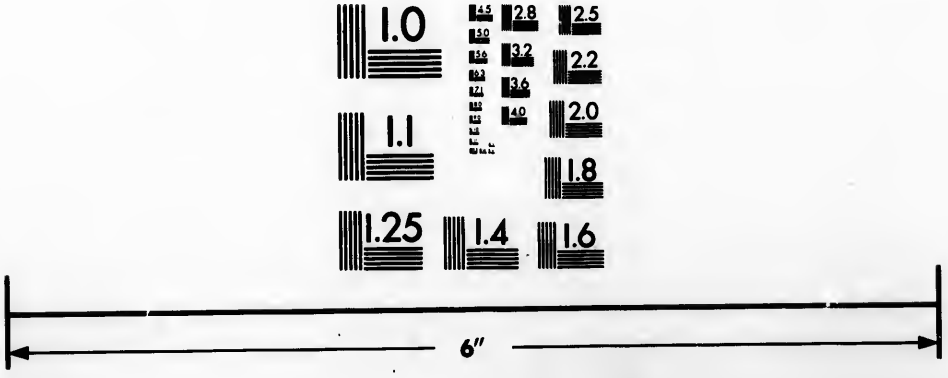

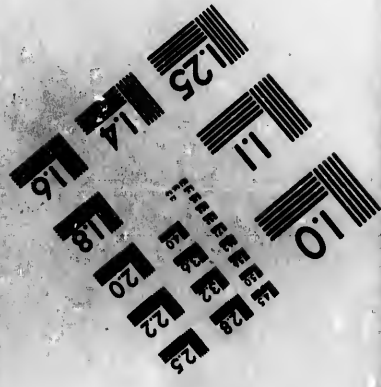

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defendant, in order to justify himself, must prove that a felony was in fact committed, and where it appears that if it were committed it could only have been committed by the plaintiff, the fact that the latter has been tried for the alleged felony and acquitted, does not estop the defendant from giving evidence that he did really commit it. For the verdict in the criminal trial was *res inter alios acta*, and could not reasonably be held binding on the defendant in a distinct proceeding (*Cahill* v. *Fitzgibbon*, 16 *L. R. Ir.* 371).

(3) **Breakers of peace.**—A private person may and ought to arrest one committing, or about to commit, a breach of the peace, but not if the affray be over, and not likely to recur (*Timothy* v. *Simpson*,[155] 1 *Cr. M. & R.* 757).

(4) **Night offenders.**—Any person may arrest and take before a justice one *found committing* an indictable offence between 9 p.m. and 6 a.m. (14 & 15 Vict. c. 19, s. 11).

(5) **Malicious injurers.**—The owner of property or his servant may arrest and take before a magistrate anyone *found committing* malicious injury to *such* property (14 & 15 Vict. c. 19, s. 11; 24 & 25 Vict. c. 97).

(6) **Offering goods for pawn.**—A private person, to whom goods are offered for sale or pawn, may, if he has reasonable ground for suspecting that an offence against

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Canadian Cases.

[155] Where a man is himself assaulted by a person disturbing the peace in a public street, he may arrest the offender and take him to a peace officer to answer for the breach of the peace (*Forester* v. *Clarke*, 3 *U. C. R.* 151).

Reid v. *Inglis*, 12 *U. C. C. P.* 191.

the Larceny Amendment Acts (24 & 25 Vict. c. 96; 35 & 36 Vict. c. 93, s. 34) has been committed with respect to them, arrest the person offering them.

(7) **Vagrants.**—Any person may arrest and take before a magistrate one *found committing* an act of vagrancy (5 Geo. 4, c. 83).

N.B. Such acts are soliciting alms by exposure of wounds, indecent exposure, false pretences, fortune-telling, betting, gaming in the public streets, and many other acts, for which I must refer to the fourth section of the Act.

(8) **Brawlers.**—A churchwarden may apprehend, and take before a magistrate, any person disturbing divine service (14 & 15 Vict. c. 19, s. 11).

(9) **Other cases depending upon relationship.**—Officers in the army or navy may imprison their subordinates (*Marks* v. *Frogley*, (1898) 1 *Q. B.* 888, and Army Act, (1881) sects. 41-45). So a parent may lock up his child, and a master his apprentice. A husband, however, may not detain his wife against her will, even for the purpose of enforcing an order for the restitution of conjugal rights (*Reg.* v. *Jackson*,[156] (1891) 1 *Q. B.* 671).

(10) **Particular exceptions.**—In London, the owner of property may arrest anyone *found* committing any indictable offence, or misdemeanour in respect to such property, punishable upon summary conviction.

Most private Railway Acts, too, give power to officers of the company to detain unknown offenders against the Acts; but arrests can only be lawfully made in strict accordance with the powers thus given (*Knights* v. *L. C. & D. Ry. Co.*, 62 *L. J. Q. B.* 378).

Canadian Cases.

[156] *Metcalf* v. *Roberts*, 23 *O. R.* 130.

Shipmasters have special powers of imprisoning crew and passengers.

Special powers, too, are frequently given to the police of certain towns and cities, by their Local Acts.

Under the above exceptions, numbered 4, 5, and 7, it is no excuse to prove the commission of the offence immediately *before* the arrest, for the arrest must be made *in the course of the commission* of the offence (*Simmons* v. *Millingen*, 2 *C. B.* 533).

Exceptional cases justifying arrests by constables without warrant.—Of course a constable can arrest a person in his capacity of a private citizen wherever a private citizen could do so. But in addition to such cases, he has greater powers conferred upon him than ordinary individuals, in order that he may efficiently perform his duty as a guardian of the public peace.

(1) **Cases of suspected felony.**—As we have seen, a private person can only arrest a suspected felon in cases where a felony has actually been committed by *some one;* and if it should turn out that no such felony was ever committed, he will be liable, however reasonable his suspicions may have been. It would, however, be obviously absurd to require a constable to satisfy himself at his peril that a felony had been in fact committed, before acting; and consequently the law provides that a constable may make an arrest merely upon reasonable suspicion that a felony has been committed, and that the party arrested was the doer; and even though it should turn out eventually that no felony has been committed he will not be liable (*Marsh* v. *Loader*, 14 *C. B. N. S.* 535; *Griffin* v. *Colman*, 28 *L. J. Ex.* 134). The suspicion, however, must be a reasonable

one, or the constable will be liable. Thus, a person told the defendant, a constable, that a year previously he had had his harness stolen, and that he now saw it on the plaintiff's horse, and thereupon the defendant went up to the plaintiff and asked him where he got his harness from, and the plaintiff making answer that he had bought it from a person unknown to him, the constable took him into custody, although he had known him to be a respectable householder for twenty years. It was held that the constable had no reasonable cause for suspecting the plaintiff, and was consequently liable for the false imprisonment (*Hogg* v. *Ward*, 27 *L. J. Ex.* 443). But, on the other hand, where a constable knows that a warrant is out against a man, that is sufficient ground for his reasonably suspecting that a felony has been committed (*Creagh* v. *Gamble*, 24 *L. R. Ir.* 458).

But where one man falsely charges another with having committed a felony, and a constable, at and by his direction, takes the other into custody, the party making the charge, and not the constable, is liable (*Davis* v. *Russell*, 5 *Bing.* 354). "It would be most mischievous," Lord Mansfield remarks, "that the officer should be bound first to try, and at his peril exercise his judgment as to the truth of the charge. He that makes the charge alone is answerable" (*Griffin* v. *Coleman*, 4 *H. & N.* 265).

(2) **Breakers of peace.**—A constable may and ought to arrest one committing, or about to commit, a breach of the peace, even after the affray (so that it be immediately after), in order to take the offender before a magistrate (*R.* v. *Light*, 27 *L. J. M. C.* 1).

(3) **Malicious injurers.**—A constable may arrest and

take before a magistrate anyone *found committing* malicious injury to property (14 & 15 Vict. c. 19, s. 11; 24 & 25 Vict. c. 97).

(4) **Brawlers.**—A constable may arrest and take before a magistrate anyone interrupting divine service (14 & 15 Vict. c. 19, s. 11).

Sub-sect. 2.—Of Imprisonment by Judicial Officers.

Art. 97.—*General Authority of Judicial Officers.*[157]

(1) No judicial officer, invested with authority to imprison, is liable to an action for a wrongful imprisonment, unless he acted beyond his jurisdiction (*Doswell* v. *Impey*, 1 *B. & C.* 169; *Kemp* v. *Neville*, 10 *C. B. N. S.* 523);

Canadian Cases.

[157] The Criminal Code, 1892 (Canada), regulates the procedure as regards summary conviction; see also R. S. O., 1897, c. 90 (*Croukhite* v. *Sommerville*, 3 *U. C. R.* 129; *Parsons qui tam* v. *Crabbe*, 31 *U. C. C. P.* 151; *McLellan* v. *McKinnon*, 1 *O. R.* 219; *Howell* v. *Armour*, 7 *O. R.* 363; *Hunter* v. *Gilkison*, 7 *O. R.* 735; *Bond* v. *Conmee*, 15 *O. R.* 716, and 16 *O. A. R.* 398; *Jones* v. *Grace*, 17 *O. R.* 681; *Sinden* v. *Brown*, 17 *O. A. R.* 173).

A justice of the peace who issues his warrant for the arrest of a person charged with felony without the information having been sworn is liable in trespass. Sects. 22 and 23 of the Criminal Code are a codification of the common law and merely justify the personal arrest by the peace officer, whether justice or constable, on his own view, or on

not even though he imprisons the plaintiff maliciously and oppressively (*Revis* v. *Smith*, 18 *C. B.* 126; *Dawkins* v. *Paulet*, *L. R.* 5 *Q. B.* 94; *Anderson* v. *Gorrie*, (1895) 1 *Q. B.* 668).

(2) In order to constitute a jurisdiction, such officer must have before him some suit, complaint, or matter in relation to which he has authority to inflict imprisonment or arrest.[158]

(1) In the case of *Scott* v. *Stansfield* (*L. R.* 3 *Ex.* 220), which, though an action of slander, will very well

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Canadian Cases.

suspicion, or calling on some one present to assist him. They do not authorize a justice to direct a constable to make an arrest elsewhere without warrant (*McGuinness* v. *Dafoe*, 23 *O. A. R.* 704; and see *Sinden* v. *Brown*, 17 *O. A. R.* 173; *Appleton* v. *Lepper*, 20 *U. C. C. P.* 138; *Friel* v. *Ferguson*, 15 *U. C. C. P.* 584; and *Bross* v. *Huber*, 18 *U. C. R.* 282; *Connors* v. *Darling*, 23 *U. C. R.* 541; *Sprung* v. *Anderson*, 23 *U. C. C. P.* 152).

158 "*Connors* v. *Darling* (23 *U. C. R.* 541) is an express authority that even if there had been originally a good information and proper warrant thereon to arrest, the commitment for trial, in the absence of any examination of witnesses, confession, &c., was an act of trespass without jurisdiction" (*Appleton* v. *Lepper*, 20 *U. C. C. P.* 143—Hagarty, C. J.).

In trespass for false imprisonment it was *held* that a judge of a district court has no authority to order an arrest upon an affidavit which disclosed a cause of action founded on a contract on which the damages were unliquidated (*Ferris* v. *Dyer*, 5 *U. C. R.* (*O. S.*) 5).

A conviction bad upon the face of it, although not quashed, was *held* not to be a sufficient defence to an action of trespass (*Briggs* v. *Spilsbury*, *Taylor's K. B. Reps.* 440).

repay a careful perusal, Kelly, C. B., remarks, "It is essential in all courts that the judges, who are appointed to administer the law, should be permitted to administer it under the protection of the law independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office, if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury, whether a matter, on which he has commented judicially, was or was not relevant to the case before him? Again, if a question arose as to the *bona fides* of the judge, it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. It is impossible to over-estimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action as this can under any circumstances be maintainable" (*a*).

(*a*) Whether a magistrate would be equally exempted from liability in cases where he had acted maliciously, does not seem to have been decided. It will at once appear that the judgment of the Chief Baron, which I have cited at considerable length on account of its lucid enunciation of the principles on which this exception is based, is broad enough to include actions brought against a justice of the peace. At the same time, it must be admitted the first section of Jervis' Act (11 & 12 Vict. c. 44), as has been pointed out by Mr. Roscoe in his Law of Nisi Prius Evidence, would seem to imply that such an action could be supported. There the matter rests, but I confess I have little doubt, should the question ever arise, that, provided he acts within his jurisdiction, a magistrate is no more answerable (by action, that is to say) for a malicious act, than is a judge of a county court or of the High Court. In this opinion the learned author above cited seems to concur.

(2) Where a court has jurisdiction of a matter before it, but acts erroneously, the parties suing (unless they acted maliciously), the court itself, and the officers executing its orders or warrants, will be protected from any action at the suit of a person arrested. But where it has no jurisdiction all these parties may be liable (*Comyn, Dig., tit. County Court*, 8; *Houlden* v. *Smith*, 14 *Q. B.* 841; *West* v. *Smallwood*, 3 *M. & W.* 421; *Wingate* v. *Waite*, 6 *M. & W.* 746; *Brown* v. *Watson*, 23 *L. T.* 745).

(3) So where a magistrate acts without those circumstances which must concur to give him jurisdiction he will be liable (*Morgan* v. *Hughes*, 2 *T. R.* 225).[159] But an information brought before a magistrate, charging an offence within his cognizance, gives him jurisdiction (*Cave* v. *Mountain*, 1 *M. & G.* 257).

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[159] Where magistrates commit a party upon a general charge of felony given upon oath, they will not be liable to an action of trespass, although the real facts of the case might not have supported such complaint if such facts were not laid before them at the time (*Gardner* v. *Burwell*, *Taylor's K. B. Reps.* 189).

Omitting to state the conviction of a defendant in his warrant of commitment will not subject a justice of the peace to an action of false imprisonment, provided the actual conviction is proved upon his defence (*Whelan* v. *Stevens*, *Taylor's K. B. Reps.* 245; and see *Burney* v. *Gorham*, 1 *U. C. C. P.* 358; *Fullarton* v. *Switzer*, 13 *U. C. R.* 575; *In re Joice*, 19 *U. C. R.* 197; *Orr* v. *Spooner*, 19 *U. C. R.* 601; *Thorpe* v. *Oliver*, 20 *U. C. R.* 264; *Haacke* v. *Adamson*, 14 *U. C. C. P.* 201; *Dickson* v. *Crabb*, 24 *U. C. R.* 494; *Moffatt* v. *Barnard*, 24 *U. C. R.* 498; *McKinley* v. *Munsie*, 15 *U. C. C. P.* 230; *Crawford* v. *Beattie*, 39 *U. C. R.* 13).

ART. 98.—Primâ facie *Jurisdiction sufficient to excuse Judicial Officer.*

The judge of an inferior court, having a *primâ facie* jurisdiction over a matter, is not responsible for a false imprisonment committed on the faith of such *primâ facie* jurisdiction, if, by reason of something of which he could have no means of knowledge, he really has no jurisdiction (*Calder* v. *Halket*, 3 *Moore, P. C. C.* 28).

Thus, if, through an erroneous statement of facts, a person be arrested under process of an inferior court, for a cause of action not accruing within its jurisdiction, no action lies against the judge or officer of the court, but against the plaintiff only (*Olliett* v. *Bessey*, 2 *W. Jones*, 214).

ART. 99.—*Power to imprison for Contempt of Court.*[160]

The superior courts of law and equity have jurisdiction to punish by commitment for any insult offered to them, and any libel upon them,

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[160] A justice of the peace, while sitting in the discharge of his duty, has the power, without any formal proceeding, to order at once into custody, and cause the removal of any party who by his indecent behaviour or insulting language is obstructing the administration of justice (*In re Clarke et al.*, 7 *U. C. R.* 223).

A justice may commit for contempt while in the execution of his office, out of sessions, but it must be by a warrant in writing and for a specified period (*Jones* v.

or any contemptuous or improper conduct committed by any person with respect to them; but inferior courts of record have power only to commit for contempts committed in court.

(1) During the pendency of a suit in a superior court, the publisher of a newspaper commits a contempt if he publishes extracts from affidavits with comments upon them (*Tichborne* v. *Mostyn*, *L. R.* 7 *Eq.* 55 n.).

(2) Where an indictment has been removed into the Queen's Bench Division, and a day appointed for trial, the holding of public meetings, alleging that the defendant is not guilty, and that there is a conspiracy against him, and that he cannot have a fair trial, is a contempt of court (*Onslow's and Whalley's case*, *Reg.* v. *Castro*, *L. R.* 9 *Q. B.* 219).

(3) A solicitor is guilty of a contempt of court in writing, for publication, letters tending to influence the result of a suit (*Daw* v. *Eley*, *L. R.* 7 *Eq.* 49).

(4) It seems that a judge of a county court has a statutory power only to commit for contempts committed before the court and whilst it is sitting. (See 51 & 52 Vict. c. 43, s. 152, *R.* v. *Lefroy*, *L. R.* 8 *Q. B.* 134; *Reg.* v. *Brompton County Court Judge*, (1873) 2 *Q. B.* 195.)

(5) A justice of the peace may commit one who calls him, in court, a liar (*Rex* v. *Revel*, 1 *Str.* 421).

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Glasford (*U. C. R.*) *M. T.* 2 *Vict.*; and see *Armour* v. *Boswell*, 6 *U. C. R.* (*O. S.*) 486; *McKenzie* v. *Mewburn*, 6 *U. C. R.* (*O. S.*) 486); *Reg.* v. *Scott*, 2 *U. C. L. J.* (*N. S.*) 323).

ART. 100.—*Power of Magistrates to imprison.*

(1) If a felony, or breach of the peace, be committed in view of a justice, he may personally arrest the offender or command a bystander to do so, such command being a good warrant. But, if he be not present, he must issue his written warrant to apprehend the offender (2 *Hale, Pl. Cr.* 86).

(2) Where a justice acts in a matter without any, or beyond his, jurisdiction, a person injured by any conviction or order issued by such justice in such matter cannot maintain an action in respect thereof, until such conviction shall have been quashed by the proper tribunal in that behalf; nor for anything done under a warrant followed by a conviction or order, until such conviction be quashed; nor at all for anything done under a warrant for an indictable offence, if a summons had been previously served and not obeyed. (See 11 & 12 Vict. c. 44.)

Constables executing the warrants of justices issued without jurisdiction are specially protected by 24 Geo. 2, c. 44, ss. 6, 8, from any action, unless they have refused for six days after written demand to produce the warrant.

It may also be observed that by the Public Authorities Protection Act (56 & 57 Vict. c. 61) no action can be brought against a justice of the peace for any neglect or default in the execution of his duty or authority, unless the action be begun within six months. When the

action is for damages, tender of amends before action may be pleaded in lieu of or in addition to any other plea. If the defendant succeeds, he is entitled to costs as between solicitor and client (see Art. 101, *infra*).

ART. 101.—*Limitation and Protection.*[161]

(1) No action can be brought for false imprisonment against a private individual, except within four years next after the cause of action

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[161] The Act *R. S. O.*, 1897, *c.* 88, for the protection of Justices of the Peace and others from vexatious actions, requires proof that the magistrate acted maliciously and without reasonable and probable cause in all cases where the foundation of the action is in respect to any matter within his jurisdiction as such justice. But an action against a magistrate will be without any such allegation when the justice acted in a matter in which by law he had not jurisdiction. Where the justices have a general jurisdiction over the subject-matter, and acting under that jurisdiction commit the plaintiff to the custody of the gaoler, the latter is not liable for trespass and false imprisonment, although the proceedings may have been erroneous (*Ferguson* v. *Adams*, 5 *U. C. R.* 200).

A conviction not set aside protects a magistrate against a trespass (*Gates* v. *Devenish*, 6 *U. C. R.* 260).

Although a conviction is not quashed, yet if it is bad on the face of it an action will lie for trespass (*Briggs* v. *Spilsbury*, *Taylor's Reps.* 440; and see *Brennan* v. *Hatelie*, 6 *U. C. R.* (*O. S.*) 308; *Clapp* v. *Laurason*, 6 *U. C. R.* (*O. S.*) 319; *Cleland* v. *Robinson et al.*, 11 *U. C. C. P.* 416; *Marsh* v. *Boulton*, 4 *U. C. R.* 354; *Ferguson* v. *Adams*, 5 *U. C. R.* 194; *Gray* v. *McCarty et al.*, 22 *U. C. R.* 568; *Graham* v. *McArthur*, 25 *U. C. R.* 478; *Cummins* v. *Moore*, 37 *U. C. R.* 130; and *Cross* v. *Wilcox*, 39 *U. C. R.* 187).

A complainant who in good faith lays an information for an offence unknown to the law before a magistrate, who thereupon without jurisdiction convicts and commits the

arose. But as imprisonment is a continuing tort, the period runs from the last day of the imprisonment, and not from the first.

(2) Where any action or other proceeding is commenced against any person for any act done in pursuance, execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority :—

(a) The action or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, default, or neglect complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof.[162]

Canadian Cases.

accused to gaol, is not liable to an action for malicious prosecution, the essential ground for such an action being the carrying on maliciously and without probable cause of a legal prosecution (*Grimes* v. *Millar*, 23 *O. A. R.* 764).

A search warrant issued under "The Canada Temperance Act" is good, and if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face, it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside (*Sleeth* v. *Hurlbirt*, 25 *S. C. R.* 620, judgment of the Supreme Court of N. S. (27 *N. S.* 375) reversed; and see *Reid* v. *McWhinnie*, 27 *U. C. R.* 289; *Truax* v. *Dixon*, 17 *O. R.* 366).

[162] *R. S. O.*, 1897. An Act to protect Justices of the Peace and others from Vexatious Actions. By section 13 it is

(b) Whenever in any such action or proceeding a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client.[163]

(c) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into Court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action.[164]

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provided that no action shall be brought against a justice of the peace for anything done by him in the execution of his office unless the same is commenced within six months next after the act complained of was committed.

[163] Sect. 22.

[164] Where a magistrate is sued in trespass for an alleged illegal proceeding under the 4 & 5 Vict. c. 26 [now *R. S. O.*, 1897, *c.* 88, *sect.* 17], he may give in evidence a tender of

(d) If in the opinion of the Court the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceedings, the Court may award to the defendant costs, to be taxed as between solicitor and client (Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61, s. 1).[165]

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amends, under the plea of the general issue (*Moon* v. *Holditch et al.*, 7 *U. C. R.* 207).

[165] Where in an action against a constable for false arrest it is found by the jury that the defendant acted in the honest belief that he was discharging his duty as a constable, and was not actuated by any improper motive, he is entitled to notice of action, and such notice must state not only the time of the commission of the act complained of, but that it was done maliciously (*Scott* v. *Reburn*, 25 *O. R.* 450).

The object of the "Act to protect Justices of the Peace and others from Vexatious Actions," *R. S. O.*, *c.* 73 [now *R. S. O.*, 1897, *c.* 88], is for the protection of those fulfilling a public duty, even though, in the performance thereof, they may act irregularly or erroneously, and notice of action in such case must allege that the acts were done maliciously and without reasonable and probable cause ; but where a person entitled to the protection of the act voluntarily does something not imposed on him in the discharge of any public duty, such notice is not required (*Kelly* v. *Archibald*, *Kelly* v. *Barton*, 26 *O. R.* 608, and 22 *O. A. R.* 522, and see *Friel* v. *Ferguson*, 15 *U. C. C. P.* 584 ; *Neill* v. *McMillan*, 25 *U. C. R.* 485 ; *Cummins* v. *Moore*, 37 *U. C. R.* 130 ; *Venning* v. *Steadman*, 9 *S. C. R.* 206 ; *Coffey* v. *Scane*, 22 *O. A. R.* 269).

The notice of action against a magistrate should set forth the substantial ground of complaint, and should specify the time and place of the commission (*Madden* v. *Shewer*, 2 *U. C. R.* 115, and *section* 14, *R. S. O.*, 1897, *c.* 188 ; and

Habeas corpus.—In addition to the remedy by action, the law affords a peculiar and unique summary relief to a person wrongfully imprisoned, viz., the writ of *habeas corpus ad subjiciendum*.

This writ may be obtained by motion made to any superior court, or to any judge when those courts are not sitting, by any of her Majesty's subjects. The party moving must show probable cause that the person whose release he desires is wrongfully detained. If the court or judge thinks that there is reasonable ground for suspecting illegality, the writ is ordered to issue, commanding the detainer to produce the party detained in court on a specified day, when the question is summarily determined. If the detainer can justify the detention, the prisoner is remitted to his custody. If not, he is discharged, and may then have his remedy by action. (See 31 Car. 2, c. 2; and 56 Geo. 3, c. 100.)

Section II.—Of Direct Bodily Injuries.

Causing death.—Direct personal injuries causing death are crimes of a most heinous nature. They rather come, therefore, under the ordinances of the criminal than of the civil law. Putting these aside, direct bodily injuries are usually classified as assaults and batteries.

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see *Oliphant* v. *Leslie*, 24 *U. C. R.* 398; *Bond* v. *Connell*, 16 *O. A. R.* 398; *Sinden* v. *Brown*, 17 *O. A. R.* 173; *Jones* v. *Grace*, 16 *O. R.* 681; and *Howell* v. *Armour*, 7 *O. R.* 363).

Amending a conviction made by a justice is not quashing it, and in such a case trespass will not lie against the justice (*McLellan* v. *McKinnon*, 1 *O. R.* 219).

ART. 102.—*Definition of Assault.*

An assault is an attempt or offer to do harm to the person of another, which might have succeeded if persevered in, or would have succeeded but for some accident.

(1) Thus, if one make an attempt, and have at the time of making such attempt a present *primâ facie* ability to do harm to the person of another, although no harm be actually done, it is nevertheless an assault. For example, menacing with a stick a person within reach thereof, although no blow be struck (*Read* v. *Coker*, 13 *C. B.* 850); or striking at a person who wards off the blow with his umbrella or walking-stick, would constitute assaults.[166]

(2) But a mere verbal threat is no assault: nor is a threat consisting not of words but gestures, unless there be a present ability to carry it out. This was illustrated by Pollock, C. B., in *Cobbett* v. *Grey* (4 *Exch.* 744). "If," said the learned judge, "you direct a weapon, or if you raise your fist within those limits which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault (*a*), 'I will commit an assault,' I think that is not an assault."

(*a*) *Query*—Battery.

Canadian Cases.

[166] "An assault is an attempt to offer with force and violence to do a corporal hurt to another; and a battery, which is the attempt executed, includes an assault" (*Reg.* v. *Shaw*, 23 *U. C. R.* 619—Draper, C. J.)

A tort feasor cannot plead incapacity of mind in answer to an action of assault (*Taggard* v. *Innes*, 12 *U. C. C. P.* 77; *Inglefield* v. *Merkel*, 3 *N. S. R.* 188).

(3) To constitute an assault there must be an *attempt*. Therefore, if a man says that he would hit another were it not for something which withholds him, that is no assault, as there is no apparent attempt (*Tuberville* v. *Savage*, 1 *Mod.* 3).

(4) For the same reason, shaking a stick in sport at another is not actionable (see *Christopherson* v. *Bare*, 11 *Q. B.* 477).

ART. 103.—*Definition of Battery.*[166a]

Battery consists in touching another's person hostilely or against his will, however slightly (*Rawlings* v. *Till*, 3 *M. & W.* 28).

This touching may be occasioned by a missile or any instrument set in motion by the defendant, as by throwing water over the plaintiff (*Pursell* v. *Horn*, 8 *A. & E.* 602), or spitting in his face, or causing another to be medically examined against his or her will (*Latter* v. *Braddell*, 29 *W. R.* 239). In accordance with the rule, a battery must be involuntary: therefore a voluntarily suffered beating is not actionable; for *volenti non fit injuria* (*Christopherson* v. *Bare*, 11 *Q. B.* 477). Merely touching a person in order to engage his attention is no battery (*Coward* v. *Baddeley*, 28 *L. J. Ex.* 261).

Wounding and Maiming.—If the violence be so severe as to wound, the damages will be greater than those awarded for a mere battery; so, also, if the hurt amount to a mayhem (that is, a deprivation of a member serviceable for defence in fight); but otherwise the same rules of law apply to these injuries as to ordinary batteries.

Canadian Cases.

[166a] *Reg.* v. *Shaw*, *ante*, p. 426.

Art. 104.—*General Liability for Assault, Battery, and other direct Bodily Injuries.*

Any person who commits an assault or battery, or otherwise directly injures another's body without lawful authority, commits a tort.

Unintentional direct bodily injuries.—In addition to batteries of a hostile character, a man commits a trespass who quite unintentionally inflicts direct bodily harm upon another without lawful authority. Thus, where a tramway company is authorized by statute to run a steam tramcar on a public road, the statute must be taken to impose on the company a duty to see that the cars and tramway, and all necessary apparatus, are kept in proper condition for this purpose. And this extends not merely to their own line, but also to the lines of other companies over which they have running powers. If they fail to do so, and the tramway be in an improper condition, then, in running their cars on that tramway, they are doing that which they are not authorized to do by their Act. They are only authorized to be on the highway at all by their Act: and as regards the public, they can only justify using the tramway if they are doing what the Act allows them to do. If, therefore (apart from any question of negligence), a car runs on the defective tramway, and injures a passer-by, the company will be liable; for it is a direct trespass to the person without justification or excuse (*Sadler* v. *South Staffordshire, &c. Tramways Co.*,[167] 23 *Q. B. Div.* 17).

Exceptions.—(1) **Self-Defence.**—A battery is justifiable

Canadian Cases.

[167] *Fraser* v. *London Street R. W. Co.*, 29 *O. R.* 411.

if committed in self-defence. Such a plea is called a plea of "son assault demesne." But, to support it, the battery so justified must have been committed in actual defence, and not afterwards and in mere retaliation (*Cockroft* v. *Smith*, 11 *Mod.* 43). Neither does every common battery excuse a mayhem. As, if "A. strike B., B. cannot justify drawing his sword, and cutting off A.'s hand," unless there was a dangerous scuffle, and the mayhem was inflicted in self-preservation (*Cook* v. *Beal*, *L. Raym.* 177).

(2) **Defence of property.**—A battery committed in defence of real or personal property is justifiable.[168]

Thus, if one forcibly enters my house, I may forcibly

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[168] "If to an assault and battery it is pleaded that the plaintiff was in the defendant's house, and that he was requested to leave and refused, and that the defendant, in order to remove him, laid hands upon him, &c., and issue be joined upon it; and if it be proved that the plaintiff was in the defendant's house and was requested to leave and would not, and that the defendant did lay hands on him, not to remove him, but for another and wholly different purpose, the plaintiff cannot recover if the defendant did no more than he had the right to do to effect the removal; for the motive, intent, and purpose with and for which the defendant did lay hands on the plaintiff is not in issue, so long as he had in fact the cause of justification" (*Glass* v. *O'Grady*, 17 *U. C. C. P.* 237—A. Wilson, J.).

A trespasser upon land of which another is in peaceable possession cannot be convicted of an assault under sect. 53 of the Criminal Code, 1892, merely because he refuses to leave upon the order or demand of the other, and the latter part of the section does not apply until there is an overt act on the part of the person in possession towards prevention of the removal, and an overt act of resistance on the part of the trespasser. A verdict, therefore, against the defendant for malicious prosecution in charging the plaintiff before a magistrate with an assault, where the plaintiff had merely refused on the demand of the defendant to quit the premises

eject him ; but if he enters quietly, I must first request him to leave. If after that he still refuse, I may use sufficient force to remove him, in resisting which he will be guilty of an assault (*Wheeler* v. *Whiting*, 9 *C. & P.* 265). On the other hand, where a railway traveller lost his ticket and could not produce it when required so to do in accordance with an indorsed condition, and refused to pay over again, it was held that this did not justify the company in forcibly ejecting him (*Butler* v. *Manchester, &c., Ry. Co.*, 21 *Q. B. D.* 207).

So, a riotous customer may be removed from a shop after a request to leave. For the same reason, where the violence complained of consisted in the defendant attempting to take away certain rabbits from the plaintiff, which did not belong to him but to the defendant's master, and which the plaintiff had refused to give up, the defendant was held to have a good defence to an action of assault (*Blades* v. *Higgs*, 10 *C. B. N. S.* 713 ; affirmed, 11 *H. L. C.* 621).

(3) **Correction of pupil.**—A father or master may moderately chastise his son, pupil, or apprentice (*Penn* v. *Ward*,[169] 2 *Cr., M. & R.* 338).

Canadian Cases.

upon which he was trespassing, was *held* to be right (*Pockett* v. *Pool*, 11 *M. L. R.* 275).

"If a man sees another, as he supposes, breaking into his house, and without notice fires at him and wounds him, it will not be a legal justification for him to allege that the man was apparently breaking into his house. Here there were threats accompanying the appearance ; but still we consider that without something more that would not justify, without warning or requesting the party to desist" (*Spires* v. *Barrick*, 14 *U. C. R.* 425—Robinson, C. J. ; and *Holmes* v. *McLeod*, 25 *U. S. R.* 67 ; and see *The Toronto Stuarts' Vice-Admirally Reps. Quebec*, 178, 179).

[169] In an action for assault, evidence that libellous and abusive articles were published on the day of and preceding

(4) **Other exceptions.**—An assault may be committed in order to stop a breach of the peace; to arrest a felon, or one who (a felony having actually been committed) is reasonably suspected of it; in arresting a person *found committing* a misdemeanor between the hours of 9 p.m. and 6 a.m.; and in arresting a malicious trespasser, or vagrant under the Vagrancy Act.

A churchwarden or beadle may eject a disturber of a congregation, and a master of a ship may assault and

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the assault in a newspaper of which the plaintiff was the proprietor, is admissible (*Percy* v. *Glasco*, 22 *U. C. C. P.* 521).

"If it were true that this plaintiff had assaulted the justice, the latter might, at the time of the assault, have ordered him into custody, but where the act was over and time had intervened, so that there was no present disturbance, then it became, like any other offence, a matter to be dealt with on a proper complaint made by defendant upon oath to some other justice, who might have issued his warrant. Neither a magistrate nor a constable is allowed to act officially in his own case except *flagrante delicto*, while there is otherwise danger of escape, or to suppress an actual disturbance and enforce the law, while it is in the act of being resisted" (*Powell* v. *Williamson*, 1 *U. C. R.* 155—Robinson, C. J.).

"The moderate correction of a servant who is an infant may be justified, but the beating of a servant of full age cannot be justified" (*Mitchell* v. *Defries*, 2 *U. C. R.* 430—Macaulay, J.).

"Independently of the substantial question of the right of a master to beat and assault his servant by way of moderate correction, the wounding, kicking, and tearing of the servant's clothes are not within the scope of moderate correction" (*Ibid.*—Robinson, C. J.).

Where an affray is admitted by the defendant in an action for assault and battery it is an answer to the pleas on assault demesne for the plaintiff to show that he took the defendant into custody in order to preserve the peace. An

arrest an unruly passenger. So assaults and batteries, committed under legal process, are justifiable; but a constable ought not *unnecessarily* to handcuff an unconvicted prisoner, and if he do so he will be liable to an action (*Griffin* v. *Colman*, 28 *L. J. Ex.* 134) (*a*). And, generally, where force is justifiable, no greater force can be lawfully used than the occasion requires.

ART. 105.—*Institution of Criminal Proceedings endangers Right of Action.*

Where any person unlawfully assaults or beats another, two justices of the peace, upon complaint of the party aggrieved, may hear and determine such offence, and if they deem the offence not to be proved, or find it to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they must forthwith make out a certificate stating the fact of such dismissal, and deliver the same to the party charged; and if any person shall have obtained such certificate, or *having been convicted shall have suffered the punishment*

(*a*) The same rule as to notice, tender of amends, and limitation applies to batteries committed by constables in the execution of their duty as in false imprisonment.

Canadian Cases.

affray is stated to have been made by the defendant in the presence of the plaintiff (a constable). That gave the plaintiff a right to lay hands on him to preserve the peace and prevent further violence (*Fido* v. *Wood*, 5 *U. C. R.* (*O. S.*) 558).

inflicted, he shall be released from all further or other proceedings, civil or criminal, for the same cause (24 & 25 Vict. c. 100,ss. 42—45).

(1) As to what constitutes a "hearing," see *Vaughton* v. *Bradshaw*, 9 *C. B. N. S.* 103; and *Reed* v. *Nutt*, 24 *Q. B. D.* 669; 59 *L. J. Q. B.* 311; 62 *L. T.* 635. The fact that the accused has been ordered by the magistrate to enter into recognizances to keep the peace and to pay the recognizance fee, will not constitute a bar to an action (*Hartley* v. *Hindmarsh*, *L. R.* 1 *C. P.* 553).

(2) The granting a certificate by a magistrate where the complaint is dismissed, is not merely discretionary. A magistrate is bound, on proper application, to give the certificate mentioned in the section (*Hancock* v. *Somes*, 28 *L. J. M. C.* 196); and, if he refuses to do so, may be compelled by mandamus (*Costar* v. *Hetherington*, 28 *L. J. M. C.* 198).

(3) The words "from all further or other proceedings against the defendant, civil or criminal, for the same cause," include all proceedings against the defendant arising out of the same assault, whether taken by the prosecutor or by any other person (*ex. gr.*, the complainant's husband) consequentially aggrieved thereby (*Masper and wife* v. *Brown*, 1 *C. P. Div.* 97).

(4) If a person is charged with an assault, and the complaint is dismissed and a certificate given him, he cannot avail himself of the defence under the statute, when sued on for the tort, unless he specially pleads such defence (*Harding* v. *King*,[170] 6 *C. & P.* 427).

Canadian Cases.

[170] In an action for assault in which the verdict was against two defendants, it was *held* that the second defendant

ART. 106.—*Amount of Damages.*

In assessing what amount of damages may be recovered for an assault, or battery, the time when, and the place in which, the assault took place should be taken into consideration.

Thus, an assault committed in a public place calls for much higher damages than one committed where there are few to witness it. "It is a greater insult," remarks Bathurst, J., in *Tullidge* v. *Wade* (3 *Wils.* 19), "to be beaten upon the Royal Exchange than in a private room."

ART. 107.—*Limitation.*

No action can be brought against ordinary persons for assault or battery except within four years next after the cause of action arose.

In the case of such actions against magistrates, constables, &c., the provisions of Art. 101 (2), *supra*, apply.

Canadian Cases.

was liable for damage equally with the first, though the principal injury was caused by the latter (*Dunham* v. *Powell*, 5 *U. C. R.* (*O. S.*) 75). Other cases dealing with assault and battery are *McCurdy* v. *Swift*, 17 *U. C. C. P.* 126; *Coward* v. *Baddeley*, 5 *U. C. L. J.* 262; *Reg.* v. *M'Evoy*, 20 *U. C. R.* 244; *Davis* v. *Lennon*, 8 *U. C. R.* 599; *Reg.* v. *Shaw*, 23 *U. C. R.* 616; *Reg* v. *Harmer*, 17 *U. C. R.* 555; *Reg.* v. *Fauenf*, 5 *L. C. J.* 167; *Reg.* v. *Dingman*, 22 *U. C. R.* 283; *Reg.* v. *Crigan*, *N. B. R.* 1 *Hannay*, 36; *Reg.* v. *Ryan*, *ib.* 119—per Ritchie, C. J.; *Reg.* v. *Gomez*, 22 *U. C. C. P.* 185; *Shires* v. *Barrick*, 14 *U. C. R.* 424; *Glass* v. *O'Grady*, 17 *U. C. C. P.* 233.

In trespass for an assault and battery the defendant offered to prove, in mitigation of damages, that the plaintiff had used

SECTION III.—OF TRESPASS TO LAND AND DISPOSSESSION.

SUB-SECT. 1.—OF TRESPASS *QUARE CLAUSUM FREGIT*.[171]

ART. 108.—*Definition.*

Trespass *quare clausum fregit* is a trespass committed in respect of another man's land, by entry on the same without lawful authority. It constitutes a tort without proof of actual damage.

Canadian Cases.

very slanderous expressions concerning defendant's wife, during defendant's absence from home, and which being reported to defendant on his return, he, on the spur of the moment, went to plaintiff and assaulted him. This evidence was refused and the jury gave a verdict for 140*l.* damages. The court set aside the verdict to give an opportunity to elicit the whole circumstances of the transaction (*Short* v. *Lewis*, 3 *U. C. R.* (*O. S.*) 385).

[171] Ejectment does not lie for pews, an action on the case being the proper remedy for disturbance of right thereto (*Ridout* v. *Harris*, 17 *U. C. C. P.* 88; *Brunskill* v. *Harris*, 1 *Error & App.* 322).

Defendant, a pathmaster, without any instructions from the municipal council, and in defiance of the plaintiff's warning, threw down the plaintiff's fences and ploughed up his land, in order to open up streets which were laid down on a plan of part of the plaintiff's land made by a former owner and found in the registry office; but it was not marked, registered or filed, no sale was shown to have been made according to it, and the streets had never been opened or used. *Held*, that the defendant was not acting within his jurisdiction, and was liable in trespass (*Brooks* v. *Williams*, 39 *U. C. R.* 530).

A sheriff having seized goods, cannot lawfully sell them on defendant's premises without his permission, and any person going on the premises to purchase may be treated as a trespasser (*McMaster* v. *McPherson*, 6 *U. C. R.* (*O. S.*) 16).

(1) **Acts of dominion.**—Thus, driving nails into another's wall, or placing objects against it, are trespasses (*Lawrence* v. *Obee*, 1 *Stark.* 22; *Gregory* v. *Piper*, 9 *B. & C.* 591); or fox hunting across land

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Canadian Cases.

Trespass *q. c. f.* will lie by the owner of a close against the owner of a pig which may break and enter and do damage (*Blacklock* v. *Millikan*, 3 *U. C. C. P.* 34; see also *Mason* v. *Morgan*, 23 *U. C. R.* 328).

An innkeeper has the sole right to select the apartment for a guest and, if he find it expedient, to change it and assign another; he cannot be treated as a trespasser for entering to make the change (*Doyle* v. *Walker*, 26 *U. C. R.* 502).

Isolated acts of trespass, committed on wild land, from year to year, will not give the trespassers a title under the Statute of Limitations, and there was no misdirection in the judge, at the time of an action for trespass on such land, refusing to leave to the jury for their consideration such isolated acts of trespass as evidence of possession under the statute. To acquire such a title there must be open, visible and continuous possession known, or which might have been known, to the owner, not a possession equivocal, occasional, or for a special or temporary purpose (*Doe* d. *Des Barres* v. *White*, 1 *Kerr, N. B. Reps.* 595, approved; *Sherren* v. *Pearson*, 14 *S. C. R.* 581, judgment of the Supreme Court of Prince Edward Island affirmed; and see *Stovel* v. *Gregory*, 21 *O. A. R.* 137).

K. brought an action for trespass to his land in laying pipes to carry water to a public institution. The land had been used as a public highway for many years, and there was an old statute authorizing its expropriation for public purposes, but the records of the municipality which would contain the proceedings on such expropriation, if any had been taken, were lost. *Held*, reversing the judgment of the Supreme Court of Nova Scotia (20 *N. S. Reps.* 95), that in the absence of any evidence of dedication of the road, it must be presumed that the proceedings under the statute were rightly taken, and K. could not recover (*Dickson* v. *Kearney*, 14 *S. C. R.* 743; and see *Kearney* v. *Oakes*, 18 *S. C. R.* 148).

E. and B. owned adjoining lots, each deriving his title

against the will of the owner (*Paul* v. *Summerhayes*, 4 *Q. B. D.* 9).

(2) **Trespass of cattle.**—So, it is a trespass to allow one's cattle to stray on to another's land, unless there

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Canadian Cases.

from S. E. brought an action of trespass against B. for disturbing his enjoyment of a right of way between said lots and for damages. The fee in the right of way was in S., but E. founded his claim to a user of the way by himself and his predecessors in title for upwards of forty years. The evidence on the trial showed that it had been used in common by the successive owners of the two lots. *Held*, affirming the judgment of the Supreme Court of Nova Scotia (19 *N. S. Reps.* 222), that as E. had no grant or conveyance of the right of way and had not proved an exclusive user, he could not maintain his action (*Ells* v. *Black*, 14 *S. C. R.* 740).

"I am of opinion that the evidence supports the second, fourth, and fifth counts of the plaintiff's declaration, which are in trespass. It makes little difference since the abolition of forms of action whether the injuries complained of are to be classified as wrongs which were formerly remediable in actions of trespass, or in some other form of action; so long as the declaration shows a legal injury that is sufficient. The wrongs complained of in the counts I have mentioned would, however, under the old system of actions, have been the subjects of an action of trespass, inasmuch as they amounted to direct injuries to the plaintiff's land. Thus, driving nails into another's wall, or even placing objects against it, have been held to be trespasses. The acts of the defendant in inserting his beams in the wall of the house then belonging to Caldwell, and now the property of the plaintiff, and in cutting holes in the wall and chimney were, therefore, illegal acts, that is trespasses, except in so far as they were justified by the grant or license of Caldwell. Then the continuance of these illegal burdens on the plaintiff's property, since the fee has been acquired by him, are also in the law fresh and distinct trespasses against the plaintiff, for which he is entitled to recover damages unless he is bound by the license or grant of Caldwell" (*Ross* v. *Hunter*, 7 *S. C. R.* 312—Strong, J., reversing judgment of the Supreme Court of Nova Scotia; and see *Dominion Telegraph*

is contributory misconduct on his part, such as keeping in disrepair a hedge which he is bound by prescription or otherwise to repair (*Lee* v. *Riley*, 34 *L. J. C. P.* 212); or leaving his door open to a highway (*Tillett* v. *Ward*, 10 *Q. B. D.* 17). But if no such duty to repair exists, the owner of cattle is liable for their trespasses even upon uninclosed land (*Boyle* v. *Tamlyn*, 6 *B. & C.* 337), and for all naturally resulting damage. But see *Sanders* v. *Teape*, 51 *L. T.* 263, as to trespasses by dogs.

(3) **Exceeding authority.**—Where one has authority to use another's land for a particular purpose, any user going beyond the authorized purpose is a trespass. Thus, where the lord of a manor entitled by custom to convey minerals *gotten within the manor* along subterranean passages under the plaintiff's land, brought

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Canadian Cases.

Company v. *Gilchrist*, 3 *Pugs. & Bur.* 553 (*N. B. Reps.*), and *Cassel's Supreme Court Digest*, 514).

Under a hire receipt of an organ sold by defendant R. to plaintiff's son, and signed by the latter, the defendant R. was authorized on default of payment to resume possession of the organ, and he and his agent were given full right and liberty to enter any house or premises where the organ might be with authority to remove the same, without resorting to any legal process. Default having been made in payment of certain instalments due under the hire receipt, defendant R. sent his book-keeper, the other defendant, and two assistants with instructions to get the organ. The book-keeper taking the hire receipt as his authority, went to plaintiff's house, where the organ was, opened the house door, and entered the hall, but on his attempting to enter the door of the room in which the organ was the plaintiff's wife (the plaintiff and the son being absent) resisted his entrance, when a scuffle ensued and the plaintiff's wife was injured. *Held*, that R. was responsible for the acts of his servant, the book-keeper, for they were done by him in the discharge of what he believed to be his duty and was within the general scope of his authority. *Held* also, that the judgment against both

thereunder minerals from mines gotten outside the manor, it was held to be a trespass (*Eardley* v. *Lord Granville*,[172] 24 *W. R.* 528).

(4) So, again, where a public highway runs across the lands of a landowner, the soil of which was vested in the owner, a member of the public who uses the road not merely in exercise of his right of way, but in order to interrupt the landowner's sport, is guilty of trespass. For he is using the site of the road for a purpose not covered by his limited right of user (*Harrison* v. *Duke of Rutland*, (1893) 1 *Q. B.* 142; and see also *Micklethwait* v. *Vincent*, 67 *L. T.* 225, *Norfolk Broad case*).

Exceptions.—In the following cases a person has lawful authority to enter upon another's land:—

(1) **Retaking goods.**—If one takes another's goods on to his land, the latter may enter and retake them (*Patrick* v. *Colerick*, 3 *M. & W.* 485).

(2) **Cattle.**—If cattle escape on to another's land through the non-repair of a hedge which the latter is bound to repair, the owner of the cattle may enter and drive them out (see *Faldo* v. *Ridge*, *Yelv.* 74).

(3) **Distraining for rent.**—So a landlord may enter his tenant's house to distrain for rent, or an officer to serve a legal process (*Keane* v. *Reynolds*, 2 *E. & B.*

Canadian Cases.

R. and the book-keeper was maintainable, for it was recovered against them as joint wrong-doers (*Murphy* v. *Corporation of Ottawa*, 13 *O. R.* 334, distinguished; *Ferguson* v. *Roblin*, 17 *O. R.* 167; and see *Schaffer* v. *Dumble*, 5 *O. R.* 716).

[172] It is, I take it, an established rule that in all cases where public works are executed under statutory authority to the extent of an infringement on private rights of property, the statutory powers must be executed without negligence and in such a way as to do the least possible

748); but he may not break open the outer door of a house.

(4) **Reversioner inspecting premises.**—A reversioner of lands may enter in order to see that no waste is being committed.

(5) **Escaping danger.**—A trespass is justifiable if committed in order to escape some pressing danger, or in defence of goods.

(6) **Grantee of easement.**—And the grantee of an easement may enter upon the servient tenement in order to do necessary repairs (*Taylor* v. *Whitehead*, 2 *Doug.* 745).

(7) **Public rights.**—Land may be entered under the authority of a statute (*Beaver* v. *Mayor, &c. of Manchester*, 26 *L. J. Q. B.* 311); or in exercise of a public right, as the right to enter an inn, provided there is accommodation (*Dansey* v. *Richardson*, 3 *E. & B.* 144).

(8) **Liberum tenementum.**—Lastly, land may be entered on the ground that it is the defendant's. This latter, known as the plea of *liberum tenementum*, is generally pleaded in order to try the title to lands.

ART. 109.—*Trespassers* ab initio.[173]

(1) Whenever a person has authority given him by law to enter upon lands or tenements for any purpose, and he goes beyond or abuses such authority, by doing that which he has

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Canadian Cases.

injury to the private owner (*The Corporation of the City of New Westminster* v. *Brighouse*, 20 *S. C. R.* 520).

[173] *Sibbald* v. *Grand Trunk R. W. Co.*, 18 *O. A. R.* 184.

no right to do, then, although the entry was lawful, he will be considered as a trespasser *ab initio*.

(2) But where authority is not given by the law, but by the party, and abused, then the person abusing such authority is not a trespasser *ab initio*.

(3) The abuse necessary to render a person a trespasser *ab initio* must be a misfeasance, and not a mere nonfeasance (*Six Carpenters' case*, 1 *Sm. L. C.* 132).

Thus, in the above case, six carpenters entered an inn and were served with wine, for which they paid. Being afterwards at their request supplied with more wine, they refused to pay for it, and upon this it was sought to render them trespassers *ab initio*, but without success; for although they had authority by law to enter (it being a public inn), yet the mere non-payment, being a nonfeasance and not a misfeasance, was not sufficient to render them trespassers.

ART. 110.—*Possession necessary to maintain an Action for Trespass.*[174]

(1) In order to maintain an action of trespass, the plaintiff must be in the possession of

Canadian Cases.

[174] *Greaves* v. *Hilliard*, 15 *U. C. C. P.* 326.

Trespass *q. c. f.* will not lie against a defendant for acts committed under the authority of the party in possession of and claiming land during the time an action of

the land; for it is an injury to possession rather than to title. A mere *interesse termini* is not sufficient (*Wallis* v. *Hands*, (1893) 2 *Ch.* 75).

(2) The possession of land suffices to maintain an action of trespass against any person

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Canadian Cases.

ejectment against the person in possession was pending (*Street* v. *Crooks et al.*, 6 *U. C. C. P.* 124).

The mother in possession of the land belonging to the heir, a minor, may sue in trespass *q. c. f.* as the real friend of the minor (*Johnson* v. *McGillis*, 7 *U. C. R.* 309).

Actual occupation of land is not essential to give a right to maintain trespass by one who has the legal title. It is sufficient that he enter upon the land so as to put himself in legal possession of it (*Donovan* v. *Herbert*, 4 *O. R.* 635; and see *Hamilton* v. *McDonell*, 5 *U. C. R.* (*O. S.*) 720; *Chestnut* v. *Day*, 6 *U. C. R.* (*O. S.*) 637; *Monahan* v. *Foley et. al.*, 4 *U. C. R.* 129; *McMillan* v. *Miller*, 7 *U. C. R.* 544; *Church* v. *Foulds*, 9 *U. C. R.* 393; *Boys* v. *Cramer*, 12 *U. C. R.* 165; *Flint* v. *Bird et al.*, 11 *U. C. R.* 444; *Perry* v. *Buck*, 12 *U. C. R.* 451; *Campbell* v. *Howland*, 7 *U. C. C. P.* 358; *Jowett* v. *Haacke et al.*, 14 *U. C. C. P.* 447; *The Corporation of the United Counties* v. *Hales et al.*, 27 *U. C. R.* 72; *Nicholson* v. *Page*, 27 *U. C. R.* 318; *Laurie* v. *Rathbun et al.*, 38 *U. C. R.* 255; *Mann* v. *English*, 38 *U. C. R.* 240; *Johnston* v. *Christie*, 31 *U. C. C. P.* 358; *Adamson* v. *Adamson*, 7 *O. A. R.* 592; *Baker* v. *Mills*, 11 *O. R.* 253; *Binyea* v. *Rose*, 19 *O. R.* 433; *McConaghy* v. *Denmark*, 4 *S. C. R.* 609; *Western Bank of Canada* v. *Greey*, 12 *O. R.* 68).

"The first question to be considered is as to whether or not the plaintiff's property extended to the *medium filum* of the street, independently of the statute upon which Mr. Justice Meagher bases his opinion. The doctrine is elementary that the law presumes the ownership of half the soil over which a highway exists to be in the owners of the land on either side of the highway, and that although lands described in a conveyance may be bounded by or on that way, the ownership *ad medium filum viæ* will pass. It is likewise

wrongfully entering upon it; and if two persons are in possession of land, each asserting his right to it, then the person who has the title to it is to be considered in actual possession, and the other person is a mere trespasser (*Jones* v. *Chapman*, 2 *Ex.* 821).

(3) Where a person is in possession of land, the onus lies upon the *primâ facie* trespasser to show that he is entitled to enter (*Asher* v. *Whitlock*, *L. R.* 1 *Q. B.* 1).

(1) **Possession relates back to the right.**—Thus a person entitled to the possession of lands or houses cannot bring an action of trespass against a trespasser until he is in actual possession of them (*Ryan* v. *Clark*,

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Canadian Cases.

as elementary that the application of this doctrine depends upon the facts in each case. It is a presumption only, and where, as in Ontario and the North-West, road or street allowances have been made in the original survey of the country the presumption is destroyed, and owners of land abutting upon such roads or streets do not take to the middle thread. It must also, I think, be taken to be settled law in the province of Nova Scotia, upon the authority of *Koch* v. *Dauphinee* (*James, N. S. Reps.* 159), that lands expropriated for highways under provincial statutes become vested in the Crown as its property, the right of the original owner, upon payment of compensation, being extinguished. It is likewise clear that where there has been no expropriation or other acquisition by the Crown or municipality of lands for highway purposes, the law presumes that the original proprietor has dedicated the highway to the use of the public, and that upon such dedication the right of the public to use such highway is paramount and perpetual" (*O'Connor* v. *The Nova Scotia Telephone Company*, 22 *S. C. R.* 289—Sedgwick, J.).

14 *Q. B.* 65). But when he has once entered, he acquires the actual possession, and such possession then dates back to the time of the legal commencement of his right of entry, and he may therefore maintain actions against intermediate and then present trespassers (*Anderson* v. *Radcliffe*, 29 *L. J. Q. B.* 128 ; *Butcher* v. *Butcher*, 7 *B. & C.* 402).

(2) **Surface and subsoil in different owners.**—Where one parts with the right to the surface of land, retaining only the mines, he cannot maintain an action for trespass to the surface, because he is not in possession of it (*Cox* v. *Mouseley*, 5 *C. B.* 533) ; but he may for a trespass to the subsoil, as by digging holes, &c. (*Cox* v. *Glue*, 17 *L. J. C. P.* 162). So the owner of the surface cannot maintain trespass for a subterranean encroachment on the minerals (*Keyse* v. *Powell*, 22 *L. J. Q. B.* 305), unless the surface is disturbed thereby.

(3) **Highways, &c.**—So, when one dedicates a highway to the public, or grants any other easement on land, possession of the soil is not thereby parted with, but only a right of way or other privilege granted (*Goodtitle* v. *Alker*, 1 *Burr.* 133 ; *Northampton* v. *Ward*, 1 *Wils.* 114). An action for trespasses committed upon it, as, for instance, by throwing stones on to it, or erecting a bridge over it, may be therefore maintained by the grantor (*Every* v. *Smith*, 26 *L. J. Ex.* 345 ; and see Illust. 4, p. 439 *sup.*)

Art. 111.—*Trespasses by Joint Owners.*

Joint tenants, or tenants in common, can only sue one another in trespass for acts done by one

inconsistent with the rights of the other (see *Jacobs* v. *Seward, L. R.* 5 *H. L.* 464).

(1) **Ordinary joint holders.**—Among such acts may be mentioned the destruction of buildings (*Cresswell* v. *Hedges*, 31 *L. J. Ex.* 497), carrying off of soil (*Wilkinson* v. *Haygarth*, 12 *Q. B.* 837), and expelling the plaintiff from his occupation (*Murray* v. *Hall*, 7 *C. B.* 441).

(2) **Co-owners of mines.**—But a tenant in common of a coal mine may get the coal, or license another to get it, not appropriating to himself more than his share of the proceeds ; for a coal mine is useless unless worked (*Job* v. *Potton*, *L. R.* 20 *Eq.* 84).

(3) **Party-walls.**—There is also one other important case of trespass between joint owners, viz., that arising out of a party-wall. If one owner of the wall excludes the other owner entirely from his occupation of it (as, for instance, by destroying it, or building upon it), he thereby commits a trespass; but if he pulls it down for the purpose of rebuilding it, he does not (*Stedman* v. *Smith*, 26 *L. J. Q. B.* 314 ; *Cubitt* v. *Porter*, 8 *B. & C.* 257).

Art. 112.—*Continuing Trespasses.*

Where a trespass is permanent and continuing, the plaintiff may bring his action as for a continuing trespass, and claim damages for the continuation ; and where after one action the trespass is still continued, other actions may be brought until the trespass ceases (*Bowyer* v. *Cook*, 4 *C. B.* 236).

Art. 113.—*Limitation.*

All actions for trespass must be commenced within six years next after the cause of action arose (21 Jac. 1, c. 16, s. 3).

Distress damage feasant.—It is convenient to mention here a peculiar remedy of landowners for trespasses committed by cattle, viz., by seizing the animals whilst trespassing, and detaining them until reasonable compensation is made (see *Green* v. *Duckett*, 11 *Q. B. D.* 275), not only for damage done to the land, but also for damage (if any) done to animals of the owner of the land (*Boden* v. *Roscoe*, (1894) 1 *Q. B.* 608). This is not, however, available where animals are being actually tended; in such case the person injured must bring his action. A somewhat analogous remedy is allowed in the case of animals *ferœ naturæ* reared by a particular person. In such cases the law, not recognizing any property in them, does not make their owner liable for their trespasses, but any person injured may shoot or capture them while trespassing. Thus, I may kill pigeons coming upon my land, but I cannot sue the breeder of them (*Hannam* v. *Mockett*, 2 *B. & C.* 939, per Bayley, J.; and see also *Taylor* v. *Newman*,[175] 32 *L. J. M. C.* 186).

Canadian Cases.

[175] "I have always been of opinion, that for trespasses by domestic animals, such as horses, cattle, pigs, &c., the owner of the close might maintain trespass against the owner of the animals, unless he can excuse the act for defect of fences" (*Blacklock* v. *Milliken*, 3 *U. C. C. P.* 34—Sir J. Macaulay; *Mason* v. *Morgan*, 24 *U. C. R.* 328).

SUB-SECT. 2.—OF DISPOSSESSION.

ART. 114.—*Definition.*

Dispossession or ouster consists of the wrongful withholding the possession of land from the rightful owner.

Specific remedy.—Before the Judicature Act, 1873, the remedy for this wrong was by an action of ejectment for the actual recovery of the land, and since that statute it is by an action claiming the recovery of the land.

ART. 115.—*Onus of Proof of Title.*

The law presumes possession to be rightful, and therefore the claimant must recover on the strength of his own title, and not on the weakness of the defendant's (*Martin* v. *Strachan* 5 *T. R.* 107).

(1) **Possession primâ facie evidence of title.**—Thus, mere possession is *primâ facie* evidence of title until the claimant makes out a better one (*Smith* v. *Webber*,[176] 1 *Ad. & E.* 119).

(2) **Title of successful claimant need not be indefeasible.**—But where the claimant makes out a better title than the defendant, he may recover the lands, although such title may not be indefeasible. Thus, where one inclosed waste land, and died without having had twenty years'

Canadian Cases.

[176] *Davison* v. *Burnham, N. S. Reps.*, and *Cassel's S. C. Digest*, 515; *Gates* v. *Davison*, 5 *Russ. & Geld.* 431, and *Cassel's S. C. Digest*, 516.

possession, the heir of his devisee was held entitled to recover it against a person who had entered upon it without any title (*Asher* v. *Whitlock*, *L. R.* 1 *Q. B.* 1).

(3) **Jus tertii.**—Conversely, a man in possession who may not have an indefeasible title as against a third party, may yet have a better title than the actual claimant, and therefore he may set up the right of a third person to the lands, in order to disprove that of the claimant (*Doe* d. *Carter* v. *Barnard*, 13 *Q. B.* 945). But the claimant cannot do the same, for possession is, in general, a good title against all but the true owner (*Asher* v. *Whitlock*, *sup.*; *Richards* v. *Jenkins*, 17 *Q. B. D.* 544).

Exceptions.—(1) **Landlord and tenant.**—Where the relation of landlord and tenant exists between the claimant and defendant, the landlord need not prove his title, but only the expiration of the tenancy; for a tenant cannot in general dispute his landlord's title (*Delaney* v. *Fox*, 26 *L. J. C. P.* 248), unless a defect in the title appears on the lease itself (*Saunders* v. *Merryweather*, 35 *L. J. Ex.* 115; *Doe* d. *Knight* v. *Smyth*, 4 *M. & S.* 347). But nevertheless he may show that his landlord's title has *expired*, by assignment, conveyance, or otherwise (*Doe* d. *Marriott* v. *Edwards*, 5 *B. & Ad.* 1065; *Walton* v. *Waterhouse*, 1 *Wms. Saund.* 418). The principle does not extend to the title of the party through whom the defendant claims prior to the demise or conveyance to him. Thus, where the claimant claims under a grant from A. in 1818, and the defendant under a grant from A. in 1824, the latter may show that A. had no legal estate to grant in 1818 (*Doe* d. *Oliver* v. *Powell*, 1 *A. & E.* 531).

(2) **Servants and licensees.**—The same principle is applicable to a licensee or servant, who is estopped from

disputing the title of the person who licensed him (*Doe* d. *Johnson* v. *Baytup*, 3 *A. & E.* 188; *Turner* v. *Doe*, 9 *M. & W.* 645).

ART. 116.—*Character of Claimant's Estate.*

The claimant's title may be either legal or equitable (*semble*), provided that he is equitably better entitled to the possession than the defendant.

Before the Judicature Act, 1873, it was a well-established rule that a plaintiff in ejectment must have the legal estate (*Doe* d. *North* v. *Webber*, 5 *Scott*, 189). It is submitted, however, that as all branches of the High Court now take cognizance of equitable rights, an equitable estate will be alone sufficient (see and consider principles of *Walsh* v. *Lonsdale*, *L. R.* 21 *Ch. Div.* 9).

ART. 117.—*Limitation.*

No person can bring an action for the recovery of land or rent but within twelve years after the right to maintain such action shall have accrued to the claimant, or to the person through whom he claims (37 & 38 Vict. c. 57, s. 1; 3 & 4 Will. 4, c. 27, s. 2; *Brassington* v. *Llewellyn*, 27 *L. J. Ex.* 297).

Exceptions.—(1) **Disability.**—Where claimants are under disability, by reason of infancy, coverture, or unsound mind, they must bring their action within six years after such disability has ceased: provided that no

action shall be brought after thirty years from the accrual of the right (37 & 38 Vict. c. 57, ss. 3, 4, 5, and 3 & 4 Will. 4, c. 27, ss. 16, 17).

(2) **Acknowledgment of title.**—When any person in possession of lands or rents gives to the person, or the agent of the person entitled to such lands or rents, an acknowledgment in writing, and signed, of the latter's title, then the right of such last-mentioned person accrues at, and not before, the date at which such acknowledgment was made, and the statute begins to run as from that date (*Ley* v. *Peter*, 27 *L. J. Ex.* 239).

(3) **Ecclesiastical corporations.**—The period in the case of ecclesiastical and eleemosynary corporations is sixty years (3 & 4 Will. 4, c. 27, s. 29).

Art. 118.—*Commencement of Period of Limitation.*

The right to maintain ejectment accrues, (a) in the case of an estate in possession, at the time of dispossession or discontinuance of possession of the profits or rent of lands, or of the death of the last rightful owner (3 & 4 Will. 4, c. 27, s. 3); and, (b) in respect of an estate in reversion or remainder or other future estate or interest, at the determination of the particular estate. But a reversioner or remainderman must bring his action within twelve years from the time when the owner of the particular estate was dispossessed, or within six years from the

time when he himself becomes entitled to the possession, whichever of these periods may be the longest (37 & 38 Vict. c. 57, s. 2).

(1) **Discontinuance.** — Discontinuance does not mean mere abandonment, but rather an abandonment by one followed by actual possession by another (see *Smith* v. *Lloyd*, 23 *L. J. Ex.* 194; *Cannon* v. *Rimington*, 12 *C. B.* 1). Therefore, in the case of mines, where they do not belong to the surface-owner, the period cannot commence to run until someone actually works them; and even then it only commences to run *quâ* the vein actually worked (see *Low Moor Co.* v. *Stanley Co.*, 34 *L. T. N. S.* 186, 187; *Ashton* v. *Stock*, 6 *Ch. Div.* 726).

(2) **Continual assertion of claim.** — No defendant is deemed to have been in possession of land merely from the fact of having entered upon it; and, on the other hand, a continual assertion of claim preserves no right of action (3 & 4 Will. 4, c. 27, ss. 10 and 11). Therefore, a man must actually bring his action within the time limited; for mere assertion of his title will not preserve his right of action after adverse possession for the statutory period. As to what acts constitute dispossession, see *Littledale* v. *Liverpool College*, (1900) 1 *Ch.* 19.

Section IV.—Of Trespass to and Conversion of Chattels.

Art. 119.—*General Rule.*

Every direct forcible injury, or act, disturbing the possession of goods without the owner's

consent, however slight or temporary the act may be, is a trespass, whether committed by the defendant himself or by some animal belonging to him. And if the trespass amount to a deprivation of possession to such an extent as to be inconsistent with the rights of the owner (as by taking, using, or destroying goods), it then becomes a wrongful conversion (*Foulds* v. *Willoughby*, 8 *M. & W.* 540; *Burroughs* v. *Bayne*,[177] 29 *L. J. Ex.* 185).

(1) **Destroying goods.**—If one lawfully having goods of another for a particular purpose (*e.g.*, to make a suit

Canadian Cases.

[177] A. lent a horse to B. for a special purpose, and while B. was using him consistent with such lending, the horse was accidentally hurt, and consequently left at a public stable, of which B. gave A. immediate notice. A. having seen the horse refused to take him, and went to B.'s residence and demanded the horse back sound as received. *Held*, that B.'s non-delivery of the horse after thus demanded back did not furnish evidence of conversion, and that A. could not sustain an action of trover for his value under the circumstances (*Wells* v. *Crew*, 5 *U. C. R.* (*O. S.*) 209; *Creighton* v. *Kuhn*, *N. S. Reps.* and *Cassel's S. C. Digest*, 514).

"While the detention or asportavit of a chattel may or may not, according to circumstances, be a conversion, it is now settled law that the assumption and exercise of dominion over a chattel for any purpose or for any person, however innocently done, if such conduct can be said to be inconsistent with the title of the true owner, it is a conversion" (*Driffil* v. *McFall*, 41 *U. C. R.* 319, 320—Harrison, C. J.).

Where the defendant received two horses from the plaintiff to sell at a certain price, and without his authority or consent sold them at a less price, it was *held* that he was liable in trover for the difference (*Priestman* v. *Kendrick and Barnard*, 3 *U. C. R.* (*O. S.*) 66).

of clothes), destroys them, he is guilty of trespass and conversion (*Cooper* v. *Willomatt*, 1 *C. B.* 672).

(2) **Excessive execution.**—So again if a sheriff sells more goods than are reasonably sufficient to satisfy a writ of *fieri facias*, he will be liable for a conversion of those in excess (*Aldred* v. *Constable*,[178] 6 *Q. B.* 381).

(3) **Injuring animals.**—Beating the plaintiff's dogs is a trespass (*Dand* v. *Sexton*, 3 *T. R.* 37). And so it was held to be a trespass where the defendant's horse injured the plaintiff's mare, by biting and kicking her *on the plaintiff's land*, without evidence of *scienter* (*Ellis* v. *Loftus Iron Co.*,[179] *L. R.* 10 *C. P.* 10; but see *Sanders* v. *Teape*, 51 *L. T. N. S.* 263). And although wild animals are not generally the subject of property while unconfined, yet if A. starts a hare *on the land of B.*, and kills it *there*, it is a trespass. For so long as the hare is on B.'s land it is his property (*Sutton* v. *Moody*, 1 *Ld. Raym.* 250). On similar grounds, rabbits, bred in a warren, are the property of the breeder so long as they stay on his land, and no longer (*Hadesden* v. *Gryssel*, *Cro. Jac.* 195).

(4) **Intention immaterial.**—The innocence of the trespasser's intentions is immaterial. Thus, where the sister-in-law of A., immediately after his death, removed some of his jewellery from a drawer in the room

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Canadian Cases.

[178] *Crowe* v. *Adams*, 21 *S. C. R.* 342; *Wilkinson* v. *Harvey*, 15 *O. R.* 346.

[179] *Chase* v. *McDonald*, 25 *U. C. C. P.* 129.

"An action will lie by a party other than the tenant to the landlord of the premises upon which a distress for rent is made, for an excessive distress" (*Huskinson* v. *Lawrence et al.*, 25 *U. C. R.* 60).

in which he had died to a cupboard in another, in order to insure its safety, and the jewellery was subsequently stolen, it was held that the sister-in-law had been guilty of a trespass, *in the absence of proof that her interference was reasonably necessary*, and she was consequently held liable for the loss (*Kirk* v. *Gregory*, 1 *Ex. Div.* 55). But, on the other hand, the finder of a chattel does not commit a tort by merely warehousing or otherwise safeguarding it, so long as he is not unnecessarily officious (see per Blackburn, J., in *Hollins* v. *Fowler*, *L. R.* 7 *H. L. at p.* 766).

(5) Again, where the owner of household furniture assigned it by bill of sale to the plaintiff, and subsequently employed the defendants (who were auctioneers) to sell it for her by auction, and they sold *and delivered possession of it* to the purchaser from them, they were held liable, although they knew nothing of the bill of sale (*Consolidated Co.* v. *Curtis & Son*, (1892) 1 *Q. B.* 495). It is important, however, to note that the tort there was the *delivering* of the furniture to the purchaser, and not the mere selling of it (see *Lanc. Waggon Co.* v. *Fitzhugh*, 6 *H. & N.* 502; and per Brett, J., in *Fowler* v. *Hollins*, *L. R.* 7 *Q. B. at p.* 627).

(6) **Conversion by innocent purchaser.**—So the purchaser of a chattel takes it, as a general rule, subject to what may turn out to be defects in the title (Sale of Goods Act, 1893, s. 21), unless it be a negotiable security (as to which see *Glyn, Mills & Co.* v. *E. & W. India Dock Co.*, 7 *App. Cas.* 591, and Sale of Goods Act, 1893, s. 25, sub-s. 2); or unless he buy it in market overt (Sale of Goods Act, 1893, s. 22), and not even then if it was stolen and the thief has been

prosecuted to conviction (*ibid.*, s. 24). But a *bonâ fide* purchaser gets a good title as against an execution creditor unless the goods are actually seized (Sale of Goods Act, 1893, s. 26). Thus, in the leading case of *Hollins* v. *Fowler* (*L. R.* 7 *H. L.* 757), it was laid down that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion.

(7) Where, however, the true owner has parted with a chattel to A. upon an actual contract, though there may be circumstances which enable that owner to set the contract aside for fraud, yet a *bonâ fide* purchaser from A. will obtain an indefeasible title (Sale of Goods Act, 1893, s. 23). The question will be, was there a contract between the real owner and A.? (*Cundy* v. *Lindsay*, 3 *App. Cas.* 459). Thus, L. was a manufacturer in Ireland: Alfred Blenkarn, who occupied a room in a house looking into Wood Street, Cheapside, wrote to L., proposing a considerable purchase of L.'s goods, and in his letters used this address, "37, Wood Street, Cheapside," and signed the letters (without any initial for a Christian name) with a name so written that it appeared to be "Blenkiron & Co." There was a respectable firm of that name carrying on business in Wood Street. The goods were sent there, and the correspondence was all addressed to Blenkiron & Co., 37, Wood Street, and Blenkarn disposed of the goods to the defendant, a *bonâ fide* purchaser: Held, that no contract was ever made with Blenkarn, and that even a temporary property never passed to him, so that he never obtained such a temporary property which he could pass to the defendant (*Cundy* v. *Lindsay*, *sup.*; and see also

Hollins v. *Fowler*, *L. R.* 7 *H. L.* 757, and *Union Credit Bank* v. *Mersey, &c. Board*, (1899) 2 *Q. B.* 205).

(8) Prior to 1893, there was an exception to the rule that one who had obtained property by a fraudulent contract could give a good title to a *bonâ fide* purchaser in market overt. This exception was, that where the original owner of the goods was induced by *false pretences* to enter into the contract of sale with A., and the original owner afterwards prosecuted A. to conviction, the property thereby became *ipso facto* revested in the original owner by virtue of the statute 24 & 25 Vict. c. 96, s. 100, and the innocent purchaser from A., who would otherwise have a good title, was defeated by the overriding statutory right of the original owner (*Bentley* v. *Vilmont*, 12 *App. Cas.* 471). The inequitable nature of that statute was, however, so strongly pointed out by Lord Watson in the last cited case, that parliament has, by sect. 24, sub-sect. 2, of the Sale of Goods Act, 1893, reversed the law as above set forth. The passage in Lord Watson's judgment, above referred to, was as follows:—"I do not think that, apart from statute law, a *bonâ fide* purchaser from one who has acquired the property of the goods by a contract of sale tainted with fraud stands in precisely the same relation to the original owner as a purchaser of stolen goods without notice of the theft, in market overt. In the latter case, the original owner, and the purchaser in open market, are to this extent in *pari casu*, that neither has done aught to mislead the other; whilst, in the former case, the original owner has intentionally given his fraudulent vendor an *ex facie* absolute and valid title to the goods, upon which purchasers without notice of fraud are entitled to rely. I have great difficulty in supposing that the legislature, as an incentive to the prosecution

of crime, deliberately intended in the case where the property has been passed by the act of the original owner, to deprive the honest purchaser both of his goods and of his money; but I have been unable to put a reasonable construction upon the language of sect. 100 which will avoid that inequitable result."

Exceptions.—(1) **Plaintiff's fault.**—It is a good justification that the trespass was the result of the plaintiff's own negligent or wrongful act. Thus, if he place his horse and cart so as to obstruct my right of way, I may remove it, and use, if necessary, force for that purpose (*Slater* v. *Swann*, 2 *St.* 892). So, if his goods or cattle trespassing on my land get injured, he has no remedy (*Farmer* v. *Hunt*, *Brownl.* 220); unless I use an unreasonable amount of force, as, for instance, by chasing trespassing sheep with a mastiff dog (*King* v. *Rose*, 1 *Freem.* 347). So, if a man wrongfully takes my garment and embroiders it with gold, I may retake it; and "if J. T. have a heap of corn, and J. D. will intermingle his corn with the corn of J. T., the latter shall have all the corn, because this was done by J. D. of his own wrong" (Coke, C. J., in *Ward* v. *Eyre*, 2 *Bulstr.* 323). And likewise, if one takes away my carriage, and has it painted anew without my authority, I am entitled to have the carriage without paying for the painting (*Hiscox* v. *Greenwood*, 4 *Esp.* 174).

(2) **Self-defence or defence of property.**[179a]—A trespass committed in self-defence, or defence of property, is justifiable. Thus, a dog chasing sheep or deer in a park, or rabbits in a warren, may be shot by the owner of the property in order to save them, but not otherwise

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Canadian Cases.

[179a] *Spires* v. *Barrick*, 14 *U. C. R.* 424—Robinson, C. J.

(*Wells* v. *Head*, 4 *C. & P.* 568). But a man cannot justify shooting a dog, on the ground that it was chasing animals *ferœ naturæ* (*Vere* v. *Lord Cawdor*, 11 *East*, 569), unless it was chasing game in a preserve, in which case it seems that it may be shot in order to preserve the game, but not after the game are out of danger (*Read* v. *Edwards*, 34 *L. J. C. P.* 31).

(3) **In exercise of right.** — A trespass committed in exercise of a man's own rights, is justifiable. Thus, seizing goods of another, under a lawful distress for rent or damage feasant, is lawful.

(4) **Legal authority.**—Due process of law is a good justification, as, for example, an execution under a writ of *fieri facias*.[180]

(5) **Pledge.**—So where goods are pledged, no action will lie against the pledgee for their detention, until tender of the debt has been made and refused (*Yungmann* v. *Briesmann*, 67 *L. T.* 642).

(6) **Market overt.**—Goods *bonâ fide* purchased in market overt, become the absolute property of the purchaser, even although the vendor had no title to them. Every *shop* in the City of London is market overt for such things only as by the trade of the owner are put there for sale *by him*. But although the shop is market

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Canadian Cases.

[180] An action for trespass will not lie against a sheriff for seizing goods which were subject to a chattel mortgage, but of which the mortgagors had possession (*Street* v. *Hamilton*; 5 *U. C. R.* (*O. S.*) 658, and *R. S. O.* 1897, *c.* 148).

In case for illegal distress the plaintiff is entitled to succeed on showing that there was no such appraisement as the law directs, even though but for nominal damage (*Maguire* v. *Post*, 5 *U. C. Q. R.* (*O. S.*) 1).

overt, a room at the back of it is not; and although a shop may be market overt for goods sold *by the owner*, it seems that it is not so for goods sold in the shop *to* him (*Hargreave* v. *Spink*, (1892) 1 *Q. B.* 25).

ART. 120.—*Possession necessary to maintain an Action of Trespass.*[181]

(1) To maintain an action merely for *trespass* or *conversion*, the plaintiff must be the person in actual or constructive possession of the goods (*Smith* v. *Milles*, 1 *T. R.* 480).

(2) A legal right to possession gives constructive possession (*Balme* v. *Hutton*, 9 *Bing.* 477).

(3) Any possession however temporary is sufficient against a wrongdoer.

Canadian Cases.

[181] A party purchasing a crop of wheat at a sheriff's sale may bring trespass against a person converting or injuring it, though he may never have received possession of the field (*Haydon* v. *Crawford*, 3 *U. C. R.* (*O. S.*) 583).

Where the plaintiff, a constable, had seized a horse under a distress warrant and the horse escaped to a railway and was killed, owing to the defendants' neglect to fence: *Held*, that the plaintiff had sufficient property in the horse to entitle him to sue (*Simpson* v. *Great Western R. W. Co.*, 17 *U. C. R.* 57; and see *Baker et al.* v. *Flint*, 3 *U. C. R.* (*O. S.*) 89; *Hamilton* v *McDonell*, 5 *U. C. R.* (*O. S.*) 720; *Bowman* v. *Fielding et al.*, *U. C. R.*, *M. T.*, 3 *Vict.*; *Henderson* v. *Moodie*, 3 *U. C. R.* 348; *Campbell* v. *Cushman*, 4 *U. C. R.* 9; *Dame* v. *Carberry*, 10 *U. C. R.* 374; *Porter* v. *Flintoff*, 6 *U. C. C. P.* 335; *Killington* v. *Herring et al.*, 17 *U. C. C. P.* 639).

(4) Although he cannot maintain an action for mere trespass, the person entitled to the reversion of goods may maintain an action for any *permanent injury* done to them (*Tancred* v. *Allgood*, 28 *L. J. Ex.* 362; *Lancas. Waggon Co.* v. *Fitzhugh*, 30 *L. J. Ex.* 231; *Mears* v. *L. & S. W. R. Co.*, 11 *C. B. N. S.* 854).

(1) **Possession of bailee.**—Where the person in temporary possession (as a carrier) delivers or sells my goods to the wrong person, then, as the immediate right to the possession of them becomes again vested in me, so the law immediately invests me with the possession, and I can maintain an action for them against either the bailee or the purchaser (*Cooper* v. *Willomatt*, 1 *C. B.* 672; *Wyld* v. *Pickford*,[182] 8 *M. & W.* 443).

(2) **Sale of property under lien.**—And so, when, by a sale of goods, the property in them has passed to the purchaser, subject to a mere lien for the price, the vendor will be liable for conversion if he resells and delivers them to another. But in such a case the plaintiff will only be entitled to recover the value of the goods, less the sum for which the defendant had a lien upon them (*Page* v. *Edulgee*, *L. R.* 1 *C. P.* 127; *Martindale* v. *Smith*, 1 *Q. B.* 389).

(3) **Action by administrator for injury committed before**

Canadian Cases.

[182] A mare which had been injured by defendant's bull, for which the plaintiff sued, was in the plaintiff's field at the time of the accident and had been put there by his father, who said he had given it to the plaintiff. *Held*, defendant liable. *Semble*, that the right of property was immaterial, as the plaintiff, if only a bailee, could recover its value in trespass or case against a wrongdoer (*Mason* v. *Morgan*, 24 *U. C. R.* 328).

his appointment.—And, on the same principle, an administrator may maintain an action for trespass to goods, which trespass was committed previously to his grant of letters of administration (*Tharpe* v. *Stallwood*, 5 *M. & G.* 760).

(4) **Possession of trustee.**—So a trustee, having the legal property, may sue in respect of goods, although the actual possession may be in his cestui que trust (*Wooderman* v. *Baldock*, 8 *Taunt.* 676; *Barker* v. *Furlong*, (1891) 2 *Ch.* 172).

(5) **Possession of a mere finder.**—In the leading case of *Armory* v. *Delamirie* (1 *Sm. L. C.* 315), it was held that the finder of a jewel could maintain an action against a jeweller to whom he had shown it, with the intention of selling it, and who had refused to return it to him; for his possession gave him a good title against all the world except the true owner. (See also *Elliott* v. *Kemp*, 7 *M. & W.* 312; and *S. Staffds. Water Co.* v. *Sharman*, (1896) 2 *Q. B.* 44.) In short, a defendant cannot set up a *jus tertii* against a person in actual possession. But where the possession of the plaintiff is not actual, but only constructive, the defendant may of course set up a *jus tertii*; for constructive possession depends upon a good title, and if the title be bad there can be no constructive possession (see *Leake* v. *Loveday*, 4 *M. & G.* 972; *Richards* v. *Jenkins*, 17 *Q. B. D.* 544), unless the third person waives or has never asserted his claim to the chattels (see *Barker* v. *Furlong*, (1891) 2 *Ch.* 172).

(6) **Action by a tenant in common.**—So one tenant in common of a chattel has a special property in the other moiety sufficient to enable him to bring an action of

trover against a wrongdoer, if the co-tenant had permitted him to have the custody of the chattel for a specific purpose (*Nyburg* v. *Handelaar*, (1892) 2 *Q. B.* 202).

ART. 121.—*Trespasses by Joint Owners.*

A joint owner can only maintain trespass or conversion against his co-owner, when the latter has done some act inconsistent with the joint ownership of the plaintiff (2 *Wms. Saund.* 47 *o*; and see *Jacobs* v. *Seward*, *L. R.* 5 *H. L.* 464).

(1) Thus, a complete destruction of the goods would be sufficient to sustain an action, for the plaintiff's interest must necessarily be injured thereby.

(2) But a mere sale of them by one joint owner would not, in general, be a conversion, for he could only sell his share in them. But if he sold them in market overt, so as to vest the whole property in the purchaser, it would be a conversion (*Mayhew* v. *Herrick*, 7 *C. B.* 229).

ART. 122.—*Trespassers* ab initio.

If one, lawfully taking a chattel, but not absolutely, abuses or wastes it, he renders himself a trespasser *ab initio* (*Oxley* v. *Watts*, 1 *T. R.* 12).

Thus, if one find a chattel, it is no trespass to keep it as against all the world except the rightful owner.

But if one spoil or damage it, and the rightful owner eventually claim it, then the subsequent damage will revert back, and render the original taking unlawful (*ibid.*). But, as against the true owner, a man commits no conversion by keeping the goods until he has made due inquiries as to the right of the owner to them (*Vaughan* v. *Watt*, 6 *M. & W.* 492; and see *Pillot* v. *Wilkinson*, 34 *L. J. Ex.* 22).

ART. 123.—*Remedy by Recaption.*

When anyone has deprived another of his goods or chattels, the owner of the goods may lawfully reclaim and take them wherever he happens to find them, so it be not in a riotous manner or attended with breach of the peace.[183]

Remedies by action.—By the effect of the Judicature Acts, the distinction in form between actions has been finally abolished, so that the former actions of trespass

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Canadian Cases.

[183] Where A., having been tried for feloniously shooting at B., and acquitted, was afterwards sued in trespass for the same act and the jury gave a verdict for the defendant, though the trespass was proved, the court, under the circumstances, declined granting a new trial (*Day* v. *Hagoman*, 5 *U. C. R.* 451).

"If a person should deliberately turn his cattle into his neighbour's grain, and his neighbour, seeing him do it, should fire at the cattle and kill one of them, he would do an act not justifiable; but if the party who gave the provocation should bring trespass for shooting the animal, and the jury should find a verdict against him it would not follow that the court would grant a new trial."—*Ibid.* Robinson, C. J.

(which lay for an interference with goods), trover (which lay for a wrongful conversion of goods), and detinue (which lay for a wrongful detainer of goods) no longer exist, although that of replevin is, at all events in its inception, still different from all other actions. It will, therefore, be convenient to consider the ordinary form of action first, and the action of replevin by itself afterwards.

ART. 124.—*Remedy by ordinary Action.*

Wherever there has been a trespass to, or wrongful conversion or wrongful detention of a chattel, an action lies at the suit of the person injured, for damages. And where the defendant still retains the chattel, the court, or a judge, has power to order that execution shall issue for return of the specific chattel detained, without giving the defendant the option of paying the assessed value instead; and if the chattel cannot be found, then, unless the court or judge shall otherwise order, the sheriff shall distrain the defendant by all his goods and chattels in his bailiwick till the defendant renders such chattel (R. S. C. Ord. 48, r. 1).

ART. 125.—*Remedy by Action of Replevin.*

The owner of *goods distrained* is entitled to have them returned upon giving such security

as the law requires, to prosecute his suit, without delay, against the distrainer, and to return the goods if a return should be awarded (see 51 & 52 Vict. c. 43, ss. 134—137).[184]

The application for the replevying or return of the

Canadian Cases.

[184] Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities, or other personal property or effects, have been wrongfully distrained under circumstances in which by the law of England, on the 5th day of December, 1859, replevin might have been made, the person complaining of such distress as unlawful may bring an action of replevin, or where such goods, chattels, property or effects, have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin for the recovery of the goods, property or effects, and for the recovery of the damages sustained by reason of the unlawful caption and detention, or of the unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses (*R. S. O.*, 1897, *c.* 66, *sect.* 2).

If an agent is intrusted by his principal with money to buy goods the money will be considered trust funds in his hands, and the principal has the same interest in the goods when bought as he had in the funds producing it. If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase as well as to the unexpended balance. Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin (*Carter* v. *Long and Bisby*, 26 *S. C. R.* 430; *Francis* v. *Turner*, 10 *Man. L. R.* 340, and 25 *S. C. R.* 110; *Sleeth* v. *Hurlbert*, 27 *N. S. Reps.* 375; 25 *S. C. R.* 620; *McDonald* v. *McPherson*, 12 *S. C. R.* 416; *McDonald* v. *Lane*, 7 *S. C. R.* 462; *Howard* v. *Herrington*, 20 *O. A. R.* 175; *Scarth et al.* v. *The Ont. Power and Flat Company*, 24 *O. R.* 446).

goods is made to the registrar of the county court of the district where the distress was made, who thereupon causes their return on the plaintiff's giving sufficient security. The action must be commenced within one month in the county court, or within one week in one of the superior courts; but if the plaintiff intends to take the latter course, it is also made a condition of the replevin bond that the rent or damage, in respect of which the distress was made, exceeds 20*l.*, or else that he has good grounds for believing that the title to some corporeal or incorporeal hereditaments, or to some toll, market, fair, or franchise, is in dispute (51 & 52 Vict. c. 43, s. 135).

ART. 126.—*Waiver of Tort.*

When a conversion consists of a wrongful sale of goods, the owner of them may elect to waive the tort, and sue the defendant for the price which he obtained for them, as money received by the defendant for the use of the plaintiff (*Lamine* v. *Dorrell*, 2 *L. Raym.* 1216; *Oughton* v. *Seppings*, 1 *B. & Ad.* 241; *Notley* v. *Buck*, 8 *B. & C.* 160). But, by waiving the tort, the plaintiff estops himself from recovering any damages for it (*Brewer* v. *Sparrow*, 7 *B. & C.* 310).

Whether, however, this election to waive the tort has been made, is a matter of fact in each particular case; and if the facts show an intention to retain the remedy in tort against one tort feasor, a settlement with another

one will not affect that right, although he may have sued him alternately both in tort and also for money had and received, and although he may have got an interim injunction restraining any dealings with the money (*Rice* v. *Reed* (1900), 1 *Q. B.* 54).

ART. 127.—*Recovery of Stolen Goods.*[185]

If any person who has stolen property, or obtained it by false pretences, is prosecuted to conviction by or on behalf of the owner, the property shall be restored to the owner, and the court before whom such person shall be

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[185] When any prisoner has been convicted, either summarily or otherwise, of any theft or other offence, including the stealing or unlawfully obtaining any property, and it appears to the court by the evidence, that the prisoner sold such property or part of it to any person who had no knowledge that it was stolen or unlawfully obtained, and that money has been taken from the prisoner on his apprehension, the court may, on application of such purchaser and on restitution of the property to its owner, order that out of the money so taken from the prisoner (if it is his) a sum not exceeding the amount of the proceeds of the sale be delivered to such purchaser (*The Criminal Code*, 1892, *sect.* 837 ; and see *sect.* 836 and *sub-sects.* 2, 3, and 4 of *sect.* 838).

If any person who is guilty of any indictable offence in stealing, or knowingly receiving, any property, is indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, or is tried before a judge or justice for such offence under any of the foregoing provisions and convicted thereof, the property shall be restored to the owner or his representative (*sect.* 838, *sub-sect.* 1, *The Criminal Code*, 1892).

tried shall have power to order restitution thereof (24 & 25 Vict. c. 96, s. 100).

Therefore, even if the goods were sold by the thief in market overt, yet, by this section, they must be given up to the original owner. And where no order is made under the Act, yet the Act revests the goods, and gives the owner a right of action for them (*Scattergood* v. *Sylvester*, 19 *L. J. Q. B.* 447). But this no longer applies where goods are obtained by false pretences and then sold to a *bonâ fide* purchaser (Sale of Goods Act, 1893, s. 24, sub-s. 2, reversing the rule in *Bentley* v. *Vilmont*, 12 *App. Cas.* 471).

Art. 128.—*Limitation.*

All actions for trespass to, or conversion, or detainer of goods and chattels, must be commenced within six years next after the cause of action arose (21 Jac. 1, c. 16, s. 3).

Sect. V.—Of Infringements of Trade Marks and Patent Right and Copyright.

Although the subject of trade marks, patent right, and copyright forms a separate group, practically standing apart from ordinary torts, and looked upon as a specialty to which a few practitioners wholly devote themselves, yet, strictly speaking, infringements of these rights are torts, and, as such, demand some notice (necessarily very elementary), even in a small work like this.

SUB-SECT. 1.—INFRINGEMENT OF TRADE MARKS AND TRADE NAMES (*a*).

ART. 129.—*Definition.*[186]

(1) A trade *mark* is the symbol by which a man causes his goods or wares to be identified and known in the market, and must now consist of one or more of the following essential particulars, namely :—

(a) The name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or

(b) A written signature or copy of a written signature of an individual or firm; or

(*a*) As to the distinction between trade marks and trade names, see *Victuallers', &c. Co.* v. *Bingham* (38 *Ch. Div.* 139).

Canadian Cases.

[186] An act respecting Trade Marks and Industrial Designs (*R. S. C.*, 1886, *c.* 63, *sect.* 3): "All marks, names, brands, labels, packages, or other business devices, which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed, or offered for sale by him—applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box, or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this act, be considered and known as trade marks, and may be registered for the exclusive use of the person registering the same in the manner herein provided; and thereafter such person shall have the exclusive right to use the same to designate articles manufactured or sold by him."

The above statute should be referred to, and the amending acts 53 Vict. c. 14, 54 and 55 Vict. c. 35, also the Criminal Code, sec. 443 *et seq.*

(c) A distinctive device, mark, brand, heading, label, ticket, or an invented word or words, but not a *single* letter (*Re Mitchell*, 7 *Ch. Div.* 36), nor a combination of letters (*Ex p. Stephens*, 3 *Ch. Div.* 659); or

(d) A word or words having no reference to the character or quality of the goods, and not being a geographical name (*Re Van Duzer's Trade Mark*, 34 *C. D.* 623, 639; *Waterman* v. *Ayres*, 39 *Ch. Div.* 29).

(e) A combination of any one or more of the above with any letters, words, or figures or combination of letters, words, or figures; or

(f) Any special and distinctive word or words, or combination of figures or letters used as a trade mark previously to the 13th August, 1875 (51 & 52 Vict. c. 50, s. 10).

(2) A trade *name* is the name under which an individual or firm sell their goods, or a name, not merely descriptive, given by an individual to an article which, although previously known to exist, is new as an article of commerce, and which has become identified in the market with the goods sold by that individual, and not merely with the article itself.

Nature of the title to relief.—Whether the relief in the case of infringements of trade *mark* is founded upon a right of property in the mark, or on fraudulent misrepresentation, has given rise to considerable conflict of opinion. It would seem that the tendency of the older cases was to hold that the jurisdiction was founded on fraud; but in the case of *The Leather Cloth Co.* v. *American Leather Cloth Co.* (33 *L. J. Ch.* 199), Lord Westbury said, "The true principle seems to be that the jurisdiction of the court in the protection given to trade marks is founded upon property," not of course property in the symbol itself, but in the sole application of the symbol to the particular class of goods of which it constituted the trade mark; and this view was followed in *Millington* v. *Fox* (3 *M. & C.* 338), and in *Harrison* v. *Taylor* (11 *Jur. N. S.* 408). On the other hand, in *The Singer Machine Manufacturers* v. *Wilson* (2 *Ch. D.* 434), the late Sir G. Jessel scouted the idea of there being any property in the trade mark, and founded the jurisdiction wholly upon deception. This view was supported by the Court of Appeal (2 *Ch. D.* 451); but upon the case being brought before the House of Lords (3 *App. Cas.* 376), Lord Cairns said, "That there have been many cases in which a trade mark has been used, not merely improperly, but fraudulently, and that this fraudulent use has often been adverted to and made the ground of the decision, I do not doubt; but I wish to state in the most distinct manner that, in my opinion, fraud is not necessary to be averred or proved in order to obtain protection for a trade mark. . . . The action of the court must depend upon the right of the plaintiff and the injury done to that right. What the motive of the defendant may be, the court has very imperfect means of knowing. If he was ignorant of the plaintiff's

rights in the first instance, *he is, as soon as he becomes acquainted with them, and perseveres in infringing upon them, as culpable as if he had originally known them.*" Lord Blackburn, however, was more guarded in his language, and said, "I prefer to say no more, than that I am not as yet prepared to assent, either to the position that there is a right of property in a name, or, what seems to me nearly the same thing, to assent, to its full extent, to the proposition that it is not necessary to prove fraud." It is conceived, however, that at common law, the question is, whether or not the assumption of the name or mark is or is not calculated to deceive the public. If it is, then, quite apart from an *intention* to deceive, the defendant will be restrained from continuing the use of the name; for, having learned that it is deceptive in fact, perseverance in its use would become fraudulent in intent. A right to *damages* would, however, seem to necessitate proof of fraudulent intent before action brought. But apart from the common law right, there is possibly a statutory proprietary right (by registration) in a trade *mark*, which entitles the owner to restrain another person from selling goods with that mark on them, without reference to the question whether or no the goods are sold under such circumstances as to pass them off as the goods of the plaintiff (see *per* Cotton, L. J., in *Mitchell* v. *Henry*, 15 *Ch. Div.* at p. 193; and in *Edwards* v. *Dennis*, 30 *ibid.*, at p. 471; and conf. *Wotherspoon* v. *Currie*, *L. R.* 5 *H. L.* 508; and *Eno* v. *Dunn*, 15 *App. Cas.* 252).

ART. 130.—*General Rule as to Infringement of Trade Marks and Names.*[187]

(1) Where a person has a definite mark or name, he is entitled to an injunction to restrain any other person from using any mark or name so similar as either actually to have deceived, or such as obviously might deceive the public, although there might be no intention to deceive (see *per* Lord Cairns in *Singer Machine Manufacturers* v. *Wilson*, *sup.*, and *per* Vice-Chancellor Wood in *Welch* v. *Knott*, 4 *K. & J.* 747; and *Tussaud* v. *Tussaud*, 62 *L. T.* 633).

(2) But where on the face of the defendant's goods the intention to deceive is not apparent evidence is necessary of such intention, and that it has been fulfilled, and that the goods are calculated to deceive (*Saxlehner* v. *Apollinaris Co.*, (1897) 1 *Ch.* 893).

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[187] The essential elements of a legal trade mark are (1) the universality of right to its use, *i.e.*, the right to use it the world over as a representation of, or substitute for the owner's signature; (2) exclusiveness of the right to use it. Where the respondents had obtained the right to use a certain trade mark in the Dominion of Canada only, and had registered the same, and claimants subsequently applied to register it as assignees under an unlimited assignment thereof made before the date of the instrument under which the respondents claimed title, the prior registration was cancelled (*J. P. Bush Mfg. Co.* v. *Hanson*, 2 *Ex. C. R.* 557).

(3) A defendant will not, however, be liable to an action for damages, or to render an account of his profits, unless he has acted fraudulently (*semble per* Lord Blackburn in *Singer Manufacturers* v. *Wilson, sup.*, and conf. *Lever* v. *Goodwin*, 36 *C. D.* 1, and *Saxlehner* v. *Apollinaris Co., sup.*).

(4) The question whether a name applied to a patented or other article constitutes a trade name, indicating the manufacturer, or has come to be regarded as the proper designation of the article itself, and therefore open to the whole world, is a question of evidence in each particular case (see *per* Lord Cairns, L.C., *Singer Machine Co.* v. *Wilson*,[188] 3 *App. Cas.*, at p. 385).

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[188] In the certificate of registration the plaintiffs' trade mark was described as consisting of "the representation of an anchor with the letters 'J. D. K. & Z.,' or the words 'John De Kuyper & Son, Rotterdam, & Co.,' as per the annexed drawings and application." In the application the trade mark was claimed to consist of a device or representation of an anchor inclined from right to left in combination with the words "J. D. K. & Z.," or the words "John De Kuyper, &c., Rotterdam," which, it was stated, might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels, and other packages containing geneva sold by plaintiffs. It was also stated in the application that on bottles was to be affixed a printed label, a copy or facsimile of which was attached to the application, but there was no express claim of the label itself as a trade mark. This label was white and in the shape of a heart with an ornamental border of the same shape, and on the label was printed the device or representation of the anchor, with the letters "J. D. K. & Z." and the words "John

(1) Thus, in *Harrison* v. *Taylor* (*sup.*) the plaintiff had adopted, as his trade mark, the figure of an ox, on the flank of which was printed the word "Durham,"

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De Kuyper & Son, Rotterdam," and also the words "Genuine Hollands Geneva," which it was admitted were common to the trade. The defendants' trade mark was, in the certificate of registration, described as consisting of an eagle, having at the feet "V. D., W. & Co.," above the eagle being written the words "Finest Hollands Geneva;" on each side were the two faces of a medal, underneath on a scroll the name of the firm, "Van Dulken, Weiland & Co." and the words "Schiedam," and lastly at the bottom the two faces of a third medal, the whole on a label in the shape of a heart. The colour of the label was white. *Held* (affirming the judgment of the Exchequer Court, 4 *Ex. C. R.* 71), that the label did not form an essential feature of the plaintiffs' trade mark as registered, but that, in view of the plaintiffs' prior use of the white heart-shaped label in Canada the defendants had no exclusive right to the use of the said label, and that the entry of registration of their trade mark should be so rectified as to make it clear that the heart-shaped label formed no part of such trade mark (*De Kuyper* v. *Van Dulken*, 24 *S. C. R.* 114).

"In the case of a label registered as a trade mark the trade mark does not lie in each particular part of the label, but in a combination of them all. In the case before us, if the plaintiffs have registered their label, they are to be protected against any imitation with mere colourable variations of the label as a whole. If it is registered and if it has been imitated in a way calculated to deceive ordinary purchasers of the article, the rights of the plaintiffs as the holders of the registered trade mark are to be protected. I must say that, from looking at the two labels, I am inclined to go further than the learned judge, and to hold that defendants' label is calculated to deceive persons into thinking that they are purchasing the goods of the plaintiffs. Upon the evidence, I think that the defendants' label was prepared for the purpose of coming as closely as defendants thought they could safely come to that of the plaintiffs" (*Ibid.*—King, J., 129, 130).

the names of the plaintiff being printed above the word "Durham," and the word "mustard" below. The defendants, who were also mustard manufacturers, used a similar ox, but without the words "Durham" and "mustard," but having the name Taylor printed below. The fact of the plaintiff's mark being well known throughout the trade having been proved, the court held, that the defendant's mark was so similar as to be likely to deceive intending purchasers; and, although the defendant did not know that he had infringed the plaintiff's mark, an injunction was granted to restrain him from further using it (see also *Colman* v. *Farrow & Co.* 15 *Reps. Pat. Cas.* 198).

(2) So, in *Cocks* v. *Chandler* (*L. R.* 11 *Eq.* 446), where the inventor of a sauce sold it in wrappers, whereon it was called "The Original Reading Sauce," and the defendant brought out a sauce which he labelled "Chandler's Original Reading Sauce," he was restrained from doing so for the future (and see *Braham* v. *Beachim*, 7 *Ch. Div.* 848; *Boulnois* v. *Peake*, 13 *Ch. Div.* 513, *n.*; *Reddaway* v. *Bentham, &c. Co.*, (1892) 2 *Q. B.* 639; and *Montgomery* v. *Thompson*, (1891) *App. Cas.* 217). In the last-named case, the plaintiffs, who were brewers in the town of Stone, had for many years sold their ales under the name of "Stone Ale," by which it had become distinctively known. Under these circumstances, a rival brewer was restrained from selling his ale under the same name so as to deceive the public (see also the *Birmingham Vinegar Brewery Co.* v. *Powell*, (1897) *A. C.* 710; *Edge & Sons* v. *Gallon & Sons*, 15 *Reps. Pat. Cas.* 689).

(3) So, where A. introduces into the market an article which, though previously known to exist, is new

as an article of commerce, and has acquired a reputation in the market by a name, *not merely descriptive* of the article, B. will not be permitted to sell a similar article under the same name (*Braham* v. *Bustard*, 1 *H. & M.* 449). But where the inventor of a *new* substance, or a new machine, has given it a name, and having taken out a patent for his invention, has, during the continuance of the patent, alone made and sold the substance or machine by that name, he is nevertheless not entitled to the exclusive use of that name after the expiration of the patent; for the name has in such a case become merely the name of the article and not the badge of the maker of it (*Dicedeum Co.* v. *Nairn*, 7 *Ch. Div.* 834; *Cheavin* v. *Walker*, 5 *Ch. Div.* 850; and see *Singer Manufacturing Co.* v. *Loog*, 8 *App. Cas.* 15).

(4) And, on the same ground, where a person has invented a game, and given it a name which is the only name by which it is known, such a name is not capable of being used as a trade mark (*Waterman* v. *Ayres*, 39 *Ch. Div.* 29).

(5) And so where the omnibuses of an omnibus proprietor were marked with particular figures and devices, an injunction was granted to restrain an opposition omnibus proprietor from adopting similar figures and devices (*Knott* v. *Morgan*, 2 *Keen*, 219).

(6) But where a manufacturer calls his goods by a name which is substantially a correct description of them he will not be restrained by reason of another manufacturer having for many years sold similar goods under the same name, although purchasers may be thereby misled into the belief that they are buying the goods of the other manufacturer (*Reddaway* v. *Banham*,

(1895) 1 *Q. B.* 286; *Parsons* v. *Gillespie*, (1898) *A. C.* 239; *Cellular Clothing Co.* v. *Maxton*, (1899) *A. C.* 236; see also *Tallerman* v. *Dowsing, &c. Co.*, (1900) 1 *Ch.* 1; and *Birmingham Vinegar Co.* v. *Powell*, (1897) *A. C.* 710).

ART. 131.—*Rights of Assignee of Trade Mark.*

(1) Although a trader may have a property in a trade mark, sufficient to give him a right to exclude all others from using it, yet if his goods derive their increased value from the personal skill or ability of the adopter of the trade mark, he will not be able to assign the exclusive right to use it; for that would be a fraud upon the public (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 1 *H. & M.* 271; *Richards* v. *Butcher*, 62 *L. T.* 867).

(2) But if the increased value of the goods is not dependent upon such personal merits, the trade mark is assignable (*Bury* v. *Bedford*, 33 *L. J. Ch.* 465) along with the goodwill of the business to which it belongs, but not apart from that goodwill (46 & 47 Vict. c. 57, s. 70).

ART. 132.—*Selling Articles under Vendor's own Name.*

Where a person sells an article with his own name attached, and another person of the

same name sells a like article with his name attached, an injunction will not be granted to prevent such last-named person from doing so, unless it appears to the court that he does it with the fraudulent intention of palming his goods upon the public as being those of the plaintiff (*Burgess* v. *Burgess*, 22 *L. J. Ch.* 675; *Sykes* v. *Sykes*, 3 *B. & C.* 541; *Massam* v. *Thorley's Food Co.*, 14 *Ch. Div.* 748; *Turton* v. *Turton*, 42 *Ch. Div.* 128; *Jamieson & Co.* v. *Jamieson*, 14 *T. L. R.* 160; *Brinsmead* v. *Brinsmead*, 13 *T. L. R.* 3).

But if a fraudulent intention is proved, or appears by necessary implication, an injunction will be granted. For instance, where two persons, one named Day and the other Martin, set up a blacking shop, and advertised their goods as "Day and Martin's," Mr. Justice Chitty granted an injunction, on the ground that it was a plain attempt to hoodwink the public into the belief that they were selling the blacking of the well-known manufacturers of blacking, for they might have called themselves Martin and Day. (See also *Acc. Ins. Co.* v. *Acc., Disease, & Gen. Ins. Co.*, 54 *L. J. Ch.* 104; and see also *Montgomery* v. *Thompson*, (1891) *App. Cas.* 217 (the *Stone Ales Case*); *North Cheshire & Manchester Brewery Co.* v. *Manchester Brewery Co.*, (1899) *A. C.* 83; *Pinet et Cie.* v. *Maison Louis Pinet*, (1898) 1 *Ch.* 179).

ART. 133.—*Registration of Trade Marks.*

No person can commence an action to prevent the infringement of any trade *mark*, unless and until such mark is registered in the register of trade marks (see *Goodfellow* v. *Prince*, 35 *Ch. Div.* 9). Registration is *primâ facie* evidence of the right to the trade mark, and after five years is conclusive evidence (46 & 47 Vict. c. 57, ss. 76, 77). But this rule does not apply to actions for preventing the infringement of a trade *name*, or for fraudulently palming off goods as those of the plaintiff (*Jay* v. *Ladler*, 40 *Ch. Div.* 649).

SUB-SECT. 2.—INFRINGEMENT OF PATENT RIGHT.

ART. 134.—*Definition of Patent Right.*[189]

A patent right is a privilege granted by the Crown (by letters patent) to the first inventor of any new manufacture or invention, that he and his licensees shall have the sole right, during the term of fourteen years, of making and vending such manufacture or invention.

It is, however, not intended in this work to give any

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[189] The statutory law affecting patent rights in Canada will be found in the Patent Act, R. S. C., 1886, c. 61, and amending acts, 53 Vict. c. 13, 54 & 55 Vict. c. 33, and 56 Vict. c. 34.

account of the mode of getting a grant of letters patent. The following summary of the law is based, in fact, on the assumption that letters patent have been granted.

ART. 135.—*Factors necessary to a Valid Patent.*

Letters patent are void and of no effect if one or more of the five following conditions are absent, viz. :—

(1) The subject of the patent must be a manufacture ;

(2) It must be a new invention, which has not been made public before the grant of protection ;

(3) The patentee or one of the patentees (where there are more than one) must be the true and first inventor ;

(4) The subject of the patent must be of general public utility ;

(5) A complete specification (*i.e.*, a sufficient description of the nature of the invention and the mode of carrying it into effect, so as to enable ordinarily skilful persons to practise and use it at the end of the term for which the patent is granted) must be filed within nine months from the date of the

application for the patent (see 21 Jac. 1, c. 3 ; 15 & 16 Vict. c. 83, s. 27; 46 & 47 Vict. c. 57, ss. 5 *et seq.*).

ART. 136.—*What is a Manufacture.*

The word manufacture denotes either (a) a thing made which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope, and many others ; or (b) an engine or instrument, or some part of an engine or instrument, to be employed either in the making of some previously known article, or some other useful purpose ; or (c) a new process to be carried on by known implements, or elements, acting upon known substances, and ultimately producing some other known substances, but in a cheaper or more expeditious manner, or of a better and more useful kind (Abbott, C.J., *R.* v. *Wheeler*, 2 *B. & Al.* 349 ; *Crane* v. *Price*, 4 *M. & G.* 580).

Thus, a patent for the omission merely of one or more of several parts of a process, whereby the process may be more cheaply and expeditiously performed, is valid (*Russell* v. *Cowley*, 1 *Webst. R.* 464) ; or for an *improvement* in one or more of several parts of a whole (*Clark* v. *Adie*, 2 *App. Cas.* 315).

ART. 137.—*Newness of Manufacture.*[190]

The prior knowledge of an invention to avoid a patent must be such knowledge as will enable

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[190] Where in case for the infringement of a patent the defendant pleaded that the invention for which the patent had been obtained was not a new invention, but had been publicly used and vended in a foreign country, to which the plaintiff replied *de injuriâ, held*, that the plea was a good answer to the declaration, but that the replication was bad, as the plea was in denial of the right and not in excuse of its violation (*Vanoeman* v. *Leonard*, 2 *U. C. Q. B.* 72. See Patent Act, R. S. C., 1886, c. 61, sect. 7 *et seq.*, *ante*, *note* [189]).

The application to a new purpose of an old mechanical device is patentable where the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but requires thought and study. The application to an oil pump of the principle of "rolling contact" was *held* patentable (*Bicknell* v. *Peterson*, 24 *O. A. R.* 427).

Sect. 46 of the Patent Act, R. S. C., 1886, c. 61, does not authorize one who has, with the full consent of the patentee, manufactured and sold a patented article for less than a year before the issue of the patent, to continue the manufacture after the issue thereof, but merely permits him to use and sell the articles manufactured by him prior thereto (*Fowell* v. *Chown*, 25 *O. R.* 71, and 22 *O. A. R.* 268).

There is no inventive merit in making in one piece the cap-bar and protector of a washing machine, the cap-bar and protector having previously been made in two separate pieces. A specification providing merely that such a protector is to be arranged "at an angle" is void for uncertainty (*Taylor* v. *Brandon Manufacturing Co.*, 21 *O. A. R.* 361; and see *Mitchell* v. *Hancock Inspirator Co.*, 2 *Ex. C. R.* 539; *Bright* v. *Bell Telephone Co.*, 2 *Ex. C. R.* 552; *Brook* v. *Broadhead*, 2 *Ex. C. R.* 562; *Barton* v. *Smith*, 2 *Ex. C. R.* 455; *Toronto Telephone Co.* v. *Bell Telephone Co.*, 2 *Ex. C. R.* 524; *Royal Electric Company of Canada* v. *Edison Electric Light Company*, 2 *Ex. C. R.* 576; *Noxon* v. *Noxon*, 24 *O. R.* 401).

C. & Co. were assignees of a patent for a cheque book used by shopkeepers in making out duplicate accounts of

the British public to perceive the very discovery and to carry the invention into practical use (*Hill* v. *Evans*, 4 *D. F. & J.* 288; *Anglo-American Brush Corporation* v. *King & Co.*, (1892) *App. Cas.* 367). If there be great utility proved, novelty will be presumed, until disproved (*Crane* v. *Price*, 1 *Webs. Pat. Cas.* 393; *Young* v. *Fernie*, 4 *Giff.* 577).

(1) Thus, a new combination of purely old elements is a novel invention, because the public could not have perceived the combination from the separate parts (*Harrison* v. *Anderston Co.*, 1 *App. Cas.* 574; *Fawcett* v. *Homan*, 12 *T. L. R.* 507).

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sales. The alleged invention consisted of double leaves, half being bound together and the other half folded in as fly-leaves with a carbonized leaf bound in next the cover and provided with a tape across the end. What was claimed as new in the invention was the device, by means of the tape, for turning over the carbonized leaf without soiling the fingers or causing it to turn up. H. made and sold a similar cheque book with a like device, but instead of the tape the end of the carbonized leaf, for about half an inch, was left without carbon and the leaf was turned over by means of this margin. In an action by C. & Co. against H. for infringement of their patent, it was *held*, affirming the decision of the Exchequer Court (3 *Ex. C. R.* 351), that the evidence at the trial showed the device for turning over the black leaf without soiling the fingers to have been used before the patent of C. & Co. was issued, and it was therefore not new; that the only novelty in the said patent was in the use of the tape; and that using the margin of the paper instead of the tape was not an infringement (*Carter & Co., Limited* v. *Hamilton et al.*, 23 *S. C. R.* 172; and *The Grip Printing and Publishing Company* v. *Butterfield*, 11 *S. C. R.* 291).

(2) On the other hand, the mere application of a known instrument to purposes so analogous to those to which it has been previously applied as to at once suggest the application, is no ground for a patent (*Harwood* v. *G. N. R. Co.*, 2 *B. & S.* 194, and 11 *H. L. C.* 654). So, where there was a known invention for dressing cotton and linen yarns by machinery and a subsequent patent was procured for finishing yarns of wool and hair, the process being the same as in the first invention for cotton and linen, the patent was held void (*Brook* v. *Aston*, 28 *L. J. Q. B.* 175, and *Patent Bottle Co.* v. *Seymer*, 5 *C. B. N. S.* 164; but compare *Dangerfield* v. *Jones*, 13 *L. T. N. S.* 142; *Young* v. *Fernie*, 4 *Giff.* 577; and *Pirrie* v. *Yorkshire, &c. Co.*, 31 *L. R. Ir.* 3).

(3) Again, where crinolines were made of whalebone suspended by tapes, and an inventor claimed a patent for crinolines of exactly similar construction, with the single substitution of steel watch springs for whalebone, it was held that there was not sufficient novelty (and see *Thorn* v. *Worthing Co.*, 6 *Ch. Div.* 415, *n.*). In the same way the new substitution of mechanical equivalents will not be sufficient novelty, and if the first machine was patented, the second one with the substituted mechanical equivalents will be an infringement of the patent (*Howes* v. *Webber*, 13 *Reps. Pat. Cas.* 39).

(4) If the article be new in this realm, but not new elsewhere, it is yet the subject for a valid patent; for the object of letters patent is to give a species of premium for improving the manufactures, not so much of the world, as of the United Kingdom (*Beard* v. *Egerton*, 3 *C. B.* 97).

(5) But not only must the invention be a novel

invention by the inventor, but it must also be a novelty to the British public. Thus, if before obtaining provisional protection, the inventor has published a description of it, or if (without fraud) it has become known to the public, no subsequent patent can be granted for it (*Patterson* v. *Gas Light and Coke Co.*, 3 *App. Ca.* 239; and see also *Harris* v. *Rothwell*, 35 *C. D.* 416; *Otto* v. *Steel*, 31 *ib.* 241; and *Rolls* v. *Isaacs*,[191] 19 *ib.* 268).

Canadian Cases.

[191] In an application for a patent the object of the invention was stated to be the connection of a spring tooth with the drag-bar of a seeding machine, and the invention claimed was "in a seeding machine in which independent drag-bars are used, a curved spring tooth, detachably connected to the drag-bar in combination with a locking device arranged to lock the head-block to which the spring tooth is attached, substantially as and for the purpose specified." In an action for infringement of the patent it was admitted that all the elements were old, but it was claimed that the substitution of a curved spring tooth for a rigid tooth was a new combination and patentable as such. *Held*, affirming the decision of the Court of Appeal, Ontario, that the alleged invention being the mere insertion of one known article in place of another known article was not patentable (*Wisner* v. *Coulthard et al.*, 22 *S. C. R.* 178).

"The principles of law involved in this case are well understood; they were very fully discussed in the case of *Smith* v. *Goldie* (9 *S. C. R.* 46), before this court in 1882, where the late Chief Justice delivered an elaborate judgment, holding that the invention involved in that case was patentable, and in the case of *Hunter* v. *Carrick* (11 *S. C. R.* 300), in 1885, when an alleged invention was held to be otherwise. The first and fundamental requisite in order to entitle to a patent is that the machine is new. Its production must have required the existence and exercise of the inventive faculty, whether the idea of the invention was a happy hit, as has been expressed, or the result of patient and laborious investigation. There must be an exercise of skill and ingenuity to entitle it to the protection of an exclusive grant (*Saxby* v. *Gloucester*

ART. 138.—*Meaning of true and first Inventor.*

If the invention has been communicated to the patentee by a person in this country, he cannot claim to be the true and first inventor; but if he has acquired the knowledge of the invention abroad, and introduces it here, the law looks upon him as the true and first inventor

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Canadian Cases.

Waggon Co. (7 *Q. B. D.* 305). An invention is likewise patentable if it consists in the improved application of existing machines to materials, whether new or old, if there be a new and beneficial combination and application of well-known machines; a patent properly limited to and claiming this combination will be valid (*Wright* v. *Hitchcock*, *L. R.* 5 *Ex.* 37). And if a combination of machinery for effecting certain results has previously existed and is well known, and an improvement is afterwards discovered consisting, for example, of the introduction of some new part or altered arrangement of some parts of the existing constituent parts of the machine, an improved arrangement, or improved combination, may be patented" (*Ibid.*—Sedgwick, J., 184, 185).

First use is the prime essential of a trade mark, and a transferee must, at his peril, be sure of his title. In the year 1885, respondents by their corporate title registered a trade mark, consisting of a label with the name "Snow Flake Baking Powder" printed thereon, in the Department of Agriculture. Some four years after such registration by the respondents, the claimant applied to register the word symbol "Snow Flake" as a trade mark for the same class of merchandize—stating that he knew of the respondents' registration, and alleging that it was invalid by reason of prior use by him and his predecessors in title. The evidence sustained the claimant's allegation, and it was therefore *held* that the word symbol in question had become the specific trade mark of the claimant by the virtue of first use, and that the registration by the respondents must be cancelled (*Groff* v. *Snow Drift Baking Powder Co.*, 2 *Ex. C. R.* 568).

(*Lewis* v. *Marling*, 10 *B. & C.* 22; *Marsden* v *Saville St. Co.*, 3 *Ex. D.* 203).

And so if the invention has been discovered before, but kept secret by the inventor, it does not render the patent of a subsequent inventor of it invalid, for it is new so far as the public are concerned (*Carpenter* v *Smith*, 1 *Webst. R.* 534, per Lord Abinger).

Art. 139.—*General Public Utility.*

The community at large must receive some benefit from the invention.

The reason of this condition is obvious, for an useless invention not only does not merit the premium of a monopoly, but, what is worse, prevents other inventors from improving upon it.

Thus, if one produces old articles in a new manner, such new way must, in some way, be superior to the old method, in order to support a patent; for otherwise the old method is as good as the new; but the Court construes such an invention very strictly, as it looks jealously at the claims of inventors seeking to limit the rights of the public in effecting a well-known object (*Curtis* v. *Platt*, 3 *Ch. D.* 135, *n.*). As was said in a recent case, it must produce either a new and useful thing or result, or a new and useful method of producing an old thing or result (*Lane Fox* v. *Kensington, &c. Co.*, (1892) 3 *Ch.* 424; and see *Gadd* v. *Mayor of Manchester*, 67 *L. T.* 569).

And if the article is produced at a cheaper rate by the new machine, or in a superior style, it is a good ground for a patent.

Art. 140.—*Specification.*

(1) If the specification (as the description is called) be ambiguous, insufficient, or misleading, it will render the patent void (*Simpson* v. *Holliday*, *L. R.* 1 *H. L.* 315; *Savory* v. *Price*, *Ry. & Mo.* 1; and *Hinks* v. *Safety Lighting Co.*, 4 *Ch. Div.* 607), unless the ambiguity, variation, or imperfection be slight and immaterial (*Gibbs* v. *Cole*, 3 *P. Wms.* 255). And it is essential that the invention described in the specification should be the same as that described in the provisional specification (*Vickers* v. *Siddell*, 15 *App. Ca.* 496). A patentee may, however, from time to time, obtain leave to amend his specification, so long as such amendment does not make the invention substantially larger than, or substantially different from the invention as originally specified. Such leave, however, cannot be obtained after the commencement of any legal proceeding in relation to the patent (46 & 47 Vict. c. 57, s. 18).

(2) If an objection be sustained against any one or more of several inventions included in the same patent, the entire patent is void. Provided that a patentee may obtain leave from the Patent Office, before the commencement of any legal proceeding, to disclaim any invention or part of an invention included in

the specification; and may, even after the commencement of any legal proceeding, obtain leave to make such disclaimer from the court or the judge before which or whom such proceeding may be pending, subject to such terms as such court or judge may impose as to costs or otherwise (46 & 47 Vict. c. 57, ss. 18, 19).

ART. 141.—*What constitutes Infringement.*

A person infringes a patent right by using, exercising, or vending the invention within this realm without the licence of the patentee.

(1) Thus, the captain of a vessel, fitted with pumps, which were an infringement of the plaintiff's patent, was held liable, although he was not owner of the vessel (*Adair* v. *Young*, 12 *Ch. Div.* 13).

(2) So, where a patent had been granted in England for a new process for producing more cheaply a product previously known, the importation of that product made abroad by *the patented* process was held to be an infringement (*Van Heyden* v. *Neustadt*, 14 *Ch. Div.* 230).

(3) So, renewing a patented article which has been worn out is an infringement (*Dunlop, &c. Co.* v. *Neal*, (1899) 1 *Ch.* 807).

Exceptions.—1. It would seem that when articles, which are the subject of a patent, are made without a licence from the patentee, simply for the purpose of *bonâ fide* experiments, those who make them are not liable, unless they are made and used for profit, or

with the object of obtaining profit, however limited (*Frearson* v. *Loe*, 9 *Ch. Div.* 48).

2. Where a specification has been amended by disclaimer or otherwise, no damages will be given in any action for infringement committed before the amendment was made, unless the patentee establishes to the satisfaction of the court that his original claim was framed in good faith and with reasonable skill (46 & 47 Vict. c. 57, s. 20).

Such is a very slight sketch of the elements of the law relating to patents. Let us now pass on to the law of copyright.

SUB-SECT. 3.—OF INFRINGEMENTS OF COPYRIGHT.

ART. 142.—*Definition and Extent of Copyright.*[192]

(1) Copyright is the exclusive right which an author possesses of multiplying copies of his own work.

(2) The copyright in a book published in the author's lifetime belongs to the author and his

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Canadian Cases.

[192] The Imperial Parliament has sanctioned and reiterated colonial legislation, whereby the possessor of a prior Canadian copyright is secured completely against all interference to the territorial extent of the Dominion, even as against English reproductions or copies made under a subsequent British copyright (*Anglo-Canadian Music Publishers' Association (Limited)* v. *Simkling*, 17 *O. R.* 239).

The Copyright Act, R. S. C., 1886, c. 62, amended by 52 Vict. c. 29, and 53 Vict. c. 13 : "Any person domiciled in Canada or in any part of the British possessions, or any citizen of any country which has an international copyright treaty with the United Kingdom, in which Canada is

assigns during the life of the author, and seven years after his death. If, however, that period expires before the end of forty-two years from the first publication of such book, the copyright in that case endures for such period of forty-two years (5 & 6 Vict. c. 45, s. 3).

(3) The copyright in a work published subsequently to the author's death belongs to the proprietor of the manuscript for the term of forty-two years from the first publication (*Ibid.*).

Canadian Cases.

included, who is the author of any book, map, chart, or musical or literary composition, or of any original painting, drawing, statue, sculpture, or photograph, or who invents, designs, etches, engraves, or causes to be engraved, etched, or made from his own design, any print or engraving, and the legal representatives of such person or citizen shall have the sole and exclusive right and liberty of printing, reprinting, publishing, reproducing, and vending such literary, scientific, musical, or artistic works or compositions, in whole or in part, and of allowing translations to be printed, and reprinted and sold of such literary works, from one language into other languages, for the term of twenty-eight years from the time of recording the copyright thereof in the manner and on the conditions, subject to the restrictions hereinafter set forth" (52 *Vict. c.* 29, *sect.* 1).

Sect. 33 of the Copyright Act, R. S. C., c. 62, does not impose the penalty mentioned therein upon the owner of a Canadian copyright in respect to a musical composition who has the work printed abroad, and inserts notification of the existence of such copyright on copies published in Canada (*Laulefield* v. *Anglo-Canadian Music Publishing Association* (*Ltd.*), 26 *O. R.* 457).

This statute has been amended by 62 & 63 Vict. c. 25, which provides that: "In case of license to reprint book copyrighted in United Kingdom or British possessions, the Minister of Agriculture may prohibit importation of other reprints" (*sect.* 1).

(4) The proprietor of a copyright cannot sue or proceed for any infringement of his copyright before making an entry of it at Stationers' Hall (*Ibid.* sect. 11).

Exceptions. Immoral works.—There is no copyright in libellous, fraudulent, or immoral works (*Stockdale* v. *Onwhyn*, 5 *B. & C.* 173; *Southey* v. *Sherwood*,[193] 2 *Mer.* 435).

Thus, where a work professes to be the work of a person other than the real author, with the object of inducing the public to pay a higher price for it, no copyright can be claimed in it (*Wright* v. *Tallis*, 1 *C. B.* 893).

ART. 143.—*Meaning of Book.*[194]

The word book includes every volume, part and division of a volume, pamphlet, sheet of letter-press, sheet of music, chart, map, or plan

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Canadian Cases.

[193] No immoral, licentious, irreligious, or treasonable or seditious, literary, scientific, or artistic work shall be the subject of such registration or copyright (52 *Vict. c.* 29, *sect.* 5, *sub-sect.* 2).

[194] The purely commercial or business character of a composition or a compilation does not oust the right to protection of copyright if time, labour and experience have been devoted to its production. The plaintiff, the proprietor of a school for the cure of stammering, had obtained copyright for publications consisting of (1) "Applicant's Blank," a series of questions to be answered by entrants to the school; (2) "Information for Stammerers," an advertisement circular; (3) "Entrance Memorandum," an agreement to be signed by entrants; and (4) "Entrance Agreement," similar

separately published (sect. 2 ; and see *Henderson* v. *Maxwell*, 5 *Ch. Div.* 892).

(1) Thus, there may be copyright in the wood engravings of a work, for they are part of the volume (*Bogue* v. *Houlston*, 5 *De G. & Sm.* 267).

(2) An illustrated catalogue of articles of furniture published as an advertisement by upholsterers, and not for sale, may be the subject of copyright (*Maple & Co.* v. *Junior Army & Navy Stores*, 21 *Ch. D.* 369 ; *Collis* v. *Cater & Co.*, 78 *L. T.* 613). So may a telegraphic code (*Ager* v. *P. & O. Co.*, 26 *Ch. Div.* 637), or even the price of stocks written by an automatic "tape" machine (*Exchange Tel. Co.* v. *Gregory & Co.*, (1896) 1 *Q. B.* 147).

(3) So also copyright may subsist in part of a work, although the rest may not be entitled to it (*Low* v. *Ward*), *L. R.* 6 *Eq.* 415).

(4) Again, a newspaper is within the Copyright Act, and requires registration in order to give the proprietor copyright in its contents ; and, in order that the proprietor of the paper may become the proprietor of the copyright in an article, he must show that he paid the writer for the copyright (*Walter* v. *Howe*, 17 *Ch. D.* 708 ; conf. *Cate* v. *Devon, &c. Co.*, 40 *C. D.* 500 ; and *Trade Auxiliary Co.* v. *Middlesborough, &c. Association*, *ib.* 425). There is, however, no copyright in the report of a speech, although there may be in a summary of a

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Canadian Cases.

to No. 3, but more formal. *Held*, that the plaintiff had copyright in the publications, and was entitled to an injunction restraining infringement thereof (*Griffin* v. *Kingston and Pembroke R. W. Co.*, 17 *O. R.* at p. 665, dissented from; *Church* v. *Linton*, 25 *O. R.* 131).

speech made by the reporter in his own language (*Walter* v. *Lane*, (1899) 2 *Ch.* 749) (*a*).

(5) But it seems that copyright is not claimable in a single word, as the title of a magazine; "Belgravia," for instance (*Maxwell* v. *Hogg*, *L. R.* 2 *Ch.* 307); nor, as a general rule, in the title of a book (*Dicks* v. *Yates*, 18 *Ch. D.* 76; *Schove* v. *Schmincke*, 34 *W. R.* 700). It seems, however, clear that the publication of a magazine or book under the title of another existing one might be a common law fraud.

(6) Directions on a barometer face have been held not to be a book (*Davis* v. *Comitti*, 54 *L. J. Ch.* 419).

ART. 144.—*What constitutes Infringement of Copyright.*

(1) Copyright is infringed by publishing in this kingdom an unauthorized edition of a work in which copyright exists, *or* by introducing here a foreign reprint of such a work, *or* while pretending to publish an original work, illegitimately appropriating the fruits of another author's labour (see per James, L.J., *Dicks* v. *Yates*, 18 *Ch. Div.* 90).

(2) In the last case the Act that secures copyright to authors, guards against the piracy of the words and sentiments, but does not prohibit writing on the same subject (per Mansfield, C.J., *Sayre* v. *Moore*, 1 *East*, 361).

(*a*) This decision has been reversed by the House of Lords, but is not yet reported.

(1) **Unauthorized publications.**—Thus, any person causing a book to be printed for sale or exportation, without the written consent of the proprietor of the copyright; or who imports for sale such unlawfully printed book; or with a guilty knowledge sells, publishes, or exposes for sale or hire, or has in his possession for sale or hire, any such book without the consent of the proprietor, is liable to an action at the suit of the proprietor, to be brought within twelve calendar months. And an injunction may be also obtained to restrain the further infringement.

(2) An injunction may even be granted to restrain a person from printing the unpublished works of another (*Prince Albert* v. *Strange*, 1 *Mac. & Gor.* 25; *Brown's Trustees* v. *Hay*, 35 *Sc. L. R.* 877). And an action at law may also be maintained for the same cause (*Mayall* v. *Higbey*, 6 *L. T. N. S.* 362).

(3) So, an injunction will also be granted, if a person, under colour of writing a review, copies out so large and important a portion of the work as to interfere with the sale of it: but a reasonable amount of quotation, in order to review the work properly, is allowable (*Campbell* v. *Scott*, 11 *Sim.* 31; *Bell* v. *Walker*, 1 *Bro. Ch. C.* 450).

(4) **Unauthorized importations of foreign reprints.**—Besides the remedy by action and injunction, there is also a quasi-criminal remedy in the case of *imported* piracies, by means of penalties. These do not take away the remedy by action, but are cumulative (sect. 17).

(5) **Passing off another's work as one's own.**—Where the infringement consists, not of a reprint, but of what may be called literary petty larceny — the stealing of

another man's labour, and the palming of it off as one's own — "there must be such a similitude as to make it probable and reasonable to suppose that one is a transcript, and nothing more than a transcript. In the case of prints, no doubt different men may take engravings from the same picture. The same principle holds with regard to charts. Whoever has it in his intention to publish a chart, may take advantage of all prior publications. There is no monopoly here, any more than in other instances; but upon any question of this kind, the jury will decide whether it be a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected, even in a small degree, so that it thereby becomes more serviceable and useful" (per Mansfield, C.J., *Sayre* v. *Moore*,[195] *sup.*).

(6) And even where a great part of the plaintiff's work has been taken into the defendant's, it is no infringement, so long as the defendant has so carefully revised and corrected it, as to produce an original result (*Spiers* v. *Brown*, 6 *W. R.* 352; and consider *Dicks* v. *Brooks*, 15 *Ch. Div.* 22); or, if it was fairly done with a

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Canadian Cases.

[195] The publisher of a work containing biographical sketches cannot copy them from a copyrighted work, even when he has applied to the subjects of such sketches and been referred to the copyrighted works therefor. In works of this nature where so much may be taken by different publishers from common sources and the information given must be in the same words, the Courts will be careful not to restrict the right of one publisher to publish a work similar to that of another, if he obtains the information from common sources, and does not, to save himself labour, merely copy from the work of the other that which has been the result of the latter's skill and diligence (*Garland* v. *Gemmill*, 14 *S. C. R.* 321).

A railway ticket is not a subject of copyright under the Act (*Griffin* v. *Kingston & Pembroke R.W. Co.*, 17 *O. R.* 660).

view of compiling a useful book for the benefit of the public, upon which there has been a totally new arrangement of such matter (per Ellenborough, C.J., *Cary* v. *Kearsley*, 4 *Esp.* 170). And the part taken by the defendant must be substantial and material to enable the plaintiff to sustain an action (*Chatterton* v. *Cave*, 3 *App. Ca.* 483).

(7) **What is piracy of music.**—With respect to music, if the whole air be taken it is a piracy, although set to a different accompaniment, or even with variations; for the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same substantially; the piracy is, where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear (*D'Almaine* v. *Boosey*, 1 *Y. & C. Ex.* 288, per Lord Lyndhurst). But, on the other hand, where one composed and published an opera in full score, and after his death B. arranged the whole opera for the piano, it was held that this was an independent musical composition and no piracy (*Wood* v. *Boosey*, *L. R.* 3 *Q. B.* (*Ex. Ch.*) 223). Perforated rolls for use in a mechanical organ are not infringements of musical copyright, being parts of the organ itself (*Boosey* v. *Whight*, (1900) 1 *Ch.* 122), nor does it make any difference that words indicating time and expression are taken from the plaintiff's publications and printed on the roll (*Ibid.*).

(8) **Plays founded on novels.**—To produce the incidents of a novel in the form of a play is theoretically no infringement of copyright (see *Reade* v. *Conquest*, 30 *L. J. C. P.* 209; *Tinsley* v. *Lacy*, 32 *L. J. Ch.* 535;

Reade v. *Lacy*, 30 *L. J. Ch.* 655). But practically it is where the play would be an infringement, if published as a book. For before a play can be acted a copy of it must be sent to the Lord Chamberlain, and other copies must be issued for the use of the actors, and these copies constitute "books" within the Law of Copyright. Thus in the recent case of *Warne* v. *Seebohm* (39 *Ch. Div.* 73), the defendant had dramatised the novel "Little Lord Fauntleroy," and caused his play to be performed. The infringement of copyright complained of was that, for the purpose of producing the play, the defendant made four copies, one for the Lord Chamberlain and three for the use of the performers. *Very considerable passages in the play were extracted almost verbatim from the novel.* Held, that the plaintiffs were entitled to an injunction restraining the defendant from multiplying copies of the play containing passages from the plaintiff's book; and also that all such passages in the four existing copies must be cancelled.

Other copyrights.—Besides the copyright in literary works, there is also a copyright in various other productions; but in a book like the present, space will not permit me to do anything more than sketch out the main heads of the rights of individuals in respect of these productions.

Oral lectures.—The publication of oral lectures, except those delivered in colleges, &c., is prohibited by 5 & 6 Will. 4, c. 65, without the author's consent; but in order to have the benefit of this act, the lecturer must give previous notice to two justices of the peace (see *Nicols* v. *Pitman*, 26 *Ch. Div.* 374).

Right of representation of dramatic and musical works.—The right of publicly *representing* dramatic and

musical compositions, *first produced in this realm* (*Boucicault* v. *Chatterton*, 5 *Ch. Div.* 267), is vested in the author or composer, and his assigns, for the same period as in literary compositions, by 5 & 6 Vict. c. 45, s. 20, which also imposes penalties upon any person performing them without the written leave of the author or composer. These penalties are not cumulative, but only alternative. As to what is a public representation, see *Wall* v. *Taylor* (11 *Q. B. D.* 102), and *Duck* v. *Bates* (13 *Q. B. D.* 843). A playwright who has adapted a novel for the purpose of dramatic representation is an author for the purposes of dramatic copyright (*Tree* v. *Bowkett*, 74 *L. T.* 77).

Assignment of copyright does not include right of representation. — I may mention, that the assignment of the copyright of a book containing dramatic or musical compositions is only an assignment of the right of multiplying copies of it, and not of the right of representing it (sect. 22), unless at the time of registering the assignment the same is expressly stated. But a mere assignment of the right of representation does not seem to require registration (*Lacy* v. *Rhys*, 33 *L. J. Q. B.* 157). Similarly, the publication, in this country, of a dramatic piece, or musical composition, as a book, before it has been publicly represented or performed, does not deprive the author or his assignee of the exclusive right of performing or representing it (*Chappell* v. *Boosey*,[196] 2 *Ch. D.* 232).

Canadian Cases.

[196] To create a perfect right under 38 Vict. c. 88 [now R. S. C. c. 62], there should be an assignment in writing of such parts of the book as the owner of the copyright therein is willing to permit his licensee to publish, but without any writing there may be such conduct on the part of the owner,

Engravings.—Engravings are protected by the statutes 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; and 17 Geo. 3, c. 57.

Sculpture.—Sculptures and models by 38 Geo. 3, c. 71, and 54 Geo. 3, c. 56.

Designs.—Useful and ornamental designs are protected by "The Patents, Designs, and Trade Marks Act, 1883."

Works of art.—Paintings, drawings, and photographs by 25 & 26 Vict. c. 68. (As to the latter, see *Nottage* v. *Jackson*, 11 *Q. B. D.* 627; *Bolton* v. *Aldin*, 65 *L. J. Q. B.* 120; and *Melville* v. "*Mirror of Life*" *Co.*, (1895) 2 *Ch.* 531. The representation of a picture by *tableau vivant*, formed by grouping in the same way as the figures in the picture, living persons dressed in the same way and placed in the same attitudes is not, however, an infringement of copyright in the picture (*Hanfstaengl* v. *Empire Palace*, (1894) 2 *Ch.* 1). But

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in assenting to and encouraging the infringement complained of as to disentitle him to relief in equity by way of injunction (*Allen* v. *Lyon*, 5 *O. R.* 615).

A person, resident in England, who procures a book for valuable consideration, to be compiled for him, the compiler not reserving his rights, is the proprietor thereof, and entitled either personally or through an agent in Canada to copyright under the Copyright Act, R. S. C. c. 62. Printing and publishing the book from stereotype plates imported into Canada is a sufficient "printing" within the meaning of the Act, though no typographical work is done in preparation of the copies. American reprints of the plaintiff's copyrighted book added as an appendix to American reprints of the Bible imported into Canada were *held* to be a violation of the plaintiff's rights (*Frowde* v. *Parrish*, 27 *O. R.* 526, and 23 *O. A. R.* 728).

G., the writer of a book, printed the book, which he intended to copyright, with notice therein of copyright having been secured, although he had not at the time

apart from copyright, where a person has been employed to copy a drawing, or to take a photograph for another, it is an abuse of confidence for him to publish copies of such drawing or photo, and he will be restrained from doing so (*Tuck* v. *Priester*, 19 *Q. B. Div.* 629; and *Pollard* v. *Photo, &c. Co.*, 40 *Ch. Div.* 345). Thus, in the last-mentioned case, a photographer, who had taken a "negative" of a lady to supply her with copies for money, was restrained from selling or exhibiting copies, both on the ground that there was an implied contract not to use the negative for that purpose, and also on the ground that such sale or exhibition was a breach of confidence.

Canadian Cases.

actually taken the steps to obtain copyright. He, however, did this merely in anticipation of applying for copyright, which he subsequently applied for and obtained. Furthermore, it appeared to be sanctioned by the practice at the office at Ottawa, and there was no publication of the book till after the statutory title of the author was complete. *Held*, that the plaintiff was entitled to an injunction to protect his copyright against invasion (*Gemmill* v. *Garland*, 12 *O. R.* 139).

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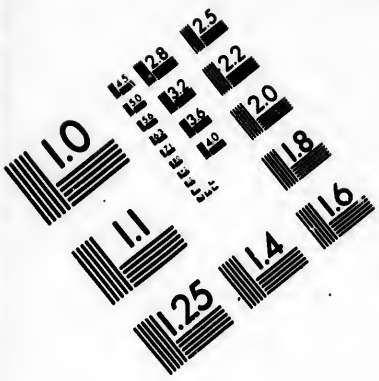

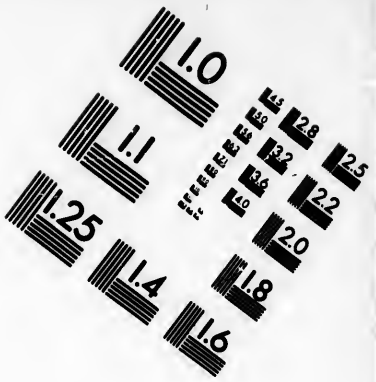

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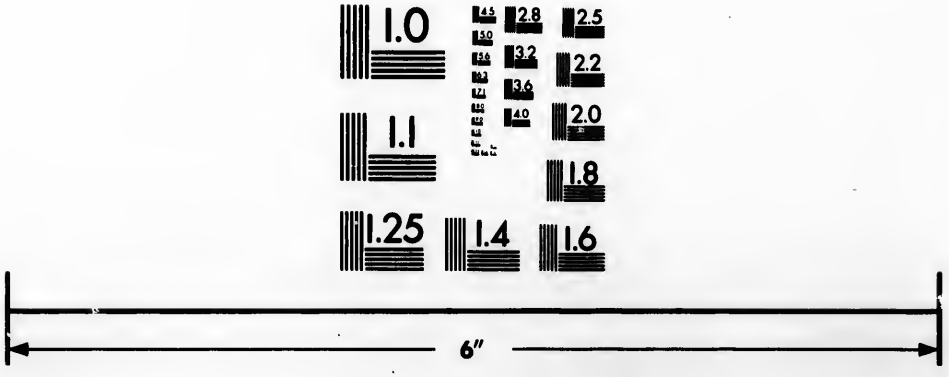

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